# HAUTE MESS: MURKY FASHION COPYRIGHT LAW AND A NEW PERIOD OF PRO-DESIGNER JURISPRUDENCE

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Abstract

Fashion copyright jurisprudence has left unclear standards for the copyrightability of fashion designs. As fashion lies at the intersection of functionality and design, courts have struggled to set bright lines for determining the copyrightability of fashion articles. This ambiguity perpetuates the use of inconsistent standards among courts, leading to periods of leniency and stringency in design copyright standards. This Note outlines current U.S. design jurisprudence and the waxing and waning of courts' willingness to recognize the copyrightability of fashion designs. This Note then compares U.S. copyright protections to those in France and other member nations of the European Union (E.U.), suggesting that the protection disparities between the regimes stem from cultural differences and anti-feminism. This Note then predicts that courts are entering another period of copyright leniency and an era of pro-designer jurisprudence following the *Star Athletica, L.L.C. v. Varsity Brands, Inc.* U.S. Supreme Court ruling.



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## INTRODUCTION

Clothes are likely the most abundant items people own. Clothes spill out of drawers, squeeze into closets, and make laundry day one to dread. Given the prevalence of clothes in peoples' lives, it is no wonder that the fashion industry is one of the biggest industries in the world. In 2019, the global sales of shoes and apparel reached 1.9 trillion dollars.[1] This is expected to rise to three trillion dollars by 2030.[2] In the United States, the fashion industry was valued at around 368 billion dollars as of 2019, making it the largest fashion industry in the world,[3] and social media and the internet are only making clothing sales more prolific.[4]

Yet, as the fashion industry yields impressive revenues, U.S. intellectual property laws leave designers guessing as to which protections their designs have. This is an especially prevalent concern as the "fast fashion" industry grows. Fast fashion retailers are known for their incredible production speed and low prices.[5] Retailers such as Zara produce more than twenty collections a year with the design-to-retail process clocking in at just about five weeks.[6] Online-based fast fashion retailers boast an even speedier turnaround. Missguided releases around 1,000 new items per month, while Fashion Nova reportedly releases about 600 to 900 new items per week.[7] The recent rise of social media has helped fuel fast fashion marketing efforts and has pressured young people to avoid repeating outfits.[8]

H&M, a Swedish retailer founded in 1947, is one of the oldest fast fashion companies.[9] In 2019, the company's net sales were 24.8 billion dollars.[10] Forever 21, although recently declaring bankruptcy, is an older

1. P. Smith, *U.S. Apparel Market – Statistics and Facts*, STATISTA (Jan. 12, 2022), https://www.statista.com/topics/965/apparel-market-in-the-us/ [https://perma.cc/W3WE-DPS3].

2. *Id.*

3. *Id.*

4. *See id.*

5. Terry Nguyen, *Fast Fashion, Explained*, VOX: THE GOODS (Feb. 3, 2020, 7:00 AM), https://www.vox.com/the-goods/2020/2/3/21080364/fast-fashion-h-and-m-zara [https://perma.cc/R5QZ-HCKP].

6. *Id.*

7. *Id.*

8. *Id.*

9. Adam Hayes, *Fast Fashion*, INVESTOPEDIA (Apr. 29, 2021), https://www.investopedia.com/terms/f/fast-fashion.asp [https://perma.cc/97XM-SP2B].

10. *Id.*

major fast fashion retailer that opened its doors in 1984.[11] Forever 21 did not reach its peak until 2015 when it profited 4.4 billion dollars from sales.[12] Newer online-based fashion brands have seen a quicker rise to prominence. Fashion Nova, originating in 2006, launched its e-commerce website in 2013.[13] The company grew 600 percent in 2017 after utilizing Instagram as an essential advertising tool.[14] Just one Instagram post from celebrity Kylie Jenner advertising Fashion Nova's clothes can reportedly generate millions of dollars in sales.[15] Other online-based fast fashion companies also yield high revenues, such as Boohoo, which generated 411.43 million dollars in revenue in 2017.[16]

These companies are frequently criticized for their adverse effects on the environment and their dependence on outsourced and underpaid workers.[17] But these fashion brands also have taken heat from other designers for their copycat items.[18] Multiple lawsuits have pitted fast fashion brands against notable high fashion designers. Versace, for example, recently sued Fashion Nova for its obvious copies of the "Jungle Print" dress (first made famous by Jennifer Lopez in 2000), among other designs.[19] Copying has become so prolific and profitable that some fast

11. Shoshy Ciment, *Forever 21 Is Selling to a Group of Buyers for $81 Million. Here's How It Went from a Fast-Fashion Powerhouse to Bankruptcy and a Troublesome Future*, BUS. INSIDER (Feb. 3, 2020, 12:43 PM), https://www.businessinsider.com/forever-21-history-success-to-bankruptcy-reports-2019-9 [https://perma.cc/U4TA-L5F6].

12. *Id.*

13. Biography of Richard Saghian, BUS. FASHION, https://www.businessoffashion.com/community/people/richard-saghian [https://perma.cc/Z9YK-FHRW].

14. Aria Hughes, *How Fashion Nova Won the Internet*, WWD (Feb. 28, 2018, 8:00 AM), https://wwd.com/fashion-news/fashion-features/inside-fashion-nova-cardi-b-1202595964/ [https://perma.cc/L5CM-VZLX].

15. *Id.*

16. *Id.*

17. *See* Nguyen, *supra* note 5 (noting that the "production of polyester textiles alone emits about 706 million tons of greenhouse gases a year" and that companies like Fashion Nova have outsourced to factories under investigation by the U.S. Labor Department for underpayment of workers). However, these fast-fashion brands are not the only ones that rely on outsourced, underpaid labor. *See* Kai Schultz et al., *Luxury's Hidden Indian Supply Chain*, N.Y. TIMES (Mar. 11, 2020), https://www.nytimes.com/2020/03/11/style/dior-saint-laurent-indian-labor-exploitation.html [https://perma.cc/5JCP-HCDJ].

18. Chavie Lieber, *Fashion Brands Steal Design Ideas All the Time. And It's Completely Legal*, VOX: THE GOODS (Apr. 27, 2018, 7:30 AM), https://www.vox.com/2018/4/27/17281022/fashion-brands-knockoffs-copyright-stolen-designs-old-navy-zara-h-and-m [https://perma.cc/RVF6-ZAJ8].

19. *Versace Is Suing Fashion Nova for "Brazenly" Copying Its Designs, Infringing Its Trademarks*, FASHION L. (Nov. 26, 2019), https://www.thefashionlaw.com/versace-is-suing-fashion-nova-for-brazenly-copying-its-designs/ [https://perma.cc/5EKG-L6FB].

fashion designers allocate a specific part of their budget for settlement of legal disputes over these copied designs.[20]

Copycat fashion designs are issues not just for prominent designers but also for new, smaller designers.[21] Smaller designers, unlike large fashion houses, do not have the resources to engage in extensive litigation to protect their designs.[22] Additionally, the murky copyright protections for designs make litigation even less attractive for up-and-coming designers. Thus, fast fashion companies prey on new designers by copying their designs without proposed or threatened litigation.[23]

The precedent set in the recent landmark Supreme Court case *Star Athletica, L.L.C. v. Varsity Brands, Inc.*[24] may improve designers' ability to enforce their copyrights; however, the case has only been used in limited circumstances. This Note first sets out the current state of legal protections for fashion[25] designs under U.S. law. Next, this Note explores the potential historical and cultural reasons for the United States' unclear fashion copyright protections. Finally, this Note predicts a trend of courts relaxing copyright standards for fashion designs following *Star Athletica*, thus opening the door to stronger protections for designers, even if on a temporary basis.

## I. COMPARING EXISTING DESIGN PROTECTIONS

U.S. trademark, copyright, and patent laws are potential avenues for fashion design protections, and fashion designers have dabbled in each of these avenues to protect their designs. Although this Note mainly focuses on copyright law, it will briefly mention these other intellectual property protections.

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20. Julia Brucculieri, *How Fast Fashion Brands Get Away with Copying Designers*, HUFFINGTON POST (Sept. 4, 2018, 5:45 AM), https://www.huffpost.com/entry/fast-fashion-copycats_n_5b8967f9e4b0511db3d7def6 [https://perma.cc/DE3V-R4FT].

21. Independent designer Tuesday Bassen accused Zara of stealing her designs on social media. *Id.*

22. *Id.* This is especially true as major fashion houses typically timely register their designs for copyright protections, which enables the winning party to recover attorney's fees, among other costs. 17 U.S.C. §§ 411(a), 412, 505.

23. *See* Lieber, *supra* note 18 (noting that a small British designer was tipped off on social media of copycats of her designs being sold by Old Navy). Smaller designers have taken to social media to protect their designs and backlash against bigger designers have caused them to remove the copycat items from their website. *Id.* Perhaps in the absence of legal protection, negative press will serve as some form of regulatory agent for companies copying small, up-and-coming designers.

24. 137 S. Ct. 1002 (2017).

25. "Fashion" as used in this article refers to the design of utilitarian items that are made to be worn on the body, like a shirt or a necklace, and especially those following a certain trend.

### A. *U.S. Trademark and Patent Protections*

Fashion designers often seek protection in trademark law. Trademark protections find their source in the Lanham Act, passed in 1946.[26] A "trademark" is defined as "any word, name, symbol, or device, or any combination thereof" used "to identify and distinguish . . . goods . . . from those manufactured or sold by others and to indicate the source of the goods."[27] Once trademarked, no one else can replicate the logo.[28] Trademarks also exist in perpetuity,[29] giving fashion brands assurance that their logos will be protected indefinitely. The Lanham Act also provides protection in the form of trade dress.[30] Trade dress typically protects a particular item as a whole, allowing designers to protect the design and shape of a particular article.[31] These definitions are very broad and can "include features such as size, shape, color or color combinations, texture, graphics, or even particular sales techniques."[32] However, to receive trade dress protections, the item must be distinct either inherently or by acquiring a "secondary meaning."[33] Essentially, the item must be so recognizable as belonging to a particular brand that its shape or design itself serves as its own trademark.[34] Therefore, these protections are partial at best. While established fashion houses, such as Gucci, have had some success in enforcing these trade dress protections,[35] these protections are unlikely to aid up-and-coming designers as their products likely have not yet acquired a "secondary meaning."

Although enforcing these trademarks against counterfeit goods is often impractical,[36] the laws themselves prohibit other companies from producing "knock-offs" that bear the fashion brand's trademark logo. The trend of designers placing their logos on their shoes and apparel may be

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26. Pub. L. No. 79-489, 60 Stat. 427 (1946) (codified as amended at 15 U.S.C. §§ 1051–1141n).

27. 15 U.S.C. § 1127.

28. *Id.* § 1114(1).

29. *Id.* §§ 1058(a), 1059(a).

30. *See id.* § 1125(a).

31. Two Pesos, Inc. v. Taco Cabana, Inc., 505 U.S. 763, 764 n.1 (1992); *Trade Dress Law*, FASHION L., https://www.thefashionlaw.com/resource-center/trade-dress-law/ [https://perma.cc/JV33-43KF].

32. *Two Pesos*, 505 U.S. at 764 n.1 (quoting John H. Harland Co. v. Clarke Checks, Inc., 711 F.2d 966, 980 (11th Cir. 1983)).

33. Wal-Mart Stores, Inc. v. Samara Bros., 529 U.S. 205, 210–11 (2000). For instance, the Hermès Birkin bag is distinct enough to be given a trade dress protection. *Trade Dress Law*, *supra* note 31.

34. *Wal-Mart Stores*, 529 U.S. at 210–11.

35. *See* Gucci Am., Inc. v. Guess?, Inc., 868 F. Supp. 2d 207, 254–56 (S.D.N.Y. 2012) (finding Gucci entitled to damages for Guess's copying of its "Quattro G Pattern" and granting a permanent injunction against Guess to prohibit further copying).

36. *Knock-off the Knockoffs: The Fight Against Trademark and Copyright Infringement*, 9 ILL. BUS. L.J. 227, 231 (2009).

related to the increased protection under trademark law.[37] While trade dress and trademark laws have historically protected more established brands, some newer brands that prominently display their trademarks have also utilized these protections. Notably, OFF-WHITE, a fashion retailer founded in 2013, regularly uses its trademarked logo on popular items, including the brand's well-known yellow warning tape belts.[38] Because these items bear the trademarked logo, there is little doubt that OFF-WHITE would be able to enforce its trademark against counterfeiters.

Patent protections were also utilized by fashion designers in early intellectual property jurisprudence,[39] but they are basically inapplicable to the fashion industry today. Patents protect "new, original[,] and ornamental design[s] for an article of manufacture" for fifteen years.[40] But design patents are only granted to inventions that are novel and nonobvious.[41] Because fashion trends build off one another, this requirement would likely not be satisfied.[42] Design patents also only protect designs, so they do not protect solely functional features.[43] This makes it unlikely that a design patent could ever protect clothing features that enable a fit to the human body.[44] Also, obtaining a patent is lengthy and costly, so by the time a designer could possibly receive one, the fashion item would likely be out of style.[45] Thus, designers will likely not find protection in patent law.

### B. *U.S. Copyright Protections*

Copyright laws are another possible avenue for fashion design protection, and many designers have used this path to attempt to protect their designs. Indeed, it is an attractive path for designers to follow.

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37. *See* Note, *The Devil Wears Trademark: How the Fashion Industry Has Expanded Trademark Doctrine to Its Detriment*, 127 HARV. L. REV. 995, 1000–01 (2014).

38. *OFF-WHITE: History*, HYPEBEAST, http://web.pdx.edu/~allstott/hypebeasthistory/offwhite.html [https://perma.cc/6CU5-6THU]. This belt probably would also qualify for copyright protections, but because of confusing copyright laws and the fact trademark exists in perpetuity, trademark or trade dress protections might be preferable.

39. *See* Charles E. Colman, *The History and Principles of American Copyright Protection for Fashion Design: A Strange Centennial*, 6 HARV. J. SPORTS & ENT. L. 225, 229–30 (2015); *see also id.* at 245 ("[D]esign-patent law[] appeared, for at least a couple of decades more, to be the most promising (and perhaps only conceivable) avenue for asserting exclusive rights in the appearance of fashion articles. Indeed, some case law of the time period appears to indicate that copyright protection for textile prints was widely assumed to be a non-starter.").

40. 35 U.S.C. §§ 171(a), 173.

41. *Id.* §§ 102(a), 103.

42. Note, *supra* note 37, at 998.

43. *Id.* (citing 35 U.S.C. § 171).

44. *Id.* But this is also true of copyright law. *See infra* Section I.B.1.

45. *See* Note, *supra* note 37, at 998; Colman, *supra* note 39, at 255.

Copyright protections last the author's[46] lifetime plus seventy years,[47] and items become copyrightable once they are fixed in a tangible medium.[48] However, U.S. fashion copyright jurisprudence has left a muddled record of case law with inconsistent standards.[49] Because of "fashion's unique blend of art, commerce, decoration, and utility," it is an "awkward conceptual fit for both copyright protection and legislative/judicial application thereof."[50] The uniqueness of fashion has led to less consistent and less powerful copyright protections when compared to other artistic works.[51]

### 1. Useful Articles and Separability

A major constraint for fashion designers is that U.S. copyright law makes a clear distinction between artwork and "useful articles."[52] "Useful articles" are defined as "having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information."[53] Works of art are copyrightable, but "useful articles," as a whole, are not.[54] Clothing is considered a "useful article."[55] Although federal copyright protections are derived statutorily (and the power to create intellectual property protections is derived constitutionally[56]), the

46. "Under copyright law, the creator of the original expression in a work is its author . . . . In cases of works made for hire, the employer or commissioning party is considered to be the author." *Definitions*, U.S. COPYRIGHT OFF., https://www.copyright.gov/help/faq-definitions.html [https://perma.cc/53DP-4JUG].

47. 17 U.S.C. § 302(a). Anonymous works, pseudonymous works, and works made for hire enjoy even longer copyright protections, lasting either 95 years from its first publication or 120 years from the year of creation. *Id.* § (c).

48. *See* Christopher Buccafusco & Jeanne C. Fromer, *Fashion's Function in Intellectual Property Law*, 93 NOTRE DAME L. REV. 51, 63 (2017) (citing 17 U.S.C. § 102(a)).

49. *See* Charles E. Colman, *The History and Principles of American Copyright Protection for Fashion Design: On "Originality,"* 6 HARV. J. SPORTS & ENT. L. 299, 301 (2015) (describing the inconsistency with which courts have applied copyright law to fashion-related cases).

50. *Id.* at 343.

51. *Id.* at 299 (noting that even "components of fashion design [that] are copyright-eligible . . . tend to receive less consistent and robust protection than that accorded to most other types of 'artistic' or 'expressive' works under the law").

52. *See* Note, *supra* note 37, at 996.

53. 17 U.S.C. § 101. The definition of "functionality" is up for debate, and some scholars call for all fashion designs to be considered functional as they are made to look good on the human form. *See, e.g.*, Buccafusco & Fromer, *supra* note 48, at 70 ([C]omponents of a garment design should be treated as functional . . . if they are valued for their ability to influence the way that the wearer is perceived.").

54. *See infra* note 66 and accompanying text.

55. Note, *supra* note 37, at 996.

56. *See* Colman, *supra* note 39, at 235–36 ("American copyright is a form of quasi-property, authorized by what some call the 'Intellectual Property Clause' of the Constitution, located at Article I, Section 8: 'The Congress shall have power To . . . promote the Progress of

judiciary has played a very large role in expanding and narrowing copyright protections.

The most classic case that shaped copyright jurisprudence concerning useful articles is *Mazer v. Stein*.[57] *Mazer* involved a lamp that had a decorative base in the shape of dancing human figures.[58] The lamp received a copyright registration as a "work of art."[59] The defendants copied the lamp base statuette, used the statuettes in their own lamps, and then sold them.[60] In a significant holding for designers, the Court found that "works of art" that were incorporated into useful articles were copyrightable.[61] The Court reasoned that original expressions of ideas, "whether meticulously delineating the model or mental image or conveying the meaning by modernistic form or color, [are] copyrightable."[62] *Mazer* established a lenient standard for copyrightability, and given the long history of courts *not* recognizing useful items as copyrightable,[63] the holding drastically changed the legal landscape for protecting fashion designs. However, in doing so, it further muddied the already-murky waters of fashion copyright protections from "uncertain" to "incoherent."[64]

Congress sought to incorporate *Mazer*'s holding in the Copyright Act of 1976,[65] declaring works of art where the characteristics of the design "can be identified separate from, and are capable of existing independently of, the utilitarian aspects of the article" as copyrightable.[66] Courts have struggled with how to apply this "doctrine of separability," finding a fine line between protectable designs and unprotectable

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Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . . .'" (alteration in original) (footnote omitted) (quoting U.S. CONST. art. 1, § 8, cl. 8)).

57. 347 U.S. 201 (1954); *see* Colman, *supra* note 39, at 272 ("The complicated doctrinal landscape of copyright-for-fashion that exists today . . . can arguably be traced back most directly to the decision in *Mazer v. Stein* . . . .").

58. *Mazer*, 347 U.S. at 202.

59. *Id.* at 202–03.

60. *Id.* at 203.

61. *Id.* at 218.

62. *Id.* at 214.

63. *See* Colman, *supra* note 39, at 244.

64. *Id.* at 277 (quoting ROBERT A. GORMAN & JANE C. GINSBURG, COPYRIGHT: CASES AND MATERIALS 221 (7th ed. 2006)).

65. Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended in scattered sections of 17 U.S.C.).

66. 17 U.S.C. § 101. Specifically, copyright protection extends to "pictorial, graphic, and sculptural works." *Id.* § 102(a)(5). However, "mechanical or utilitarian aspects" of a work are not protected, and useful articles are included only to the extent that the work's "pictorial, graphic, or sculptural features" are separable from the utilitarian aspects. *Id.* § 101; *see also* Buccafusco & Fromer, *supra* note 48, at 67 ("Congress intended to extend copyright protection only to some components of a limited class of useful articles—their separable 'pictorial, graphic, or sculptural' (expressive) features." (quoting 17 U.S.C. § 101)).

utilitarian functions.[67] The Court recently revisited the separability requirement for the first time since *Mazer* in *Star Athletica.*[68] Varsity Brands, Inc., a corporation that designs, makes, and sells cheerleading uniforms, sued Star Athletica, a company that also sells cheerleading uniforms, for infringement of five of Varsity Brands' copyrighted designs.[69] The Court held that Varsity Brands' designs were separable, and the Court created a new standard for interpreting 17 U.S.C. § 101's "separate-identification and independent-existence requirements."[70] Under the new standard:

> a feature incorporated into the design of a useful article is eligible for copyright protection only if the feature (1) can be perceived as a two- or three-dimensional work of art separate from the useful article and (2) would qualify as a protectable pictorial, graphic, or sculptural work—either on its own or fixed in some other tangible medium of expression—if it were *imagined separately* from the useful article into which it is incorporated.[71]

This two-pronged test established a low standard of separability,[72] thus potentially allowing many more fashion designs to be copyrighted. The Court just required that a design have separately identifiable "features" of pictorial, graphic, or sculptural "qualities" to be eligible for protection.[73] Consequently, it would be hard to think of a work that would not qualify[74] considering this threshold was met by Varsity Brands' cheerleader uniforms' simplistic chevron and stripe pattern.[75] Therefore, a design need not be intricate or complicated to qualify as a copyrightable design when separated from the useful article.

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67. *E.g.*, Pivot Point Int'l, Inc. v. Charlene Prods., Inc., 372 F.3d 913, 921 (7th Cir. 2004) ("Of the many fine lines that run through the Copyright Act, none is more troublesome than the line between protectible pictorial, graphic and sculptural works and unprotectible utilitarian elements of industrial design." (quoting 1 PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 2.5.3 (2d ed. 2004))).

68. 137 S. Ct. 1002 (2017).

69. *Id.* at 1007.

70. *Id.*

71. *Id.* (emphasis added).

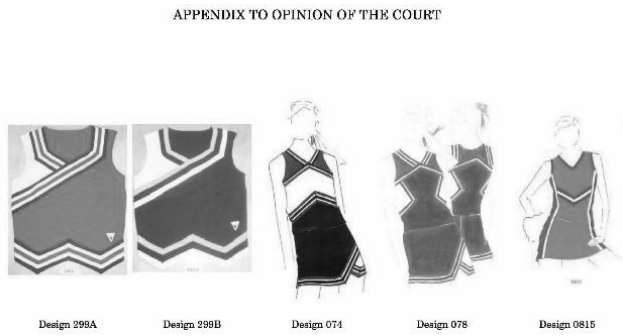
72. *See* Buccafusco & Fromer, *supra* note 48, at 92.

73. *Star Athletica*, 137 S. Ct. at 1012.

74. *See* Buccafusco & Fromer, *supra* note 48, at 90.

75. *Star Athletica*, 137 S. Ct. at 1012.

Figure 1: Varsity Brands' cheerleading designs in question.[76]




However, even though simplistic designs are likely eligible for copyright protection, the Court made clear that the uniform's *only* feature potentially eligible for copyright is its two-dimensional work of art.[77] The Court noted that other companies were free to "manufactur[e] a cheerleading uniform of identical shape, cut, and dimensions to the ones on which the decorations in this case appear."[78] Therefore, designs without pictorial and graphic features, even if the shape or cut of the clothing is unique, will not receive protection.

Prior to *Star Athletica*, the standard for "separability" was ambiguous. Both physical and conceptual separability were used by the courts as a basis for valid protections,[79] and just within conceptual separability, courts articulated at least six different tests.[80] Although the Court attempted to clarify the separability standard,[81] the new "imagination test" is also quite unclear. Even though this new test has been applied in limited circumstances, the outcome of a case that used the "imagination test" may shed light on coming trends in copyright law, which will be discussed in Part III.

Another notable outcome of *Star Athletica* was that the Court did not find functionality in the actual patterns on the cheerleading uniforms,[82]

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76. *Id.* at 1017.

77. *Id.* at 1013.

78. *Id*.

79. *See* Buccafusco & Fromer, *supra* note 48, at 68.

80. *See* Galiano v. Harrah's Operating Co., 416 F.3d 411, 417, 419 (5th Cir. 2005) (noting that "[h]ow to conduct the conceptual separation is . . . what continues to flummox federal courts" and that "[t]here are at least six different variations of that test"); Varsity Brands, Inc. v. Star Athletica, L.L.C., 799 F.3d 468, 484–85 (6th Cir. 2015) (listing and describing nine approaches to conceptual separability that courts have proposed or used), *aff'd*, 137 S. Ct. 1002.

81. The Court eliminated the use of "physical" separability and declared all separability must be judged conceptually. *Star Athletica*, 137 S. Ct. at 1014. This is arguably more consistent with 17 U.S.C. § 101.

82. *Star Athletica*, 137 S. Ct. at 1012.

raising criticism from some scholars. These critics argue that the chevron designs on the uniforms are functional because they "work as appropriate designs for garments meant to emphasize the fitness, athleticism, and attractiveness of those who don them."[83] They argue that almost all fashion designs have a functional aspect as they "influence the way the wearer is perceived . . . by making him or her look taller, slimmer, broader, curvier, or lengthier."[84] The Court's refusal to open the door to the inherent functionality of most fashion items suggests that designers may find more protection in copyright law in the coming years.

### 2. Fixation, Originality, and the Expression-Idea Doctrine

Even if fashion designs pass the new "imagination test" for separability, to be eligible for copyright protections, designs must also be fixed, original, and an expression, not an idea.[85] Whether fashion designs are fixed is usually not an issue as the design is manifested in clothing or accessories.[86] But, like separability, courts have frequently struggled with how to apply the originality requirement to useful objects such as fashion designs, frequently intermixing the originality requirement with the idea-expression doctrine.[87]

The originality requirement does not call for absolute novelty, which would be required for patent protections. Rather, "originality" requires *some* independent creation.[88] The most recent Supreme Court case weighing in on "originality" was the 1991 decision in *Feist Publications, Inc. v. Rural Telephone Service Co.*[89] In *Feist*, a telephone company sued a phone book manufacturer for copying address listings from its phone book.[90] The Court established a lax standard of "originality" and required only that the author independently created it with a "minimal degree of creativity."[91] Applying such a standard, the Court held that, although the facts themselves could not be copyrighted, how those facts are arranged

83. Buccafusco & Fromer, *supra* note 48, at 89.

84. *Id.* at 53.

85. *See* Colman, *supra* note 49, at 303; 17 U.S.C. § 102.

86. Colman, *supra* note 49, at 303 ("[B]ecause most fashion articles are static, tangible objects, there are seldom disputes as to whether works of fashion design satisfy the 'fixation' requirement.").

87. *See also id.* at 301 (noting that some "courts have . . . invoked the 'idea-expression' distinction and/or the 'originality' requirement as a way to put a decisive 'foot down' on the question of copyrightability" while others "have applied the 'idea-expression' and 'originality' doctrines in decidedly mechanical ways that do not reflect the ontological differences between many works of fashion design and more traditional genres of copyrightable works, like books and musical compositions").

88. *Id.* at 305 (explaining that for copyrightability, courts have "traditionally claimed not to care whether a work is in fact new, but only whether it is the author's 'independent creation'").

89. 499 U.S. 340 (1991).

90. *Id*. at 343–44.

91. *Id.* at 345.

could be.[92] The Court also emphasized that it is the end product, not the labor used to create it, that counts in the originality analysis.[93] Although the phone book in question was not found to have met the originality requirement,[94] the Court still articulated a low bar for "originality."[95]

Because originality focuses on creation solely from the mind of the creator, it is understandable why the idea-expression doctrine is so closely tied to originality. Under the idea-expression doctrine, ideas themselves cannot be copyrighted, but expressions of those ideas can be.[96] So, an idea must be *originally expressed* in a tangible medium to receive copyright protections.

Because *Mazer*'s holding meant that many more "useful articles" could be eligible for copyright protections, some courts aimed to quell the potential fire by narrowing copyright protections through the idea-expression doctrine, concluding that a design is an idea rather than an expression.[97] One can especially see the intertwining of "originality"' and the "idea-expression" doctrine when designs are based on natural objects or things within the public domain. This intertwining has arguably led to a heightened standard of originality for fashion designs when compared to more traditionally copyrightable articles.[98] For instance, one court held that a windchime that depicted a dolphin and frog had no elements that were unique to the *idea* of a swimming dolphin or a sitting frog, thus denying its copyrightability.[99] And yet another court held that jewelry shaped like barbed wire could not be copyrighted because it embodied the *idea* of barbed wire.[100] Intertwining the traditional standard of "originality," which requires only slight creativity, with the idea-expression doctrine arguably requires designers to rise to the level of "novelty" required in patent law.[101]

The heightening of the "originality" standard is hard to reconcile with the *Feist* holding and serves to deny copyright protections to depictions of already-existing objects. Because fashion designs build off of one

92. *Id.* at 347–49.

93. *See id.* at 353–60.

94. *Id.* at 362–63.

95. *See id.* at 363 (explaining that the originality requirement is satisfied if a work "possess[es] more than a *de minimis* quantum of creativity").

96. *See* 17 U.S.C. § 102(b) ("In no case does copyright protection . . . extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery . . . ."); Colman, *supra* note 49, at 303 ("Both Congress and the courts have repeatedly recited the mantra that copyright protection exists only for particular *expressions* of an idea, and not for *the ideas contained* therein.").

97. Colman, *supra* note 49, at 304–05.

98. *Id.* at 305–06.

99. George S. Chen Corp. v. Cadona Int'l, Inc., 266 F. App'x 523, 524 (9th Cir. 2008).

100. Todd v. Montana Silversmiths, Inc., 379 F. Supp. 2d 1110, 1113–14 (D. Colo. 2005).

101. Colman, *supra* note 49, at 306.

another, heightening the originality requirement for already-existing objects is a major obstacle in the path of copyright protection. And because scholars and courts have recognized that "all creative works draw on the common wellspring that is the public domain,"[102] it would be questionable whether other more accepted copyrightable materials would meet this heightened standard.

### 3. Charles Colman's Shifting "Pendulum"

With the complexities and amorphous standards of "originality" laid out by the courts, which "originality" standard a court may use to evaluate fashion may depend on the judicial attitude towards fashion designs at the time. Professor Charles Colman has identified four different periods of what he terms the "originality pendulum," where courts flip-flopped between strict and lenient standards for recognizing the copyrightability of fashion designs over the years.[103]

Professor Colman's first period began in 1954, after the Court's landmark decision in *Mazer*.[104] After *Mazer*, courts seemingly entered a fifteen-year period where they largely sided with designers on the issues of copyrightability and originality.[105] One court upheld the originality of a design based on another in the public domain, noting that the new creation was embroidered, thus giving a three-dimensional appearance to the design, which required effort and skill by the designer.[106] Another court upheld the copyright of a simple textile pattern, finding the composite design to have created an aesthetic effect that made it original.[107] However, beginning in the late 1960s, courts began to set the stage for a heightened originality standard, likely because they believed too many "commonplace" works were obtaining protection.[108] But, throughout the mid-1970s, the leniency created by *Mazer* was reflected in many federal court decisions as they continued to find originality and copyrightability requirements of fashion designs met.[109]

Professor Colman's second period spanned from 1976 until the Court's *Feist* decision in 1991.[110] This second period was characterized by courts imposing more stringent demands on fashion designs to satisfy

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102. *Id.* at 314 (quoting Tufenkian Imp./Exp. Ventures, Inc. v. Einstein Moomjy, Inc., 338 F.3d 127, 132 (2d Cir. 2003)).

103. *Id.* at 319.

104. *Id.*

105. *Id.* at 321.

106. *See id.* at 321–22 (citing Millworth Converting Corp. v. Slifka, 276 F.2d 443, 444–45 (2d Cir. 1960)).

107. *Id.* at 322 (citing H. M. Kolbe Co. v. Armgus Textile Co., 315 F.2d 70, 72 (2d Cir. 1963)).

108. *Id.* at 323.

109. *Id.* at 325.

110. *Id.* at 319.

copyrightability.[111] Professor Colman cites *L. Batlin & Son, Inc. v. Snyder*[112] as an indication of the trend among the courts of disfavoring fashion designers.[113] The opinion articulated a new standard for originality by declaring that, for a work to be copyrightable, it must have some "substantial" originality,[114] a marked difference from the minimal standard articulated in the years following *Mazer*. 1976 was also the year that the modern Copyright Act was passed, which originally included protections for certain fashion items, but these protections were ultimately dropped in the final version of the Act.[115] The cases following *Batlin* continued on a similar path of not only requiring more originality but also claiming that fashion items were not copyrightable at all.[116]

Professor Colman's third period was ushered in by the Court's decision in *Feist*.[117] *Feist* once again created a low "originality" threshold,[118] and lower courts abided. One court upheld the copyrightability of polka dots, finding they were not "average circles," and their irregular shapes met the originality requirement.[119] Another court held that the "translation" of a pattern through needlework onto a different medium was original enough to warrant protection.[120]

Yet, once again, the leniency ushered in by a Supreme Court decision favorable to designers gave way to more stringent standards. Professor Colman points to the early 2000s as the beginning of his fourth and final period of judicial attitudes towards fashion copyrights.[121] In 2005, an interlocking "C" pattern that the designer, Coach, put on its purses was considered non-copyrightable by the U.S. Copyright Office, and the court suggested its agreement with the Copyright Office when it stated that "letters, mere variations of letters, and familiar symbols could not be

111. *Id.* at 325.

112. 536 F.2d 486 (2d Cir. 1976) (en banc).

113. Colman, *supra* note 49, at 325.

114. *Batlin*, 536 F.2d at 490.

115. Colman, *supra* note 49, at 327.

116. *Id.* at 327–28.

117. *Id.* at 319, 330.

118. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 362 ("The standard of originality is low, but it does exist.").

119. Prince Grp. v. MTS Prods., 967 F. Supp. 121, 125 (S.D.N.Y. 1997).

120. C & F Enters. v. Barringtons, Inc., No. Civ.A. 96-1108-A, 1997 WL 626568, at *4 (E.D. Va. May 13, 1997).

121. Colman, *supra* note 49, at 319, 332.

copyrighted."[122] In *Express, LLC v. Forever 21, Inc.*,[123] the court refused to recognize copyright protections of a plaid pattern, noting that "mere changes in color are generally not subject to copyright protection."[124]

What Professor Colman's four periods reveal is that there is a pattern of Supreme Court cases establishing favorable copyrightability standards for designers, followed by periods of leniency for the copyrightability of fashion by the lower courts, to eventual rejection of copyrightability by the lower courts. Although there are less than 100 years of cases to analyze since *Mazer*, it seems that once courts realize how many fashion design-related items are being copyrighted, they go back to rejecting their validity. Professor Colman's fourth period, however, was created before the *Star Athletica* decision. Although *Star Athletica* dealt with "separability" rather than "originality," its effect may still mirror the trend of the four previous periods, ushering in a fifth period of judicial leniency. How courts have handled the *Star Athletica* opinion up until now will be discussed in Part III.

Fashion's unique nature involving both design and utilitarian elements has left the courts to muddle their way through unclear standards. In turn, designers have been left in the dark as to whether their designs are eligible for copyright. Although *Star Athletica* has potentially ushered in a new era of copyright leniency and designers may find courts more sympathetic to their copyright claims, the back-and-forth of strict to lenient copyright standards over the years only adds another layer of ambiguity. But it is likely that this ambiguity will continue to be the trend because legislative action seems unlikely and judicial standards remain unclear, even as the Supreme Court attempts to provide uniformity among the lower courts.

## II. UNDERLYING REASONS FOR UNCLEAR PROTECTIONS

Over the years, fashion designers have attempted to secure more comprehensive and clearer protections through legislation. Over seventy bills have been proposed to Congress that either aimed to expressly extend copyright protections to fashion designs or create a different system of protection altogether, but none have passed.[125] The most recent

122. Coach, Inc. v. Peters, 386 F. Supp. 2d 495, 498 (S.D.N.Y. 2005). The court was reviewing the Copyright Office's refusal to register the work, rather than the ultimate copyrightability of the work, so Coach had to show that the Copyright Office had acted arbitrarily or capriciously. *Id.* at 496–97. Noting that the Copyright Office had "cited a number of cases" supporting its position, *id.* at 498, the court granted summary judgment against Coach, *id.* at 499. Interestingly, Coach's design would likely be capable of copyright under *Star Athletica* today.

123. No. CV 09-4514, 2010 WL 3489308 (C.D. Cal. Sept. 2, 2010).

124. *Id.* at *6; Colman, *supra* note 49, at 333–34.

125. *See* Note, *supra* note 37, at 998–99. Fashion design protection advocates "made their first serious attempt" to persuade Congress to create a copyright-like regime for fashion design protection in 1914 and 1916 in the Oldfield Bills. Colman, *supra* note 39, at 256.

bill, the Innovative Design Protection Act, was introduced in 2012.[126] This Act would have amended the Copyright Act to give three-year protections for fashion designs that were the designer's own creative project and would have "provide[d] a unique, distinguishable, non-trivial[,] and non-utilitarian variation over prior designs."[127]

It is commonly argued by scholars that Congress is reluctant to extend protections to fashion designs because it fears "restraining competition" or "promoting litigiousness."[128] Congress does not wish to create a monopoly over designs, especially ones that serve useful functions.[129] This fear was prevalent in the deletion of the section of the Copyright Act of 1976 that would have created copyright protections for "'original' designs which are clearly a part of a useful article, regardless of whether such designs could stand by themselves, separate from the article itself."[130] Even after the United States implemented the Berne Convention, which requires protection of applied art for countries adhering to it, Congress still declined to provide protections to such designs.[131] The long history of legislative reluctance to clearly grant (or flat-out deny) fashion design protections under copyright law makes it unlikely that the trend will change anytime soon.

### A. *European Design Protections*

Even though fashion designers are unsure where they stand regarding U.S. copyright protections, they enjoy extensive copyright protections under French law. Indeed, France has the most extensive fashion law protections.[132] French laws protect "*any* work of the mind and does not consider what kind or the form of expression that embodies the work."[133] The French Intellectual Property Code specifically protects "the creation[] of the seasonal industries of dress and articles" as a work of the mind.[134] Because high fashion is typically broken up into "seasons" of

126. S. 3523, 112th Cong. (2012).

127. *Id.* § 2(a)(2)(B), (d).

128. *See* Note, *supra* note 37, at 999.

129. *Id.*

130. H.R. REP. NO. 94-1476, at 50 (1976).

131. Note, *supra* note 37, at 999.

132. *France: Legal Protections for Fashion*, FASHION L., https://www.thefashionlaw.com/learn/france-legal-protections-for-fashion/ [https://perma.cc/BZ4X-T9WG].

133. *Id.* (emphasis added).

134. Francesca Montalvo Witzburg, *Protecting Fashion: A Comparative Analysis of Fashion Design Protection in the U.S. and Europe*, CARDOZO ARTS & ENT. L.J. (Sept. 19, 2014), http://cardozoaelj.com/2014/09/19/protecting-fashion-a-comparative-analysis-of-fashion-design-copyright-protection-in-the-u-s-and-europe/ [https://perma.cc/28V2-ABTE].

Fall/Winter and Spring/Summer,[135] French law clearly had protections for high fashion houses in mind. French law also recognizes a presumption of ownership for designers upon disclosure of the work under a designer's name, even without evidence of the particular designer's creation of the work.[136]

Because France is a member of the European Union, the E.U.'s protections are also enforced. The E.U. recognizes the copyrightability of clothing, accessories, and footwear.[137] The "E.U. Designs Protection Directive"[138] ("Directive") is one legislative initiative aimed at protecting fashion designs. The Directive requires all E.U. member states to protect "designs" by registration.[139] A "design" is defined as "the appearance of the whole or a part of a product resulting from the features of . . . the lines, contours, colours, shape, texture and/or materials of the product itself and/or its ornamentation."[140] For a design to be protected, it must be "novel[]" and have "individual character."[141] The E.U.'s "novelty" requirement is met if there is no other identical design that is already available to the public[142]—a much lower standard than the "novelty" required under U.S. patent law or the court-enhanced "originality" requirement. "Individual character" requires the overall impression of the design to differ from the overall impression of another design already available to the public.[143] Under this standard, an article with the same overall impression as another copyrighted article may be infringing upon the copyright. So, a design need not be an exact copy to be considered a copyright infringement. Designs that meet these requirements are protected for at least one five-year period, but may extend up to twenty-five years.[144]

Thus, designers in France and other E.U. countries enjoy much clearer and more extensive copyright protections than their U.S. counterparts. E.U. protections expressly allow the copyright of clothing, accessories, and footwear, without the bogging down of the utilitarian versus work-

135. *See, e.g.*, *Paris Fashion Week*, FÉDÉRATION DE LA HAUTE COUTURE ET DE LA MODE, https://fhcm.paris/en/paris-fashion-week-en/ [https://perma.cc/PY5H-EC7G] (providing schedule for the Fall/Winter and Spring/Summer seasons).

136. Studio Legale Jacobacci & Associati, *Protection of Applied Art Works by Copyright in France: Counterfeiters Wear out Their Shoe Leather Before French Courts*, LEXOLOGY (Apr. 9, 2013), https://www.lexology.com/library/detail.aspx?g=808ca51f-3e98-4d04-9f1b-51d4df61798a [https://perma.cc/49SY-67KH].

137. Witzburg, *supra* note 134.

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

139. *Id.* art. 3(1).

140. *Id.* art. 1(a).

141. *Id.* art. 3(3)(b).

142. *Id.* art. 4.

143. *Id.* art. 5(1).

144. *Id.* art. 10. If designers are able to secure U.S. copyright protections, they do extend beyond twenty-five years. *See supra* notes 46–47 and accompanying text.

of-art distinction. The Directive also protects textures, materials, lines, colors, and contours of fashion designs, while *Star Athletica* clarified that *only* pictorial, graphic, or sculptural elements of fashion items could be protected. France's protections of *any* "work of the mind" and express inclusion of "dress and articles" as such works is an obvious approval of the copyrightability of fashion designs. Disparities between U.S. and European design protections, especially French protections, create an interesting dynamic for designers selling items on both sides of the Atlantic and raise interesting questions about why the protections are different.

### B. *Cultural Differences Creating Copyright Differences*

As discussed in the previous section, French laws provide a far more extensive fashion design protection scheme than U.S. laws. This difference is likely due to many reasons, but underlying both countries' copyright laws lie very different rationales. U.S. courts often cite the idea that copyright laws exist to motivate creativity and allow the public access to genius—a utilitarian viewpoint.[145] Reliance on this theory of copyright is derived from the Intellectual Property Clause in the U.S. Constitution. The Clause states that Congress has the power "[t]o promote the Progress of Science and useful Arts[] by securing . . . to Authors . . . the exclusive Right to their respective Writings."[146] On the other hand, French copyright law rests upon the idea of upholding the individuality and dignity of creators—a personality theory viewpoint that is focused on the creator's self-expression.[147]

Another reason for these differences could lie in the feminine connotation of fashion. American culture associates femininity with fashion.[148] As such, fashion is considered frivolous.[149] The idea of the masculine man tends to reject fashion; to be anti-fashionable is to assert his masculinity, in contrast to the fashionable woman.[150] Ironically, the pressures to "fit in" in certain male-dominated professions, such as those on Wall Street, very much affect men's fashion choices.[151] Although the Wall Street uniform is typically a dark suit and tie, this is distinctly a fashion trend.[152] Such a uniform, which typically rejects fashion, is often

145. Colman, *supra* note 39, at 237.

146. U.S. CONST. art. 1, § 8, cl. 8.

147. *See* Colman, *supra* note 39, at 237.

148. Jeanne L. Schroeder, *Technology, Gender and Fashion*, 34 CARDOZO ARTS & ENT. L.J. 753, 760 (2016).

149. *Id.*

150. *See id.* at 788–89.

151. *Id.* at 788.

152. *Id.*

seen as necessary for both men and women to appear "serious" and "professional" in their careers.[153]

As Congress is dismissive of legislation providing stronger and clearer protections for fashion designs,[154] the judiciary has often done the same. As one commentator put it, "The U.S. federal judiciary has frequently displayed a dismissive attitude toward *fashion*, while simultaneously recognizing the great economic importance of *clothing*."[155] Fashion refers to "the prevailing style (as in dress) during a particular time,"[156] while clothing means "items . . . designed to be worn to cover the body."[157] The idea is that everyone needs *clothes*, while typically, just women need *fashion*.

Indeed, as U.S. courts have recognized, the economic importance of clothing cannot be discounted. It has greatly affected economies throughout time and geography. For example, the Silk Road, the world's first international trade highway connecting ancient China and the Roman Empire, was created for trade of Chinese silk.[158] The Silk Road facilitated the exchange of goods and ideas between Asia and Europe.[159] Although silk was not the only commodity traded along this ancient network, the long-term effects of the silk trade is just one example of clothing's significant economic impact.[160]

Fast forward to the eighteenth century, and clothes again play a major role in the economy—this time beginning in the West through the Industrial Revolution. Prior to the mechanization of textiles, "cottage

153. *See id.*; Charles E. Colman, *Fashion, Sexism, and the United States Federal Judiciary*, (July 3, 2013) (manuscript at 1), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2286898 [https://perma.cc/T9B5-FXE9].

154. *See supra* notes 125–31 and accompanying text.

155. Colman, *supra* note 153 (manuscript at 1).

156. *Fashion*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/fashion [https://perma.cc/DCN8-NMNL].

157. *Clothing*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/clothing [https://perma.cc/TRD7-CDNQ].

158. Tyler Beck, *The Silk Road: The International Ramifications of Ancient Textile Trade*, MICH. ST. UNIV.: GLOBALEDGE (Oct. 17, 2017, 11:48 AM), https://globaledge.msu.edu/blog/post/54482/the-silk-road-the-international-ramifica [https://perma.cc/SY34-YG92]. These routes were created around 100 or 200 BCE. *Id.* Silk was sought after in the Roman Empire because it was more comfortable and it was a luxury, so it also served as a status symbol. *Id.* A recent excavation of a high-status elite's Roman-era grave in London revealed a noblewoman buried in Chinese silk. David Keys, *Revealed: The Story of the Silk and Gold Clad Woman Buried in London's Spitalfields 1,600 Years Ago*, INDEP. (Dec. 16, 2020, 7:59 AM), https://www.independent.co.uk/news/science/archaeology/archaeology-london-spitalfields-woman-mola-b1774473.html [https://perma.cc/6LUR-AKCW]. The presence of such luxury items, like silk, helped researchers establish the extent of economic networks in Roman Britain. *See id.*

159. Beck, *supra* note 158.

160. *See id.* ("[T]he ancient Roman demand for monopolized Chinese silk laid the groundwork for today's international economic and political environment.").

industries" were the main producers of clothing.[161] But the invention of the "spinning jenny," the water frame, and the Watt steam engine spurred the beginnings of textile manufacturing in England in the 1700s.[162] These technologies were eventually brought to the United States in the 1780s, and inventions, such as the cotton gin, further improved the efficiency of the textile manufacturing process.[163]

Judges in the mid-1800s admired these technological advancements in the textile production of *clothes*,[164] but they did not share the same admiration for disputes involving *fashion*. In one early patent case, the court stated: "New inventions in regard to some trifling article of dress, such as hoops, or crinolines, or . . . 'a new invention to poison people,' are not patentable. The one is frivolous, the other mischievous."[165] Nineteenth-century courts thought it was appropriate to intervene in more "utilitarian" issues—associated with masculinity—rather than purely "aesthetic" issues—associated with femininity.[166]

The disdain for fashion was also reflected in other aspects of society, not just the courts. One nineteenth-century physician cautioned:

> We have before warned our readers against the "most pernicious practice," the dire effects of which are so forcibly presented in the above extract; but so prevalent is this evil, and such is the bending power of fashion, that the subject cannot be too often or too strongly urged upon the attention of mothers. The above remarks are as applicable to every part of our country as to the city of Paris, for from Paris we receive our fashions, and with Paris we must suffer the dreadful consequences of following the senseless requisitions of vanity and folly in preference to the plain dictates of reason, physiology, and common sense. Mothers can never expect health for themselves and their children until they make the laws of health their guide, instead of the

161. Alli Farago, *The Textile Industry During the Industrial Revolution*, MICH. ST. UNIV.: GLOBALEDGE (Oct. 18, 2017, 11:39 AM), https://globaledge.msu.edu/blog/post/54483/the-textile-industry-during-the-industrial-revolution [https://perma.cc/Q8JV-S4HE].

162. *Id.*

163. *Id.*

164. Colman, *supra* note 153 (citing Motte v. Bennett, 17 F. Cas. 909, 916–17 (C.C.D.S.C. 1849) (No. 9,884)).

165. Page v. Ferry, 18 F. Cas. 979, 982 (C.C.E.D. Mich. 1857) (quoting Lowell v. Lewis, 15 F. Cas. 1018 (C.C.D. Mass. 1817) (No. 10,662)).

166. Colman, *supra* note 153. The word "clothing" and "textiles" have more utilitarian connotations while the word "fashion" has a connotation that suggests aesthetics are its main features.

> decrees of fashion; until they study physiology and hygiene more, and French fashion-plates less.[167]

This writing basically identifies reason as the opposite of fashion, if not claiming fashion may be the death of reason. It is clear that early U.S. judicial and intellectual attitudes looked down on fashion, concluding it did not add anything substantive to society, and that it was not worthy of serious intellectual property protections.

The disfavor of fashion among early American courts and legislatures may also be due to the lack of a "'court culture' where fashion was *de rigueur* for both men and women."[168] To compare, the French were known for their over-the-top and glamorous court culture—potentially a reason why French fashion protections are so comprehensive today.

French fashion design protections date back to the fifteenth century,[169] and the French have prided themselves on fashion since the reign of the "Sun King," King Louis XIV.[170] Ever concerned with the appearance of power, King Louis XIV wanted to ensure that he and his courtiers reflected the power and mysticism of the "Sun King" himself and "obviously fashion and ceremonial dress . . . were a big part of that."[171] The most well-known minister of finance during King Louis XIV's reign, Jean-Baptiste Colbert, allegedly said, "[f]ashion is to France what the gold mines of Peru are to Spain."[172] Whether or not those words were spoken, many of Louis XIV's policies laid the groundwork for France to become the center of Western fashion. King Louis XIV supported laws that restricted the importation of foreign textiles, protected the local textile industry, and established institutions like the dressmakers guild.[173] The importance of fashion was central to King Louis XIV's economic plan, and according to the curator of Paris, Capital of Fashion, Dr. Valerie

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167. JD Thomas, *The Dangers of Bare Arms in Godey's Lady's Book*, ACCESSIBLE ARCHIVES (Nov. 11, 2011) (quoting Jno. Stainback Wilson, *Health Department*, GODEY'S LADY'S BOOK, July–Dec. 1861, at 444, 444 (emphasis omitted)), https://www.accessible-archives.com/2011/11/the-dangers-of-bare-arms-in-godeys-ladys-book/#ixzz3NxpGgXtH [https://perma.cc/WUP3-NQSJ].

168. Colman, *supra* note 153.

169. *France: Legal Protections for Fashion*, *supra* note 132. The Decree of 19-24 July 1793 protected some fashion designs as "pure art." Another special design law was enacted in 1806, and another in 1909 "further refined the advantages conferred by sui generis legislation." *Id.* (quoting J. H. Reichman, *Design Protection in Domestic and Foreign Copyright Law: From the Berne Revision of 1948 to the Copyright Act of 1976*, 1983 DUKE L.J. 1143, 1157).

170. Valerie Steele, *The History and Significance of Haute Couture*, L'OFFICIEL (July 24, 2019), https://www.lofficielusa.com/fashion/history-of-haute-couture-2019 [https://perma.cc/FQP4-YD8C].

171. Joobin Bekhrad, *Why Are the French So Chic?*, BBC: CULTURE (Oct. 8, 2019) (ellipsis in original) (citation omitted), https://www.bbc.com/culture/article/20191007-why-are-the-french-so-chic [https://perma.cc/F56R-PVFZ].

172. Steele, *supra* note 170.

173. *Id.*

Steele, "three-and-a-half centuries later, it's still true: [fashion] is a major pillar of the French economy."[174] The French began promoting seasonal fashion as early as 1675, and foreigners fawned over French fashion, beginning the French fashion hegemony that is still in place today.[175]

The first haute couture house was created in Paris by Charles Frederick Worth in 1858.[176] By 1868, Le Chambre Syndicale de la Haute Couture, des Confectionneurs et des Tailleurs pour Dame (The Trade Association for Couture, Clothing Manufacturers and Tailors for Women) was created, which allowed designers to label themselves as a couture house if they met certain specifications.[177] Requiring designers to meet specific standards served to safeguard high fashion by limiting those who could be classified as couture designers.[178] In 1921, protections for haute couture designers went further when the L'Association de Protection des Industries Artistiques Saisonnieres was created.[179] Fashion designs were photographed from the front, back, and side, and were registered as evidence of creation.[180] In the 1960s, French ready-to-wear fashion emerged, and the Chambre Syndicale du Prêt-à-Porter, des Couturiers et des Créateurs de Mode was founded in 1973.[181] On that same day, a men's fashion regulatory body was created—the Chambre Syndicale de la Mode Masculine.[182] Today, these three bodies are governed by the Fédération de la Haute Couture et de la Mode.[183]

As Western high fashion has its roots in France, it continues to play a large role in the French economy today. The direct turnover of France's fashion industry is 150 billion euros, 33 billion euros of which are exports,[184] and the annual economic benefit from Paris Fashion Week is 1.2 billion euros.[185] The fashion industry provides 1 million French jobs,[186] about 1.5% of the French population[187] and more than both the

174. Bekhrad, *supra* note 171 (alteration in original) (citation omitted).

175. Steele, *supra* note 170.

176. *The History of Haute Couture*, HARPER'S BAZAAR (Jan. 19, 2017), https://www.harpersbazaar.com/uk/fashion/fashion-news/news/a31123/the-history-of-haute-couture/ [https://perma.cc/JUE5-3W5Y].

177. *Id.*

178. *See id.*

179. *Id.*

180. *Id.*

181. Steele, *supra* note 170.

182. *Id.*

183. *Id.*

184. *Fashion: 7 Figures That Will Make You Proud of France*, GOUVERNEMENT, https://www.gouvernement.fr/en/fashion-and-luxury-goods-0 [https://perma.cc/JUE5-3W5Y].

185. *Id.*

186. *Id.*

187. *See infra* note 191.

automobile and aeronautical industries combined.[188] Also, the industry comprises 2.7% of the French gross domestic product.[189] To compare, the fashion industry in the United States employs 1.8 million people,[190] which is about 0.5% of the U.S. population,[191] and New York Fashion Week generated 598 million dollars in 2017.[192] Although 598 million dollars is a large sum, it is just about 42% of the 1.2 billion euros generated from Paris Fashion Week.

The existence of a court culture, the instilled pride for fashion within French culture, and the continuing economic importance of fashion likely indicate why France has the most comprehensive protections for fashion designs. To contrast, the United States has generally considered fashion to be associated with women and not something upon which U.S. culture has prided itself. These stark differences are apparent in the U.S. legislative's unwillingness to provide more protections to fashion designers as well as the U.S. judiciary's inconsistent and sometimes incoherent standards for fashion copyrightability. But, as discussed in Part I, a new period of judicial leniency for the copyrightability of fashion designs may be ushered in after the pro-designer *Star Athletica* decision.

## III. COPYRIGHT LAW IN THE WAKE OF *STAR ATHLETICA*

The confusing protections for fashion designs in the United States have left many scholars to discuss possible solutions. One of the more common and obvious answers would be through legislative action.[193]

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188. Pascal Morand, *How Fashion Impacts France*, GOOGLE ARTS & CULTURE, https://artsandculture.google.com/story/how-fashion-impacts-france/qwLSAlykk8X5Lg [https://perma.cc/HS86-86MJ].

189. *The Figures of Fashion*, FÉDÉRATION DE LA HAUTE COUTURE ET DE LA MODE, https://fhcm.paris/en/the-federation/the-figures-of-fashion/ [https://perma.cc/H2JJ-GHJL].

190. Júlia Vilaca, *Fashion Industry Statistics: The 4th Biggest Sector Is Way More than Just About Clothing*, FASHINNOVATION (Feb. 18, 2022), https://fashinnovation.nyc/fashion-industry-statistics/ [https://perma.cc/KVV5-NHZ3].

191. The U.S. population as of July 1, 2021, is 331,893,745. *U.S. and World Population Clock*, U.S. CENSUS BUREAU, https://www.census.gov/popclock/ [https://perma.cc/8VY8-DLVF]. Therefore, 0.5% of the U.S. population is employed by the fashion industry. To compare, France has a population of 67,391,582 people as of 2020. *Population, Total – France*, WORLD BANK, https://data.worldbank.org/indicator/SP.POP.TOTL?locations=FR [https://perma.cc/7Q6R-4EG4]. Therefore, 1.5% of the French population is employed by the fashion industry.

192. Vivian Hendriksz, *Key Numbers: How Much Money New York Fashion Week Makes*, FASHION UNITED (Feb. 8, 2017), https://fashionunited.com/news/business/key-numbers-how-much-money-new-york-fashion-week-makes/2017020814622 [https://perma.cc/4F9U-SRH3].

193. *See* Denisse F. García, Note, *Fashion 2.0: It's Time for the Fashion Industry to Get Better-Suited, Custom-Tailored Legal Protection*, 11 DREXEL L. REV. 337, 363–67 (2018) (detailing numerous attempts to pass legislation that would provide more copyright protection for fashion designs); Julie Zerbo, *Protecting Fashion Designs: Not Only "What?" But "Who?,"* 6 AM. U. BUS. L. REV. 595, 621 (2017) ("Practically speaking, lawmakers should strive to safeguard

But, as stated before, legislative action seems unlikely at this point. However, as evidenced by *Mazer*, courts also have a drastic impact on copyright protections, even in the absence of legislative action (and sometimes spurring legislative action).

As previously discussed in Part I, U.S. fashion copyright jurisprudence follows a cyclical pattern of leniency and stringency following a Supreme Court decision on copyrightability. Although Professor Colman's four periods of the "originality pendulum" arguably ended before the *Star Athletica* decision, there is reason to believe that *Star Athletica* ushered in a fifth period of judicial leniency. And while Professor Colman's periods concerned "originality" and *Star Athletica* was seemingly just a decision on "separability," *Star Athletica*'s holding is still an indication that judges will be more willing to grant fashion designs copyright protections generally. This is especially true because the beginning of Professor Colman's first period of leniency was ushered in by *Mazer*, the case establishing the "separability doctrine," recognizing that some parts of utilitarian articles can be copyrighted. Thus, it is significant that the Court leaned pro-designer in *Star Athletica* because it is the first case to comment on "separability" since the *Mazer* decision almost seventy years ago.

However, since *Star Athletica*, only a few courts have dealt with the issue of how to apply separability. How the U.S. Court of Appeals for the Third Circuit treated the copyrightability of a costume may provide some insight into future trends. In *Silvertop Associates v. Kangaroo Manufacturing Inc.*,[194] the Third Circuit recognized that a full-body banana suit was copyrightable.[195] Utilizing the "imagination test," the court found that the banana could be imagined apart from the costume as an "original sculpture."[196] In supporting its conclusion, the court misapplied *Star Athletica*. While confirming the *copyrightability* of the banana suit, it used the *separability* test in *Star Athletica*. The alleged infringer, Kangaroo Manufacturing, argued that each feature of the banana costume should be inspected individually for copyrightability, not examined as a whole.[197] But, the court rejected that approach, holding that the "separately imagined banana—the sum of [the banana's] non-utilitarian parts—[was] copyrightable."[198] The court stated that "the *Star*

a brand's intangible assets, namely, a designer's brand image (and corresponding brand signatures)."); Gianna Cresto, Note, *A Design of Its Own: How to Protect the Fashion Industry*, 46 AIPLA Q.J. 571, 592–95 (2018) (proposing a narrow exception to the U.S. intellectual property scheme that would model France's protections for the fashion industry and safeguard lesser-known designers).

194. 931 F.3d 215 (3d Cir. 2019).

195. *Id.* at 221.

196. *Id.*

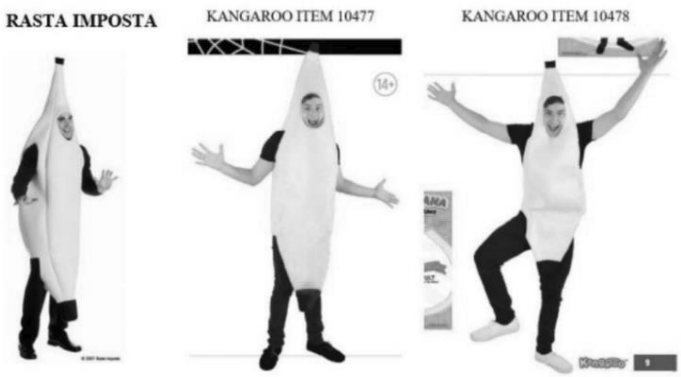
197. *Id.*

198. *Id.*

*Athletica* Court did not cherry-pick the uniform designs' colors, shapes, or lines; it too evaluated their combination."[199] Thus, the court's willingness to find copyrightability based on *Star Athletica*, a decision evaluating only separability, may be an indication of the changing tides in lower courts to uphold more fashion design copyrights.

The Third Circuit's decision to find such a basic costume copyrightable is also significant. Both banana costumes in question were very simple, featuring a yellow banana-shaped body with black tips on each end of the banana, as seen in Figure 2. They looked very much like actual bananas.

Figure 2: The copyright-protected banana on the left with the two infringers in the center and on the right.[200]




Because Silvertop's costume looks so much like a real banana, a simple object, does this costume company now have a monopoly on banana costumes?[201] The Third Circuit said no and agreed with the district court in holding that there are many ways to create a banana costume that differ from the copyrighted banana costume shown above.[202] The district court listed several ways a banana costume could be designed without infringing on Silvertop's copyright, including the variation of the "shape and curvature," the use of different colored tips, the display of different levels of ripeness, the addition of vertical lines, or the change to resemble a wholly or partially peeled banana.[203]

199. *Id.*

200. *Id*. at 224 app. A.

201. *See id.* at 222 ("Because Congress has excluded 'any idea, procedure, process, system, method of operation, concept, principle, or discovery' from copyright protection, . . . courts deny such protection when a work's underlying idea can effectively be expressed in only one way." (quoting 17 U.S.C. § 102(b))).

202. *Id.* at 223.

203. Silvertop Assocs. v. Kangaroo Mfg., Inc., 319 F. Supp. 3d 754, 768 (D.N.J. 2018), *aff'd*, 931 F.3d 215.

Although the court suggested changes that would make another's banana costume distinguishable from Silvertop's, the simplicity of the banana, paired with a desire to maintain a realistic depiction of a banana may make it harder to create a non-infringing costume than the court proposes. The copyrighted banana costume seems to be how a person pictures a banana in their head. Any changes to the costume by another manufacturer must be more than minimal, and because the copyrighted costume is so banana-like, manufacturers may have trouble retaining a new costume's resemblance to a commonly imagined banana.

Does *Silvertop Associates* further complicate the jurisprudence on copyrightability of natural objects or objects in the public domain? The Third Circuit does little to clarify the confusion. It stated that "whether natural objects are copyrightable depends on the circumstances."[204] In so concluding, the Third Circuit cited one case that held that a sculpture of a jellyfish was not copyrightable and another case that held several elements of a frog plush toy were copyrightable.[205] To determine the appropriate circumstances, the court held that the "essential question is whether the depiction of the natural object has a minimal level of creativity."[206] Silvertop's banana costume was determined to have met the minimal threshold,[207] but the court did not explain whether certain parts or the entirety of the costume displayed creativity, nor did it explain the exact amount of creativity required for natural objects to become copyrightable.

It is clear that *Silvertop Associates* applied more relaxed standards of "originality" and the "idea-expression" doctrine when compared to previous courts. In *Past Pluto Products v. Dana*,[208] the United States District Court for the Southern District of New York refused to recognize copyright protection for Statute of Liberty-inspired foam hats.[209] Although the hats differed from the real statue, the court found the differences too minor to meet the "originality" requirement.[210] To compare, *Silvertop Associates* found the banana suit copyrightable even though it minimally differed from the appearance of a real banana.[211] Thus, the "originality" requirement appears to be trending towards leniency, consistent with Professor Colman's periods of the "originality pendulum."

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204. *Silvertop Assocs*., 931 F.3d at 221.

205. *Id.* (first citing Satava v. Lowry, 323 F.3d 805, 810 (9th Cir. 2003); and then citing Coquico, Inc. v. Rodríguez-Miranda, 562 F.3d 62, 69 (1st Cir. 2009)).

206. *Id.* at 221–22.

207. *Id.* at 222.

208. 627 F. Supp. 1435 (S.D.N.Y. 1986).

209. *Id.* at 1437, 1442.

210. *Id.* at 1443.

211. *See supra* Figure 2, notes 200–03 and accompanying text.

*Silvertop Associates* also reflects a more pro-designer interpretation of the separability test laid down by the *Star Athletica* Court. The Third Circuit disapproved of the U.S. Court of Appeals for the Second Circuit's ruling in *Whimsicality, Inc. v. Rubie's Costume Co.*[212] The Second Circuit imagined a costume's separability as "deflated piles of fabric."[213] The Third Circuit pointed out that *Star Athletica*'s new separability test required it to imagine Silvertop's costume as, "not a crumpled pile of fabric," but as a "recognizable rendering of a banana."[214] What is likely the most significant aspect of *Silvertop Associates* is that both the lower court and the Third Circuit found the banana suit copyrightable. This endorsement for copyrightability shows that lower courts may be following the pattern identified in Professor Colman's four periods, and that courts are currently in a fifth period characterized by relaxed judicial copyright standards.

However, it is uncertain how *Silvertop Associates* forecasts non-costume fashion designs as courts have arguably treated costumes differently than fashion accessories or clothing.[215] Like the caselaw surrounding fashion designs, costume jurisprudence is also unclear. The major dispute is whether a costume is a utilitarian item and if so, whether the utilitarian features can be separated from the artistic features of the item. Some courts have held that elements of costumes, such as a nose mask, bear no utilitarian function and are thus copyrightable.[216] The Copyright Office wrote a Policy Decision that enforced the idea that clothing generally could not be copyrighted and held that costumes fit within the definition of a useful article.[217] Some courts have since found costumes not eligible for copyright because their usefulness cannot be separated from their artistic aspects.[218] But many courts have not followed the Policy Decision, continuing the trend of nonuniform

212. 891 F.2d 452 (2d Cir. 1989).

213. *Silvertop Assocs*., 931 F.3d at 222 (citing *Whimsicality*, 891 F.2d at 456).

214. *Id.*

215. *See* Charles E. Colman, *The History and Doctrine of American Copyright Protection for Fashion Design: Managing* Mazer, 7 HARV. J. SPORTS & ENT. L. 151, 195 (2016) ("Costume-specific judicial decisions are arguably unique in reflecting hybrid approaches, in which earlier 'novelty item' precedent interacts heavily with . . . the 1976 Copyright Act and administrative guidance provided thereunder.").

216. *See* Masquerade Novelty, Inc. v. Unique Indus., 912 F.2d 663, 670–71 (3d Cir. 1990) ("Unlike a design incorporated in a belt, which holds up the wearer's pants, or even a costume, which may serve, aside from its appearance, to clothe the wearer, nose masks have no utility that does not derive from their appearance." (citation omitted)).

217. Registrability of Costume Designs, 56 Fed. Reg. 56, 530, 56, 531 (Nov. 5, 1991).

218. *See, e.g.*, Whimsicality, Inc. v. Battat, 27 F. Supp. 2d 456, 463 (S.D.N.Y. 1998) ("Because the purpose of Whimsicality's line of costumes is to enable the wearer to masquerade, the 'artistic' elements of the costumes . . . are not separable on these facts from the costumes' utilitarian aspects.").

rulings.[219] Because costumes often have dual utilitarian and design purposes, they are similar to fashion. And the Third Circuit's willingness to uphold the banana suit's copyright likely foreshadows the coming judicial attitudes toward fashion copyrights.

Still, *Star Athletica* has not yet been used by fashion designers, even litigious ones such as Louis Vuitton. But, with a pro-designer Supreme Court decision on the record, it may very well be that designers will soon test the limits of the new standard and the limits of the potential new judicial leniency.

## CONCLUSION

The discussion of the copyrightability of fashion designs in this Note attempts to clarify the reasons behind ambiguous copyright protections and predicts a potential coming trend for fashion law litigation. Although the association of fashion with femininity has caused unclear fashion copyright standards, courts have also flip-flopped between lenient and stringent standards for fashion copyrightability, leading to more confusion. Upon the issuance of a pro-designer Supreme Court decision, lower courts tend to apply more lenient copyright standards for designs. Then, after a period of lax standards, there seems to be an era of stringency among the courts. *Star Athletica*'s new pro-designer decision may be another catalyst for leniency, and although not many courts have utilized its standard, *Star Athletica* has the potential to increase the number of fashion designs being copyrighted. *Star Athletica* does not create a concrete standard, and if history repeats itself, the leniency will not last forever. Still, designers may find some reprieve in its holding for the near future.

219. *See* Colman, *supra* note 215, at 202–03.