

# Stealing More than Just Designs: Utilizing Environmental Law as a Remedy to Design Piracy by Fast Fashion Brands

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## I. INTRODUCTION

In the summer of 2021, small business Elexiay took to social media to address a direct copy of its sweater design created without its knowledge or consent.<sup>1</sup> This particular pink and green sweater design, for which its designers spent hours creating a pattern, plus an additional four to five days for its artists to hand crochet, was reproduced in an identical copy by mega-brand Shein.<sup>2</sup>

The labor-intensive sweater design, known as the Amelia sweater, was sold by Elexiay for \$330, a necessary price to compensate the Nigerian, women-owned, sustainable business for its time and effort of both designing and producing the high quality sweater.<sup>3</sup> In contrast, the Shein copies sold for only \$17.<sup>4</sup> Shein was able to do this by reproducing the sweater using a machine and cheap materials, and by not having to expend the time, energy, and money to compensate a designer.<sup>5</sup> Unfortunately, this design piracy by large fast fashion brands like Shein producing cheap copies is a very commonplace occurrence,<sup>6</sup> which is economically devastating to small businesses like Elexiay.<sup>7</sup>

“Fast fashion” is the term used for brands who manufacture new designs quickly, using cheap, low-quality materials to keep up with the ever-changing fashion landscape and sell the pieces at very low prices which allow for continued purchases from their consumer base.<sup>8</sup> Large fast fashion brands are able to scout trending designs on social media and can manufacture identical

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<sup>1</sup> Kelly McLaughlin & Samantha Grindell, *Nigerian Crochet Brand Claims Shein Stole Its Sweater Design*, INSIDER (July 16, 2021), <https://www.insider.com/nigerian-crochet-brand-elexiay-claims-shein-copied-sweater-design-2021-7> [<https://perma.cc/ZZ2B-ZR8M>].

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> Matthew Perlman, *How Fashion Brands Commonly Steal Designs and Get Away with It*, COURTROOM (June 17, 2021) (on file with the *Ohio State Law Journal*); Keyon Lo, *Stop Glorifying Fashion Piracy: It Is Time to Enact the Innovative Design Protection Act*, 21 CHI.-KENT J. INTELL. PROP. 159, 164 (2022).

<sup>6</sup> See Gil Appel, Barak Libai & Eitan Muller, *On the Monetary Impact of Fashion Design Piracy*, 35 INT'L J. RSCH. MKTG. 591, 592 (2018) (explaining that the rise of fast fashion has led to an increase in design piracy, while the sales of the original designers are plummeting following the production of the knockoff).

<sup>7</sup> Susan Scafidi & Narciso Rodriguez, *Fashion Designers Need Strong Legal Protection for Their Clothing*, N.Y. TIMES (Oct. 22, 2015), <https://www.nytimes.com/roomfordebate/2014/09/07/who-owns-fashion/fashion-designers-need-strong-legal-protection-for-their-clothing> [<https://perma.cc/57FC-JDPL>]; see also Chavie Lieber, *Fashion Brands Steal Designs All the Time. And It's Completely Legal*, VOX (Apr. 27, 2018), <https://www.vox.com/2018/4/27/17281022/fashion-brands-knockoffs-copyright-stolen-designs-old-navy-zara-h-and-m> [<https://perma.cc/RT38-S35V>].

<sup>8</sup> Perlman, *supra* note 5.

copies in less than two weeks from start to finish.<sup>9</sup> It is commonplace for these large fast fashion brands to add over 4,000 new styles to their websites each week.<sup>10</sup> The quick turnaround and massive quantity of new styles is made possible by design piracy, the use of other brands' designs.<sup>11</sup> Sometimes, fast fashion brands even go so far as to take the exact image from the original designer to use when promoting their pirated design.<sup>12</sup> Design piracy is not a new problem facing fashion designers, both high-end and small businesses alike.<sup>13</sup> However, the speed and quantity at which retailers are able to make identical copies of designs has increased with the rise of social media and fast fashion brands.<sup>14</sup>

Under current intellectual property law in the United States, these pirated designs produced by fast fashion brands are entirely legal.<sup>15</sup> This piracy can lead to the death of small or emerging designer brands due to the economic devastation of having their design available for a significantly cheaper price.<sup>16</sup> Legal protection for designs is currently based on a patchwork of protection through the combination of copyright, trademark and trade dress, and patent law.<sup>17</sup> This patchwork, however, is largely ineffective.<sup>18</sup> Unfortunately, intellectual property law does not currently offer a specific scheme to protect designs as a whole outside of this patchwork structure.<sup>19</sup>

The fight to expand legal protection for designs has been ongoing.<sup>20</sup> Lobbyists have tried to give fashion the same protection offered to writers, filmmakers, painters, photographers, and jewelry designers under intellectual property law with no success.<sup>21</sup> These proposals have even suggested minimal

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<sup>9</sup> Lieber, *supra* note 7.

<sup>10</sup> *See id.*

<sup>11</sup> *See* Lo, *supra* note 5, at 163–64.

<sup>12</sup> Lieber, *supra* note 7.

<sup>13</sup> *See* Lieber, *supra* note 7 (explaining that big brands have been stealing designs from small brands for a long time, even before the use of social media); *see also* Kristin Sutor, Comment, *In Fast-Fashion, One Day You're In, and the Next Day You're Out: A Solution to the Fashion Industry's Intellectual Property Issues Outside of Intellectual Property Law*, 2020 MICH. ST. L. REV. 853, 873 (2020) (describing the copying of designs from as early as 1937).

<sup>14</sup> *See* Lieber, *supra* note 7; *see also* Sutor, *supra* note 13, at 856.

<sup>15</sup> Perlman, *supra* note 5.

<sup>16</sup> *See* Scafidi & Rodriguez, *supra* note 7; Alice Wickens, *Design Piracy in the United States: Time to Fashion a Remedy?*, 24 J. WORLD INTELL. PROP. 55, 57–58 (2021).

<sup>17</sup> *See* Wickens, *supra* note 16, at 58–60 (describing the limits of the available remedies under patent, trademark, and copyright law that provide for the “patchwork” of protection for fashion designs).

<sup>18</sup> The current patchwork does not allow for a “specific scheme for design protection.” Sutor, *supra* note 13, at 864. Instead, portions of designs such as logos and patterns can be protected while the actual piece of creativity, the clothing itself, is left unprotected. *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> Scafidi & Rodriguez, *supra* note 7.

<sup>21</sup> *See id.*

protection for designs under copyright law for periods as short as three years.<sup>22</sup> However, Congress has denied these proposals, showing a reluctance to expand intellectual property law to cover a design beyond the limited protection currently available under the patchwork structure.<sup>23</sup>

While design piracy is one of the biggest negative impacts of the fast fashion industry,<sup>24</sup> the environmental consequences are just as impactful.<sup>25</sup> Currently, the fashion industry is responsible for approximately ten percent of global carbon emissions.<sup>26</sup> This means that the fashion industry has one of the biggest global carbon footprints,<sup>27</sup> very closely trailing behind the oil and gas industry, which accounts for approximately fifteen percent of global carbon emissions.<sup>28</sup> This problem is further exasperated by the wasteful nature of fast fashion.<sup>29</sup> Should the environmental concerns of fast fashion not be addressed, experts predict a fifty percent surge in greenhouse gas emissions from the fashion industry by the year 2030.<sup>30</sup>

Legal efforts to protect designs need to look beyond intellectual property law.<sup>31</sup> If Congress does not see fit to expand intellectual property law as applied

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<sup>22</sup> *Id.*

<sup>23</sup> See Lo, *supra* note 5, at 192–93 (explaining that although there have been multiple proposals in Congress to protect fashion designs, none of those proposals have been successful).

<sup>24</sup> See Scafidi & Rodriguez, *supra* note 7.

<sup>25</sup> See Rashmila Maiti, *Fast Fashion and Its Environmental Impact*, EARTH.ORG (June 12, 2022), <https://earth.org/fast-fashions-detrimental-effect-on-the-environment/> [<https://perma.cc/4JAR-2CRC>].

<sup>26</sup> See, e.g., *How Much Do Our Wardrobes Cost to the Environment?*, WORLD BANK (Sept. 23, 2019), <https://www.worldbank.org/en/news/feature/2019/09/23/costo-moda-medio-ambiente> [<https://perma.cc/86A3-KXMH>]; Maiti, *supra* note 25.

<sup>27</sup> See *How Much Do Our Wardrobes Cost to the Environment?*, *supra* note 26. For reference, ten percent of global carbon emissions is equal to the global carbon emissions from the entire European Union. See Maiti, *supra* note 25.

<sup>28</sup> *Methane Tracker 2020: Methane from Oil & Gas*, INT’L ENERGY AGENCY, <https://www.iea.org/reports/methane-tracker-2020/methane-from-oil-gas> [<https://perma.cc/7WQB-ZYTR>].

<sup>29</sup> The operating model of the fast fashion industry, with constant clothing releases and increased inventory at low costs, has more than doubled the amount of clothing produced in the past 20 years. See *How Much Do Our Wardrobes Cost to the Environment?*, *supra* note 26. With increased clothing consumption due to fast fashion (over 62 million metric tons of apparel were purchased globally in 2019), more clothing is ending up in landfills and being incinerated, releasing toxic substances or large amounts of poisonous gases into the nearby communities. Ngan Le, *The Impact of Fast Fashion on the Environment*, PRINCETON STUDENT CLIMATE INITIATIVE (July 20, 2020), <https://psci.princeton.edu/tips/2020/7/20/the-impact-of-fast-fashion-on-the-environment> [<https://perma.cc/LRL7-U3GE>].

<sup>30</sup> See, e.g., *How Much Do Our Wardrobes Cost to the Environment?*, *supra* note 26.

<sup>31</sup> For example, several recent articles have considered solutions outside of intellectual property that could possibly be used to address design piracy. See Sutor, *supra* note 13, at 858 (proposing that the issue be addressed by changing labor laws instead of intellectual property laws); see also Arielle K. Cohen, *Designer Collaborations as a Solution to the Fast-*

to fashion, it can and should still address design piracy through other avenues.<sup>32</sup> Without increased protection, small brands will struggle to thrive in a world that relies upon social media to compete with fast fashion giants including Zara, H&M, and Forever 21.<sup>33</sup> In addition, changes can be made without causing a disproportionate impact to lower socio-economic classes who often rely on fast fashion to afford their clothing.<sup>34</sup> If Congress addresses design piracy, whether through intellectual property or otherwise, fast fashion retailers will have no choice but to change their ways, for example by hiring their own designers to interpret the current fashion trends instead of relying on replicating small brands who cannot always fight back.<sup>35</sup> Congressional change has the opportunity to keep costs low for the consumers, while also providing the added benefit of new original designs and increased creativity in the fashion world.<sup>36</sup>

This Note examines the steps that the federal government should take to provide fashion designers with some form of protection for their original designs. Part II reviews the current state of the law that provides for the patchwork protection of fashion designs. It then delves into the limitations and problems associated with that current state of protection and describes past attempts to revise intellectual property law to better account for fashion designs.<sup>37</sup> Part III discusses the environmental concerns associated with the fast fashion industry and how the environmental concerns connect with intellectual property.<sup>38</sup> Part IV provides a solution to address the lack of design protection through the creation and implementation of environmental law reform. Such reform will provide notice to consumers of fast fashion's environmental impact as well as regulate limitations on the use of harmful chemicals in fashion designs.<sup>39</sup> Finally, Part V briefly concludes.<sup>40</sup>

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*Fashion Copyright Dilemma*, 11 CHI.-KENT J. INTELL. PROP. 172, 173 (2013) (explaining the role that brand collaborations could play in providing a solution to design piracy).

<sup>32</sup> See, e.g., Sutor, *supra* note 13, at 858 (addressing the issue from a labor law perspective).

<sup>33</sup> See Lieber, *supra* note 7.

<sup>34</sup> Scafidi & Rodriguez, *supra* note 7 (explaining that design protection would actually encourage affordable choices, as fast fashion retailers would have to rely on their own designers to interpret a trend instead of turning to design piracy).

<sup>35</sup> *Id.*

<sup>36</sup> See *id.*

<sup>37</sup> See discussion *infra* Part II.

<sup>38</sup> See discussion *infra* Part III.

<sup>39</sup> See discussion *infra* Part IV.

<sup>40</sup> See discussion *infra* Part V.

## II. CURRENT INTELLECTUAL PROPERTY PROTECTIONS FOR FASHION DESIGNS ARE OVERALL VERY LIMITED

The United States' intellectual property regime offers little to no protection of fashion designs.<sup>41</sup> Unlike the countries in the European Union,<sup>42</sup> the United States lacks any comprehensive intellectual property law covering fashion design.<sup>43</sup> Instead, designers rely on a patchwork of protection composed of (1) copyright law to protect jewelry and certain two-dimensional design features,<sup>44</sup> (2) trademark and trade dress law to protect distinctive marks and logos,<sup>45</sup> and (3) patent law to protect ornamental appearance.<sup>46</sup> This patchwork is insufficient to protect fashion designers at-large from design piracy in the United States,<sup>47</sup> and instead extends coverage to individual elements of design, like logos and patterns.<sup>48</sup>

### A. *The Limited Extent of Copyright Protections*

The United States Constitution grants Congress the power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their respective Writings and Discoveries.”<sup>49</sup> Through this power, Congress enacted United States Code Title 17 Section 102, also known as the Copyright Act, to provide copyright protection to certain

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<sup>41</sup> See Sutor, *supra* note 13, at 864 (noting the ineffective “patchwork of protection” provided to fashion under US law).

<sup>42</sup> In the European Union, there is uniform, EU-wide protection under the EU Designs Protection Directive: all member states must protect designs (which includes the entire appearance of a piece of clothing) which are novel and have an individual character. See Francesca Montalvo Witzburg, *Protecting Fashion: A Comparative Analysis of Fashion Design Protection in the U.S. and Europe*, CARDOZO ARTS & ENT. L.J.: BLOG (Sept. 19, 2014), <https://cardozoaelj.com/2014/09/19/protecting-fashion-a-comparative-analysis-of-fashion-design-copyright-protection-in-the-u-s-and-europe/> [<https://perma.cc/QB8B-94YR>]. This protection given within the European Union provides what is currently sought within the United States, but due to the lack of political support for such a law, it is unlikely to be enacted any time soon. See *id.*

<sup>43</sup> Wickens, *supra* note 16, at 58.

<sup>44</sup> See Witzburg, *supra* note 42; see also Scafidi & Rodriguez, *supra* note 7.

<sup>45</sup> See Silvia Beltrametti, *Evaluation of the Design Piracy Prohibition Act: Is the Cure Worse than the Disease? An Analogy with Counterfeiting and a Comparison with the Protection Available in the European Community*, 8 NW. J. TECH. & INTELL. PROP. 147, 154–55 (2010).

<sup>46</sup> See Michele Lawson, *Can Fashion Designs Be Protected by IP?*, SMITH & HOPEN (Sept. 2, 2020), <https://smithhopen.com/2020/07/30/can-fashion-designs-be-protected-by-ip/> [<https://perma.cc/U89V-6C96>].

<sup>47</sup> Lo, *supra* note 5, at 174.

<sup>48</sup> Robin M. Nagel, *Tailoring Copyright to Protect Artists: Why the United States Needs More Elasticity in Its Protection for Fashion Designs*, 54 U. RICH. L. REV. 635, 639, 644 (2020).

<sup>49</sup> U.S. CONST. art. I, § 8, cl. 8.

creative works.<sup>50</sup> Fashion designs are not included in the statutory scheme for copyright protection.<sup>51</sup> Instead, fashion designs are considered to be utilitarian, which cannot be copyrighted under the Copyright Act.<sup>52</sup>

Under Title 17 Section 101 of the United States Code, pictorial, graphic, or sculptural features, can be protected by copyright law as useful articles only when they “can be identified separately from, and are capable of existing independently of, the utilitarian aspect of the article.”<sup>53</sup> Prior to 2017, it was hard to determine what was considered a useful article and subject to copyright protection, outside of textile designs and jewelry.<sup>54</sup> At the time, there was a wide variety of caselaw but a split in the courts on whether a feature with an aesthetic purpose could be separated from the utilitarian function of the clothing itself.<sup>55</sup> However, in 2017, the Supreme Court agreed to hear *Star Athletica v. Varsity Brands*, which would clarify which test should be used to determine when copyright law may cover a feature of a useful article.<sup>56</sup> Varsity owned five registered copyrights for the designs that it placed on its cheerleading uniforms.<sup>57</sup> When Star Athletica produced exact copies of the cheerleading uniforms, Varsity alleged copyright infringement for the uniforms’ chevron patterns.<sup>58</sup> The lower courts struggled to decide whether there was separability between the design and uniform itself to allow for the designs to be copyrighted.<sup>59</sup> The *Star Athletica* Court created a two-part test to decide when a useful article, but not the entire fashion design, is protected by copyright law.<sup>60</sup> The test considers: (1) whether the aesthetic of the design can be imagined separately from the utilitarian aspect of the clothing and (2) whether the design would be a protected pictorial, graphic, or sculptural work when viewed separately from the clothing.<sup>61</sup>

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<sup>50</sup> 17 U.S.C. § 102(a) provides protection to “works of authorship” which includes “(1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recording; and (8) architectural works.” 17 U.S.C. § 102(a).

<sup>51</sup> *See id.*

<sup>52</sup> *See* Lawson, *supra* note 46.

<sup>53</sup> 17 U.S.C. § 101.

<sup>54</sup> *See* Lo, *supra* note 5, at 181–82.

<sup>55</sup> Petition for a Writ of Certiorari at 21–25, *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002 (2017) (No. 15-866) (explaining that there were at least ten separate tests to determine separability: the copyright office’s approach, the primary-subsidary approach, the objectively necessary approach, the ordinary-observer approach, the design-process approach, the stand-alone approach, the likelihood-of-marketability approach, the Patry approach, the subjective-objective approach, and the Sixth Circuit approach).

<sup>56</sup> *Star Athletica*, 137 S. Ct. at 1007.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 1008.

<sup>60</sup> *Id.* at 1012–13.

<sup>61</sup> *See id.*

While *Star Athletica* clarified the separability test, it did little to expand copyright protection and failed to offer any clarification on what constitutes a “useful article.”<sup>62</sup> Copyright law’s limited scope, which encompasses jewelry and textile designs,<sup>63</sup> is entirely incapable of protecting entire fashion designs without further amendment.<sup>64</sup>

### *B. Trademark and Trade Dress Law Offer the Most Protection, but Still Not Enough*

Under the Lanham Act, a trademark “includes any word, name, symbol, or device, or any combination thereof” that is used to “identify and distinguish his or her goods.”<sup>65</sup> To be considered a trademark, a “mark”<sup>66</sup> must (1) be used to distinguish or identify the good in commerce from its competitors to receive trademark protection<sup>67</sup> and (2) be arbitrary and nonfunctional.<sup>68</sup> Further, the Lanham Act (“the Act”) protects the mark itself, but not the product on which the mark is placed.<sup>69</sup> For example, the Act protects the Nike swoosh as a mark but not the article of clothing (i.e., shirt, sweatpants, etc.) that the swoosh is on.<sup>70</sup> Finally, the degree of protection applied to the trademark varies based on the specific mark’s distinctiveness.<sup>71</sup>

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<sup>62</sup> The Court in *Star Athletica* refers to the statutory definition of a “useful article” by quoting the Copyright Act and does little more to define the term. *Star Athletica*, 137 S. Ct. at 1008; see also Tyler T. Ochoa, *What Is a “Useful Article” in Copyright Law After Star Athletica?*, 166 U. PA. L. REV. ONLINE 105, 106 (2017), <https://www.pennlawreview.com/2017/10/25/what-is-a-useful-article-in-copyright-law-after-star-athletica/> [<https://perma.cc/FR2D-QFUC>] (explaining that even following *Star Athletica*, it is unclear what a useful article is).

<sup>63</sup> See Scafidi & Rodriguez, *supra* note 7; Lo, *supra* note 5, at 181–82.

<sup>64</sup> See discussion *infra* Parts II.B, II.C.

<sup>65</sup> 15 U.S.C. § 1127.

<sup>66</sup> A mark is the portion of the design that can be covered by trademark law and includes words, phrases, symbols, or a combination that allows the consumer to identify the manufacturer of the product. See *Categories of Marks*, JUSTIA, <https://www.justia.com/intellectual-property/trademarks/categories-of-marks/> [<https://perma.cc/H3C4-B7WX>].

<sup>67</sup> See *id.*

<sup>68</sup> See *Christian Louboutin S.A. v. Yves Saint Laurent Am. Holding, Inc.*, 696 F.3d 206, 212, 222 (2d Cir. 2012) (“[D]istinctive and arbitrary arrangements of predominantly ornamental features that do *not* hinder potential competitors from entering the same market with differently dressed versions of the product are non-functional[,] and [are] hence eligible for [trademark protection].” (alteration in original) (quoting *Fabrication Enters., Inc. v. Hygenic Corp.*, 64 F.3d 53, 59 (2d Cir. 1995))).

<sup>69</sup> See *Intellectual Property 101: A Primer*, FASHION L. (Apr. 26, 2020), <https://www.thefashionlaw.com/intellectual-property-rights-a-primer/> [<https://perma.cc/Y3AN-HV5Z>].

<sup>70</sup> See *id.*

<sup>71</sup> See *Zatarains, Inc. v. Oak Grove Smokehouse, Inc.*, 698 F.2d 786, 790–91 (5th Cir. 1983) (explaining that there is a spectrum of distinctiveness that warrants different trademark protections based on the category the mark falls into, from fanciful, to arbitrary, to suggestive, to descriptive, and finally ending with distinctive).



Determining what constitutes a mark under the Act has been construed by the courts to even include a single color when it has a secondary meaning as a distinctive symbol to identify the brand.<sup>72</sup> This became clear when Christian Louboutin sued Yves Saint Laurent for using its trademark red lacquered outsole.<sup>73</sup> The court held that the distinctiveness of the red lacquered outsole was enough to create a trademark specifically for the red lacquered outsole, not the shoe itself.<sup>74</sup> The red outsole garnered a secondary meaning in the public mind for Christian Louboutin shoes, which established distinctiveness.<sup>75</sup> The ruling was a win for Louboutin, but the impact is still rather limited in its application. Protection will only apply when the shoe at issue has a red lacquered outsole combined with a contrasting color on the remainder of the upper shoe.<sup>76</sup> Therefore, the trademark would not apply to entirely red shoes or shoes that used another color on the outsole,<sup>77</sup> and using it to combat design piracy may prove easier said than done.

While trademark law is very helpful for large businesses trying to limit counterfeits, it does little to nothing to prevent design piracy.<sup>78</sup> Since trademark law relies on the distinctiveness of a mark, it is practically useless to small businesses whose broad exposure in the public mind is more limited.<sup>79</sup> Without the large clientele of a brand like Louboutin, small businesses cannot create the distinctiveness necessary to substantiate a right to trademark protection.<sup>80</sup> Unfortunately, fast fashion brands can easily take advantage of this gap in the law.<sup>81</sup> With trademark providing the most protection of the patchwork laws, the

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<sup>72</sup> See Oliver Herzfeld, *Protecting Fashion Designs*, FORBES (Jan. 3, 2013), <https://www.forbes.com/sites/oliverherzfeld/2013/01/03/protecting-fashion-designs/?sh=6e5a45eeb317> [<https://perma.cc/CCM6-G38C>].

<sup>73</sup> *Christian Louboutin S.A.*, 696 F.3d at 212.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 225.

<sup>76</sup> *Id.* at 227.

<sup>77</sup> See *id.*

<sup>78</sup> Trademark law encompasses counterfeits that misappropriate a registered trademark in the production of the design which allows for indirect protection for the design itself. Kevin V. Tu, *Counterfeit Fashion: The Interplay Between Copyright and Trademark Law in Original Fashion Designs and Designer Knockoffs*, 18 TEX. INTELL. PROP. L.J. 419, 432 (2010). However, this still will not prevent design piracy because it can only be utilized when the company has registered a mark that was used in the counterfeit design and will not protect stolen designs in general. *Id.* at 432–33.

<sup>79</sup> See Lo, *supra* note 5, at 175; Natalya Y. Belonozhko, Comment, *Famous Trademarks in Fashion: Why Federal Trademark Dilution Law Favors a Monopoly over Small Business Success*, 51 WILLAMETTE L. REV. 365, 387–88 (2015).

<sup>80</sup> Belonozhko, *supra* note 79, at 387–88.

<sup>81</sup> See Lo, *supra* note 5, at 175.

inability of small businesses to seek refuge within its legal framework has created a breeding ground for design piracy by fast fashion retailers.<sup>82</sup>

Trade dress law has also proved an important judicial extension of the Lanham Act for designers.<sup>83</sup> In 2000, the trade dress doctrine was broadened to include protection for the overall appearance of a product, including its shape and design.<sup>84</sup> Trade dress protects the overall appearance and design of a product, essentially the many elements that make up the total package seen by the customer.<sup>85</sup>

Trade dress law provides protection to designs if they can demonstrate a level of distinctiveness that warrants the protection.<sup>86</sup> Under the Lanham Act, the mark must be inherently distinctive or have a secondary meaning in trade.<sup>87</sup> To establish having a secondary meaning in trade, most courts utilize a multifactor test that includes factors such as exclusivity and continued use.<sup>88</sup> For example, trade dress law was applied to the Hermès Birkin bag silhouette to afford it trademark protection since the overall appearance of the bag, given the unique shape, is distinctive.<sup>89</sup> However, designers often find it very hard to qualify for trade dress protection due to the fact that fashion has such a short life cycle.<sup>90</sup> In an era of fast fashion, not every piece can be as timeless as say a

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<sup>82</sup> See Nicole Martinez, *How Fast Fashion Retailers Build Billion-Dollar Businesses by Stealing Designs*, ART BUS. J. (June 18, 2015), <https://abj.artrepreneur.com/fast-fashion-retailers-built-billiondollar-businesses-stealing-designs/> [<https://perma.cc/9PR4-3XNM>].

<sup>83</sup> See *Wal-Mart Stores, Inc. v. Samara Bros.*, 529 U.S. 205, 209 (2000); Manon Burns & Lisa Holubar, *Is It Functional or Is It Functional? Trade Dress vs. Design Patent “Functionality,”* A.B.A. (Feb. 8, 2021), [https://www.americanbar.org/groups/intellectual\\_property\\_law/publications/landslide/2020-21/january-february/is-it-functional-trade-dress-vs-design-patent-functionality/](https://www.americanbar.org/groups/intellectual_property_law/publications/landslide/2020-21/january-february/is-it-functional-trade-dress-vs-design-patent-functionality/) [<https://perma.cc/CCP5-NT63>].

<sup>84</sup> See *Wal-Mart Stores*, 529 U.S. at 212–14.

<sup>85</sup> See Josh Gerben, *‘Trade Dress’ed: Can You Protect Clothing Design Elements Through Trademark Law?*, GERBEN, <https://www.gerbenlaw.com/blog/trade-dressed-can-you-protect-clothing-design-elements-through-trademark-law/> [<https://perma.cc/FCC7-LEZX>]; Burns & Holubar, *supra* note 83.

<sup>86</sup> See Burns & Holubar, *supra* note 83.

<sup>87</sup> See 15 U.S.C. § 1127; see also *Wal-Mart Stores*, 529 U.S. at 210–11.

<sup>88</sup> *Converse, Inc. v. Int’l Trade Comm’n*, 909 F.3d 1110, 1120–21 (Fed. Cir. 2018); Camille M. Miller, *The Federal Circuit Redefines Secondary Meaning and Infringement for Product Trade Dress in Converse*, COZEN O’CONNOR (Nov. 20, 2018), <https://www.cozen.com/news-resources/publications/2018/the-federal-circuit-redefines-secondary-meaning-and-infringement-for-product-trade-dress-in-converse> [<https://perma.cc/J2UC-58VX>].

<sup>89</sup> See Overview of Trademark Law, FASHION L., <https://www.thefashionlaw.com/resource-center/trademark-law/> [<https://perma.cc/Z85H-6D7A>]; Kettj Talon, *A Timeless Icon: The Birkin Bag by Hermès*, NSS G-CLUB (Dec. 29, 2020), <https://www.nssgclub.com/en/fashion/24534/fashion-icon-birkin-bag-hermes> [<https://perma.cc/SX5T-S9JT>].

<sup>90</sup> In order to receive the trade dress protection, the appearance of the design must be distinctive to the public, which is uncommon for a typical design since it can take years to develop. See Gerben, *supra* note 85; Perlman, *supra* note 5 (describing the rise of the “52

Hermès Birkin bag.<sup>91</sup> The courts created trade dress doctrine as an attempt at expanding design protection, but it has never been codified by Congress and, in effect, does not truly protect fashion design.<sup>92</sup>

### *C. Patent Protection Does Little to Support Small Businesses*

Patent law offers two forms of protection though utility patents and design patents.<sup>93</sup> Utility patents apply to an invention, discovery, or new and useful process.<sup>94</sup> They are used to protect the functionality of an article, and are not applicable to fashion designs.<sup>95</sup> Conversely, design patents apply to original and aesthetic product designs.<sup>96</sup> Design patents protect an item's "ornamental appearance," which includes its shape, configuration, or decoration on the surface of a design.<sup>97</sup> In order to qualify, the design must be both original and nonobvious, and this form of protection can be applicable to a limited amount of fashion designs.<sup>98</sup>

Many fashion designs are considered to be neither novel nor nonobvious, so they typically fail to meet the ornamental requirement necessary to qualify for a design patent.<sup>99</sup> Since clothing always fits into some form of a standard category, such as shirts, pants, skirts, or shoes, it cannot meet the nonobvious

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seasons of fashion"). While it is an expansion of traditional trademark law, practically it cannot be applied to a significant number of designs to prevent design piracy. *See id.*

<sup>91</sup> *See* Talon, *supra* note 89.

<sup>92</sup> *See* Burns & Holubar, *supra* note 83; Martinez, *supra* note 82; Lo, *supra* note 5, at 192–93.

<sup>93</sup> Vic Lin, *Design Patents vs. Utility Patents: What Are the Differences?*, PAT. TRADEMARK BLOG, <https://www.patenttrademarkblog.com/design-patents-vs-utility-patents-differences/> [<https://perma.cc/BN7C-6F9M>].

<sup>94</sup> 35 U.S.C. § 101; Joe Runge, *The Utility Patent: What Is It and What Does It Protect?*, LEGALZOOM, <https://www.legalzoom.com/articles/the-utility-patent-what-is-it-and-what-does-it-protect> [<https://perma.cc/MWQ8-TEHT>] (May 2, 2022).

<sup>95</sup> Utility patents are used to protect "new machines, systems, and other useful inventions," which does not include fashion designs. Runge, *supra* note 94. Even if utility patents could be used in some way to protect fashion designs, the application can take years and several rejections before the patent is granted, which is longer than the lifespan of most fashion designs. *See* Vic Lin, *Can Fashion and Clothing Be Protected with Design Patents?*, PAT. TRADEMARK BLOG, <https://www.patenttrademarkblog.com/fashion-clothing-design-patent/> [<https://perma.cc/MJ6T-XHVB>].

<sup>96</sup> 35 U.S.C. § 171(a); Gene Quinn, *Design Patents: Under Utilized and Overlooked*, IP WATCHDOG (Mar. 4, 2021), <https://www.ipwatchdog.com/2021/03/04/design-patents-utilized-overlooked/id=130540/> [<https://perma.cc/YHU4-6DTS>].

<sup>97</sup> Quinn, *supra* note 96.

<sup>98</sup> *See* Patents: *Make Sure Your Idea Is Useful, Novel, and Non-Obvious*, FINDLAW (Feb. 20, 2018), <https://www.findlaw.com/smallbusiness/intellectual-property/idea-must-be-useful-novel-or-non-obvious.html> [<https://perma.cc/WHJ2-BPYF>].

<sup>99</sup> *See* Keeley Irene Vega, *A Proposal for the Protection of Fashion Design: Knocking Off Design Patent Law*, 56 J. COPYRIGHT SOC'Y U.S.A. 985, 992–94 (2008).

requirement of a design patent.<sup>100</sup> Design patents can, however, protect fashion designs such as handbags, shoes, jewelry, and hair accessories.<sup>101</sup> Obtaining a design patent is an incredibly time intensive process<sup>102</sup> and is associated with a high cost, which small businesses are often unable to shoulder.<sup>103</sup>

The current patchwork system of protection through copyright, trademark and trade dress, and patent protection offers minimal protection to designers.<sup>104</sup> The patchwork does not deter fast fashion retailers from re-creating the exact designs, with minimal exceptions for marks protected as trademarks.<sup>105</sup> However, the limited protection of trademarks does not protect small businesses nearly as well as it protects large designers.<sup>106</sup> Small brands cannot afford costly litigation to protect their design the same way large designers can.<sup>107</sup> Big brands are able to constantly litigate these issues, which often leads to out-of-court settlements to stop the misuse of the design.<sup>108</sup> A settlement is usually the best option when litigation occurs since the court is highly unlikely to uphold the protection of a design.<sup>109</sup> Without enacting legislation that protects all original fashion designs, small businesses will continue to be inordinately impacted by patchwork protection.<sup>110</sup>

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<sup>100</sup> See Overview of Patent Law, FASHION L., <https://www.thefashionlaw.com/resource-center/patent-law/> [<https://perma.cc/4T5U-9HYT>] (explaining that in order to be nonobvious, the design for which a patent is sought must be different enough from prior iterations so that it would not be an obvious improvement to an ordinary person).

<sup>101</sup> Lin, *supra* note 95.

<sup>102</sup> See Vega, *supra* note 99, at 994 (explaining that patents take plenty of time to create and there are many costs associated with it).

<sup>103</sup> See *id.* On average, a design patent takes twenty-one months to be granted, and while the process is not as long as that of utility patents, it still takes longer than some fashion designs are relevant for. See Lin, *supra* note 95.

<sup>104</sup> See Jamie Smith, *Fashion (Law) Forward: An Interview with Professor Susan Scafidi*, CORNELL J.L. & PUB. POL'Y (Nov. 23, 2020), <http://jlp.org/blogzine/fashion-law-forward-an-interview-with-professor-susan-scafidi/> [<https://perma.cc/H6EA-TMMM>].

<sup>105</sup> See Martinez, *supra* note 82.

<sup>106</sup> See generally Elizabeth Vulaj, *Will Fast Fashion Go Out of Style Soon? How Couture Designers, Celebrities, and Luxury Brands Fighting Back May Change the Future Legal Landscape for Mass Affordable Retailers*, 36 SANTA CLARA HIGH TECH. L.J. 65 (2020) (discussing the current state of litigation between fast fashion retailers and luxury brands).

<sup>107</sup> See Lieber, *supra* note 7.

<sup>108</sup> See, e.g., Vulaj, *supra* note 106, at 81–82.

<sup>109</sup> See, e.g., Versace, *Fashion Nova Settle Case Days Before the Start of Trial Over Copycat Wares*, FASHION L. (July 19, 2021), <https://www.thefashionlaw.com/versace-fashion-nova-settle-case-days-before-the-start-of-trial-over-copycat-wares/> [<https://perma.cc/VG7Z-TQ93>].

<sup>110</sup> See Lo, *supra* note 5, at 175–76.

*D. Previous Attempts to Protect Designers from Design Piracy by Revising Copyright Law Have Repeatedly Failed*

Since 1914, there have been over seventy failed attempts by Congress to give fashion designers varying degrees of protection from design piracy, with no success to date.<sup>111</sup> The most recent bill to suggest changes to copyright law was first introduced in 2006 and became known as the Design Piracy Prohibition Act (DPPA).<sup>112</sup> The DPPA has since experienced several minor modifications and is known as both the Innovative Design Protection and Piracy Prevention Act (IDPPPA)<sup>113</sup> and the Innovative Design Protection Act of 2012 (IDPA).<sup>114</sup> While some version of the three bills has been heard in both the House and the Senate, none have ever been put to a vote.<sup>115</sup> With the last version, the IDPA, being introduced in 2012, it seems unlikely that Congress is actively considering a revision to intellectual property law for designers.<sup>116</sup>

*1. Design Piracy Prohibition Act*

Representative Robert Goodlatte initially introduced the DPPA in 2006 in the House of Representatives.<sup>117</sup> Despite large support from fashion designers, no vote was ever taken on the bill.<sup>118</sup> The DPPA was reintroduced twice, once in April 2007 by Representative William Delahunt<sup>119</sup> and again in August 2007

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<sup>111</sup> The rise in legislative activity around the protection of fashion designs shows the concern of both advocates and opponents of design protection. The proposed bills have evolved in response to opponents' concerns of too much protection. Margaret E. Wade, Note, *The Sartorial Dilemma of Knockoffs: Protecting Moral Rights Without Disturbing the Fashion Dynamic*, 96 MINN. L. REV. 336, 349–50, 353 (2011).

<sup>112</sup> H.R. 5055, 109th Cong. (2006); Design Piracy Prohibition Act, H.R. 2033, 110th Cong. (2007) (introducing a subsequent version of the bill and designating it as the "Design Piracy Prohibition Act").

<sup>113</sup> Innovative Design Protection and Piracy Prevention Act, S. 3728, 111th Cong. (2010).

<sup>114</sup> Innovative Design Protection Act of 2012, S. 3523, 112th Cong. (2012).

<sup>115</sup> Wade, *supra* note 111, at 349–50.

<sup>116</sup> S. 3523; *see* Wade, *supra* note 111, at 349–50.

<sup>117</sup> H.R. 5055. Introducing the DPPA repeatedly, Goodlatte intended the DPPA to keep up with the design protections enacted in other countries, with a focus on the jobs that he believed would be supported or created by protecting the original design. *See* Press Release, Jerry Nadler, Congressman, House of Representatives, Delahunt, Goodlatte and Nadler Reintroduce Legislation to Combat Design Piracy (May 2, 2009) [hereinafter Press Release, Reintroduce Legislation], <https://nadler.house.gov/news/documentsingle.aspx?DocumentID=392212> [https://perma.cc/J7KU-4MUT].

<sup>118</sup> *See* Anya Jenkins Ferris, Note, *Real Art Calls for Real Legislation: An Argument Against Adoption of the Design Piracy Prohibition Act*, 26 CARDOZO ARTS & ENT. L.J. 559, 567–68 (2008).

<sup>119</sup> Design Piracy Prohibition Act, H.R. 2033, 110th Cong. (2007). Delahunt was concerned of the risk posed to the United States fashion industry as one of the few industrialized countries that did not provide design protection. *See* Press Release,

by Senator Charles Schumer and Representative Jerrold Nadler.<sup>120</sup> Just like with the initial introduction by Representative Goodlatte, neither of these versions ever reached a vote.<sup>121</sup>

The DPPA would have extended copyright protection to include fashion designs for a period of three years.<sup>122</sup> This would exclude useful articles made public by the designer over three months prior to the copyright registration, whether in the United States or a foreign country.<sup>123</sup> Fashion designs would include “the appearance as a whole of an article of apparel, including its ornamentation.”<sup>124</sup> Apparel was defined as “(A) an article of men’s, women’s, or children’s clothing, including undergarments, outerwear, gloves, footwear, and headgear; (B) handbags, purses, and tote bags; (C) belts; and (D) eyeglass frames.”<sup>125</sup> The DPPA required the registration of any copyrights to be placed in a database.<sup>126</sup>

The DPPA would have also amended Section 1309 of Title 17 of the United States Code in three places.<sup>127</sup> First, the DPPA would shift subsection (c) from including only knowledge that the design was protected as infringement to also include “. . . reasonable grounds to know that protection for the design is claimed.”<sup>128</sup> Second, the bill would add to subsection (e) to extend infringement when the design was “copied from a design protected under this chapter” or “*from an image thereof*.”<sup>129</sup> Finally, the DPPA would add an entirely new subsection (h) that would apply secondary infringement and secondary liability to make anyone liable under either doctrine for design infringement.<sup>130</sup>

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Reintroduce Legislation, *supra* note 117. According to Delahunt, the lack of design protection resulted in the loss of 750,000 jobs. *Id.*

<sup>120</sup> Design Piracy Prohibition Act, S. 1957, 110th Cong. (2007). Both Schumer and Nadler represented New York where fashion is the second largest industry, and they were worried about the harm the lack of design protection presented. *See* Press Release, Jerry Nadler, Congressman, House of Representatives, Sen. Schumer and Rep. Nadler Reveal Gaping Hole in Piracy Law That Allows Cheap Imports to Flood NYC Market (Aug. 7, 2007) [hereinafter Press Release, Gaping Hole], [https://nadler.house.gov/news/document\\_single.aspx?Documentid=390418](https://nadler.house.gov/news/document_single.aspx?Documentid=390418) [<https://perma.cc/Q3PZ-YLTS>]. Nadler stated that he was particularly concerned that New York City lost over \$1 billion in taxes annually due to design piracy. *Id.*

<sup>121</sup> There appears to be a strong lack of interest in expanding design protection among Congress, as evidenced by the many iterations of bills offering stronger design protection that were never voted on. *See* Ferris, *supra* note 118, at 567–68; Wade, *supra* note 111, at 349–50.

<sup>122</sup> H.R. 5055 § 1.

<sup>123</sup> *Id.*

<sup>124</sup> H.R. 2033 § 2.

<sup>125</sup> *Id.*

<sup>126</sup> *See* Wade, *supra* note 111, at 350–51.

<sup>127</sup> H.R. 2033 § 2.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* (emphasis added).

<sup>130</sup> *Id.*

The DPPA was well received in the fashion world.<sup>131</sup> Not only would the DPPA have provided fashion designers with a clear legal remedy for design piracy, but it also would have given the courts a clearer standard to apply in design piracy cases.<sup>132</sup> In 2006, Professor Susan Scafidi spoke before the Subcommittee on Courts, the Internet, and Intellectual Property to describe the benefits such an Act would give to small businesses, describing the DPPA as a “short-term, narrowly tailored protection for the fashion industry, [that] is . . . a groundbreaking example of how copyright law can be narrowly tailored, and carefully designed to serve the creators and the public interest.”<sup>133</sup> Fashion Designer Jeffrey Banks also spoke on behalf of the Council of Fashion Designers of America (CFDA) to voice the organization’s support of the DPPA.<sup>134</sup>

Even with the large amount of support, the DPPA also attracted numerous opponents, and the bill failed to pass through the House Judiciary Committee.<sup>135</sup> Opponents argued that fashion designs are not art and are therefore incapable of being protected under copyright law.<sup>136</sup> They also argued that design piracy is actually helpful to the fashion industry, rather than creating the harms that many designers allege, and has led to the thriving fashion industry that we know today.<sup>137</sup> Overall, the opponents agreed that the costs of the DPPA outweighed any of the possible benefits that it could provide the fashion industry.<sup>138</sup> Subsequent proposed legislation attempted to address the concerns that were raised with the DPPA.<sup>139</sup>

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<sup>131</sup> See Laura C. Marshall, Note, *Catwalk Copycats: Why Congress Should Adopt a Modified Version of the Design Piracy Prohibition Act*, 14 J. INTELL. PROP. L. 305, 310 (2007); *A Bill to Provide Protection for Fashion Design: Hearing on H.R. 5055 Before the Subcomm. on Cts., the Internet, and Intell. Prop. of the H. Comm. on the Judiciary*, 109th Cong. 78–79 (2006) [hereinafter *Hearing on H.R. 5055*] (statement of Susan Scafidi, Associate Professor, Southern Methodist University); *Hearing on H.R. 5055, supra*, at 9–11 (statement of Jeffrey Banks, Fashion Designer, The Council of Fashion Designers of America).

<sup>132</sup> See Marshall, *supra* note 131, at 326.

<sup>133</sup> See *Hearing on H.R. 5055, supra* note 131, at 78 (statement of Susan Scafidi Associate Professor, Southern Methodist University).

<sup>134</sup> See *Hearing on H.R. 5055, supra* note 131, at 9–10 (statement of Jeffrey Banks, Fashion Designer, The Council of Fashion Designers of America).

<sup>135</sup> Casey E. Callahan, Note, *Fashion Frustrated: Why the Innovative Design Protection Act Is a Necessary Step in the Right Direction, but Not Quite Enough*, 7 BROOK. J. CORP. FIN. & COM. L. 195, 203–05 (2012); see Ferris, *supra* note 118, at 574 (explaining that the DPPA would lead to increased litigation, be difficult to enforce, and actually harm the fashion industry); see also Wade, *supra* note 111, at 363 (explaining that the benefits of copyright protection for fashion designs are outweighed by the costs).

<sup>136</sup> Callahan, *supra* note 135, at 201.

<sup>137</sup> Wade, *supra* note 111, at 337.

<sup>138</sup> Ferris, *supra* note 118, at 574–75; see Wade, *supra* note 111, at 364.

<sup>139</sup> See discussion *infra* Parts II.D.2, II.D.3.

## 2. Innovative Design Protection and Piracy Prevention Act

After the failure of the DPPA, the IDPPPA was introduced in the Senate by Senator Schumer in 2010.<sup>140</sup> Not much time passed between the introduction of the DPPA and the IDPPA, and the IDPPA largely took the structure of the DPPA with several notable changes to address the concerns voiced by DPPA opponents.<sup>141</sup> However, despite the authors' best efforts to accommodate opponents' perspectives and offer compromise through the IDPPPA, the bill never left the Senate.<sup>142</sup> Representative Robert Goodlatte also introduced the IDPPPA in the House in 2011, where it stalled out just like its Senate companion.<sup>143</sup>

The main difference in the IDPPPA from the DPPA was the way "fashion design" was defined, the limitation of what an infringing article includes, and the removal of the registration requirement.<sup>144</sup> In order to be a fashion design, on top of the DPPA definition the design must be "(i) . . . the result of a designer's own creative endeavor; and (ii) provide a unique, distinguishable, non-trivial and non-utilitarian variation over prior designs for similar types of article."<sup>145</sup> This limitation allows the IDPPPA to provide copyrights only for truly original designs by the designer instead of designs that were new, but not necessarily entirely original.<sup>146</sup> This helped address the opponent's concern that fashion designs are not art by limiting the scope only to original design concepts that could be considered art.<sup>147</sup>

The IDPPPA also limited what is considered an article that infringes the copyright.<sup>148</sup> A design was not considered an "infringed article" if it was "not substantially identical in overall visual appearance to and as to the original elements of a protected design."<sup>149</sup> Essentially, a similar design would not count as copyright infringement; the design must be substantially identical to that of the protected design in order to be considered infringement.<sup>150</sup> The IDPPPA defined "substantially identical" to mean "an article of apparel which is so similar in appearance as to be likely to be mistaken for the protected design, and

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<sup>140</sup> Innovative Design Protection and Piracy Prevention Act, S. 3728, 111th Cong. (2010).

<sup>141</sup> Compare *id.*, with Design Piracy Prohibition Act, H.R. 2033, 110th Cong. (2007).

<sup>142</sup> See Wade, *supra* note 111, at 350.

<sup>143</sup> *Id.*; Innovative Design Protection and Piracy Prevention Act, H.R. 2511, 112th Cong. (2011). The IDPPPA did not have strong political support, as it was not an issue that the United States is particularly concerned with at this time. See also Ferris, *supra* note 118, at 579.

<sup>144</sup> S. 3728 § 2.

<sup>145</sup> *Id.* § 2(a)(2)(B).

<sup>146</sup> Essentially, in order to be protected under the IDPPPA the design must be something that has not been done before, not just a new spin on a design that has already been created. *Id.*

<sup>147</sup> See Ferris, *supra* note 118, at 578.

<sup>148</sup> S. 3728 § 2(e)(2).

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*



contains only those differences in construction or design which are merely trivial.”<sup>151</sup>

Finally, unlike the DPPA, the IDPPPA had no registration requirement for design copyrights.<sup>152</sup> This shift came with quite a big consequence. Without a registration requirement, no searchable database would exist that can be utilized by designers to make sure their design does not infringe on another designer’s copyright.<sup>153</sup> While it is unclear if this lack of registration led to the failure of the IDPPPA, it may be the most notable change that did not address any of the problems opponents had with the DPPA.

### 3. *Innovative Design Protection Act*

Following the repeated failures of both the DPPA and the IDPPPA, the most recent attempt to provide fashion designers with copyright protection for their designs was introduced by Senator Schumer in 2012.<sup>154</sup> To date, the IDPA is the most comprehensive proposed legislation for copyright protection of fashion designs, building off both the DPPA and the IDPPPA.<sup>155</sup> However, the IDPA has failed equally as much as its predecessors by never reaching a vote.<sup>156</sup>

While the IDPA does not have a registration requirement, it added a new provision to Section 1309 of Title 17 of the United States Code to correct some issues that lack of registration could have prevented.<sup>157</sup> Under the IDPA, the owner of the fashion design must provide written notice to the party it believes has violated or will violate its copyright.<sup>158</sup> The design owner cannot file an infringement action until twenty-one days after the written notice was given.<sup>159</sup>

The IDPA also provides several smaller points of clarity to the copyright protection being sought for fashion designs. The copyright has not been infringed when a party creates a substantially identical design without knowledge, either actual or reasonably inferred from the circumstances.<sup>160</sup> Infringement criteria for retailers of an infringing design was clarified in Section 1309 of Title of 17 of the United States Code to be more limited than it is in its

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<sup>151</sup> *Id.* § 2(a)(2)(B).

<sup>152</sup> *Compare* Design Piracy Prohibition Act, H.R. 2033, 110th Cong. § 2(e) (2007), *with* S. 3728 § 2(e).

<sup>153</sup> *See* Wade, *supra* note 111, at 351–52.

<sup>154</sup> Innovative Design Protection Act of 2012, S. 3523, 112th Cong. (2012).

<sup>155</sup> *Compare* H.R. 2033, *and* S. 3728, *with* S. 3523 (updating the language from both the DPPA and IDPPPA based on complaints from the opponents of the proposed legislation).

<sup>156</sup> *See* S.3523 - *Innovative Design Protection Act of 2012*, CONGRESS.GOV (2012), <https://www.congress.gov/bill/112th-congress/senate-bill/3523/all-actions?q=S.3523> (on file with the *Ohio State Law Journal*). Congress overall has shown a lack of interest in design piracy, evidenced by its failure to pass a bill expanding intellectual property for design protection. *See id.*; Wade, *supra* note 111, at 349–50.

<sup>157</sup> *See* S. 3523. § 2(f).

<sup>158</sup> *Id.* § 2(d).

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* § 2(f)(2)(B).

modern state.<sup>161</sup> The IDPA also states that infringement does not include the creation of a single copy of the design for personal use.<sup>162</sup>

Even with these numerous amendments and clarifications from the DPPA and the IDPPPA, the IDPA has not become law.<sup>163</sup> Since no new bills have been proposed since the IDPA, proponents are still seeking a way for the IDPA to be enacted by Congress.<sup>164</sup> Some proponents even argue that the IDPA does not provide enough protection to designers.<sup>165</sup> Despite the IDPA's many proponents, however, the critics have managed to win thus far.<sup>166</sup> Well-known critics of the IDPA, Professors Kal Raustiala and Christopher Sprigman, argue that fashion designs should not be the subject of copyright law.<sup>167</sup> According to Raustiala and Sprigman, under the so-called "piracy paradox," design piracy actually promotes innovation that benefits the fashion industry, regardless of the damage done to small businesses.<sup>168</sup> However, creativity is actually stifled by allowing design piracy, and thereby discourages the creation of new, creative designs.<sup>169</sup> Allowing for an expansion of intellectual property laws would have an opposite effect of the allegations espoused by piracy paradox theorists as such an expansion would force fast fashion brands to produce creative designs of their own in lieu of their relying on design piracy.<sup>170</sup>

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<sup>161</sup> *Id.* § 2(f).

<sup>162</sup> *Id.* § 2(f)(6).

<sup>163</sup> See S.3523 - *Innovative Design Protection Act of 2012*, *supra* note 156.

<sup>164</sup> See Lo, *supra* note 5, at 193.

<sup>165</sup> Some argue that the definition of a "fashion design" should be updated to clarify what is considered "non-trivial," want the presence of a graphic print to be a factor instead of an exclusion for protection, and want clarification of "overall visual appearance" to clarify what is deemed to be a copied design. See Callahan, *supra* note 135, at 214–22.

<sup>166</sup> See S.3523 - *Innovative Design Protection Act of 2012*, *supra* note 156 (showing that the IDPA has failed to reach a vote in Congress).

<sup>167</sup> Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687, 1717–34 (2006).

<sup>168</sup> *Id.* at 1722. Most that believe in the Piracy Paradox describe the benefit of "free advertising" for luxury or high-end brands, saying that "everyone wins." See, e.g., Michael Heller & James Salzman, *High Fashion vs. Fast Fashion: The Piracy Paradox*, SATURDAY EVENING POST (Oct. 25, 2021), <https://www.saturdayeveningpost.com/2021/10/high-fashion-vs-fast-fashion-the-piracy-paradox/> [<https://perma.cc/5PZZ-4P64>]. However, the same reasoning fails for small businesses, which the Piracy Paradox realizes but does little to address, other than stating that design piracy is "perfectly legal," and that small businesses can use social media (evidenced by a single instance) to retaliate against fast fashion brands that steal their designs. *Id.*

<sup>169</sup> See Mark K. Brewer, *Slow Fashion in a Fast Fashion World: Promoting Sustainability and Responsibility*, 8 LAWS 1, 3 (2019), <https://www.mdpi.com/2075-471X/8/4/24/htm> [<https://perma.cc/4S8P-VQCB>].

<sup>170</sup> See, e.g., Lo, *supra* note 5, at 208 (explaining that the piracy paradox is an "obsolete understanding of fashion theories and trend formation" and design piracy does not lead to trend formation the same way a design inspired from that of another would).

Design piracy is a large issue under current intellectual property law that is exasperated by the fast fashion industry.<sup>171</sup> Fast fashion is able to produce and replicate so many stolen designs based on its massive production model.<sup>172</sup> This production is possible due in large part to the lack of environmental regulations placed on the fashion industry.<sup>173</sup> The negative impact that fast fashion has on our global environment is massive.<sup>174</sup> Neither design piracy nor the environmental impacts of fast fashion are currently being addressed by the United States.<sup>175</sup> While based on recent failed efforts it is unlikely Congress will respond to the concerns of design piracy under the intellectual property lens anytime soon,<sup>176</sup> reform via environmental regulations is more likely to commence through notice and comment rulemaking by the Environmental Protection Agency (EPA).<sup>177</sup> By addressing the environmental concerns of fast fashion, a trickle-down effect can dually act as a preventative measure against design piracy.<sup>178</sup>

### III. FAST FASHION HAS AN INORDINATE IMPACT ON OUR ENVIRONMENT

The fashion industry has one of the biggest impacts on our global environment, barely trailing the impact of the oil and gas industry.<sup>179</sup> Specifically, fast fashion exasperates the negative environmental impact with mass production and increased waste.<sup>180</sup>

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<sup>171</sup> See *supra* text accompanying notes 103–110.

<sup>172</sup> *Id.*; see Lieber, *supra* note 7.

<sup>173</sup> See discussion *infra* Part III.B.

<sup>174</sup> See discussion *infra* Part III.B; see also Maiti, *supra* note 25.

<sup>175</sup> See Perlman, *supra* note 5; see also Ashley Lauren, *Why Regulations Aren't Solving the Fashion Industry's Environmental Problem*, AGE OF AWARENESS (Nov. 11, 2019), <https://medium.com/age-of-awareness/why-regulations-arent-solving-the-fashion-industry-s-environmental-problem-9a50be4c2843> (on file with the *Ohio State Law Journal*).

<sup>176</sup> See discussion *supra* Part II.D.

<sup>177</sup> See discussion *infra* Part IV.B.

<sup>178</sup> Some might wonder why environmental law should be used over revisions to intellectual property law. While environmental law is a more indirect option to address design piracy, Congress is not currently interested in enacting revised intellectual property law any time soon, as evidenced by its lack of action on the DPPA, the IDPPPA, or the IDPA. See discussion *supra* Part II.D. Environmental law is something that is frequently adjusted by the EPA and could be done with relative ease and practicality as compared to intellectual property law. See discussion *infra* Part IV.B. The impact that environmental regulations would have on fast fashion companies would be massive and slow production as a result of compliance with the new regulations. The slowed production would lead to this trickle-down effect of less design piracy since less production can occur under the environmental regulations. See discussion *infra* Part IV.B.2.

<sup>179</sup> See discussion *infra* Part III.A.

<sup>180</sup> See discussion *infra* Part III.B.

*A. The Fashion Industry Creates One of the Biggest Strains on Our Environment*

As a whole, the fashion industry is one of the world's largest polluting industries, second only to oil.<sup>181</sup> Fashion accounts for approximately ten percent of global carbon emissions<sup>182</sup> and twenty percent of waste water.<sup>183</sup> Overall, this is more than both aviation and shipping combined.<sup>184</sup> By 2030, the fashion industry's water consumption is expected to grow by approximately fifty percent.<sup>185</sup> Yet, there remain few regulations in place for the fashion industry in the United States, mainly due to the complexity of the global nature of fashion production.<sup>186</sup> Some seem to believe that increased regulations will not solve the environmental problem because the clothing production predominantly occurs overseas.<sup>187</sup> However, this approach fails to recognize the United States' ability to regulate the industry under existing structures that have the power to prevent much of the environmental impact.<sup>188</sup> This indirect approach to regulation can still achieve the desired effect on the fashion industry without becoming overly complicated. Many other countries have already successfully enacted similar regulations,<sup>189</sup> showing that the concern that regulations in the United States would lack impact are unfounded.<sup>190</sup> The environmental impact

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<sup>181</sup> See, e.g., Lauren, *supra* note 175.

<sup>182</sup> See Christine Ro, *Can Fashion Ever Be Sustainable?*, BBC (Mar. 10, 2020), <https://www.bbc.com/future/article/20200310-sustainable-fashion-how-to-buy-clothes-good-for-the-climate> [<https://perma.cc/SV89-PJNX>].

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> Mark Sumner, *Can the Fashion Industry Ever Really Be Sustainable?*, FASHION L. (Apr. 19, 2019), <https://www.thefashionlaw.com/can-the-fashion-industry-ever-really-be-sustainable/> [<https://perma.cc/NN6X-VY7F>].

<sup>186</sup> See Melissa Gamble, *Is the Tide Changing for the Fashion Industry When It Comes to Regulations?*, FASHION L. (Jan. 4, 2022), <https://www.thefashionlaw.com/is-the-tide-changing-for-the-fashion-industry-regulations-environment-in-the-u-s/> [<https://perma.cc/4954-XZX5>].

<sup>187</sup> See *id.* (arguing that while the theory of regulations for fashion is simple, the application would be impractical since production occurs overseas).

<sup>188</sup> The United States EPA is able to regulate the use of certain chemicals in products that are sold within the country, even if they cannot directly regulate production. See, e.g., *EPA Takes Action to Stop Use of Certain PFAS in Products and Protect American Consumers*, EPA (June 22, 2020) [hereinafter *EPA Takes Action*], <https://www.epa.gov/news-releases/epa-takes-action-stop-use-certain-pfas-products-and-protect-american-consumers> [<https://perma.cc/HXS5-4YFX>].

<sup>189</sup> For example, countries such as Australia, the United Kingdom, and India have already adopted environmental regulations in the form of reporting requirements known as environmental corporate social responsibility. See Salman Zafar, *An Introduction to Environmental CSR*, BLOGGING HUB (Aug. 3, 2020), <https://www.cleantechloops.com/environment-csr/> [<https://perma.cc/8QUM-NE4N>].

<sup>190</sup> See *Mandatory Sustainability Reporting*, INDUS. TODAY (Apr. 15, 2020), <https://industrytoday.com/mandatory-sustainability-reporting/> [<https://perma.cc/S87W-2RVB>].

of the fashion industry is further exasperated by the existence of the fast fashion industry.<sup>191</sup>

*B. Fast Fashion Has One of the Largest Impacts on the Environment Compared to the Rest of the Industry Due to Its Wasteful Nature*

The oversized environmental impact of the fashion industry is largely due to fast fashion.<sup>192</sup> The industry not only creates environmental and occupational hazards during production but leads to an increase in textile waste.<sup>193</sup> Clothing is purchased more frequently through fast fashion due to the quick turnaround of available styles, leading to increased changes in trends.<sup>194</sup> Unlike high fashion, quick trends and lower prices offered by fast fashion brands allows consumers to change out their closets more frequently and increase the amount of clothing sent to landfills.<sup>195</sup> Similar to the lack of intellectual property protection for designers,<sup>196</sup> the environmental impact has not been adequately addressed by the United States.<sup>197</sup> Without further action in the United States, both design piracy and the lack of environmental regulations will leave the country woefully behind the actions already taken by many other industrialized countries.<sup>198</sup>

#### IV. APPLYING ENVIRONMENTAL LAW TO COMBAT DESIGN PIRACY IN THE FASHION INDUSTRY

The current protections offered through a patchwork of trademark and trade dress, copyright, and patent laws are not enough to protect designs.<sup>199</sup> The main

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<sup>191</sup> See Maiti, *supra* note 25.

<sup>192</sup> See also Lauren, *supra* note 175 (noting that the fashion industry is the second-largest polluting industry in the world). See generally Rachel Bick, Erika Halsey & Christine C. Ekenga, *The Global Environmental Injustice of Fast Fashion*, 92 ENV'T HEALTH 1, 4 (Dec. 27, 2018), <https://ehjournal.biomedcentral.com/track/pdf/10.1186/s12940-018-0433-7.pdf> [<https://perma.cc/MFY9-2L2D>] (explaining the increase in clothing consumption with the rise of fast fashion and the environmental hazards associated with the production of clothing by fast fashion retailers).

<sup>193</sup> See Bick, Halsey & Ekenga, *supra* note 192.

<sup>194</sup> *The Monster in Our Closet: Fast Fashion & Textile Waste on the Rise*, CTR. FOR ECOTECH. (Oct. 11, 2017), <https://www.centerforecotechnology.org/fast-fashion-textile-waste/> [<https://perma.cc/XXL6-2DDB>].

<sup>195</sup> See *id.*

<sup>196</sup> See discussion *supra* Part III.D.3.

<sup>197</sup> See Gamble, *supra* note 186.

<sup>198</sup> See Witzburg, *supra* note 42 (discussing the copyright protection guaranteed to designers in the European Union); Zafar, *supra* note 189 (discussing the required environmental reporting in Australia, the United Kingdom, and India); Gamble, *supra* note 186 (discussing loopholes in current U.S. environmental laws).

<sup>199</sup> See discussion *supra* Part II.D; see also Lo, *supra* note 5, at 174 (discussing the overall lack of protection given to fashion designs under current intellectual property law).

protection offered to designers through trademark and trade dress law does very little to protect small businesses from fast fashion retailers stealing their designs.<sup>200</sup> Even with the limited availability of patent law, small businesses are unlikely to be able to afford the cost or time associated with a design patent.<sup>201</sup> Without increased protection, small businesses in the United States will continue to be unable to protect their designs from large fast fashion brands.<sup>202</sup> The environmental impacts of fast fashion must also be addressed before global carbon emissions expand beyond the levels they have already reached.<sup>203</sup> While it is unlikely that Congress will address intellectual property expansion for designs any time in the near future, environmental regulations are constantly expanding.<sup>204</sup> Applying environmental regulations to the fashion industry can create a trickledown effect that will reduce the current levels of design piracy.<sup>205</sup>

*A. An Expansion of Current Intellectual Property Law to Include Protection of Identical Designs Is Ideal but Unrealistic*

Ideally, Congress would enact some form of holistic copyright protection, such as the IDPA. However, the repeated failure of the DPPA, IDPPPA, and IDPA, along with their many prior iterations,<sup>206</sup> seems to show Congress's overall reluctance to extend copyright law to include fashion designs specifically. Several possible solutions have suggested changes that could be made to the IDPA to make it more attractive to Congress,<sup>207</sup> but the lack of action taken since the IDPA's introduction in 2012 is telling of Congress's reluctance to expand intellectual property protection to entire designs.<sup>208</sup>

While some think that enacting intellectual property law to protect designs for a limited time would stifle the creativity of the fashion market under the "piracy paradox,"<sup>209</sup> in actuality enacting overall protection for fashion designs would allow trends to spread throughout the market through creative interpretations while still limiting design piracy.<sup>210</sup> Designers would be able to

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<sup>200</sup> See Martinez, *supra* note 82; Lieber, *supra* note 7; Lo, *supra* note 5, at 208.

<sup>201</sup> See Vega, *supra* note 99, at 994.

<sup>202</sup> See Lo, *supra* note 5, at 168–70.

<sup>203</sup> See discussion *supra* Part III.A.

<sup>204</sup> See *supra* notes 171–80 and accompanying text.

<sup>205</sup> See *infra* Part IV.A.1.

<sup>206</sup> See discussion *supra* Part II.D.

<sup>207</sup> The main suggestion offered is shortening the protected period from three years to one year. See, e.g., Tina Martin, Note, *Fashion Law Needs Custom Tailored Protection for Designs*, 48 U. BALT. L. REV. 453, 474–75 (2019).

<sup>208</sup> The IDPA was introduced in 2012, and no further action has been taken since then. See S.3523 - *Innovative Design Protection Act of 2012*, *supra* note 156.

<sup>209</sup> See Raustiala & Sprigman, *supra* note 167, at 1717–34.

<sup>210</sup> See Brewer, *supra* note 169, at 3 (explaining that the use of design piracy by fast fashion in actuality stifles creativity and individuality of fashion while hampering both new and emerging designers since less new designs are produced); see also Lo, *supra* note 5, at 197.

protect their exact design and fast fashion brands would remain free to take inspiration from other brands without consequence in a more creative manner than they currently utilize.<sup>211</sup> This would also allow for small business brands to protect their designs without risking lengthy and costly litigation as they would need to do under current law.<sup>212</sup> While enacting intellectual property protection would be the best case scenario to provide small businesses with some protection, it seems designers will likely be forced to look beyond intellectual property law for a solution.<sup>213</sup>

### 1. *Remedying Design Piracy with Environmental Regulations Is More Practical*

While the EPA is very proactive with its response to the industries that the government expressly concludes are dangerous to the environment, like oil and gas,<sup>214</sup> little is done in response to many others, including the fast fashion industry.<sup>215</sup> Countries can take a very active role in protecting the environment from the fashion industry. For example, France appointed a minister devoted specifically to the impact of fashion on the environment, which granted the minister the power to impose sanctions on companies that violate the strict regulations.<sup>216</sup> Australia has the “Clean Energy Regulator,” a government body responsible for accelerating carbon abatement in the country.<sup>217</sup> The United States is woefully behind in this endeavor. As the world’s top fashion consumer, the United States is duty-bound to take a stance on environmental regulations for the fashion industry, not only to keep up with other countries, but also to prevent further environmental harm.<sup>218</sup>

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<sup>211</sup> See Lo, *supra* note 5, at 197.

<sup>212</sup> Currently, litigation on design piracy is instigated by large, luxury brands who are able to afford the cost of litigation. See, e.g., Vulaj, *supra* note 106, at 67–69.

<sup>213</sup> See generally Sutor, *supra* note 13 (suggesting that designers look to labor laws instead of intellectual property to solve design piracy). See also Cohen, *supra* note 31 (suggesting the use of increased designer collaborations to avoid design piracy).

<sup>214</sup> See *Methane Tracker 2020: Methane from Oil & Gas*, *supra* note 28 (explaining that the oil and gas industry accounts for approximately fifteen percent of global carbon emissions); see also Elizabeth Segran, *It’s Time to Regulate Fashion the Way We Regulate the Oil Industry*, FAST CO. (Jan. 22, 2020), <https://www.fastcompany.com/90453905/its-time-to-regulate-fashion-the-way-we-regulate-the-oil-industry> [<https://perma.cc/J49J-DX4E>].

<sup>215</sup> See Gamble, *supra* note 186 (explaining the lack of overall regulation on the fashion industry, leaving the burden on the consumer to be “responsible for checking the quality and suitability of goods before a purchase is made”); Segran, *supra* note 214.

<sup>216</sup> See Segran, *supra* note 214.

<sup>217</sup> *The Clean Energy Regulator*, CLEAN ENERGY REGUL., <http://www.cleanenergyregulator.gov.au/About/Pages/default.aspx> [<https://perma.cc/4FVM-AGB7>].

<sup>218</sup> The United States purchases “more clothing and textiles than any other nation in the world. Approximately 85% of the clothing that Americans consume . . . is sent to landfills as solid waste, amounting to nearly 80 pounds per American per year.” Bick, Halsey & Ekenga, *supra* note 192, at 1.

The lack of environmental regulations allows the fashion industry to be responsible for significant portion of annual global carbon emissions, with a more than fifty percent increase expected by 2030.<sup>219</sup> Fast fashion is an industry perfectly poised to have a detrimental environmental impact without regulations. The industry promotes a culture of waste by relying on the constant purchase of cheap designs, and it has dramatically expanded the carbon footprint of the fashion industry.<sup>220</sup> This fast fashion strategy as an industry is also what lead to the need for design piracy in the first place. In order to keep up with demand and constantly shifting trends, the brands rely on the ability to steal the designs of others.<sup>221</sup>

The environmental concerns of the fast fashion industry are closely intertwined with the major concerns of design piracy.<sup>222</sup> The lack of environmental regulations promotes design piracy by brands, so by creating environmental protections, small businesses would also benefit from a reduction in design piracy by fast fashion brands.<sup>223</sup> If intellectual property law will not be expanded by Congress, approaching the problem from an environmental lens could reduce both design piracy and the environmental impact of fast fashion.

Since very limited environmental regulations currently exist for fashion brands, any approach to environmental law must be addressed on two fronts: one that provides disclosure to consumers<sup>224</sup> and one that regulates the production of the clothing itself.<sup>225</sup> Each approach will be discussed in turn to create a comprehensive environmental approach targeted at also reducing design piracy.

## *2. Requiring Environmental Corporate Social Responsibility for Fashion Brands*

Environmental Corporate Social Responsibility (commonly referred to as “environmental CSR”) is a form of “soft law” in the United States.<sup>226</sup> The burden of reviewing environmental CSR is on the consumers, who use this

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<sup>219</sup> *How Much Do Our Wardrobes Cost to the Environment?*, *supra* note 26 (explaining that the fashion industry is predicted to increase its global carbon emissions so significantly by 2030 due to the increase in the fast fashion model for massive clothing production); *see also* Brewer, *supra* note 169, at 2.

<sup>220</sup> Brewer, *supra* note 169, at 3.

<sup>221</sup> *See id.*

<sup>222</sup> *See id.* at 3–4.

<sup>223</sup> *Id.* at 4.

<sup>224</sup> *See* discussion *infra* Part IV.A.2.

<sup>225</sup> *See* discussion *infra* Part IV.A.3.

<sup>226</sup> Environmental CSR is considered to be a “soft law” since it is not required by any statute or regulation in the United States. Elizabeth George, *Can Corporate Social Responsibility Be Legally Enforced?*, FORBES (Oct. 11, 2019), <https://www.forbes.com/sites/uhenergy/2019/10/11/can-corporate-social-responsibility-be-legally-enforced/?sh=7d3f169e3d44> (on file with the *Ohio State Law Journal*).



report to decide if this is a brand they wish to purchase from based on an alignment of values.<sup>227</sup> Unfortunately, there is ambiguity in these CSR reports by corporations,<sup>228</sup> and, as soft law, environmental CSR is not completed by all corporations.<sup>229</sup> As of 2020, ninety-two percent of S&P 500 companies published an environmental CSR report,<sup>230</sup> while only seventy percent of Russell 1000 companies published a report.<sup>231</sup> With the burden of review on consumers,<sup>232</sup> creating a requirement that all fashion companies file an annual environmental CSR report would level the playing field and show consumers the real damage that fast fashion companies are doing to the environment.

The United States would be far from the first country to require environmental disclosures from private and public companies alike.<sup>233</sup> In Australia, the National Greenhouse and Energy Reporting Act requires companies to report on their greenhouse gas emissions, energy production, and energy consumption.<sup>234</sup> The United Kingdom has the CRC Energy Efficient Scheme, under which companies with an electricity demand greater than 6,000

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<sup>227</sup> See Michael R. Siebecker, *Bridging Troubled Waters: Linking Corporate Efficiency and Political Legitimacy Through a Discourse Theory of the Firm*, 75 OHIO ST. L.J. 103, 106 (2014) (explaining that in an efficient market, both consumers and investors “should reward companies that comply with CSR preferences by paying a premium in stock or product price”).

<sup>228</sup> *Id.*

<sup>229</sup> See 92% of the S&P 500® and 70% of the Russell 1000® Published Sustainability Reports in 2020, *G&A Research Shows*, GOVERNANCE & ACCOUNTABILITY INST. [hereinafter *G&A Research*], <https://www.ga-institute.com/index.php?id=9127> [<https://perma.cc/YB7Q-ENWX>]; see also *Mandatory Sustainability Reporting*, *supra* note 190 (explaining that the SEC requires environmental compliance expenses to be disclosed and that the NYSE mandates that listed companies have a disclosed “code of business conduct and ethics,” neither of which leads to required environmental CSR for companies).

<sup>230</sup> *G&A Research*, *supra* note 229. The S&P 500 Index, also known as the Standard & Poor’s 500 Index, is a market capitalization index that utilizes 500 of the top publicly traded companies in the United States to gauge stock market performance. See generally Will Kenton, *The S&P 500 Index: Standard & Poor’s 500 Index*, INVESTOPEDIA, <https://www.investopedia.com/terms/s/sp500.asp> [<https://perma.cc/K9AH-Y34S>] (Feb. 15, 2022).

<sup>231</sup> *G&A Research*, *supra* note 229. In contrast, the Russell 1000 Index is a market capitalization index that utilizes the top 1000 publicly traded companies by market capitalization to gauge stock performance. See generally Akhilesh Ganti, *Russell 1000 Index*, INVESTOPEDIA, [https://www.investopedia.com/terms/r/russell\\_1000index.asp](https://www.investopedia.com/terms/r/russell_1000index.asp) [<https://perma.cc/YCW3-66AR>] (Mar. 8, 2021).

<sup>232</sup> See Tim Stobierski, *Types of Corporate Social Responsibility to Be Aware of*, HARV. BUS. SCH. ONLINE: BUS. INSIGHTS (Apr. 8, 2021), <https://online.hbs.edu/blog/post/types-of-corporate-social-responsibility> [<https://perma.cc/8PG6-KYMQ>] (explaining that participating in CSR identifies the company to consumers as one that is socially responsible, providing a powerful marketing technique).

<sup>233</sup> See Zafar, *supra* note 189 (discussing Australia, the United Kingdom, and India, all of which have a form of environmental reporting for private companies).

<sup>234</sup> *The NGER Scheme*, CLEAN ENERGY REGUL., <http://www.cleanenergyregulator.gov.au/NGER> [<https://perma.cc/G76Q-S6PD>].

Megawatt Hour per year to participate in mandatory environmental reporting,<sup>235</sup> which encompasses large fashion companies such as Hermès.<sup>236</sup> The European Union, China, and India also require some form of mandatory environmental CSR reporting.<sup>237</sup> Even with mandatory environmental CSR reporting in place, it is important to note that China and India are two of the top clothing producers in the world.<sup>238</sup> Unlike these other countries, the United States, the top consumer in the industry,<sup>239</sup> places the lowest regulatory burden on companies.<sup>240</sup>

Similar to Australia and the United Kingdom, it is time for the United States to require environmental CSR. Currently, the majority of fast fashion companies do not file an environmental CSR report,<sup>241</sup> leaving consumers to rely on whatever data can be compiled from the company to try and form an understanding of their purchase's environmental impact. Without concrete data on the environmental impact of fast fashion compared to other brands, it is impossible for consumers to fully grasp the impact these brands have on the environment compared to the rest of the fashion industry.<sup>242</sup>

While environmental CSR may not be capable of directly regulating the clothing production as mentioned by some critics,<sup>243</sup> it will provide clarity to consumers who want to be mindful of their own carbon footprint.<sup>244</sup> This solution cannot entirely solve the environmental crisis of the fashion industry

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<sup>235</sup> Env't Agency, *CRC Energy Efficiency Scheme: Qualification and Registration*, GOV.UK, <https://www.gov.uk/guidance/crc-energy-efficiency-scheme-qualification-and-registration> (Mar. 12, 2019) (on file with the *Ohio State Law Journal*).

<sup>236</sup> Large fashion companies typically exceed this 6,000 Megawatt Hours limit. *See, e.g.*, Statista Rsch. Dep't, *Energy Consumption of Hermès Paris 2018–2020, by Type of Activity*, STATISTA (July 5, 2021), <https://www.statista.com/statistics/1127401/hermes-energy-consumption-by-activity/> (on file with the *Ohio State Law Journal*). For example, the large luxury fashion brand Hermès consumed 199,177 Megawatt Hours in 2020, well surpassing the UK limit for mandatory reporting. *Id.*

<sup>237</sup> *See Mandatory Sustainability Reporting*, *supra* note 190.

<sup>238</sup> The continued high levels of production in China and India following required environmental CSR shows that the enactment of regulations did not stymie economic development and innovation. *See China and India – Emerging Powers of Textile and Apparel Industry*, FIBRE2FASHION (Dec. 2019), <https://www.fibre2fashion.com/industry-article/8484/china-and-india-emerging-powers-of-textile-and-apparel-industry> [<https://perma.cc/55X9-AJDN>].

<sup>239</sup> Bick, Halsey & Ekenga, *supra* note 192, at 1.

<sup>240</sup> *See Gamble*, *supra* note 186.

<sup>241</sup> *See, e.g.*, *The Most Popular Fast Fashion Brands, Ranked for Conscious Consumers*, BRIGHTLY (Aug. 2, 2022), <https://brightly.eco/fast-fashion-brands-sustainability/> [<https://perma.cc/FN6S-MWR3>] (explaining that the CEO of fast fashion brand Misguided explicitly wrote that the brand does not articulate a commitment to corporate social responsibility on its website, even as one of the least sustainable fast fashion brands in the market).

<sup>242</sup> *See Le*, *supra* note 29.

<sup>243</sup> *See Lauren*, *supra* note 175 (explaining the belief that regulations are unhelpful when they cannot regulate the overseas production process).

<sup>244</sup> *See Stobierski*, *supra* note 232.

on its own, but it is the first step to bolstering awareness. If a company must report on the totality of its environmentally damaging actions, it is more likely to find ways to lessen its impact so that consumers have a better view of the company and choose its goods over others.<sup>245</sup>

Assuming required environmental CSR has the desired impact on fast fashion, not only would consumers have a clearer view of the company's practices, but the changes made to prevent severe environmental harm would inevitably slow the production line.<sup>246</sup> When production slows, fast fashion companies would not be able to produce new designs at their current rates, limiting their ability to steal the designs of businesses, and in particular small, lesser known businesses.<sup>247</sup> As important as requiring environmental CSR is for regulating the environmental impact of fashion brands, the issue must also be addressed based on the chemicals fast fashion brands are using to produce their designs. These chemicals allow for such fast and cheap production by fast fashion companies in order to truly impact design piracy by fast fashion.<sup>248</sup>

### 3. *Regulating the Use of PFAS in Clothing*

Regrettably, with a majority of companies producing their clothing overseas, the United States is unable to regulate the process that the clothing is made through, which in and of itself has detrimental environmental impacts.<sup>249</sup> The United States can, however, regulate the substances contained within the clothing that are sold within the country, even if they are produced overseas.<sup>250</sup> Per- and polyfluoroalkyl substances (also known as "PFAS" or "forever chemicals")<sup>251</sup> are long-lasting chemicals that have been linked to harmful

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<sup>245</sup> *Id.* (explaining that CSR can be a powerful marketing tool and "force business leaders to examine practices" that they otherwise may leave be).

<sup>246</sup> See Brewer, *supra* note 169, at 6–7.

<sup>247</sup> See *id.* at 4.

<sup>248</sup> See Max G. Levy, *How to Make Fashion Sustainable*, AM. CHEM. SOC'Y (Apr. 2021), <https://www.acs.org/content/acs/en/education/resources/highschool/chemmatters/past-issues/2020-2021/april-2021/sustainable-fashion.html> [<https://perma.cc/5EFB-YNYY>] (explaining the environmental burden caused by the chemicals used within clothing production, the use of which allows for faster production than environmentally conscious options).

<sup>249</sup> While the United States has the ability to indirectly regulate overseas production through import standards, such as what chemicals can be contained in imports, direct regulations of the manufacturing process in another country cannot be put into place. See *Foreign Import Regulations*, INT'L TRADE ADMIN., <https://www.trade.gov/import-regulations> [<https://perma.cc/F3RA-VDTH>].

<sup>250</sup> The EPA has issued a final regulation which can stop certain products containing PFAS from being "manufactured, imported, produced, or sold in the U.S." *EPA Takes Action*, *supra* note 188.

<sup>251</sup> PFAS are commonly referred to as "forever chemicals" since they are able to resist break down by sunlight, weather, and microbes. See Pat Rizzuto, *All Nonessential PFAS Should Be Phased Out, Scientists Advise*, BLOOMBERG L. (Nov. 24, 2020),

health effects in humans.<sup>252</sup> The EPA regulates the use of PFAS to limit their existence in water.<sup>253</sup> Outside of that, the EPA has begun to regulate the use of PFAS in more products to protect consumers from the danger of PFAS outside of drinking water and recognizing the harm that can result from external exposure to PFAS.<sup>254</sup>

The EPA has planned to increase its regulations of PFAS over the next several years due to their known harm to both the environment and humans.<sup>255</sup> Scientists now believe that all nonessential PFAS used by manufacturers should be phased out due to the harms PFAS can cause.<sup>256</sup> PFAS restriction was listed as a priority by the Biden administration as part of his environmental justice platform, making now an excellent time to expand PFAS regulations.<sup>257</sup>

PFAS are unfortunately highly prevalent in the fashion industry,<sup>258</sup> but their use in clothing has yet to be regulated by the EPA.<sup>259</sup> Several major brands, including Ralph Lauren, American Eagle, and Patagonia, have recently announced that they will eliminate the use of PFAS within their brand in the near future.<sup>260</sup> Many brands have begun eliminating PFAS after research over

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<https://news.bloomberglaw.com/environment-and-energy/all-nonessential-pfas-should-be-phased-out-scientists-advice> (on file with the *Ohio State Law Journal*).

<sup>252</sup> See *PFAS Explained*, EPA, <https://www.epa.gov/pfas/pfas-explained> [<https://perma.cc/D98F-U8XB>].

<sup>253</sup> Regulations began with water due to the large presence of PFAS and their potentially harmful effects on human health when drinking water containing PFAS. See *EPA Actions to Address PFAS*, EPA, <https://www.epa.gov/pfas/epa-actions-address-pfas> [<https://perma.cc/HES3-7FFE>]; *PFAS Explained*, *supra* note 252.

<sup>254</sup> See *EPA Takes Action*, *supra* note 188 (describing the harm of products containing surface level PFAS such as carpet, furniture, electronics, and household appliance); see also *EPA Actions to Address PFAS*, *supra* note 253.

<sup>255</sup> Research shows that exposure to high levels of PFAS can lead to adverse health outcomes, specifically in children. Exposure can happen in a variety of ways and not just through ingesting the chemicals. See *PFAS Strategic Roadmap: EPA's Commitments to Action 2021–2024*, EPA [hereinafter *PFAS Strategic Roadmap*], <https://www.epa.gov/pfas/pfas-strategic-roadmap-epas-commitments-action-2021-2024> [<https://perma.cc/P484-YPAS>]; *Our Current Understanding of the Human Health and Environmental Risks of PFAS*, EPA [hereinafter *Environmental Risks of PFAS*], <https://www.epa.gov/pfas/our-current-understanding-human-health-and-environmental-risks-pfas> [<https://perma.cc/5T54-HRSL>].

<sup>256</sup> See Rizzuto, *supra* note 251.

<sup>257</sup> *Id.*

<sup>258</sup> See Sujatha Bergen & Yiliqi, *Toxic Fashion: Remove “Forever” PFAS Chemicals from Our Apparel*, NAT. RES. DEF. COUNCIL (Jan. 31, 2022), <https://www.nrdc.org/resources/toxic-fashion-remove-forever-pfas-chemicals-our-apparel> [<https://perma.cc/V485-6G4B>].

<sup>259</sup> See *EPA Actions to Address PFAS*, *supra* note 253.

<sup>260</sup> Ralph Lauren has planned to eliminate PFAS by the end of 2022, American Eagle has plans to phase out PFAS by 2024, and Patagonia has committed to eliminating PFAS by 2024. Sujatha Bergen & Yiliqi, *Major Fashion Brands Phasing Out of Toxic Forever Chemicals*, NAT. RES. DEF. COUNCIL (Feb. 1, 2022), <https://www.nrdc.org/experts/sujatha-bergen/calvin-kleinralph-lauren-phasing-out-toxic-forever-chemical> [<https://perma.cc/QX4H-EY5K>].

the past two decades has shown their huge impact on the environment and human health.<sup>261</sup>

Scientists have gone so far as to condemn the use of PFAS in a number of industries, including the fashion industry.<sup>262</sup> Fast fashion retailers, however, have not released such plans.<sup>263</sup> Recently, a Canadian investigation found incredibly high levels of PFAS in fashion items, such as purses, coats, and more, purchased from fast fashion retailers Shein, Zafal, and AliExpress.<sup>264</sup> The high impact of PFAS on our environment, in combination with its prevalence in fast fashion clothing, makes its regulation an ideal starting place for enacting environmental reform.<sup>265</sup>

Since the EPA has already promulgated rules limiting the use of PFAS in items manufactured, imported, produced, or sold within the United States,<sup>266</sup> it would not be as difficult to add clothing to this list. Products including carpet, furniture, electronics, and household appliances were added in the 2020 final rule.<sup>267</sup> Regulating the use of PFAS in products made by fashion brands would not be any more difficult than adding new categories to the existing rule and reviewing the newly products in the same way as those to whom the rule presently applies.

While regulating the use of PFAS by fast fashion brands certainly will not eliminate design piracy, it will require the brands to use more sustainable materials, adding to their production costs.<sup>268</sup> By effectively slowing their production cycles, design piracy will occur at a less frequent rate. Design piracy occurs at the current frequency due to the quick production cycle of fast fashion companies.<sup>269</sup> With a lower production rate, fast fashion companies will not be able to produce at their current rates, slowing the frequency at which they will be able to produce stolen designs. The slower production cycle will not entirely eliminate design piracy from the fast fashion industry, but it will reduce the amount of design piracy that is currently occurring. This will represent a small

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<sup>261</sup> See Rachel Cernansky, *Can Fashion Eliminate “Forever Chemicals”?*, VOGUE BUS. (Dec. 3, 2020), <https://www.voguebusiness.com/sustainability/can-fashion-eliminate-forever-chemicals> [<https://perma.cc/SFW7-96QF>].

<sup>262</sup> See Rizzuto, *supra* note 251.

<sup>263</sup> See Jenny Cowley, Stephanie Matteis & Charlsie Agro, *Experts Warn of High Levels of Chemicals in Clothes by Some Fast-Fashion Retailers*, CANADIAN BROADCASTING CORP. (Oct. 1, 2021), <https://www.cbc.ca/news/business/marketplace-fast-fashion-chemicals-1.6193385> [<https://perma.cc/6BW5-53JS>].

<sup>264</sup> Following this investigation, the specific items mentioned in the article were removed from the fast fashion retailer’s respective websites due to the concerns shown by many consumers showed over the high levels of PFAS. *Id.*

<sup>265</sup> See Cernansky, *supra* note 261.

<sup>266</sup> See EPA Takes Action, *supra* note 188.

<sup>267</sup> *Id.*

<sup>268</sup> See Brewer, *supra* note 169, at 6–7.

<sup>269</sup> See Overview of Fast Fashion, FASHION L., <https://www.thefashionlaw.com/resource-center/fast-fashion/> [<https://perma.cc/8XHZ-G6N5>].

but meaningful preventative win against design piracy but certainly not the end of the war to protect designers' original designs.

Now more than ever, climate change has a real voice in the world, with regulations increasing significantly over the past 30 years.<sup>270</sup> If ever there was a time that change to environmental regulations could be enacted, it is now.<sup>271</sup> The Biden Administration has stated that one of the Administration's main policy goals is to decrease greenhouse gas emissions by 2030.<sup>272</sup> The Administration's policy even goes as far as to address the concern of PFAS in its policy on environmental law.<sup>273</sup>

Since the Biden Administration has expressed this sincere interest in reducing greenhouse gas emissions and PFAS,<sup>274</sup> turning to the fashion industry is a logical step. As one of the top contributors to greenhouse gas emissions with an expected fifty percent rise by 2030,<sup>275</sup> addressing the industry now will allow the Biden Administration to achieve its goals and improve the environmental conditions of the fashion industry. While the PFAS concerns of the Biden Administration are more closely related to clean drinking water,<sup>276</sup> the EPA has begun reviewing the use of PFAS in other areas, and fashion is an industry closely related to what the EPA has regulated so far.<sup>277</sup>

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<sup>270</sup> *Congress Climate History*, CTR. FOR CLIMATE & ENERGY SOLS., <https://www.c2es.org/content/congress-climate-history/> [https://perma.cc/5LAT-U4V7] (explaining that over the past 30 years, action taken by Congress to combat climate change has increased significantly, including laws and funding).

<sup>271</sup> The Biden Administration has clear goals related to climate change, and specifically greenhouse gas emissions. See *Fact Sheet: President Biden Renews U.S. Leadership on World Stage at U.N. Climate Conference (COP26)*, WHITE HOUSE (Nov. 1, 2021) [hereinafter *Fact Sheet*], <https://www.whitehouse.gov/briefing-room/statements-releases/2021/11/01/fact-sheet-president-biden-renews-u-s-leadership-on-world-stage-at-u-n-climate-conference-cop26/> [https://perma.cc/R7B8-64C8].

<sup>272</sup> *Id.* (explaining the Biden Administration's goal is to reduce "greenhouse gas emissions 50–52 percent below 2005 levels in 2030, reaching a 100% carbon pollution-free power sector by 2035, and achieving a net-zero economy no later than 2050").

<sup>273</sup> Specifically related to drinking water, the Biden Administration states that it seeks to "[d]eliver clean drinking water by replacing the nation's lead pipes and service lines, addressing PFAS chemicals . . ." *Id.* (emphasis added).

<sup>274</sup> *Id.*

<sup>275</sup> See, e.g., *How Much Do Our Wardrobes Cost to the Environment?*, *supra* note 26 (explaining that the greenhouse gas emissions by the fashion industry, which currently account for ten percent of global greenhouse gas emissions, are expected to increase fifty percent by 2030).

<sup>276</sup> See Karen Feldscher, *Why More Stringent Regulation Is Needed for 'Forever Chemicals'*, HARV. T.H. CHAN SCH. PUB. HEALTH (Jan. 4, 2022), <https://www.hsph.harvard.edu/news/features/why-more-stringent-regulation-is-needed-for-forever-chemicals/> [https://perma.cc/CG58-3RVA] (explaining that that Biden Administration is specifically seeking to limit the presence of PFAS chemicals in drinking water by March 2023 but should consider regulating their use in other products as well).

<sup>277</sup> See *EPA Takes Action*, *supra* note 188.

Environmental regulations may not be the most direct solution that expanding intellectual property law would be for preventing design piracy by fast fashion companies, but it is significantly more realistic<sup>278</sup> and simultaneously addresses the growing environmental concerns related to fast fashion, making it the best available solution to address design piracy and protect small businesses.<sup>279</sup> Small businesses cannot afford to wait for intellectual property law and the interest of Congress in expanding the laws to catch up to protect their hard work and original designs from the design piracy by fast fashion companies.<sup>280</sup> It is much more practical and prudent that they instead rely on environmental law as a means of protection, and the current administration is ready to act on the major environmental concerns presented by the fashion industry.<sup>281</sup> Addressing the environmental concerns as a way to both improve both the environmental impact of fast fashion and design piracy to protect small businesses is a logical solution to apply based on the current legal and political landscape.<sup>282</sup>

## V. CONCLUSION

The current patchwork structure of intellectual property protection for fashion designs is insufficient to protect small businesses from design piracy by fast fashion retailers. Since Congress is unlikely to propose any new legislation to enact intellectual property law designed specifically for fashion designers, it is time to think outside the colloquial “box” and beyond intellectual property for a solution. The environmental impact of fast fashion is astronomical.<sup>283</sup> Addressing this impact is a realistic and smart way to not only address growing environmental concerns, but also to decrease design piracy by fast fashion retailers. By requiring environmental CSR and eliminating PFAS for all fashion brands, the environmental impact can be addressed at both the consumer and product regulation levels. While required environmental CSR and PFAS regulation will not directly impact design piracy, they will force fast fashion brands to utilize environmentally conscious methods of production. By changing the methods of production, fast fashion brands will no longer be able

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<sup>278</sup> See *supra* notes 170–79 and accompanying text.

<sup>279</sup> See discussion *supra* Part III.B.

<sup>280</sup> See, e.g., Lieber, *supra* note 7 (describing the large impact of design piracy by fast fashion companies on small businesses).

<sup>281</sup> See *Fact Sheet*, *supra* note 271 (explaining the Biden Administration’s goal of decreasing greenhouse gas emissions by 2030); see also Feldscher, *supra* note 276 (stating that the Biden Administration has the goal of addressing PFAS in drinking water by March of 2023).

<sup>282</sup> See *supra* notes 170–178 and accompanying text (explaining in depth why the use of environmental law to impact design piracy and protect small businesses is the best option and could be reasonably undertaken through notice-and comment rulemaking by the EPA under similar measures to those it is currently taking on household products).

<sup>283</sup> See discussion *supra* Part III.

to produce designs utilizing their current business models. This limitation to production will prevent the brands from stealing as many designs from small brands. While this method alone cannot entirely end design piracy, it is a tangible, preventative measure that can be taken right now to protect both small businesses and the environment from being taken down by fast fashion.