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Copyright & Fashion: The Shoe That Does Not Fit

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> *"Historically, fashion has rarely been elevated to the same stature as painting, music, sculpture, or architecture. But fashion is one of the purest expressions of art because it is art lived on a daily basis."*[1]

I. INTRODUCTION

The fashion industry in the United States generates more than $350 billion in revenue annually[2] and employs more than 1.8 million people.[3] Not only does the industry positively impact the economy,[4] but it also inspires exhibits across the globe that showcase the artistic ability of fashion designers.[5] Despite the cultural, artistic, and economic benefits the fashion industry provides, the United States does not offer significant intellectual property protections for fashion designs.[6]

The idea that authors should be encouraged to create new works, while preventing others from copying, profiting, reproducing, or destroying those works is at the heart of intellectual property protection.[7] Intellectual property protections include patents, trademarks, trade secrets, and copyrights.[8] Recent efforts have attempted to use copyright law to protect the intellectual property of fashion designers.[9] As codified in Article 1, Section 8 of the U.S. Constitution, copyright law states that "Congress shall have power to . . . promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective

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1. Georges Berges, *In Defense of Fashion as a True Art Form*, Observer (June 20, 2017), https://observer.com/2017/06/fashion-true-art-form.

2. Carolyn B. Maloney, *The Economic Impact of the Fashion Industry*, U.S. Congress Joint Econ. Comm. 1 (Feb. 2019), https://www.jec.senate.gov/public/_cache/files/39201d61-aec8-4458-80e8-2fe26ee8a31e/economic-impact-of-the-fashion-industry.pdf.

3. *Id.*

4. *See id.* at 1–2.

5. Sara Tardiff, *11 Best Museum Exhibits for Alternate Fashion History*, Elle Decor (Oct. 24, 2017), https://www.elledecor.com/life-culture/travel/g9925490/best-museum. Such exhibits include the following temporary showcases: Volez, Voguez, Voyagez – Louis Vuitton (New York City), The Glamour and Romance of Oscar de la Renta (Houston), Christian Dior, Couturier Du Rêve (Paris), and Balenciaga: Shaping Fashion (London). *Id.*

6. *See* Francesca Montalvo Witzburg, *Protecting Fashion: A Comparative Analysis of Fashion Design Protection in the United States and the European Union*, 107 Trademark Rep. 1131, 1149 (2017) ("In the United States, fashion designs may be afforded minimal protection under trademark and patent law, and currently only certain designs incorporated on fashion articles would be protected under copyright."). For purposes of this Note, fashion design refers to the design of articles such as garments, handbags, and accessories.

7. *See* Casey E. Callahan, *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, 196 (2012).

8. *Protecting Intellectual Property in the United States: A Guide for Small and Medium-Sized Enterprises in the United Kingdom*, U.S. Pat. and Trademark Off., https://www.uspto.gov/sites/default/files/documents/UK-SME-IP-Toolkit_FINAL.pdf (last visited Mar. 3, 2020).

9. *See generally* Star Athletica, LLC v. Varsity Brands, Inc., 137 S. Ct. 1002 (2017).

writings and discoveries."[10] Copyright law is intended to promote the growth of creative trades[11] and protect works such as books, paintings, movies, music, and software.[12] However, the creativity embodied in fashion design is not encompassed in those protections.[13]

This Note contends that new legislation should be adopted to protect fashion designs because the current intellectual property laws do not afford sufficient protection. Part II of this Note outlines the history of copyrighting fashion designs and the evolution of the separability doctrine. Part III discusses the 2017 Supreme Court decision *Star Athletica, LLC v. Varsity Brands, Inc.*,[14] the first copyright case to reach the Supreme Court involving fashion designs. Part IV discusses the legal and fashion communities' reactions to *Star Athletica*, how they believe it affected the applicability of copyright law to fashion designs, and why these beliefs are misplaced. Part V explores how fashion designs do not fit within the current intellectual property regime and why these designs deserve intellectual property protection. Part VI proposes that Congress should adopt new legislation to properly protect fashion designs, and concludes this Note.

II. THE HISTORY OF COPYRIGHTING FASHION DESIGNS

Copyright law protects "original works of authorship, fixed in any tangible medium of expression."[15] To be original, the work must be "independently created by the author (as opposed to copied from other works)" and possess "at least some minimal degree of creativity."[16] Generally, clothes are not copyrightable due to their intrinsic utilitarian function.[17] Although clothing designs likely possess the degree of

10. U.S. Const. art. I, § 8, cl. 8.

11. Christiane Schuman Campbell, *Protecting Fashion Designs Through IP Law*, Duane Morris (Apr. 14, 2015), https://www.duanemorris.com/articles/protecting_fashion_designs_through_ip_law_5516.html.

12. *See* 17 U.S.C. § 102 (2020); *Copyright Basics*, Univ. of Wisconsin-Madison Libr., https://www.library.wisc.edu/about/scholarly-communication/copyright/copyright-basics (last visited Mar. 31, 2020). Copyright law is intended to give individuals an incentive to create and share. *See What Is Copyright Law, Who Created It, And Why Do People Think We Need it?*, New Media Rts. (June 28, 2017), https://www.newmediarights.org/business_models/artist/what_copyright_law_who_created_it_and_why_do_people_think_we_need_it. "The immediate effect of our copyright law is to secure a fair return for an author's creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good." Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) (citation omitted).

13. *See* Callahan, *supra* note 7, at 195–96.

14. 137 S. Ct. 1002 (2017).

15. 17 U.S.C. § 102 (2012).

16. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991) (citing 1 Melville B. Nimmer & David Nimmer, Nimmer on Copyright §§ 2.01(A), (B) (1990)).

17. Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 Va. L. Rev. 1687, 1748 (2006) ("Fashion firms and designers in the United States have neither obtained expanded copyright protection applicable to apparel designs nor sui generis statutory protection.").

creativity necessary to meet the originality standard for copyright protection, clothing is inherently useful and copyright protection does not per se extend to useful items.[18] A "useful article" is defined in the Copyright Act of 1976 ("Copyright Act") as "an article having an intrinsic utilitarian function that is not merely to portray the appearance of an article or to convey information."[19]

Although useful articles are not themselves copyrightable, the Copyright Act allows the "design of a useful article" to be copyrighted "if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article."[20] This separability requirement was set forth in 1954 by the Supreme Court in *Mazer v. Stein*.[21]

In *Mazer*, the Court held that statuettes used as bases for table lamps, with electric wiring sockets and lamp shades attached to them, were copyrightable despite their utilitarian function.[22] The Court stated: "Respondents may not exclude others from using statuettes of human figures in table lamps; they may only prevent use of copies of their statuettes as such or as incorporated in some other article."[23] The Court reasoned that the intended use of the article did not limit its copyright protection.[24] In essence, the Court ensured that an otherwise copyrightable article would not be denied copyright protection just because it was part of a useful article.[25]

The Court in *Mazer* introduced the notion of "works of applied art," which are described as "encompass[ing] all original, pictorial, graphic, and sculptural works that are intended to be or have been embodied in useful articles[.]"[26] After *Mazer*, various courts found, inter alia, dress designs, scarf designs, plate designs, and Christmas

18. *See id.* "A 'useful article' is an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information. An article that is normally a part of a useful article is considered a 'useful article.'" 17 U.S.C. § 101. In addition to clothing, examples of "useful articles" include cars, lamps, sinks, and computer monitors. *Works Unprotected by Copyright Law*, BitLaw, https://www.bitlaw.com/copyright/unprotected.html (last visited Mar. 3, 2020).

19. 17 U.S.C. § 101. The enactment of the Copyright Act of 1976 extended copyright protection to all works as soon as they were fixed in a tangible means of expression. Previously, works were not properly protected unless registered with the Copyright Office. Geoffrey P. Hull, *Copyright Act of 1976*, Free Speech Ctr. at Middle Tenn. Univ., https://www.mtsu.edu/first-amendment/article/1072/copyright-act-of-1976 (last visited Mar. 31, 2020). The Act also included new protections for parodies under the fair use doctrine. *Id.*

20. 17 U.S.C. § 101.

21. *See generally* 347 U.S. 201 (1954).

22. *Id.* at 218–19.

23. *Id.* at 218.

24. *Id.*

25. *See id.*

26. 1 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 2A.08(B)(1)(a) (Matthew Bender & Co., Inc., rev. ed. 2019).

decorations protectable under the Copyright Act.[27] In 1979, the Copyright Office attempted to incorporate the *Mazer* decision with the following regulation:

> If the sole intrinsic function of an article is its utility, the fact that the article is unique and attractively shaped will not qualify it as a work of art. However, if the shape of a utilitarian article incorporates features, such as artistic sculpture, carving, or pictorial representation, which can be identified separately and are capable of existing independently as a work of art, such features will be eligible for registration.[28]

After *Mazer*, courts have held that designs on garments are copyrightable. For example, in the 1980 case *Kieselstein-Cord v. Accessories By Pearl, Inc.*, the Second Circuit Court of Appeals held that a decorative belt buckle was eligible for copyright protection.[29] In 1995 the Second Circuit held, in *Knitwaves v. Lollytogs*, that a motif comprised of leaves, squirrels, and acorns on a children's sweater was infringed because "[a]n observer viewing the [two] sweaters side by side cannot help but perceive them as coming from one creative source."[30] And in the 2005 case, *Chosun International, Inc. v. Chrisha Creations, Ltd.*, the Second Circuit held that Halloween costumes may be copyrighted, reasoning that certain aspects of the designs may "invoke in the viewer a concept separate from that of the costume's clothing function."[31]

David Nimmer, a law professor widely recognized as an expert on copyright law and the author of the leading treatise *Nimmer on Copyright*,[32] explains how courts determine copyright eligibility by making a distinction between fabric designs and

27. *See id.* ("Applying . . . *Mazer*, courts held protectible under the 1909 Act artistic jewelry, designs imprinted upon scarves and dress fabrics, dinnerware patterns, dolls, Christmas decorations, banks in the shape of dogs, and artistic jewelry boxes."); *see also* Fisher-Price Toys, Div. of the Quaker Oats Co. v. MY-TOY Co., 385 F. Supp. 218, 223 (S.D.N.Y. 1974) (granting an injunction to permanently enjoin defendants from infringing plaintiff's copyrighted doll designs); Royalty Designs, Inc. v. Thrifticheck Serv. Corp., 204 F. Supp. 702, 704 (S.D.N.Y. 1962) ("Royalty copyrights for its Boxer and Cocker Spaniel dog toy banks are valid . . . it has made out a prima facie case of infringement of such copyrights by Thrifticheck."); Syracuse China Corp. v. Stanley Roberts, Inc., 180 F. Supp. 527, 528 (S.D.N.Y. 1960) (granting a preliminary injunction to restrain the sale of defendant's dinnerware that infringed plaintiff's copyrighted ornamental design); Peter Pan Fabrics, Inc. v. Brenda Fabrics, Inc., 169 F. Supp. 142, 143 (S.D.N.Y. 1959) (holding that plaintiff's fabric design was copyrightable subject matter); Scarves by Vera, Inc. v. United Merchs. & Mfrs., Inc., 173 F. Supp. 625, 627 (S.D.N.Y. 1959) (stating that the silk screen painting applied in the manufacture of ladies' blouses was "[c]learly . . . a proper subject of copyright"); Trifari, Krussman & Fishel, Inc. v. B. Steinberg-Kaslo Co., 144 F. Supp. 577, 580 (S.D.N.Y. 1956) (holding that plaintiff's expression of a hansom cab, embodied in a pin, was copyrightable).

28. 37 C.F.R. § 202.10(c) (1972). This language is seen in §§ 101 and 113 of the current Copyright Act. 17 U.S.C. § 113(a) (2012) ("[T]he exclusive right to reproduce a copyrighted pictorial, graphic, or sculptural work in copies under section 106 includes the right to reproduce the work in or on any kind of article, whether useful or otherwise.").

29. 632 F.2d 989, 993–94 (2d Cir. 1980).

30. 71 F.3d 996, 1004 (2d Cir. 1995).

31. 413 F.3d 324, 330 (2d Cir. 2005) (citation omitted).

32. Nimmer, *supra* note 26, at § 2A.08(H)(1).

dress designs.[33] Nimmer defines fabric designs as "the design printed on a fabric" and dress designs as "the design that graphically sets forth the shape, style, cut and dimensions for converting fabric into a finished dress or other clothing garment."[34] After the Court's decision in *Mazer*, fabric designs are copyrightable because the design on a dress can be separated from its utilitarian feature, the actual dress.[35] In the 1959 case *Peter Pan Fabrics, Inc. v. Brenda Fabrics, Inc.*, the Southern District of New York held that a design printed on dress fabric was copyrightable subject matter as both a work of art and as an independent print.[36] Essentially, if a design is "pictorial," it makes no difference in terms of copyright protection if that design is printed on canvas or fabric.[37]

In 1997, the Southern District of New York, in *Eve of Milady v. Impression Bridal*, expanded copyright protection of fabric designs to include lace designs.[38] The court rejected the idea that lace designs are not copyrightable because they are part of the actual garment.[39] After concluding that lace designs were a type of fabric design and not a dress design, the court found that the lace designs at issue were copyrightable subject matter.[40]

III. STAR ATHLETICA V. VARSITY BRANDS

In response to *Mazer* and subsequent legislation, many tests were constructed by various district and circuit courts to determine whether a design aspect of a useful article was separable from the article itself.[41] In 2017, to streamline these tests and discard the ambiguity surrounding the standard, the Supreme Court granted certiorari in *Star Athletica, LLC v. Varsity Brands, Inc.*, which involved a copyright infringement dispute over the design on cheerleading uniforms.[42] The case's main

33. *Id.*

34. *Id.*

35. *See* Mazer v. Stein, 347 U.S. 201, 217 (1954); *see also* Nimmer, *supra* note 26, § 2A.08(H)(2) ("Under an earlier view, fabric designs were not regarded as copyrightable. By reason of *Mazer v. Stein*, however, these designs are subject to copyright protection.").

36. 169 F. Supp. 142, 143 (S.D.N.Y. 1959).

37. *See id.* ("[P]laintiffs' design is a proper subject of copyright both as a work of art and as a print. It was described in the application for copyright as a work of art but that does not preclude sustaining its copyrightability on the ground that it is a print."); *see also* Guillermo Jimenez & Barbara Kolsun, Fashion Law Cases and Materials 61 (2016) ("If the designs are 'pictorial,' as the court appears to accept, then it does not matter whether they are printed on paper or on fabrics.").

38. 957 F. Supp 484, 489 (S.D.N.Y. 1997) (holding that lace designs are copyrightable because they are fabric designs). Lace is "an openwork usually figured fabric made of thread or yarn and used for trimmings, household coverings, and entire garments." *Lace*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/lace (last visited Mar. 3, 2020).

39. *Eve of Milady*, 957 F. Supp. at 489.

40. *See id.*; Jimenez, *supra* note 37, at 65.

41. *See* Star Athletica, LLC v. Varsity Brands, Inc., 137 S. Ct. 1002, 1007 (2017).

42. *Id.* at 1004.

issue was whether the arrangements of lines, chevrons, and colorful shapes on Varsity's cheerleading uniforms could be granted copyright protection as "separable features of the design of those cheerleading uniforms."[43] Addressing this issue with a two-prong test, the Court stated that, "[w]hether a feature incorporated into a useful article 'can be identified separately from,' and is 'capable of existing independently of,' the article's 'utilitarian aspects' is a matter of 'statutory interpretation.'"[44]

The Court reasoned that the first requirement of the two-prong test—whether the design could be identified separately—only requires the decisionmaker to "be able to look at the useful article and spot some two or three-dimensional element that appears to have pictorial, graphic, or sculptural qualities."[45] The second requirement—whether the design could exist independently—requires the decisionmaker to "determine that the separately identified feature has the capacity to exist apart from the utilitarian aspects of the article."[46] If the feature cannot exist on its own as a pictorial, graphic, or sculptural work, it is a utilitarian feature of the article and not eligible for copyright protection.[47]

Next, the Court looked at Section 106(1) of the Copyright Act which grants the owner of the copyright "exclusive rights" to "reproduce the copyrighted work in copies."[48] This right of reproduction, as outlined in Section 113(a) of the Copyright Act, "includes the right to reproduce the work in or on any kind of article, whether useful or otherwise."[49] The Court concluded that Sections 106 and 113 "make clear that copyright protection extends to pictorial, graphic, and sculptural works regardless of whether they were created as freestanding art or as features of useful articles."[50] Consistent with *Mazer* and the subsequent regulations, the Court then articulated the following rule: "A feature of the design of a useful article is eligible for copyright if, when identified and imagined apart from the useful article, it would qualify as a pictorial, graphic, or sculptural work either on its own or when fixed in some other tangible medium."[51]

The Court held that the decorative design on the cheerleading uniforms satisfied the two-prong test and was therefore eligible for copyright protection. The design was separable because: (1) the design had pictorial, graphic, or sculptural qualities;

43. *Id.* at 1008–09.

44. *Id.* at 1005 (quoting 17 U.S.C. § 101 (2012)).

45. *Id.* at 1010.

46. *Id.*

47. *Id.* The Court further explained that a pictorial, graphic, or sculptural work cannot itself be a useful article or "[a]n article that is normally a part of a useful article." *Id.* (quoting 17 U.S.C. § 101); *see also Useful Article*, U.S. Copyright Off., https://www.copyright.gov/register/va-useful.html (last visited Mar. 3, 2020) ("An article that is normally part of a useful article may itself be a useful article, for example, an ornamental wheel cover on a vehicle.").

48. *Star Athletica,* 137 S. Ct. at 1010 (quoting 17 U.S.C. § 106(1) (2012)).

49. *Id.* (quoting 17 U.S.C. § 113(a) (2012)).

50. *Id.* at 1011.

51. *Id.* at 1012.

(2) the arrangement of the different aspects of the design (the chevrons, colors, stripes, and shapes) could be separated, "applied in another medium," and "qualify as 'two-dimensional . . . works of . . . art,'" and (3) conceptually removing the decorative design and placing it in a different medium "would not replicate the uniform itself."[52]

The Court rejected the argument that the decorative designs were not separable from the cheerleading uniform because the designs still depicted the outline of the uniform once extracted from it.[53] Instead, the Court noted that a two-dimensional design can conform to its medium while remaining its own individual design and not taking on the shape of the medium as part of the design itself.[54] Further, the Court rejected the idea that once the decorative design was removed, the uniform would no longer be functional stating that "[t]he focus of the separability inquiry is on the extracted feature and not on any aspects of the useful article that remain after the imaginary extraction."[55] Essentially, the useful article need not remain after the design in issue is separated from that article. Physical separability is when a feature can "be physically separated from the article by ordinary means while leaving the utilitarian aspects of the article completely intact."[56] Conceptual separability, on the other hand, is when the feature would not be able to be removed "from the useful article by ordinary means," but is still nonetheless separable.[57] Ultimately, the Court rejected the physical-conceptual distinction in the separability analysis, leaving only the test of conceptual separability.[58] However, after *Star Athletica*, this distinction is no longer necessary.

Notably, the Court stated that only the two-dimensional decorative design was eligible for copyright protection and that even if a valid copyright was found, the copyright owner would "have no right to prohibit any person from manufacturing a cheerleading uniform of identical shape, cut, and dimensions" and "only the reproduction of the surface designs in any tangible medium of expression" could be prohibited.[59]

IV. THE RESPONSE TO STAR ATHLETICA

"A figurative celebratory cry was heard around the fashion world the day this opinion was published."[60] *Star Athletica* was the first copyright case in which the

52. *Id.*

53. *Id.* Petitioner argued, and the dissent agreed, that the decorative designs were not separable from the cheerleading uniform because the designs still depicted the outline of the uniform after their removal. *Id.*

54. *See id.* at 1012–13.

55. *Id.* at 1013.

56. *Id.*

57. *Id.*

58. *Id.* at 1014.

59. *Id.* at 1013.

60. Jennifer Carter, *Fast Fashion May Be on Fast Decline After Star Athletica Ruling*, Juris Mag. (Nov. 5, 2017), http://sites.law.duq.edu/juris/2017/11/05/fast-fashion-may-be-on-fast-decline-after-star-athletica-ruling.

Supreme Court granted certiorari for a garment.[61] For this reason, many fashion companies, designers, and advocates view the case as a landmark decision that changed the way fashion designs could be protected through copyright law.[62] This seemed like a win to the fashion community because the fashion designer prevailed.[63] Commentators point to three different aspects of the *Star Athletica* decision when discussing its positive impact on the copyrightability of fashion designs. The decision, however, merely maintained the status quo of copyright law.[64]

A. The Star Athletica Decision Does Not Offer New Protection for Fashion Designs

First, critics were thrilled with the decision because the Supreme Court rejected the idea of a physical-conceptual distinction, stating it was unnecessary.[65] The Court did indeed state that the separation analysis should focus on the extracted article and not on the aspects of the useful article that remain after the separation.[66] However, with this conclusion the Court did nothing more than reiterate the holding in *Mazer*.[67] In *Mazer*, the statuettes were only conceptually separable because they were the actual bases of the lamps.[68] A physical separation would have left the lamp as a non-

61. Kali Hayes, *Star Athletica v. Varsity Brands Copyright Suit: A Fashion Primer*, WWD (Feb. 27, 2017), https://wwd.com/business-news/legal/cheerleader-uniform-supreme-court-case-10817470/.

62. *See* Francisco Javier Careaga Franco, *Star Athletica v. Varsity Brands: Supreme Court Issues Landmark Ruling on Fashion and Design Copyright*, Jolt Dig. (Apr. 12, 2017), https://jolt.law.harvard.edu/digest/supreme-court-issues-landmark-ruling-on-fashion-and-design-copyright ("This [decision] opens a door for designers to apply for inexpensive copyright protections[,]" and "[m]ay be especially disruptive for the fashion and apparel industry . . . that work with fast and not-lasting trends[.]").

63. *See generally Star Athletica,* 137 S. Ct. at 1002.

64. *Id.* at 1016.

65. *See* Andrea L. Calvaruso, *V-I-C-T-O-R-Y for the Fashion Industry: SCOTUS Establishes Uniform Test for Protection of Artistic Works Applied to Apparel*, Ad L. Access (Mar. 28, 2017), https://www.adlawaccess.com/2017/03/articles/v-i-c-t-o-r-y-for-the-fashion-industry-scotus-establishes-uniform-test-for-protection-of-artistic-works-applied-to-apparel ("The Court's decision also confirmed that copyright protection for pictorial, graphic and sculptural features applied to useful articles such as apparel and other fashion items is alive and well.").

66. *Star Athletica*, 137 S. Ct. at 1013.

67. *See id.* at 1013–14.

> [B]ecause the removed feature may not be a useful article—as it would then not qualify as a pictorial, graphic, or sculptural work—there necessarily would be some aspects of the original useful article "left behind" if the feature were conceptually removed. But the statute does not require the imagined remainder to be a fully functioning useful article at all, much less an equally useful one. Indeed, such a requirement would deprive the *Mazer* statuette of protection had it been created first as a lamp base rather than as a statuette. Without the base, the "lamp" would be just a shade, bulb, and wires. The statute does not require that we imagine a nonartistic replacement for the removed feature to determine whether that *feature* is capable of an independent existence.

Id.

68. Nimmer, *supra* note 26, at § 2A.08(B)(3).

functional item.[69] *Star Athletica* ensured that an otherwise copyrightable decorative design that is part of a useful article will not lose its copyright eligibility merely because it was first placed on that useful article and not on some other medium of expression, such as a canvas or piece of paper.[70] In essence, the conceptual separability analysis was left unchanged.[71] The abandonment of the physical separability test allows a design element to be copyrightable subject matter even if the "underlying useful article" does not remain a "fully functioning useful article" after the separation.[72]

The second reason *Star Athletica* was seen as a landmark decision was because the Court rejected the idea that design purposes and methods should be considered when determining whether a decorative design is eligible for copyright protection.[73] This, again, did nothing more than restate common copyright practices. In 1903, the Court in *Bleistein v. Donaldson Lithographing Co.* stated the danger of "persons trained only to the law" to be the "final judges of the worth of pictorial illustrations."[74] This assertion, made by Justice Oliver Wendell Holmes, Jr., has been read to stand for the notion that judges should refrain from assessing aesthetic merit.[75] Refraining from such judgment allows a judge to avoid the "what is art?" question.[76] *Star Athletica* simply reiterated the way *Bleistein*, over a century ago, directed courts to be cautious when determining the creativity necessary for copyright eligibility.[77] The statement made by Holmes "is the most famous and strongly articulated on the point of judicial restraint in aesthetic determinations."[78] Further, *Mazer* explicitly rejected the idea that the intended use of an article should limit its copyright eligibility.[79] In other words, the artist's intent when creating the work, and how subjectively difficult the

69. *Id.*

70. *See Star Athletica*, 137 S. Ct. at 1014 (discussing *Mazer*'s abandonment of "distinctions between purely aesthetic articles and useful works of art").

71. *See id.*

72. *See, e.g.*, *id.* at 1013; George Thuronyi, *U.S. Supreme Court Clarifies Separability Analysis in its Ruling on Star Athletica, LLC v. Varsity Brands, Inc.*, Lib. of Congress (Apr. 6, 2017), https://blogs.loc.gov/copyright/2017/04/u-s-supreme-court-clarifies-separability-analysis-in-its-ruling-on-star-athletica-llc-v-varsity-brands-inc.

73. Calvaruso, *supra* note 65 ("Had the Court considered [design methods, purposes, and reasons], as advocated by Star Athletica, it could have effectively eliminated protection for applied art for fashion companies that employ designers to create pictorial, graphic and sculptural works for the purpose of applying them to fashion products."); *see also Star Athletica*, 137 S. Ct. at 1015.

74. 188 U.S. 239, 251–52 (1903).

75. *See* Brian Soucek, *Aesthetic Judgment in Law*, 69 Ala. L. Rev. 381, 448 (2017) ("Holmes's admonition has been generalized as a general principle of aesthetic neutrality in law.").

76. Christine Haight Farley, *Judging Art*, 79 Tul. L. Rev. 805, 815 (2005); *see also Bleistein*, 188 U.S. at 251 (explaining the dangers of having judges be the arbiters of what is and is not art).

77. *Bleistein*, 188 U.S. at 251.

78. Farley, *supra* note 76, at 817.

79. Mazer v. Stein, 347 U.S. 201, 218 (1954) ("We find nothing in the copyright statute to support the argument that the intended use or use in industry of an article eligible for copyright bars or invalidates its registration. We do not read such a limitation into the copyright law.").

work was to create, should not be a factor in determining copyright eligibility. This principle is firmly rooted in the history of copyright protection, and the Court in *Star Athletica* did little more than abide by previous precedent that warned judges against judging the artistic worth of art.[80]

Third, scholars in the field put an emphasis on the Court's language stating that the "shape, cut, and physical dimensions" of the cheerleading uniform were not eligible for copyright protection.[81] The two-prong test laid out in *Star Athletica* seemed like a slam dunk for the fashion community in that a fabric design could be copyrightable if it was able to be "separated" from the clothing itself.[82] However, the design on the cheerleading uniforms was not simply a design placed on the surface of the fabric.[83] This suggests that, on remand, the district court could find that the design was actually the shape, cut, and dimension of the cheerleading uniforms.[84] Scholars in the field who focus on this language of the opinion argue that the cheerleading uniforms at issue were actually uncopyrightable dress designs.[85]

B. An Uncopyrightable Dress Design Versus a Copyrightable Fabric Design

Cheerleading uniforms are made up of cut-and-sew garments.[86] Each part of the chevron and stripe pattern at issue in *Star Athletica* was cut from individual pieces of various colored material and sewn together to create the decorative design seen on

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80. *See* Ryan Littrell, *Toward a Stricter Originality Standard for Copyright Law,* 43 B.C. L. Rev. 193 (2002) (stating that "the *Bleistein* Court provided the conceptual structure underlying an exceedingly low originality standard").

81. Telephone Interview with Steven M. Crosby, Feldman Law Group (Oct. 5, 2018). Crosby represented Star Athletica in *Star Athletica, LLC. v. Varsity Brands, Inc.* 137 S. Ct. 1002, 1016 (2017).

> To be clear, the only feature of the cheerleading uniform eligible for a copyright in this case is the two-dimensional work of art fixed in the tangible medium of the uniform fabric. Even if respondents ultimately succeed in establishing a valid copyright in the surface decorations at issue here, respondents have no right to prohibit any person from manufacturing a cheerleading uniform of identical shape, cut, and dimensions to the ones on which the decorations in this case appear. They may prohibit only the reproduction of the surface designs in any tangible medium of expression—a uniform or otherwise.

Id. at 1013.

82. *See* Carter, *supra* note 60 ("In the recent Supreme Court decision *Star Athletica*, apparel designers saw a monumental change in the protection that clothing could receive under copyright laws.").

83. Steven M. Crosby, Address at the New York Law School Fashion Law Symposium: What is Real? Authenticity, Transparency, and Trust in the Digital Age of Fashion (Feb. 7, 2019). Crosby was a keynote speaker at the New York Law School Fashion Law Symposium who spoke about his experience as lead counsel in the *Star Athletica* case. *Fashion Law: What is Real? Authenticity, Transparency, and Trust in the Digital Age of Fashion*, N.Y.L Sch. L. Rev., https://www.nyls.edu/innovation-center-for-law-and-technology/icltevents/fashion-law-symposium/ (last visited Mar. 16, 2020).

84. Crosby, *supra* note 83.

85. *Id.*

86. *Id.* The cheerleading uniforms at issue in *Star Athletica* were made up of multiple components. Specifically, the zigzag pattern that follows the bottom hem of the top portion of the uniform was made up of multiple pieces of colored fabric sewn together to create a striped effect. *Id.*

the uniforms.[87] Since the pattern is created this way, a cheerleading uniform is constructed with, or composed of, its design.[88] This gives rise to the question of whether the design of a cheerleading uniform is actually the "shape, cut, and dimension" of the garment, making the cheerleading uniform an uncopyrightable dress design instead of a copyrightable fabric design. In other words, the issue is whether the design is one that "graphically sets forth the shape, style, cut, and dimensions" of the garment[89] or one where "the design [is] imprinted on a fabric."[90]

If the design is interpreted to be the "shape, cut, and dimension" of the garment, the cheerleading uniform in *Star Athletica* would be an uncopyrightable dress design. The strips of fabric are cut and sewn together to create the pattern of the uniform, regardless of the fact that these strips of fabric also combine to create the chevron and zigzag patterns of the cheerleading uniforms. This combination of fabric strips is part of a useful article that cannot "be identified separately from" and is not "capable of existing independently" of the cheerleading uniform.[91]

In addition, cheerleading uniforms are designed to be useful. They allow cheerleaders to move, dance, jump, and flip without hindrance.[92] The way the fabric is sewn together affects how the fabric moves when a cheerleader performs. This, in and of itself, is a useful function of a cheerleading uniform.[93] Cheerleading uniforms are constructed to make the best use of the garments for cheerleaders during their

87. Reply Brief for the Petitioner at 32–33, Star Athletica, LLC v. Varsity Brands, Inc., 137 S. Ct. 1002 (2017) (No. 15-866) (discussing Varsity's cut-and-sew cheerleading uniforms).

88. Crosby, *supra* note 83.

89. Nimmer, *supra* note 26, at § 2A.08(H)(1).

90. *Id.*

91. *See* Star Athletica, LLC v. Varsity Brands, Inc., 137 S. Ct. 1002, 1007 (2017) (citing 17 U.S.C. § 101 (2012)).

92. *See* Reply Brief for the Petitioner, *supra* note 87, at 16–17.

> Clothing encompasses everything from a parka to a bikini, and all clothing covers at least some of the body. But different kinds of clothing have different intrinsic functions. . . . It violates [17 U.S.C. § 101] to analyze utilitarian aspects of "clothing" generically rather than "the article actually at issue here: cheerleading uniforms."

Id.

93. *See* Jovani Fashion, Ltd. v. Fiesta Fashions, 500 F. App'x 42, 45 (2d Cir. 2012).

> While such dresses plainly have a decorative function, the decorative choices, as we have already observed, merge with those that decide how (and how much) to cover the body. Thus, a jeweled bodice covers the upper torso at the same time that it draws attention to it; a ruched waist covers the wearer's midsection while giving it definition; and a short tulle skirt conceals the wearer's legs while giving glimpses of them. In sum, the aesthetic and the functional are inseparable in the prom dress at issue and, therefore, Jovani cannot state a plausible copyright claim.

Id.

performance, the physical and aesthetic aspects of the uniform as well as the practicality of the uniform as it pertains to cheerleading.[94]

C. The Holding in Star Athletica Creates Inconsistencies

Although the argument that the design should be interpreted as the "shape, cut, and dimension" of a garment is logical on its face, it uses a hyper-technical interpretation of the *Star Athletica* holding. This creates several inconsistencies that pose issues for determining the copyrightability of fabric designs; this Note offers four below.

First, if the holding in *Star Athletica* is interpreted to mean that the design is part of the shape, cut, and dimension of the cheerleading uniforms, the application of the holding does not make practical sense. If interpreted in this manner, the district court on remand would have found that Varsity's cheerleading uniform design was uncopyrightable because the design was sewn together with pieces of colored fabric—a dress design—in lieu of being placed on the already existing cheerleading uniform. This would produce an absurd result and the policy rationale behind the prohibition of copyrighting a useful article would no longer make sense.[95]

Consider a scenario in which there are three different cheerleading uniforms all seeking copyright protection. The first is Star Athletica's uniform featuring different colored fabric strips that are cut and sewn together to create the pattern of the uniform. The second is made of two pieces of fabric, sewn together at the seams to create the uniform's shape, with the chevron and zigzag patterns created by screen-printing the design on top of the fabric. The third is made up of cut-and-sew pieces of fabric in the exact same manner as Star Athletica's except that the fabric is all one color. The chevron and zigzag patterns are then created by dye, screen-printing, or other means. In terms of appearance, the three uniforms are essentially identical. However, under this interpretation of the *Star Athletica* holding, only the second and third designs would be copyrightable fabric designs, because the chevron and zigzag patterns are placed on the garment and are not part of the dress design. The first design would be uncopyrightable because the pattern is sewn into the garment, making it part of the dress design itself. This is an absurd result—all three uniforms look the same but one is deemed uncopyrightable simply because of its construction.

The second inconsistency of *Star Athletica's* holding is that the chevron and zigzag patterns are not useful. The importance of this is demonstrated in *Kieselstein-Cord*, in which the belt at issue was useful when taken as a whole, but the belt's buckle was

94. *See Why Choose Varsity Spirit Fashion*, VARSITY, https://www.varsity.com/school/spirit-fashion/why-choose-varsity (last visited Mar. 3, 2020) (explaining why Varsity's uniforms are better than its competitors).

95. Masquerade Novelty, Inc. v. Unique Industries, Inc., 912 F.2d 663, 669 (3d Cir. 1990). "[T]he copyright laws are a reflection of Congress' desire to protect and encourage artistic creativity, while at the same time ensuring the wide availability of useful designs." *Id.* The separability test described by *Star Athletica* incorporates these goals by allowing only the design on the uniform to be protected and not the design of the cheerleading uniform itself. *Star Athletica*, 137 S. Ct. at 1013.

determined to be separable from the useful function of the belt itself.[96] The decorative buckle did not enhance the ability of the belt to hold up pants and was not integral to the functionality of the belt itself.[97] Varsity's cheerleading uniforms were undeniably useful. At the very least, they are useful just as any other article of clothing is useful—to cover one's body.[98] However, the chevron and zigzag patterns on the cheerleading uniform, whether created during or after construction, do not enhance the uniform's ability to be used. The cheerleading uniforms, with or without the patterns, perform the same function of covering the cheerleader's body, as any other uncopyrightable article of clothing would. The addition of the chevron and zigzag patterns do not enhance this function. The way the fabric strips are sewn together denotes the fabric design of the uniform only, and the structure of the cheerleading uniform—the dress design—remains unchanged.

Third, the use of fabric strips to make the chevron and zigzag design does not preclude the design from copyright protection. This is illustrated in *Eve of Milady*, where the court concluded that the lace designs of bridal gowns were fabric designs and rejected the idea that the lace was part of the dress design itself.[99] The same argument could be made in *Star Athletica*, where the design was integrated into the fabric, as was the lace in *Eve of Milady*, instead of being placed on the fabric. Using this logic, Varsity's cheerleading uniform would be an uncopyrightable dress design, but the chevron and zigzag patterns would be a copyrightable fabric design. Although the fabric design at issue is a cut-and-sew design, it still denotes a fabric design, just like the lace in *Eve of Milady*.

And fourth, if the chevron and zigzag patterns on the cheerleading uniforms were interpreted to be an uncopyrightable dress design, there are many other items of clothing that would be considered mere dress designs, as well. For example, a knitted sweater with a design knitted directly into the fabric would be uncopyrightable. But if the designer first knitted a plain sweater, knitted separate adornments, and then attached the adornments to the sweater, it would now be a copyrightable fabric design, because the adornments are not part of the sweater's structure. This outcome does not make any practical sense, and it would be senseless to interpret the holding of *Star Athletica* this narrowly. Courts have dealt with situations similar to this in the past. For example, in *Knitwaves*, the court determined that the sweaters at issue were useful articles, but the artwork on the sweaters was a copyrightable fabric design.[100] The sweater motifs in *Knitwaves* were treated the same as any other fabric design,

96. Kieselstein-Cord v. Accessories by Pearl, Inc., 632 F.2d 989, 993–94 (2d Cir. 1980) (finding that "buckles rise to the level of creative art").

97. *Id.* ("We see in appellant's belt buckles conceptually separable sculptural elements, as apparently have the buckles' wearers who have used them as ornamentation for parts of the body other than the waist.").

98. *See Can You Copy Clothing Designs?*, New Media Rts., https://www.newmediarights.org/business_models/artist/can_you_copyright_clothing_designs (last modified Oct. 10, 2017) (discussing clothing's utilitarian purpose).

99. Eve of Milady v. Impression Bridal, 957 F. Supp 484, 489 (S.D.N.Y. 1997).

100. Knitwaves, Inc. v. Lollytogs Ltd., 71 F.3d 996, 1002 (2d Cir. 1995).

regardless of the fact that the motifs were incorporated into the sweater, technically making up the "shape, cut, and dimension" of the sweater.[101] If the chevron and zigzag patterns on Varsity's cheerleading uniform were treated as part of an uncopyrightable dress design, the logic behind the separability doctrine would not make practical sense and would lead to inconsistent results.

Although it may have seemed like a win for fashion design protection when the Court ruled in favor of *Varsity*, the consequences of the decision were far from groundbreaking. The decision did not expand the scope of copyright protection for fashion designs or offer any new protection. Following *Star Athletica*, fashion designers are faced with the same difficulties in securing copyright protection as before the decision.

V. FASHION DESIGNS DO NOT FIT WITHIN THE CURRENT INTELLECTUAL PROPERTY REGIME

The legislature should adopt a form of intellectual property protection that properly protects the work of fashion designers. Fashion designs are a form of artistic expression, equal to that of music, paintings, and sculptures, which are properly protected through copyrights. There are, however, many differences between these other forms of art and fashion designs, rendering copyright law ill-suited to protect fashion designs. The solution is to forgo copyright protection altogether for fashion designs and to create a new regime specifically for fashion.

A. Fashion Designs are Worthy of Intellectual Property Protection

Fashion designs are hard to protect because they are part of the inherent usefulness of clothing.[102] Clothing is inherently functional, as it keeps us warm, clean, and protected.[103] In other respects, however, clothing is seen as a form of art.[104] Many proponents of intellectual property protection for fashion designs argue that fashion designs are as much a part of artistic culture and expression as other forms of art that are granted intellectual property protection.[105] Iconic fashion houses such as Carolina Herrera, Christian Dior, Cristobal Balenciaga, Emilio Pucci, Hubert de Givenchy, and

101. *See id.* (citing Soptra Fabrics Corp. v. Stafford Knitting Mills, Inc., 490 F.2d 1092 (2d Cir. 1974); Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487 (2d Cir. 1960) (L. Hand, J.)).

102. Patrick J. Concannon, *How to Protect Your Fashion Designs*, Art L.J. (July 10, 2017), https://alj.artrepreneur.com/fashion-design.

103. *Can You Copy Clothing Designs?*, *supra* note 98.

104. Berges, *supra* note 1 ("The art we wear and live with is the art we become. Art—fashion and otherwise—reflects who we are and who we aspire to be.").

105. *Id.*

Miuccia Prada express their creative genius through fashion, their chosen artistic medium.[106] Fashion is an expression of creativity that undoubtedly constitutes "art."[107]

Even if, however, one were to concede that the creative elements in fashion designs do not equate to the works of Michelangelo,[108] Claude Monet,[109] Pablo Picasso,[110] or Jackson Pollock,[111] it would still be wrong to argue that fashion designs do not deserve intellectual property protection. The Copyright Act only requires "some minimal degree of creativity" to qualify for protection.[112] While fashion designs undoubtedly deserve legal protection, copyright law is not the proper avenue to secure such protection.

B. Copyright Is Not the Proper Form of Protection for Fashion Designs

First, fashion designers, companies, and advocates have been trying to fit fashion designs into the copyright regime for decades, to no avail.[113] Although more than seventy bills have been considered by Congress since 1914, fashion designs remain

106. *See Carolina Herrera Bids Her Line Adieu With Elegant Flourish*, Associated Press (Feb. 12, 2018), https://www.apnews.com/ba0f10db4e2a435da781311f44d53e30; Johanna Agerman Ross & Manijeh Verghese, *The Genius of Christian Dior*, Disegno (Oct. 5, 2011), https://www.disegnodaily.com/article/the-genius-of-christian-dior; Chino R. Hernandez, *The Mad Genius of Cristóbal Balenciaga*, Lifestyle Asia (May 4, 2018), https://lifestyleasia.onemega.com/the-mad-genius-of-cristobal-balenciaga; *Emilio Pucci*, Designer-Vintage (Aug. 11, 2016), https://www.designer-vintage.com/en/masterclass/article/emilio-pucci; Emilia Petrarca, *Fashion Remembers Hubert de Givenchy's Genius*, The Cut (Mar. 13, 2018), https://www.thecut.com/2018/03/hubert-de-givenchy-obituary-fashion-memories.html; Teo van den Broeke, *Miuccia Prada to Win Outstanding Achievement Award at the BRAs*, GQ (Nov. 26, 2018), https://www.gq-magazine.co.uk/gallery/miuccia-prada-wins-outstanding-achievement-award. The Metropolitan Museum of Art has an exhibit of over thirty-three thousand costumes and accessories on display as well as tours that delve into the history of fashion across the globe. *See Fashion in Art*, The Met, https://www.metmuseum.org/events/programs/met-tours/guided-tours/fashion-in-art (last visited Mar. 3, 2020); *The Costume Institute*, The Met, https://www.metmuseum.org/about-the-met/curatorial-departments/the-costume-institute (last visited Mar. 3, 2020).

107. *See* Berges, *supra* note 1.

108. Michelangelo, 1475–1564, was an Italian Renaissance sculptor and painter. *See* Creighton E. Gilbert, *Michelangelo*, Encyclopedia Britannica (Mar. 2, 2020), https://www.britannica.com/biography/Michelangelo.

109. Claude Monet, 1840–1926, was a French painter known primarily for his impressionist style. *See* William C. Seitz, *Claude Monet*, Encyclopedia Britannica (Dec. 2, 2019), https://www.britannica.com/biography/Claude-Monet.

110. Pablo Picasso, 1881–1973, was a Spanish artist famously considered to be the founder of Cubism. *See* Marilyn McCully, *Pablo Picasso*, Encyclopedia Britannica (Jan. 17, 2020), https://www.britannica.com/biography/Pablo-Picasso.

111. Jackson Pollock, 1912–1956, was an American painter recognized for his contributions to the abstract expressionist movement. *See* Francis Valentine O'Connor, *Jackson Pollock*, Encyclopedia Britannica (Aug. 7, 2019), https://www.britannica.com/biography/Jackson-Pollock.

112. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991) ("[T]he requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, 'no matter how crude, humble or obvious' it might be.").

113. Emma Yao Xiao, *The New Trend: Protecting American Fashion Designs Through National Copyright Measures*, 28 Cardozo Arts & Ent. L.J. 417, 432 (2010).

generally unprotected through copyright law.[114] Under the current Copyright Act, courts have attempted to give protection to fashion designs, but the protection is inadequate at best.[115] When courts grant copyright protection to separable features of a useful article, fashion designers still do not get the protection they deserve for the design they created.[116] For example, the design of an Hermès Birkin Bag, one of the most coveted handbags in the world,[117] is not copyrightable because the bag is a useful article. However, if a print or pattern fabric design were placed on the bag, that design could be copyrightable. So even if, in this hypothetical situation, Hermès were to win the copyright infringement suit and the infringer could not copy the pattern or print on the bag, the design of the bag itself could still be copied. Thus, under the current Copyright Act, even when designers win an infringement suit, copycats are not completely prohibited from copying their designs.[118]

Second, copyright protection is not the appropriate avenue to protect fashion designs because of the duration of the copyright protection. For works created after January 1, 1978,[119] copyright protection lasts for the life of the author plus seventy years.[120] In the fashion world, this is an extremely long time because new designs, trends, and fashions are created many times each year.[121] The length of time that copyright protection lasts is simply unsuitable for the fast paced and ever-changing world of fashion. Congress has made clear that useful articles are not subject to copyright protection, and that the threshold for copyrighting separable elements of a useful article is intended to be high.[122] The copyright laws are "a reflection of Congress' desire to protect and encourage artistic creativity, while at the same time ensuring the

114. *Id.*

115. *See* Seth Appel, *Copyrights in the Fashion Industry – Tips for Protecting Design*, Lexis Prac. Advisor J. (Sept. 27, 2017), https://www.lexisnexis.com/lexis-practice-advisor/the-journal/b/lpa/posts/copyrights-in-the-fashion-industry-tips-for-protecting-designs (discussing courts' difficulties in determining the copyrightability of fashion designs).

116. *See* Julia Brucculieri, *How Fast Fashion Brands Get Away with Copying Designers*, HuffPost (Sept. 4, 2018), https://www.huffpost.com/entry/fast-fashion-copycatsn5b8967f9e4b0511db3d7def6.

117. *Hermès Birkin*, World's Best, https://www.worldsbest.com/fashion/handbags/hermes/birkin (last visited Mar. 20, 2020).

118. *See* Brucculieri, *supra* note 116.

119. The Copyright Act went into effect on January 1, 1978, and applies to all works created after this date. 17 U.S.C. § 301 (2020).

120. *How Long Does Copyright Protection Last?*, U.S. Copyright Off., https://www.copyright.gov/help/faq/faq-duration.html (last visited Mar. 3, 2020). For a work made for hire, a pseudonymous work, or an anonymous work, copyright protection lasts for ninety-five years from the date of first publication or 120 years from the date of creation, whichever is first. *Id.*

121. Candice Chua, *The Many Fashion Seasons and Fashion Weeks, Explained*, Yoyokulala (Feb. 20, 2018), https://yoyokulala.com/fashion/fashion-week-explained.

122. Jane C. Ginsburg, *"Courts Have Twisted Themselves into Knots": U.S. Copyright Protection for Applied Art*, 40 Colum. J.L. & Arts 1, 2 (2016). A "copyright protects originality rather than novelty or invention—conferring only 'the sole right of multiplying copies.' Absent copying there can be no infringement of copyright." Mazer v. Stein, 347 U.S. 201, 218 (1954).

wide availability of useful designs."[123] Allowing useful designs to gain copyright protection for long periods of time is exactly what Congress was trying to avoid.[124]

Third, given the length of protection and the commonalities between many fashion designs, the Copyright Act does not appropriately address the needs of the fashion community. Fashion designers commonly gather inspiration from other garments.[125] Designers find inspiration in nature, culture, architecture, photography, music, and through their own life experiences.[126] Some of the world's most influential fashion designers have started trends that are still seen on runways today.[127] Intellectual property protection for fashion designs should not hinder the ability to rethink old designs or invent new trends by using old ones.

Finally, copying may actually stimulate growth and expression in the fashion community. Law professors Kal Raustiala[128] and Christopher Sprigman[129] argue that "piracy is paradoxically beneficial to the fashion industry."[130] By quickly mainstreaming fashion designs, copied designs lose their appeal and leave consumers with an induced desire for new designs, a phenomenon the professors call "induced obsolescence."[131] This argument supports the idea that copyright law is not the proper form of protection for fashion designs, but it does not suggest that fashion designs should be excluded from legal protection.

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123. Masquerade Novelty, Inc. v. Unique Industries, Inc., 912 F.2d 663, 669 (3rd Cir. 1990).

124. *See id.*

125. Segrets, Inc. v. Gillman Knitwear Co., 207 F.3d 56, 59 (1st Cir. 2000).

126. *Where Do Fashion Designers Find Sources for Inspiration?*, Fashion Gone Rouge, https://www.fashiongonerogue.com/content/fashion-designers-inspiration (last visited Mar. 3, 2020); Cameron Chapman, *Finding Inspiration in Uncommon Sources: 12 Places to Look*, Smashing Mag. (Feb. 26, 2010) https://www.smashingmagazine.com/2010/02/finding-inspiration-in-uncommon-sources-12-places-to-look.

127. Bethan Warrior, *7 Designs We Can Thank For Today's Fashion Trends*, Style Mag. (Mar. 21, 2018), https://stylemagazines.com.au/fashion/historic-designers-todays-fashion-trends1/#close. Coco Chanel's little black dress, Louis Réard's bikini, Dior's pencil skirt, Givenchy's shift dress, and Yves Saint Laurent's power suit are just some examples of fashion designs that have been given new inspiration throughout the years and have had a timeless impact on the fashion world. *Id.*

128. Kal Raustiala is a professor at the University of California, Los Angeles School of Law. His research focuses on international law, international relations, and intellectual property. He earned a B.A. in political science from Duke University, a PhD in political science from the University of California San Diego, and a J.D. from Harvard Law School. *Kal Raustiala Faculty Profile*, UCLA L., https://law.ucla.edu/faculty/faculty-profiles/kal-raustiala/ (last visited Mar. 31, 2020); *Kal Raustiala Profile*, Princeton U. Program in L. & Pub. Aff., https://lapa.princeton.edu/people/kal-raustiala (last visited Mar. 3, 2020).

129. Christopher Sprigman is a professor at New York University School of Law. He teaches intellectual property law, antitrust law, torts, and comparative constitutional law. He earned a B.A. in history from the University of Pennsylvania and a J.D. from the University of Chicago School of Law. *Christopher Jon Sprigman Profile*, N.Y.U. L., http://its.law.nyu.edu/facultyprofiles/index.cfm?fuseaction=profile.overview&personid=37891 (last visited Mar. 31, 2020).

130. Kal Raustiala & Christopher Sprigman, *Response: The Piracy Paradox Revisited*, 61 Stan. L. Rev. 1201, 1203 (2009).

131. *Id.*

C. Other Forms of Intellectual Property Are Inadequate for Fashion Designs

Arguments in favor of denying copyright protection to fashion designs often assert that fashion is covered by the more rigorous form of intellectual property protection—design patents.[132] A design patent protects the ornamental aspects of an article.[133] There are several reasons why design patents offer inadequate protection for fashion designs. Two of the most important have to do with time. Design patents are granted for a term of fifteen years.[134] During this period, designers have the right to exclude others from making or selling their designs.[135] Granting protection to a useful article for this period of time poses the same issues here as it does with copyright law and raises concerns over granting a monopoly to a single design. Further, design patents take approximately twelve to eighteen months from the date of filing to be issued.[136] This is problematic in the fashion arena, which evolves and reinvents itself at a rapid pace.[137]

Trademarks are another form of intellectual property protection that inadequately protect fashion designs. Trademarks protect a brand—a logo, name, or symbol—used on a good or service.[138] While trademarks allow fashion designers to protect the name of their brand, trademark law cannot be used to protect an entire article of clothing.[139] For example, many Louis Vuitton bags have the famous "LV" printed on them.[140] Although Louis Vuitton's "LV" is undoubtedly protected through trademark law, such protection is generally not sufficient because the actual design of the bag is not protected.[141] Protecting the logo and design of the bag would be ideal, however,

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132. *See* Julie Zerbo, *Currently Trending in Fashion: Design Patents*, Fashion L. (June 23, 2016), http://www.thefashionlaw.com/home/currently-trending-in-fashion-design-patents.

133. Gene Quinn, *Design Patents: The Under Utilized and Overlooked Patent*, IP Watchdog (Sept. 10, 2016), http://www.ipwatchdog.com/2016/09/10/design-patents/id=72714.

134. 35 U.S.C. § 173 (2020) ("Patents for designs shall be granted for the term of 15 years from the date of grant."). Design patents granted from applications filed before May 13, 2015 have a fourteen year term from the date of grant. *1505 Term of Design Patent [R-08.2017]*, U.S. Pat. & Trademark Off., https://www.uspto.gov/web/offices/pac/mpep/s1505.html (last visited Mar. 3, 2020).

135. Campbell, *supra* note 11.

136. Nicholas Wells, *Design Patent Protection in the United States*, Nicholas Wells IP L., https://www.wellsiplaw.com/design-patent-protection-in-the-united-states (last visited Mar. 3, 2020).

137. *See* Sanford Stein, *How Could Changing Consumer Trends Affect Fast-Fashion Leaders H&M And Zara?*, Forbes (Feb. 10, 2019), https://www.forbes.com/sites/sanfordstein/2019/02/10/how-could-changing-consumer-trends-affect-fast-fashion-leaders-hm-and-zara/#1f4792c16f48 (noting that fashion trends are changing from a "top-down fashion evolution, dictated by manufacturers and fashion periodicals, to a bottom-up percolation, driven by social media and personal expression").

138. *Protecting Your Trademark*, U.S. Pat. & Trademark Off. 2 (2018), https://www.uspto.gov/sites/default/files/documents/BasicFacts.pdf.

139. *See id.* at 1.

140. *See* Louis Vuitton, https://us.louisvuitton.com/eng-us/homepage (last visited Mar. 3, 2020).

141. *LV Trademark Details*, Justia Trademarks, https://trademarks.justia.com/713/13/lv-71313983.html (last visited Mar. 3, 2020).

coupling trademark protections with design patents is also deficient—per the reasons discussed above.[142]

Trade dress is a form of trademark protection that has enabled designers to gain additional protection on aspects such as color, packaging, or a product itself.[143] Two of the most famous designs that have been granted trade dress protection are Christian Louboutin's red sole[144] and Tiffany's blue box—which includes its color, packaging, and even the white satin ribbon.[145] Christian Louboutin and Tiffany have both acquired secondary meaning[146] and are two of the most recognizable trademarks in the industry.[147] Trade dress, however, is inappropriate for most fashion designs because it requires secondary meaning before it can be granted which, in turn, requires brand recognition of the article seeking trade dress.[148]

VI. CONCLUSION

Despite the popular view to the contrary, the Supreme Court's holding in *Star Athletica* did not broaden the scope of copyright protection in the fashion world. Although the Court set out a test for copyright eligibility, this test is far from clear and can still lead to different interpretations regarding its application. Further, the holding in *Star Athletica* leaves open the question of whether the scope of copyright protection should be broadened to include fashion designs. For decades, fashion designers and companies have been unsuccessful in their attempts to fit fashion designs into the current copyright regime, which offers them inadequate protection, at best.

Fashion designs are a form of artistic expression undoubtedly deserving of intellectual property protection. There are, however, many factors that make copyright law the wrong form of legal protection for them. Since fashion designs do not fit

142. This Note does not discuss counterfeiters and the causes of action fashion designers have against them.

143. Campbell, *supra* note 11.

144. Christian Louboutin S.A. v. Yves Saint Laurent Am. Holding, Inc., 696 F.3d 206, 212 (2d Cir. 2012) (concluding that "Louboutin's trademark, which covers the red, lacquered outsole of a woman's high fashion shoe, has acquired limited 'secondary meaning' as a distinctive symbol that identifies the Louboutin brand").

145. Robert Klara, *How Tiffany's Iconic Blue Box Became the World's Most Popular Package*, AdWeek (Sept. 22, 2014), https://www.adweek.com/brand-marketing/how-tiffany-s-iconic-box-became-world-s-most-popular-package-160228.

146. *What is Trade Dress?*, Gabor & Marotta LLC, https://www.marottalaw.com/Articles/What-is-Trade-Dress.shtml (last visited Mar. 3, 2020) ("Secondary meaning is when the public associates a trademark or trade dress with a source or producer of goods or services, rather than just the product itself. If trade dress is well known and identifies a specific company to the public . . . it can be protectable.").

147. Julie Zerbo, *How Difficult is it to Claim a Color as Your Own?*, Fashion L. (June 18, 2018), http://www.thefashionlaw.com/home/how-difficult-is-it-to-claim-a-color-as-your-own (explaining that the colors trademarked by Christian Louboutin and Tiffany are recognized as some of the most famous trademarks in the world).

148. *See What is Trade Dress?*, *supra* note 146 ("To be protectable, trade dress must be distinctive or have acquired *secondary meaning*.").

neatly into the Copyright Act, they should not be forced into a regime that does not properly protect them. Instead, the legislature should create a new form of protection specifically for fashion designs and the use of those designs in the fashion industry.