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Tailoring Copyright to Protect Artists: Why the United States Needs More Elasticity In Its Protection for Fashion Designs

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TAILORING COPYRIGHT TO PROTECT ARTISTS: WHY THE UNITED STATES NEEDS MORE ELASTICITY IN ITS PROTECTION FOR FASHION DESIGNS

INTRODUCTION

For as long as copyright protection has existed in the United States, protection has never expressly extended to fashion designs because copyright law categorizes fashion designs as “useful articles” that do not receive any protection. In the eighteenth century, this policy perhaps made sense—most clothing was generic, non-decorative, and required little creativity for many of the everyday garments people wore. Clothing in the eighteenth century was commonly made up of useful articles that served very little purpose outside of their utility. However, in today’s society, fashion has transformed into an industry that prizes creativity, ingenuity, innovation, and something more than just utility. Copyright laws have not developed alongside the fashion industry. As a result, almost no fashion designs can receive copyright protection, and other areas of intellectual property law provide little to no protection, especially for smaller, less-established designers. This lack of protection has very real and sometimes very detrimental effects on designers who have the misfortune of a third party stealing their work and reproducing it at low cost. The current hierarchy in the fashion industry favors the well-established designer with the ability to reproduce a stolen design en masse and sell to the world, while the small, independent designer enjoys no recognition and is generally unable to collect for what almost anyone would agree is a morally wrong act.

Copyright law in the United States should change to reflect current practices within the fashion industry, which have developed over time to meet the industry’s changing needs. At one time, fashion designs would have been protected under copyright law; early drafts of the Copyright Act of 1976 included protections for fashion designs that were not “staple” articles, and multiple subsequent bills have been introduced in Congress to extend pro-

tection to fashion designs that are more than simply generic pieces of clothing. The need for change is also heavily based on the United States's membership in the Berne Convention for the Protection of Literary and Artistic Works, which includes particularly heavy protection of copyright authors' moral rights. The Berne Convention is an international agreement that coordinates copyright protections internationally, providing specific rules for when a copyrightable creation begins to exist, setting up terms of protection, and requiring that all parties recognize the copyrights from all other countries party to the agreement. Despite being a party to the Berne Convention since the 1980s, the United States, as a general rule, has declined to adopt any kind of moral-rights-based copyright protection, but clearly seems to be required to do so, not only to provide the reasonable protection that is due to the fashion industry, but also to fulfill its duties as a party to the Berne Convention. The United States needs to grant more protection, through expanded and more elastic copyright laws, to those unique and creative fashion designs that call for greater protections against copying and knockoffs.

The first Part of this Comment will outline basic copyright law and policies in the United States, including the "useful article" doctrine, which dictates that fashion designs are usually classified as useful articles that are not eligible for protection. Part I will also introduce Brazilian bikini maker and vendor Maria Solange Ferrarini and her suit against Kiini, L.L.C. and its owner, Ipek Irgit, to illustrate the need for greater protections for fashion designs and the harms that will occur in the absence of such protections.

The second Part of this Comment will highlight the fashion industry's unique history of policing copying without legal protections and why those methods no longer work in the industry. Part II will further discuss the development of the fashion industry in the last century and the current attitudes surrounding the creativity and innovation that flow into fashion designs from not only the high-end fashion houses, but also the bikini vendor on the beaches of Brazil.

The third Part of this Comment will outline the various ways in which this law could change, as well as the legal theories behind change in the first place. Part III will also discuss moral rights copyright protection and various European copyright laws which protect authors' rights beyond simply the economic rights

that are recognized in the United States. Part III will also analyze the single moral rights copyright law, as well as other legislation introduced throughout the past decades in Congress that would have provided protection to fashion, all of which failed to pass through Congress and become law.

The fourth and final Part of this Comment returns to reflect on the case study and, after taking all of the possible solutions into account, makes a final recommendation on the best way or ways in which the current copyright regime in the United States should adapt to allow protection for fashion designs.

I. COPYRIGHT LAW CURRENTLY DOES NOT PROTECT FASHION DESIGNS

The Constitution of the United States empowers Congress to create and enact copyright laws, specifically giving 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.”¹ Wielding this power, the Congress of the newly independent United States passed the nation’s first federal copyright laws with the Copyright Act of 1790.² This Act protected only limited categories of works, specifically maps, charts, and books.³ As the next two centuries passed, protection grew to cover other categories of works, including prints, musical works, dramatic works, photographs, motion pictures, and sound recordings.⁴ During this same period, various doctrines emerged in copyright law, controlling what kinds of works that copyright laws protect, such as ideas and useful articles.⁵ The Supreme Court first encountered useful articles in the

1. U.S. CONST. art. I, § 8, cl. 8.

2. See Copyright Act of 1790, ch. 15, 1 Stat. 124; see also Oren Bracha, *The Adventures of the Statute of Anne in the Land of Unlimited Possibilities: The Life of a Legal Transplant*, 25 BERKELEY TECH. L.J. 1427, 1453 (2010) (discussing the British copyright law known as the “Statute of Anne” and how the first copyright act in the United States was the same law, just rewritten in more modern language).

3. 1 Stat. at 124–25.

4. See *Timeline: 19th Century*, U.S. COPYRIGHT OFF., https://www.copyright.gov/timeline/timeline_19th_century.html [<https://perma.cc/P5GY-D85W>]; *Timeline: 1900–1950*, U.S. COPYRIGHT OFFICE, https://www.copyright.gov/timeline/timeline_1900-1950.html [<https://perma.cc/K9LT-DSEM>]; *Timeline: 1950–1997*, U.S. COPYRIGHT OFF., https://www.copyright.gov/timeline/timeline_1950-1997.html [<https://perma.cc/JTL4-8JKG>].

5. See *Mazer v. Stein*, 347 U.S. 201, 211–14, 217 (1954) (holding that works of art embodied in a useful article were still copyrightable, but only their form, not any utilitarian aspects); *Baker v. Selden*, 101 U.S. 99, 103 (1880) (declining to extend copyright protec-

1950s in *Mazer v. Stein*.⁶ The Court interpreted the existing copyright regime in light of guidance released by the U.S. Copyright Office and held that statuettes were copyrightable artistically even though they were also being used as lamp bases.⁷ The current definition of a useful article was enshrined in the United States Code in the Copyright Act of 1976, and the Supreme Court re-examined the useful article doctrine in *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, in which it held that designs as part of a useful article could still be imagined separately from the useful article and were therefore copyrightable.⁸

Congress passed the current copyright act in 1976, which redefined many previously required formalities which existed in older copyright acts.⁹ The Copyright Act of 1976 (“the Copyright Act” or “the 1976 Act”) defines copyrightable subject matter as works of authorship that include literary works; musical works; dramatic works; pantomimes and choreographic works; pictorial, graphic, and sculptural works; motion pictures and other audiovisual works; sound recordings; and architectural works.¹⁰ While this section of the Copyright Act does not include “fashion designs” or a similar type of work in the list of works that receive protection, this section also does not explicitly or implicitly bar fashion designs from protection.¹¹

A. *Fashion Designs Considered Useful Articles*

If there is nothing in the Copyright Act itself that explicitly or implicitly seems to bar fashion designs from protection, why then does copyright protection not extend to fashion designs? Since the enactment of the 1976 Act, courts have generally refused to ex-

tion to a “method” or to “knowledge” because that protection would frustrate the very object of publishing the book in question, and no engineer could use that method or knowledge without infringing the copyright).

6. See *Timeline: 1950–1997*, *supra* note 4.

7. *Mazer*, 347 U.S. at 202, 208–17.

8. 17 U.S.C. § 101 (2012); *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1007, 1010–12 (2017).

9. See PETER S. MENELL ET AL., *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE*: 2018, at 520–21 (2018).

10. 17 U.S.C. § 102(a) (2012).

11. *Id.* § 102. This section extended protection to “works of authorship” that include literary works; musical works; dramatic works; pantomimes and choreographic works; pictorial, graphic, and sculptural works; motion pictures and other audiovisual works; sound recordings; and architectural works, but bars copyright protection to ideas, procedures, processes, systems, methods of operation, concepts, principles, and discoveries. *Id.*

tend copyright protection to fashion designs, describing them as useful articles that are generally barred from receiving any kind of protection under 17 U.S.C. § 101.¹² Other examples of things that are also generally barred from receiving any kind of protection because they are useful articles are generic shovels,¹³ street lights,¹⁴ objects that “begin as three-dimensional designs” such as measuring spoons shaped like heart-tipped arrows, candleholders shaped like sailboats, or wire spokes on a wheel cover.¹⁵ The one exception to this bar from protection is that if there are pictorial, graphic, or sculptural features of the useful article that “can be identified separately from and are capable of existing independently of, the utilitarian aspects of the article,” then those separately identifiable features can be eligible for copyright protection.¹⁶

The Supreme Court of the United States applied the useful article doctrine to clothing for the first time in 2017 in *Star Athletica, L.L.C. v. Varsity Brands, Inc.*¹⁷ This case dealt with two-dimensional designs that appeared on the surface of cheerleading uniforms and whether those designs could be imagined separately from the useful article into which they were incorporated.¹⁸ The Court decided here that these two-dimensional designs could be imagined separately from the cheerleading uniforms on which they were attached and were eligible for copyright protection.¹⁹ Notably, however, the Court seemingly assumed—and never ex-

12. *Id.* § 101 (defining “useful article” as “an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information”); *Chosun Int’l v. Chrisha Creations, Ltd.*, 413 F.3d 324, 328 (2d Cir. 2005) (explaining that useful articles as a whole are ineligible for copyright protection); *Whimsicality, Inc. v. Rubie’s Costumes Co.*, 721 F. Supp. 1566, 1572 (E.D.N.Y. 1989) (“[A] garden variety article of wearing apparel is intrinsically utilitarian and therefore a noncopyrightable useful article. Equally noncopyrightable are the elaborate designs of the high fashion industry, no matter how admired or aesthetically pleasing they may be.”).

13. *Star Athletica*, 137 S. Ct. at 1013 n.2.

14. *See Esquire, Inc. v. Ringer*, 591 F.2d 796 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 908 (1979).

15. *Star Athletica*, 137 S. Ct. at 1032 (Breyer, J., dissenting) (first citing *Bonazoli v. R.S.V.P. Int’l, Inc.*, 353 F. Supp. 2d 218, 226–27 (D.R.I. 2005); then citing *Design Ideas, Ltd. v. Yankee Candle Co.*, 889 F. Supp. 2d 1119, 1128 (C.D. Ill. 2012); and then citing *Norris Industries, Inc. v. Int’l Tel. & Tel. Corp.*, 696 F.2d 918, 922–24 (11th Cir. 1983)).

16. 17 U.S.C. § 101 (2012) (defining “pictorial, graphic, and sculptural works”); *see also Star Athletica*, 137 S. Ct. at 1006; *Chosun Int’l*, 413 F.3d at 328.

17. 137 S. Ct. at 1002.

18. *Id.* at 1007.

19. *Id.* at 1011–13. *But see id.* at 1012 n.1 (discussing that while the surface decorations could be imagined as separate from the uniform enough to be eligible for copyright protection, they might not be sufficiently original to qualify for copyright protection).

plicitly held—that cheerleading uniforms were useful articles, merely stating that there was “utilitarian function [to] the uniform.”²⁰ Prior to and since *Star Athletica*, courts continue to label clothing as inherently utilitarian and therefore not copyrightable.²¹ Only those parts of clothing that are separable from the utilitarian function of the article of clothing can possibly be eligible for copyright protection.²²

Congress has considered legislation to protect fashion designs several times throughout the last fifty years, even explicitly when considering the 1976 Act itself.²³ Prior to Congress passing the 1976 Act, the original legislation contained a second title that would have acted as a sui generis design-protection clause for original designs of useful articles, providing up to ten years of protection for useful articles that were not “staple or commonplace.”²⁴ This title would have provided protections for useful articles such as fashion designs that were more original and creative. This title also likely would have covered the more unique and useful articles that are not copyrightable under the Supreme Court’s separability test from *Star Athletica*, like the heart-shaped measuring spoons, the candleholder shaped like a boat, or the wire on the wheel covers.²⁵ Without this title, no useful arti-

20. *Id.* at 1008 (citations omitted).

21. *See* Fashion Originators Guild v. FTC, 114 F.2d 80, 83–84 (2d Cir. 1940); Diamond Collection, L.L.C. v. Underwraps Costume Corp., No. 17-cv-0061, 2019 U.S. Dist. LEXIS 11737, at *9–10 (E.D.N.Y. Jan. 22, 2019) (collecting cases); Express, L.L.C. v. Fetish Group, Inc., 424 F. Supp. 2d 1211, 1224 (C.D. Cal. 2006); Chosun Int’l, Inc. v. Chrisha Creations, Ltd., No. 02-cv-7918, 2004 U.S. Dist. LEXIS 9403, at *4–6 (S.D.N.Y. Mar. 22, 2004) (collecting sources).

22. *See* Express, 424 F. Supp. 2d at 1224 (holding that the lace and embroidery on a tunic were copyrightable because they were “totally irrelevant to the utilitarian functions of the tunic.”); *see also* *Star Athletica*, 137 S. Ct. at 1007 (holding that designs incorporated onto a useful article are eligible for copyright protection only if two requirements are met: that the design “(1) can be perceived as a two- or three-dimensional work of art separate from the useful article and (2) would qualify as a protectable pictorial, graphic, or sculptural work—either on its own or fixed in some other tangible medium of expression—if it were imagined separately from the useful article into which it is incorporated”).

23. *See* Rocky Schmidt, *Designer Law: Fashioning a Remedy for Design Piracy*, 30 UCLA L. REV. 861, 865 n.30 (1983) (collecting seventy-three pieces of legislation introduced in Congress from 1914 to 1983 on the topic of fashion design protection, none of which ever became law); *see also* Innovative Design Protection Act of 2012, S. 3523, 112th Cong. (2012); Design Piracy Act, H.R. 2196, 111th Cong. (2009); Design Piracy Prohibition Act, S. 1957, 110th Cong. (2007); H.R. 5055, 109th Cong. (2006).

24. S. 22, 94th Cong. (1975), reprinted in S. REP. NO. 94-473, at 39–40 (1975); *see also* Katelyn N. Andrews, *The Most Fascinating Kind of Art: Fashion Design Protection as a Moral Right*, 2 N.Y.U. J. INTEL. PROP. & ENT. L. 188, 189–90, 189 n.2 (2012).

25. *See supra* notes 13–15 and accompanying text.

cles are copyrightable whatsoever—including fashion designs. This title was struck just before the 1976 Act was passed, with little to no explanation why.²⁶

B. *Economic Rights Versus Moral Rights in Copyright*

In the 1980s, the United States became a party to the Berne Convention for the Protection of Literary and Artistic Works (“Berne Convention” or “Convention”). The Berne Convention differed from the 1976 Act in several ways, including automatic copyright protection, international protection for a work originating in a member state, and protection independent of that provided by the originating member state.²⁷ Most notable (at least for the purposes of this Comment) is a concept enshrined in the Berne Convention known as an author’s “moral right” to protection. Moral rights in copyright are thought of as the rights of authors generally to preserve the integrity and dignity of their works—specifically, to prevent distortion of their work, to be recognized as the author, to control the work’s publication, and to withdraw a work after publication.²⁸ The Convention itself defines the moral rights that it protects as “the right to claim authorship of the work and the right to object to any mutilation, deformation or other modification of, or other derogatory action in relation to, the work that would be prejudicial to the author’s honor or reputation.”²⁹ This protection of moral rights in copyright seems heavily reliant on general European copyright doctrine, which recognizes literary and artistic works as “inalienable extensions of the author’s personality.”³⁰ When the United States became a party to the Convention, U.S. copyright law had yet to recognize moral

26. *Berne Notification No. 121*, WORLD INTELL. PROP. ORG., https://www.wipo.int/treaties/en/notifications/berne/treaty_berne_121.html [<https://perma.cc/7G8S-P59K>]. Compare S. 22, 94th Cong. (1975), reprinted in S. REP. NO. 94-473, at 39–40 (1975), with H.R. REP. NO. 94-1476, at 50 (1976).

27. *Summary of the Berne Convention for the Protection of Literary and Artistic Works (1986)*, WORLD INTELL. PROP. ORG. [hereinafter *Berne Convention*], https://www.wipo.int/treaties/en/ip/berne/summary_berne.html [<https://perma.cc/75CP-A4UY>].

28. 4 PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 17.23, at 17:200 (3d ed. Supp. 2019).

29. *Berne Convention*, *supra* note 27.

30. Neil Netanel, *Alienability Restrictions and the Enhancement of Author Autonomy in United States and Continental Copyright Law*, 12 CARDOZO ARTS & ENT. L.J. 1, 2 (1994) (discussing generally copyright as the quintessential property metaphor of a bundle of sticks, largely based on a desire to protect an author’s personal interest in protecting, designing, and presenting his work); see also *infra* notes 123–33 and accompanying text.

rights at all, despite Congress's claim that moral rights were already sufficiently protected by U.S. law to ensure the U.S. abided by the Convention.³¹

Prior to joining the Convention, the United States's copyright regime only recognized an author's *economic* rights in his or her designs.³² In response to criticism that even after joining the Berne Convention the United States did not provide sufficient moral rights protection to authors, two congressmen introduced two moral-rights-centered bills in 1989 and 1990.³³ In 1990, Congress passed the Visual Artists Rights Act ("VARA").³⁴ VARA set up protections similar to those of the Berne Convention, giving artists the right "to prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor," as well as the right "to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right," and the right to "prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right."³⁵

At first glance, VARA clearly seems to embody the moral rights prongs of the Berne Convention, but VARA only applies to those works that are a "work of visual art" under 17 U.S.C. § 101.³⁶ Under this statute, a work of visual art is

a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or a still photographic image pro-

31. See Edward J. Damich, *The Visual Artists Rights Act of 1990: Toward a Federal System of Moral Rights Protection for Visual Artists*, 39 CATH. U. L. REV. 945, 945-46 & n.3 (1990) (citing H.R. REP. NO. 100-609, at 38 (1988)).

32. See *id.* at 939 (comparing economic rights to an owner's right to control a "good in commerce").

33. See S. 1198, 101st Cong., 135 CONG. REC. S6811-13 (daily ed. June 16, 1989); H.R. 2690, 101st Cong., 136 CONG. REC. H3111-16 (daily ed. June 5, 1990).

34. Visual Artists Rights Act of 1990, Pub. L. No. 101-650, 104 Stat. 5128, 5133 (codified at 17 U.S.C. §§ 101, 106A, 107, 113, 301, 411, 412, 501, 506).

35. 17 U.S.C. § 106A(a)(2)-(3) (2012).

36. *Id.* § 106A(a)(1) (2012).

duced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.³⁷

The definition of a work of visual art continues, explicitly excluding any part of posters, maps, globes, technical drawings, diagrams, models, applied arts, motion pictures or other audiovisual works, books, magazines, newspapers, periodicals, databases, electronic information services, electronic publications and the like, as well as merchandising items, advertisements, trade dress, works made for hire, and all other works excluded from copyright protections elsewhere in Title 17.³⁸ In sum, it would seem that Congress wants to protect only the moral rights of authors who create a specific type of fine art, providing moral rights protection to no other creations.³⁹ Nothing explains why Congress was so intent on protecting only these limited categories of works, and one cannot help but wonder why moral rights protection is not extended to any other kind of creation.

VARA is relevant to the issue of fashion designs being excluded from copyright protection because the arguments surrounding why fashion designs ought to be protected in copyright are identical to the basis for protection in VARA. Basic copyright rights (outside of VARA) extend only to reproducing the work, preparing derivative works, distributing copies, public performance, and public display.⁴⁰ While the VARA rights are most similar to preparing derivative works, VARA and the moral rights theories enshrined in the Berne Convention take the concept of protecting derivative works to a higher level.⁴¹ In the context of fashion designs, given the concept of trends and designers using similar styles based on trend or season, moral rights like those in VARA and the Berne Convention provide a clearer standard to protect against misappropriation and illegal copying than the broader right to prepare a derivative work currently does. Later, this Comment will discuss whether the best form of protection for fashion designs would be to include them under VARA,⁴² or to

37. *Id.* § 101 (2012).

38. *Id.*

39. *Id.*

40. *Id.* § 106 (2012).

41. Compare 17 U.S.C. § 106 (2012), with § 106A(a), and *Berne Convention*, *supra* note 27.

42. See *infra* Section III.C.

adopt a standard similar to that initially proposed in the 1976 Act, as previously discussed.⁴³

C. *Lack of Alternative, Viable Legal Protections*

Not only does copyright law in the United States generally fail to protect fashion designs, the other two main categories of intellectual property law also fail to bring any protection to fashion. Trademark law, as a general rule, tends to serve only those designers with distinctive logos, which trademark law requires.⁴⁴ Design patents, too, serve only a very specific subset of designers—those who look to secure protection for “new, original and ornamental design[s]” for their “article[s] of manufacture.”⁴⁵

Trademark law protects those source-identifying marks that are distinctive and are being used in commerce.⁴⁶ Trademark law in fashion helps designers communicate to consumers that they are the source of a particular product or type of product.⁴⁷ Thus, trademark laws would only help designers police those who might be trying to pass off products as the original designer’s, when the product would in fact be coming from a different source. While some argue that trademark law provides sufficient protection to brands and fashion innovation,⁴⁸ trademarks effectively protect only those well-known designers or those with sufficiently unique designs that allow them to be instantly recognizable.⁴⁹ Furthermore, trademark law protects only the source-identifying mark within a design—not the design itself. Even if a designer wanted to use trademark law to protect a design, the functionality doc-

43. See *supra* notes 23–26 and accompanying text.

44. See 15 U.S.C. § 1052(e)–(f) (2012) (discussing that descriptive marks are not eligible for trademark protection and that distinctive marks are eligible for trademark protection); *Zatarains, Inc. v. Oak Grove Smokehouse, Inc.*, 698 F.2d 786, 790–91 (5th Cir. 1983) (discussing the four classifications of potential trademarks and the inherent rights of each).

45. 35 U.S.C. § 171 (2012).

46. 15 U.S.C. § 1127 (2012); *Zatarains, Inc.*, 698 F.2d at 790–91 (discussing the four classifications of potential trademarks and the inherent rights of each).

47. Cf. *Coca-Cola Co. v. Koke Co.*, 254 U.S. 143, 146 (1920).

48. See generally Dayoung Chung, *Law, Brands, and Innovation: How Trademark Law Helps To Create Fashion Innovation*, 17 J. MARSHALL REV. INTELL. PROP. L. 493 (2018).

49. See *supra* note 46.

trine would block protection in order to keep basic, staple designs in the public domain for the sake of competition.⁵⁰

Design patents are another avenue of intellectual property protection that a designer *could* apply for, which provide fifteen years of protection to “any new, original and ornamental design for an article of manufacture.”⁵¹ The problem with design patents for fashion designers comes from the fact that “clothing rarely meets the criteria of patentability.”⁵² Fashion designs rarely possess the necessary novelty requirement, since so many designs are often combinations of or fresh takes on existing designs.⁵³ Along the same lines, many designs would also fail the nonobviousness requirement for patentable subject matter. Many designs, as fresh takes on existing designs, would be obvious as a whole to a person having ordinary skill in fashion design.⁵⁴ Also, similar to the useful article doctrine in copyright, if the design of the item is “essential to the use of the article,” the item is ineligible for design patent protection.⁵⁵ A design patent, then, can only be issued to protect the ornamental, nonfunctional aspects of a design.⁵⁶ Thus, a design patent fails fashion designers in very much the same way that copyrights do.⁵⁷ But copyright law has the ability to adapt the standards necessary to protect fashion designers—as evidenced by the Berne Convention, by the European Union’s recognition of moral rights, and the United States’s minimal and mediocre protections under VARA.

50. Chung, *supra* note 48, at 494.

51. 35 U.S.C. §§ 171, 173 (2018).

52. *A Bill To Provide Protection for Fashion Design: Hearing on H.R. 5055 Before the Subcomm. on Courts, the Internet, and Intellectual Prop. of the H. Comm. on the Judiciary*, 109th Cong. 4 (2006) (statement of Rep. Bob Goodlatte).

53. Chung, *supra* note 48, at 494.

54. *See id.* at 493–94; *see also* 35 U.S.C. § 103 (2012) (requiring “non-obviousness” for patentability—that “the differences between the claimed invention and the prior art [not be] obvious . . . to a person having ordinary skill in the art to which the claimed invention pertains”).

55. 69 C.J.S. Patents § 112 (2019).

56. *Id.* § 113.

57. *Compare* 69 C.J.S. Patents §§ 112–13 (2019), *with supra* notes 12–26 and accompanying text.

D. *A Stolen Bikini: A Case Study in the Repercussions of Copyright's Lack of Protection for Fashion Designs*

The lack of copyright protections for fashion designs has very real effects on people who are harmed when someone else copies their designs. This Comment will examine a currently pending case in the United States District Court for the Southern District of New York, brought by Brazilian beach vendor Maria Solange Ferrarini against Kiini, L.L.C. (“Kiini”), and its owner, Ipek Irgit.⁵⁸ Ferrarini lives in Trancoso, Brazil, where she has sold her handmade, crocheted bikinis on the local beaches to tourists since 1998.⁵⁹ Irgit is a New York City resident who founded a bikini boutique named Kiini in 2013, after visiting Trancoso and buying a handmade bikini from Ferrarini on the beach.⁶⁰ Ferrarini’s initial complaint contains notes, emails, screenshots, and photographs obtained from Irgit and Kiini.⁶¹ One such email in particular that Irgit wrote to a Chinese manufacturer included photographs of a crocheted bikini that she wanted the manufacturer to make samples of and use to generate pricing for mass manufacture.⁶² In her complaint, Ferrarini included a closeup of the waistband of the bikini bottom in one of the photos that was attached to the email, where one can read, through some of the crocheting, “Trancoso, B.A.,” Ferrarini’s signature, and her phone number.⁶³ The remainder of Ferrarini’s complaint alleges that Irgit registered a “knockoff” bikini with the United States Copyright Office as “artwork,”⁶⁴ and that Irgit assigned this copyright to Kiini in 2015.⁶⁵

On its face, the complaint alleges that Kiini (through Irgit) committed extensive copying of Ferrarini’s bikini design, although the complaint only scratches the surface of all the facts

58. First Amended Complaint at 1, 3–4, *Ferrarini v. Irgit*, No. 1:19-cv-00096 (S.D.N.Y., Apr. 17, 2019) (transferred from C.D. Calif., No. 2:18-cv-05250, Jan 4, 2019) (complaint retained original filing date of June 13, 2018, upon transfer) [hereinafter Ferrarini Complaint].

59. *Id.* at 1.

60. *Id.* at 1–2, 5.

61. *See generally id.* at 2–6, 9.

62. *Id.* at 3–4.

63. *Id.* at 5.

64. *Id.* at 6. This Comment takes no position on whether Irgit’s (and later Ferrarini’s) ability to register a bikini as artwork signals a shift in the Copyright Office’s definition of a work of visual art as later discussed in relation to VARA.

65. *Id.*

that exist in this case. An investigative piece published in *The New York Times* in December 2018 revealed that Irgit, after returning home from this trip to Brazil, contacted a friend and told her explicitly, “I need to figure out how to copy [this bikini].”⁶⁶ So, it would seem that Irgit did intentionally copy the Ferrarini bikini—but that is not all. In the first two years of selling her “Kiinis,” Irgit’s sales brought in approximately nine million dollars.⁶⁷ Armed with a newfound financial power and popularity on social media, Irgit sued a number of companies for copying the very design she stole from Ferrarini—companies including Victoria’s Secret and Neiman Marcus.⁶⁸ In each suit, Irgit claimed that she, the “original, individual, sole author” created, through her “original and creative talents,” an “original, distinct, copyright-protected design” in this bikini that these companies copied.⁶⁹

Despite Irgit’s representation to the copyright office and to the federal courts that her bikini was her own original design, the evidence contained in Ferrarini’s complaints and *The New York Times* article tells a strikingly different story. Instead of supporting Irgit’s story of originality, the evidence instead clearly shows proof of copying: first, Irgit’s email to the Chinese manufacturer with the photos of a bikini that Ferrarini clearly made; second, testimony from the witnesses Irgit asked to “copy” the Ferrarini bikini and to whom Irgit admitted that the bikini was bought in Brazil; and third, statements from Irgit herself, who admitted to a reporter for *The New York Times* that she had travelled to Brazil in 2012.⁷⁰ Initially, Ferrarini’s complaint claimed only that Irgit and Kiini had violated California’s fair business practice

66. Katherine Rosman, *The Itsy-Bitsy, Teenie-Weenie, Very Litigious Bikini*, N.Y. TIMES (Dec. 20, 2018), <https://www.nytimes.com/2018/12/20/business/kiini-bikini-lawsuit-ipek-irgit-solange-ferrarini.html> [<https://perma.cc/86F9-KBKY>].

67. *Id.*

68. *See id.*; *see also* First Amended Complaint at 1–2, Kiini, L.L.C. v. Neiman Marcus Group, L.L.C., No. 1:18-cv-03778 (S.D.N.Y. May 22, 2018) [hereinafter Neiman Complaint]; First Amended Complaint at 1, Kiini, L.L.C. v. Victoria’s Secret Stores Brand Mgmt., Inc., No 2:15-cv-8433 (C.D. Cal. Feb. 29, 2016) [hereinafter Victoria’s Secret Complaint]. By March 2017, Kiini and Victoria’s Secret had agreed to a confidential settlement. Rosman, *supra* note 66 (citing Ariel Givner, *Kiini, Victoria’s Secret Settle Swimsuit Infringement Lawsuit*, FASHION L. (Mar. 29, 2017)). Kiini voluntarily dropped its suit against Neiman Marcus and the other defendants in that suit shortly after the Ferrarini suit was filed. *Id.*

69. Neiman Complaint, *supra* note 68, at 9; Victoria’s Secret Complaint, *supra* note 68, at 2, 7.

70. *See* Rosman, *supra* note 66.

code.⁷¹ In late April 2019, however, Ferrarini filed an amended complaint with leave from the court, alleging new counts of copyright infringement, conversion, and intentional interference with prospective economic advantage.⁷² The amended complaint revealed that Ferrarini applied for copyright registration in the United States on June 23, 2018, about ten days after filing the initial lawsuit against Irgit in California.⁷³ At first, her registration application was denied because it was so similar to Irgit's own copyright, but on appeal, after presenting evidence to the Copyright Office, Ferrarini was granted a copyright, but only to the "artwork" in her bikini.⁷⁴

Even with this level of copying not only the "trade dress" or artistic details of the bikini but also the basic utilitarian aspects of the bikini, Ferrarini lacks the ability to register her bikini at the Copyright Office specifically as a fashion design and can only sue for copyright infringement on the basis of the "artwork" because United States copyright law refuses to recognize nearly any clothing or fashion designs as fully copyrightable subject matter. Registration as artwork is certainly better than no copyright at all, but, looking at the new complaint, Maria Solange Ferrarini is only able to sue for protection of her bikini *as a bikini* with causes of action for unfair and fraudulent business practices, conversion, and interference with prospective economic advantage.⁷⁵ While these causes of action surely will allow Ferrarini to collect some damages for Irgit's acts, protection as a fashion design in copyright ensures more than simply keeping people honest—it allows an author to establish clear and public ownership,⁷⁶ to control who profits from their work,⁷⁷ and to control how their work is updated or changed in the future.⁷⁸

71. See Ferrarini Complaint, *supra* note 58, at 10.

72. Ferrarini Complaint, *supra* note 58, at 14–17, 19–21.

73. *Id.* at 4.

74. *Id.* at 4, Exhibit C.

75. *Id.* at 17–21.

76. Clear and public ownership is established the moment a copyright is registered with the Copyright Office. See, e.g., *Fourth Estate Pub. Benefit Corp. v. Wall-Street.com, L.L.C.*, 139 S. Ct. 881, 886–87 (2019).

77. Controlling who makes money from one's own work is established through licensing and assignment—rights not necessarily available to noncopyrightable works. See, e.g., 17 U.S.C. § 116 (2018).

78. Controlling how one's work is changed in the future is handled through the code sections that give authors rights to derivative works. See § 106(2).

Absent congressional expansion of (or Ferrarini convincing the court to expand) copyright protections for fashion designs as fashion designs (and not, for example, as “artwork”), Ferrarini is only able to sue the infringer (Irgit) under unfair or fraudulent business practice statutes.⁷⁹ Surely, even to someone who might not know anything about copyright, Ferrarini’s inability to register her bikini as a fashion design, receive a copyright for her bikini *as a bikini*, and then protect it with a lawsuit based in copyright should feel wrong. Regardless of the potential success of a suit (due to issues regarding the statute of limitations or any other problems that may arise), granting protection to fashion designers for their creations in the first place would serve the purposes and goals of intellectual property protection and create incentives for larger distributors and designers to partner with designers with smaller reach and influence in such a way that distributors would gain legal access to innovative and creative designs while simultaneously giving smaller designers a larger platform with which to become known.⁸⁰

79. Under no circumstances does this suggest that, should copyright protection be expanded to cover fashion (and specifically a bikini such as Ferrarini’s) Ferrarini would have a successful copyright case for fashion design infringement against Irgit. For one, Ferrarini may have a statute of limitations problem. *See* § 507(b) (2018) (“No civil action shall be maintained under the provisions of this title unless it is commenced within three years after the claim accrued.”); *see also* Defendant’s Memorandum of Law in Support of Motion to Dismiss at 1–6, *Ferrarini v. Irgit*, No. 1:19-cv-00096 (S.D.N.Y., Apr. 30, 2019) [hereinafter Motion to Dismiss]. Courts are divided as to what would toll the statute of limitations—would Irgit’s continued selling of infringing bikinis count, or would the statute have tolled back during the Victoria’s Secret case when rumors of a Brazilian beach vendor who was the real mastermind behind this design originated? *See* Rosman, *supra* note 66 (discussing how Ferrarini’s current attorney heard rumors of her existence from lawyers working on the Victoria’s Secret case brought by Irgit); *Shop by Style*, KIINI, <https://kiini.com/pages/shop-by-style> (showing bikinis under “Bikini Top” and “Bikini Bottom” identical to the pieces at issue in the Ferrarini case) [<https://perma.cc/T45M-M53E>]; *see also* *Kwan v. Schlein*, 634 F.3d 224, 227–29 (2d Cir. 2011) (holding that plaintiff’s suit was time-barred, as evidence showed she had actual knowledge of infringement for nearly ten years before filing suit); *Warren Feedenfeld Assocs. v. McTigue*, 531 F.3d 38, 44 (1st Cir. 2008) (discussing that the statute of limitations accrues when a plaintiff has actual knowledge of infringement, or when a reasonable person in the plaintiff’s shoes would have discovered the infringement); *Monsanto Co. v. Mycogen Plant Sci., Inc.*, 261 F.3d 1356, 1367 (Fed. Cir. 2001) (“[D]etermining whether a party was diligent during a critical period can . . . be complex.”). *But see* *Petrella v. MGM*, 572 U.S. 663, 672 (2014) (“[W]hen a defendant has engaged (or is alleged to have engaged) in a series of discrete infringing acts, the copyright holder’s suit ordinarily will be timely under § 507(b) with respect to more recent acts of infringement.”).

80. *See infra* Section III.A.

II. WHY FERRARINI'S BIKINI SHOULD BE PROTECTED UNDER COPYRIGHT LAW, AND WHY FASHION IN GENERAL SHOULD BE PROTECTED

As with many other categories of protected works, fashion designs need protection to ensure originality and authenticity, and to protect designers (and even cultures and indigenous peoples) from the misappropriation of their works. There is a fine line between being inspired by a design and copying a design, and designers should be able to receive compensation when someone misappropriates their works. But, even as the United States fashion and design industry has boomed in the last century, copyright protections have failed to grow even remotely as extensively.⁸¹

As explained previously, the current practice in copyright law is that fashion designs usually fall under the umbrella of useful articles and therefore receive no protection.⁸² But installing protections for fashion designs is not actually new for the fashion industry. In the 1930s, American designers formed the Fashion Originators' Guild of America (the "Guild"), an organization dedicated to holding designers accountable for copied designs and policing any copying that might occur.⁸³ Participant-members of the Guild were required to sign a "declaration of cooperation" upon joining in which they promised not to have any dealings with garments copied from American designers.⁸⁴ In a few short years, over 60% of women's garments sold in the United States for more than \$10.75 and nearly 40% of women's garments sold for \$6.75 were sold by Guild participants.⁸⁵ Eventually, internal conflicts led to one participant suing the Guild for restraint of trade, and, although the Guild prevailed in the suit, the Federal Trade Commission ("FTC") took notice of the activities and ordered the Guild to disband after likening the Guild's system to an illegal cartel.⁸⁶ In 1941, the Supreme Court upheld the FTC's decision, and the Guild promptly went out of business.⁸⁷ Since then, Con-

81. See KAL RAUSTIALA & CHRISTOPHER SPRIGMAN, *THE KNOCKOFF ECONOMY* 34 (2012).

82. See *supra* Section I.A.

83. RAUSTIALA & SPRIGMAN, *supra* note 81, at 31.

84. See *id.*

85. *Id.*; *Dress War*, 27 *TIME* 88, 88–90 (Mar. 23, 1936).

86. RAUSTIALA & SPRIGMAN, *supra* note 81, at 33; *Dress War*, *supra* note 85.

87. *Fashion Originators' Guild, Inc. v. FTC*, 312 U.S. 457, 468 (1941); RAUSTIALA & SPRIGMAN, *supra* note 81, at 33.

gress has not passed any legislation to extend fashion copyright protections, and no organizations in the same realm as the Guild have cropped up to act as the protector of fashion designs.

A. *Does the Fashion Industry Even Want (or Need) Protection?*

Perhaps one of the most perplexing issues regarding copyright protection for fashion designs is that, in the eyes of many who work in the industry, fashion does not need protection and in fact thrives because of rampant copying.⁸⁸ But such analyses tend to focus on established fashion designers and fast fashion knockoffs, not on less-established designers such as the Brazilian beach vendor, whose design was stolen and made the infringer millions.

Regardless of whether the biggest names in fashion think fashion designs need protection, there is something fundamentally counterintuitive about the fact that a designer—*any* designer—can create the most exquisite, one-of-a-kind gown, but never receive legal copyright protection for it. But the paparazzo who catches a photograph of a celebrity wearing that same gown to an awards show automatically has full copyright protection over that photograph—so much so that the designer of the gown could not even share the post to an Instagram page without being sued for copyright infringement.⁸⁹

To a small degree, the fashion industry is self-policing. While the days of the Fashion Originators' Guild are surely over, other means and methods, especially with the popularity of social media, provide platforms for designers, consumers, and advocates to call attention to potential infringement or unfair copying. One such "industry watchdog," an Instagram account titled "Diet Prada," is becoming widely known for "regularly nam[ing] and sham[ing] brands, designers and others for fashion copycatting,

88. Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687, 1722 (2006) ("[P]iracy paradoxically benefits designers by inducing more rapid turnover and additional sales."); see also *id.* at 1727 ("Our core claim is that piracy is paradoxically beneficial for the fashion industry, or at least piracy is not very harmful.")

89. See Kelly-Leigh Cooper, *Why Celebrities Are Being Sued over Images of Themselves*, BBC NEWS (Feb. 6, 2019), <https://www.bbc.com/news/world-us-canada-47128788> [<https://perma.cc/PY6Q-AMKR>]; *Lawsuits over Paparazzi Images on Instagram Raise Celebrity Questions over Right of Publicity*, FASHION L. (Oct. 19, 2018), <http://www.thefashionaw.com/home/lawsuits-over-instagram-images-raise-celebrity-questions-over-right-of-publicity> [<https://perma.cc/6UA6-A3WR>].

similarities in design,” and even racism.⁹⁰ After four years of operation, Diet Prada and the masterminds behind the account, Tony Liu and Lindsey Schuyler, now have designers “watching their backs” and publicize when fashion giants rip off small, indie designers as well.⁹¹ While such a role in the fashion industry does not come without making a few enemies, the account succeeds in reminding designers and fashion houses that the eyes of the world are on them.⁹² Besides drawing attention to the occasional copycat, Diet Prada was also praised after calling out Dolce & Gabbana for a racially bigoted ad and subsequent racist messages from its founder.⁹³ One fashion blogger in particular credits Diet Prada for designers now watching themselves: “no one ever really called [them] out before.”⁹⁴ But the question remains: why should fashion bloggers be responsible for policing the entire fashion industry when the laws themselves could easily provide the requisite protection?

B. *Who Should We Listen to on the Issue of Needing Protection?*

Certain individuals in the fashion industry have argued that fashion designs do not need intellectual property protections; rather, they argue that the fashion industry thrives because of the pervasiveness of copying, in direct contradiction to the idea that more protections mean more productivity.⁹⁵ Ralph Lauren himself, when interviewing with Oprah Winfrey, said that the secret to his design success for forty-five years is “copying.”⁹⁶ While many present seemed to believe Lauren was joking, commentators could not help but note that the quip itself is probably at least partially true—especially since most know that knockoffs are (and have been) such a pervasive part of the fashion industry.⁹⁷

90. Jonah Engel Bromwich, *We're All Drinking Diet Prada Now*, N.Y. TIMES (Mar. 14, 2019), <https://www.nytimes.com/2019/03/14/fashion/diet-prada.html> [<https://perma.cc/9Y76-GD4J>].

91. *Id.*

92. *See id.*

93. *See id.*

94. *Id.* (quoting fashion blogger Bryan Grey Yambao).

95. *See* RAUSTIALA & SPRIGMAN, *supra* note 81, at 3–8.

96. Eric Wilson, *O and RL: Monograms Meet*, N.Y. TIMES (Oct. 25, 2011), <https://www.nytimes.com/2011/10/27/fashion/oprah-winfrey-interviews-ralph-lauren.html> [<https://perma.cc/U5GP-4W3R>].

97. *See* RAUSTIALA & SPRIGMAN, *supra* note 81, at 19.

Knockoffs are certainly pervasive in the fashion industry. Most recently, reality television star Kim Kardashian has been embroiled in legal and social media battles with “fast fashion” brand Missguided.⁹⁸ The fast fashion industry, led by brands such as Missguided and Fashion Nova, focuses on the quick turn-around of knockoffs of looks that popular celebrities wear.⁹⁹ In the current legal battle with Missguided, Kardashian sued after the brand posted a photo on Instagram, showing a Kardashian look-alike model wearing a metallic cut out dress that was a dead ringer of a custom Yeezy dress that Kardashian had posted a photo of herself wearing on Instagram.¹⁰⁰ Many celebrities, like Kardashian, are vocal about their disdain for brands like Missguided and Fashion Nova, who manufacture knockoff designer clothes at a low cost, then turn around and profit on the “celebrity” of those designs.¹⁰¹ Notably, however, other designers are less vocal about any ill will they may hold against the fast fashion industry.

Many designers acknowledge the knockoff fashion industry, but simply roll their eyes and do not care. To them, the consumers purchasing clothes from the fast fashion brands probably cannot afford the original, high-end designs that they are creating in the first place.¹⁰² Thus, these knockoffs do nothing to their business except perhaps bring more publicity and exposure to their original designs (for those consumers who can actually afford them). One author gives an example of a consumer who sees a Chanel bag for in a store in New York City, but sees that it is outside her price range—later that day, the consumer walks the street, and sees a knockoff version of that bag for under \$40, so

98. See *Kim Kardashian Is Suing Missguided, Cites Right of Publicity Violations, Trademark Infringement*, FASHION L. (Feb. 20, 2019) [hereinafter *Suing Missguided*], <http://www.thefashionlaw.com/home/kim-kardashian-is-suing-missguided-cites-right-of-publicity-violations> [<https://perma.cc/6KSZ-LY96>].

99. See *Kim K and the Copycats: Fast Fashion at Its Quickest or a Marketing Ploy in Disguise?*, FASHION L. (Feb. 11, 2019) [hereinafter *Kim K and the Copycats*], <http://www.thefashionlaw.com/home/kim-k-and-missguided-fast-fashion-at-its-quickest-or-a-marketing-ploy-in-disguise> [<https://perma.cc/QHB7-9Q4N>] (discussing the rise of fast fashion and certain brands’ propensities for copying the Kardashian sisters).

100. *Suing Missguided*, *supra* note 98.

101. *Id.*; *Kim K and the Copycats*, *supra* note 99.

102. See Johanna Blakley, *Lessons from Fashion’s Free Culture*, TED TALK (Apr. 13, 2010), https://www.ted.com/talks/johanna_blakley_lessons_from_fashion_s_free_culture (showing a video of a Tom Ford interview where he discusses research conducted by Gucci and other established designers where they concluded that the “counterfeit customer was not [their] customer”) [<https://perma.cc/DNK8-7RKG>].

she buys the knockoff version.¹⁰³ Did the knockoff salesperson steal a customer from Chanel? Not at all, because she was never a customer of Chanel in the first place. Did Chanel lose anything because that consumer purchased the bag from the street vendor and not Chanel? Also no, because Chanel never had anything from that consumer to begin with. In the long run, if a knockoff of a Chanel design becomes so commonplace as to completely rob the design of value to the Chanel customer, even this will not hurt Chanel because Chanel has the resources and manpower to churn out a new design. This concept stands in complete contrast to a small designer like Ferrarini, whose livelihood depends on the sales of her one bikini: she, in contrast, would not have the same resources as Chanel to simply make a new product if the value of her original product decreases.

Since in the world of knockoff fashion designs made for cheap no one is actually stealing customers or profits from one another (at least when dealing with high-end designers), it may seem to some as though fashion does not, in fact, need any legal protections. But scholars have recognized that, while copying via cheap street knockoffs or comparable products does not hurt established brands, it is the less-established, up-and-coming designers who might be disproportionately harmed, even fatally, by illegal copying and unlicensed sales.¹⁰⁴ Laws do not exist merely to protect people who may actually be able to protect themselves—whether through pricing or through quality of materials. Instead, laws often reflect what is morally, ethically or socially correct—which often results in legislation protecting those who might not otherwise be able to protect themselves, especially in the realm of intellectual property law.

But then, the issue that remains unaddressed is the exact issue exemplified by the Ferrarini bikini case: a small designer, who makes her entire living selling bikinis on the beach to tourists, losing money because a designer with more connections and resources and the ability to market her product to a greater number of people (effectively going viral overnight) copied her design and

103. See Jeanne L. Schroeder, *Technology, Gender and Fashion*, 34 *CARDOZO ARTS & ENT. L.J.* 753, 805 (2016).

104. *Id.*; C. Scott Hemphill & Jeannie Suk, *The Law, Culture, and Economics of Fashion*, 61 *STAN. L. REV.* 1147, 1175–76 (2009) (arguing that sales of original designs from smaller designers for hundreds of dollars rather than thousands is still within reach of the copyists' customers and therefore does cause a loss to the original designer).

made millions of dollars as a result.¹⁰⁵ Meanwhile, for her trouble, Ferrarini has earned, to date, less than \$30,000.¹⁰⁶ But, under the copyright damages statute, Ferrarini could collect, as actual damages, all that Kiini has made since its founding—a number surely greater than ten million dollars.¹⁰⁷ Furthermore, given that this suit is now taking place in the Southern District of New York, Ferrarini may even be able to recover punitive damages for the copyright infringement, since some judges in the Southern District, at least in the early 2000s, started to allow copyright holders to seek punitive damages in a copyright claim.¹⁰⁸ Both the evidence Ferrarini would need to provide and the burden of proof she would bear with regard to punitive damages are unclear from the Southern District cases that have allowed punitive damages for copyright infringement.¹⁰⁹ The question that remains is whether Ferrarini could obtain any of the damages that Kiini received as part of its settlement with Victoria's Secret.¹¹⁰

Perhaps one of the reasons why so many fashion designers do not feel as though their industry requires additional copyright

105. See Rosman, *supra* note 66.

106. *Id.*

107. See 17 U.S.C. § 504(b) (2012) (allowing copyright owners to collect damages equal to “actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement [that] are not taken into account in computing the actual damages.”); see also Rosman, *supra* note 66 (noting that by 2015, Kiini had raked in upwards of nine million dollars—a number surely higher today, nearly four years later). This amount does not take into account the costs and attorneys’ fees that could also be awarded to Ferrarini under 17 U.S.C. § 505.

108. Compare *Stehrenberger v. R.J. Reynolds Tobacco Holdings, Inc.*, 335 F. Supp. 2d 466, 469 n.3 (S.D.N.Y. 2004) (refusing to dismiss a claim for punitive damages as a matter of law), *Blanch v. Koons*, 329 F. Supp. 2d 568, 569 (S.D.N.Y. 2004) (“[T]he determination whether punitive damages are available for copyright infringement cases must be made in a case where the issue is squarely presented: where the jury could find malice or willful infringement, and the plaintiff is not seeking (or is barred from obtaining) statutory damages.”), and *TVT Records v. Island Def Jam Music Group*, 262 F. Supp. 2d 185, 187 (S.D.N.Y. 2003) (holding that plaintiffs were able to seek punitive damages since for a claim of copyright infringement when defendants’ actions were willful), *with Oboler v. Goldin*, 714 F.2d 211, 213 (2d Cir. 1983) (“[P]unitive damages are not available under the Copyright Act.”), and *BanxCorp v. Costco Wholesale Corp.* 723 F. Supp. 2d 596, 620 (S.D.N.Y. 2010) (“Punitive damages cannot be recovered under the Copyright Act.”). The cases allowing punitive damages for copyright claims remain outliers, as the majority of circuit courts have held that punitive damages are not allowed under the Copyright Act. Regardless, given that this is somewhat the precedent in the Southern District, these are potential damages Ferrarini could recover if she were able to bring a copyright claim against Kiini and Irgit.

109. See *supra* note 108.

110. Givner, *supra* note 68 (discussing that Kiini and Victoria’s Secret had come to a settlement regarding Kiini’s lawsuit against the lingerie brand for copyright infringement).

protection is because, at least for the larger fashion houses, these are the designers who are in the best position to absorb any damages from infringing copies or knockoffs being made. Alternatively, the smaller designers—like the beach vendor in Brazil—are the people with little money, who may not have the resources to absorb illegal copies of their designs. In the long run, Ferrarini *has* received some money for Neiman Marcus’s and other department stores’ abilities to sell bathing suits based on her design.¹¹¹ But she has only made pennies to the dollar that Kiini has brought in since stealing Ferrarini’s bikini design.¹¹² As of late 2018, Kiini had brought in more than nine million dollars since its founding in 2014.¹¹³ Looking to the Kiini website, Kiini sells a variety of styles of swimsuits, including one-piece suits, one-shoulder tops, and bottoms in various styles, but the “bikini top” that is identical to Ferrarini’s boasts the most colors and options for buyers. Each style of suit is clearly based on the original Ferrarini design—with the same style of neon crocheting on every edge of the garment.¹¹⁴ To be clear, each of the other suit designs is still relevant to a potential copyright claim because each of the other designs would fall under a “derivative work,” the creation of which is yet another right protected under copyright.¹¹⁵ So, sales of all of the suit designs would count in calculating damages in a potential suit.

Instead of allowing copying of fashion designs to go unchecked on the word of those who can financially absorb any losses, public policy demands that copyright laws recognize that the smaller designers (like Ferrarini) are the ones who are more likely to be harmed without copyright protections since they cannot otherwise protect themselves.

111. See Rosman, *supra* note 66 (discussing the money that Ferrarini received from PilyQ, a sum of \$5100 in 2016, that has increased to around \$7700 for 2019).

112. *Id.* Kiini and Irgit have brought in more than nine million dollars since 2014 (likely well over ten million at this point), while Ferrarini has not earned even \$30,000 from various brands and stores in the United States by giving license to those brands and stores to sell suits similar to her design. *Id.*

113. *Id.*

114. *Shop by Style*, KIINI, <https://kiini.com/pages/shop-by-style> [<https://perma.cc/T45M-M53E>].

115. See 17 U.S.C. § 106 (2012).

III. CHANGING THE LAWS TO GIVE FASHION DESIGNS TIGHTER PROTECTIONS

The shortcomings of copyright protections for fashion designs in the United States are clear, and these shortcomings demand change. What remains to be seen is the best way to enshrine the necessary protections within the United States Code. The United States has an abysmal set of protections for moral rights and expanding these protections for moral rights would surely include protection for at least the most egregious copying in fashion designs. The only category the United States has protected with moral rights is works of visual art. At one time, U.S. copyright law looked to add protections for certain fashion designs in Title II of the 1976 Act, which Congress later scrapped for unknown reasons. Thus, any changes that were to align with these recognized deficiencies would serve to adequately protect those designs sufficiently artistic or original to warrant protection.

A. *A Focus on Moral Rights*

Moral rights in copyright are the rights of authors generally to preserve the integrity and dignity of their works—specifically, to prevent distortion of their work, to be recognized as the author, to control the work’s publication, and to withdraw a work after publication.¹¹⁶ Not all countries that aim to protect moral rights generally encompass all four of these rights.¹¹⁷ In the United States, the only works protected under some version of moral rights doctrine are works of visual art, according to 17 U.S.C. § 106A.¹¹⁸ Instead of expressly recognizing moral rights in copyright, a “patchwork of common law doctrine” alongside state and federal

116. GOLDSTEIN, *supra* note 28, at 17:200.

117. *Id.*

118. See § 106A. A “work of visual art” is defined as a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast, carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.

Id. § 101.

statutes provide minimal coverage to authors.¹¹⁹ Instead of having causes of action based in copyright law, often United States authors must rely on laws in the void between copyright and unfair competition laws—mainly contract, defamation, and unethical business practice laws.¹²⁰ By contrast, in European common law countries, moral rights of authors are at least as protected as an author's economic rights.¹²¹

The Berne Convention, to which the United States is a party, provides in relevant part:

Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.¹²²

Under the Berne Convention, moral rights last at least until the expiration of an author's economic rights.¹²³ A moral rights-based copyright protection focuses on four main rights of authors: (1) the right to claim appropriate credit for one's work, (2) the right to protect one's work against mutilation and destruction, (3) the right to control public disclosure, and (4) the right to withdraw a work after publication.¹²⁴

Legal scholars have long discussed the differences between the economic rights protected in countries like the United States and the moral rights protected by a variety of European countries, even theorizing that these differences are based in simple moral

119. GOLDSTEIN, *supra* note 28, at 17:203.

120. *Id.* Maria Solange Ferrarini is one such example of an author being forced to rely on a cause of action within such a void, initially filing her suit against Kiini and Irgit for a violation of California unfair business practices. *See generally* Ferrarini Complaint, *supra* note 58. Only in April 2019 did Ferrarini amend her complaint to include a copyright cause of action based on Ferrarini registering her bikini as artwork (like Irgit did). *See* Ferrarini Complaint, *supra* note 58, at 4. Ferrarini still has no inherent copyright protections in her bikini as a fashion design, however, which is the problem highlighted by this Comment.

121. *See generally* Berne Convention for the Protection of Literary and Artistic Works, art. 6bis(1), Sept. 9, 1886, 1161 U.N.T.S. 31 (as last revised in Paris on July 24, 1971, and amended Sept. 28, 1979).

122. *Id.*; *List of Berne Convention Signatories*, COPYRIGHT HOUSE, <http://copyrighthouse.co.uk/copyright/countries-berne-convention.htm> [<https://perma.cc/QCV6-GS6X>].

123. Berne Convention for the Protection of Literary and Artistic Works, *supra* note 121, at 31.

124. GOLDSTEIN, *supra* note 28, at 17:200; William Fisher, *Theories of Intellectual Property*, in *NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY* 168, 174 (Stephen R. Munzer ed., 2001).

and philosophical comparative differences.¹²⁵ Copyright regimes in the United States seem to be based in Lockean labor theory and general utilitarian theory, with more emphasis on the utilitarian theory.¹²⁶ Locke's labor theory essentially states that man has a natural right to the fruits of his labor, which is plainly clear through even the existence of laws that protect an author's creations.¹²⁷ On the other hand, utilitarian theory argues that the moral good is whatever produces the greatest good for the greatest number of people and any individual benefits are not based on natural rights but rather a benefit that is "entirely subject to the will of the sovereign."¹²⁸ Some scholars have noted that the protections awarded by Congress take into account Lockean labor theory, but copyright protections are clearly more heavily rooted in the public good—by providing limited protections for works that will eventually end up back in the public domain.¹²⁹ Somehow, after the founding fathers enshrined protections for authors in the United States Constitution, Congress has only ever since interpreted "for limited Times"¹³⁰ as encouraging more of what is better for society as a whole, and less of a natural right to the fruits of one's own labor.

In contrast to the philosophical underpinnings of United States copyright law, legal scholars have compared the extensive moral rights protections in the European Union and other parties of the Berne Convention to the philosophical teachings of Immanuel Kant and G.W.F. Hegel, German philosophers who taught heavily on human autonomy and the importance of human dignity.¹³¹ These roots in autonomy and dignity are especially obvious when looking at the amount of countries that have been adopting moral rights protections in their copyright statutes since the birth of the Berne Convention.¹³² Part of the increase in countries passing

125. See Fisher, *supra* note 124, at 174 (discussing that the French and German copyright regimes are strongly shaped by the writings on human autonomy and dignity from philosophers Kant and Hegel and that "[t]his influence is especially evident in the generous protections those countries provide for 'moral rights.'"); see also Cyril P. Rigamonti, *The Conceptual Transformation of Moral Rights*, 55 AM. J. COMP. L. 67, 67–69 (2007).

126. Netanel, *supra* note 30, at 8–10; Rigamonti, *supra* note 125, at 68.

127. Netanel, *supra* note 30, at 8–10 (citing *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984)).

128. *Id.* at 8–10 & n.33; see also Fisher, *supra* note 124, at 177.

129. Netanel, *supra* note 30, at 8–9.

130. U.S. CONST. art. I, § 8, cl. 8.

131. See Fisher, *supra* note 124, at 174.

132. Aaron D. White, *The Copyright Tree: Using German Moral Rights as the Roots for*

moral rights legislation is clearly attributable to these countries becoming parties to the Berne Convention and therefore being required as a party to adopt some kind of moral rights protections similar to those in the Berne Convention.¹³³ But scholars also credit the adoption of moral rights protections to a growing movement worldwide that values human dignity and uses the law to protect that dignity.¹³⁴ In contrast, the policy basis for United States copyright law is not dignity or ownership, but rather that copyright protections incentivize authors to create, to enrich the public, and to give the public access to new creations.¹³⁵ In fact, nearly the whole realm of United States intellectual property law focuses on the idea that a limited monopoly on an invention or creation incentivizes authors to continue to create in order to provide more works for public education and progress.¹³⁶ But specifically, within copyright, the goals that legislators from the Founders through the current Congress seem to aim for is not the economic protection of the author, but to provide materials for public use as part of a kind of “social exchange.”¹³⁷

Thus, adequate protections for copyright seem to require a fundamental shift in copyright aims in the United States—aims that align with legal progress for dignity in other areas of law including fundamental rights, free speech, and gay rights.¹³⁸ Laurence Tribe has advocated for protection for human dignity that in-

Enhanced Authorship Protection in the United States, 9 LOY. L. & TECH. ANN. 30, 37 & n.35 (2010) (collecting legislation).

133. See Berne Convention for the Protection of Literary and Artistic Works, *supra* note 121; *List of Berne Convention Signatories*, *supra* note 122.

134. See generally Kim Treiger-Bar-Am, *Copyright and Positive Freedom: Kantian and Jewish Thought on Authorial Rights and Duties*, 63 J. COPYRIGHT SOC'Y 551, 564 (2016); Rex D. Glensy, *The Right to Dignity*, 43 COLUM. HUM. RTS. L. REV. 65, 115 (2011); Ilhyung Lee, *Toward an American Moral Rights in Copyright*, 58 WASH. & LEE L. REV. 795 (2001).

135. Jane C. Ginsburg, *A Tale of Two Copyrights: Literary Property in Revolutionary France and America*, 64 TUL. L. REV. 991, 998 (1990).

136. L. Ray Patterson & Craig Joyce, *Copyright in 1971: An Essay Concerning the Founders' View of the Copyright Power Granted to Congress in Article I, Section 8, Clause 8 of the U.S. Constitution*, 52 EMORY L.J. 909, 934 (2003).

137. Ginsburg, *supra* note 135, at 992; Patterson & Joyce, *supra* note 136, at 951–52.

138. See *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (discussing the right of dignity, and how that interplays with the right to marriage); Guy E. Carmi, *Dignity Versus Liberty: The Two Western Cultures of Free Speech*, 26 B.U. INT'L L.J. 277, 283 (2008) (discussing the roles of dignity and liberty in constitutional rights and free speech analysis); Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1895 (2004) (discussing the rightful place of the *Lawrence v. Texas* decision “in the context of the larger project of elaborating, organizing, and bringing to maturity the Constitution’s elusive but unquestionably central protections of liberty, equality, and—underlying both—respect for human dignity”).

cludes “those aspects of self which must be preserved and allowed to flourish if we are to promote the fullest development of human faculties and ensure the greatest breadth to personal liberty and community life.”¹³⁹ In terms of Tribe’s interpretation of the Constitution and of human dignity, then, there is a balance that U.S. copyright laws should be able to reach in order to protect both the human dignity of authors as well as the interest in public education, access, and progress.

Eugen Ulmer, a prominent German professor of intellectual property, compares copyrights to a tree, describing the roots of the tree as the author’s interests and the branches of the tree as the faculties growing from those interests.¹⁴⁰ Some of the branches draw from multiple interests—others from only one interest.¹⁴¹ The moral right faculties draw their forces from the personal and intellectual interests of the copyright’s author (the author’s autonomy and inherent human dignity), while the economic faculties draw their forces from the economic interests of the author.¹⁴² With this idea of the copyright in mind, it is clear that “[w]ithout doubt . . . the exercise of moral rights can serve financial interests and the exercise of pecuniary rights can serve personal and intellectual interests.”¹⁴³

Enshrining moral rights protection in United States copyright law is good for both authors and the general public because doing so protects the dignity and integrity of authors and their works. While United States copyright has, as a policy matter, preferred the idea of incentivizing creation to increase public education and access,¹⁴⁴ expanding copyright to include moral rights protection still protects these same interests—simply in a better manner. No harm comes to the public when Maria Solange Ferrarini is allowed to receive injunctive relief or punitive damages for the Irgit’s blatant copying and continued passing off Ferrarini’s bikini as Irgit’s own. No harm comes to the public’s education and access when a designer is allowed to police potentially derogatory

139. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 15-3, at 1308 (2d ed. 1988).

140. Adolf Dietz, *The Moral Right of the Author: Moral Rights and the Civil Law Countries*, 19 COLUM.-VLA J.L. & ARTS 199, 211 (1995) (citation omitted).

141. *Id.*

142. *Id.*

143. *Id.* at 212.

144. *See supra* note 136 and accompanying text.

derivatives of their original work. Instead, moral rights protections in copyright protect original designs for public consumption and serve to educate the public on the true author or the true inventor behind a design or other work. Moral rights further incentivize creation even more than the current copyright regime because moral rights allow authors to have the final say when it comes to their creations. What is the good in creation if not the ability to control one's own work, and what is the good in protection if not to preserve the integrity and originality behind a work or design?

B. *The European Union's Focus on Moral Rights in Copyright Protection*

Another example of how the United States could and ought to be protecting innovative, original fashion designs can be found in the copyright laws of the European Union ("EU"). The EU bases most of its copyright laws not only on the concept of economic rights (the kind of rights that the United States copyright laws serve) but also on the concept of moral rights.¹⁴⁵ Where the United States focuses on the economic harm that is exacted on an author when their work is infringed, the EU has extended that protection to cover the moral harm that occurs when an idea is stolen—even if the original author may not have suffered specific economic harm.¹⁴⁶ When questions of fashion copyright arise after a designer is accused of infringing another person's designs, EU courts apply an "individual character" standard, asking whether the overall impression that the design produces is different from any individual design which has previously been made available to the public.¹⁴⁷ In the *Karen Millen* case, the plaintiff sued for infringement of an unregistered design.¹⁴⁸ To succeed on this claim, Millen had to show that the copied design had been new and had "individual character," which the Court of Justice of the European Union determined meant that the design produced a different

145. See Damich, *supra* note 31, at 945–49.

146. *Id.*

147. Case C-345/13, *Karen Millen Fashions Ltd. v. Dunnes Stores, Dunnes Stores (Limerick) Ltd.*, Court of Justice of the European Union, 2014 E.C.R. I-1.

148. *Id.*

impression from any individual design previously made available to the public.¹⁴⁹

The European Council adopted a special directive in 1998 to protect fashion designs, which requires the European Union member countries to adopt similar laws to protect “registered industrial designs,” which includes fashion designs.¹⁵⁰ A few years later, instead of waiting for member countries to go about actually adopting their own laws, the European Council adopted a Council Regulation for industrial designs, which applied the protections previously laid out in the 1998 directive to all the European Union member countries.¹⁵¹ This regulation not only provides copyright protection in fashion design to registered designs, but also protects unregistered designs.¹⁵²

The EU and its member countries exemplify exactly how the United States can protect both the economic *and* moral rights of authors when it comes to copyright, and further how copyright protection can be extended to cover fashion designs as well. This protection is not unrealistic, unfeasible, or undesirable, but is realistic to the needs of the fashion industry, is feasible as exemplified by European countries, and is desirable to those such as Maria Solange Ferrarini, who simply want their work to be credited to them and to get what they are due.

C. *Restructuring the Visual Artists Rights Act*

One way the United States could expand its moral rights protections for copyright would be to expand the category of works that VARA applies to. VARA is currently the only moral rights copyright protection that exists in the United States, and it only applies to a narrow category of works—works of visual art.¹⁵³ Simply put, restructuring VARA could be accomplished by either (1) expanding VARA itself to also apply to fashion designs (with some limitations), or (2) expanding the definition of a “work of

149. *Id.*

150. Council Directive 1998/71, at 1, 3, 1998 O.J. (L289) 28 (EC).

151. European Commission, Press Release, Commission Welcomes Adoption of Regulation on Community Designs (Dec. 12, 2001), http://europa.eu/rapid/press-release_IP-01-1803_en.htm?locale=en [<https://perma.cc/3WTW-RYRB>].

152. *See id.*; Raustiala & Sprigman, *supra* note 88, at 1736.

153. *See supra* notes 36–37, 39 and accompanying text.

visual art” to also include those artistic, unique, or original fashion designs.

The first way in which VARA could expand is to broaden the scope of § 106A to include more than simply “works of visual art.”¹⁵⁴ Since clearly copyright could not be granted to every article of clothing ever designed, there would also need to be some limitations to such an expansion—we could not simply add moral rights protections to “fashion designs” because such a term would be too vague to effectively work in concert with the Supreme Court’s decision in *Star Athletica* regarding “useful articles.” By no means should the copyright regime be purged of the useful article doctrine—everyday items like shovels and bike racks simply do not fit into a category of works that makes sense to protect.¹⁵⁵ Instead, perhaps the United States should adopt definitions and limitations on the copyrightability of fashion designs like those recognized in European courts might work best.¹⁵⁶

The second way in which VARA could expand is to amend the definition of a “work of visual art” to include sufficiently innovative and creative fashion designs. Fashion designs as art is not a new concept.¹⁵⁷ In fact, the copyright registrations that both Irgit and Ferrarini obtained for the bikinis were categorized as “artwork.”¹⁵⁸ The United States Copyright Office clearly then has the ability and willingness to recognize pieces of clothing and fashion designs as artwork, but Congress is still unwilling to statutorily extend the definition of a work of visual art or VARA in general to

154. See 17 U.S.C. § 106A (2012).

155. See generally *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1013 n.2 (2d Cir. 2017); *Brandir Int’l, Inc. v. Cascade Pac. Lumber Co.*, 834 F.2d 1142, 1147–48 (1987). Furthermore, it is important to note that abolishing the useful article doctrine in favor of a broad and rather vague definition of fashion design to allow any article of clothing to be protected would run afoul of the idea-expression dichotomy in copyright. This dichotomy ensures that ideas (that are often common and easily shareable) are not protected (and ultimately are part of the public domain), but that particular expressions of those ideas (unique to each person expressing that idea) are protected. See generally Edward Samuels, *The Idea-Expression Dichotomy in Copyright Law*, 56 TENN. L. REV. 321, 322–29. A broad definition of fashion design could essentially allow someone to copyright a basic white t-shirt, and no one else would be able to create or sell a white t-shirt—which is clearly antithetical to the whole purpose and goals of copyright protections.

156. See *supra* Section III.B.

157. See *infra* notes 168–76 and accompanying text.

158. See *supra* note 64. It is certainly a positive note that this bikini was copyrightable in some form, but without changing the Copyright Act’s definition of a work of visual art to include those artistic fashion designs or loosening the restrictions on copyrightable materials to include the more innovative fashion designs, there is no long-term or certain answer for fashion designers seeking protection against others copying their work.

include fashion designs. Furthermore, during the congressional debates on the Innovative Design Protection and Piracy Prevention Act (“IDPPPA”), the manager of government relations for the America Apparel and Footwear Association said that, if IDPPPA was passed, “[t]he industry will finally have the ability to protect the truly original, artistic pieces of fashion that presently do not have any protection. This bill does a great job of drawing the line between what is useful and [what is] artistic.”¹⁵⁹

In a TedxTalk at the University of Southern California in 2010, fashion and intellectual property researcher Johanna Blakley discussed the lack of copyright protection in the fashion industry.¹⁶⁰ She suggested that, as a result of this lack of protection, “fashion designers have actually been able to elevate utilitarian design—things to cover our naked bodies—into something we consider art.”¹⁶¹ She continues, arguing that the lack of copyright protection translates to “a very open and creative ecology of creativity.”¹⁶² Because of the lack of protection and the prevalence of copying, designers like Stuart Weitzman have had to up their game—to design products that cannot be copied or knocked off.¹⁶³ Dr. Blakley compared these problems and stories in fashion (like those of Stuart Weitzman) to jazz artist Charlie Parker, whom she quoted as saying that he invented bebop because he knew that people (specifically, “white artists”) would not be able to replicate the sounds.¹⁶⁴ While Dr. Blakley has clearly built a career out of her research and work on fashion and the fashion industry, the fact that the only remedy that she mentions for designers is to either grin and bear it or to design something that cannot be copied still does nothing to protect the lesser-established designer—the Maria Ferrarinis of the fashion industry. The Ferrarinis of the fashion industry still possess ingenuity, dignity, and creativity that still ought to be protected without having to just deal with copying or just innately having the resources to design a

159. Kristi Ellis, *Design Piracy Bill Advances to Senate*, WOMEN’S WEAR DAILY (Dec. 2, 2010), <https://wwd.com/fashion-news/designer-luxury/piracy-bill-passes-3393455/> [<https://perma.cc/79FH-LFD5>].

160. Johanna Blakley, Researcher, University of Southern California, *Lessons from Fashion’s Free Culture TED Talk* (Apr. 13, 2010) https://www.ted.com/talks/johanna_blakley_lessons_from_fashion_s_free_culture [<https://perma.cc/DNK8-7RKG>].

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

creation that is not as easily copied.¹⁶⁵ But what Dr. Blakley stated perhaps most accurately, however, was that “fashion designers have been able to elevate utilitarian design . . . into something we consider art.”¹⁶⁶ “Art” is the category of work that VARA protects. Therefore, changing the definition of “a work of visual art”¹⁶⁷ to incorporate more artistic fashion designs seems to be in line with what Blakley believes is reasonable for fashion protection.

Even beyond just Dr. Blakley’s perspective on fashion as art, treating fashion designs as works of art would not be new for copyrights or just in general. In 2006, when the Design Piracy Prohibition Act was heard before the House Subcommittee on Courts, the Internet, and Intellectual Property, Fordham Law School Professor Susan Scafidi argued that fashion has long been recognized as an art form.¹⁶⁸ She scolded Congress for not taking fashion seriously, then highlighted society’s recognition of fashion as an art:

Institutions from the Smithsonian to Sotheby’s take fashion seriously, and organizations like the National Arts Club and the Cooper-Hewitt National Design Museum have recently added fashion designers to their annual categories of honorees. . . . It is inconsistent with this cultural shift for copyright law to deny fashion’s role as an artistic form.¹⁶⁹

Scafidi further distinguished fashion as an art form from clothing as useful articles. Clothing is a term for “articles of dress that cover the body,” but fashion is a form of creative artistic expression.¹⁷⁰ She continued, arguing that if the fashion industry was solely driven by utility, people would wear clothes until they fell apart or lost their utility.¹⁷¹ Since wearing clothes until they fall apart is clearly not what the majority of society does, then, fashion serves another purpose other than utility—and that is artistic creation.¹⁷²

165. Susan Scafidi, *Op-Ed: Fashion Designers Deserve the Same Protection as Other Creatives*, BUS. FASHION (Mar. 15, 2016), <https://www.businessoffashion.com/community/voices/discussions/what-is-the-real-cost-of-copycats/op-ed-fashion-designers-deserve-the-same-protection-as-other-creatives> [<https://perma.cc/6T3C-4LTX>].

166. *See supra* note 161 and accompanying text.

167. *See supra* notes 37–39 and accompanying text.

168. *A Bill To Provide Protection for Fashion Design: Hearing on H.R. 5055 Before the Subcomm. on Courts, the Internet & Intellectual Prop. of the H. Comm. on the Judiciary*, 109th Cong. 79–85 (2006) (statement of Susan Scafidi, Professor, Fordham Law School).

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.* at 80–81.

Society itself—the consumers of clothing and fashion—also recognizes the artistic value of fashion designs. With every music or media awards ceremony, social media floods with opinions on who was “best dressed” and “worst dressed.”¹⁷³ No one watches red carpets and obsesses over what celebrities are wearing for the utility of their gowns and suits and other get-ups. Instead, what consumers want is the spectacle—the creativity, beauty, and artistic inspiration that goes into each look before a celebrity hits the red carpet. The biggest and best example of this is perhaps the annual Met Gala—often dubbed “Fashion’s Biggest Night Out.”¹⁷⁴ The theme for 2019 was “Camp: Notes on Fashion,” surrounding the Metropolitan Museum’s newest exhibit, “Notes on ‘Camp,’” based on Susan Sontag’s 1964 essay.¹⁷⁵ The pink carpet at the Met saw extravagant design after extravagant design as the invited celebrities were ushered inside, where the new exhibit focused on “artifice and exaggeration” in fashion awaited them.¹⁷⁶ If the designs paraded through and exhibited within the Met do not rise to the level of artistic creativity that deserves copyright protection, nothing could.

Another alternative to provide some copyright protection to fashion designs, but without any moral-rights-based protection, would be to reinstate the original Title II to the 1976 Act.¹⁷⁷ The original 1976 Act included copyright protection for useful articles that were not “staple or commonplace.”¹⁷⁸ While reinstating this Title of the Act would not provide the moral rights advocated for above, it would still provide protection to those designs that would otherwise be original enough to earn copyright protection. Otherwise, Congress could look to the wide variety of legislation that has been introduced throughout the last few decades looking to expand copyright protections to fashion designs as guidance for the protection that fashion designs need.¹⁷⁹ Most importantly, the

173. *Met Gala 2019*, VOGUE, <https://www.vogue.com/tag/event/met-gala> [https://perma.cc/U8DL-WT82].

174. *Id.*

175. *Id.*; see also *Camp: Notes on Fashion*, MET, <https://www.metmuseum.org/exhibitions/listings/2019/camp-notes-on-fashion> [https://perma.cc/TY4P-UF2T].

176. Lauren Alexis Fisher, *The Met’s “Camp” Costume Exhibit Is All About the Art of Being Extra*, HARPER’S BAZAAR (May 6, 2019, 5:19 PM) <https://www.harpersbazaar.com/fashion/designers/a27375911/what-is-camp-fashion-met-costume-exhibit-2019/> [https://perma.cc/F3N5-KFVD].

177. See *supra* note 24 and accompanying text.

178. *Id.*

179. See *supra* note 23.

unique, innovative bikini design that Maria Solange Ferrarini created would be eligible for copyright protection, and she would actually have recourse to recover the money and reputation that Irgit and Kiini have stolen from her.

IV. TAILORING COPYRIGHT LAWS TO PROTECT THE BIKINI

The United States's participation in the Berne Convention demands that U.S. copyright law extend moral-rights-based protections to more than just "works of visual art." Fashion designs no longer constitute simply "useful articles" but are works that deserve copyright protection against the Irgits of the world who would rather steal a design and profit from her infringement instead of buying a license for the design so the creator receives due credit. However, Congress also has the ability to reinstate Title II of the original 1976 Act, as well as simply expanding basic copyright doctrine to allow for protections of fashion designs. As Professor Scafidi explained, clothing is the basic article meant to cover your body, but fashion is an artistic piece meant to be appreciated as art, as a unique design, rather than just a "useful article" that has no intrinsic value outside of its utility.¹⁸⁰

Looking back to the Ferrarini case, as we look to which form of copyright protection best suits the void in protection for fashion design, reviewing the copyright laws present in her country, and thus what she may expect while dealing with the judiciary in the United States, may prove useful. Brazil, like the United States, is a party to the Berne Convention.¹⁸¹ Thus, a reasonable party coming from Brazil would likely expect at least as much moral right to protection as is present in the Berne Convention itself. So, for the Ferrarini case, the better policy might be to adopt a moral rights-based policy. Redefining VARA to include artistic designs would also be suitable, as the United States Copyright Office has already recognized this bikini as copyrightable, even if only as artwork.¹⁸²

180. *A Bill To Provide Protection for Fashion Design*, *supra* note 168, at 79.

181. *List of Berne Convention Signatories*, *supra* note 122.

182. *See supra* notes 64 and 158 and accompanying text.

CONCLUSION

Recognition of human dignity and the value in moral rights in copyright require that the United States expand its copyright protection to include fashion design—the specific avenue taken, whether in moral rights legislation or otherwise, matters less. What matters most is that those like Maria Ferrarini, who has spent her life innocently creating innovative swimsuits and selling them to tourists only to be ripped off by one of those same tourists, have recourse to remedy their situation. Greater elasticity in copyright protection still fulfills intellectual property aims and copyright policies, while also recognizing that authors have an inherent right to preserve the dignity of their works. This fact does not change when it comes to artistic fashion designs—if anything, these designs reflect more of the autonomy and personhood of individual authors than most creations might otherwise. These connections to authors’ autonomy, then, ought to be preserved. The United States, as a signatory to the Berne Convention, has the solemn duty to expand copyright protections to match the Convention—that is what is required as a signatory and what Brazil itself has adopted; thus, the United States needs to adopt adequate laws to protect the Ferrarinis of the world and protect the creativity and innovation that the Constitution has always protected and that copyright law has always been intended to serve.

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