IN FAST-FASHION, ONE DAY YOU'RE IN, AND THE NEXT DAY YOU'RE OUT: A SOLUTION TO THE FASHION INDUSTRY'S INTELLECTUAL PROPERTY ISSUES OUTSIDE OF INTELLECTUAL PROPERTY LAW

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ABSTRACT

Fast-fashion companies often produce stylish garments at low costs by copying designs others invested time and money into and by contracting with manufacturers overseas who use unfair labor practices. The United States' intellectual property framework does not protect clothing designs, so fast-fashion designers can easily take others' designs with little or no modifications. Designers spend hours of work and thousands of dollars on creating designs that fit their clients but are undersold by companies whose design practices consist of photographing and reproducing original designs. The manufacturing factories that reproduce the designs are often unsafe, and the workers are underpaid and overworked. However, when the workers attempt to hold their employer accountable, they find that the manufacturing company has no assets, and they are not able to collect damages. These two injustices in the fashion industry are very closely related.

Labor laws, including the Fair Labor Standards Act (FLSA), do not incentivize fast-fashion companies to create original designs or to ensure their contactors use fair labor practices. The FLSA protects workers in the United States against the labor practices of their direct employers. The statute also contains a portion known as the "hot goods provision" that allows the Secretary of Labor to enjoin anyone from transporting or selling goods produced in unfair work

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conditions. The hot goods provision could be used to hold goods produced overseas if the work conditions violate the Fair Labor Standards Act. This could have a major impact on both the intellectual property and labor issues on an international scale.

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INTRODUCTION

In the 2006 fashion industry movie *The Devil Wears Prada*, Meryl Streep's character lectures her new assistant and describes the relationship between the art of high fashion and utilitarian function of

clothing.[1] She discusses how fashion trends often begin with high-end designers presenting their looks on the runway, eventually leading department stores, independent designers, and low-end retailers to pick up the trend.[2] Streep's character highlights the investments of millions of dollars and numerous jobs dedicated to developing the trend and making said trend more accessible.[3] Although in the monologue she intended to demean her new assistant, Streep's character also explains the intricacies of the fashion industry and the way trends develop and pass from designer to designer.[4]

For many, the luxury of high fashion comes with an unattainable price tag.[5] The expense creates a large demand for clothing inspired by high fashion trends that are sold at a more affordable price.[6] As Streep's character stated, many designers use Fashion Week trends as inspiration for their own looks by borrowing a color here or a cut

1. *See* THE DEVIL WEARS PRADA (Fox 2000 Pictures 2006) (articulating the intricacies of the fashion industry and how trends are set).

2. *See id.* (explaining that fashion trends often start with high-end designers presenting a look, and then other designers take inspiration and create similar looks that are more affordable).

3. *See id.* (discussing the money and time investment necessary for designers and brands to create and promote their products).

4. *See id.* (highlighting the intricacies of the fashion industry that many people are unaware of).

> Oscar de la Renta did a collection of cerulean gowns. And then . . . it was Yves Saint Laurent . . . who showed cerulean military jackets . . . . And then cerulean quickly showed up in the collections of eight different designers. And then it . . . filtered down through the department stores and then trickled on down into some tragic Casual Corner where you no doubt fished it out of some clearance bin. However, that blue represents millions of dollars and countless jobs . . . .

Id. (describing in detail how a specific trend of cerulean clothing was created and made more accessible when department stores and other designers took inspiration from Yves Saint Laurent's original military jackets).

5. *See* Dana Thomas, *The High Price of Fast Fashion*, WALL ST. J. (Aug. 29, 2019, 12:37 PM), https://www.wsj.com/articles/the-high-price-of-fast-fashion-11567096637 [https://perma.cc/CX73-4CDV] (describing the expense of high fashion trends and the demand for lower-priced options).

6. *See id.* (explaining the popularity of fast-fashion, which the article defines as "trendy, inexpensive garments mass produced at lightning speed in subcontracted factories and hawked in thousands of chain stores world-wide").

there.[7] Some designers do this in an ethical manner.[8] Other designers take more than just inspiration and attempt to closely copy items or even entire looks.[9] The recreation and copying of other designers' work led to the emergence of a subindustry called "fast-fashion."[10]

Fast-fashion retailers can copy entire designer looks and put them on shelves even faster than the original designer.[11] They accomplish this speedy production by watching a designer's showcase, contacting a cheap manufacturer with employees who work long hours, and copying the looks in an impressively short amount of time.[12] With low design costs, low-quality materials, and high demand among consumers, fast-fashion companies such as Forever 21 and Zara are quite profitable.[13] Because of the inadequate intellectual property protection afforded to fashion designs, this strategy of taking other designers' work and mass producing it in a cheaper form is completely legal.[14]

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7. "Fashion Week" refers to events worldwide in which fashion designers premiere their latest collections through runway shows and presentations. *See Paris Fashion Week*, FASHION UNITED, https://fashionweekweb.com/paris-fashion-week [https://perma.cc/GGG3-P5C4] (last visited Nov. 2, 2020); *see also* Thomas, *supra* note 5 (explaining how fast-fashion companies wait to see which trends at large fashion shows are popular and then recreate the outfits).

8. *See* Thomas, *supra* note 5 (describing how some designers will take inspiration from other designers work without recreating a replica of what the other designer produced).

9. *See* Chavie Lieber, *Beyond Elle Woods: The Rise of Fashion Law*, RACKED (Jan. 15, 2015, 11:00 AM), https://www.racked.com/2015/1/15/7561277/fashion-law [https://perma.cc/9J9J-LKGB] (citing anecdotes of independent designers who saw their designs reproduced by fashion retailers or in other media, such as a movie, and were advised their cases were not worth pursuing in a legal action).

10. *See* Cassandra Elrod, Note, *The Domino Effect: How Inadequate Intellectual Property Rights in the Fashion Industry Affect Global Sustainability*, 24 IND. J. GLOB. LEGAL STUD. 575, 577 (2017) (explaining how copying other designers' work became so common place it is recognized as a subindustry of fashion).

11. *See* C. Scott Hemphill & Jeannie Suk, *The Law, Culture, and Economics of Fashion*, 61 STAN. L. REV. 1147, 1171–72 (2009) (explaining how fast-fashion designers can generate a sizeable profit because of their low costs of production and high demand for affordable clothing).

12. *See id.* at 1171 (describing the speed with which fast-fashion designers can produce articles of clothing).

13. *See id.* at 1171–72 (describing the process fast-fashion retailers use to accomplish their speedy production).

14. *See* Amy L. Landers, *The Anti-Economy of Fashion: An Openwork Approach to Intellectual Property Protection*, 24 FORDHAM INTELL. PROP., MEDIA & ENT. L.J. 427, 499–500 (2014) (explaining the modern intellectual property framework does not fit fashion perfectly and, therefore, there are gaps).

The lack of intellectual property protection incentivizes fast-fashion designers to take others' designs with little or no modifications.[15] Designers who spend hours of work and thousands of dollars on researching and refining designs to best serve their clients are falling victim to companies whose design practices consist of photographing and reproducing original designs.[16] Additionally, the factories used to reproduce the designs are unsafe, and the workers are underpaid and overworked.[17] Unfortunately for these workers, when they attempt to hold their employer accountable, they find the manufacturing company has no assets and they are not able to collect damages.[18] These two injustices in the fashion industry are very closely related.[19]

Current laws, including the Fair Labor Standards Act (FLSA), do little to incentivize fast-fashion designers to come up with original designs or to investigate their supply chain's work conditions.[20] The FLSA only protects workers in the United States against the acts of their direct employers.[21] However, the statute contains a unique section known as the hot goods provision that imposes liability on an

15. *See id.* (discussing how the lack of intellectual property rights for fashion designers encourages other designers to cut costs by copying designs).

16. *See id.* (describing how many designers save research and development costs by copying other designer's popular outfits or articles of clothing, which hurts the profits of the original designer).

17. *See* Angela Terese Timpone, Note, *The True Price for Your Fake Gucci Bag Is a Life: Why Eliminating Unsafe Labor Practices Is the Right Answer to the Fashion Counterfeit Problem*, 15 CARDOZO PUB. L., POL'Y & ETHICS J. 351, 355 (2017) (referencing the collapse of a shoe factory in China in 2015 and Nike underpaying workers).

18. *See* Bruce Goldstein et al., *Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment*, 46 UCLA L. REV. 983, 995 (1999) (explaining contracting factories have a pattern of going out of business or bankrupt during slow seasons and returning to business during peak seasons). The factory owners often do not have assets to compensate employees when a judgment is entered against them for unfair labor practices so, therefore, employees often do not see relief. *See id.*

19. *See id.* at 1000–01 (discussing how many of the designers who copy other designers' work also use unfair labor practices).

20. *See* Kevin Sobel-Read & Georgia Monaghan, *Fashion Industry Giants Keep Failing to Fix Labor Exploitation*, FASHION L. (July 28, 2020), https://www.thefashionlaw.com/why-does-the-fashion-industry-keep-failing-to-fix-labor-exploitation-its-simple/ [https://perma.cc/V3TA-3UJU] (discussing how current intellectual property and labor laws do not encourage designers to cease copying others' designs or take more control over their supply chains). Neither are required and doing so often opens up the designer to extra liability. *See id.*

21. *See* Fair Labor Standards Act of 1938 §§ 3, 13, 29 U.S.C. §§ 203, 213 [hereinafter FLSA] (defining who is covered by the Fair Labor Standards Act).

entity for purchasing or shipping goods produced in conditions that violate FLSA.[22] Using the hot goods provision to hold goods produced overseas if produced in conditions violating the FLSA would have a major impact on both the intellectual property and labor issues.[23] If the hot goods provision was applied to entities covered by the FLSA who purchase goods for resale or ship goods produced by any entity in violation of fair labor standards, unfair labor practices and design infringement internationally could be prevented.[24]

Part I of this Comment examines the current state of intellectual property protection for fashion and discusses the long history between fashion and labor abuse, which is unfortunately still rampant.[25] Part II explores the connection between the inability of designers to protect their designs from fast-fashion copiers and poor labor conditions present throughout the fashion industry.[26] Finally, this Comment proposes that if fashion companies had to take more responsibility for their supply chains, the frequency of design-stealing and unfair labor practices would diminish because they would no longer be profitable.[27]

I. FASHION ECONOMICS AND ITS ETHICAL PRICE

Intellectual property laws in the United States provide protection through patents, trademarks, trade dress, and copyrights.[28] Experts opine that intellectual property law is inadequate to protect fashion designers.[29] Technological advances allow people to copy popular

22. *See id.* §§ 215–17 (describing the hot goods provision that allows permits the Secretary of Labor to impose liability on covered entities for shipping or purchasing for resale goods that are produced in conditions violating the FLSA).

23. *See id.* § 215 (stating that the hot goods provision only applies when both the organization selling the hot goods and the organization that produced them are covered entities under the FLSA).

24. *See* FLSA EMPLOYEE EXEMPTION HANDBOOK ¶ 746 (Susan Prince ed., Supp. 2017), Westlaw FLSAEEHBK (describing the type of entities currently subjected to the hot goods provision).

25. *See infra* Part I (explaining the current intellectual property framework in the United States and the unfair labor conditions workers face).

26. *See infra* Part II (discussing the connection between unfair labor conditions and intellectual property theft in the fashion industry).

27. *See infra* Part II (discussing how labor laws can affect both unfair labor practices and intellectual property protection).

28. *See* Irene Kosturakis, *Intellectual Property 101*, 46 TEX. J. BUS. L. 37, 41 (2014) (naming the different kinds of intellectual property protection available).

29. *See* Mark K. Brewer, *Fashion Law: More Than Wigs, Gowns, and Intellectual Property*, 54 SAN DIEGO L. REV. 739, 756–57 (2017) (describing the weaknesses in fashion intellectual property law); *see also* Hemphill & Suk, *supra* note 11, at 1150–51, 1170–71 (stating fashion law is not adequately protecting designers

original designs that fashion brands invested countless hours and dollars to develop and then reproduce those designs quickly and cheaply.[30] The fashion industry has a long history of labor abuses, and brands are hesitant to exercise more control over garment manufacturers.[31] Statutes and case law attempt to control both work conditions and intellectual property relating to fashion, but the framework is still inadequate.[32] The economics of fashion do not prevent fashion designers from copying others' designs and contracting with companies using unfair labor.[33]

A. The Economics of Modern Fashion

Although independent designers may go through the entire design and production process in a one-man operation, large fashion houses and fast-fashion companies tend to have complicated product life cycles.[34] The design and production process can be long and expensive.[35] Fashion brands, like other companies, attempt to reduce the time and money invested by outsourcing and subcontracting with unskilled laborers to complete processes such as sewing.[36] Fast-fashion companies will often attempt to further cut their investments by shortening the design phase and recreating garments or looks

from copiers); *see also* Landers, *supra* note 14, at 429 (describing intellectual property laws, as they relate to fashion, as "infeasible, unworkable, and sometimes unenforceable as a practical matter").

30. *See* Thomas, *supra* note 5 (explaining the methods, such as photography and instant messaging, that allow fast-fashion designers to produce garments quickly).

31. *See* Sobel-Read & Monaghan, *supra* note 20 (discussing the reasons fashion designers hesitate to embrace chain integration).

32. *See id.* (describing attempts to rectify labor and intellectual property issues in fashion).

33. *See* Thomas, *supra* note 5 (describing the current fashion economic and legal issues).

34. *See* Patsy Perry & Steve Wood, *Exploring the International Fashion Supply Chain and Corporate Social Responsibility: Cost, Responsiveness and Ethical Implications*, *in* LOGISTICS AND RETAIL MANAGEMENT: EMERGING ISSUES AND NEW CHALLENGES IN THE RETAIL SUPPLY CHAIN 97, 99 (John Fernie & Leigh Sparks eds., 2019) (discussing how supply chains have become longer and more complex as the economy has become more and more global).

35. *See* Thomas, *supra* note 5 (describing the expense associated with product research and development).

36. *See* Brishen Rogers, *Toward Third-Party Liability for Wage Theft*, 31 BERKELEY J. EMP. & LAB. L. 1, 1 (2010) (describing how the supply chains for fashion design companies are longer than they used to be and includes more subcontractors).

produced by other designers.[37] The relationship between the contracting fashion company and the unskilled workers of the manufacturing company is not an employee–employer relationship.[38] Therefore, the fashion company cannot be held liable for any unfair labor practices those unskilled workers may face.[39]

1. *The Fashion Supply Chain*

"Global value chains" involve all the processes for a product's life cycle.[40] Market globalization has complicated fashion supply chains, resulting in greater market segmentation.[41] However, greater market segmentation results in an increase in outsourcing to factories outside of the original designer's company.[42] Following this trend, design companies extend their supply chains and use subcontractors to complete unskilled labor tasks.[43] Workers are frequently underpaid, work long hours without overtime compensation, and suffer working conditions that violate labor laws.[44] Additionally, the rise of the Internet and online shopping affect the fashion industry significantly.[45] Online shopping creates a demand for garments produced and delivered quickly, giving fast-fashion retailers a cheap venue to sell their goods.[46]

Usually, the design company is only legally responsible for suppliers if the design company directly employs the supplier.[47] Contracting with outside manufacturing companies is not enough to

37. *See* Thomas, *supra* note 5 (discussing fast-fashion companies' strategy of reducing costs by cutting the design phase of garment production).

38. *See* Sobel-Read & Monaghan, *supra* note 20 (explaining that companies are only considered employers of those they directly employ).

39. *See id.* (discussing the liability imposed by the FLSA on employers).

40. *See id.* (including processes such as designing, manufacturing, selling, and at times recycling).

41. *See* Perry & Wood, *supra* note 34, at 97 (discussing how supply chains have become longer and more complex as the economy has become more and more global).

42. *See id.* at 100–01 (discussing the process of outsourcing).

43. *See id.* at 104–06 (discussing various supply chain strategies).

44. *See id.* at 106 (explaining that these contractors often do not provide safe and fair work environments).

45. *See id.* at 98 (discussing the rising popularity of online shopping due to the Internet).

46. *See id.* (describing the effect of the Internet on the fashion industry).

47. *See* Sobel-Read & Monaghan, *supra* note 20 (explaining that companies are only considered employers of those they directly employ and are therefore only liable for labor violations against those employees).

establish legal liability.[48] Some manufacturing subcontractors with frequent FLSA violations have no assets besides thread and needles, and they declare bankruptcy when employees sue.[49] Also, the same agents of companies going out of business will occasionally restart the same company performing the same tasks under a different name, thus continuously violating the FLSA with each incarnation of their business.[50] Chain integration allows laborers to hold the brand liable if the work conditions are illegal.[51] Some brands, like Chanel, are already using chain integration to exercise better control over their supply chain.[52]

2. *How Fashion Designers Make Profit*

Fashion companies will often directly hire designers to work in-house.[53] When companies hire designers in this way, the company—not the designer—owns the design.[54] Independent designers work for themselves to create their own brand, work for a particular client, or work for a set of clients.[55] Fast-fashion companies can skip the lengthy and often expensive design process and merely photograph a designer's look during a showcase, send it to a manufacturing company overseas, sell it, and, if the look is unsuccessful, quickly

48. *See id.* (explaining that companies are not liable to those employed by a contractor).

49. *See* Rogers, *supra* note 36, at 3 (explaining how employees working in illegal conditions do not always receive damages when they sue employers).

50. *See* News Release, U.S. Dep't of Lab., Garment Manufacturer Sells 'Hot Goods' to Charlotte Russe That Prompts Restraining Order Following U.S. Department of Labor Investigation (Apr. 13, 2018) [hereinafter News Release] (providing an example of the leadership of a fashion manufacturing company who formed multiple companies with the same FLSA violations).

51. *See id.* (discussing reasons Chanel and other luxury brands started acquiring supplier factories).

52. *See* Sobel-Read & Monaghan, *supra* note 20 (providing the example of Chanel as a major fashion house that utilizes chain integration and accepts more responsibility for its production).

53. *See* Tiffany din Fagel Tse, Note, *Coco Way Before Chanel: Protecting Independent Fashion Designers' Intellectual Property Against Fast-Fashion Retailers*, 24 CATH. U. J.L. & TECH. 401, 405 (2016) (explaining that fashion companies will often directly hire their designers instead of contracting or buying designs from independent designers).

54. *See id.* (explaining that when fashion companies hire designers directly, the design is the property of the company due to the employer–employee relationship).

55. *See id.* at 405–06 (discussing the difference between in-house designers and independent designers).

reproduce another trend.[56] This practice limits a designer's ability to be compensated for their original work because fast-fashion companies can often undersell the original designer.[57] This model puts a lot of time pressure on laborers, which requires workers to work overtime.[58] Sometimes the laborers are unpaid for this overtime.[59]

Fast-fashion companies also tend to target lesser-known designers instead of brands with excellent customer recognition specifically to avoid intellectual property litigation.[60] Fast-fashion companies are aware of the lack of intellectual property protection for fashion, and they exploit it in their business strategies.[61] Although intellectual property protection is limited for fashion, designers whose work was copied still attempt to sue offending fast-fashion companies.[62] The potential cost for defending a suit can be daunting to any company, even if they will likely prevail.[63] Independent designers often do not have the money or other resources to protect their designs or face large fast-fashion companies in litigation.[64]

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56. *See* Thomas, *supra* note 5 (describing the way fast-fashion companies copy and reproduce popular designs).

57. *See* Tedmond Wong, Comment, *To Copy or Not to Copy, That Is the Question: The Game Theory Approach to Protecting Fashion Designs*, 160 U. PA. L. REV. 1139, 1154 (2012) (discussing the effect fast-fashion has on the profitability of original designers). Because fast-fashion companies can cut design costs, they can sell their garments for less than the original designer while still making a profit. *See id.*

58. *See* Thomas, *supra* note 5 (discussing the long hours laborers often must endure to keep up with the demands for fast-fashion).

59. *See* Goldstein et al., *supra* note 18, at 1001 (explaining that manufacturing companies sometimes violate labor laws and mandate employees to work overtime without overtime compensation).

60. *See* Hemphill & Suk, *supra* note 11, at 1175–76 (explaining how mid-price range designers account for a majority of the complaints regarding copying designs).

61. *See id.* (discussing how fast-fashion companies use the lack of intellectual property law in their business strategies to make profits).

62. *See id.* at 1176 (discussing how mid-price range designers attempt to circumvent the lack of intellectual property laws and allege violations, usually to no avail).

63. *See* Chavie Lieber, *Fashion Brands Steal Design Ideas All the Time. And It's Completely Legal.*, VOX (Apr. 27, 2018, 7:30 AM), https://www.vox.com/2018/4/27/17281022/fashion-brands-knockoffs-copyright-stolen-designs-old-navy-zara-h-and-m (describing independent designers' inability to afford legal fees in large lawsuits against fashion companies and the impact of the media and social media have on these legal battles).

64. *See id.* (explaining why independent designers often do not sue fast-fashion companies when the fast-fashion companies copy their designs).

B. Fashion and Intellectual Property Law

Intellectual property law is imperfect in protecting fashion designers and their products.[65] Trademark and trade dress laws protect any symbol, word, color, or other feature that identifies a good in commerce.[66] Because trademark and trade dress protection require the protected characteristic to achieve a secondary meaning in trade, fashion designers often struggle to protect their creations under these doctrines.[67] Clothing pieces are usually categorized as either pants, shirt, dress, or another predetermined category.[68] These standardized categories prevent clothing from being novel and nonobvious enough to gain patent protection.[69] Because clothing serves the functional purpose of covering a human body, the law will not grant it copyright protection.[70] Although people recognize fashion more and more as a culturally significant expression, courts and legislators have not elevated it to the status of artwork protectable through copyright or conceptual separability.[71] The unavailability of intellectual protection for fashion allows fast-fashion companies to copy designs and make a profit.[72]

65. *See* Wong, *supra* note 57, at 1142 (discussing the incomplete framework of intellectual property law as it relates to fashion).

66. *See* Lanham Act, 15 U.S.C. § 1127 (2018); Christine Quilichini, *Haute Couture Legislation: Tailor Made High Fashion Design Protection in the United States*, 4 U.P.R. BUS. L.J. 228, 236 (2013) (describing types of features that can be protected with trademark or trade dress protection).

67. *See* Quilichini, *supra* note 66, at 237 (discussing the applicability of trademark and trade dress protection to fashion).

68. *See* Arielle K. Cohen, *Designer Collaborations as a Solution to the Fast-Fashion Copyright Dilemma*, 11 CHI.-KENT J. INTELL. PROP. 172, 175 (2012) (quoting Neufeld-Furst & Co. v. Jay-Day Frocks, Inc., 112 F.2d 715, 715 (2d Cir. 1940)) (describing the manner in which clothing is standardized).

69. *See id.* (discussing patent requirements of novel and nonobvious as related to fashion).

70. *See* Brewer, *supra* note 29, at 751 (explaining that the U.S. Copyright Act does not protect fashion designs because they are functional).

71. *See* Virginia Postrel, *Fashion as Art: Fashion Week's Move to Lincoln Center Reflects a Growing Recognition of Style as Culture*, WALL ST. J. (Sept. 11, 2010, 12:01 AM), https://www.wsj.com/articles/SB10001424052748703453804575479902076411376 [https://perma.cc/26BE-UWYX] (discussing varying and changing views of fashion as art).

72. *See* Hemphill & Suk, *supra* note 11, at 1172, 1174 (discussing the lack of intellectual property protection and fast-fashion's use of the incomplete framework).

1. *Trademarks, Patents, and Copyrights—Why They Are Elusive to Fashion Designers*

The product of a creator's hard work, creativity, and investment—including technology, scientific innovations, books, paintings, and other creations—is easy for others to quickly reproduce or copy.[73] American intellectual property laws provide a "patchwork of protection" for fashion because they do not provide a specific scheme for design protection.[74] A designer's need for protection does not neatly fit into the categories of patents, copyrights, trademarks, or a combination of these categories.[75] While trademark and copyright law protect parts of fashion, such as logos and patterns, the most common creative product of the fashion industry—clothing—is largely unprotected.[76]

a. Trademark and Trade Dress Protection

The Lanham Act provides protection for trademarks, often simply referred to as "mark[s]."[77] Trademark laws protect names, slogans, symbols, or any other distinct character used to identify or distinguish one good from another in commerce.[78] To receive trademark protection, a mark must be used in commerce to identify goods or distinguish the product from competitors by indicating the source of the product.[79] Trademark law protects marks on a continuum based on how distinctive the mark is.[80] To protect a mark that is merely

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73. *See* Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687, 1688 (2006) (discussing the policies behind intellectual property protection).

74. *See* Wong, *supra* note 57, at 1142 (describing the incomplete framework of intellectual property protection for fashion designers).

75. *See id.* Some commentators say fashion is "really seen as the bastard child of capitalism and female vanity." *See* Postrel, *supra* note 71 (quoting Valerie Steele, Director, Fashion Institute of Technology Museum).

76. *See* Raustiala & Sprigman, *supra* note 73, at 1689 (discussing how trademark protection does not protect articles of clothing).

77. *See* 15 U.S.C. § 1051 (2018) (providing the framework for trademark protection).

78. *See id.* § 1127 ("[A]ny word, name, symbol, or device, or any combination thereof . . . used by a person . . . to identify and distinguish his or her goods.").

79. *See id.* (describing the elements of trademark protection).

80. *See* David Scalise, Alexa Koenig & Brandon Carr, *Secondary Meaning in Trademark and Trade Dress Law: What It Is and What You Need to Know*, 14 GRAZIADIO BUS. REV., no. 2, 2011, at 2 (discussing the levels of trademark protection).

descriptive, as opposed to fanciful and arbitrary or suggestive, the mark must also gain a secondary meaning in trade.[81] A mark can gain a secondary meaning in two ways: (1) if the designer uses the mark exclusively and continuously for five years or more, or (2) if the designer can demonstrate that the mark is uniquely associated with a particular company.[82] An example of both fanciful and arbitrary and gaining a secondary meaning is Apple Computers.[83] The Apple mark is fanciful and arbitrary because there is no connection between apples—a fruit—and computers or technology, and the mark has a secondary meaning because the use of the word "Apple" is now uniquely associated in the consumer's mind with Apple technology.[84] However, trademark protection specifically applies to the mark, not the product bearing the mark.[85] A mark is considered aesthetically functional and is not subject to protection through trademark law if extending protection would significantly undermine a competitor's ability to compete.[86]

Trademark protection can be limited to specific characteristics.[87] Christian Louboutin is famous for producing shoes with a specific shade of red lacquer on the bottom, usually in sharp contrast to the color of the shoe.[88] He first started painting the bottoms of his shoes red in 1992, and he registered for trademark protection in 2008.[89] During a 2012 infringement action, the Second Circuit Court of Appeals determined that Louboutin promoted the shoes to the point where the red-bottomed shoes became closely associated with Louboutin's brand.[90] In an earlier decision, the Supreme Court of the

81. *See id.* (discussing the necessity of secondary meaning).

82. *See id.* (discussing the two ways secondary meaning is demonstrated).

83. *See* David Scalise, Alexa Koenig & Brandon Carr, *The Quest for Distinctiveness in Trademark and Trade Dress Law: What It Means and How to Get It*, 14 GRAZIADIO BUS. REV., no. 1, 2011, at 3–4 (providing examples of trademark protection).

84. *See id.* (showing the use of Apple to describe technology can work in either way for trademark).

85. *See* Quilichini, *supra* note 66, at 236 (describing how trademark protection applies to various marks).

86. *See* Knitwaves, Inc. v. Lollytogs Ltd., 71 F.3d 996, 1006 (2d Cir. 1995) (limiting the instances in which trademark protection is granted to certain characteristics).

87. *See* Christian Louboutin S.A. v. Yves Saint Laurent Am. Holdings, Inc., 696 F.3d 206, 212 (2d Cir. 2012) (identifying the amount of protection afforded to Louboutin's red soled shoes).

88. *See id*. at 212–13 (describing Louboutin's signature design).

89. *See id.* at 211 (discussing the length of time involved in the protection).

90. *See id*. at 213 (analyzing Louboutin's infringement claim).

United States determined that the Lanham Act can protect a single color if the color's only purpose is to identify the source of the product.[91] The Second Circuit determined that Louboutin's red sole mark is protected by trademark law but is limited to red lacquered outsoles that contrast with the upper portion of the shoe.[92] Therefore, Louboutin may prevent other designers from attempting to place a red outsole on an otherwise black shoe but would not protect against a designer placing a red outsole on an all red shoe or a designer placing a contrasting green outsole on the bottom of a black shoe.[93]

Trade dress, an elusive doctrine that is not referenced in the Lanham Act, considers the composite look and feel of a product.[94] The Supreme Court created the trade dress doctrine as an uncodified extension of trademark law.[95] Trade dress protects the packaging or design of a product.[96] In some jurisdictions, trade dress does not protect the goodwill of the design but rather protects the goodwill of the designer.[97] Similar to trademark protection, the trade dress doctrine allows designers to register and protect designs if they can demonstrate distinctiveness, which is defined as an inherently distinctive mark or a secondary meaning in trade.[98] Also similar to trademark protection, the design must be arbitrary and nonfunctional.[99] This doctrine may be used to potentially protect a full look.[100]

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91. *See* Qualitex Co. v. Jacobson Prods., 514 U.S. 159, 166 (1995) (explaining a single color can only be trademark protected if the color "act[s] as a symbol that distinguishes a firm's goods and identifies their source, without serving any other significant function") (emphasis added).

92. *See Christian Louboutin S.A.*, 696 F.3d at 228 (providing limitations on the kind of trademark protection Louboutin can assert).

93. *See* Quilichini, *supra* note 66, at 239–40 (describing when a designer would potentially be infringing on Louboutin's trademark).

94. *See id.* at 236–37 (defining trade dress).

95. *See* Wal-Mart Stores, Inc. v. Samara Bros., 529 U.S. 205, 209–10 (2000) (explaining the source of the trade dress doctrine).

96. *See id.* at 209 (giving examples of things that are protected under the trade dress doctrine).

97. *See id.* (describing the difference between goodwill of a design and designer).

98. *See id.* at 210–11 (comparing the requirements for trade dress with trademark).

99. *See* Taco Cabana Int'l, Inc. v. Two Pesos, Inc., 932 F.2d 1113, 1118–19 (5th Cir. 1991) (explaining the elements of trade dress protection).

100. *See id.* (providing the possibility that trade dress may protect an entire fashion design, even though it is uncommon).

However, many designers struggle to get trade dress protection because the life cycle of fashion is short.[101]

b. Patent Protection

There are two kinds of patents: utility and design patents.[102] Utility patents are available for an invention, discovery, or improvement on a novel and useful process, machine, manufacture, or composition of matter.[103] Design patents protect original and aesthetic product designs.[104] The difference between the two types of patents is that a utility patent protects the way an article works or is used, and a design patent protects an item's ornamental appearance.[105] Ornamental appearance includes the shape, configuration, or decoration on the surface of a design.[106] A design patent requires the design be both original and nonobvious.[107] The originality requirement is a higher bar than the novel requirement for utility patents.[108] An original design must give off the impression of such uniqueness and be so unexpected and imaginative in character that it surpasses the ability of the average

101. *See* Quilichini, *supra* note 66, at 237–38 (explaining that because fashion designs go in and out of cycle quickly, it is difficult to claim a design achieved a secondary meaning in trade).

102. *See* Kosturakis, *supra* note 28, at 42–44 (describing how patents can be used to protect fashion).

103. *See id.* (providing that, to be eligible for a patent, a design must be a "new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement" on the aforementioned).

104. *See* 35 U.S.C. § 171(a) (2018) (defining a design patent as a "new, original and ornamental design for an article of manufacture").

105. *See id.* § 101 (allowing a patent to be granted to anyone who "invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof"); *see id.* § 171 (permitting a patent be granted to a person who "invents any new, original and ornamental design for an article of manufacture may obtain a patent therefor[e], subject to the conditions and requirements of this title").

106. *See 1502 Definition of a Design [R-07.2015]*, U.S. PAT. & TRADEMARK OFF., https://www.uspto.gov/web/offices/pac/mpep/s1502.html [https://perma.cc/Y8RW-L2PF] (last visited Nov. 2, 2020) (discussing the ways ornamental appearance has been applied).

107. *See* Joseph E. McNamara, *Modifying the Design Piracy Prohibition Act to Offer "Opt-Out" Protection for Fashion Designs*, 56 J. COPYRIGHT SOC'Y U.S.A. 505, 513–14 (2009) (discussing the requirements to obtain a design patent).

108. *See* Spaulding v. Guardian Light Co., 267 F.2d 111, 112 (7th Cir. 1959) (holding a design patent requires a showing of originality, which is a higher bar than novelty).

designer.[109] Additionally, a design patent protects ornamental designs if the purpose of the feature is ornamental and not a by-product of function.[110] A feature is functional or useful if it is necessary for using the article.[111] Although some fashion designs meet this burden, courts generally hold that fashion designs are neither novel nor nonobvious.[112]

A design is obvious when an existing work has design characteristics that are fundamentally the same as the new design.[113] Even if no single prior work would make a design obvious, a work is considered obvious if elements from multiple previous works would make the design obvious when considered together.[114] Generally, clothing comes in standard categories such as shirt, pants, skirt, or dress.[115] These standard categories and the industry practice of "quot[ing], comment[ing] . . . , and refer[ring] to prior work" prevent fashion designs from meeting the nonobvious requirement of both design and utility patents.[116]

109. *See id.* ("A design . . . that is new, original and ornamental, unanticipated and inventive in character, and beyond the skill of the ordinary designer or draftsman. . . . Originality imparts something of uniqueness and character,—something more than mere novelty.").

110. *See* McNamara, *supra* note 107, at 515 (describing the difference between an ornamental feature and a feature that is decorative but a by-product of function).

111. *See id.* (explaining the test for whether a design feature is ornamental or functional).

112. *See* Cohen, *supra* note 68, at 175 (citing Neufeld-Furst & Co. v. Jay-Day Frocks, Inc., 112 F.2d 715, 715 (2d Cir. 1940)) (explaining that fashion garments do not meet the standard of being an invention requiring demonstrating "exceptional talent beyond the skill of the ordinary designer").

113. *See* McNamara, *supra* note 107, at 514 (quoting *In re* Rosen, 673 F.2d 388, 391 (C.C.P.A. 1982)) (explaining obvious designs are "basically the same" as previous designs).

114. However, if multiple other works are considered, they must be "so related that the appearance of certain ornamental features in one would suggest the application of those features to the other." McNamara, *supra* note 107, at 514–15 (quoting *In re* Glavas, 330 F.2d 447, 450 (C.C.P.A. 1956)); *see also id.*, at 515 (discussing the high bar of non-obviousness).

115. *See* Wong, *supra* note 57, at 1144–45 (discussing the barriers to patent protection for fashion designs).

116. *See* Hemphill & Suk, *supra* note 11, at 1160 (explaining how the industry-wide practice of drawing inspiration from other designers' work typically prevents fashion designs from being considered "nonobvious").

c. Copyright Protection

Copyright protection encompasses any tangible new expression and prohibits unauthorized reproduction, creation of derivative works, offer for sale, performance, or public display.[117] To protect the public domain and free flow of ideas, copyright protection is limited to specific categories: literary, musical, dramatic, pantomimes and choreography, pictorial, graphic or sculptural, motion pictures and audiovisual, sounds recordings, and architectural work.[118] Copyright protection is unique because it is available at the moment of creation.[119] However, copyright only protects creative works and is not available to anything that is utilitarian or useful.[120] Although fashion is gaining more recognition as culturally significant, courts do not recognize clothing as creative expressions subject to copyright protection.[121] While jewelry and textile designs can receive copyright protection as works of art, clothing cannot.[122] Because clothing serves the function of covering the human body, it is utilitarian and cannot receive copyright protection.[123] However, conceptual separability is one way that clothing designers can get protection from copyright law.[124]

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117. *See* 17 U.S.C. § 102(a) (2018) (providing copyright protection for "original works of authorship fixed in any tangible medium of expression.").

118. *See id.* (enumerating the categories of what is considered a work of authorship).

119. *See id.* § 302(a) (explaining that unlike other forms of intellectual property protection, which take time to become available, copyright protection is immediate upon creation).

120. *See* Mazer v. Stein, 347 U.S. 201, 217–18 (1954) (limiting copyright protection to creative works).

121. *See* Postrel, *supra* note 71 (stating fashion is gaining more recognition as significant to culture); *see* Brewer, *supra* note 29, at 750–51 (discussing courts' refusal to protect designs under the U.S. Copyright Act).

122. *See* Quilichini, *supra* note 66, at 241 (noting that jewelry and belt buckles are considered sculptural works with ornamental purposes under 17 U.S.C. § 102(a)(5) (2018)). Fabric designs are considered writing. *See id.* A garment can be made in a copyright-protected textile, and the fabric would be protected while the actual frame of the garment is not. *See id.*

123. *See* Hemphill & Suk, *supra* note 11, at 1185 (explaining that articles of clothing are typically not considered creative works because they serve the purpose of covering a person).

124. *See* 17 U.S.C. § 101 (2018) (providing the basis for conceptual separability intellectual property protection); Galiano v. Harrah's Operating Co., 416 F.3d 411, 418 (5th Cir. 2005) (establishing the two-prong test for conceptual separability by first determining if the design is useful and then determining if an element can be separated from the utilitarian part of the design).

Conceptual separability protects pictorial, graphic, or sculptural elements that can be separately identified from and exist independently from the utilitarian aspects of the design.[125] Circuits are split on how to apply this doctrine to fashion.[126] However, the United States Copyright Office released a policy decision in 1991 stating that, in general, the Copyright Office will not register copyrights for "three-dimensional aspects of clothing or costume design."[127] The policy decision said that clothing does not have any artistic properties separable from the utilitarian aspects of its nonobvious form.[128] The Copyright Office stated it would protect clothing only if it has a unique pictorial or sculptural aspect separate from the utilitarian aspects of the garment.[129]

2. *Intellectual Property Litigation for Fashion*

Between 2003 and 2008, Forever 21 was the defendant in fifty-three trademark and copyright infringement actions.[130] In contrast, low-priced fashion companies such as Zara and H&M, which do not create exact replicas like Forever 21, had almost no intellectual property litigation during this time.[131] International brand Puma SE (Puma) commenced one such suit against Forever 21.[132] Puma alleged that Forever 21 infringed on its various intellectual property rights to three items from a shoe line called Fenty, which it designed in collaboration with popstar Rihanna.[133] One shoe design, the "Creeper

125. *See id.* (describing conceptual separability and courts' application of the doctrine).

126. *See* Cohen, *supra* note 68, at 176–77 (explaining the tests in various circuits for conceptual separability).

127. *Id.* at 176 (citing Registrability of Costume Designs, Policy Decision, 65 Fed. Reg. 56, 530–31 (Nov. 5, 1991)) (stating that the Office will protect these aspects of clothing designs).

128. *See id.* (stating the Office is unwilling to separate any potential aesthetic or artistic properties of clothing design in a three-dimensional form from its nonobvious and useful form).

129. *See id.* at 176–77 (distinguishing clothing from costumes).

130. *See* Hemphill & Suk, *supra* note 11, at 1173.

131. *See id.* at 1172–73 (comparing the frequency at which Forever 21, a fast-fashion company copying other designs, experiences litigation to the frequency with which fashion companies that do not recreate garments experience litigation).

132. *See* Puma SE v. Forever 21, Inc., No. CV-17-2523 PSG Ex, 2017 WL 4771004, at *1 (C.D. Cal. June 29, 2017).

133. *See id.* (describing the causes of action against Forever 21).

Sneaker," had a design patent protecting its ornamental design.[134] Puma also alleged a trade dress violation because after the shoes' sales success, Forever 21 attempted to capitalize on the goodwill created by the Fenty shoes and created knock-off versions that were confusingly similar.[135] The Central District of California determined that minor dissimilarities, such as the shape of the heel of the shoe, will not prevent infringement if, when considering the whole of the design of the shoe, a reasonable person would see them as substantially similar.[136] However, the court also held that Puma did not sufficiently allege trade dress protection for the three designs because Puma failed to allege that the designs were nonfunctional.[137]

Some fashion brands have successfully recovered damages and been granted an injunction under the trade dress doctrine.[138] In a major piece of litigation, Coach successfully protected its classic handbag design from We Care Trading Co. using trade dress protection.[139] We Care Trading Co. started to produce a handbag that replicated Coach's popular classic handbag.[140] Coach successfully showed the jury its trade dress was nonfunctional and the design elements had a secondary meaning in trade that the public used to identify the source of the product.[141] A survey demonstrated that consumers associated with the Coach brand three out of the four elements that Coach argued were protected by the trade dress doctrine.[142] From this evidence, the jury

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134. *See id.* at *2 (describing the ornamental design that Fenty could prohibit others from using).

135. *See id.* at *1 (explaining the basis of the claims against Forever 21).

136. *See id.* at *3 (stating the court will not overlook the infringement because of small differences between the original and the copy).

137. *See id.* at *4 (concluding that Puma was not protected under the trade dress doctrine).

138. *See* Coach, Inc. v. We Care Trading Co., 67 F. App'x 626, 627–28 (2d Cir. 2002) (alleging violation of the trade dress doctrine on the class Coach handbag and requesting an injunction).

139. The classic Coach handbag was described as:

> . . . glove tanned leather, bound edges, brass or nickel-plated brass hardware, and a lozenge-shaped hang tag with a beaded chain, which is somewhat rectangular in shape with rounded edges and a protrusion on one end which has a hole in it through which the beaded chain may extend so that the beaded chain can attach to the hang tag.

Id. at 627 (internal quotation marks omitted) (discussing the allegedly protected elements).

140. *See id.* at 630 (explaining Coach's classic handbag's popularity).

141. *See id.* at 629–30 (analyzing Coach's claims under the trade dress doctrine).

142. *See id.* at 631 (concluding that Coach's design was protected under the trade dress doctrine).

also determined that Coach's hand tag was protected by trademark law because it had a secondary meaning in trade, was distinctive, and was nonfunctional.[143] The court granted a permanent injunction prohibiting We Care Trading Co. from manufacturing, selling, or distributing the hand tag or the specific handbags at the center of the litigation.[144] The Second Circuit Court of Appeals forbade We Care Trading Co. from producing handbags with a confusingly similar silhouette to Coach's, a tag with the same shape as Coach's hand tag, or handbags with the word "Coach" on them.[145] However, the court somewhat limited Coach's protection by vacating a section of the permanent injunction that prevented We Care Trading Co. from using any handbag design combining glove-tanned leather and bound edges because, without distinctive Coach hardware or the hand tag, such designs would not cause a likelihood of confusion.[146] Although the court partially upheld the injunction and grant of attorneys' fees, the court also did not touch the verdict from the lower court that Coach should receive no damages.[147]

C. Copying v. Inspiration: The Rise of Fast-Fashion

Before World War I, the women's ready-to-wear fashion industry was practically nonexistent.[148] Previously, it was more common for a person to order an outfit or article of clothing to be custom-made after either hiring a seamstress to produce an outfit or seeing a sample on a mannequin.[149] However, during the World Wars,

143. *See id.* at 629–30 (explaining the rationale behind the holding).

144. *See id.* at 631 (holding that We Care Trading Co. violated Coach's intellectual property rights).

145. *See id.* at 628 (describing the parameters of the injunction and the classic Coach design).

146. *See id.* at 631.

147. *See id.* at 627–28 (finding for Coach, Inc. on the trade dress infringement, contributory trade dress infringement, and dilution claims but finding for the We Care Trading Co., on the trademark infringement and contributory trademark infringement claims). The court granted a permanent injunction enjoining We Care Trading Co., from manufacturing, importing, or selling the six handbag styles at issue in trial and any other handbag, tote bag, or backpack with the four identified trade dress elements. *See id.* This split decision further demonstrates the difficulty of proving trademark and trade dress infringement claims. *See id.* at 628–29, 631.

148. *See* W.M. Filene's Sons Co. v. Fashion Originators' Guild of Am., 90 F.2d 556, 557 (1st Cir. 1937) (commenting on the rise of ready-to-wear fashion as a consequence of the World Wars).

149. *See* Sarah Maisey, *A Brief History of Ready-to-Wear Fashion*, NATIONAL (Sept. 20, 2019), https://www.thenational.ae/lifestyle/fashion/a-brief-history-of-

the ready-to-wear styles became more popular and maintained popularity even after World War II ended.[150] These standard-size, pre-made designs were offered for a lower price, thus making ready-to-wear fashion desirable.[151] However, ready-to-wear fashion designers started taking more than just inspiration from others.[152] Even shortly after World War II, courts and designers noticed that some manufacturers did not create original designs but copied and reproduced others' original work.[153] As early as 1937, courts noted that copiers would merely reproduce the works of Parisian designers instead of sending artists to get inspired from the work of designers in fashion capitals.[154] Eventually, large fashion houses like Yves Saint Laurent and Chanel embraced ready-to-wear styles, and today, most clothing is sold this way.[155]

Copying is not limited to counterfeiting logos or symbols.[156] However, there has been successful litigation against those who steal a company's logo and place it on a cheaply made garment or accessory.[157] Original designers experience little successful litigation over designers who copy the exact shape and appearance of fashion designs likely due to the misfit of fashion and intellectual property law.[158] Marketplace globalization and technology advances make it easier, quicker, and cheaper to copy designs and get them

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ready-to-wear-fashion-1.912472 [https://perma.cc/2WK7-A8U5] (describing the evolution of ready-to-wear fashion).

150. *See W.M. Filene's Sons Co.*, 90 F.2d at 557 (explaining that, even after World War II ended, ready-to-wear fashion continued to be popular).

151. *See* Maisey, *supra* note 149 (contrasting ready-to-wear fashion from couture designs).

152. *See W.M. Filene's Sons Co.*, 90 F.2d at 557 (discussing the manner in which ready-to-wear designers began copying other designers).

153. *See id.* ("Other manufacturers do not originate their own styles, but copy the styles and designs of other manufacturers.").

154. *See id.* at 558 (stating that fashion designers began simply copying the designs they saw in Paris instead of working to produce original clothing or merely drawing inspiration from Parisian designers).

155. *See id.* (describing how the top fashion houses eventually started producing ready-to-wear styles in the 1960s).

156. *See* Meredith Derby & Liza Casabona, *Counterfeiting Wars Heat Up for Shoe Players*, 62 FOOTWEAR NEWS, Oct. 3, 2006, at 2, 10 (explaining various ways in which fashion designers can copy others).

157. *See id.* (describing the successes of shoe manufacturers such as New Balance and Asics in policing their trademarks against infringers).

158. *See* Wong, *supra* note 57, at 1153 (explaining that original designers often do not have luck in defending their designs when the law does not provide much protection for fashion designs).

reproduced.[159] Additionally, because there is a shorter, less labor-intensive design phase and laborers work long hours to produce garments, fast-fashion companies can observe which of the original designers' pieces are most well-received and easiest to copy and only produce those.[160] These changes have led to the rise of fast-fashion companies.[161]

Low-price fashion designers can be a positive force in the fashion industry.[162] When designers offer trendy products at a low price, the fashion industry becomes more accessible.[163] However, a key difference between designers and copiers is that designers take inspiration from another's work and supply features that distinguish their version from the original.[164] While designers open the market and contribute by adding new characteristics to inspiration from others' work, copiers undermine the market of the originals and damage the profitability of the original designer.[165]

While a significant demand for low-priced fashion exists, some consumers prefer to buy high priced garments.[166] Consumers value expensive designer goods for many reasons, such as high-quality and brand recognition.[167] The existence of cheaper copies of a garment may reduce the demand for the pricier original in a phenomenon called

159. *See id.* at 1144 (describing how patents can be used to protect fashion).

160. *See id.* at 1154 (describing how fast-fashion companies often wait and see how the target audience receives designs from other fashion designers before reproducing the outfit or garment).

161. *See id.* at 1153–54 (explaining the evolution of fashion industry and law allowed fast-fashion designers to grow in size and popularity).

162. *See* Hemphill & Suk, *supra* note 11, at 1174 (describing the difference between designers and copiers).

163. *See id.* (describing how more affordable garments allow people of different socioeconomic statuses to participate in trends).

164. *See id.* at 1174–75 (distinguishing copying a designer's work from using it as inspiration for an original creation); Lieber, *supra* note 63 (discussing designers, such as Old Navy, that are not fast-fashion designers but take others' designs).

165. *See* Hemphill & Suk, *supra* note 11, at 1175–76 (commenting on the effect copiers have on the profits of originals); W.M. Filene's Sons Co. v. Fashion Originators' Guild of Am., 90 F.2d 556, 558 (1st Cir. 1937) ("Copying destroys the style value of dresses which are copied. Women will not buy dresses at a good price at one store if dresses which look about the same are offered for sale at another store at half those prices. . . . [C]opying substantially reduces the number and amount of reorders which the original creators get.").

166. *See* Hemphill & Suk, *supra* note 11, at 1156–57 (explaining that consumers may still choose to purchase higher priced items, even when cheaper alternatives exist, for social and societal reasons).

167. *See id.* at 1176 (discussing the reasons some consumers are attracted to high-priced items).

the "snob effect."[168] Some consumers enjoy purchasing high priced items for the status and lose interest in garments when the status is affected by the availability of lower-priced copies.[169]

D. Fashion and International Labor: Fast-Fashion Contracting Around the FLSA

Lawmakers and courts have attempted to provide relief for workers who face unfair work conditions.[170] The FLSA aims to provide minimum acceptable working conditions for worker safety and dignity, and it provides workers with relief when employers violate those standards.[171] The hot goods provision is one tool provided by the FLSA that allows the Secretary of Labor to prohibit retailers from selling goods that the Secretary believes were produced in unfair labor conditions.[172] Courts have attempted to hold those in violation of the FLSA accountable for their actions.[173]

1. *The Fair Labor Standards Act*

The FLSA forbids employers from paying employees less than minimum wage, employing children, and working employees long overtime hours without extra pay.[174] One goal of the FLSA is to benefit employers who treat employees well but are at a competitive disadvantage in their markets as a result.[175] The FLSA employs a

168. *See id.* (internal quotation marks omitted) (discussing the ways copies affect the demand for originals).

169. *See id.* (explaining how fast-fashion designers harm the profitability of original designers when the clothes are offered for a cheaper price).

170. *See* Sobel-Read & Monaghan, *supra* note 20 (discussing attempts to bring companies using unfair labor practices to justice).

171. *See* FLSA § 215-16 (providing companies with instructions on acceptable work conditions for employees and relief for workers when those standards are not met).

172. *See* §§ 216–17 (providing the Secretary of Labor a vehicle to prohibit the sale or transport of goods allegedly produced in violation of the FLSA).

173. *See* Hemphill & Suk, *supra* note 11, at 1173 (discussing litigation regarding fashion).

174. *See* § 202 (eliminating "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers").

175. *See* Citicorp Indus. Credit, Inc. v. Brock, 483 U.S. 27, 36–37 (1987) (discussing the goals and purposes of the FLSA).

broader definition of "employ" than common law.[176] Common law focuses on the amount of supervision and control a potential employer exerts over the potential employee.[177] The FLSA defines "employer" as anyone who "suffer[s] or permit[s another] to work," which is a broader definition.[178] Some workers and agents have the power to prevent labor violations but choose not to.[179] Congress enacted the FLSA with the goal of holding those workers and agents responsible.[180] This goal started a trend of Congress and the judiciary holding employers responsible for the violations occurring in their workplaces.[181]

Under the FLSA, either a worker or the Secretary of Labor can bring an action against an employer who allegedly commits an unfair labor practice.[182] Violations of the FLSA are common among unskilled labor forces.[183] One survey in 2009 reported that more than two-thirds of low-wage workers experienced one or more compensation violations in the past work week.[184] Many of the workers who were surveyed worked for labor contractors.[185]

Only the Secretary of Labor may bring an action under the hot goods provision to enjoin a person or company from transporting or selling goods.[186] Manufacturers are not exempt from punishment under the hot goods provision by current compliance with the FLSA standards when they have past violations or simply do not know about

176. *See* Goldstein et al., *supra* note 18, at 1004–05 (explaining the different interpretations of the term "employ" in federal law).

177. *See id.* (explaining the common law test for "employ").

178. *See id.* (explaining the difference between the FLSA definition of employ and the common law interpretation).

179. *See id.* (discussing common labor violations in the fashion industry that supervisors and agents fail to prevent).

180. *See id.* (describing the goals of the FLSA).

181. *See* Rogers, *supra* note 36, at 11 (noting after the FLSA was enacted, Congress and the courts held employers accountable for labor violations with increasing regularity).

182. *See id.* at 10 (describing the two methods for FLSA enforcement).

183. *See id.* (noting that low-wage industries suffer unfair working conditions more commonly than the skilled workforce).

184. *See* ANNETTE BERNHARDT ET AL., BROKEN LAWS, UNPROTECTED WORKERS: VIOLATIONS OF EMPLOYMENT AND LABOR LAWS IN AMERICA'S CITIES 5 (2009) (reporting that more than two third of low-wage workers "experienced at least one pay-related violation in the previous work week").

185. *See id.* (noting that many of the workers in the survey who suffered from a pay-related violation were part of the unskilled workforce).

186. *See* Rogers, *supra* note 36, at 10 (explaining that, unlike in unfair labor practice actions, only the Secretary of Labor has a cause of action under the hot goods provision).

violations.[187] When hot goods are put into the stream of commerce, they have a negative ripple effect on labor conditions and competition in the industry.[188] By violating the FLSA, companies cut costs, which gives them a competitive advantage over competitors who follow the FLSA.[189] Therefore, when products manufactured in conditions that violate the FLSA are put into commerce without penalty, those labor conditions are perpetuated and the entire industry can be adversely impacted.[190]

The hot goods provision has two major exceptions.[191] Anyone who transports hot goods in good faith as a common carrier is not liable for their transportation of the goods.[192] Similarly, a purchaser or transporter of hot goods who believes in good faith the production of the goods complied with the FLSA and has written assurances from the producer is also exempt.[193] Good faith written assurances that the goods were not produced in violation of the FLSA are not required by law for the sale of goods, but are the only protection against a hot goods injunction for an innocent purchaser.[194] A boilerplate compliance clause in a purchase order, a continuing guarantee, or written assurances before or after the goods are delivered will not protect the purchaser if it is not performing due diligence or ignoring obvious indications of a violation.[195]

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187. *See* Herman v. Fashion Headquarters, Inc., 992 F. Supp. 677, 679 (S.D.N.Y. 1998) (explaining once hot goods enter the stream of commerce, the damage cannot be undone).

188. *See Production Manager Enjoined from Shipping "Hot Goods*,*"* 61 PAYROLL GUIDE NEWSL. No. 13, June 28, 2002, at *2, 2002 WL 32139659 (explaining policies behind the hot goods provision).

189. *See id.* (describing the effects hot goods have on the entire industry).

190. *See id.* (discussing the effects of substandard labor conditions).

191. *See* FLSA § 212(a) (providing two exceptions to the hot goods provision).

192. *See* § 215(a) (establishing the good faith exception to the hot goods provision).

193. *See id.* (establishing the written assurances exception to the hot goods provision).

194. *See id.* (stating that, although written assurances establish an exception, they are still not required to participate in the marketplace); *Employer's Guide to Fair Labor Standards Act* § 990 Seizure of Hot Goods (Oct. 2019) (explaining that corporations cannot take "ostrichlike attitude" by ignoring obvious issues and still be protected by the hot goods provisions safe harbor).

195. *See id.* (defining the written assurances exception).

2. *Fast-Fashion's Entanglement with Labor Issues*

Charlotte Russe is an example of a fast-fashion company that contracted with a manufacturer in violation of labor laws.[196] One of Charlotte Russe's garment manufacturing contractors, RK Apparel, Inc. (RK Apparel), had multiple wage and overtime violations, which made the garments it produced hot goods and unfit for interstate commerce.[197] RK Apparel paid some workers as low as $4.00 per hour.[198] RK Apparel required others to work up to fifty-eight hours per week but only paid them a flat rate for the garments with no overtime pay.[199] RK Apparel assured the Department of Labor (DOL) that it would not ship the goods, but ultimately shipped them to Charlotte Russe.[200] In an effort to make a statement that the DOL takes FLSA violations seriously and will use the hot goods provision as a tool to ensure compliance, the DOL issued a temporary restraining order on RK Apparel that prevented the manufacturer from shipping clothes to Charlotte Russe.[201]

In a similar instance, the DOL put a hot goods hold on the manufacturing company Ladies Apparel Group, and the Secretary of the DOL brought an action against the company and several of its leaders for FLSA violations.[202] One production manager, Morris Suss, and several other personnel previously met with the DOL five times between 1999 and 2001.[203] Suss met with the DOL when he was the production manager for Suits Apparel Group, a company that went out of business.[204] Suits Apparel Group and Ladies Apparel Group were not technically the same company but shared many of the same personnel and a common owner.[205] Suss picked contractors to cut and

196. *See* News Release, *supra* note 50 (reporting on RK Apparel and Charlotte Russe's alleged violations).

197. *See id.* (describing the nature of RK Apparel, Inc.'s violations).

198. *See id.* Federal minimum wage is $7.25 per hour. *See id.* (discussing wage requirements in the United States).

199. *See id.* (describing RK Apparel's offenses).

200. *See id.* (explaining the violation of the hot goods provision).

201. *See id.* (explaining the policy reasoning behind the decision).

202. *See Production Manager Enjoined from Shipping "Hot Goods," supra* note 188, at *1 (describing how the DOL held products from a manufacturing company due to suspected violations of the FLSA).

203. *See id.* (discussing the fact about Suss's meeting with the DOL previously for labor violations).

204. *See id.* (explaining the nature of Suss's meetings with the DOL).

205. *See* Chao v. Ladies Apparel Grp., No. 01 Civ. 10724(JGK), 2002 WL 1217194, at *1–2 (S.D.N.Y. June 5, 2002) (explaining how Suits Apparel Group

sew the garments, placed orders, and arranged for shipping the garments.[206] A subsequent investigation revealed that nineteen out of twenty-four of Ladies Apparel Group's "contractors owed back wages to approximately 560 employees."[207] Ladies Apparel Group and two of its principals consented to a preliminary injunction, but Suss attempted to fight a preliminary junction against him personally.[208] A Southern District of New York trial court granted the injunction against Suss personally since he had multiple violations of the FLSA standards.[209]

In February 2020, a fire broke out in Nandan Denim, an Indian denim factory.[210] Nandan Denim and its sister companies manufacture denim clothing for more than twenty international brands, including Target, H&M, and Wal-Mart.[211] The factory had only one exit, which required workers to climb up a ladder to access.[212] Seven workers died because they were trapped in the factory after working a long shift inside with no other way to get out.[213] Indian authorities acknowledged the single, inaccessible exit was just one of several Indian regulatory violations in the factory.[214] The workers often worked fourteen hours per day and were paid only $0.35 per hour.[215] At least one employee was too scared to speak out against the company in fear of losing his

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essentially reopened under the name Ladies Apparel Group after it was found in violation of the FLSA).

206. *See id.* at *1 (describing Suss's responsibilities and duties as an employee of Ladies Apparel Group).

207. *See id.* at *2.

208. *See id.* at *1, *5 (explaining that Suss was not a consenting party to a preliminary injunction during the investigation and litigation).

209. *See Production Manager Enjoined from Shipping "Hot Goods," supra* note 188, at *1–2 (describing the outcome of the litigation).

210. *See* Sheikh Saaliq & Martha Mendoza, *Burned India Denim Factory Had Single Door Reached by Ladder*, ABC NEWS (Feb. 12, 2020, 9:27 AM), https://abcnews.go.com/Business/wireStory/ladder-door-escape-deadly-india-factory-fire-68931511 [https://perma.cc/5JHD-D8LS] (reporting a factory fire in India).

211. *See id.* (listing several international brands doing business in the United States that Nandan Denim claims it does business with).

212. *See id.* (discussing the layout of the factory and that the only exit was up a steep ladder).

213. *See id.* (reporting the tragic death of seven factory workers who were either unable to escape the conditions or gave their lives to return to the factory to try to rescue others).

214. *See id.* (quoting a spokesperson acknowledging multiple labor violations in the factory).

215. *See id.* (describing the labor violations experienced by the workers in the factory).

job.[216] Several of the fashion brands have since condemned the work conditions, and the owner, manager, and fire safety officer were arrested.[217] A spokesperson for the Textile Labour Association and the factory workers claimed that Indian factories are rarely inspected and enforce few safety regulations.[218] The spokesperson also stated that brands and retailers are aware of the conditions that textile factory workers in India face but still choose to contract with the factories.[219]

Many companies claim they want to help eradicate the problem.[220] However, under the current legal climate, they are not required to, and if they voluntarily take more control, they open themselves up to liability.[221] If a design company chooses to embrace chain integration instead of hiring a contractor, and its employees are violating the FLSA, the harmed employees have a cause of action directly against the design company.[222] If the company used a contractor instead, the harmed employees would only have a cause of action against the contractor.[223] Although the companies want to be responsible, the risk of litigation, profit loss, and public image damage is high, and current laws allow them to avoid that risk.[224]

While the manufacturing companies may violate labor laws, an issue arises with who the workers can hold liable.[225] The labor contractor has no assets and is judgment-proof, and the fashion designers are too far removed in the supply chain to be held liable, so

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216. *See id.* (stating one witness who was quoted was afraid to be identified because doing so would put his job at risk).

217. *See id.* (reporting that one of the brands doing business with Nandan Denim stated the factory fire was tragic).

218. *See id.* (explaining that although these practices are illegal, a lack of safety inspections and safety regulations do little to protect workers).

219. *See id.* (lamenting the fact fashion companies continue to do business with Nandan Denim and other textile factories that violate labor laws).

220. *See* Sobel-Read & Monaghan, *supra* note 20 (noting the desire of many companies to use fair labor).

221. *See id.* (providing the potential liability for unfair labor practices as a reason fashion companies are reluctant to take more control over their supply chains when they are not required to do so).

222. *See id.* (referencing the fact that laborers only have a cause of action against employers, not contractors).

223. *See id.* (describing the employer–employee relationship and the FLSA's applicability).

224. *See* Thomas, *supra* note 5 (explaining the risks associated with assuming more responsibility over the supply chain through integration).

225. *See* Sobel-Read & Monaghan, *supra* note 20 (explaining that, because the manufacturing company is the employer and not the fashion brand, workers do not have a cause of action against the fashion brand for which the design is ultimately produced).

the workers often see no actual relief even if a court enters judgment against the factories.[226] Often, the hired manufacturing companies' only assets are the thread and needles needed to sew.[227] They force their employees to work long hours and provide meager wages.[228]

II. WHY NOT INTELLECTUAL PROPERTY LAW?

Intellectual property law is inadequate to protect fashion designers, and a solution to the issue may be outside of property law.[229] Labor laws could require fashion companies to exercise more control over their supply chain, which would decrease the profitability of copying designs and contracting with companies who use unfair labor practices.[230] Once fast-fashion companies use subcontractors that use fair labor practices, the fast-fashion companies will lose their competitive advantage over original designers and those complying with the FLSA.[231] When fast-fashion companies lose this competitive advantage, their business model will crumble, and they will be forced to either make original designs produced in fair conditions or go out of business.[232]

The "patchwork" framework of intellectual property law is inadequate to protect fashion designers' work.[233] The traditional policy goal behind much of intellectual property law is to encourage innovation and reward those who invest in creating.[234] Fashion houses and designers continue to innovate and create new designs.[235] However, the intellectual property framework has gaps where fashion

226. *See* Goldstein et al., *supra* note 18, at 987–88 (explaining why workers often do not receive relief when they bring actions for unfair labor practices).

227. *See id.* (describing workers' inability to collect damages from some manufacturers because they are judgment proof).

228. *See id.* (describing the poor work conditions and compensation the workers are often forced to endure).

229. *See* Raustiala & Sprigman, *supra* note 73, at 1699 (describing the incompetence of intellectual property law in protecting fashion).

230. *See* Sobel-Read & Monaghan, *supra* note 20 (describing labor laws that could help with these abuses).

231. *See* FLSA § 217 (discussing the way the hot goods provision works).

232. *See id.* § 207 (discussing unfair labor conditions).

233. *See* Wong, *supra* note 57, at 1142 (describing intellectual property law's inadequacy in protecting fashion).

234. *See* Raustiala & Sprigman, *supra* note 73, at 1689–91 (discussing the policy reasons for protecting intellectual policy).

235. *See id.* at 1689 (stating that, like others whose products are protected through intellectual property laws, fashion designers continue to innovate).

designs go unprotected.[236] Even if intellectual property law did protect fashion, the time and money investments make pursuing such protection too burdensome in many cases.[237] The amount of time and money necessary to gain patent or trademark protection is too great to be effective for fashion.[238] Additionally, an increase of intellectual property protection in fashion, even with the best intentions, could inadvertently slow down or halt fashion innovation and punish designers who honestly try to innovate but create works close to originals.[239]

A. Trademark

Trademark protection covers names, slogans, symbols, or any other distinguishing characters used to identify or distinguish the source of one good from another in commerce.[240] Therefore, trademark protection would ensure that a designers' logo is protected, but not an entire look or the product bearing the logo.[241] Trademark law rarely protects garments because it requires distinctiveness and does not protect any feature of a look or design that is considered functional.[242] Distinctiveness is measured on a spectrum.[243] Fanciful or arbitrary and suggestive marks are inherently distinct, and a trademark applicant can demonstrate distinctiveness for descriptive marks if the mark gained a

236. *See id.* (discussing the incomplete intellectual property framework as it relates to fashion).

237. *See* Wong, *supra* note 57, at 1142–45 (discussing drawbacks to intellectual property protection and litigation including time and money expenditures).

238. *See id.* (discussing the time that it takes to get a patent or gain a secondary meaning in trade for trademark protection).

239. *See* Emily Zanotti, *What's the Role of Intellectual Property in Fashion Design?*, REALCLEARPOLICY (Feb. 6, 2014), https://www.realclearpolicy.com/blog/2014/02/07/whats_the_role_of_intellectual_property_in_fashion_design_830.html [https://perma.cc/X6UD-ZWLH] (discussing the potential inefficiencies in creating new intellectual property protection for fashion).

240. *See* Wong, *supra* note 57, at 1142 (discussing trademark applicability to certain marks).

241. *See* 15 U.S.C. § 1127 (2018) (defining the parameters for trademark protection).

242. *See* Qualitex Co. v. Jacobson Prods., 514 U.S. 159, 163–66 (1995) (forbidding a company from preventing legitimate business competition by allowing a company to prevent others from utilizing a functional feature of a product unless other intellectual property protection applies).

243. *See* Scalise, Koenig & Carr, *supra* note 80 (describing the different levels of distinctiveness).

secondary meaning.[244] As demonstrated by Apple, Inc., a fanciful or arbitrary mark is something that is unique and unrelated to the product.[245] Fast-fashion companies are copying clothing designs and patterns, which are not as unique and distinct as the name "Apple" for a computer company.[246]

Trademark protection requires the design to be inherently distinct or achieve a secondary meaning in commerce, which can take years.[247] Because it is so easy for fast-fashion companies to copy original designs quickly, it is difficult for a designer to use a characteristic exclusively and continuously for five years.[248] Achieving a secondary meaning is a challenge for designers because the majority of designs have a short life cycle.[249] Likewise, a fast-fashion company can recreate a design in a much shorter time than it takes for a characteristic to be uniquely associated with its original designer.[250] In trade dress litigation, the Supreme Court determined that designs cannot be inherently distinct.[251] Therefore, the Lanham Act cannot protect designs as either trademark or trade dress unless the design is a name, color, or other mark that is either fanciful and arbitrary or has achieved a secondary meaning in trade.[252]

Trade dress is an uncodified extension of the Lanham Act created by the Supreme Court.[253] This doctrine protects the packaging or design of a product by considering the total look and feel of a product.[254] Like trademark protection, the trade dress doctrine will protect a nonfunctional feature if it is inherently distinct or has gained

244. *See* Raustiala & Sprigman, *supra* note 73, at 1694–95 (discussing the ways a mark can be distinct).

245. *See* Scalise, Koenig & Carr, *supra* note 80 (describing the ways to prove different levels of distinctiveness).

246. *See id.* (discussing fanciful and arbitrary marks as distinct).

247. *See id.* (explaining that achieving a secondary meaning in trade requires years).

248. *See id.* (explaining the modes of showing secondary meaning in trade).

249. *See* Quilichini, *supra* note 66, at 237 (discussing the barriers to fashion designs achieving a secondary meaning in trade).

250. *See* Scalise, Koenig & Carr, *supra* note 80 (discussing the time it takes to achieve a secondary meaning).

251. *See* Wal-Mart Stores, Inc. v. Samara Bros., 529 U.S. 205, 212 (2000) (holding that designs are not different enough from each other to be distinct).

252. *See id.* (explaining the incompatibility between fashion designs and the Lanham Act protection).

253. *See id.* at 209 (extending the Lanham Act to include trade dress).

254. *See* Taco Cabana Int'l, Inc. v. Two Pesos, Inc., 932 F.2d 1113, 1118 (5th Cir. 1991) (defining the trade dress doctrine and determining its elements).

a secondary meaning in trade.[255] The trade dress doctrine is unique because it has the potential to protect a whole garment if the look and feel of the product warrants such protection.[256] However, similar to trademark protection, trade dress protection often does not protect designs in practice because of the length of time needed to gain secondary meaning in trade.[257]

Additionally, even if trademark or trade dress law did protect fashion designs, the timeline for getting either is impractical.[258] As Louboutin's trademark litigation demonstrates, intellectual property protection and litigation takes a great deal of time.[259] He began his practice of painting the outsoles of shoes red in 1992, he registered for trademark protection sixteen years later in 2008, and the Second Circuit delivered its opinion protecting his red-soled shoes in 2012.[260] Similarly, Coach, Inc. started using the same leather that later gained intellectual property protection on its classic handbag when it was founded in 1941 but still needed to litigate over its intellectual property rights in 2012.[261] Also, although Coach, Inc. won an injunction against We Care Trading Co., the jury awarded no damages.[262] Coach, Inc. is a large brand that can afford to litigate over its intellectual property rights without being awarded damages, but many independent designers could not afford to pursue this action.[263] Therefore, independent designers would not receive protection from

255. *See Wal-Mart Stores, Inc.*, 529 U.S. at 210 (analyzing the trade dress doctrine and comparing it to trademark protection).

256. *See Taco Cabana Int'l, Inc.*, 932 F.2d at 1118–19 (explaining the applicability of trade dress to composite products and looks).

257. *See* Quilichini, *supra* note 66, at 237–38 (discussing the fashion life cycle as it relates to trademark and trade dress protection).

258. *See* Cohen, *supra* note 68, at 175; Wong, *supra* note 57, at 1144–45 (describing the length of time necessary to get trademark, trade dress, and patent protection).

259. *See* Christian Louboutin S.A. v. Yves Saint Laurent Am. Holdings, Inc., 696 F.3d 206, 211–12 (2d Cir. 2012) (describing the timeline of Louboutin's red-bottomed shoes and their trademark protection).

260. *See id.* (discussing the length of time of this litigation).

261. *See* Katie Davies, *The Full History of Coach Handbags*, LOVETOKNOW, https://handbags.lovetoknow.com/The_Full_History_of_Coach_Handbags (last visited Nov. 2, 2020) (discussing the origins of Coach Inc.'s iconic tanned leather); Coach, Inc. v. We Care Trading Co., 67 F. App'x 626, 627–28 (2d Cir. 2002).

262. *See Coach, Inc.*, 67 F. App'x at 627–28 (holding that Coach, Inc. won its action, although the jury chose not to award monetary damages).

263. *See id.* (explaining that the jury decided to award an injunction only).

the court system and would be left vulnerable to fast-fashion companies.[264]

B. Patents

Patents have a strict framework, and the requirements are difficult for a fashion designer to meet.[265] A design patent protects an original, nonobvious, ornamental design.[266] Originality requires a design to be so unique, unanticipated, and inventive that it is more than novel and beyond what an ordinary designer could make.[267] A feature is obvious if it is fundamentally the same as a prior work.[268] A feature is also obvious if it is fundamentally the same as multiple prior works when considered in the aggregate.[269] Few ornamental fashion designs are original and nonobvious enough to qualify for a design patent.[270] However, as demonstrated by Fenty's Creeper Sneaker litigation, a fashion company can successfully protect its creations when they can get a design patent.[271]

Moreover, the patent system takes a long time.[272] Garments are perishable goods, and by the time the patent is granted, the trend is often already out of style.[273] Similar to the length of time it takes to

264. *See id.* (holding that We Care Trading Co. violated Coach, Inc.'s intellectual property rights).

265. *See* Wong, *supra* note 57, at 1144–45 (explaining that designers often struggle to meet the requirements for a patent due to the regimented high standard).

266. *See* 35 U.S.C. § 171 (2018) (creating the framework for a design patent).

267. *See* Spaulding v. Guardian Light Co., 267 F.2d 111, 112 (7th Cir. 1959) (defining a design patent as "a design that is new, original and ornamental, unanticipated and inventive in character, and beyond the skill of the ordinary designer or draftsman. . . . Originality imparts something of uniqueness and character,—something more than mere novelty") (internal citations omitted).

268. *See* McNamara, *supra* note 107, at 514–15 (explaining the elements of an obvious design).

269. *See id.* at 514–15 (describing the elements for a design patent and the difficulties the framework presents for fashion designers).

270. *See id.* (discussing that fashion garments tend to follow a typical structure that precludes a designer from receiving a design patent due to a lack of innovation).

271. *See* Puma SE v. Forever 21, Inc., No. CV-17-2523 PSG Ex, 2017 WL 4771004, at *1 (C.D. Cal. June 29, 2017) (holding Fenty's Creeper Sneaker had a valid design patent and Forever 21 infringed on it).

272. *See id.* (recognizing that fashion is perishable and by the time a patent is granted, garments may have already been copied or the design may no longer be in style); *see also* Wong, *supra* note 57, at 1144–45 (explaining that, on average, a patent applicant must wait 25.7 months to receive a patent).

273. *See* Thomas, *supra* note 5 (explaining that the average article of clothing is only worn seven times before it is thrown out, further showing the perishability of

gain trademark or trade dress protection, getting a patent often takes twenty-five months.[274] Even if the designer receives either protection, fashion usually has a short life cycle, and trends can change multiple times a year.[275] Both can be very expensive to obtain and designers create numerous garments a year, which makes trying to protect each design through a patent too expensive.[276] The timeframe and expense creates a huge barrier for new or small designers who do not regularly make large profits off designs like major fashion houses.[277]

C. Copyright and Conceptual Separability

Copyright law would appear to protect fashion designs because it protects creative expressions.[278] Also, the fact copyright protection is available at the moment a work is created would be more beneficial than trademark or patent law due to the short life cycle of fashion.[279] Copyright protection attempts to strike a balance between prohibiting unauthorized reproductions, creations of derivative works, offers for sale, performances, or public displays of a work, while encouraging the free flow of ideas.[280] Because of this balance, copyright protection is only available for creative works, not anything utilitarian or useful.[281] While fashion's legitimacy as an art form is still under debate, courts hold that clothing is considered utilitarian.[282] Clothing

fashion); Wong, *supra* note 57, at 1144–45 (discussing the frequency at which trends go in and out of style).

274. *See* Wong, *supra* note 57, at 1144–45 (explaining that the average waiting period for a patent is 25.7 months).

275. *See* Thomas, *supra* note 5 (describing the speed at which fashion designs can go out of style).

276. *See id.* (describing the high costs associated with getting intellectual property protection).

277. *See* Hemphill & Suk, *supra* note 11, at 1175–76 (explaining the difficulty for new or independent designers to profit from original designs in an industry that benefits copyists and entrenched distributers).

278. *See* Wong, *supra* note 57, at 1145–46 (discussing fashion in terms of copyright law and its potential applicability).

279. *See* 17 U.S.C. § 302(a) (2018) (stating copyright protection is available when the expression is made).

280. *See id.* § 102 (providing the framework of copyright protection).

281. *See* Mazer v. Stein, 347 U.S. 201, 218 (1954) (excluding useful and utilitarian works from copyright protection).

282. *See id.* (explaining that clothing is used to cover the body, so it is not considered an expression); Postrel, *supra* note 71 (discussing fashion designers' legitimacy as artists and the cultural significance of clothing).

serves the functional purpose of covering the human body, so courts generally refuse to extend copyright protection to clothing.[283]

Some aspects of fashion and clothing are subject to copyright protection.[284] Jewelry, belt buckles, and patterns are eligible for copyright protection.[285] Jewelry and belt buckles are considered sculptural works.[286] Patterns on a textile are considered writings.[287] Both sculptural works and writings are eligible for copyright protection if a work meets the other requirements of copyright.[288] Jewelry, belt buckles, and patterns do not serve a functional purpose and are creative expressions subject to copyright protection, unlike clothing.[289] Therefore, some protection exists for designers creating their own textile patterns.[290] Copyright law would protect the pattern itself but not the garment bearing the pattern.[291] However, fast-fashion companies act in a calculated manner to avoid copyright litigation.[292] For example, fast-fashion companies avoid unique fabrics or extremely unique garment forms.[293] They tend to copy mid-range designers instead of industry leaders who are much more

283. *See Mazer*, 347 U.S. at 218 (holding clothing is utilitarian, not a creative expression, and declining to extend copyright protection to fashion).

284. *See* Quilichini, *supra* note 66, at 241 (discussing how some features or parts of fashion can be copyright protected even though clothing cannot).

285. *See* § 102(a)(5) (stating a sculptural work with ornamental purpose can be copyright protected); *see also* Quilichini, *supra* note 66, at 241 (comparing the utilitarian aspects of clothing with the ornamental features of jewelry, belt buckles, and textile patterns).

286. *See* Quilichini, *supra* note 66, at 241 (discussing jewelry and belt buckles as eligible for copyright protection).

287. *See id.* (describing a textile pattern as a writing).

288. *See* § 102(a)(5) (enumerating categories of work eligible for copyright protection).

289. *See id.* (discussing eligibility for copyright protection); *see also* Quilichini, *supra* note 66, at 241 (contrasting the functional purpose of clothing with the ornamental purpose of jewelry, belt buckles, and patterns).

290. *See* Quilichini, *supra* note 66, at 241 (discussing the applicability of copyright law to patterns).

291. *See id.* (explaining the extent of copyright protection for a pattern on a garment).

292. *See* Hemphill & Suk, *supra* note 11, at 1154–55 (explaining fast-fashion companies are sophisticated and intentionally circumvent intellectual property laws to continue their practices).

293. *See id.* at 1174–76 (explaining fast-fashion companies' strategies in selecting which designs to copy).

recognizable.[294] These strategic actions circumvent any protection copyright law provides for fashion designers.[295]

Pictorial, graphic, or sculptural elements separable from utilitarian aspects of a design can be protected under the doctrine of conceptual separability.[296] Circuits are split on how to apply conceptual separability.[297] However, the United States Copyright Office stated that it will not recognize copyright protection for three-dimensional features of clothing.[298] Similar to copyright law, the Copyright Office explained its belief that clothing does not have artistic value beyond its utilitarian function of covering the body, and it will only protect graphic or sculptural elements with ornamental purpose.[299] Although some circuits provide more protection for clothing under conceptual separability, those circuits do not offer enough protection because the remaining circuits and the Copyright Office are unwilling to protect designs with this doctrine.[300]

III. HOW THE HOT GOODS PROVISION CAN PROTECT HAUTE COUTURE

Fashion is a $1.2 trillion industry worldwide and a $250 billion industry in the United States alone.[301] If the United States Congress incentivized chain integration, brands would take control of their supply chains to ensure compliance.[302] Enforcing the hot goods provision against noncompliant companies would force these

294. *See id.* (describing manners in which fast-fashion companies circumvent intellectual property laws).

295. *See id.* (discussing fast-fashion's strategic operations in avoiding fashion litigation); *see also* Quilichini, *supra* note 66, at 241 (discussing the applicability of copyright protection to ornamental features of fashion).

296. *See* 17 U.S.C. § 101 (2018) (discussing the kinds of work conceptual separability applies to); *see also* Hemphill & Suk, *supra* note 11, 1186–87 (suggesting conceptual separability could be used as a method to protect fashion designs).

297. *See* Cohen, *supra* note 68, at 176–77 (discussing the various applications of conceptual separability).

298. *See id.* (discussing the United States Copyright Office's 1991 policy decision).

299. *See id.* (analyzing the Copyright Office's policy decision and its impact on fashion designers).

300. *See id.* (discussing the effects of the circuit split and policy decision on designers).

301. *See* JOINT ECON. COMM., U.S. CONG., THE ECONOMIC IMPACT OF THE FASHION INDUSTRY 1 (2015).

302. *See* Sobel-Read & Monaghan, *supra* note 20 (explaining the effect United States laws would have on the international industry).

companies to change their manufacturers and break the draconian reliance on companies who exploit labor.[303]

A. Chain Integration

Chain integration occurs when a brand takes more control over their suppliers and potentially their supplier's suppliers and so forth.[304] Requiring companies to take more control, and thus more liability, over their supply chain would have the dual outcome of forcing companies to improve work conditions and create original designs.[305] This additional oversight forces companies to implement fair work practices and it would allow laborers to sue the design company if unfair practices persist.[306]

If Congress required or incentivized chain integration, brands would be relieved from the double-edged sword of taking control of their supply chains.[307] Requiring or incentivizing chain integration would give workers suffering from unfair work conditions relief if they received a judgment against their factories.[308] If the United States were to enforce the hot goods provision against companies producing clothing overseas, fashion brands would be responsible for contracting with a judgment-proof manufacturing company.[309] This use of the hot goods provision would provide an incentive for fashion brands to establish control and take responsibility for the work conditions in the manufacturing companies they contract with.[310] Therefore, some fashion companies may determine that it is safer to personally oversee

303. *See* FLSA §§ 212, 215–17 (creating the hot goods provision).

304. *See* Sobel-Read & Monaghan, *supra* note 20 (explaining how the fashion industry would benefit from large fashion brands using chain integration).

305. *See* FLSA § 207 (identifying unfair labor practices that are prohibited).

306. *See id.* (explaining that implementing chain integration would allow workers to recover from fashion companies through the employee–employer relationship required by the FLSA).

307. *See* Sobel-Read & Monaghan, *supra* note 20 (explaining in the current fashion industry climate, brands are usually not liable for the unfair conditions of their suppliers' workplaces). Although many brands want to take control, this exposes them to legal liability, so they are faced with the difficult choice of avoiding liability or potentially allowing their products to be produced in unfair and unsafe work conditions. *See id.*

308. *See* Goldstein et al., *supra* note 18, at 996–97 (explaining how this would protect workers from judgment-proof manufacturing companies).

309. *See* CAL. LAB. CODE § 2670 (West 1980) (providing a broad definition of employ and allowing workers for contracting companies to recover).

310. *See id.* (providing a broad range of relief for those facing unfair labor practices).

the production process because then they can ensure that the required labor conditions are met.[311]

B. The Hot Goods Provision and Fashion

Fast-fashion companies copy others' designs and contract with manufacturing companies with unfair work conditions to reduce production costs.[312] Broader enforcement of labor laws would increase these companies' costs, which would thus make them less profitable and force them to increase their retail prices.[313] Higher prices and higher costs ultimately destroy their business model.[314] Fast-fashion companies that copy designs and reproduce them rapidly eliminate the time and financial investment other brands dedicate to their design process.[315] However, enforcement of labor laws would raise the costs associated with production simply because it is more expensive to run a fair company.[316] The FLSA eliminates the competitive advantage associated with paying employees less and forcing them to work in unfair or unsafe conditions.[317]

Fashion companies operating in the United States often contract with international companies who employ unskilled workers to produce garments.[318] The garments are transported and sold in the United States.[319] Currently, the hot goods provision is only used to enjoin the shipment and sale of goods produced in the United States in violation of the FLSA.[320] However, unskilled workers worldwide

311. *See* Sobel-Read & Monaghan, *supra* note 20 (discussing Chanel's strategic decision to embrace chain integration in order to control quality and its manufacturing processes).

312. *See* Hemphill & Suk, *supra* note 11, at 1152 (discussing the profitability of fast-fashion).

313. *See id.* at 1171 (discussing how fast-fashion reduces costs).

314. *See id.* (discussing the profitability of fast-fashion). If fast-fashion cannot make a profit, it will be forced to adapt or go out of business). *See id.*

315. *See* Wong, *supra* note 57, at 1154 (explaining the potential consequences for fast-fashion companies).

316. *See* Sobel-Read & Monaghan, *supra* note 20 (discussing the expenses associated with running a fair business).

317. *See id.* (discussing the competitive advantages associated with unfair labor practices). Although they are unethical, these practices save companies money and result in a business advantage over companies complying with the FLSA. *See id.*

318. *See id.* (discussing the long supply chain that many fashion companies utilize to reduce costs).

319. *See id.* (discussing the long supply chains fashion companies use, but the garments produced are still sold and transported in the United States).

320. *See id.* (discussing the current scope of the hot goods provision).

could benefit if the Secretary of Labor enjoined companies operating in the United States from shipping or selling goods produced in violation of labor laws.[321] The FLSA was written to enforce a base-level of protection for workers against employers who attempt to provide them with unfair work environments or unjust compensation.[322] The hot goods provision provides the Secretary of Labor the power necessary to extend protection of workers to those who are taken advantage of by fast-fashion companies globally.[323]

Enforcing the hot goods provision in this way would also encourage chain integration.[324] Many brands, like Chanel, already see the benefits of chain integration.[325] This broader enforcement of the hot goods provision presents a new set of risks for any fashion brand contracting with a manufacturing company.[326] Using the hot goods provision to enforce fair labor conditions would require the United States to attempt communication with companies overseas when these companies violate labor standards.[327] This communication and enforcement could be expensive.[328] However, the FLSA and courts have established a goal to ensure safe work conditions for employees.[329] This change would be an impactful way to accomplish this goal, and risk-averse businesses would be incentivized to change potentially illegal conditions before they were even found in violation of the FLSA.[330] Fast-fashion companies would risk profits, reputation, and customer approval if they continue to operate under these conditions.[331]

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321. *See* Rogers, *supra* note 36, at 17 (explaining the global effect United States legislation can have).

322. *See* FLSA § 206 (discussing goals and policies behind the FLSA).

323. *See id.* §§ 216–17 (providing the Secretary of Labor with a vehicle to enforce fair labor standards in a broad sense).

324. *See* Hemphill & Suk, *supra* note 11, at 1171–72 (explaining how chain integration would help unskilled workers in fast-fashion who face unfair conditions).

325. *See* Sobel-Read & Monaghan, *supra* note 20 (discussing Chanel's use of chain integration as part of its business strategy).

326. *See* FLSA §§ 216–17 (establishing the hot goods provision, its enforcement, and punishments for any entity found in violation of it).

327. *See id.* (describing fallbacks of this approach).

328. *See id.* (discussing the expenses of the hot goods provision).

329. *See id.* §§ 206–07 (discussing the goals and benefits in creating and enforcing the FLSA).

330. *See id.* (providing repercussions for those found in violation of FLSA standards).

331. *See* Sobel-Read & Monaghan, *supra* note 20 (discussing different assets businesses own besides capital). Although profit is important, businesses often

Fashion companies will find this expansion of the hot goods provision objectionable because fashion is a perishable good.[332] Fashion companies produce new garments and styles with each season.[333] Every product sold has a life cycle, and fashion garments' life cycles are short because the demand and tastes of consumers change rapidly.[334] Similar to produce that rots after a certain time period, garments go in and out of style quickly because fashion companies are always working on upcoming lines and the latest trend.[335] The threat of the Secretary of Labor putting a hold on garments during a workplace investigation is huge and would severely harm a company's bottom line through fines and the inability to sell the garments.[336] Holding goods serves as a sort of preliminary injunction.[337] If the investigation reveals the company is not in violation of the FLSA, it still faces the consequence of garments going out of style with no recourse for their losses.[338] However, the good

consider many factors in their strategies, including customer approval and reputation. *See id.*

332. *See* Wong, *supra* note 57, at 1144–45 (explaining that fast-fashion is popular because it can produce goods quickly). Styles and trends change rapidly, and once the garments are out of style, they are no longer fit to be sold. *See id.*

333. *See id.* at 1145 (discussing the fashion life cycle).

334. *See id.* (explaining that fashion is constantly changing, and to miss out on a key selling point would harm fashion companies severely).

335. *See* Hemphill & Suk, *supra* note 11, at 1171–72 (comparing fashion to other perishable goods, like produce, that once produced are only fit to be sold for a limited amount of time); Wong, *supra* note 57, at 1144–45 (describing the speed at which items go in- and out-of-style); Stephanie Trong, *How 'It' Items Go In- and Out-of Fashion*, FASHIONISTA (May 28, 2014) https://fashionista.com/2014/05/it-item-lifespan [https://perma.cc/ZQ4L-PLNE] (discussing the speed at which items can go out of style).

336. *See* Hemphill & Suk, *supra* note 11, at 1171–72 (explaining the risks of continuing to violate the FLSA for a business that sells perishable goods); Wong, *supra* note 57, at 1144–45 (discussing the speed at which fashion garments go out-of-style, which would negatively impact a company's ability to profit if its garments were held for a significant period of time); Caroline Brown, *A Cost of Getting "Caught"-FLSA Civil Money Penalties*, FISHER PHILLIPS (Jan. 25, 2019) https://www.fisherphillips.com/Wage-and-Hour-Laws/a-cost-of-getting-caught-flsa-civil-money-penalities [https://perma.cc/66FU-6LYV] (discussing various penalties associated with labor law violations).

337. *See* Hemphill & Suk, *supra* note 11, at 1171–72 (discussing the effect of the hot goods provision as similar to a preliminary injunction).

338. *See id.* (discussing criticisms of a wider use of the hot goods provision); Trong, *supra* note 335 (discussing the speed at which certain fashion items can go out of style); Rogers, *supra* note 36, at 10 (explaining the Secretary of Labor's ability to enjoin a company from transporting or selling products).

faith and written assurances exceptions would still be in effect and could protect any company that complies with them.[339]

The Secretary of Labor used the hot goods provision to prevent and punish the unfair conditions caused by RK Apparel, Ladies Apparel Group, and Morris Suss.[340] RK Apparel violated multiple wage and overtime laws and shipped the goods produced in those conditions despite a preliminary injunction.[341] Morris Suss violated labor laws through multiple incarnations of the manufacturing company Ladies Apparel Group.[342] Through the hot goods provision, the Secretary of Labor and workers held Suss, Ladies Apparel Group, RK Apparel, and the companies they contracted with responsible.[343] Although Charlotte Russe and the companies contracting with RK Apparel did not have to pay damages, they could not sell the products, and thus, they lost profits and their reputations were harmed.[344] After the Nandan Denim factory fire in India, spokespeople acknowledged that fashion brands perpetuate labor violations when they continue to contract with manufacturing companies in India that violate labor laws.[345] If the hot goods provision was expanded, the Secretary of Labor could prevent the companies in the United States from selling and transporting the denim produced by Nandan Denim.[346]

339. *See* FLSA § 215(a)(1) (providing two exceptions to the hot goods provision).

340. *See* News Release, *supra* note 50 (reporting on RK Apparel and Charlotte Russe's alleged violations); *see also Production Manager Enjoined from Shipping "Hot Goods," supra* note 188, at *1.

341. *See* News Release, *supra* note 50 (discussing RK Apparel's violation).

342. *See Production Manager Enjoined from Shipping "Hot Goods," supra* note 188, at *1 (discussing the violations and sanctions against Morris Suss and Ladies Apparel Group).

343. *See* News Release, *supra* note 50 (discussing the alleged violations); *see also Production Manager Enjoined from Shipping "Hot Goods," supra* note 188, at *2.

344. *See* News Release, *supra* note 50 (discussing the prohibition against selling the products).

345. *See* Saaliq & Mendoza, *supra* note 210 (stating the effects on companies continuing to contract with factories violating labor laws).

346. *See Production Manager Enjoined from Shipping "Hot Goods," supra* note 188, at *1 (describing the sanctions against Morris Suss and Ladies Apparel Group when they violated the hot goods provision); Saaliq & Mendoza, *supra* note 210 (describing the unfair labor conditions in Nandan Denim's factory).

C. Fair Labor and its Effect on Fast-Fashion

The United States has a large demand for fashion.[347] Out of the $1.2 trillion spent on fashion worldwide each year, $250 billion is spent by consumers in the United States.[348] This demand would cause fashion design and manufacturing companies worldwide to take notice of the new enforcement of the hot goods provision and investigate the conditions in which laborers are producing garments.[349] If goods produced in violation of the FLSA are prevented from being transported or sold in the United States, fast-fashion companies will suddenly lose a large quantity of sales, eat the costs of production, and anger any customers denied a product.[350] These risks would prove to be a huge deterrent for any fashion company turning a blind eye to their manufacturing companies' actions.[351] Manufacturing companies would have their own incentive to enforce fair labor practices because a manufacturing company that prevents its contracting fashion company from being able to sell its goods would not be rehired and would quickly go out of business permanently.[352]

Once fast-fashion companies lose profits and take responsibility for work conditions, their whole business model falls apart.[353] Suddenly, their clothes are more expensive to produce and thus must be sold for a higher price, and reproducing others' designs with cheaper material is not profitable.[354] Fast-fashion companies can no longer quickly produce cheap replications overseas because fair work hours and compensation are required, so their advantage of releasing

347. *See* JOINT ECON. COMM., U.S. CONG., *supra* note 301 (discussing the amount of money consumers in the United States spend on fashion each year).

348. *See id.* (discussing the profitability of the fashion industry globally and in the United States).

349. *See* Sobel-Read & Monaghan, *supra* note 20 (alluding to the effect the United States can have on the global economy).

350. *See* FLSA §§ 216–17 (discussing the repercussions of the hot goods provision and providing a way for the Secretary of Labor to enforce fair labor conditions).

351. *See* Thomas, *supra* note 5 (explaining how fast-fashion companies make profits and that if they cannot reduce costs, they will be forced to either change their business model or go out of business).

352. *See* Sobel-Read & Monaghan, *supra* note 20 (discussing the fashion supply chain).

353. *See* Thomas, *supra* note 5 (discussing the fast-fashion business model and how those companies make profits).

354. *See id.* (discussing the various competitive advantages associated with fast-fashion and failure to comply with the FLSA).

the garments for sale before the original designer disappears.[355] This change protects both large fashion houses and independent designers.[356] Losing their competitive advantages would force fast-fashion companies to come up with original designs and use fair labor practices to manufacture their products.[357]

CONCLUSION

Innovation, creative design, and profits for designers in the fashion industry should be protected.[358] However, the current state of intellectual property law does not provide enough protection from fast-fashion copies for original designers.[359] Using the hot goods provision to prevent fast-fashion companies from exploiting laborers would not completely solve the intellectual property and labor issues running rampant in the fashion industry.[360] But, the broader enforcement of the hot goods provision would prevent fast-fashion companies from copying other's designs and underselling them to make profit.[361] When labor costs rise, fast-fashion companies can no longer undersell competitors with the same level of profitability.[362] Suddenly, the low prices are not as low as before, and copying other designers costs more, so consumers may buy the original items.[363] Additionally, the legislation would affect all fashion retailers, not just

355. *See id.* (explaining the fast-fashion business strategy. and implying that once this business strategy is no longer profitable, fast-fashion companies will need to either adapt or be forced out of the market).

356. *See* Sobel-Read & Monaghan, *supra* note 20 (discussing the interests of all market players in ensuring that competitors use fair and standard work practices).

357. *See id.* (discussing the fast-fashion business model).

358. *See generally* din Fagel Tse, *supra* note 53 (discussing the potential benefits of protecting fashion intellectual property).

359. *See id.* at 422 (opining that intellectual property laws allow fast-fashion companies to unfairly copy designs).

360. *See id.* 430–31 (discussing how there is likely not one clear answer to solve the various issues and identifying the need for solutions to various other issues in the fashion industry).

361. *See generally* Hemphill & Suk, *supra* note 11 (discussing various issues the fashion industry faces that could not be solved with the proposal).

362. *See* Sobel-Read & Monaghan, *supra* note 20 (describing the fast-fashion business model and how they make money).

363. *See id.* (providing that consumer demand for fast-fashion relies on low prices).

fast-fashion, which will lead overall to a more ethical and enduring industry.[364]

364. *See* FLSA §§ 216–17 (providing the hot goods provision, which would extend further than just fast-fashion, as any company found in violation would suffer the same consequences).