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FASHION FORWARD: FASHION INNOVATION IN THE ERA OF DISRUPTION♦

FRANCESCA M. WITZBURG*

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INTRODUCTION

The fashion industry ranks as one of the world’s most economically and culturally significant industries. In 2020, the global apparel market valued at \$1.5 trillion.¹ In the United States alone, the industry employs more than 1.8 million people.² The economic and cultural significance of fashion relates to the fact that it is “an area where consumptive choices are also expressive.”³ Fashion is where necessity and utility, art and style, and luxury and desire meet. In other words, we not only *need* clothing, but also *desire* clothing. This necessity, method of expression, and desire drive the industry and explain the proliferation of brands and retailers in the market.

Each year, designers and fashion houses present their new collections to buyers and the media during fashion shows. With the rise of the Internet, designers began streaming their shows, allowing anyone to view runway trends immediately. Once this occurred, everything began to accelerate.⁴ Consumers began demanding cheap trending clothing that could be rapidly purchased. This demand only continued to grow over the last decade and led to the dominance of fast fashion brands like Forever 21 in the United States. The accelerated speed and rise of fast fashion brands ultimately disrupted the industry.

Fast fashion refers to cheaply produced and priced apparel that copies the latest runway styles and is pumped quickly through stores to profit from current trends.⁵ The model originated in Europe and infiltrated the

¹ M. Shahbandeh, *Global Apparel Market—Statistics & Facts*, STATISTA (Jan. 22, 2021), https://www.statista.com/topics/5091/apparel-market-worldwide/#dossierSummary_chapter1 [<https://perma.cc/E85H-4L8N>].

² Carolyn B. Maloney, *The Economic Impact of the Fashion Industry*, U.S. CONG. JOINT ECON. COMM. (Feb. 2019), https://www.jec.senate.gov/public/_cache/files/39201d61-aec8-4458-80e8-2fe26ee8a31e/economic-impact-of-the-fashion-industry.pdf [<https://perma.cc/XN77-5K2G>].

³ C. Scott Hemphill & Jeannie Suk Gerson, *The Law, Culture, and Economics of Fashion*, 61 STAN. L. REV. 1147, 1152 (2009).

⁴ Irina Aleksander, *Sweatpants Forever: How the Fashion Industry Collapsed*, N.Y. TIMES (Aug. 6, 2020), <https://www.nytimes.com/interactive/2020/08/06/magazine/fashion-sweatpants.html> [<https://perma.cc/L98T-F24C>].

⁵ Rashmila Maiti, *Fast Fashion: Its Detrimental Effect on the Environment*, EARTH.ORG (Jan. 29,

U.S. market in the 1990s and 2000s.⁶ The fast fashion business model relies on taking trending styles shown on the runway and reproducing them quickly and cheaply in order to offer them with more affordable pricing than the original brand.⁷ U.S. laws, generally speaking, do not protect fashion designs (i.e., the cuts and shapes of a garment).⁸ In Europe, the laws are broader to provide more protection for fashion designs.

To compete with the fast fashion companies, many designers sped up their fashion cycles to produce more collections. Illustratively, designers and brands went from making on average two collections per year to four or more.⁹ While many fashion players faced challenges amidst the rise of fast fashion, e-commerce growth, and the unprecedented COVID-19 global pandemic, from these disruptions new businesses emerged in the form of faster fashion brands, ethical brands, resale and rental brands, direct-to-consumer brands, and innovative licensing business models.

Part I of this Article discusses the current legal protections available for fashion in two major markets—the United States and Europe—and how brands and designers can deploy creative strategies under the current IP regimes to protect their businesses and designs. Part II summarizes both sides of the debate regarding whether the United States should adopt stronger IP protections for fashion designs. Part III analyzes the impact that an accelerated fashion cycle had on the fashion industry in the 2010s and during the COVID-19 pandemic. Part IV concludes that the accelerated fashion cycle led to innovation in the form of new and creative business models in the fashion industry; and that rather than try to slow down the fashion cycle with stronger IP property laws, businesses can and should self-disrupt by adopting innovative business models to stay competitive and relevant.

2020), <https://earth.org/fast-fashion-detrimental-effect-on-the-environment/> [<https://perma.cc/E5Z8-R62P>].

⁶ Sara Idacavage, *Fashion History Lesson: The Origins of Fast Fashion*, FASHIONISTA, <https://fashionista.com/2016/06/what-is-fast-fashion> [<https://perma.cc/2L2L-J5NF>] (last updated Oct. 17, 2018).

⁷ See Adam Hayes, *Fast Fashion*, INVESTOPEDIA, <https://www.investopedia.com/terms/f/fast-fashion.asp> (last updated Apr. 1, 2021) [<https://perma.cc/5H8F-UFMD>].

⁸ See *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002 (2017).

⁹ Aleksander, *supra* note 4.

I. CURRENT LEGAL PROTECTIONS FOR FASHION

Intellectual property rights are the main source of legal protection for fashion designs.¹⁰ Such rights are territorial,¹¹ and every country has its own intellectual property laws. Therefore, brands and designers should understand the laws of each, not only to avoid legal issues but also to take advantage of the protection available in the relevant territory. In general, U.S. intellectual property law offers limited protection for fashion designs. In contrast, E.U. laws protect fashion under a comprehensive regime that includes E.U. *sui generis* design protection and copyright laws, with overlapping protection under national laws.

A. Fashion Design Protection in the United States

In the United States, the three main categories of intellectual property tools available to fashion brands and designers are copyrights, trademarks (including trade dress), and patents. It would be misleading to say U.S. law does not protect fashion designs. Rather, U.S. law affords protection for fashion designs, albeit limited protection due to the specific requirements of each IP regime.

1. Copyright

U.S. copyright laws protect “original works of authorship fixed in any tangible medium of expression.”¹² Certain aspects of fashion designs will meet the requirements for copyright protection.¹³ For example, certain fabric designs and patterns may be sufficiently original and protectable, such as an intricate artistic repeated pattern on a blouse.¹⁴ However, copyright protection does not extend to the size, shape, and cut of a fashion article.¹⁵

¹⁰ Intellectual property rights protect the designs themselves, but there are other legal tools available to fashion companies. For example, companies can use contract law to hold their partners, manufacturers, suppliers, distributors, and anyone else in the supply chain liable for infringement of designs or any other rules. Fashion companies can also belong to organizations and certified groups that adhere to certain requirements to demonstrate to consumers that they are ethical and sustainable, such as B Corps. See, e.g., Cecily Mauran, *9 B Corps Leading in Ethical Fashion*, B THE CHANGE (Nov. 29, 2018), <https://bthechange.com/9-b-corps-leading-in-ethical-fashion-c7c659f6c92e> [<https://perma.cc/SYV5-Q7UP>]; see also discussion *infra* Section III.B.4.

¹¹ See Marketa Trimble, *The Territorial Discrepancy Between Intellectual Property Rights Infringement Claims and Remedies*, 23 LEWIS & CLARK L. REV. 501, 510 (2019).

¹² Copyright Act of 1976, 17 U.S.C. § 102 (2018).

¹³ See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 346 (1991) (“Originality requires independent creation plus a modicum of creativity.”).

¹⁴ 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2A.08[H], LexisNexis (database updated Apr. 2021).

¹⁵ The U.S. Supreme Court made this clear in its *Star Athletica* decision by stating that the test “does not render the shape, cut, and physical dimensions of the [useful article] eligible for copyright protection.” *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1016 (2017).

Under U.S. copyright law, “useful articles” generally do not receive copyright protection because they have “an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information.”¹⁶ Fashion articles, specifically clothing, historically fall under the definition of useful articles, as they traditionally have the intrinsic function of clothing the body.¹⁷ Nevertheless, certain aspects of the useful article, and therefore fashion, may be protected by copyright under certain conditions. The U.S. Supreme Court recently addressed the issue in *Star Athletica v. Varsity Brands*.

In *Star Athletica*, Varsity Brands sued Star Athletica for alleged infringement of five copyright registrations for two-dimensional designs incorporated into its cheerleading uniforms. The case made its way up to the Supreme Court. In its decision, the Supreme Court established a new¹⁸ two-pronged test for determining whether a feature of a useful article has protectable elements under copyright law:

An artistic feature of the design of a useful article is eligible for copyright protection if the feature (1) can be perceived as a two- or three-dimensional work of art separate from the useful article and (2) would qualify as a protectable pictorial, graphic, or sculptural work either on its own or in some other medium if imagined separately from the useful article.¹⁹

In other words, if a design not affixed to a useful article can be protected by copyright, then it can be protected even if it is affixed to the useful article.

A few recent cases highlight *Star Athletica*'s limitations. A week after the *Star Athletica* decision, Puma sued Forever 21 alleging that Forever 21 copied designs from its Fenty sandal collection.²⁰ A California judge ruled against Puma on the basis that there was insufficient evidence to show that Puma had a copyright claim to the aesthetic element due to the subtle differences in Forever 21's product design.²¹ This case demonstrates that while *Star Athletica* set out a single test, it did not address

¹⁶ 17 U.S.C. § 101.

¹⁷ U.S. COPYRIGHT OFF., COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 924.1 (3d ed. 2021). *But see* NIMMER & NIMMER, *supra* note 14, § 2.08 n.646 (citation omitted) (offering men's ties to illustrate that not all clothing has an intrinsic utilitarian function, but rather some items may be “intended merely to portray the appearance of the article”).

¹⁸ Prior to *Star Athletica*, courts applied various differing tests to determine when copyright could exist in certain useful articles. *See Star Athletica*, 137 S. Ct. at 1007 (“We granted certiorari to resolve widespread disagreement over the proper test for implementing §101's separate identification and independent-existence requirements.”)

¹⁹ *Id.* at 1016.

²⁰ Puma SE v. Forever 21, Inc., No. 2:17-cv-02523, 2017 U.S. Dist. LEXIS 211140 (C.D. Cal. June 29, 2017).

²¹ *Id.* at *17–21.

how much of a difference there must be for a design to be considered infringing.²²

Some scholars and practitioners assert that although the test's purpose was to create clarity, it did not do much except to unify the once-diverse tests to determine separability of a useful article's copyrightable elements.²³ As the case involved 2D-artwork—sketches of cheerleading uniforms—designers may consider filing copyright applications for the sketches. However, copyright owners of such artwork may not be able to enforce their rights against clothing created from the sketch.²⁴ An owner would want to consider alternative avenues of legal protection, including design patents and trade dress.

2. Trademarks

Many fashion companies utilize trademarks as their main source of IP protection. Trademarks are names, designs, logos, and other designations that indicate source.²⁵ Designers and fashion brands can utilize trademarks to protect their businesses and products in a variety of ways. Brands protect their businesses by adopting distinctive trademarks to distinguish their goods and services from those of competitors.²⁶ They may select a house mark and other trademarks to indicate a particular collection, product, or style, or use slogans.²⁷

Brands can also use trademarks to protect the designs featured on products. One strategy used by brands with strong trademarks is to incorporate their logos and marks within the designs themselves. This is why we see the “logo-fication” of products, like Louis Vuitton Monogram, Gucci's monogram, and Fendi's FF pattern.²⁸

²² Kshithija Mulam, *The Intellectual Property Implications of Star Athletica v. Varsity Brands*, COLUM. UNDERGRADUATE L. REV. ONLINE (Apr. 15, 2019), <https://www.culawreview.org/journal/the-intellectual-property-implications-of-star-athletica-v-varsity-brands> [https://perma.cc/4F3A-A5WS].

²³ See, e.g., David Jacoby, 'Star Athletica' Three Years On, N.Y.L.J. ONLINE (Aug. 28, 2020), <https://www.law.com/newyorklawjournal/2020/08/28/star-athletica-three-years-on/> (last visited Feb. 2, 2021).

²⁴ *Can I Use Copyright to Protect My Fashion Designs?*, COPYRIGHT ALLIANCE, https://copyrightalliance.org/ca_faq_post/copyright-fashion-designs/ [https://perma.cc/49E2-ENZX] (last visited Feb. 13, 2021).

²⁵ See 15 U.S.C. § 1127 (2018).

²⁶ *Id.*

²⁷ See TMEP § 1402.03(b) (Oct. 2018).

²⁸ One commentator notes:

The re-introduction of logos on bags and garments is . . . also on the rise. This is a way for brands to meet the demands of Instagram-happy millennials and Gen-Z consumers, who want to make it known what brand they are wearing. It also gives brands a way to legally protect aspects of their garments and other utilitarian items that might not otherwise be protectable.

John Zarocostas, *The Role of IP Rights in the Fashion Business: A US Perspective*, WIPO MAG. (Aug. 2018), https://www.wipo.int/wipo_magazine/en/2018/04/article_0006.html [https://perma.cc/8ENN-ZRA3]; see also Victoria Moss, *Fashion's Logofication: What Does Beyonce's Gucci*



Even more directly, trademark law can protect the actual product designs under “trade dress.” Trade dress is a broad concept that extends to “the overall commercial image (look and feel) of a product or service that indicates or identifies the source of the product or service and distinguishes it from those of others.”²⁹ Trade dress can extend to product packaging, the designs themselves, décor, website layouts, or even a retail store’s design.³⁰ The Supreme Court in *Wal-Mart Stores, Inc. v Samara Brothers* differentiated product design and product packaging.³¹ If trade dress is defined as “product design,” it can never be inherently distinctive and will always require a showing of secondary meaning before earning trademark protection.³² In other words, it requires proof that the trade dress has become “distinctive as applied to the applicant’s goods or services in commerce.”³³ Factors to prove acquired distinctiveness include advertising and sales figures, market surveys, affidavits, unsolicited media coverage of the product, and length and exclusivity of use.³⁴ Clearing the high threshold for demonstrating acquired distinctiveness typically requires large amounts of evidence. For example, a business may have to compile market surveys indicating that consumers recognize the design as the company’s, as well as proof of substantial advertising and marketing expenditures.³⁵ And even that may not be enough to get trademark protection.

Look Really Mean?, THE TELEGRAPH (June 8, 2018), <https://www.telegraph.co.uk/fashion/brands/fashions-logofication-does-beyonces-gucci-look-really-mean/> [https://perma.cc/T2AB-3QHA].

²⁹ *Trade Dress*, INT’L TRADEMARK ASS’N, <https://www.inta.org/topics/trade-dress/> [https://perma.cc/FVB3-XA94] (last visited Jan. 9, 2021).

³⁰ *See Resource Center: Trade Dress Law*, FASHION L., <https://www.thefashionlaw.com/resource-center/trade-dress-law/> [https://perma.cc/ETF9-ANFU] (last visited Feb. 13, 2021); *see also* Scott E. Taylor & Andrew C. Stevens, *Obtaining Trade Dress Protection for Distinctive Retail Store Designs*, ARNALL GOLDEN GREGORY LLP (Apr. 10, 2015), <https://www.agg.com/news-insights/publications/trade-dress-protection-for-distinctive-retail-store-designs-04-10-2015/> [https://perma.cc/3VPK-H3SP].

³¹ *Wal-Mart Stores, Inc., v. Samara Bros.*, 529 U.S. 205, 215 (2000).

³² *Id.* at 212.

³³ TMEP § 1212 (Oct. 2018).

³⁴ *See id.* § 1212.06; 37 C.F.R. § 2.41(a)(3) (2019); *Cartier, Inc. v. Sardell Jewelry, Inc.*, 294 F. App’x 615 (2d Cir. 2008).

³⁵ One resource guide lists a number of considerations for proving secondary meaning:

If the product design is considered to be functional, it cannot be registered even with a showing of acquired distinctiveness.³⁶ The Supreme Court noted that product design almost invariably serves purposes other than source identification, and that “[c]onsumers are aware . . . that, almost invariably, even the most unusual of product designs—such as a cocktail shaker shaped like a penguin—is intended not to identify the source but to render the product itself more useful or more appealing.”³⁷

Some notable examples of fashion designs that would likely be able to receive trade dress protection include Louboutin red soles and the Hermes Birkin bag.³⁸ Most recently, the U.S. Patent and Trademark Office (USPTO) accepted for registration Valentino’s Rockstud shoes and determined that the design elements have acquired distinctiveness sufficient to constitute trade dress.³⁹ At first, the USPTO rejected Valentino’s assertion claiming acquired distinctiveness because the elements are highly ornamental and common on shoes, specifically stating that brands “commonly use studs along the tops and along straps of shoes as a decorative feature of shoes,” such that “consumers will perceive them only as an ornamental and nondistinctive feature of the goods.”⁴⁰ In response to the refusals, counsel for Valentino submitted substantial evidence and arguments to demonstrate why the design of the Rockstud pump met the requisite level of acquired distinctiveness. Such arguments in the office action response included claims that Valentino “invested millions of dollars in promoting the sales of its Rockstud pump in a wide variety of media” and that the shoes have been worn by “countless celebrities.”⁴¹ The USPTO accepted Valentino’s arguments, and Valentino’s three designs registered on December 15, 2020.⁴² Having registrations for its Rockstud

To put this simply, (1) Has the brand spent a significant amount of money to advertise the design at issue? (2) Do consumers tend to link the design to the brand that designed it? (3) Are magazines, blogs, etc. featuring this design without the brand paying for the coverage? (4) Has the design sold well? (5) Are other brands trying to copy the design? and (6) Has the brand been using the trade dress design for a long time exclusively?

Resource Center: Trade Dress Law, supra note 30.

³⁶ TMEP § 1212.02 (citing *TraFFix Devices, Inc. v. Mktg. Displays, Inc.*, 532 U.S. 23, 33 (2001); *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 774 (1992)).

³⁷ *Samara Bros.*, 529 U.S. at 213–14.

³⁸ *Resource Center: Trade Dress Law, supra note 30.*

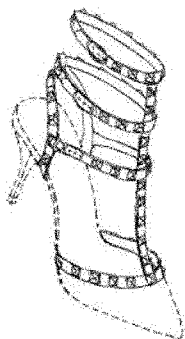
³⁹ See U.S. Trademark Reg. Nos. 6,219,646; 6,219,645; 6,219,641; see also *In New Trademark Filing, Valentino Says Rockstud Pump Is Just as Famous as Louboutin’s Red Sole*, FASHION L. (Aug. 11, 2020), <https://www.thefashionlaw.com/valentino-says-rockstud-pump-is-just-as-famous-as-louboutins-red-sole/> [https://perma.cc/YS84-BCRN].

⁴⁰ *In New Trademark Filing, Valentino Says Rockstud Pump Is Just as Famous as Louboutin’s Red Sole, supra note 39.*

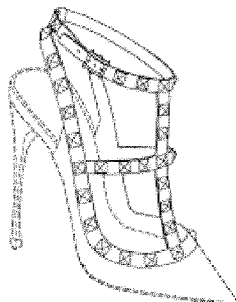
⁴¹ Office Action Response at 2, Rockstud Ankle Strap Shoe, Registration No. 6,219,646 (U.S. Pat. & Trademark Off. Aug. 5, 2020).

⁴² U.S. Trademark Registration Nos. 6,219,646; 6,219,645; 6,219,641.

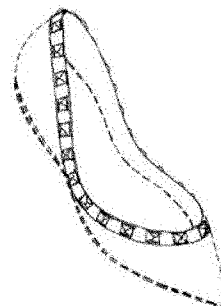
shoe design will greatly help Valentino to enforce against infringing and confusingly similar designs.⁴³



Registration No. 6,219,646



Registration No. 6,219,645



Registration No. 6,219,641

3. Patents

Fashion designers and brands can also utilize patent protection in the United States.⁴⁴ A patent is a property right granted to an inventor,⁴⁵ issued by the USPTO.⁴⁶ Put another way, a patent is an exchange between an inventor and the government, whereby the government grants a monopoly to the inventor for the invention for a set term, in exchange for the inventor disclosing the invention to the government and making it available to the public⁴⁷ when the term expires.⁴⁸

The two types of patents relevant for fashion are design and utility patents.⁴⁹ A utility patent generally protects the way an article is used and works, compared with a design patent, which protects the way an article

⁴³ However, Valentino is not completely out of the woods. Anyone can try and cancel the registration and contest the USPTO's determination.

⁴⁴ See 35 U.S.C. § 101 (2018) (“[W]hoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.”).

⁴⁵ *General Information Concerning Patents*, U.S. PAT. & TRADEMARK OFF., <https://www.uspto.gov/patents-getting-started/general-information-concerning-patents#heading-2> [<https://perma.cc/TBJ4-7ZF6>] (last modified June 1, 2020).

⁴⁶ Currently there is no common law patent right in the United States. *Cf.* *Petition for Writ of Certiorari, Cheetah Omni LLC v. AT&T Servs., Inc.*, *cert. denied*, 141 S. Ct. 362 (2020) (No. 20-68); Dennis Crouch, *Federal Common Law of Patent License Interpretation*, PATENTLY-O (July 27, 2020), <https://patentlyo.com/patent/2020/07/federal-license-interpretation.html> [<https://perma.cc/E5TH-YMKR>].

⁴⁷ *Contra Trade Secrets*, WORLD INTELL. PROP. ORG., <https://www.wipo.int/tradesecrets/en/> [<https://perma.cc/H43N-2YAZ>] (last visited Feb. 7, 2021) (indicating that unlike patents, trade secrets may be protected where a business keeps confidential information a secret without the public having the benefit of taking advantage of the protectable property unless it becomes disclosed and becomes public).

⁴⁸ *Government-Granted Monopoly*, ENCYCLOPEDIA.COM, <https://www.encyclopedia.com/finance/encyclopedias-almanacs-transcripts-and-maps/government-granted-monopoly> [<https://perma.cc/WHR5-8YYR>] (last visited Feb. 7, 2021).

⁴⁹ There are three types of patents: utility, design, and plant patents. *General Information Concerning Patents*, *supra* note 45.

looks.⁵⁰ If an element of a fashion good is *new* and *useful*, companies may seek to take advantage of a utility patent.⁵¹ Utility patents have a term of twenty years of protection from the patent application filing date.⁵² Examples of utility patents for fashion include a collapsible shoe, a wrinkle-free garment, and a handbag featuring an interchangeable liner.⁵³

Design patents are granted to inventors of *new, original, and ornamental* designs of an article.⁵⁴ Designers and fashion houses can use design patents to protect the ornamental design itself.⁵⁵ A design patent can cover an article's shape, surface ornamentation, or a combination of shape and surface.⁵⁶ Design patents extend to the designs themselves, give rights for fifteen years from the date of filing, and are relatively inexpensive compared with a utility patent.⁵⁷ Such rights are recommended for fashion industry when applicable and can be helpful for enforcing design rights.

When designers create a new product, they may seek protection for both design and utility patents, if applicable. In order for an invention to be patentable, it must be "new" or "novel," meaning it has not been publicly disclosed (with exception of a one-year grace period), and "non-obvious."⁵⁸ "Novelty" means the invention cannot be publicly disclosed.⁵⁹ The United States has a one-year grace period during which inventors can file for patent protection, but many other countries do not have a such a grace period.⁶⁰

⁵⁰ MPEP § 1502.01 (9th ed. Rev. 10.2019, June 2020).

⁵¹ 35 U.S.C. § 101 (2018).

⁵² *Id.* § 154.

⁵³ Jason J. Jardine, *Utility Patents in Fashion Design? Nike & Huzu Innovate the Way*, KNOBBE MARTENS (Sept. 15, 2017), <https://www.knobbe.com/news/2017/09/utility-patents-fashion-design-nike-huzu-innovate-way> [<https://perma.cc/7H7X-HQ5R>].

⁵⁴ 35 U.S.C. § 171.

⁵⁵ Ornamentality is a bar to trademark protection, TMEP § 1202.03 (Oct. 2018), but is a requirement for design patents. 35 U.S.C. § 171.

⁵⁶ Peter Law & Jason J. Jardine, *Design Patent Protection for Fashion*, KNOBBE MARTENS (June 3, 2020), <https://www.knobbe.com/blog/design-patent-protection-fashion> [<https://perma.cc/WM39-TBWL>].

⁵⁷ *Id.*

⁵⁸ 35 U.S.C. §§ 101–103; *see also General Information Concerning Patents*, *supra* note 45.

⁵⁹ 35 U.S.C. § 102.

⁶⁰ Ian Rainey & Craig W. Mueller, *United States: Preserving Patent Rights on a Global Stage: Foreign Filing Options and How to Successfully Navigate Novelty Requirements*, LEWIS BRISBOIS (Jan. 23, 2019), <https://lewisbrisbois.com/blog/category/intellectual-property-technology/preserving-patent-rights-on-a-global-stage-foreign-filing-options-and-how-t> [<https://perma.cc/M722-HA6N>] ("Most foreign jurisdictions follow strict 'absolute novelty' rules that preclude or limit protection after an invention is publicly disclosed. Thus, it may be necessary to claim the earlier filing date if the invention has been publicly disclosed or commercialized after the filing date of the U.S. patent application. Again, if the invention was publicly disclosed before U.S. filing, foreign protection may be impossible.") (emphasis removed); *see also* Kyu Yun Kim, Maeve O'Flynn, Ningling Wang, Amanda K. Murphy, K. Victoria Barker & Stacey Lewis, *Drafting for Multiple Jurisdictions Miniseries: Part 1—Grace Period Provisions*, FINNEGAN: AIA BLOG (Aug. 17, 2020), <https://www.finnegan.com/en/insights/blogs/america-invents-act/unitary-patent-series-part-1-grace-period-provisions.html> [<https://perma.cc/3277-FUL9>].

Not only must the patent be “new,” but also the design or invention must be a “non-obvious” improvement over pre-existing designs or prior art.⁶¹ In other words, the designers would have to prove that the innovations and improvements are “sufficiently different from what has been used or described before that it may be said to be non-obvious to a person having ordinary skill in the area of technology related to the invention.”⁶² One of the difficulties designers and brands face is that many improvements incorporate preexisting designs and elements, and may only be considered “mere[] reworkings of previously existing designs” as opposed to the “sufficiently different” improvements required by patent law.⁶³

Patents are important and traditionally underutilized tools for fashion brands,⁶⁴ but may be on the rise.⁶⁵ Some of the concerns when considering patent protection are legitimate, and others are less so. For example, there is a concern about the price of patents. While utility patents may be more expensive due to the specific drafting requirements, a design patent is generally less expensive. Another issue is that certain designs may not meet the novelty requirement if they were accidentally disclosed or filed after the one-year filing grace period. And as discussed above, to be patentable, designers would have to show that their designs are sufficiently different from prior art such that the design is considered an improvement, and thus non-obvious. Yet, various designers and brands have been able to secure design patents on a variety of goods.⁶⁶

⁶¹ 35 U.S.C. § 103; *see also Resource Center: Patent Law*, FASHION L., <https://www.thefashionlaw.com/learn/patent-law/> [<https://perma.cc/S5U2-EQXT>] (last visited Feb. 5, 2021).

⁶² *General Information Concerning Patents*, *supra* note 45.

⁶³ Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687, 1704 (2006).

⁶⁴ Elizabeth Ferrill & Tina Tanhehco, *Protecting the Material World: The Role of Design Patents in the Fashion Industry*, 12 N.C. J.L. & TECH. 251, 253 (2011).

⁶⁵ The use of design patents in particular is on the rise:

On May 12, 2020, the United States Patent and Trademark Office issued over 700 new design patents. Fashion-related designs figured prominently among the new patent grants including accessories like eyeglasses (see U.S. Patent Nos. D884,062–D884,067), jewelry, watches, and gemstones (D883,835–D883,852), or shoe-related designs (D883,617–D883,650). There were also design patent grants for “Utility glove” (D883,610), “Brassiere” (D883,611), “Garment” (D883,612), “Swaddle sack” (D883,613), “Bodysuit” (D883,614), “Shirred relaxed fit dress” (D883,615), and “Short kaftan with hardware” (D883,616).

Law & Jardine, *supra* note 56.

⁶⁶ The Fashion Law lists a number of recently issued design patents, including [T]he designs of Christian Louboutin’s Azimut Leather Lace-up Ankle Boots, Manovra 70 Studded Leather and Pvc Slingback Pumps, Guerilla Studded Open-Toe Booties, Gortik bootie, Body Strass crystal-embellished mesh and leather pumps, and Tassilo Flat Black Patent Loafers With Spikes, among other styles. CÉLINE’s Case bag and Diamond bag designs are also protected, as is Alexander Wang’s Rocco bag design.

Resource Center: Patent Law, *supra* note 61.

Overall, the United States has various IP mechanisms available for fashion design protection. Designers and brands should consider whether copyrights, trademarks, and patent protection is available for a particular design. The protection, albeit limited, is still available and creative strategies can be implemented to protect fashion businesses and designers.

B. *European Union and United Kingdom Design Protections*

Europe is home to some of the world's premier fashion brands and lucrative apparel markets.⁶⁷ Europe's fashion and luxury industries represent its cultural heritage and expertise.⁶⁸ As such, European Union laws offer significant protection for fashion designs. Whether it is luxury brands like Prada and Chanel that rely on IP laws to protect designs, or fast fashion companies like Zara and Top Shop that understand the rules to delicately tread the line between legal and illegal designs, the European fashion industry is guided by a comprehensive set of intellectual property regimes favoring strong protection for fashion designs.⁶⁹

Designers and fashion houses in the European Union and United Kingdom⁷⁰ have a variety of laws related to fashion design protection at their disposal, including copyright, trademark, patent, and a *sui generis* right to protect designs themselves.

1. European Union Design Protection

The European Union offers a *sui generis* design right.⁷¹ The European Union first adopted the E.U. Designs Protection Directive 98/71/EC, which harmonized design protection across all E.U. Member States by requiring them to protect designs by registration.⁷² The European Union then enacted the E.U. Community Design Regulation 6/2002/EC,

⁶⁷ See M. Shahbandeh, *Apparel and Clothing Market Europe—Statistics & Facts*, STATISTA (Dec. 1, 2020), <https://www.statista.com/topics/3423/clothing-and-apparel-market-in-europe> [https://perma.cc/7L3L-HWJK].

⁶⁸ See *Fashion and High-End Industries in the EU*, EUR. COMM'N, https://ec.europa.eu/growth/sectors/fashion/high-end-industries/eu_en [https://perma.cc/LE6M-4GRU] (last visited Feb. 16, 2021).

⁶⁹ See Francesca Montalvo Witzburg, *Protecting Fashion: A Comparative Analysis of Fashion Design Protection in the United States and the European Union*, 107 TRADEMARK REP. 1131, 1141 (2017).

⁷⁰ The United Kingdom exited the European Union (known as Brexit), effective January 1, 2021. For more on how U.K. IP rights are affected by Brexit, see *UK Intellectual Property Office Guide on IP and BREXIT*, <https://www.iprhelpdesk.eu/news/uk-intellectual-property-office-guide-ip-and-brexite> (last visited Feb. 21, 2021).

⁷¹ See *Designs in the European Union*, EUR. UNION INTELL. PROP. OFF., <https://euiipo.europa.eu/ohimportal/en/designs-in-the-european-union> [https://perma.cc/T5P9-RWP4] (last visited Feb. 25, 2021).

⁷² Council Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the legal protection of designs, 1998 O.J. (L 289).

creating a unified E.U. system of design rights for both registered and unregistered designs.⁷³

The E.U. Community Design Regulation defines designs as “the appearance of the whole or a part of a product resulting from the features of, in particular, the lines, contours, colours, shape, texture and/or materials of the product itself and/or its ornamentation.”⁷⁴ The design must be “novel”⁷⁵ and pose “individual character”⁷⁶ when compared to other designs.⁷⁷ In this context, novelty means that there are no identical pre-existing designs.⁷⁸ Such rights can be protected with the European Union Intellectual Property Office (EUIPO) either with a registered Community design before they are publicly disclosed or commercialized or with unregistered Community design rights after disclosing and commercializing the design and forgoing registration.⁷⁹ If an owner wants to seek registration after the design has been publicly disclosed or commercialized, there is a one-year grace period to do so.⁸⁰

Unregistered Community design protection lasts three years from the date on which the design was first made publicly available in the European Union, with no extensions.⁸¹ The scope of the rights is limited for unregistered designs, as they are only protected against copying that is made in bad faith—intentional copying by knowing of the earlier design.⁸² This means unintentional copying is permissible. In contrast, registered Community designs are valid for five years from filing and can be renewed in blocks of five years up to a maximum of twenty-five years.⁸³ And notably, registered Community designs will allow owners to enforce against intentional and unintentional copying.⁸⁴

According to the EUIPO website, “Design protection is an important business asset for companies of all sizes, not just bigger ones.

⁷³ Council Regulation 6/2002 of 12 December 2001 on Community designs, 2002 O.J. (L 3).

⁷⁴ *Id.* art. 3.

⁷⁵ Mathias Kleespies & Leyre Barragán Zapirain, *Design Rights: European Union*, WORLD TRADEMARK REV. (Jan. 7, 2019), <https://www.worldtrademarkreview.com/brand-management/design-rights-european-union> [https://perma.cc/CYN2-KJCY] (“A design will be considered new if no identical design was made available to the public anywhere in the world before the filing date (in case of registered Community designs) or disclosure date (in case of unregistered Community designs). A design will not be considered new if it differs only in immaterial details from a prior design.”).

⁷⁶ *Id.* (“A design will be considered to have individual character if the overall impression it produces on the informed user is different from that produced by any other design which has been made available to the public before.”).

⁷⁷ Council Regulation 6/2002, art. 4.1.

⁷⁸ *Id.* art 5.1.

⁷⁹ See *Designs in the European Union*, *supra* note 71.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

EUIPO's research shows that small and medium enterprises (SMEs) which own designs have 17% higher revenue per employee than SMEs that do not own any intellectual property rights.⁸⁵ Design rights are useful tools for fashion designers as they can apply to fashion articles themselves—including shapes and cuts—and can be issued quickly.⁸⁶ Designers can also seek overlapping protection for logos by filing design rights for an article with their logos on it. There is no distinctiveness requirement, meaning if the design does not rise to the level of trade dress protection, it may be protected with design right, as long as other requirements for design right protection are met (novelty, individual character, and filing within the one-year grace period). Moreover, design rights are not limited to particular goods and services.⁸⁷ They are also fairly affordable at 350 euros for one filing.⁸⁸ An applicant can also file several designs in one application as long as the designs belong to the same Locarno class.⁸⁹

2. E.U. National Design Rights and Cumulative Copyright Protection

The E.U. Designs Protection Directive harmonized all of the national laws of E.U. Member States, so design rightsholders have the option of protecting their designs in the European Union by a Community design covering all or select Member States, or under national design laws⁹⁰ of the Member State of interest.⁹¹ The Community design system is popular for rightsholders given the importance of the single E.U. market.⁹² Courts of European Union Member States can enforce E.U. design rights and may submit request for preliminary ruling concerning the E.U. Designs Protection Directive's interpretation with the European Court of Justice.⁹³

⁸⁵ *Design Definition*, EUR. UNION INTEL. PROP. OFF., <https://euipo.europa.eu/ohimportal/en/design-definition> [<https://perma.cc/6CUN-4MBR>] (last updated July 28, 2020).

⁸⁶ See, e.g., David Stone, *Ten Years of EU Design Law*, WIPO MAG. (Dec. 2013), https://www.wipo.int/wipo_magazine/en/2013/06/article_0006.html [<https://perma.cc/9L5C-6MG5>] (noting that in 2012, 2,659 same-day registrations were issued).

⁸⁷ Kleespies & Zapirain, *supra* note 75.

⁸⁸ *Designs in the European Union*, *supra* note 71.

⁸⁹ The Locarno Classification, established by the Locarno Agreement (1968), is an international classification used for the purposes of the registration of industrial designs.

⁹⁰ Currently, the E.U. Member National State laws provide only national registered rights. While the E.U. Design Protections Directive did not introduce national unregistered design rights, it also did not limit any Member State's laws on unregistered design rights. *Legal Review on Industrial Design Protection in Europe*, EUR. COMM'N 26 (Apr. 15, 2016), <https://ec.europa.eu/docsroom/documents/18921/attachments/1/translations/en/renditions/native> [<https://perma.cc/TP5F-LYK2>].

⁹¹ Kleespies & Zapirain, *supra* note 75.

⁹² *Id.* ("According to the latest statistics published by the . . . EUIPO[] on 12 September 2018, the number of Community design applications in the European Union has been increasing every year (85,000 designs in the past year). In the past three years, applicants based in Germany were the largest users of the Community design system, followed by Italy, the United States and France.")

⁹³ *Id.*

E.U. national laws also offer protection for fashion under national copyright laws. While the European Union has adopted legislation involving copyright,⁹⁴ there is no “single EU title” for copyright protection.⁹⁵ Rather, each Member State has its own laws and policies.⁹⁶ A design may meet the requirements for both copyright protection and design rights. While there is generally no such thing as “international copyright” that grants automatic protection for creative works globally, E.U. copyright owners may be able to claim protection in other countries that are member to the Berne Convention.⁹⁷

By way of example, France has strong protection for fashion designs under its copyright laws. The French Intellectual Property Code protects original “works of the mind,” and expressly lists “the creations of the seasonal clothing and adornment industries” as protectable works.⁹⁸ Despite the express protection for fashion articles, designers may face similar issues faced by U.S. designers—many fashion designs follow current trends and may lack originality. French courts typically interpret the originality requirement for designs strictly and tend to deny copyright protections for a design that may be considered commonplace.⁹⁹

Similar to France, Italy protects fashion designs under its national copyright laws. The Italian Copyright Law covers “works of the mind having a creative character and belonging to literature, music, figurative arts, architecture, theater or cinematography, whatever their mode or form of expression,” and “[i]n particular, protection shall extend to industrial design works that have creative character or inherent artistic character.”¹⁰⁰

As demonstrated above, designers have a variety of options when it comes to fashion design protection, including E.U. design rights, national design rights, and national copyright. They can also utilize E.U.

⁹⁴ *The EU Copyright Legislation*, EUROPA (Oct. 29, 2020), <https://ec.europa.eu/digital-single-market/en/eu-copyright-legislation> [<https://perma.cc/SWL5-2GWG>].

⁹⁵ *FAQs on Copyright*, EUR. UNION INTELL. PROP. OFF., <https://euiipo.europa.eu/ohimportal/en/web/observatory/faqs-on-copyright> (last visited Oct. 29, 2020).

⁹⁶ *Id.* The European Union is rolling out an ambitious modernization of the E.U. copyright framework focusing on digital content. For more European Commission updates, see *The EU Copyright Legislation*, *supra* note 94.

⁹⁷ See generally *Summary of the Berne Convention for the Protection of Literary and Artistic Works (1886)*, WORLD INTELL. PROP. ORG. [WIPO], https://www.wipo.int/treaties/en/ip/berne/summary_berne.html [<https://perma.cc/3DBN-TNEY>] (last visited Apr. 26, 2021).

⁹⁸ Code de la propriété intellectuelle [Intell. Prop. Code] art. L-112-2, 14° (Fr.).

⁹⁹ Holger Gauss, Boriana Guimberteau, Simon Bennett & Lorenzo Litta, *Red Soles Aren't Made for Walking: A Comparative Study of European Fashion Laws*, LANDSLIDE, July–Aug. 2013, at 19, 20.

¹⁰⁰ Art. 2(10) c. della proprietà industrial [Indus. Prop. Code], L. n. 633/1941 (It.), translated in WORLD INTELL. PROP. ORG., <https://wipolex.wipo.int/fr/text/128286> [<https://perma.cc/VA7F-2LMM>].

trademarks, national trademarks, and patents (which cover inventions offering a new technical solution to a problem).¹⁰¹

3. U.K. Rights Post-Brexit

January 31, 2020, marked the United Kingdom's official separation from the European Union, known to the world as Brexit. Accordingly, registered and unregistered Community designs would no longer apply in the United Kingdom after a one-year transition period. Beginning on January 1, 2021, existing Community design rights were immediately and automatically replaced by U.K. design rights.¹⁰² Any existing Community design rights will cover the remaining E.U. Member States.¹⁰³ Design rightsholders can seek protection via a national registered design granted by the Intellectual Property Office of the United Kingdom or rely on an unregistered U.K. design right.¹⁰⁴

4. Other Protective Legal Doctrines: Unfair Competition and Passing Off

In addition to intellectual property, other legal doctrines may be available to designers for protection of their works. For example, unfair competition laws of France protect a product's appearance from "slavish imitation," and Sweden offers protection from "misleading imitation."¹⁰⁵ The United Kingdom and Ireland have passing-off laws that a designer may rely on as well.¹⁰⁶ Such rules focus on the use of the design, the unacceptable actions of the offending party, and how they unfairly prejudice the plaintiff's interest.¹⁰⁷

Unfair competition and passing off claims are great enforcement tools for European designers, but they give rise to the concern that, by giving broader rights to creators than are already protected by IP, they will result in anti-competitive design protection.¹⁰⁸ In 2016, the European Commission published a study, finding that:

[M]ost courts in Member States have been reluctant to extend unfair competition protection to designs which have already enjoyed

¹⁰¹ *Frequently Asked Questions: Industrial Designs*, WORLD INTELL. PROP. ORG., https://www.wipo.int/designs/en/faq_industrialdesigns.html [<https://perma.cc/GH9V-P4DM>] (last visited Feb. 2, 2021).

¹⁰² *See Changes to EU and International Designs and Trade Mark Protection*, GOV.UK (Dec. 3, 2020), <https://www.gov.uk/guidance/changes-to-eu-and-international-designs-and-trade-mark-protection> [<https://web.archive.org/web/20210510065217/https://www.gov.uk/guidance/changes-to-eu-and-international-designs-and-trade-mark-protection>].

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Legal Review on Industrial Design Protection in Europe*, *supra* note 90, at 118.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

protection under design or copyright laws. The general principle is that the imitation of designs and other shapes is allowed if they are not protected by other intellectual property laws. This is especially true in the absence of further and special circumstances, such as behaviour contrary to ethical business practices, misleading or confusing behaviour, or unfair exploitation of the plaintiffs' goodwill or obstructing the plaintiff from exploiting the economic benefits of his products.¹⁰⁹

However, the Commission concluded that since no major problems have arisen, no change should be made to Article 16 of the E.U. Design Directive.¹¹⁰

C. Creative Legal Strategies Under the Existing Legal Regimes

As set out above, the United States has intellectual property laws that fashion companies can utilize to protect their businesses and designs. Businesses and brands can work with intellectual property lawyers to develop creative and holistic strategies to protect and enforce their works. For example, in 2019, Kim Kardashian won close to \$2.8 million in a lawsuit against ultra-fast fashion company Missguided.¹¹¹ Kim Kardashian took a picture of herself in a dress that she never wore in public and was never sold.¹¹² Missguided made a nearly identical replica and continued to tag Kim Kardashian in its posts.¹¹³ While the case did not have strong grounds for direct copying under U.S. law, Kardashian had creative counsel that argued the business was using her "persona and trademarks" to sell copies of her outfits.¹¹⁴

Similarly, Versace sued Fashion Nova for knocking off the famous Versace dress worn by Jennifer Lopez.¹¹⁵ Counsel submitted creative arguments that Fashion Nova knocked off the entire look and feel of the dress, amounting to a trade dress argument and copyright claims of the infringing pattern.¹¹⁶ Fashion Nova in its answer rejected all claims outright, drawing upon the lack of protection for the shape and cut of apparel under U.S. law.¹¹⁷

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ Default Judgment, *Kimsaprincess, Inc. v. Missguided USA Fin. Inc.*, No. 2:19-cv-01258 (C.D. Cal. Feb. 20, 2019).

¹¹² Complaint, *Kimsaprincess, Inc. v. Missguided USA Fin. Inc.*, No. 2:19-cv-01258 (C.D. Cal. Feb. 20, 2019).

¹¹³ *Id.*

¹¹⁴ Ashley Carman, *Kim Kardashian West Wins \$2.8 Million from Company that Kept Tagging Her in Instagram Posts*, THE VERGE (July 3, 2019), <https://www.theverge.com/2019/7/3/20681128/missguided-kim-kardashian-west-lawsuit-instagram-tag-fashion> [<https://perma.cc/TP6F-JCFJ>].

¹¹⁵ Complaint, *Gianni Versace S.r.l. v. Fashion Nova, Inc.*, No. 2:19-cv-10074 (C.D. Cal. Nov. 25, 2019).

¹¹⁶ *Id.*

¹¹⁷ Response Brief, *Gianni Versace S.r.l. v. Fashion Nova, Inc.*, No. 2:19-cv-10074 (C.D. Cal. Nov. 25, 2019).

These cases demonstrate how businesses can work within the current laws by using creative legal arguments to protect their rights under the current U.S. legal IP regimes. While bigger brands may have bigger budgets to spend on legal, small designers, start-ups, and individuals can still take advantage of the current IP protections by filing applications early for their names and works and employing creative strategies with the help of intellectual property counsel. Moreover, many fashion brands are now global and may be able to take advantage of the above broader European laws.

II. STRENGTHENING IP PROTECTION FOR FASHION DESIGNS: THE GREAT DEBATE

Fashion designs are not granted equal protection in every territory. As demonstrated above, two of the most important apparel markets have drastically different protections for designs. The United States offers limited protection for fashion, whereas the European Union has much broader regimes and a complex system with overlapping and cumulative protections that include E.U. Member State copyright laws.

Many of the differences between the legal protections for fashion designs of the United States and Europe come down to history.¹¹⁸ Europe is the home of some of the oldest and most prestigious fashion houses and an epicenter of fashion.¹¹⁹ But the United States is the world's largest fashion market,¹²⁰ with New York as one of the fashion centers of the world. Why then has not American law and policy adopted stronger protections? In fact, U.S. Congress has made several attempts to grant IP protection for fashion articles.¹²¹ However, as of the date of this Article, no progress has been made on this front.

Why do these two markets—where many companies do business in both—have such different IP rules for fashion designs? The answers to these questions are cultural, economic, and political, and the subject of much debate.

¹¹⁸ Zarocostas, *supra* note 28 (“France was one of the first places to turn out original creative designs. Design protection has been a priority in France since the 15th century, when the ‘fabrication of textiles’ was granted protection. That was just not on our radar in America at that time. Design-specific protection was confirmed in French national law by the Decree of the National Convention of July 19, 1793, and further refined by the special design laws of 1806 and 1909, which provide French designers with significant levels of protection.”).

¹¹⁹ Three out of the four “fashion capital” cities are in Europe. See Nancy Mangano, *New York, London, Milan, Paris: The Four Fashion Capitals of The World*, STRUTTING IN STYLE (May 13, 2020), <https://www.struttinginstyle.com/new-york-london-milan-paris-the-four-fashion-capitals-of-the-world/> [<https://perma.cc/6FPL-XNZA>].

¹²⁰ Shahbandeh, *supra* note 1.

¹²¹ The most recent is the Innovative Design Protection Act of 2012 (the IDPA). In the IDPA, Congress proposed to include “apparel” under the Copyright Act’s definition of “useful article.” S. REP. NO. 112-259, at 12 (2012).

A. The Piracy Paradox: *A Call for a Lower IP Regime*

The year 2006 was marked by rapid increase in consumer spending, supported by rising employment and overall favorable economic conditions.¹²² It also was a huge year for fast fashion: Uniqlo opened its flagship location in Soho in New York City, and the Spanish brand Mango expanded to North America.¹²³ H&M arrived in the United States a few years earlier, and although Zara has already been operating in New York City since 1989, it arguably did not gain wide recognition in the United States until the early 2000s.¹²⁴

Against this backdrop, Kal Raustiala and Christopher Sprigman published their seminal article, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, with the goal of explaining why fashion design protection was limited in the United States and how design copying ultimately, and paradoxically, benefited fashion companies.¹²⁵ This “piracy paradox,” as it became known, explains why the U.S. low-IP regime for fashion protection persists. While piracy in general is said to threaten incentives to create, in the U.S. fashion industry, the lack of design protection paradoxically serves the industry’s interest better than a high-IP system.¹²⁶

Having a low-IP regime fosters the fashion cycle¹²⁷ by permitting the design appropriation, which then helps accelerate the diffusion of styles and designs—the authors refer to this acceleration as “induced obsolescence.”¹²⁸ “The fashion cycle is accelerated by widespread design copying, because copying erodes the positional qualities of fashion goods. Designers in turn respond to this obsolescence with new designs. In short, piracy paradoxically benefits designers by inducing more rapid turnover and additional sales.”¹²⁹

According to the authors, a low-IP regime also helps establish and set trends, making room for new trends, a process the authors refer to as

¹²² FED. RESRV. BD., 93RD ANNUAL REPORT, ECONOMIC AND FINANCIAL DEVELOPMENTS IN 2006 AND EARLY 2007 (2007), <https://www.federalreserve.gov/boarddocs/rptcongress/annual06/sec1/c2.htm> [<https://perma.cc/5Z5L-G652>].

¹²³ Alexandra Ilyashov & Ana Colon, *12 Ways the Fashion Industry Has Changed Since 2006*, REFINERY29 (Dec. 30, 2015), <https://www.refinery29.com/en-us/2015/12/100262/2016-fashion-trends-compared-2006-trends> [<https://perma.cc/WT4J-TVYU>].

¹²⁴ *Id.*

¹²⁵ Raustiala & Sprigman, *supra* note 63.

¹²⁶ *Id.* at 1722 (“The fashion cycle has long been familiar. What is less commonly appreciated is the role of IP law in fostering the cycle. We argue that fashion’s low-IP regime is paradoxically advantageous for the industry.”).

¹²⁷ The cycle is made up of five stages: Introduction stage; Increase stage; Peak stage; Decline stage; and Obsolescence stage. *Understanding the 5 Stages of the Fashion Cycle*, MASTERCLASS (Jan. 14, 2021), <https://www.masterclass.com/articles/fashion-cycle-explained> [<https://perma.cc/A3B4-QKB5>].

¹²⁸ Raustiala & Sprigman, *supra* note 63, at 1722.

¹²⁹ *Id.*

“anchoring.”¹³⁰ A low-IP regime helps to convey a trend, accelerating it. “Like a school of fish moving first this way and then that, fashion designers follow the lead of other designers in a process that, while bewildering at times, results in the emergence of particular themes.”¹³¹ Once the market becomes flooded with the trend, it no longer is a trend.¹³² The authors argue that copying accelerates the cycle, getting to the obsolescence stage quickly so that designers can create more trends, produce more, and sell more.

B. The Law, Culture, and Economics of Fashion: *A Call for a Higher IP Regime*

In December 2007, shortly after *The Piracy Paradox* was published, the United States entered “The Great Recession,” affecting consumer shopping.¹³³ Although the recession was considered “officially” over in the United States in June 2009, many Americans, as well as people all over the world, continued to feel the repercussions of the economic downturn many years after.¹³⁴ Amidst this background, Scott Hemphill and Jeannie Suk published their article, *The Law, Culture, and Economics of Fashion*, in January 2009, advocating for stronger IP protection for fashion designs.¹³⁵ Their article purported that fast fashion threatened innovation because the law permits copying on a large scale.¹³⁶ In contrast to Raustiala and Sprigman, Hemphill and Suk proposed adoption of an intellectual property right to protect original fashion designs, but only from close copying.¹³⁷ They allege that their proposal takes an “intermediate stand” in the debate between “permitting free copying of fashion designs and creating a broad right of exclusion.”¹³⁸ The authors explain the difference between remix, paying homage, and inspiration, versus close copying. The authors consider the former to be acceptable but not the latter.¹³⁹

¹³⁰ *Id.* at 1728.

¹³¹ *Id.*

¹³² *Id.* at 1732.

¹³³ *The Great Recession*, INVESTOPEDIA, <https://www.investopedia.com/terms/g/great-recession.asp> [<https://perma.cc/T3TZ-UBGR>] (last updated Oct. 23, 2020) (“American households lost roughly \$19 trillion of net worth as a result of the stock market plunge, according to the U.S. Department of the Treasury.”).

¹³⁴ *Great Recession*, HISTORY.COM, <https://www.history.com/topics/21st-century/recession> [<https://perma.cc/N79X-TNBP>] (last updated Oct. 11, 2019).

¹³⁵ Hemphill & Suk, *supra* note 3.

¹³⁶ *Id.* at 1179–80; *see also id.* at 1155 (“[F]ast-fashion copyists both reduce innovation and affect its direction.”).

¹³⁷ *Id.* at 1155; *see also id.* at 1184 (“Our proposed policy response aims to preserve differentiated innovation. Our distinctive goal is to prohibit close copies while preserving flocking and differentiation in its varied forms of inspiration, homage, referencing, and quotations.”).

¹³⁸ *Id.* at 1155.

¹³⁹ *Id.* at 1153 (“Our theory leads us to favor a legal protection against close copying of fashion designs.”).

Because fashion is “an area where consumptive choices are also expressive,” fashion designs may share trend elements—referred to as “flocking”—but the goods also have elements that differentiate them from other goods of the same trend.¹⁴⁰ Hemphill and Suk also compare fashion designs to creative goods like music, film, books, and other artistic areas, both that flock to music that has common themes, but differentiate themselves within the flocking elements.¹⁴¹ In sum, they propose “tailored protection for original designs” to prevent close copying.¹⁴²

This proposed right would operate under copyright law by extending copyright protection to original works of apparel. The right would preclude a finding of infringement where the later work is “substantially different,” which is in contrast to the usual “substantially similar” standard for copyright liability.¹⁴³

In response to Hemphill and Suk, Raustiala and Sprigman published *The Piracy Paradox Revisited*, which addresses some of Hemphill and Suk’s concepts.¹⁴⁴ In this article, Raustiala and Sprigman argue that “even limited design protection is unnecessary and unwise, and may well undermine those designers it is intended to help” but nonetheless agree with Hemphill and Suk on “many other points of analysis, including the importance of understanding competing impulses—dubbed ‘differentiation’ and ‘flocking’—that spur apparel purchases, and on the more general point that fashion design cannot easily be subsumed under conventional copyright analysis.”¹⁴⁵

III. FASHION ACCELERATED AND DISRUPTED

Fast fashion grew in popularity in the mid- to late-2000s, and the growth continued in the following decade.¹⁴⁶ The ever-growing influence of the Internet led to the rise of e-commerce and the mobile experience, which revolutionized consumer shopping and demand.¹⁴⁷ With consumers having rapid access to styles and trends not only at their desktops but

¹⁴⁰ *Id.* at 1152 (“Fashion puts into relief people’s tendency to flock while also differentiating from each other. Individual differentiation within flocking is our account of fashion behavior.”).

¹⁴¹ *Id.* at 1152–53.

¹⁴² *Id.* at 1184 (“Our distinctive goal is to prohibit close copies while preserving flocking and differentiation in its varied forms of inspiration, homage, referencing, and quotation.”).

¹⁴³ *Id.* at 1185.

¹⁴⁴ See generally Kal Raustiala & Christopher Jon Sprigman, *The Piracy Paradox Revisited*, 61 STAN. L. REV. 1201 (2009).

¹⁴⁵ Kal Raustiala & Christopher Jon Sprigman, Abstract to *The Piracy Paradox Revisited*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1404247 [<https://perma.cc/F79V-YHRR>].

¹⁴⁶ See generally Idacavage, *supra* note 6.

¹⁴⁷ See Daniela Coppola, *Total and E-commerce Value of U.S. Retail Trade Sales from 2000–2019*, STATISTA (Feb. 12, 2021), <https://www.statista.com/statistics/185283/total-and-e-commerce-us-retail-trade-sales-since-2000/> [<https://perma.cc/Q35S-86V9>] (“Due to the ubiquity of desktop and mobile computers and devices, as well as through the worldwide propagation of the internet, a new form of retail has emerged: e-commerce.”).

now also on mobile—at their fingertips around the clock—the demand for fast fashion increased.¹⁴⁸ This increased demand also accelerated the fashion cycle as businesses tried to shorten their calendars and create more collections to keep up with consumer demands and competitors.¹⁴⁹ As the fashion industry accelerated, various new business models and brands emerged, including ultra-fast fashion brands like Missguided and Boohoo,¹⁵⁰ sustainable and ethical brands like Everlane,¹⁵¹ alternative business models like The RealReal and Rent the Runway,¹⁵² direct-to-consumer brands like Allbirds and UNTUCKit,¹⁵³ and licensing business models like Authentic Brands Group.¹⁵⁴

A. *Faster Fashion*

*Consumers were consuming, store buyers were buying more and designers produced more and faster. Business boomed. And everyone just kept growing.*¹⁵⁵

In the early 2010s, a generation of millennials in their teens and twenties wanting cheap trendy fashion drove consumer demand for fashion.¹⁵⁶ Between 2010 and 2015, the top fast fashion retailers grew at an annual pace of 9.7%.¹⁵⁷ For example, Forever 21 peaked in 2015 with

¹⁴⁸ See, e.g., Achim Berg, Miriam Lobis, Felix Rölkens & Patrick Simon, *Faster Fashion: How to Shorten the Apparel Calendar*, MCKINSEY & CO. (May 17, 2018), <https://www.mckinsey.com/industries/retail/our-insights/faster-fashion-how-to-shorten-the-apparel-calendar> [https://perma.cc/98BR-5XYU] (“When Burberry and Tom Ford began experimenting with the fashion-industry concept known as ‘see now, buy now’ in 2016, their efforts were met with a little skepticism and a lot of excitement. The thinking was that consumers, especially millennials, have become accustomed to instant gratification and are therefore much less willing to wait several months to own the latest runway styles.”).

¹⁴⁹ See *id.*

¹⁵⁰ Vivian Hendriksz, *Boohoo, Asos & Missguided Pave the Way for ‘Ultrafast Fashion,’* FASHIONUNITED (May 24, 2017), <https://fashionunited.uk/news/fashion/boohoo-asos-missguided-pave-the-way-for-ultrafast-fashion/2017052424625> [https://perma.cc/6W7T-9WW2].

¹⁵¹ Lexie Sachs, *20 Best Sustainable Fashion Brands You Can Actually Trust*, GOOD HOUSEKEEPING (Apr. 20, 2020), <https://www.goodhousekeeping.com/clothing/g27154605/sustainable-fashion-clothing/> [https://perma.cc/5FVY-N3Q8].

¹⁵² Elena Del Real, *Rent the Runway: Data and Fashion Combine to Deliver Your Dream Wardrobe*, DIGITAL INITIATIVE (Dec. 9, 2015), <https://digital.hbs.edu/platform-rctom/submission/rent-the-runway-data-and-fashion-combine-to-deliver-your-dream-wardrobe/> [https://perma.cc/5VM2-U3UM]; *About The RealReal*, THE REALREAL, <https://www.therealreal.com/about> [https://perma.cc/TM6P-X6XE] (last visited Apr. 25, 2021).

¹⁵³ Elaine Underwood, *These DTC Companies Are Disrupting the Old Guard*, CAMPAIGN US (Feb. 11, 2020), <https://www.campaignlive.com/article/dtc-companies-disrupting-old-guard/1673613> [https://perma.cc/BT3L-FHZU].

¹⁵⁴ Cale Guthrie Weissman, *How Authentic Brands Group Has Positioned Itself as the 2020 Repo Man*, DIGIDAY (Dec. 30, 2020), <https://digiday.com/marketing/authentic-brands-group-2020-repo-man/> [https://perma.cc/FA7U-AY69].

¹⁵⁵ Aleksander, *supra* note 4.

¹⁵⁶ Kate Bowers, *During the 2010s, Consumers Made Big Demands of the Apparel Industry*, FORTUNE (Dec. 19, 2019), <https://fortune.com/2019/12/19/2010s-decade-fashion-apparel-retail/> [https://perma.cc/Q48V-4DU9].

¹⁵⁷ Zhai Yun Tan, *What Happens When Fashion Becomes Fast, Disposable and Cheap?*, NPR (Apr. 10, 2016), <https://www.npr.org/2016/04/08/473513620/what-happens-when-fashion->

\$4.4 billion in sales from more than 600 stores.¹⁵⁸ The fast fashion industry continued to thrive as the pace just continued to get faster with the ubiquitous nature of the Internet.¹⁵⁹ With the accelerated pace, all players felt pressure to keep up with the demand.¹⁶⁰

Under the traditional fashion cycle, fall collections are shown in the spring, and spring collections shown in the fall, giving designers time to show the collection to buyers, produce the products, and fulfill wholesale orders in time for the season in which the products are to be sold and worn.¹⁶¹ Fast fashion companies took advantage of the lag time between the runway shows and the time the items were available for sale.¹⁶² To keep up, traditional designers and brands began increasing the number of collections—some brands moving from producing two collections per year to four, or more if there was a men’s line or couture.¹⁶³ But some fast fashion companies like Zara produced twenty different collections per year.¹⁶⁴ In order to stay competitive and close the gap between when the products are shown and when they arrive in stores, some designers and brands also adopted a “see now, buy now” model, where consumers could purchase goods right after the runway show is over.¹⁶⁵

But the acceleration did not just stop there. A new generation of even faster retailers known as “ultra-fast fashion” companies emerged in the form of online retailers like Boohoo, Misguided, and Fashion Nova that focus on celebrity partnerships, influencer marketing, and digital analytics that can rapidly spot, predict, and test trends.¹⁶⁶ By operating primarily online, these companies are not bogged down by the brick-and-mortar overhead like their predecessors—think Forever 21.¹⁶⁷ Under the

becomes-fast-disposable-and-cheap [https://perma.cc/D7P9-HAX2].

¹⁵⁸ Amy Lamare, *The Rise and Fall of Fast Fashion Purveyor Forever 21*, BUS. OF BUS. (Jan. 6, 2020, 9:55 AM), <https://www.businessofbusiness.com/articles/the-rise-and-fall-of-fast-fashion-purveyor-forever-21/> [https://perma.cc/3JUY-MXYF].

¹⁵⁹ See Terry Nguyen, *Fast Fashion, Explained*, VOX: THE GOODS (Feb. 3, 2020), <https://www.vox.com/the-goods/2020/2/3/21080364/fast-fashion-h-and-m-zara> [https://web.archive.org/web/20210426212335/https://www.vox.com/the-goods/2020/2/3/21080364/fast-fashion-h-and-m-zara].

¹⁶⁰ *Id.*

¹⁶¹ Aleksander, *supra* note 4.

¹⁶² See Hayes, *supra* note 7.

¹⁶³ Aleksander, *supra* note 4.

¹⁶⁴ Nguyen, *supra* note 159.

¹⁶⁵ Greg Petro, *How ‘See-Now-Buy-Now’ Is Rewiring Retail*, FORBES (Jan. 31, 2018), <https://www.forbes.com/sites/gregpetro/2018/01/31/how-see-now-buy-now-is-rewiring-retail/> [https://perma.cc/H8AZ-M2FX].

¹⁶⁶ Maria Bobila, *11 Retailers to Know in a Post-Forever 21 World*, FASHIONISTA (Oct. 10, 2019), <https://fashionista.com/2019/10/fast-fashion-stores-retailers-brands-like-forever-21> [https://perma.cc/56NZ-CCAF]; see also Anna, *From Fast Fashion to Ultra-Fast & Beyond*, OMNILYTICS (Mar. 13, 2018), <https://omnilytics.co/blog/fast-fashion-ultra-fast-beyond> [https://perma.cc/A4PS-BKGK].

¹⁶⁷ Bobila, *supra* note 166 (“When Forever 21 officially filed for bankruptcy in September, critics were quick to point out the reasons for its downfall: an aggressive expansion of physical stores that eventually lost foot traffic; losing focus on actual fashion trends and becoming over assorted; and a lack of awareness when it comes to evolving consumer habits. So while Forever 21 was declining,

traditional fashion cycle, it would take months to develop and sell a new product, in fast fashion it could take several weeks or more, but ultra-fast fashion companies can get a product from concept to sale within one to two weeks.¹⁶⁸ One report reveals that the “site Missguided releases about 1,000 new products monthly, and Fashion Nova’s CEO has said that it launches about 600 to 900 new styles every week.”¹⁶⁹

What is the impact of having more collections throughout the year? According to one Vox reporter, “The rapid rate at which new capsule collections and trendy designs are being released only feeds into shoppers’ desire to buy more.”¹⁷⁰ It is cyclical: faster collections drive the consumer demand higher for quicker releases of new collections. And with the increased demand for faster fashion, businesses are incentivized to come up with even faster business models. Raustiala and Sprigman discuss how this “induced obsolescence” leads to new designs and, in turn, actually benefits the fashion industry by inducing faster turnover and more sales.¹⁷¹ Clearly, it has benefited the ultra-fast fashion businesses that emerged. But has it also helped other areas of the industry?

B. *The Rise of the Conscious Consumer*

*We’ve long known that fashion is one of the most polluting industries on the planet. But now people want to know where things come from and where they end up.*¹⁷²

1. The Conscious Consumer

Critics of fast fashion highlight its environmental and labor costs.¹⁷³ As discussed above, fashion companies went from producing on average two collections per year in 2000 to five in 2011, with some brands putting out more—Zara produced twenty-four and H&M twelve to sixteen per year.¹⁷⁴ Some sources indicate that much of this clothing ends up as trash

other adaptable, faster retailers were on the rise, combining social media with e-commerce and focusing on celebrity partnerships and influencer marketing.”).

¹⁶⁸ Anna, *supra* note 166 (“Boohoo has the ability to get a product from concept to sale within just 2 weeks while Missguided is even faster, at just 1 week.”).

¹⁶⁹ Nguyen, *supra* note 159.

¹⁷⁰ *Id.*

¹⁷¹ Raustiala & Sprigman, *supra* note 63, at 1722.

¹⁷² Eleanor Beardsley, *COVID-19 Is Turning the Fashion Industry on Its Head*, NPR: WKLY. EDITION SUNDAY (Oct. 11, 2020, 7:52 AM), <https://www.npr.org/2020/10/11/922756218/covid-19-is-turning-the-fashion-industry-on-its-head> [<https://perma.cc/W5LP-JB5W>].

¹⁷³ See Tatiana Schlossberg, *How Fast Fashion Is Destroying the Planet*, N.Y. TIMES (Sept. 3, 2019), <https://www.nytimes.com/2019/09/03/books/review/how-fast-fashion-is-destroying-the-planet.html> [<https://perma.cc/CT9Y-TTQ5>].

¹⁷⁴ Nathalie Remy, Eveline Speelman & Steven Swartz, *Style That’s Sustainable: A New Fast-Fashion Formula*, MCKINSEY & CO. (Oct. 20, 2016), <https://www.mckinsey.com/business-functions/sustainability/our-insights/style-thats-sustainable-a-new-fast-fashion-formula> [<https://perma.cc/7HCT-XJ6J>].

and in dumps, and microfibers from washing these goods end up in water supplies and lead to carbon emissions.¹⁷⁵ Fast fashion has also been criticized for poor labor and working conditions.¹⁷⁶ In 2013, the Rana Plaza building in Bangladesh, housing five garment factories that manufactured some fast fashion brands, collapsed, resulting in the death of 1,132 workers.¹⁷⁷ The tragedy shook the world and brought poor working conditions in the industry to center stage and directly to consumers' phones.¹⁷⁸

2. Ethical and Sustainable Brands

With the pervasiveness of the Internet, consumers could see and learn about the environmental and labor costs in real time. With access to extensive information, they make decisions about which brands to buy.¹⁷⁹ Consumers began showing an interest in favor of sustainable and ethical brands, and sustainable and ethical brands emerged.¹⁸⁰ For example, Reformation was founded in 2009 as a vintage clothing store and quickly expanded into a sustainable fashion brand.¹⁸¹ In 2010, Everlane launched with a novel concept of offering a full breakdown of the cost to make each product.¹⁸² With a segment of consumers now focusing on the environment, more businesses began addressing environmental and social issues. For example, Nike supported Colin Kaepernick, the face of the NFL "anthem protest," and Levi's endorsed an anti-gun violence campaign.¹⁸³

¹⁷⁵ Morgan McFall-Johnsen, *The Fashion Industry Emits More Carbon than International Flights and Maritime Shipping Combined*, BUS. INSIDER (Oct. 21, 2019), <https://www.businessinsider.com/fast-fashion-environmental-impact-pollution-emissions-waste-water-2019-10> [https://perma.cc/U74Q-U2SC].

¹⁷⁶ See Syama Meagher, *The Not-So-Hidden Ethical Cost of Fast Fashion: Sneaky Sweatshops in Our Own Backyard*, FORBES (Feb. 5, 2020), <https://www.forbes.com/sites/syamameagher/2020/02/05/the-not-so-hidden-ethical-cost-of-fast-fashion-sneaky-sweatshops-in-our-own-backyard/> [https://perma.cc/883U-L42B]; Victoria Stafford, *Factory Exploitation and the Fast Fashion Machine*, GREEN BUS. NETWORK (Aug. 8, 2021), <https://www.greenamerica.org/blog/factory-exploitation-and-fast-fashion-machine> [https://perma.cc/FE4J-32HT].

¹⁷⁷ Michael Safi & Dominic Rushe, *Rana Plaza, Five Years On: Safety of Workers Hangs in Balance in Bangladesh*, THE GUARDIAN (Apr. 24, 2018), <https://www.theguardian.com/global-development/2018/apr/24/bangladeshi-police-target-garment-workers-union-rana-plaza-five-years-on> [https://perma.cc/5SCN-GX79].

¹⁷⁸ *The Rana Plaza Accident and Its Aftermath*, INT'L LAB. ORG., https://www.ilo.org/global/topics/geip/WCMS_614394/ [https://perma.cc/3G23-SMZL] (last visited Apr. 25, 2021).

¹⁷⁹ See Quirijn Foeken, *The Rise of the Conscious Consumer and the Need for Greater Transparency*, CONSUMER GOODS F. (Nov. 16, 2017), <https://www.theconsumergoodsforum.com/blog/the-rise-of-the-conscious-consumer-and-the-need-for-greater-transparency/> [https://perma.cc/LN8J-W3VL].

¹⁸⁰ See, e.g., *35 Ethical & Sustainable Clothing Brands Betting Against Fast Fashion*, THE GOOD TRADE, <https://www.thegoodtrade.com/features/fair-trade-clothing> [https://perma.cc/4SH4-RX8L] (last visited Apr. 25, 2021).

¹⁸¹ *Ref Timeline*, REFORMATION, <https://www.thereformation.com/pages/timeline> [https://perma.cc/HYZ9-Y9JN] (last visited Apr. 25, 2021).

¹⁸² *Everlane*, FAST CO., <https://www.fastcompany.com/company/everlane> [https://perma.cc/M7W3-UXE8] (last visited Apr. 25, 2021).

¹⁸³ Imran Amed, Anita Balchandani, Marco Beltrami, Achim Berg, Saskia Hedrich & Felix Rölkens, *The Influence of 'Woke' Consumers on Fashion*, MCKINSEY & CO. (Feb. 12, 2019), <https://www.mckinsey.com/industries/retail/our-insights/the-influence-of-woke-consumers-on-fashion>

In terms of the environment, many fashion brands—including Tapestry¹⁸⁴ and Capri Holdings¹⁸⁵—adopted sustainability initiatives.

This consumer shift led to the emergence of new ethical brands and business models and encouraged existing brands to become purpose-driven to target the conscious consumer.¹⁸⁶ Many young consumers have social and environmental issues at the forefront of their purchasing decisions.¹⁸⁷ But it is not just young consumers that are driven by environmental and social issues, as two-thirds of consumers worldwide have indicated they would avoid brands based on a stand on a controversial issue.¹⁸⁸ According to McKinsey & Company, “A new global ethos is emerging, and billions of people are using consumption as a means to express their deeply held beliefs.”¹⁸⁹

3. Slow Fashion

Another fast-fashion countermovement that emerged is known as “slow fashion.”¹⁹⁰ Slow fashion is about consuming fashion consciously and making well-made, lasting clothing.¹⁹¹ “Instead of chasing trends, slow fashion brands utilize enduring styles with layering options and create pieces that are classic and versatile.”¹⁹² Many ethical brands may also be considered slow-fashion brands if they have well-made and long-lasting products, such as Everlane.¹⁹³

[<https://perma.cc/K2QC-4LPL>].

¹⁸⁴ *Corporate Responsibility Report*, TAPESTRY, INC., <https://tapestry.gcs-web.com/sustainability-reports> [<https://perma.cc/FB9Z-2F8L>] (last visited Apr. 25, 2021).

¹⁸⁵ *Corporate Social Responsibility*, CAPRI HOLDINGS LTD., <http://www.capriholdings.com/RESPONSIBILITY/Corporate-Social-Responsibility/default.aspx> [<https://perma.cc/V338-5GAD>] (last visited Apr. 25, 2021).

¹⁸⁶ See MCKINSEY & CO., *THE STATE OF FASHION 2019*, at 16, <https://www.mckinsey.com/~media/McKinsey/Industries/Retail/Our%20Insights/The%20end%20of%20ownership%20for%20fashion%20products/The-State-of-Fashion-2019.ashx> [<https://perma.cc/V98S-JA9N>] (“Younger generations’ passion for social and environmental causes has reached critical mass, causing brands to become more fundamentally purpose driven to attract both consumers and talent.”).

¹⁸⁷ Amed et al., *supra* note 183 (“Nine in ten Generation Z consumers believe companies have a responsibility to address environmental and social issues. . . . [The millennial and Gen Z] cohorts represent around \$350 billion of spending power in the United States alone (approximately \$150 billion spent by Gen Z and around \$200 billion by millennials); additionally, Gen Z will account for 40 percent of global consumers by 2020.”).

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ Leigh Weingus, *What Is the ‘Slow Fashion’ Movement Everyone’s Hashtagging on Instagram?*, PARADE (Sept. 24, 2019, 5:33 PM), <https://parade.com/927146/leighweingus/slow-fashion/> [<https://perma.cc/YXX3-RBG6>].

¹⁹¹ Kat Collings, *Why We’re Celebrating the Slow-Fashion Movement in July*, WHO WHAT WEAR (July 1, 2018), <https://www.whowhatwear.com/slow-fashion-movement> [<https://perma.cc/B44V-4LYM>].

¹⁹² Markéta Kettnerová, *What Does Slow Fashion Actually Mean?*, BRAND KETTNER (May 22, 2020), <https://www.brandkettner.com/post/what-does-slow-fashion-actually-mean> [<https://perma.cc/3Z9M-YR2E>].

¹⁹³ See, e.g., Jessica Estrada, *8 Slow Fashion Brands that Are Anything but Basic*, WELL + GOOD (May 11, 2019), <https://www.wellandgood.com/slow-fashion-brands/> [<https://perma.cc/JCQ7-ALGY>].

4. Ethical and Sustainable Initiatives and Organizations

The shift toward ethical and sustainable brands also led to brand certifications and organizations like B Corp and Sustainable Brands, which allow certified and member businesses to signal to consumers that they abide by a certain ethos.¹⁹⁴ To be a certified B Corp, an organization or entity must meet certain standards of “verified social and environmental performance, public transparency, and legal accountability to balance profit and purpose.”¹⁹⁵ Examples of fashion Certified B Corps are ATHLETA, Allbirds, Toms, and Patagonia.¹⁹⁶ Sustainable Brands is a community of “brand leaders who are tapping environmental and social challenges to drive innovation, business and brand value,”¹⁹⁷ and some apparel and footwear members include Gildan and Aldo.¹⁹⁸

C. *Alternative Business Models*

So far in this Article we have discussed the rise of ultra-fast fashion businesses that rode the coattails of the accelerated fashion cycle and technology, as well as the rise of ethical, sustainable, and slow-fashion brands and organizations that have benefited in response to movements away from fast fashion. The accelerated fashion cycle and technology also presented opportunities for businesses to adopt innovative and alternative business models to compete and disrupt the industry.

1. Resale and Rental Brands

For example, resale and rental brands like The RealReal (resale) and Rent the Runway (rental) disrupted the industry with new ways of catering to customers who wanted trendy fashion goods for less, and quickly. The RealReal allows luxury good owners to sell their goods on The RealReal platform to purchasers.¹⁹⁹ The business model is disruptive as it embraces a circular economy that contributes to “a more sustainable fashion industry where luxury goods stay in circulation” compared to

¹⁹⁴ See CERTIFIED B CORPORATION, <https://bcorporation.net/> [<https://perma.cc/H2Q4-EWUE>] (last visited Apr. 25, 2021); *About Sustainable Brands*, SUSTAINABLE BRANDS, <https://sustainablebrands.com/corporate> [<https://perma.cc/7WZP-3ZTJ>] (last visited Apr. 25, 2021).

¹⁹⁵ *About B Corps*, CERTIFIED B CORPORATION, <https://bcorporation.net/about-b-corps> [<https://perma.cc/T4Y4-KVDC>] (last visited Apr. 25, 2021). “B Corps are accelerating a global culture shift to redefine success in business and build a more inclusive and sustainable economy.” *Id.*

¹⁹⁶ *B Corp Directory*, CERTIFIED B CORPORATION, <https://bcorporation.net/directory?search=&industry=Apparel%2C%20Footwear%20%26%20Accessories&country=United%20States&state=&city=> [<https://perma.cc/UZD3-RTJ9>] (last visited Apr. 25, 2021).

¹⁹⁷ *About Sustainable Brands*, *supra* note 194.

¹⁹⁸ *The SB Corporate Member Network*, SUSTAINABLE BRANDS, <https://sustainablebrands.com/participate/corporatemember/community> [<https://perma.cc/3VCT-ACFT>] (last visited Apr. 25, 2021).

¹⁹⁹ *Sell with Us. It's Easy.*, THE REALREAL, <https://www.therealreal.com/consign> [<https://perma.cc/X6LR-6Q6S>] (last visited Apr. 25, 2021).

traditional vertical economy based on the creation, use, and disposal of fashion goods.²⁰⁰

Similarly, Rent the Runway solves a problem for consumers who crave high quality, trendy clothing without the heavy price tag or the regret of having an expensive piece sitting in their wardrobe until they decide to wear it next. The business model also has roots in sustainability as it prevents proliferation of clothing that may end up in landfills.²⁰¹ Rent the Runway calls its model a “shared clothing economy” and states that “[r]enting things you’d only wear a few times is a more sustainable answer because more people sharing clothing means less clothing waste.”²⁰²

2. Direct-to-Consumer Brands

Another business model that has emerged is the direct-to-consumer model such as Rothy’s, Allbirds, UNTUCKit, and many of the other brands that sell directly to their customers on company-owned websites, platforms, and more recently, in physical stores. The direct-to-consumer movement allows brands to re-tool strategies to focus on direct sales and not rely on third-party retailers.²⁰³ Many of these brands are digital natives as they started out selling directly to consumers on brand-controlled websites and platforms, but some brands, like Allbirds, eventually opened stores to capitalize on other distribution channels.²⁰⁴

3. Licensing Model

By the end of the 2010s, many big names announced store closings, including Urban Outfitters, American Eagle, and Ralph Lauren.²⁰⁵ Then the bankruptcies began, including Nine West, Roberto Cavalli, Barneys, and Forever 21.²⁰⁶ The dramatic number of bankruptcies created opportunity for the emergence of an innovative licensing business model, with Authentic Brands Group (ABG) at the forefront. ABG purchases the

²⁰⁰ *The Future of Fashion Is Circular*, THE REALREAL, <https://www.therealreal.com/sustainability> [<https://perma.cc/YB4F-NAEU>] (last visited Apr. 25, 2021).

²⁰¹ See *The Real Sustainable Fashion Movement*, RENT THE RUNWAY, <https://www.renttherunway.com/sustainable-fashion> [<https://perma.cc/FC3K-BL9B>] (last visited Apr. 25, 2021).

²⁰² *Id.*

²⁰³ Jasmin Malik Chua, *Direct-to-Consumer’s Lasting Impact on Fashion*, VOGUE BUS. (Feb. 3, 2020), <https://www.voguebusiness.com/consumers/direct-to-consumer-lasting-impact-on-fashion-levis-nike-samsonite> [<https://perma.cc/BEL2-6XAU>].

²⁰⁴ George Anderson, *Will High-Flying Allbirds Be Weighed Down by Physical Stores?*, FORBES (Feb. 9, 2021, 8:00 AM), <https://www.forbes.com/sites/retailwire/2021/02/09/will-high-flying-allbirds-be-weighed-down-by-physical-stores/> [<https://perma.cc/NN6K-SS5F>].

²⁰⁵ Derek Thompson, *What in the World Is Causing the Retail Meltdown of 2017?*, THE ATLANTIC (Apr. 10, 2017), <https://www.theatlantic.com/business/archive/2017/04/retail-meltdown-of-2017/522384/> [<https://perma.cc/M85N-8JQF>].

²⁰⁶ *Retail Woes: A Running List of Fashion & Retail Bankruptcies*, THE FASHION L. (Apr. 5, 2021), <https://www.thefashionlaw.com/retail-woes-a-bankruptcy-timeline/> [<https://perma.cc/RTB2-DZTS>].

intellectual property assets of the famous distressed businesses and revives them in a leaner, more profitable way.²⁰⁷ Most recently, ABG purchased Brooks Brothers, Forever 21, and Barneys.²⁰⁸

D. COVID-19 and the “Darwinian Shakeout”

*The fashion industry as we knew it no longer exists.*²⁰⁹

In the 2010s, e-commerce shook the traditional retail model;²¹⁰ the Internet helped feed an insatiable consumer demand for faster fashion, which ultimately accelerated the fashion cycle as existing and emerging brands attempted to appease the appetite;²¹¹ and the acceleration created opportunities for alternative and innovative business models to emerge, as discussed above.

When COVID-19 reached the United States in March 2020, it raised unprecedented challenges. The industry felt immediate shocks to supply chains and sales, having to close stores around the world, pivot to remote working, and furlough or lay off workers.²¹² In the months that followed, many longstanding businesses struggled and succumbed,²¹³ but others pivoted to focus on e-commerce sales,²¹⁴ making PPE and facemasks,²¹⁵ as well as other categories that were doing better—e.g., loungewear.²¹⁶ McKinsey & Company succinctly predicted fashion’s “Darwinian Shakeout”: “The crisis will shake out the weak, embolden the strong and accelerate the decline of companies that were already struggling before

²⁰⁷ Sapna Maheshwari & Vanessa Friedman, *The Two Men Buying Your Favorite Retailers*, N.Y. TIMES (Sept. 8, 2020), <https://www.nytimes.com/2020/09/08/business/retail-bankruptcy-authentic-brands.html> [<https://perma.cc/T5GX-L9NE>].

²⁰⁸ Weissman, *supra* note 154.

²⁰⁹ Paul McLaughlan, *Fashion Discusses the Future of Its “Non-Essential” Industry*, HIGH-SNOBIETY (Apr. 2020), <https://www.highsnobiety.com/p/fashion-world-post-corona-industry/> [<https://perma.cc/YP79-VQ9A>].

²¹⁰ *Stores Are Being Hit by Online Retailing*, THE ECONOMIST (Oct. 26, 2017), <https://www.economist.com/special-report/2017/10/26/stores-are-being-hit-by-online-retailing> [<https://perma.cc/HW4G-M3QZ>] (last visited Apr. 25, 2021).

²¹¹ AJ Ogundimu, *How Technology Inspired and Drove Fast Fashion’s Meteoric Rise*, CB4 SPOTLIGHT (June 29, 2018), <https://cb4.com/blog/technology-social-media-fast-fashion-rise/> [<https://perma.cc/4DFV-HJFZ>]; see generally Aleksander, *supra* note 4.

²¹² *COVID-19: Implications for Business*, MCKINSEY & CO. (Apr. 21, 2021), <https://www.mckinsey.com/business-functions/risk/our-insights/covid-19-implications-for-business> [<https://perma.cc/9N7J-UPNR>].

²¹³ Layla Ilchi, *All the Major Fashion Brands and Retailers Severely Impacted by the COVID-19 Pandemic*, WWD (Dec. 24, 2020), <https://wwd.com/fashion-news/fashion-scoops/coronavirus-impact-fashion-retail-bankruptcies-1203693347/> [<https://perma.cc/6S36-J5LE>].

²¹⁴ Brandon Ginsberg, *How Fashion Brands Have Optimized Their E-Commerce Efforts to Survive the Pandemic*, ROLLING STONE (Mar. 2, 2021, 12:30 PM), <https://www.rollingstone.com/culture-council/articles/fashion-brands-e-commerce-efforts-pandemic-1134906/> [<https://perma.cc/7QDV-E3XE>].

²¹⁵ Irina Grechko, *How the Nap Dress, Masks & Tie-Dye Helped These Fashion Brands Thrive in the Pandemic*, REFINERY29 (Dec. 30, 2020, 12:23 PM), <https://www.refinery29.com/en-us/2020/12/10244533/top-fashion-brands-covid> [<https://perma.cc/RZU3-NECZ>].

²¹⁶ *Id.*

the pandemic, leading to massive waves of consolidation, M&A activity and insolvencies.”²¹⁷ As of the date of this Article, many businesses declared insolvency, and some have been scooped up by ABG.

CONCLUSION: FUTURE OF INNOVATION IN FASHION

The new brands and innovative business models that emerged from an accelerated fashion cycle support Raustiala and Sprigman’s theory that design copying promotes innovation in the fashion industry. New brands and business models emerged to meet consumer demands, whether in favor of fast fashion (faster fashion brands) or contra-fast fashion (ethical and sustainable brands and organizations), or to compete and stay ahead of the accelerated market (rental, resale, direct-to-consumer, and licensing models).

To keep up with the accelerated fashion cycle and advances in technology, more businesses are and should embrace disruption and think of ways to self-disrupt.²¹⁸ Fashion incubators and accelerators can help existing businesses and brands stay competitive and relevant by thinking of new ways to sell, market to, and reach customers.²¹⁹ COVID-19 forced businesses to adapt, pivot and think of innovative ways to run their businesses. According to Anna Wintour, “I think it’s really giving the industry a pause . . . I think everybody is rethinking what the fashion industry stands for, what it means, what it should be.”²²⁰ Ultimately, the disruption that the industry has seen will benefit the industry by making way for leaner, more efficient businesses and newer business models. Fashion and retail are not dead—they are just getting the makeover they need to thrive.

²¹⁷ MCKINSEY & CO., THE STATE OF FASHION 2020: CORONAVIRUS UPDATE 29, <https://www.mckinsey.com/~media/mckinsey/industries/retail/our%20insights/its%20time%20to%20rewire%20the%20fashion%20system%20state%20of%20fashion%20coronavirus%20update/the-state-of-fashion-2020-coronavirus-update-final.pdf> [https://perma.cc/9EST-8AGT].

²¹⁸ Imran Amed, Anita Balchandani, Marco Beltrami, Achim Berg, Saskia Hedrich & Felix Rölkens, *Self-Disruption in the Fashion Industry*, MCKINSEY & CO. (Feb. 15, 2019), <https://www.mckinsey.com/industries/retail/our-insights/self-disruption-in-the-fashion-industry> [https://perma.cc/7YMP-Y2B6].

²¹⁹ See Maura Brannigan, *Incubators Are Back—and Good Thing, Because Fashion Really Needs Them*, FASHIONISTA (Aug. 10, 2020), <https://fashionista.com/2020/08/fashion-incubators-accelerators-coronavirus> [https://perma.cc/4BLD-9W9U].

²²⁰ Kevin Stankiewicz, *Vogue Editor Anna Wintour Says Coronavirus Has Been ‘Catastrophic’ for the Fashion Industry*, CNBC, <https://www.cnbc.com/2020/05/20/vogue-editor-anna-wintour-coronavirus-has-been-catastrophic-for-fashion-industry.html> [https://perma.cc/9RB6-WTER] (last updated May 21, 2020, 5:12 AM).