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PIRATING THE RUNWAY: THE POTENTIAL IMPACT OF THE DESIGN PIRACY PROHIBITION ACT ON FASHION RETAIL

H. Shayne Adler*

I. INTRODUCTION

In the Academy-Award nominated film *The Devil Wears Prada*, Meryl Streep’s character memorably explains the style cycle of a single shade of blue:

You go to your closet and you select out, oh, I don’t know, that lumpy blue sweater, for instance, because you’re trying to tell the world that you take yourself too seriously to care about what you put on your back. But what you don’t know is that that sweater is not just blue, it’s not turquoise, it’s not lapis, it’s actually cerulean. You’re also blithely unaware of the fact that in 2002, Oscar de la Renta did a collection of cerulean gowns. And then, I think it was Yves Saint Laurent, wasn’t it? 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 it 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, and it’s sort of comical how you think that you’ve made a choice that exempts you from the fashion industry when, in fact, you’re wearing a sweater that was selected for you by the people in this room from a pile of stuff.¹

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¹. *THE DEVIL WEARS PRADA* (Fox 2000 Pictures 2006).
This speech pinpoints the degree of influence that fashion designers have on a multi-billion dollar international business. The fashion industry pervades the lives and choices of millions of Americans, and it is shaped by a small group of designers who create collections twice a year. These collections set trends that men and women adopt, the media advertises, and other companies emulate to varying degrees. The pattern described above has been the modus operandi of the business for over a century, yet the industry is beginning to see significant changes in how it functions that are not necessarily welcomed by all the individuals and businesses involved.

At one point, fashion was exclusive to the wealthy and the aristocracy. Those who could afford luxury items purchased one of a kind pieces tailored to the individual consumer. Since Charles Frederick Worth began the practice of creating collections about 150 years ago, haute couture has given way to mass production and mass marketing of designer items in order to bring in the greatest profits for the labels and the corporations that own them, and companies race to create garments to follow the latest trends at ever accelerating rates. The slogan chosen for Sarah Jessica Parker's low-cost clothing line, Bitten, best encapsulates the modern attitude towards the industry: "Fashion is not a luxury, it's a right."

It is the precise approach to the fashion industry expressed by the Bitten slogan that has led to the dramatic rise in fashion piracy and imitation. From the famous counterfeit designer purses and sunglasses available on Canal Street in New York City to low-cost designer look-alikes advertised in Marie Claire under the title “Splurge vs. Steal,” designer knockoffs are ubiquitous in modern society. Design piracy, when an individual or manufacturer produces an imitation of a designer item at lower costs, is pervasive and easy to accomplish with modern technology and rapid communications. The question is whether it is a part of the natural evolution of the fashion industry, or a damaging influence over American businesses.

Stopping design piracy is a priority issue for the Council of Fashion Designers of America (“CFDA”), but there are strong arguments on both sides of the debate surrounding intellectual property rights for fashion designs. The Design Piracy Prohibition Act has become a focal point in this debate, and, if passed, the ramifications could have a widespread and lasting effect on a multi-billion dollar industry.

4. Eric Wilson, O.K., Knockoffs, This Is War, N.Y. TIMES, Mar. 30, 2006, at G1 [hereinafter Knockoffs, This Is War].
II. THE CURRENT STATE OF PROTECTION FOR FASHION DESIGN

Copyright laws address tension inherent in all discussions of intellectual property: The author's right to an interest in his or her creation versus the public's right to have access and develop an idea. In its current state, copyright laws largely do not protect fashion design since the courts view clothing design as a useful or lesser art, as opposed to a protected fine art. As a useful article, the law protects a designer's work only to the extent that the "pictorial, graphic, or sculptural features" are separable from the utilitarian function of the article. In *Morris v. Buffalo Chips Bootery*, the court ruled that copyright law does not protect an element of a garment that cannot exist independently of the article itself. For example, the fabric pattern of an article of clothing may be separable from its function as clothing or protection from the elements. In these cases, courts have held that a "substantial difference" in patterns is necessary.

Trademark law provides a degree protection for designers by protecting items that bear a distinguishing mark. According to the statute, a trademark "includes any word, name, symbol, or device ... [used] to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown." Practically, trademark can offer protection to a designer's work that bears a recognizable logo, like handbags or sunglasses. In recent years, law enforcement has stepped up enforcement of trademark infringement and counterfeit goods, but despite these efforts, trademark infringement of designer goods is a fast growing industry that generates $600 billion annually.

Designers encounter further obstacles to effectively protect their ideas using trademark law. While case law has established a broad definition of what elements of an article may be protected by trademark, including

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12. Id.
the Lanham Act does not protect the cut or design of the garment. Typically a garment design does not bear such a distinguishing mark, so its utility as a protective measure is limited. In order to gain legal protection of a design element, however, the designer must create the pattern or logo, use a distinctive color, or have established a consistent design over time that allows his or her works to be distinguishable from others. A consumer’s familiarity with a specific color requires time and an established business, so it may be impractical for many lesser-known designers.

III. COUNTERFEIT AND IMITATION GOODS

Historians have evidence of the existence of knockoff or counterfeit luxury goods dating back to the Roman Republic in 100 B.C.E. The historian Jonathan Stamp found that the nouveaux riches in ancient Rome bought lower-quality imitations of a citron wood table famously purchased by Cicero for a very large sum of money. At the time, Roman citizens not only required wealth, but objects to display their status, so counterfeit reproductions became popular. Modern designer goods have been the subjects of counterfeit operations since their rise to prominence in the late nineteenth century. In 1954, the French gendarmes arrested a gang of counterfeiters who stole dress design patterns to create cheap imitations.

Since 1993, counterfeiting has increased by 1,700 percent, demonstrating remarkable growth according to Indicam, an Italian anti-counterfeiting coalition. Estimates by the International Anti-Counterfeiting Coalition ("IACC") in Washington, D.C. say that counterfeiting may represent up to 7 percent of all global trade earning $600 billion. These figures only factor in outright black-market goods, however, such as handbags with logos that would be subject to claims of trademark infringement. In 2003, Market & Opinion Research International found that one third of those questioned would purchase a knock-off item because they consider it a "victimless crime." One of the necessary steps in lowering prices, however, is cutting production costs such as labor. Factories produce these items using child labor and

15. DANA THOMAS, DELUXE 273 (The Penguin Press 2007) [hereinafter DELUXE].
16. Id.
17. Id.
18. Id.
20. DELUXE, supra note 15, at 274.
21. Id.
22. Fake Trade, supra note 13, at 72.
sweatshops,\(^2\) which is relevant to a debate on regulating imitation goods from a human rights perspective. Dana Thomas, author of *Deluxe*, traveled to Guangzhou, China and observed a police raid on a factory producing knockoffs. The children working there had been sold to the factory owners and worked to earn money for their families.\(^2\) Another instance, related by a government official, described a factory producing knockoffs in which the legs of young Thai children whose legs were broken and tied so they could not heal, because they had asked to go outside to play.\(^2\)

The issue at the heart of this phenomenon is why counterfeiting has grown so sharply in recent years. Simply, luxury and designer goods function as status symbols within society. These logos and labels are familiar to many Americans, and the products are common sights in one’s everyday life.\(^2\) Within the fashion industry, consumers of haute couture and the most expensive designers seek out the most original and most expensive pieces, which can reach hundreds of thousands of dollars.\(^2\) These wealthier consumers drive the cyclical nature of the fashion industry, and as they adopt new trends, lower-cost imitations are produced for the mass market.\(^2\) Traditionally, by the time the trend has spread enough for the lower-cost versions to be in circulation, the trendsetters have already adopted a new style.

For example, a typical handbag by Louis Vuitton can cost anywhere from $510 to $3,900.\(^2\) However, the median income for a single American household in 2006 was $48,201.\(^2\) The average American consumer cannot reasonably afford the actual luxury item. Knockoffs and imitations of designer goods, therefore, may be an attractive alternative for those individuals who wish to acquire such luxury goods, but lack the disposable income of the designer’s target customer. This is only one reason why retail chains that specialize in low-cost designer goods have flourished. Forever 21, for example, reported earnings of $400 million from 100 stores in 2001.\(^2\) In 2007, it earned over $1 billion in sales from 390 locations.\(^2\)

\(^2\) *Deluxe*, supra note 15, at 287-88; see also *MADE IN L.A.* (Independent Television Service 2007) (documenting Forever 21’s use of sweatshop labor).

\(^2\) See, e.g., *Fake Trade*, supra note 13. The author relates a conversation with a young girl wearing a purse who “proudly” announces that it is a Louis Vuitton, though the author can see that it is counterfeit. *Id.* at 71-72.


\(^2\) *Los Angeles Garment Workers Announce Settlement with Major Manufacturer, SWEATSHOP WATCH*, Spring 2002, at 1, 1-3.
Lower-priced garments that reference high fashion are the basis of the mass-market fashion industry and benefit the general public. Further, there remains a question of whether these low-priced retailers are causing the more expensive designers to lose profits since there is little evidence on whether a customer that chooses to shop at, for example, Forever 21 would have purchased the more expensive original item if the imitation were not available. Therefore, the designer did not actually lose any profits. Some designers welcome imitation. Marc Jacobs has called counterfeiting “fantastic,” since it implies that a design is highly desirable. Additionally, Coco Chanel, an icon of the modern fashion industry, once said that “[t]he very idea of protecting the seasonal arts is childish.” Imitation garments, some experts argue, are “too entrenched in the culture to be controlled.”

However, with increased communication speed and improved technologies, this “style cycle” has changed. Instead of lower-cost items referencing high fashion designs, companies are instead copying them to a degree that some sources have called “pirating.” Images of designer goods from runway shows are available on the internet months before they are available to the public. Photographs from the runway shows can be emailed to factories abroad, imitated, and produced much more cheaply than the original, since this form of production does not expend time or resources on the more extensive design process of the original creator. These imitations then arrive in stores months before the original, turning the “style cycle” on its head. Traditionally, courts relied on the theory that competition in the creative industries encourages innovation, and thereby justified a lack of protection for fashion, which is relatively ephemeral. Such a dramatic shift in the fashion industry’s operation, however, calls into question whether the benefits of widespread dissemination of fashion design outweigh the economic harm caused to the designer. The CFDA estimates that knockoffs of this sort represent at least $9.05 billion or a

32. FOREVER 21, INC., HOOVER’S COMPANY RECORDS—BASIC RECORD (Mar. 18, 2008).
33. DELUXE, supra note 15, at 276.
35. Eric Wilson, The Knockoff Won’t Be Knocked Off, N.Y. TIMES, Sept. 9, 2007, at 4.5.
38. Id. Wilson provides an example of a dress designed by Tory Burch sold for $750 and an imitation produced by Simonia Fashions that sold for $260. Id.
39. Id.
40. See, e.g., Cheney Bros. v. Doris Silk Corp., 35 F.2d 279, 280 (2d. Cir. 1929).
minimum of 5 percent, of the American apparel market annually.\footnote{Knockoffs Fly, supra note 37, at A1.} The CFDA has focused its efforts on increased protection for fashion design as intellectual property as a result and several designers, including the CFDA president Diane von Furstenberg, have testified before Congress and met with legislators to support legislation prohibiting design piracy.\footnote{Council of Fashion Designers of America, Design Piracy, http://www.cfda.com (follow “About” hyperlink; then follow “Design Piracy” hyperlink) (last visited March 22, 2009).} Recently, designers have used creative tactics to draw attention to the issue, as well.\footnote{See, e.g., Vuitton Takes Brooklyn, WOMEN’S WEAR DAILY, Apr. 4, 2008, http://www.wwd.com/lifestyle-news/eye/vuitton-takes-brooklyn-1023025.} At an event honoring the artist Takashi Murakami, who designed a line of often-imitated handbags for Louis Vuitton, faux street vendors operated card tables stocked with real Louis Vuitton handbags, poking fun at the vendors that sell knockoff items on the streets in New York.\footnote{Id.}

IV. THE DESIGN PIRACY PROHIBITION ACT

In 2007, Rep. William Delahunt from Massachusetts and Sen. Charles Schumer from New York introduced the Design Piracy Prohibition Act into the House of Representatives and to the Senate, respectively.\footnote{See S. 1957, 110th Cong. (2007); H.R. 2033, 110th Cong. (2007). Rep. Delahunt introduced the bill in the House on April 25, 2007 with thirteen co-sponsors, whereas Sen. Schumer and his ten co-sponsors introduced it to the Senate over three months later on August 2, 2007. The bills are identical, so for purposes of this article, the bill will be referred to by the number assigned to it in the House, which is H.R. 2033.} The Act would amend Title 17 of the U.S. Code, which pertains to copyright protections.\footnote{H.R. 2033.} If passed, designers would have the right to receive copyright protections for “an article of apparel” and fashion design.\footnote{Id.} The bill defines an “article of apparel” as “an article of men’s women’s, or children’s clothing, including undergarments, outerwear, gloves, footwear, and headgear . . . handbags, purses, and tote bags . . . belts . . . [and] eyeglass frames.”\footnote{Id.} Further, the bill defines “fashion design” as “the appearance as a whole of an article of apparel, including its ornamentation.”\footnote{Id.}

While a typical copyright provides protection for the duration of the life of the author plus 70 years,\footnote{17 U.S.C. § 302(a) (2006).} protection for a fashion design would only last three years from the date when protection commenced.\footnote{H.R. 2033.} Additionally,
a copyright in a fashion design must have been registered within three
months of being made public in order to obtain protection, though the
penalty for infringement would also increase by 400 percent.\textsuperscript{52}

Delahunt, with the same text as the 2007 bill.\textsuperscript{53} The House Subcommittee
on Courts, the Internet, and Intellectual Property held hearings in July
2006, but it held no vote.\textsuperscript{54} Currently, H.R. 2033 is before the same
subcommittee, and hearings have been held.\textsuperscript{55}

During the hearings for H.R. 5055 and H.R. 2033, designers, industry
experts, and attorneys testified regarding the perceived benefits and
dangers of protecting fashion design under copyright law.\textsuperscript{56} One of the
primary arguments made by the sponsor of H.R. 2033, Rep. Delahunt, was
that fashion design protection benefits the economy and protects the
competitiveness of American industries, specifically from the threat posed
by the fashion piracy industry emerging in China.\textsuperscript{57} According to Rep.
Delahunt, such protections will encourage the fashion industry to become
more innovative and attract more individuals, rather than "watch[ing] yet
another industry migrate out of the U.S."\textsuperscript{58} Sen. Hatch introduced the bill
with a similar economic rationale for the Design Piracy Prohibition Act,
stating that, while the U.S. fashion industry "enjoys a trade surplus and has
clear leaders in the world market," it is "not taken as seriously" as other
industries regulated by intellectual property.\textsuperscript{59} Sen. Hatch argued that the
bill is necessary to protect the investments that designers make in the forms
of time, resources, and innovation,\textsuperscript{60} an argument echoed in testimony
given before a Congressional Subcommittee by Narciso Rodriguez, a
prominent American fashion designer and member of the CFDA.\textsuperscript{61}
According to Rodriguez, a single collection takes six to twelve months to
create and costs nearly $6 million to produce and piracy creates a major

\textsuperscript{52} Id.
\textsuperscript{56} See, e.g., Design Piracy Prohibition Act: Hearing on H.R. 5055 Before the Subcomm. on
Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary, 109th Cong. 1-4
(2006) (statement of Christopher Sprigman, Associate Professor, University of Virginia School of Law)
[hereinafter Sprigman]; Design Piracy Prohibition Act: Hearing on H.R. 2033 Before the Subcomm. on
Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary, 110th Cong. 1-3
\textsuperscript{57} Delahunt, supra note 56, at 1-3. See also 153 CONG. REC. S10,804-5 (daily ed. Aug. 2, 2007)
\textsuperscript{58} Delahunt, supra note 56, at 1-3.
\textsuperscript{60} Id.
\textsuperscript{61} Design Piracy Prohibition Act: Hearing on H.R. 2033 Before the Subcomm. on Courts, the
Internet, and Intellectual Property of the H. Comm. on the Judiciary, 110th Cong. (2008) (statement of
Narcisco Rodriguez, Designer).
roadblock in earning a return on that investment. Rodríguez, for example, testified that a gown he designed for Carolyn Bessette’s wedding in 1996 put him “on the fashion map.” However, while the design sold approximately 7 million to 8 million copies, only 40 of those were actually of Rodríguez’s design and the rest were imitations. For new designers, knockoffs and pirated imitations can cause dramatic harm to a new or small business, especially with such large investments necessary on the front end of the design process.

In testimony for H.R. 5055 during the 2006 hearings, Susan Scadifi, a law professor, argued that the popular conception of fashion design has changed significantly from the time during which clothing was deemed a useful article. She argued that this is a “reductionist view” that does not account for the creative expression involved. Those who support H.R. 2033 argue that, since fashion is more democratic than in the past, and therefore imitation items are not necessary in order to protect those who cannot afford original designer items. Scadifi cites collections available at H&M, Target, and Wal-Mart created by upscale designers as evidence that creative designs are available at a variety of price points. Therefore, the prior justification that knockoffs and imitation items protect individuals in lower income brackets has become obsolete.

Traditionally, however, fashion has functioned in a cyclical manner, discussed in a previous section, and some argue that the success witnessed by the fashion industry in the U.S. is due to a lack of intellectual property protection. Designers and clothing producers draw inspiration from many different sources, including other designers, and those who oppose the Act believe that copyright protection would only serve to increase industry costs because of litigation. Some believe that there is no true originality in the fashion industry, and therefore copyright is antithetical to the process. If the Act were to pass, fashion design would no longer be part of the public domain, interfering with the process of

62. Id.
63. Id.
64. Id.
66. Id.
67. Id. at 4.
68. Id.
69. Id.
70. See supra Part III.
71. Wolfe, supra note 34, at 1. Wolfe is the creative director for a company that tracks and forecasts trends in the fashion industry.
72. Id.
73. Id. at 2.
innovation necessary to develop trends and concepts in a manner that has always been an inherent part of the style cycle. Further, the fashion industry in the U.S. is successful without protections, so there is no need to veer from the status quo.  

The American fashion industry developed from the model established in Europe, so an analysis of European intellectual property law may provide insight into the potential effects of the Act, should it pass. In 2003, the European Union created uniform regulations for intellectual property rights for fashion design, renewable for up to twenty-five years when they are registered with the Office for Harmonization in the Internal Market in Spain, and unregistered designs enjoy protection within EU territories if the plaintiff can provide competent proof of copying. EU law defines a design as "the appearance of the whole or a part of a product resulting from the features of, in particular, the lines, contours, colors, shape, texture, and/or materials of the product itself and/or its ornamentation." The "overall impression" must be substantially different from the earlier or original creation.

Despite such strong protections, the EU has not witnessed any dramatic increase in litigation pertaining to fashion design infringement. Between January 2004 and November 2005, only 1,631 designs were registered under EU law, and many of those were for pictorial works on items of clothing that would be subject to trademark protection, not copyright. Further, only ten out of a total of 308 appeal cases related to design infringement related to registered fashion designs. National laws within EU member countries also provide protection for fashion designs, but designers do not widely utilize them, either. In fact, the number and types of designs registered mimicked the EU-wide database of registered designs. These figures indicate that, though protection is available for fashion designs, many designers opt not to take advantage of registration.

74. Sprigman, supra note 56, at 2.
75. DELUXE, supra note 15, at 18-37.
78. 4 EUROPEAN UNION LAW GUIDE, INTELLECTUAL PROPERTY LAW, BOOKLET IX.B.7, Tit. II, § 1, art. 3(a), at 6 (Phillip Raworth ed. 2003).
80. Delahunt, supra note 56, at 2.
82. Id.
83. Id. at 1742.
84. Id.
If these results were indicative of what one might expect if the Design Piracy Prohibition Act were to pass, it would substantially weaken two strong arguments put forth by the opposition. First, if the majority of designs remained unregistered, then no “monopolies” over designs would emerge. Second, the courts would not suddenly become overwhelmed with infringement suits simply by expanding the scope of protected items. In fact, some designers have brought copyright infringement suits against companies that imitate their designs, as will be discussed later in this article, so such litigation has already become an issue for the courts despite the fact that the Act has not passed. However, the paucity of registered designs may indicate that designers lack interest in registering their designs, as one expert hypothesized in his testimony against H.R. 5055. If the EU fashion industry is sufficiently similar to the industry in the U.S., one may glean that only a fraction of designs created by American designers would be registered, causing minimal impact on the business.

V. THE CURRENT COPYRIGHT INFRINGEMENT LITIGATION AGAINST FOREVER 21

In recent months, Forever 21, the discount clothing retailer, has become a target in several lawsuits brought by fashion designers alleging copyright infringement of clothing designs. Founded in 1984 by Don and Jin Sook Chang, Forever 21 maintains a chain of outlets throughout the U.S. and Canada, stocking both men’s and women’s private label clothing and accessories. The company’s primary attractions, aside from trendy clothing items, are its low prices and high turnover rates. A typical Forever 21 location will turnover approximately 20 percent of its stock every week with new items arriving daily, keeping space available for emerging trends.

However, “the knockoffs are easy to spot,” according to one journalist. These designer imitations have made the company the target

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85. See, e.g., Wolfe, supra note 34, at 2-4.
86. Id. at 4.
87. See, e.g., Knockoffs Fly, supra note 37, at A1. The article names Anna Sui as “one of more than 20 designers who have filed lawsuits against Forever 21.” Id.
88. Sprigman, supra note 56, at 3.
89. See, e.g., Knockoffs Fly, supra note 37, at A1.
90. FOREVER 21, INC., HOOVER'S COMPANY RECORDS—BASIC RECORD (Mar. 18, 2008).
92. Id.
93. Id.
of lawsuits in the last couple of years. With the Design Piracy Prohibition Act in committee, the rate at which these lawsuits are filed has increased.

A. DIANE VON FURSTENBERG STUDIO, LP v. FOREVER 21, INC.

Diane von Furstenberg, president of CFDA, which is one of the Act’s most vocal supporters, has received the most media attention for her lawsuits against Forever 21, among others. Filed on March 29, 2007, the complaint in Diane von Furstenberg (DVF) Studio v. Forever 21 alleges copyright infringement, unfair competition and false designation of origin, and unlawful and deceptive acts and practices under both New York state and federal statutes. DVF seeks an injunction against sale of the imitation item, claiming that there is otherwise no adequate remedy at law. The designs that prompted the litigation are known as “Cerisier” and “Aubrey.” When compared to the Forever 21 designs “Sabrina” and “Pinecone,” respectively, the designs are nearly indistinguishable to a viewer. The Cerisier design was part of von Furstenberg’s Holiday Collection released in October 2006, and uses material with a design copyrighted by the DVF. The Cerisier design retailed for $325, while the similar Sabrina dress sold for $32 at Forever 21. Von Furstenberg first showed the Aubrey design in a fashion show in September 2005, but did not sell the dress until winter 2006. The Aubrey design also utilized a fabric design copyrighted by DVF.

Von Furstenberg is in an uncommon situation since her studio designed the patterns on the dresses and that they are distinctive enough to register copyrights for them as original designs. This is rarely the case when an imitation of a designer’s work enters the market, but it gives von Furstenberg an advantage to have designs apparently based on original patterns. These distinctive patterns are the basis of DVF’s first claim of

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96. Id. at 8.
97. Id. at 5-6. See Figures A and B, infra, for images of the designs.
98. See Figures A and B, infra, for images of the two original designs and the Forever 21 imitations.
99. DVF Complaint, supra note 95, at 5.
101. DVF Complaint, supra note 95, at 5-6.
102. Id.
103. See, e.g., Knockoffs, This Is War, supra note 4, at G1.
Further, DVF argues that given the similarities between the DVF and Forever 21 designs, the Forever 21 dresses create a likelihood of confusion by customers regarding the actual origin of the garments.\textsuperscript{105} Forever 21 contends that the DVF dresses are not inherently distinctive nor do they have any acquired distinctiveness.\textsuperscript{106} The term "acquired distinctiveness," however, typically refers to trademark cases, not to copyright, and therefore is not likely to be relevant to this discussion.\textsuperscript{107}

Given that DVF registered its designs for copyright protection, the Design Piracy Prohibition Act would not necessarily have an impact on the outcome of this case. However, the provision protecting the "appearance as a whole"\textsuperscript{108} of a garment would have allowed DVF to register the overall design of these dresses. The Cerisier and Sabrina silhouettes are apparently identical to the viewer, but Forever 21's Pinecone design has subtle differences from the Aubrey design that may distinguish it. The Forever 21 design lacks a slit in the front of the garment and the coloring of the pattern is more easily distinguishable from von Furstenberg's design in coloring and pattern. Such a choice or variation by the designer is part of the garment's appearance, and, depending upon the degree of similarity necessary to establish that a garment is a copy under the Act, may be sufficient to set the Pinecone design as a separate concept under copyright law, as the Act would modify it. The courts would have to determine whether shifting tones or slightly modifying aspects of the garment's silhouette have an effect on the overall appearance of an item.

Under the existing copyright statutes, "[i]t shall not be infringement ... to make, have made, import, sell, or distribute, any article embodying a design which was created without knowledge that a design was protected ... and was copied from such protected design."\textsuperscript{109} Forever 21's answer to DVF's complaint states that the "[d]efendants had no prior knowledge of the DVF Copyrights [sic] and the DVF Products [sic]."\textsuperscript{110} This statutory language means that if Forever 21 legitimately created the patterns without knowledge that von Furstenberg's pattern had copyright protection, then no infringement exists. The finder of fact would have to determine whether Forever 21 had prior knowledge of DVF's protected design when it produced the Sabrina and Pinecone dresses.

\textsuperscript{104} DVF Complaint, supra note 95, at 7.
\textsuperscript{105} Id.
\textsuperscript{108} H.R. 2033, 110th Cong. (2006)
\textsuperscript{110} Answer of Defendants, supra note 106, at 10.
The Design Piracy Prohibition Act, however, proposes language to modify this section of the Copyright Codes.\textsuperscript{111} Instead of requiring that the defendant have knowledge that the design was protected, the finder of fact must determine that the he or she had "reasonable grounds to know that protection for the design is claimed,"\textsuperscript{112} lowering the level of proof necessary. Instead of requiring actual knowledge, the defendant need only have had an idea that the design was registered or copyrighted. The degree of similarity between von Furstenberg’s and Forever 21’s designs is too close to assume that the two arose independently of each other out of pure coincidence. Given that the silhouettes and patterns are similar on both designs, most viewers would likely assume that one design inspired the other. As stated earlier, DVF made its garments available for sale months after the public first viewed them on the runway, and, according to individuals in the industry, manufacturers use images from the runway shows as a basis for the imitation item.\textsuperscript{113} Lowering the standard of knowledge necessary to establish infringement in section 1309(c) of the Copyright Code directly addresses the issue of where an imitator sees the item copied. If an item is viewed in a runway show and then copied or mimicked, a plaintiff may more easily establish "reasonable grounds to know that protection for the design was claimed,"\textsuperscript{114} than that the defendant had actual knowledge.

Given the advantage that von Furstenberg designed original patterns that a court would likely consider separable from the garment, or the useful article, DVF is in an advantageous position. The Design Piracy Prohibition Act would only serve to strengthen von Furstenberg’s case against Forever 21, assuming that the court would find the garments to be as similar to one another as they appear in images. The Act would benefit designers in similar situations similar to the one von Furstenberg is in here.

B. ANNA SUI CORP. V. FOREVER 21, INC.

Anna Sui created her first collection in 1980 and staged her first runway show in 1991.\textsuperscript{115} Like von Furstenberg, Sui has received a great deal of attention and criticism for her outspoken stance on imitation garments. Sui filed suit against Forever 21 on April 23, 2007, for, among other claims, copyright infringement of patterns she used on one of the pieces in her Spring 2007 ready-to-wear collection.\textsuperscript{116} In the complaint, Sui

\begin{itemize}
    \item \textsuperscript{111} H.R. 2033.
    \item \textsuperscript{112} Id.
    \item \textsuperscript{113} Knockoffs Fly, supra note 37, at A1.
    \item \textsuperscript{114} H.R. 2033.
    \item \textsuperscript{116} Complaint of Plaintiff at 5-11, Anna Sui Corp. v. Forever 21, No. 07-CV-03235 (S.D.N.Y.)
\end{itemize}
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explains that many of the pieces in the runway show had not yet been manufactured, claiming that Forever 21 blatantly and intentionally copied her designs to release before Sui’s designs became available to the public.117

Like in the von Furstenberg suit, Sui’s complaint relies on claims that Forever 21 infringed upon Sui’s copyright interest in the fabric patterns on the garments at issue.118 However, this case provides a contrast to that of the von Furstenberg case since the Forever 21 garment is not an exact replica of Sui’s design. In the von Furstenberg case, Forever 21 imitated both the pattern, which DVF claimed had copyright protection, and the structure of the dress. In Sui’s case, the Maven top produced by Forever 21 only imitates the fabric pattern, not the overall look of the dress Sui showed on the runway. The question arises, then, of whether the Design Piracy Prohibition Act would have any effect in Sui’s case.

Setting aside the issue of whether Sui holds the copyright to the rose design at the bottom hem of the garment, the two items raise an issue regarding the degree of similarity necessary to claim that the Maven top has the same “appearance as a whole” as Sui’s dress.119 Both designs have a similar, loose fit, but the similarities end at that point. In the von Furstenberg case, to the eye the designs at issue may lead to a likelihood of confusion, but that is not necessarily the case with regard to Sui’s design. Instead, if the Design Piracy Prohibition Act were to pass, the finder of fact would have to determine whether the two garments are substantially similar enough for the Forever 21 garment to qualify as mimicking the overall appearance of Sui’s design. Certainly the Maven top evokes the design created for Sui’s collection, but despite the additional protections that the Act would bring to designers, Sui probably still would have to rely on copyright protections for this particular instance of imitation. If the Act were to protect this design, it would likely open the door to a much larger number of lawsuits. Aside from the fabric used, this appears to be a case in which Forever 21 drew inspiration from the runway item, and did not pirate or knockoff the overall design.

VI. CONCLUSION

The CFDA and other supporters of the current move to legislate against fashion design piracy acknowledge that it is necessary to allow for an exchange of ideas and inspiration within the fashion industry. They also

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117. Id. at 5.
118. Id. at 5-11.
119. H.R. 2033.
acknowledge that the specter of frivolous lawsuits looms should the Act pass.\textsuperscript{120} However, the Act would not necessarily have the dramatic effect that some designers might hope it would. As evidenced by the comparison with the European system of protection, the onus is on the designer to register his or her creation, and registration statistics in the EU are startlingly low. Additionally, despite the existing copyright protections on the patterns of the garments discussed previously, other manufacturers proceeded to imitate and pirate the designs regardless. Such behavior may imply that companies like Forever 21 would act in the same manner regardless of any changes in legislation.

On the other hand, many have argued that the lack of existing protections sends a message that the courts do not take the fashion industry as seriously as it does other sectors of the U.S. economy.\textsuperscript{121} Passage of the Design Piracy Prohibition Act may bring additional legitimacy to the debate over whether fashion design deserves the same protection as other expressions of creativity. Further, if fashion became legitimized as creative expression, it may serve as a deterrent against future infringement.

The fashion industry has always been a fiercely competitive business, subject to the whims of the consumer and an ever-changing economic landscape. Technological advances have heightened competition to unprecedented levels. The Design Piracy Prohibition Act is certainly a controversial measure, but it may serve to level the playing field for American designers.\textsuperscript{122}

\textsuperscript{120} Stop Fashion Piracy, http://www.stopfashionpiracy.com/about.php.
\textsuperscript{122} As of the date of this article's publication, the California Central District Court had scheduled another claim against Forever 21, \textit{Trovata Inc. v. Forever 21, Inc. et. al.}, to go to jury trial, which is the first design piracy case against Forever 21 not to settle out of court. This litigation may have a significant effect on how courts interpret the law pertaining to fashion design infringement despite the current lack of progress in passing the Design Piracy Prohibition Act. See David Lipcke, \textit{Trovata, Forever 21 Case Set for Trial}, \textit{WOMEN'S WEAR DAILY}, Apr. 13, 2009, \textit{available at} http://www.wwd.com/retail-news/trovata-forever-21-copying-case-set-for-trial-2101514.
Figure A: Diane von Furstenberg's "Cerisier" (on the left) next to Forever 21's "Sabrina."123

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Figure B: Diane von Furstenberg’s “Aubrey” (on the left) next to Forever 21’s “Pinecone.” 124
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Figure C: Anna Sui's dress (on the left) next to Forever 21's "Maven" top.125
