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Article 1

Beautifying the Human Experience: The Road to Knocking Out the Knockoff Industry Through Adaptions to Copyright & Design Patent Protections for Clothing

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BEAUTIFYING THE HUMAN EXPERIENCE: THE ROAD TO KNOCKING OUT THE KNOCKOFF INDUSTRY THROUGH ADAPTIONS TO COPYRIGHT & DESIGN PATENT PROTECTIONS FOR CLOTHING

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CONTENTS

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I. INTRODUCTION

> When we put on clothes, we're putting on so much more: ideologies, identities, economies, lineages . . . Our garments illuminate the tension between the corporeal and the inorganic; they can draw us closer to one another or separate us from the values we reject. Fashion is, of course, about place … But fashion is also fluid, allowing for play and experimentation and fantasy among communities and individuals. It's an ever-changing, moveable feast that allows us to be who we are – or who we want to be.[1]

Historically, fashion designers were seen as artisans, as opposed to artists.[2] Thus, since fashion designers were viewed as "a worker who practices a trade or handicraft,"[3] rather than one "who creates art . . . using conscious skill and creative imagination,"[4] their designs did not receive intellectual property

[1] Melissa Leventon & Jean Cacicedo, *Reflections on Artwear: Melissa Leventon and Jean Cacicedo in Conversation*, S.F. Museum of Modern Art (June 10, 2019), https://openspace.sfmoma.org/2019/06/reflections-on-artwear-melissa-leventon-and-jean-cacicedo-in- conversation/.

[2] Alissandra Burack, Comment, *Is Fashion an Art Form That Should be Protected or Merely a Constantly Changing Media Encouraging Replication of Popular Trends?*, 17 Vill. Sports & Ent. L.J. 605, 606 (2010) (citing J. H. Reichman, *Design Protection in Domestic and Foreign Copyright Law: From the Berne Revision of 1948 to the Copyright Act of 1976*, 1983 Duke L.J. 1143, 1149-52 (1983)).

[3] *Artisan*, Merriam-Webster, https://www.merriam-webster.com/dictionary/artisan (last visited July 16, 2023).

[4] *Artist*, Merriam-Webster, https://www.merriam-webster.com/dictionary/artist (last visited July 16, 2023).

protection.[5] Although fashion has been accepted as an art form, clothing designers still face difficulties receiving intellectual property protection over their clothing designs due to their historical classification as an artisan of a useful product.[6]

Intellectual property protections are in place, as explained below, for the ultimate benefit of the consumer and the general public. Thus, as consumer needs have evolved, so have the laws regarding the available intellectual property protections. However, intellectual property protections have not evolved to meet the consumers' changing needs with regards to the fashion industry. Despite clothing being a form of art, clothing is not adequately protected, leading to a "knockoff" industry[7] whose occurrence would be appalling to other artistic fields.[8] The prevalence of a knockoff industry thrives in the absence of intellectual property protections, which in turn can be viewed as a detriment to the consumers, as knockoff clothing is typically of lesser quality[9] and negatively impacts an individual's emotions.

This article explores the inadequacies of copyright, design patent, and trade dress protections over clothing, despite clothing being a protectable form of intellectual property, and possible solutions to benefit the public. Specifically, Part II will discuss who was intended to ultimately benefit from copyright and patent protections, as well as how such protections have evolved as society's needs have evolved. Part III will explore the benefits aesthetic objects provide individuals, as well as society as a whole. Part IV will discuss how clothing is in fact a protectable form of intellectual property, despite the law's focus on the utility of clothing. Then, Parts V, VI, and VII, will discuss the difficulties with receiving copyright, design patent, and trade

[5] Burack, *supra* note 2, at 606.
[6] *Id.*
[7] *Id.* at 605 (citing Brian Hilton et al., *The Ethics of Counterfeiting in the Fashion Industry: Quality, Credence and Profit Issues*, 55 J. Bus. Ethics 345, 345 (2004). The knockoff industry occurs where a designers clothing is copied and sold, usually being of less quality and sold at cheaper prices.)
[8] *Id.* (citation omitted).
[9] *See* Brandon Scruggs, Comment, *Should Fashion Design be Copyrightable?*, 6 NW. J. Tech. & Intell. Prop. 122, 134 (2007)).

dress protections for clothing. The article will conclude, in Parts VIII and IX, with a discussion of the possible adaptations to the current copyright and design patent protections over clothing in order to beautify one's human experience, and the need and ability of adequately protecting clothing in order to reach such goal.

II. WHO BENEFITS FROM INTELLECTUAL PROPERTY PROTECTIONS?

A. The Origins of Copyrights & Patents

The availability of copyright and patent protections emerged from the United States Constitution.[10] The Framers of the Constitution granted Congress the power to extend copyrights and patents to authors' writings and inventors' discoveries.[11] Although the constitutional provision explicitly states that Congress can secure authors and inventors "the exclusive Right to their respective Writings and Discoveries," the purpose of extending the exclusive rights were in order to "promote the Progress of Science and useful Arts."[12] Thus, just from the words of the constitutional clause, the ultimate purpose of copyright and patent protections is to promote science and art for the public benefit, while the benefit provided to the authors and inventors is secondary.

The Supreme Court has further emphasized that the reasoning behind these exclusive rights is for the public benefit.[13] As early as 1858, the Supreme Court stated that "[i]t is undeniably true, that the limited and temporary monopoly granted to inventors was never designed for their exclusive profit or advantage."[14] The Court then went on to state that another purpose, and without a doubt the primary purpose, was for the benefit to the public and community.[15] The public benefit being the primary purpose of

[10] U.S. Const. art I, § 8, cl. 8.
[11] *Id.*
[12] *Id.*
[13] *See* Kendall v. Winsor, 62 U.S. 322, 327-328 (1858); *See also* Feist Publ'n. v. Rural Tel. Serv. Co., 499
U.S. 340, 349 (1991).
[14] *See Kendal*, 62 U.S. at 327-328.
[15] *Id.* at 328.

copyright and patent protections is still the belief today. The Supreme Court emphasized such long-standing belief and stated that the primary objective ". . . is not to reward the labor of authors, but [t]o promote the Progress of Science and useful Arts."[16] Although these authors and inventors will gain the exclusive right to their writings and inventions, this right was given as an incentive to provide the public with their writings and inventions.[17]

B. How Copyrights have Evolved with the Public's Evolution

The type of science and useful arts that benefited the public at the time the Constitution was ratified are vastly different from the type of science and useful arts that the public would benefit from today.[18] As such, the Copyright Act has been amended throughout the years since the powers were originally granted by the Constitution.[19] However, as explained above, the justifications for the protections remain the same. Congress passed the first copyright legislation in 1790, which was to encourage learning and covered maps, charts, and books.[20] The Copyright Act went through various amendments throughout the years, but a major revision to the Copyright Act was made in 1909,[21] which included

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[16] *See* Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991) (quoting U.S. Const. art. I, § 8, cl. 8 and citing Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156, 95 S.Ct. 2040, 2044, 45 L.Ed.2d 84 (1975)).

[17] *See* U.S. v. Paramount Pictures, 334 U.S. 131, 158 (1948) (". . . reward to the author or artist serves to induce release to the public of the products of his creative genius").

[18] *See* Milestones in U.S. patenting, USPTO (May 10, 2021), https://www.uspto.gov/patents/milestones#:~:text=The%20first%20U.S.%20patent&text=Issued%20to%20Samuel%20Hopkins%20for,Washington%20signed%20the%20first%20patent (showing the progression of patents through the "millions milestones").

[19] Meera Puri, Comment, *The Implications of Pop-Star Practices on The Future of Intellectual Property*, 121 Penn St. L. Rev. 505, 509 (2016).

[20] *Id.* (citing Jonathan L. Kennedy, Note, *Double Standard and Facilitated Forum Shopping: A Historical Approach to Resolving the Circuit Split on Copyright Registration Timing*, 60 Drake L. Rev. 305, 317 (2011) and Copyright Act of 1790, ch. 15, 1 Stat. 124).

[21] *See Copyright Timeline: A History of Copyright in the United States,* Ass'n of Res. Libr., http://www.arl.org/focus-areas/copyright-ip/2486-copyright-

"all the writings of an author."[22] Such writings included, among others, musical compositions, works of art, models or designs for works of art, drawings, photographs, and prints and pictorial illustrations.[23]

The Copyright Act was further amended in 1976 and one reason for such amendment was due to the technological developments and how such developments may impact what can be copyrighted, how the works could be copied, and what constitutes infringement.[24] The Copyright Act of 1976 further expanded what constituted works of authorship, which included, in conjunction with the 1909 Act and among others, choreographic works, pictorial, graphic, and sculpture works, motion pictures and other audiovisual works, and sound recordings.[25] Most notably, for purposes of this article, the Copyright Act of 1976, included protections over pictorial, graphic, and sculpture works, which includes works of *applied art*.[26]

C. How Patents have Evolved with the Public's Evolution

Although the patent laws have not undergone as many changes as the copyright laws have,[27] likely due to the original broad scope of patentable subject matter,[28] the patent laws have nonetheless

timeline#.Vhcebem_KRk (last visited July 15, 2023). [hereinafter *Copyright Timeline*].

[22] Copyright Act of 1909, ch. 1, § 4, 25 Stat. 1075 (current version at 17 U.S.C. § 102).

[23] Copyright Act of 1909, ch. 1, § 5, 25 Stat. 1075 (current version at 17 U.S.C. § 102).

[24] Copyright Timeline, *supra* note 21 (The other reason it was amended was in anticipation of adherence with the Berne Convention).

[25] *Compare* Copyright Act of 1909, ch. 1, § 5, 25 Stat. 1075 (current version at 17 U.S.C. § 102), *with* 17
U.S.C. § 102.

[26] 17 U.S.C. § 101 (emphasis added).

[27] *Compare* Patent Act of 1793, ch. 11, § 1, 1 Stat. 318-318 (current version at 35 U.S.C. § 101) (, with 35
U.S.C. § 101 (a minor change from ". . . any new and useful art . . ." to ". . . any new and useful process...").

[28] The patentable subject matter has always been broad, and thus, has not required as many amendments as the Copyright Act has since the Copyright Act originally was very narrow. *Compare Patent Act of 1793*, ch. 11, § 1, 1 Stat. 318-323 (current version at 35 U.S.C. § 101) (stating that any person who invents "any new and useful art, machine, manufacture or composition of

expanded regarding patentable subject matter over the years. For purposes of this article, the most notable change in the patent laws regards the expansion of patent eligibility to include design patents.[29] The first design patent statute was enacted in 1842, paving a new form of intellectual property for "any new and original design for a manufacture" or "shape or configuration of any article of manufacture."[30] As the Supreme Court indicated, design patents were made available in order to encourage decorative arts.[31]

The importance of protecting decorative arts was emphasized by the Patent Acts' amendment in 1902, which specified an ornamental requirement and stated that design patents are available for "any new, original, and ornamental design for an article of manufacture."[32] The language in the 1902 amendment remains today,[33] indicating that the decorative arts are still an important aspect to strive towards. In fact, as Matthew Nimetz stated in 1965:

> In a civilized state men have sufficient leisure and affluence to concern themselves with more than the bare necessities of survival. They can afford to make ordinary things - tools, utensils, shelters - more pleasing aesthetically as well as more efficient technically. And societies are measured, as much as we can ever measure societies, for their artistic accomplishments as well as for their technical achievements. It is therefore no exaggeration to

matter, or any new and useful improvement on any art, machine, manufacture or composition of matter" could obtain a patent), *with* Copyright Act of 1790, ch. 5, 1 Stat. 124 (current version at 17 U.S.C. § 102) (copyright protection would extend over maps, charts, and books).

[29] *See* William J. Seymour and Andrew W. Torrance, *(R)evolution in Design Patentable Subject Matter: The Shifting Meaning of "Article of Manufacture"*, 17 Stan. Tech. L. Rev. 183, 184 (2013) (citing Patent Act of 1842, ch. 263, 5 Stat. 543).

[30] *Id.* at 190 (citing Patent Act of 1842, ch. 263, § 3, 5 Stat. 543, 543).

[31] *See* Gorham Mfg. Co. v. White, 81 U.S. 511, 524 (1871).

[32] The amendment in 1902 included the same general language as the original Patent Act in 1842, but specifically included the requirement of ornamentality. *See* Gene Quinn, *A Brief History of Design Patents,* IPWatchdog (Jan. 11, 2014, 11:57 AM), https://ipwatchdog.com/2014/01/11/design-patent-history/id=47283/.

[33] *Id.*; *See also* 35 U.S.C. § 171.

> assert that the promotion of the arts, particularly such applied arts as architecture and design, is a traditional and important social endeavor.[34]

Moreover, investments in product design furthers a product's aesthetic appearance, which in turn increases a consumer's aesthetic pleasure[35] by beautifying one's own human experience. When one's own human experience is beautified by aesthetic products, public welfare is enhanced.[36]

The benefits of aesthetic products that stem from design patents' emphasis on decorative arts can be applied with the same strength to copyright's protection for applied art, as both can be looked at as striving to beautify the human experience. One can readily see the changes in copyright and patent protections in response to humans' evolving needs; a society once concerned with becoming literate and advancing inventions that, although revolutionary at the time, are now used every day without blinking an eye as to its advancement to society,[37] to a society that is enhanced by the aesthetic appearance of everyday objects.

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[34] *See* Matthew Nimentz, *Design Protection*, 15 COPYRIGHT L. Symp. 79, 79 (1965).

[35] *See* Orit Fischman Afori, Article, *Reconceptualizing Property in Designs*, 25 Cardozo Arts & Ent. L.J. 1105, 1111 (2008) (citing Uma Suthersanen, *Design in Europe 6*, 1-3 (Sweet & Maxwell 2000); *See also Gorham Mfg. Co.*, 81 U.S. at 524-26.

[36] Afori, *supra* note 35, at 524-26 (citing Paul Goldstein, Copyright, Principles, Law and Practice § 2.5.3(c) (Little, Brown and Co. 1989)).

[37] Inventions like Thomas Edison's light bulb were revolutionary at the time but are now so simplistic compared to the extensive technical patents produced today. *Compare Thomas Edison's Patent Application for the Light Bulb,* The U.S. National Archives and Records Administration (Sept. 8, 2016) https://www.archives.gov/historical-docs/edisons-light-bulb-patent ("On January 27, 1880, Thomas Edison received the *historic* patent embodying the principles of his incandescent lamp that paved the way for the universal domestic use of electric light") (emphasis added), *with Revolutionary new bandage uses Nano cells to deliver antimicrobials and promote healing,* N.Y. Medical College (July 14, 2020) https://www.nymc.edu/news-and-events/press-room/new-york-medical-college-announces-breakthrough-patent.php#:~:text=The%20%E2%80%9CStatVac%E2%80%9D%20%E2%84%A2%20is%20a,the%20wound%20cleaner%20and%20drier (explaining a bandage system that releases pathogen killing ingredients and leaves the wound cleaner and drier).

In conclusion, as time passes, the publics' needs change. Thus, due to the public being the one to ultimately benefit from copyrights and patents, such intellectual property protections have evolved to continue to benefit the public. As explored in the remainder of this article, as it pertains to clothing, these intellectual property protections have not evolved, despite the clear ability for such laws to be amended to meet the publics' needs.

III. ADVANCING SOCIETY THROUGH AN AESTHETIC EXPERIENCE

Social change should always be an overarching goal in society since, in practice, social change "involves real people working to improve the lives of others."[38] Since change is always happening,[39] what society will benefit from today is vastly different from not only what society benefited from at the time the Constitution was ratified, but also at the time the Copyright Act of 1976 was enacted and in 1842 when design patents were introduced.

Studies reveal that individuals live longer and are happier in the most modern societies.[40] The increase in the years lived happily and healthily can stem from achievements of modern society, such as increased freedom, increased self-understanding, and overcoming common evils of the past.[41] According to Ruut Veenhoven, a faculty member of Social Sciences at Erasmus University Rotterdam in the Netherlands who studied the changes in human society, the "notion of improvement is typically part of an evolutionary view, in which society is seen as a human tool that is gradually perfected."[42] Thus, in order to continue to gradually perfect society, society needs to continue to modernize.

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[38] Walden University, *5 Things That Everyone Should Know About Social Change*, (last visited Aug. 6, 2023), https://www.waldenu.edu/why-walden/social-change/resource/five-things-that-everyone-should-know-about-social-change.

[39] Theo Spanos Dunfey, *What is Social Change and Why Should We Care?*, Southern New Hampshire University (May 29, 2019), https://www.snhu.edu/about-us/newsroom/social-sciences/what-is-social-change.

[40] *See* Ruut Veenhoven, *Life is Getting Better: Societal Evolution and Fit with Human Nature*, Soc Indic Res. 105, 114- 115 (2010).

[41] *Id.* at 120.

[42] *Id.* at 106.

As explained above, copyrights and patents originated in order to incentivize authors and inventors to provide the public with their writings and inventions, which further benefited the public by increasing the publics' knowledge. As explained above, the copyright and patent laws have evolved, as society has evolved, in order to further incentivize authors and inventors to provide the public with the writings and inventions necessary to further expand the publics' knowledge and needs. As time goes on and basic needs are met, individuals are growing as people and society requires different needs, a progression depicted in Maslow's Hierarchy of Needs.[43]

Notably, changes to Maslow's model developed during the 1960s and 1970s to include cognitive needs in stage five, followed by aesthetic needs in stage six.[44] Cognitive needs include knowledge and understanding, curiosity, exploration, and the need for meaning and predictability.[45] It is easy to see how copyrights and patents have furthered individuals' abilities to meet their cognitive needs stage through various teachings found in copyrights and patents. After the cognitive needs stage comes the aesthetic needs stage, which is described as an appreciation and search for beauty, balance, and form.[46] Not only do aesthetics help an individual achieve self-actualization,[47] aesthetics can benefit the public overall.[48]

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[43] The patent and copyright laws have incentivized authors and inventors to provide the public with information needed to advance each level of Maslow's Hierarchy of Needs. For example, inventions like the light bulb, housing structures, and heating systems allowed individuals to satisfy their biological and psychological and safety needs. *See* Saul McLeod, *Maslow's Hierarchy of Needs*, SimplyPsychology, (May 21, 2018), https://canadacollege.edu/dreamers/docs/Maslows-Hierarchy-of-Needs.pdf.

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] According to the hierarchy of needs, in order for an individual to achieve self-actualization, their cognitive and aesthetic needs need to first be met. McLeod, *supra* note 43.

[48] *See* Patrick et. al, *Introduction to Special Issue: Uncovering the Potential of Aesthetics and Design to Transform Everyday Life*, JACR, vol. 4, no. 4, 306, 307 (2019) (". . . [a]esthetics can help build esteem and forge the bonds needed to bring together a community (Bublitz et al. 2019), "nudge" consumer decision

Through design patents and the explicit protection of applied art, the copyright and patent laws have opened the door to incentivizing authors and inventors to provide the public with the resources to satisfy their aesthetic needs. However, as explained below, more is required to allow the public to fully satisfy their aesthetic needs and beautify their human experience. Thus, since society is seen as a human tool that is gradually perfected and aesthetics enhance one's life, society can move more towards perfection by protecting the aesthetic components of life through incentives for creators.

IV. CLOTHING HAS EMERGED AS A PROTECTABLE FORM OF INTELLECTUAL PROPERTY

A. The Ability to Define what Constitutes Art in the Eyes of the Law

The law has strayed away from determining what is or is not considered to be art due to the subjectiveness that surrounds *perceiving art*.[49] Regardless of whether art is "good" or "bad," it is nonetheless art, just as happiness and anger, whether good or bad, are nonetheless emotions.

Art can be defined in many different ways, however, the most compelling definition of what constitutes art seems to be that art encompasses objects that the public appreciates for its beauty and objects that incite an emotional reaction in the viewer.[50] As stated

making toward more personally optimal choices (Crolic et al. 2019; Cutright et al. 2019; Schnurr 2019), or aid pro-social causes, society, and the planet at large (Carvalho, Hildebrand, and Sen 2019; Huang et al. 2019; Koo et al. 2019; Mourey and Elder 2019)").

[49] *See e.g.*, Smith v. Goguen, 415 U.S. 566, 573 (1974) (quoting Note, *Desecration of National Symbols as Protected Political Expression*, 66 Mich. L. Rev. 1040, 1056 (1968)) ("[W]hat is contemptuous to one . . . may be a work of art to another"); *See also* Mazer v. Stein, 347 U.S. 201, 214 (1954) ("Individual perception of the beautiful is too varied a power to permit a narrow or rigid concept of art"); *See also* Cohen v. California, 403 U.S. 15, 25 (1971) ("One man's vulgarity is another's lyric").

[50] *See Art,* The Britannica Dictionary, https://www.britannica.com/dictionary/art (last visited Aug. 6, 2023) (defining art as "something . . . that is beautiful or expresses important ideas or feelings"); *See also Art,* Vocabulary.com,

by Clive Bell:

> The starting point for all systems of aesthetics must be the personal experience of a peculiar emotion. The objects that provoke this emotion we call works of art…every work produces a different emotion. But all these emotions are recognizably the same in kinds… This emotion is called the aesthetic emotion.[51]

Thus, if a work is appreciated by others for its beauty or it incited an emotional reaction in the viewer, it should be considered art, whether one person views it as good art and another individual views it as bad art.

Such broad definition of what constitutes art may potentially have endless limits. As it pertains to the law and intellectual property, the presence of endless limits as to what could constitute art may have negative impacts. However, since copyrights and patents' ultimate beneficiary is the public, this article explores how the determination of what constitutes art can be determined by the aesthetic and emotional impact it has on individuals. If individuals are not impacted by an object's aesthetic appearance and emotional impact, and thus, do not perceive it as

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https://www.vocabulary.com/dictionary/art (last visited Aug. 6, 2023), (defining art as "the expression of ideas an emotions through a physical medium . . . "); *See also Art,* Cambridge Dictionary, https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwjc1Nah7ciAAxUbMVkFHcf6AZg4ChAWegQIAxAB&url=https%3A%2F%2Fdictionary.cambridge.org%2Fus%2Fdictionary%2Fenglish%2Fart&usg=AOvVaw0vuE29NUnascTrmEz7X7nB&opi=8997844 9, (last visited Aug. 6, 2023) (defining art as "the making of objects, images, music, etc. that are beautiful or express feelings"); *See also Art,* Dictionary.com, https://www.dictionary.com/browse/art (last visited Aug. 6, 2023) (defining art as "the quality, production, expression, or realm, according to aesthetic principles, of what is beautiful, appealing, or of more than ordinary significance").

[51] Charles Harrison & Paul Wood, *Art in Theory 1900-1990: An Anthology of Changing Ideas*, Blackwell Pub.113 (1992), https://monoskop.org/images/archive/b/b8/20150905140414%21Harrison_Charles_Wood_Paul_eds_Art_in_Theory_1900-1990_An_Anthology_of_Changing_Ideas.pdf.

art, the copyright and patent protections would be meaningless since it would not further its intent of promoting science and useful arts.

Just how criminal law's intent requirement is guided by psychological research[52] and the courts defer to educational[53] and business expertise when determining such issues,[54] the law's determination of what constitutes art can too be guided by psychological research and the courts can defer to artists' expertise. However, despite such ability to do so, the courts and the law draw the line at defining what constitutes art due to its subjectiveness.

B. Fashion is Art

Although the idea of fashion being an art has been long-enduring,[55] the inability of clothing designs to enjoy the benefits of copyright and patent protections, as explained below, does not reflect the general public's belief that fashion is an art. In today's world, it is easy to see how the public appreciates clothing for its beauty. Although what constitutes beauty is arguably subjective,

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[52] *See* Tori DeAngelis, *Informing the courts with the best research*, American Psychological Association, Vol. 50, No. 11 (Dec. 1, 2019), https://www.apa.org/monitor/2019/12/cover-courts.

[53] *See* C.K v. Bd. Of Educ. Of Sylvania City Sch. Dist., 2022 WL 4116491 at 16 (6th Cir. 2022) (quoting L.H. v. Hamilton Cnty. Dep't. of Educ., 900 F.3d 799, 790 (6th Cir. 2018) (". . . federal courts are required to defer to the findings of school officials and state education officers 'on matters of substantive educational methodology' when 'the finding is based on educational expertise'").

[54] *See* Rubenstein v. Adamany, 2021 WL 5782359 at 72 (2d. Cir. 2021) (quoting Auerbach v. Bennett, 393 N.E.2d 994, 1000 (N.Y. 1979) ("New York's business judgment rule 'bars judicial inquiry into actions of corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes' . . . we defer to the board's decision not to sue . . .").

[55] In the mid-nineteenth century, the Aesthetic Dress reform began, which sought alternatives to women's dress with attempts to make fashion beautiful. The "[a]esthetic or artistic dress was sparked by influential artists and designers." *See* University of Missouri, *Arts and Crafts (Re)forms: Reform and Aesthetic Dress*, Missouri Historic Costume and Textile Collection, https://mhctc.missouri.edu/exhibitions/arts-and-crafts- design-re-forms/reform-and-aesthetic-dress/.

an individual can appreciate the beauty in a work of art, even if it is not their "style."

Fashion finds its art form in a silhouette[56] and "the human consciousness in appreciating a cut and shape of [a] silhouette is as legitimate as any other appreciation of Art."[57] Just as individuals flock to museums to view and experience historical *art* pieces, individuals also flock to The Metropolitan Museum of Art to experience The Costume Institute.[58] The Costume Institute displays tens of thousands of fashion pieces from over the years, indicating that the public views fashion as an art.[59] Moreover, hundreds of thousands of consumers tune in for The Met Gala a year,[60] which is a fundraising event for The Costume Institute and a "much-loved annual celebration of fashion."[61]

In addition to The Met Gala, fashion is also appreciated as evidenced by the countless amounts of fashion shows. Designers from all over the world show the public their art at various locations during fashion week, including New York, Paris, Milan, London, and Madrid.[62] New York Fashion Week is a five-day event that typically brings in 230,000 people to the city and

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[56] *See* Angelique Benton, *Fashion as Art/Art as Fashion: Is Fashion, Art?*, The Ohio State University (March 2012) (Stating that the silhouette is fashion's art form, and a designer chooses to alter or enhance the silhouette by different lines and colors).

[57] *See* Dr. D. Saravanan, *Fashion Trends and its Impact on Society*, Bannari Anmman Institute of Technology (Sept. 2015).

[58] *The Met Collection*, The Met, https://www.metmuseum.org/art/the-collection (last visited July 9, 2023).

[59] *Search The Collection*, The Met, https://www.metmuseum.org/art/collection/search?showOnly=withImage&department=8%7C62 (last visited July 9, 2023).

[60] Jennifer Maas, *Met Gala 2022 Is Highest-Viewed Red Carpet on 'Live From E!' Across All Platforms (EXCLUSIVE)*, Variety (May 6, 2022, 10:50 AM) https://variety.com/2022/tv/news/met-gala-red-carpet- ratings-live-from-e-viewers-1235260559/.

[61] Kerry McDermott, *Everything You Need To Know About The Met Gala 2023*, British Vogue (May 3, 2023), https://www.vogue.co.uk/article/metgala#:~:text=How%20many%20people%20attend%20the,attended%20the%202021%20Met%20Gala.

[62] Fashion Weeks Spring Summer 24, Modem Online, https://www.modemonline.com/fashion/fashion-weeks (last visited July 9, 2023).

generates about $500 million in visitor spending.[63] Thus, the breadth of fashion weeks is immense, demonstrating the public perception of fashion being an art.

Not only does the public appreciate clothing for its beauty, but they also experience an emotional reaction to clothing. As stated by Clive Bell, lines and colors are combined in a particular way to stir our aesthetic emotions.[64] Such emotional reactions can include, among others, the feeling of expressing themselves. As found by Bain & Company, 82% of consumers believe fashion and luxury brands are necessary to assist in expressing their true selves.[65]

A study was performed to investigate women's relationship to their clothing and how clothing is used as a means of self-presentation.[66] The researchers identified three different perspectives as it related to clothing and oneself.[67] The first group was labeled "the woman I want to be" and comprised of women who used clothing to formulate positive self-projections.[68] Specifically, these women used their favorite items of clothing to bridge the gap between the person they want to be and the image achieved with the clothing.[69] A second group of responses was "the woman I fear I could be," which reflected experiences where clothing failed to achieve a specific look or led to a negative self-presentation.[70]

The third and last category was "the woman I am most of the

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[63] Lisa Fickenscher, *New York Fashion Week is back in person - masked and vaxxed*, N.Y. Post (Sept. 6, 2021, 2:43 PM), https://nypost.com/2021/09/06/new-york-fashion-week-is-back-in-person-masked-and-vaxxed/.

[64] Harrison & Wood, *supra* note 51, at 113.

[65] Vogue Business for Porsche, *Meet the fashion designers specializing in the art of self-expression*, Vogue Business (November 26, 2021), https://www.voguebusiness.com/fashion/meet-the-fashion-designers-specialising-in-the-art-of-self-expression.

[66] *See* Johnson et al., *Dress, body and self: research in the social psychology of dress*, University of Minnesota SpringerOpen J. Fashion and Textiles 17 (citing a study done by Guy and Banim in 2000).

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *Id.*

time" and the women stated they had a "relationship with clothes that was ongoing and dynamic and that a major source of enjoyment for them was to use clothes to realize different aspects of themselves."[71] As explained by John Galliano, "the joy of dressing is an art"[72] and such joy can be used to beautify ones human experience.

Moreover, studies have shown that clothing affects individuals due to its symbolic meaning and the physical experience the individual has while wearing the clothing item,[73] which indicates that not only does clothing produce an emotional reaction in its viewers, but such emotional reactions also manifest into outward actions.

Women are shown to have performed better on a math test when wearing a sweater, as opposed to a bathing suit, due to their higher self-objectification and greater negative mood when thinking of wearing a bathing suit;[74] black-shirted sports players selected more aggressive games than those in white shirts and hockey players who wore black-uniforms received more penalties due to their aggressive behavior;[75] individuals who wore a white lab coat that was described as a doctor's lab coat outperformed the group who wore a white painter's coat on an experimental task.[76]

Clothing can be one of the ways in which individuals can beautify their human experience and meet their aesthetic needs. Generally speaking, aesthetics encompasses the evaluation and appreciation of beauty and design.[77] Moreover, everyday

[71] *Id.* at 17.

[72] *See* Harper's Bazaar, *The 87 Greatest Fashion Quotes of All Time* (Feb. 3, 2022), https://www.harpersbazaar.com/fashion/designers/a1576/50-famous-fashion-quotes/ (quoting John Galliano).

[73] Johnson et al., *supra* note 66, at 9 (citing Adams and Galinsky 2012).

[74] *Id.* at 5 (citing Tiggemann and Andrew (2012)) ("The researchers found main effects for clothing such that as compared to thinking about wearing a sweater, thinking about waring a bathing suit resulted in higher state self-objectification, higher state body shame, higher state body dissatisfaction, and greater negative mood"); *Id.* at 8 (citing Fredrickson et al. (1998), Hebl et al. (2004), and Martins et al. (2007)) (While no such effects occurred to the men, women performed more poorly on a math test while wearing a swimsuit than did women performing the test wearing a sweater").

[75] *Id.* at 8 (citing Frank and Gilovich 1988).

[76] *Id.* at 9 (citing Adams and Galinsky 2012).

[77] *See* Patrick et. al, *supra* note 48, at 306 (citing Patrick and Peracchio 2010).

consumer aesthetics encompasses "the appreciation of the beauty and design of objects, spaces, or events in our daily lives."[78] Clothing is undoubtedly an object in our daily lives and individuals have come to appreciate the beauty and design of clothing.

The sociological and psychological effects clothing has on the public clearly reveal that clothing is a form of art that should be protected through copyrights and patents, just as other forms of art are protected. However, as explained below, obtaining copyright and design patent protections over clothing is difficult to obtain.

V. COPYRIGHT & CLOTHING

Despite the fact that aspects of clothing are a protectable form of intellectual property, the issue of copyright protection for clothing has been a subject of ongoing debate due to its utilitarian functions. Generally speaking, copyright protection encompasses original works of authorship fixed in any tangible medium of expression. [79] Works of authorship includes, among others, pictorial, graphic, and sculptural works, which encompasses two- or three-dimensional works of fine, graphic, and applied art.[80]

A. Clothing is a Work of Authorship

Congress intended, through the use of the words "works of art," that the scope of the Copyright Act was to encompass more than the traditional fine arts.[81] Congress' intent is evidenced by the explicit inclusion of applied art in the definition of pictorial, graphic, and sculptural works.[82] Afterall, the Supreme Court, in *Mazer v. Stein*, stated that "[i]ndividual perception of the beautiful is too varied a power to permit a narrow or rigid concept of art."[83]

Applied art, as stated by the Supreme Court, is art that is employed in the decoration, design, or execution of useful objects or the designs and decorations used in art that has a primarily

[78] *Id.* at 306 (citing Patrick 2016).
[79] 17 U.S.C. § 102(a).
[80] 17 U.S.C. § 101.
[81] *See Mazer*, 347 U.S. at 213.
[82] 17 U.S.C. § 101.
[83] *See Mazer*, 347 U.S. at 214.

utilitarian function.[84] As explained above, the public views clothing as a form of art and therefore, clothing ought to be protected through copyright, just like other forms of art, due to their clear categorization of applied art as it is art employed in a useful object.

In fact, Jean Cacicedo, one of the pioneers of "wearable art," studied painting and sculpture and wanted to "fashion the body."[85] When she left art school, she wanted her work to be seen in the streets, and not just in galleries and museums.[86] The concept of clothing being an applied art is further emphasized by the fact that Jean stated that she and others, "really didn't care about being fashionable; we had more of a theme and a concept of transforming the body with our visions – we all told stories in our work."[87] Thus, the goal of artistic expression, as opposed to being fashionable, can further the idea that clothing, while functional, could also be non-functional.

B. The "Useful Article" Hurdle

However, the Copyright Act makes it explicitly clear that the protections extend over the form of the artistic craftsmanship, as opposed to their mechanical or utilitarian aspects.[88] As such, when the design seeking copyright protection is embodied in a useful article, such design is considered a pictorial, graphic, or sculptural work if the design features can be identified separately from, and can exist independently of, the utilitarian aspects of the article.[89] The Copyright Act further defines a useful article as having an intrinsic utilitarian function that does not merely portray the article's appearance.[90]

Since clothing is undisputedly a useful article, fashion designers have historically struggled to receive copyright protections due to the traditional outlook that clothing is not a form

[84] *See* Star Athletica v. Varsity Brands, 580 U.S. 405, 421 (2017).
[85] *See* Leventon & Cacicedo, *supra* note 1.
[86] *Id.*
[87] *Id.*
[88] *See Star Athletica*, 580 U.S. at 421.
[89] *Id.*
[90] *Id.*

of art, but a useful article.[91] As a result of the outlook on clothing serving merely a utilitarian purpose, the ability to receive copyright protection for clothing has been the topic of debate. As stated in *Pivot Point v. Charlene Products, Inc*, "[o]f the many fine lines that run through the Copyright Act, none is more troublesome than the line between protectable pictorial, graphic, and sculptural works and unprotectable utilitarian elements of industrial design."[92]

C. Artistic Features: Their Separability and Independent Existence

Clothing is clearly a work of applied art that should be eligible for copyright protection. However, copyright eligibility over clothing faces an uphill battle due to the fact that clothing is a useful article; it has an intrinsic utilitarian function that does not merely portray the article's appearance.[93]

Over the years, courts have been hesitant to grant copyright protection over clothing due to its utility. Although it is arguable that the line between clothing that is copyrightable and clothing that merely serves a utilitarian purpose is still blurry, the Supreme Court opened the door to a possibility of more clothing designs receiving copyright protection.[94] In fact, Michelle Mancino Marsh, who is a fashion law partner at Arent Fox LLP and filed an amicus brief in the case, stated that the ruling is "a sigh of relief for fashion innovators and IP lawyers alike" and the impact is to "reinforce the value of copyright in applied arts, and in particular for the apparel fashion industry."[95]

The Supreme Court in *Star Athletica* articulated the requirements for designs in useful articles to achieve copyright

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[91] *Id*. at 448-449 (2017) (Breyer, J., dissenting) (". . . the resulting pictures on which Varsity seeks protections do not simply depict designs, They depict clothing. They depict the useful articles of which the designs are inextricable parts.").

[92] *See* Pivot Point Int'l. v. Charlene Products, 372 F.3d 913, 921 (7th Cir. 2004) (quoting Paul Goldstein, 1 *Copyright § 2.5.3, at 2:56* (2d ed. 2004)).

[93] *Id.*

[94] *See Star Athletica*, 580 U.S. at 405.

[95] *See* Patrick H.J. Hughes, *Attorneys cheer (and jeer) high court's cheerleading outfit copyright holding (U.S.)*, 2017 WL 1087433.

protection and stated that the determination of when a feature in a useful article can be identified separately and exist independently of the article depends solely on statutory interpretation.[96] The Court stated that for the separate identification requirement, one must only need to spot some two- or three-dimensional element that has pictorial, graphic, or sculptural qualities.[97]

As it pertains to clothing, the surface designs on a piece of clothing can have pictorial and graphic qualities. On the other hand, the cut and shape of the design can have sculptural qualities, all of which are explicitly protected by the Copyright Act.

Once some element on a utilitarian article has been determined to have pictorial, graphic, or sculptural qualities, it must then be determined that such separately identified features have the ability to exist apart from the utilitarian features of the article.[98] Since the Court rejected the need for the useful article to remain fully functioning after the design features were imaginatively separated,[99] the court stated that the distinction between "physical" and "conceptual" separability must be abandoned.[100]

As it pertains to surface designs on a piece of clothing, like the copyrightable designs on the cheerleading uniforms in *Star Athletica*, copyright protection over such designs is a straightforward inquiry as it is easy to see how these surface designs can be identified separately from, and exist independently of, the utilitarian clothing. One can readily see how such designs, with pictorial or graphic qualities, can easily be transferred onto a canvas that one can place on the walls of their home. Thus, copyright protection can extend over the design itself since the work of art can be embodied in a piece of clothing or a canvas without losing any artistic features.

However, the separability of the design and utilitarian function becomes more difficult to determine when inquiring into the cut and shape of the design, which has been referred to as the "soul" of clothing.[101] Whether the clothing's cut and shape has separate

[96] *See Star Athletica*, 580 U.S. at 413.
[97] *Id.* (citing 2 Party § 3:146, at 3-474 to 3-475).
[98] *Id.*
[99] *Id.* at 420.
[100] *Id.* at 421.
[101] Burack, *supra* note 2, at 610.

sculptural qualities is more straightforward; the difficulty arises when determining whether the separate sculptural qualities can exist independently of the clothes without merely replicating the clothing itself.[102]

Although the Supreme Court in *Star Athletica* did not lay out a clear test to determine the separability, the Court stated that the statutory text indicates that it is a conceptual undertaking and the inquiry is not how or why the features were designed, but how they are perceived.[103] Thus, the Court specifically rejected the test that looks at whether the design elements reflect the designer's artistic judgment and were exercised independently of functional influence.[104] However, the Court also rejected the test that looks at whether a segment of the market would be interested in a given design since "it would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits."[105]

As one can see, it may be difficult to reconcile how the Supreme Court, on one hand, stated that the separability inquiry focuses on how the features are perceived, but then stated, on the other hand, that those trained only in the law will not be the final judges of the arts' worth. The Copyright Act does not explicitly state whether the features' separability is to be determined by the artists' reasons or methods for creating the design or by how the consumers perceive the features. Without fully expanding on their reasoning, *Star Athletica* nonetheless held that the features' separability is to be determined by how it is perceived. [106] However, the sense of perception is a subjective undertaking.

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[102] *See Star Athletica*, 580 U.S. at 417-418 (stating that the uniforms are separable and eligible for copyright protection since "respondents have applied the designs in this case to other media of expression – different types of clothing – without replicating the uniform").

[103] *Id.* at 422 (citing Brandir Int'l, Inc. v. Cascade Pacific Lumber Co., 834 F.2d 1142, 1152 (C.A.2 1987)).

[104] *Id.*

[105] *Id.* (quoting Bleistein v. Donaldson Lithographing Co., 188 U.S. 239. 251 23 S.Ct. 298, 47 L.Ed. 460
(1903)).

[106] *Id.* at 422 (citing *Brandir Int'l*, 834 F.2d at 1152).

Thus, the question becomes, is the court, who is trained only in the law, going to effectively become the judge of the worth of pictorial, graphic, and sculpture works when determining the separability of the features and the utilitarian purpose based on how the artistic features are perceived, when individuals' perception is subjective?

As stated by the Supreme Court, the determination of whether an artistic feature can be separated from the useful article depends solely on statutory interpretation.[107] Thus, the Court stated that the separability inquiry considers ". . . how the article and feature are perceived, not how or why they were designed."[108] Although this is not explicitly stated in the statute itself, determining separability based on how the article and feature are perceived would further the intent of the statute. A court's objective in construing a statute is to determine Congress' intent in enacting it and give effect to such intent.[109]

As explained above, copyright protection is given to benefit the public. Thus, it would make sense that the separability of an article and its features are determined based on how the article is perceived; if the public would not consider the features separate from the article, the copyright protections would be meaningless as the public would not receive the benefit.

However, whether one would perceive artistic features as being separate from an article is a subjective undertaking.[110] As mentioned, it is easy to perceive surface designs as being removed from a piece of clothing and transported to a canvas. Difficulty

[107] *Id.* at 413 (quoting *Mazer,* 347 U.S. at 214) ("This [deciding when a feature in a useful article can be identified separately from and exist independently of the utilitarian aspects] is not a free-ranging search for the best copyright policy, but rather 'depends solely on statutory interpretation'").

[108] *Star Athletica*, 580 U.S. at 422 (citing *Brandir Int'l,* 834 F.2d at 1152).

[109] *See* U.S. v. Stephens, 424 F.3d 876, 882 (9th Cir. 2005) (citing United States v. Gilbert, 266 F.3d 1180,
1183 (9th Cir. 2001)).

[110] *See e.g.*, Smith v. Goguen, 415 U.S. 566, 573 (1974) (quoting Note, Desecration of National Symbols as Protected Political Expression, 66 Mich. L. Rev. 1040, 1056 (1968)) ("[W]hat is contemptuous to one . . . may be a work of art to another"); *See also Mazer*, 347 U.S. at 214 ("Individual perception of the beautiful is too varied a power to permit a narrow or rigid concept of art"); *See also* Cohen v. California, 403 U.S. 15, 25 (1971) ("One man's vulgarity is another's lyric").

arises when one attempts to perceive a clothes' cut and shape as being separated from the clothing itself and being transported to a sculpture.

Since sculptures are figurative or abstract works of art that represent a thing, person, or idea,[111] artistic features of clothing may contain sculptural qualities given that clothing is a work of art, and the features can represent an endless amount of things, people, or ideas. However, due to the subjectiveness of perceiving art, individuals will perceive the artistic sculptural features in different ways.

Thus, a court will effectively be the one to determine whether artistic features are separable from the useful article they are embodied in as the court will be the one to ultimately determine whose subjective perception of separability they will adopt, as evidenced by the cases illustrated below in *Lanard Toys Ltd. v. Dolgencorp and Silvertop Assoc.s v. Kangaroo Mfg*.[112] However, courts have time and time again stated that judges lack the artistic merit to determine such issues.[113]

Although *Star Athletica* opened the door to clothing designs receiving copyright protection, courts are still grappling with how to apply the case to future situations since, as noted above, the Court did not give a clear-cut test to determining the separability.

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[111] *See Sculpture*, Dictionary.com, https://www.dictionary.com/browse/sculpture (last visited July 23, 2023) (defining sculpture as "the art of . . . producing figurative or abstract works of art . . ."; *See also Sculpture*, Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/sculpture (last visited July 23, 2023) (defining sculpture as "the art of forming solid objects that represent a thing, person, idea, etc.").

[112] *Compare* Lanard Toys Ltd. v. Dolgencorp, 958 F.3d 1337 (2020), *with* Silvertop Assoc.'s. v. Kangaroo Mfg., 931 F.3d 215, 217 (3d Cir. 2019).

[113] *See, e.g., Pivot Point Int'l,* 372 F.3d at 924 ("[T]his approach necessarily involves judges in a qualitative evaluation of artistic endeavors--a function for which judicial office is hardly a qualifier"); *See also* Bucklew v. Hawkins, Ash, Baptie, & *Co.*, 329 F.3d 923, 929 (7th Cir. 2003) (". . . involve judges in making aesthetic judgments, which few judges are competent to make"); *See also Brandir Int'l,* 834 F.2d at 1145 n.3 ("[W]e judges should not let our own view of styles of art interfere with the decision making process in this area"); *See also* Gracen v. Bradford Exch., 698 F.2d 300, 304 (7th Cir. 1983) (Posner, J.) ("[J]udges can make fools of themselves pronouncing on aesthetic matters").

The Third Circuit, in *Silvertop Associates* applied the holding from *Star Athletica* when it found copyright protection for a full- body banana costume.[114] The court found that, after looking at all of the artistic features of the costume in combination, that such artistic features were both separable and capable of independent existence as a sculpture.[115] The court specifically found that the banana costume's combination of colors, lines, shape, and length constituted artistic features that were separate from the utilitarian features of the cutout holes for the arms, legs, and face, the holes' dimensions, and the holes' locations on the costume.[116]

While the Third Circuit's holding in *Silvertop Associates* was a win for the fashion industry, the reasoning behind their holding, like *Star Athletica's* holding, is difficult to apply to further cases. In finding copyright protection in the banana costume, the Third Circuit held that the two-part inquiry from *Star Athletica* "effectively turns on whether the separately imagined features are still intrinsically useful."[117] The Third Circuit found that, although more difficult to imagine separately, one can still imagine the banana costume as a sculpture apart from the utility of the costume.[118] The court then stated that since the banana costume, once separated, is not intrinsically utilitarian and does not merely replicate the costume, it is copyrightable.[119]

Despite the Third Circuit finding that the sculpture qualities of a banana costume were separable from the utilitarian components of such, the Federal Circuit came to a different conclusion. In *Lanard Toys Ltd.*, the plaintiff had a design patent and copyright protection over its toy chalk holder that was designed to look like a pencil.[120] Although the design patent was found to be valid, but not infringed upon, the court found that the copyright was invalid since the artistic sculptural features were not separable from the utility of the chalk holder.[121] In so holding, the court stated that the

[114] *See Silvertop Assoc.'s.,* 931 F.3d at 217.
[115] *Id.* at 221.
[116] *Id.*
[117] *Id.* at 220.
[118] *Id.* at 221.
[119] *Id*.
[120] *See Lanard Toys Ltd.*, 958 F.3d at 1340.
[121] *Id.* at 1346.

separable feature cannot itself be a useful article and that when the features are imagined as a separate sculpture, one merely pictures a replica of the chalk holder.[122]

Regardless of the inability to reconcile how a banana costume's features can be separated without merely replicating the costume, while a chalk holder's features cannot, both decisions' emphasis on whether the separated features are still intrinsically utilitarian overlooks the Copyright Act's explicit inclusion of applied art. As stated above, the Supreme Court defined applied art as art employed in the design of useful objects or art that has a primarily utilitarian function.[123] If the artistic features are able to be separated and exist as a sculpture, requiring such separated features to then also not be intrinsically utilitarian would abrogate Congress' intent. Not only does the Copyright Act explicitly cover art that has a primarily utilitarian function, but it also allows the holder of a copyright to reproduce the work in or on any kind of article.[124] Thus, if the artistic features are able to be separated from the clothing and exist as an independent sculpture, it should be immaterial whether such features are intrinsically utilitarian once separated.

Moreover, it is questionable as to whether the Copyright Act requires such an extensive separation between the artistic features and the utilitarian components. As the Supreme Court noted, the separability inquiry is a statutory undertaking, and the extent of the separability is not spelled out in the words of the statute. In addition, requiring such an extensive amount of separation between the artistic features and the utilitarian components seems to be at odds with the explicit inclusion of protection for applied art.

Not only is the design's separability and independent existence a difficult task for individuals not trained in the art to determine, but it is also at odds with the purpose in which clothing designs are consumed. It is arguable as to whether individuals purchase

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[122] *Id.* (citing *Star Athletica,* 137 S. Ct. at 1010 and Progressive Lighting Inc. v. Lowe's Home Ctrs., Inc.,
549 F. App'x 913, 921 (11th Cir. 2013)).
[123] *See Star Athletica*, 580 U.S. at 421.
[124] 17 U.S.C. § 113(a).

clothing designs for the utilitarian purposes, as opposed to the way in which the clothes are perceived or displayed.

As explained above, it is clear that clothing is so much more than its utility. Moreover, the youth is attracted to fashion trends today, even if those trends do not allow them to sit or walk properly. [125] In addition, according to Annette Ames, many clothing that is shown on the runways "are not meant to be sold or worn," which has become common in the industry.[126] It is hard to see how articles of clothing in a multi-billion dollar industry[127] where trends come and go could not be disconnected from the utilitarian components of the articles. If individuals only purchased clothing for its utility, there would be no need for such a huge industry and various different trends coming to the forefront for individuals to purchase, which further demonstrates that clothing is considered an art.

According to the Copyright Office's regulation, it is immaterial how unique and attractively shaped an article is if the sole intrinsic function of it is its utility because it is not copyrightable regardless.[128] As explained above, it is clear that the *sole* intrinsic function of clothing designs is not the utilitarian components of the article. Exactly what the *sole* intrinsic function of clothing is varies among individuals, as it is an art and is extremely subjective.

As noted by the United States District Court for the Central District of California, what satisfies the independent-existence requirement "is not yet well-defined in the context of the extreme breadth with which something can be construed to be a sculpture or sculptural."[129] If an artistic feature is able to be perceived as a sculpture, it is deserving of copyright protection if it satisfies the originality requirement, whether it is embodied in a useful article as Congress explicitly extended copyright protection over applied

[125] Saravanan, *supra* note 57.
[126] *See* Annette Ames, *Fashion Design for a Projected Future,* Clothing & Textiles Research Journal, vol. 26, no. 02 104, 118 (April 2008).
[127] *See* Carolyn B. Maloney, *The Economic Impact of the Fashion Industry,* U.S. Congress Joint Economic Committee (Feb. 2019).
[128] *Star Athletica,* 580 U.S. at 416-417 (quoting 37 C.F.R. § 202.10(c) (1960)).
[129] Corinna Warm and Studio Warm v. Innermost LTD., 2022 WL 2062914 at *3 (C.D. Cal. 2022).

art.[130]

D. The Clothing Must Still be Original to Receive Copyright Protections

Although Congress did not intend to permit a narrow or rigid concept of art, the works of art must still be original and the product of the author's tangible expression of his or her ideas.[131] Afterall, the "sine qua non of copyright is originality"[132] and the originality of a work of art is what determines which parts are eligible for copyright protection.[133] Originality, in the copyright sense, just requires that the work was independently created by the author, with at least some minimal degree of creativity.[134] A work can still be considered to be original even if it closely resembles other works, as long as the similarity is not the product of copying.[135]

Critics of extending copyright protection over clothing worry that it will create a monopoly over a useful article,[136] and would effectively be affording copyright protection over the idea of a piece of clothing. Although copyright protection cannot extend over an idea, only the expression of that idea, [137] affording copyright protections over clothes would neither copyright an idea nor create a monopoly over a useful article due to the originality requirement.

As explained above, the originality requirement of copyright protections requires that the designer input at least *some minimal* degree of creativity. An individual receiving copyright protection for their expression of a shirt that contains some minimal degree of creativity would not bar another individual from producing a

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[130] 17 U.S.C. § 101.
[131] *Mazer*, 347 U.S. at 214.
[132] *Feist Publ'n.,* 499 U.S. at 345 (1991).
[133] *Id.* at 351.
[134] *Id*. at 345 (citing 1 M. Nimmer & D. Nimmer, Copyright §§ 2.01[A], [B] (1990)).
[135] *Id.* at 345.
[136] *Star Athletica*, 580 U.S. at 445 (Breyer, J., dissenting) (. . . "[c]opyright protection imposes costs. Those costs include the higher prices that can accompany the grant of a copyright monopoly.")
[137] *Lanard Toys Ltd.*, 958 F.3d at 1346 (Fed. Cir. 2020) (citing 17 U.S.C. § 102(b)) (". . . copyright protection does not extend to an "idea.").

shirt that contains their own independent and minimal degree of creativity. Moreover, as explained above, even if the shirt closely resembled the copyrighted shirt, such shirt would still be eligible for copyright protection as long as it can be shown to not be the product of copying, which is referred to as an independent creation.

Thus, if the clothing satisfies the minimal degree of creativity required and was not the product of copying another article of clothing, the clothing is original and could receive copyright protection. As stated by the Supreme Court, ". . . copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work."[138]

Extending copyright protection over the expression contained in clothing does not prevent others from producing clothing that builds freely on the copyrighted piece of clothing. A clothing designer is expressing the idea of clothes' look and would receive copyright protection over the expression contained in clothes, rather than the clothes themselves.

Moreover, as stated by the Supreme Court, the holder of a copyright for statuettes of human figures used as bases for table lamps ". . . may not exclude others from using statuettes of human figures in table lamps; they may only prevent use of copies of their statuettes as such or as incorporated in some other article."[139] Thus, the holder of a copyright over a piece of clothing can only exclude others from using copies of the artistic features within the piece of clothing. As such, copyright protections over clothes would not afford the copyright holder a monopoly since the protections can *only* exclude others from using their artistic features. Thus, such protections would enable others to freely build on the idea with their own expressions contained in clothing designs that possesses *some minimal* degree of creativity and originality.

When considering the fashion industry and the way in which designers create their works, a minimal degree of creativity is beneficial as clothing designers gain inspiration from the world

[138] *Feist Publ'n.*, 499 U.S. at 349-350 (citing Harper & Row Publishers v. Nation Enterprises, 471 U.S. 539, 556-557 (1985)).
[139] *Mazer*, 347 U.S. at 218 (1954).

around them. These sources of inspiration include paintings, culture, textiles,[140] sculptures, historic attire,[141] and previously existing fashion.[142] Thus, given that copyrightable works only need to contain some minimal degree of creativity and not be the product of intentional copying, copyright's originality requirement works in favor of the fashion industry.

Although copyright's originality requirement is not a concern as it pertains to the possibility of receiving copyright protection over clothing, the fashion industry, the separability requirement, as explained above, does pose a concern to the possibility of gaining copyright protections for clothing.

VI. DESIGN PATENTS & CLOTHING

Although copyright protections for clothing may be difficult to achieve, another potential form of intellectual property protection over clothing can potentially be obtained through a design patent. Generally speaking, an individual who invents any new, original, and ornamental design for an article may receive a patent for such design.[143] As explained, the purpose of the design patent statute is to encourage decorative arts, and therefore, the patent is given for the peculiar or distinctive appearance of the article.[144]

A design patent can be acquired for the design embodied in or applied to an article, as opposed to the article itself.[145] Thus, the subject matter of the design patent would be the design for an article, which could include the configuration or shape of an article, the surface ornamentation on the article, or the combination of both the configuration or shape and the surface ornamentation.[146]

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[140] *See* Benton, *supra* note 56, at 27.
[141] *Id.* at 9.
[142] *See* George B. Sproles, *Analyzing Fashion Life Cycles: Principles and Perspectives,* Journal of Marketing, vol. 45, no. 4, 116, 117 (1981) (". . . each new fashion is an outgrowth or elaboration of the previously existing fashion. Thus, new fashions are predicted to represent relatively small styling changes rather than revolutionary or visually dramatic changes from the recent past").
[143] 35 U.S.C. § 171(a).
[144] Cavu Clothes v. Squires, 184 F.2d 30, 32 (6th Cir. 1950).
[145] *See* Manual of Patent Examining Procedure § 1503.02 (Feb. 2023).
[146] *Id.* at § 1504.01 (citing In re Schnell, 46 F.2d 203, 8 USPQ 19 (CCPA 1931); Ex parte Donaldson, 26 USPQ2d 1250 (Bd. Pat. App. & Int. 1992)).

When considering this specifically from the viewpoint of clothing, a design patent may cover the configuration or shape of a piece of clothing, which is considered to be the "soul" of clothing,[147] the surface ornamentation applied to the piece of clothing, like the copyrighted designs from *Star Athletica*,[148] or a combination of both.

As differentiated from copyright, design patents do not require that the design features be separate from the article of manufacture.[149] Thus, a design patent, assuming it satisfies all the requirements for patent validity, can be more readily acquired for the cut and shape of clothing. However, the design claim does not broadly cover a design, but is limited to the article of manufacture that is identified in the claim.[150] Thus, if one were to acquire a design patent for a design applied to a specific piece of clothing, such patent protections would only apply to that specific article of clothing.

Based on the foregoing explanation regarding the subject matter of a design patent, the ability to acquire a design patent for clothing may seem promising. The following subsections analyze the difficulties that may arise when considering the ornamentality, originality, novelty, and non-obviousness requirements for a design patent, as well as the process of acquiring a design patent.

A. Ornamental or Functional?

A design patent covers the appearance of an article and since it must be ornamental, a particular design cannot be the subject of a design patent if the design is essential to the article's use.[151] When determining whether a design is primarily functional or primarily ornamental, the design is viewed in its entirety and the overall

[147] *See* Burack, *supra* note 2, at 610.
[148] *Star Athletica*, 580 U.S. at 409-410.
[149] A design patent covering a piano box was valid but did not cover the piano itself. *See Bush & Lane Piano Co. v. Becker Bros.*, 222 F. 902, 904 (1915) (". . . the design is not for a piano but for a piano case - an ornamental decorated wooden box in which the piano is placed, but which may be and is sold separate and apart from the music-making apparatus").
[150] *See* In re SurgiSil, 14 F.4th 1380, 1382 (2021) (A design patent for a lip implant was not anticipated by a similar design that was applied to an art tool).
[151] *See* L.A. Gear v. Thom McAn Shoes Co., 988 F.2d 1117, 1123 (Fed. Cir. 1993).

appearance of the article is the main focus.[152] An ornament is defined as "an accessory, article, or detail used to *beautify* the appearance of something to which it is added or of which it is a part."[153]

The ornamental qualities of a design can include, among others, the products' curves, the assemblies of straps,[154] the shape of a specific portion of the design, the surface texture, and the sizes of elements in relation to each other.[155] Such judicial findings of ornamental qualities make sense when one considers the elements and principles of art and design. The elements of art and design includes line, shape, form, color, value, space, and texture, while the principles of art and design includes balance, emphasis, movement, pattern and repetition, rhythm, proportion, variety, and unity.[156]

As explained throughout this article, clothing designs can clearly be ornamental as they beautify the appearance of clothing. Moreover, according to the Fashion Institute of Technology, fashion designers are trained to consider the elements and principles of design.[157] In the context of fashion, the design element of line refers to "the direction of visual interest in a garment," which can be accomplished by the details of seams, openings, pleats, stitching, and trims; the shape, or silhouette, is the description of the outline

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[152] *Id.* at 1123 (citing Lee v. Dayton-Hudson, 838 F.2d 1186, 1189, 5 USPQ2d 1625, 1627 (Fed. Cir. 1988)
and Gorham v. White, 81 U.S. (14 Wall.) 511, 530, 20 L.Ed. 731 (1872)).

[153] *Ornament*, Dictionary.com, https://www.dictionary.com/browse/ornament (last visited July 24, 2023) (emphasis added).

[154] Richardson v. Stanley Works, 597 F.3d 1288, 1295 (Fed. Cir. 2010) (citing *Crocs v. Int'l. Trade Comm'n.,* 598 F.3d 1294, 1306-07 (Fed. Cir. 2010)) (finding that the curves in the shoe and the strap assembly were ornamental elements).

[155] *Lanard Toys*, 958 F.3d at 1342 (finding that the "columnar shape of the eraser, the specific grooved appearance of the ferrule, the smooth surface and straight taper of the conical piece, and the specific proportional size of these elements in relation to each other" were ornamental aspects).

[156] *See* UC Berkley, *Design Fundamentals: Elements & Principles*, University of California Berkley Library (Nov. 10, 2021),
https://guides.lib.berkeley.edu/design.

[157] *See* Fashion Institute of Technology, *Elements and Principles of Fashion Design*, State University of
N.Y., https://www.fitnyc.edu/museum/documents/elements-and-principles-of-fashion-design.pdf. (last visited March 22, 2024).

of the clothing; and the texture refers to how something feels, or looks like it would feel.[158]

A beautiful design is a product of various, intentionally chosen elements to achieve the principles of design.[159] As it concerns the design principle of proportion, clothing designs look at the interrelationship between parts of a design, which should be scaled in size.[160] Emphasis, as applied to clothing, "creates a center of interest in a garment," whereby the elements of the design support it, and "emphasize the theme of the design."[161] In addition, rhythm allows the eyes to travel the clothing design, creating a movement through repetition of elements.[162]

Moreover, unlike copyright, the ornamental feature must have been created by the inventor for the purpose of ornamenting, and not for the functional considerations.[163] The requirement that the ornamentality be "the result of a conscious act by the inventor" finds its support in the words of the statute; a design patent is "given only to 'whoever *invents* any new, original, and ornamental design.'"[164]

Determining the ornamentality of the design from the point of view of the inventor differs from copyright, where the separability of the artistic features from the useful article are determined by how they are perceived, as opposed to how or why they were made. Regardless of whose viewpoint is considered when determining the functionality inquiry, the ornamentality can be satisfied when considering the nature of clothing designs.[165]

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[158] *Id.*

[159] *See* Mydee Lasquite, *What Makes Good Design? Basic Elements and Principles*, Visme (Sep. 28, 2015), https://visme.co/blog/elements-principles-good-design.

[160] *See* Fashion Institute of Technology, *supra* note 157.

[161] *Id.*

[162] *Id.*

[163] *See* Manual of Patent Examining Procedure § 1504.01(c) (citing In re Carletti, 328 F.22d 1020, 140 USPQ 653, 654 (CCPA 1964); Blisscraft of Hollywood v. United Plastic Co., 189 F. Supp. 333, 337, 127 USPQ 452, 454 (S.D.N.Y. 1960), *aff'd,* 294 F.2d 694, 131 USPQ 55 (2d Cir. 1961).

[164] *Id.* (quoting 35 U.S.C. § 171 and citing In re Carletti, 328 F.2d at 1022).

[165] If the functionality of a design on clothing is considered from the consumers point of view, the ornamentality requirement would be met for the same reasoning as it would be met for the separability inquiry in copyright.

As mentioned, fashion designers are trained to consider the elements and principles of design "in order to design clothes that are visually intriguing and stand out."[166] For example, Alexander McQueen intertwined various materials in order to produce clothing that makes women look stronger.[167] To make women look more powerful, he used leather, metal, chains, and silver coins, while the more feminine materials would be feathers, suede, lace, crystals, and silk.[168] Thus, fashion designers create designs for the purpose of ornamenting.

Moreover, since clothing is a means for the public to beautify everyday objects, a designer is likely, in order to sell its designs, satisfying the publics' needs by providing clothing that is ornamental. Similarly, an article is more likely to serve an ornamental purpose when there are several ways to achieve the functionality of such an article.[169] If a clothing designer was producing clothing where the primary purpose was the function, an artist would not continue designing clothes that differ in appearance yet serve the same function. To exemplify, it is clear that there are immeasurable ways to achieve the functionality of a shirt given the number of shirts, which differ in appearance and serve the same function, circulating the marketplace.

Although clothing can easily be considered ornamental, it is uncertain whether patent examiners, or a court,[170] have the necessary skills to determine an article's ornamentality. The presence or lack of ornamentality is decided on a case by case basis and in order for an examiner to reject an application due to its functionality being primary, the examiner must provide a sufficient evidentiary basis for the factual assumption.[171] The examiner will

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[166] *See* Fashion Institute of Technology, *supra* note 157.
[167] *See* Benton, *supra* note 56, at 42-43.
[168] *Id.*
[169] *L.A. Gear*, 988 F.2d at 1123 (citing Avia Group Int'l. v. L.A. Gear Cali., 853 F.2d 1557, 1563, 7
USPQ2d 1548, 1553 (Fed. Cir. 1988).
[170] The reasoning for why a court does not obtain the necessary skills to determine artistic merit when determining the separability issue in copyright applies with the same force to the ornamentality of design patent applications.
[171] *See* Manual of Patent Examining Procedure § 1504.01(c) (citing In re Jung, 98 USPQ2d 1174, 1177 (Fed. Cir. 2011).

evaluate the appearance of the design itself, and may supplement their analysis by the examiner's knowledge of the prior art, a reply from the designer, a brochure that shows the functional features of the design, and an analogous utility patent.[172]

Similar to the separability determination under copyright, although the designers' intent is the focus in determining whether the design is primarily ornamental, it is ultimately the patent examiner's determination based on the appearance of the design itself. When considering patent bar eligibility, it is questionable as to whether patent examiners have the skill to determine issues centering around *designs*. The Director of the USPTO has the primary responsibility to protect the public from unqualified practitioners.[173] Thus, in order to further such responsibility, an individual must possess "the legal, scientific, and technical qualifications necessary for him or her to render applicants valuable service."[174]

Although there are various degrees and educational experiences that would render an individual as possessing the scientific and technical qualifications required, none of these qualifications center around design.[175] Thus, how can an individual, who very likely may not[176] have any background in designs, be qualified to provide valuable services to *design* patent applicants?

Without an adequate background to determine whether a design is primarily functional or primarily ornamental, due to the various ways in which clothing can be used, it is questionable as to whether an examiner has the ability to adequately determine a clothing designs' ornamentality.

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[172] *Id.*

[173] *See* USPTO, *General Requirements Bulletin for Admission to the Examination for Registration to Practice in Patent Cases before the United Stated Patent and Trademark Office* (May 2023) at 1 (citing Husan-Yeh Chang v. Kappos, 890 F. Supp. 2d 110, 116-17 (D.D.C. 2012)).

[174] *Id.* (citing Premysler v. Lehman, 71 F.3d 387, 389-90 (Fed. Cir. 1995)).

[175] *Id.* at 3.

[176] Although the specified degrees and educational backgrounds do not encompass degrees and backgrounds in design, a patent examiner may still have an educational background in design, in addition to the background that qualifies them for patent bar eligibility. However, the existence and prevalence of such is, if not unlikely, burdensome as it would require a large amount of education.

B. Design Patents' Originality

A design must also be original to be protected through a design patent.[177] A designer utilizing a natural form and a natural pose in their design, without more, does not constitute originality.[178] However, if the designer, exercising more than imitation, selects and adapts an existing form that results in a new creation, the design is patentable.[179]

For example, a figure of a naked baby with its bottle in one hand and applying a watch to its ear with its other hand did not satisfy the originality requirement because it was a natural form with no unusual features.[180] On the other hand, "the exaggerated headdress, elongated eyelashes, and . . . spit curls. . ." on dolls were considered to be unusual and striking features that departed from the ordinary and thus, were considered to be original, despite their natural form.[181]

Articles of clothing may be considered to be natural forms as clothes can be considered to be simulations of existing objects.[182] Thus, in order for a clothing design to be original, the designer must adapt the existing object in a way that results in a new creation.

The reasoning behind an originality requirement in design patents is unclear, but regardless, courts have held that design patents are not to be treated differently than utility patents, despite the input of an originality requirement.[183] Thus, it seems as if the

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[177] 35 U.S.C. § 171(a).

[178] In re Smith, 77 F.2d 513, 513 (C.C.P.A. 1935) (". . . a person cannot be permitted to select an existing form, and simply put it to a new use, any more than he can be permitted to take a patent for the mere double use of a machine").

[179] *Id.* (citing Smith v. Whitman Saddle Co., 148 U.S. 674, 679, 13 S. Ct. 768, 770, 37 L. Ed. 606; Cooper
v. Robertson (D. C.) 38 F.(2d) 852, 858; In re Whiting, 48 F.(2d) 912, 18 C.C.P.A. (Patents) 1220).

[180] *Id.*

[181] *Id.* (citing Geo. Borgfeldt & Co. v. Weiss (C. C. A.) 265 F. 268; Pfeffer et al. v. Western Doll Mfg. Co. et al. (C. C. A.) 283 F. 966; Wilson et al. v. Haber Bros., (C. C. A.) 275 F. 346).

[182] *See* Manual of Patent Examining Procedure § 1504.01(d) ("35 U.S.C. 171 requires that a design to be patentable be 'original.' Clearly, a design which simulates an existing object or person is not original as required by the statute").

[183] When the design patent law was first enacted, it excluded the "useful" requirement of utility patents but inserted an "original" requirement. *See* Int'l.

originality requirement in design patents relates to the design's novelty and non-obviousness.[184]

C. Novel

In order for an existing object, like clothing, to result in a new creation, the design must not be anticipated by prior art.[185] Since anticipation over a prior art reference is the same factual inquiry for design patents as it is for utility patents,[186] the prior art must be identical in all material aspects; the prior art and claimed design must be substantially the same.[187]

When determining whether the claimed design is substantially the same as the prior art, the ordinary observer test is applied.[188] Under the ordinary observer test, two designs are substantially the same if an ordinary observer, giving the usual attention a purchaser

Seaway Trading Corp. v. Walgreens Corp., 589 F.3d 1233, 1238 (Fed. Cir. 2009) (citing 35 U.S.C. § 171 and 35 U.S.C. § 171); *See also* 35 U.S.C. § 171(b) ("The provisions of this title relating to patents for inventions shall apply to patents for designs, except as otherwise provided").

[184] *Int'l. Seaway*, 589 F.3d at 1238 (The court first mentioned how the originality requirement does not change the manner in which design patents are treated as compared to utility patents, then went right into its discussion of anticipation and invalidity).

[185] *See* Manual of Patent Examining Procedure § 1504.02.

[186] The design patent statute requires that, unless provided otherwise, the provisions of the title relating to inventions shall apply to design patents as well. *See* 35 U.S.C. § 171(b). Thus, the conditions for patentability require that the patent be novel. *See* 35 U.S.C. § 102(a) (stating that a person is entitled to a patent unless the claimed invention was previously patented, described in a printed publication, or otherwise available to the public before the application date).

[187] *See* Manual of Patent Examining Procedure § 1504.02 (quoting Hupp v. Siroflex of America, 122 F.3d 1456, 43 USPQ2d 1887 (Fed. Cir. 1997) and citing Door-Master Corp. v. Yorktowne, 256 F.3d 1308, 1313, 59 USPQ2d 1472 (Fed. Cir. 2001)).

[188] *Int'l. Seaway,* 589 F. 3d at 1240 (citing Egyptian Goddess v. Swisa, 543 F.3d 665, 679 (Fed. Cir. 2008) ("In light of Supreme Court precedent and our precedent holding that the same tests must be applied to infringement and anticipation, ad our holding in *Egyptian Goddess* that the ordinary observer test is the sole test for infringement, we now conclude that the ordinary observer test must logically be the sole test for anticipation as well").

would give, would be deceived by the resemblance of the overall designs and purchase one of the designs thinking it was the other.[189]

When considering the fashion industry, the novelty requirement, at first glance, does not seem to cause any issues for an article of clothing to receive a design patent. As explained above, clothing designers are inspired by other clothing in the marketplace. Thus, an individual purchasing an article of clothing for its ornamentality, rather than its functionality, may give an adequate amount of attention to the slight differences in designs and be able to tell the difference between the two designs. For example, the lines and shape of a clothing design, which may contain only slight differences from the prior design, could make a vast difference in the fit it has on an individual's specific body size.

However, as explained above, it is not an ordinary observer who is determining the novelty of the clothing design, it is the patent examiner who is attempting to, in effect, determine the artistic qualities of any given design by determining how an ordinary observer would view the differences. Similar to the separability inquiry in copyright and the ornamental inquiry for design patents, the patent examiner may not be equipped to determine such subjective, artistic judgments.

The test for novelty becomes even more difficult to satisfy when the patent examiner is instructed to take into account the significant differences between the designs, and not the minor or trivial differences.[190] It is likely that clothing designs contain minor differences due to the manner in which designers gain inspiration and the various ways a design can fit an individual; however, these minor differences would not lead an ordinary observer, when giving the designs the attention a purchaser would give, to be deceived by the resemblance. The same is difficult to say when a patent examiner, who is not trained in artistic components, attempts to make a value judgment on the novelty of design elements.

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[189] *See* Manual of Patent Examining Procedure § 1504.02 (quoting *Gorham*, 81 U.S. at 528).

[190] *Id.* (quoting *Int'l Seaway*, 589 F.3d at 1243) (". . . minor differences cannot prevent a finding of anticipation").

D. Non-Obvious

Since the statute's conditions and requirements for utility patents are to be applied to design patents,[191] the design must also satisfy the non-obvious requirement. [192] Thus, once a design satisfies the novelty requirement, it must then also be evaluated for non-obviousness. [193] To guide the obviousness evaluation, an examiner will determine the scope and content of the prior art references, establish the differences between the design and prior art references, sort out the level of ordinary skill in the art to determine whether the differences between the design and prior art references are obvious, and then, if applicable, evaluate the secondary considerations of non- obviousness.[194]

When considering the scope and content of the prior art references, the obviousness evaluation will extend to all analogous arts, which includes all prior arts that are "so related that the appearance of certain ornamental features in one would suggest the application of those features to the other."[195] Then, the examiner will, like the novelty requirement, consider the design in its overall appearance and compare it to the analogous arts.[196] Thus, the patent examiner must find all of the elements of the design seeking protection across multiple prior art references.

Moreover, patentability of the design is not justified just by the mere fact that there are differences between the design and the prior analogous art references. [197] While the novelty requirement contemplates whether an ordinary observer would determine the prior art and the claimed design as being substantially similar, the nonobvious requirement determines that the design, from the viewpoint of a designer having ordinary skill in the art, would not

[191] 35 U.S.C. § 171(b).
[192] 35 U.S.C. § 103.
[193] *See* Manual of Patent Examining Procedure § 1504.03.
[194] The examiner will consider these basic factual inquiries to guide the obviousness determination, which are the same inquiries as applied to utility patents. *See* Graham v. John Deere Co., 383 U.S. 1, 148 USPQ 459 (1966).
[195] *See* Manual of Patent Examining Procedure § 1504.03 (citing In re Glavas, 230 F.2d 447, 450 109 USPQ
50, 52 (CCPA 1956)).
[196] *Id.* (citing In re Leslie, 547 F.2d 116, 192 USPQ 427 (CCPA 1977)).
[197] *Id.* (citing In re Lamb, 286 F.2d 610, 128 USPQ 539 (CCPA 1961)).

view the additional designs in the claimed design as being obvious additions when comparing it to the prior art references.[198]

Thus, in order for a patent examiner to find the design as being obvious, they would first need to find all of the applied-for design elements in multiple different prior art references. If the examiner does find all of the applied-for design elements in other prior arts, they must then compare the applied-for design with all of the prior art references and hold that an ordinary designer skilled in the art would combine the prior art references to reach the applied-for design.

The same reasoning for the examiner's lack of credentials in determining the novelty of a design is applied with equal, if not greater, force to the examiner's lack of credentials in determining the non-obviousness of a design. The examiner, with a legal, science, and technical background, will be required to place themselves in the shoes of a clothing designer to determine not only whether all of the claimed design elements span across other prior art references, but also whether such combination of the elements in the applied-for design is obvious when comparing it to other patented designs.

Since the patent bar eligibility is in place to ensure that the public is protected from unqualified practitioners by ensuring an examiner is giving an application valuable service, one would think that a design patent examiner would be qualified to determine design features.

If, after the above inquiry, an examiner determines that the clothing design is obvious, the applicant can rebut the finding of obviousness with secondary considerations, which includes the design's commercial success, expert testimony, and the prevalence of others copying the design.[199] Although secondary considerations seem to be beneficial as an examiner's knowledge is immaterial when determining these considerations, other issues may arise due to the unique nature of the fashion industry.

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[198] *Int'l Seaway,* 589 F.3d at 1240 ("For design patents, the role of one skilled in the art in the obviousness context lies only in determining whether to combine earlier references to arrive at a single piece of art for comparison with the potential design or to modify a single prior art reference").

[199] *See* Manual of Patent Examining Procedure § 1504.03.

As explained further below when considering the amount of time it takes to obtain a design patent and the difficulties surrounding the secondary meaning requirement for trade dress, a clothing design, due to the nature of the fashion industry, cannot afford a wait time for the design to achieve objective commercial success, to provide the examiner with expert testimony, or to wait for others to copy the design.

In conclusion, a design for an article of clothing must be ornamental, original, novel, and non- obvious. It is interesting that the ornamentality of a design is to be construed from the designer's perspective, the novelty requirement is to be construed from an ordinary observer perspective, and the non-obvious requirement is to be construed from an ordinary observer skilled in the art's perspective. Thus, in effect, the patent examiner, with a legal, science, and technical background, will be the designer, ordinary observer, and the ordinary, skilled clothing designer when determining whether a design is eligible for a patent, which goes against the purpose for the patent bar eligibility requirement.

E. The Length of Receiving a Design Patent vs. The Nature of the Fashion Industry

Even *if* the patent examiner determines that the design features of an article of clothing are primarily ornamental, original, novel, and non-obvious, the process of obtaining a design patent, particularly the length of time, is another hurdle for clothing designers. According to the USPTO, it takes, on average, almost twenty-one months for a patent examiner to grant a final decision after the application was filed.[200]

Given the unique nature of the fashion industry, acquiring a design patent for a clothing design that will be in style for a short period of time is not realistic. As of 1981, there were considered to be two-time frames for fashion cycles: long run secular trends that span decades and centuries and short run specific styles that last between several months and years.[201] The long run secular trends consist of major style changes, like the length of dresses, as

[200] *See* USPTO, *Design Data June 2023*, https://www.uspto.gov/dashboard/patents/design.html (last visited Aug. 6, 2023).

[201] Sproles, *supra* note 142, at 116-17.

changing from long dress lengths to short dress lengths is an extreme change that the public will need to get used to.[202] Thus, it is believed that such major styles will, although continue to present slight changes, remain in style for long periods of time.[203]

On the other hand, the short run styles consist of a single, specific fashion style that can last for several years, and sometimes for five to ten years. [204] In addition, design details, like *ornamentation*, color, fabric, and trim, exhibit noticeable changes yearly and thus, clothing designs with such details could potentially only last for a season.[205] Although the lengths of time in which these fashion cycles last have likely changed since 1981, the principle that fashion trends come and go still remains today. The uncertainty regarding how long a certain fashion design will remain in style further emphasizes the impracticality of obtaining a design patent due to the length of time the process takes. Moreover, although trends come and go, it is uncertain as to whether the specific design will be back in style during the fifteen-year span of protection the design patent grants.[206]

The difficulty of acquiring a design patent in the fashion industry was discussed by the Second Circuit in 1929.[207] In *Cheney Bros.*, Judge Hand acknowledged the fact that a manufacturer of silks produces new patterns that are designed to attract purchasers due to their novelty and beauty.[208] However, since "they have only a short life, for the most part no more than single season of eight or nine months . . . it is in practice impossible, and it would be very onerous if it were not, to secure design patents upon all of these."[209] The impossibility to know which designs would be profitable in advance and patent only those makes the possibility of obtaining a design patent even more difficult.[210] Thus, since it was impossible to copyright the designs under the Copyright Act at that time, "it is

[202] *Id.* at 117.
[203] *Id.*
[204] *Id.* at 117-18.
[205] *Id.* at 117.
[206] 35 U.S.C. § 173.
[207] Cheney Bros. v. Doris Silk Corp., 35 F.2d 279, 279 (1929).
[208] *Id*.
[209] *Id.*
[210] *Id.*

easy for any one to copy . . . and the plaintiff, which is put too much ingenuity and expense in fabricating them, finds itself without protection of any sort for its pains."[211]

Given the rise of the internet, the impracticality of obtaining a design patent for a clothing design, due to the nature of the fashion industry, has only gotten worse as fashion trends circulate the internet at a much more rapid rate.[212] However, the USPTO offers an option for individuals' applications to be on a fast-track through a petition to make special.[213] The expedited application process is intended to benefit those who's new designs, due to marketplace conditions, are typically popular for only limited periods of time.[214] Once the petition to make special is granted, the design patent application process is expedited[215] and applicants can expect a first action response within two-and-a-half months from the date the petition is granted.[216]

Although this may be a beneficial asset to design patent applicants for clothing, as clothing is typically only popular for limited periods of time, the likelihood that the petition would be granted is uncertain. It is also uncertain as to how long it takes the USPTO to decide on the petition. Moreover, given the unique nature of the fashion industry, it is questionable as to whether the fast- track application review would be quick enough to benefit fashion designers.

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[211] *Id.*

[212] *See* Open Access Government, *How the internet has transformed the design and fashion industries,* (Feb. 6, 2023),https://www.openaccessgovernment.org/internet-transformed-design-fashion-industries- social-media-e-commerce/152624/ (stating that the internet and social media has transformed the fashion industry because it has made it possible for designers to reach a global audience and for consumers to purchase clothing from anywhere in the world and at any time).

[213] 37 C.F.R. § 1.155 (2015).

[214] *See* Manual of Patent Examining Procedure § 1504.30.

[215] *Id.*

[216] *See* USPTO, *Design Data June 2023,* https://www.uspto.gov/dashboard/patents/design.html (last visited Aug. 6, 2023).

VII. **TRADE DRESS & CLOTHING**

Since copyright protections and design patents are difficult to obtain for clothing designs, one may think that other protections, like trade dress, may be available for clothing. At first thought, trade dress may seem to be an adequate means to protect clothing designs as trade dress can protect the total image of a product, including size, shape, color, texture, and graphics.[217] However, the applicability of trade dress to clothing becomes difficult as, in addition to the non-functional requirement,[218] the product must also have required secondary meaning in order to be protected under trade dress.

Since trademark and trade dress concerns brand recognition,[219] the product needs to be distinctive, meaning the product identifies the source of such a product.[220] A product can be distinctive either because it is inherently distinctive – its intrinsic nature itself identifies the source – or it has developed secondary meaning.[221] A product develops secondary meaning when, "in the minds of the public, the primary significance of a [mark] is to identify the source of the product rather than the product itself."[222]

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[217] John H. Harland Co. v. Clarke Checks, 722 F.2d 966, 980 (citing Original Appalachian Artworks
v. Toy Loft, 684 F.2d 821, 831 (11th Cir. 1982), SK & F Co. v. Premo Pharm. Laboratories, 481 F.Supp. 1184, 1187, aff'd, 625 F.2d 1055 (3d Cir. 1980), and 1 J.T. McCarthy, Trademarks & Unfair Competition
§ 8.1, at 230-31 (1973)).

[218] As explained previously when considering the utilitarian aspects of clothing when considering copyright protection and the ornamentality requirements for design patents, it is uncertain whether a court would find features of clothing to be nonfunctional.

[219] Yankee Candle Co. v. Bridgewater Candle Co., 259 F.3d 25, 38 (1st Cir. 2001) (citing I.P. Lund Trading ApS v. Kohler, 163 F.3d 27, 35 (1st Cir. 1998) ("The primary purpose of trade dress protection is to protect that which identifies a product's source").

[220] Wal-Mart Stores v. Samara Bros., 529 U.S. 205, 210 (2000).

[221] *Id.* at 210-211.

[222] *Id.* at 211 (quoting Inwood Laboratories v. Ives Laboratories, 456 U.S. 844, 851, n.11, 102 S.Ct. 2181,
72 L.E.d.2d 606 (1982)).

Moreover, a showing of secondary meaning calls for "vigorous evidentiary requirements."[223]

However, the Supreme Court then stated that a product design is not inherently distinctive, and thus, can only be protected through trade dress if the design has acquired secondary meaning.[224] The Court has explained that customers, over time, can eventually treat a design as indicating the origin and thus, having secondary meaning.[225] More specifically, secondary meaning may be shown by the length or exclusivity of the use of the mark, the size of the business, the amount of advertising, and proof of intentional copying.[226]

In today's world, only very few clothing designs will be able to acquire secondary meaning and therefore, gain protection through trade dress as the requirement of secondary meaning poses a few difficulties when considering its application to clothing. First, the source of the design must be a brand that is widely known in order for the general public to be able to see a design and almost immediately signify a brand.[227] The consuming public will not be able to immediately signify a brand after looking at a particular piece of clothing if the clothing does not come from a very well-known brand.

Secondly, and on a related note, clothing, as opposed to bags and shoes, do not have the brands' logo and name on the front of the article of clothing as frequently as it is seen on bags and shoes. Thus, acquiring secondary meaning for clothing may be difficult, even for a widely known brand, to achieve unless the clothing contains the brands' identification.

Third, if multiple sources are producing clothing designs that look the same, the general public will not identify the designs

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[223] *Yankee Candle Co.*, 259 F.3d at 43 (quoting Perini Corp. v. Perini Constr., 915 F.2d 121, 125 (4th Cir. 1900)).

[224] *Wal-Mart Stores*, 529 U.S. at 212, 214.

[225] *Id.* at 212.

[226] *I.P. Lund Trading Aps*, 163 F.3d at 42 (stating that the mentioned ways are just some factors that the court can weigh when determining whether there is secondary meaning).

[227] *Wal-Mart Stores*, 529 U.S. at 212 (citing Qualitex Co. v. Jacobson Products Co., 514 U.S. 159, 162- 163, 115 S.Ct. 1300 (1995)) (the Court found that a product's color is not inherently distinctive because it does not almost automatically, and does not immediately, signal a brand or a product source).

to one single source or brand. Given the way in which fashion is consumed in today's heavily social media dominated world, clothing designs circulate the internet at a rapid pace.[228] Thus, it is not a difficult task for a brand to notice another brands' design gaining popularity on the internet and design a similar product. When such is the case, the ability for the original designer of the product to gain secondary meaning is largely diminished.

Lastly, since fashion trends come and go quickly, a clothing design may not be "in" long enough at a given period of time in order to acquire secondary meaning. A product design may, as the Supreme Court noted, *over time*, lead the public to see the product and identify its source.[229] This suggests that a product must be circulated long enough for consumers to know the source of the product. Although the specific length of time that is required to acquire secondary meaning is unknown, it is likely that a clothing design, due to the quick trend cycles, may not be able to acquire secondary meaning. Thus, despite what courts may state, the availability of clothing to achieve protections through trade dress is unlikely.

VIII. THE ROAD TO ADEQUATELY PROTECTING CLOTHING

Despite each branch of intellectual property posing a difficulty to a clothing designs' ability to gain protections, courts have justified not expanding a certain type of intellectual property over an article of clothing due to the ability to be protected through other forms of intellectual property.

The Supreme Court stated that a producer can ordinarily gain protection for a design that does not yet have secondary meaning under trade dress with a design patent or a copyright for the design.[230] In Justice Breyer's dissent in *Star Athletica*, when he

[228] *See* Open Access Government, *supra* note 212 (stating that the internet and social media has transformed the fashion industry because it has made it possible for designers to reach a global audience and for consumers to purchase clothing from anywhere in the world and at any time).
[229] *Wal-Mart Stores*, 529 U.S. at 212 (emphasis added).
[230] *Id.* at 214 ("The availability of these other protections [design patents and copyrights] greatly reduces any harm to the producer that might ensue from our

was discussing why he would not have extended copyright protection over the clothing designs, he stated that "Congress' decision not to grant full copyright protection to the fashion industry has not left the industry without protection. Patent design protection is available. . . A maker of clothing can obtain trademark protection under the Lanham Act for signature features of the clothing."[231]

Following similar reasoning, it is easy to imagine a situation in which a design patent would not be granted if there is an issue regarding novelty or non-obviousness with a justification that copyright protection may be attainable. However, as outlined above, the current copyright, design patent, and trade dress protections over clothing are not adequate to properly protect the artistic components of clothing designs.

Although copyright protection over clothes' surface design is straightforward, such protection over clothes' cut and shape as sculptural qualities is difficult to obtain due to the difficulty in applying the separability inquiry. Design patents are inadequate to protect clothing designs due to the patent examiner's lack of knowledge to determine a clothing design's ornamentality, novelty, and non- obviousness, in addition to the length of time in which a design patent is granted. Lastly, trade dress is difficult to obtain in today's world due to the difficulty in acquiring secondary meaning.

Since trade dress centers around brand recognition, rather than the design itself,[232] the best options for intellectual property protections for clothing consist of copyrights and design patents. Thus, the copyright and design patent requirements should be adapted in order to allow society to beautify their human experience.

Given that clothing is an art, whether it be deemed an applied art under copyright or a decorative art under design patents, it is hard to reconcile a group of individuals untrained in the arts to

conclusion that a product design cannot be protected under § 43(a) without a showing of secondary meaning").

[231] *Star Athletica,* 580 U.S. at 446 (citing 35 U.S.C. §§ 171, 173 and 15 U.S.C. § 1051 *et seq.*) (Breyer, J., dissenting).

[232] *I.P. Lund Trading Aps*, 163 F.3d at 32 (discussing how the claim for protection was from the design of the faucet itself and thus, it should have sought design patent protection but "it chose to turn for protection to legal doctrines of trademark and trade dress, originally crafted without product designs in mind").

determine exactly what artistic features are separate from the utilitarian aspects of clothing and what features are primarily ornamental. Thus, in order to better benefit the public with continued access to applied and decorative arts in the form of clothing, such a determination needs to be more clear and better informed.

A. The Need for Congress to Make the Separability Requirement Clear

As explained above, it is questionable as to whether the words of the statute require such artistic features to be that heavily separated from the utilitarian components. Given the fact that the Supreme Court stated the inquiry into separability is solely based on statutory interpretation and the statute explicitly protects applied art, it is puzzling why the courts have construed the following statute in such a way that requires such an extensive amount of separability:

> The design of a useful article . . . as defined in this section, shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.[233]

Regardless, Congress should clarify the applicability of copyright protections to clothing designs as applied art in order to make the troublesome line between protectable pictorial, graphic, and sculptural works of art and unprotectable utilitarian articles[234] clear. As explained throughout this article, clothing is a work of authorship as it contains pictorial, graphic, and sculptural qualities and although clothing is utilitarian, it is copyrightable as an applied art.

Thus, Congress should amend the Copyright Act to clarify that clothing, as long as it is has pictorial, graphic, and sculptural qualities and is original, is protectable through copyright. Just as

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[233] 17 U.S.C. § 101.

[234] *Pivot Point Int'l,* 372 F.3d at 921 (quoting Paul Goldstein, *1 Copyright § 2.5.3*, at 2:56 (2d ed. 2004)).

other laws are guided by psychological and sociological studies, Congress can refer to the previously cited research, as well as other research, regarding the belief that fashion is an art and the benefits of aesthetic clothing.

Moreover, just as courts defer to educational and business expertise,[235] the court can similarly defer to artistic expertise in the determination of whether the clothing has pictorial, graphic, and sculptural qualities. In the alternative, the court could also refer to the art and design elements and principles referenced above in its determination of the artistic qualities. Since, as the courts have made explicitly clear, judges lack the artistic merit to make such determinations, they can always defer to artistic expertise, or to the elements and principles in art as those are quite straightforward.

As it pertains to the originality requirement, courts are well-equipped to make such determination as all that is required is just some minimal level of creativity and independent creation. As evidenced by the countless cases that deal with originality in copyright, the court is willing and able to make such a determination.

B. Expanding Patent Bar Eligibility

As it relates to design patents, Congress has already stated that articles can obtain a design patent, regardless of whether the design features are separable from the article of manufacture it is applied to. However, like the issue surrounding the ability of the judiciary to determine separability in copyright, issues arise regarding the ability of patent examiners to determine whether a design is ornamental, original, novel, and non-obvious.

As explained above, the purpose of having patent bar eligibility only extend to those with legal, scientific, and technical backgrounds is to provide the applicants a valuable service.[236] Such required educational backgrounds makes sense as it pertains to utility patents, but it is difficult to see how scientific and technical educational backgrounds would render design patent applicants a valuable service.

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[235] *Rubenstein*, 2021 WL 5782359 at 72; *C.K*, 2022 WL 4116491 at 16.
[236] *See* USPTO, *supra* note 173, at 1 (citing Premysler v. Lehman, 71 F.3d 387, 389-90 (Fed. Cir. 1995)).

In fact, the USPTO has already proposed expanding patent bar eligibility to those who would only practice in design patent proceedings,[237] indicating that the USPTO has acknowledged a potential inadequacy in their examiner evaluation that disparately impacts those seeking design patents. The original request received feedback in which majority were in favor of expanding patent bar eligibility, however, majority of those in favor preferred doing so by requiring the design patent practitioner bar applicants to take the current patent bar, just with modified scientific and technical requirements.[238] Thus, based on the feedback, the USPTO would implement what majority of commenters and stakeholders believed was best.[239]

If the USPTO implements the proposal, it would extend patent bar eligibility to those who would only practice in design patent proceedings and have a bachelor's, master's, or doctorate of philosophy degree in industrial design, product design, architecture, applied arts, graphic design, fine/studio arts, art teacher education, or an equivalent degree.[240] Although this is a great first step towards providing design patent applicants with valuable services, other issues may arise that could potentially render the changes meaningless.

Despite the scientific and technical backgrounds no longer being a requirement for those who would practice design patents, the individuals with design backgrounds would still be required to take the current patent bar examination that is in place for all patent practitioners, just with modified scientific and technical requirements. [241] Although it is uncertain how modified the requirements would be, it would make most sense that the exam for those who are only going to practice with design patents would not be tested on material in the Manual of Patent Examining Procedure

[237] U.S. Patent & Trademark Office, *Changes to the Representation of Others in Design Patent Matters Before the United States Patent and Trademark Office*, 37 CFR Parts 1, 11, and 41 (proposed May 16, 2023), https://public-inspection.federalregister.gov/2023-10410.pdf [Docket No. PTO-C-2023-0010].
[238] *Id.*
[239] *Id.*
[240] *Id.*
[241] U.S. Patent & Trademark Office, *supra* note 237.

(MPEP) that deals exclusively with the scientific and technical requirements.

Moreover, while those who do not have a scientific and technical background, only a design background, can only practice in design patent proceedings, those without a design background, and only scientific and technical backgrounds, are eligible to practice all patent proceedings.[242] Although this would be beneficial to maintain in order to allow those with design backgrounds to become design patent practitioners, it should eventually change once there are an adequate amount of design patent practitioners. If the proposed expansion is in place to "improve design patent practitioner quality and representation" and "ensure consistent, high-quality patents via qualified practitioners,"[243] it is difficult to imagine how such improvements will be met if those with *only* scientific and technical backgrounds are able to continue to practice in design patent proceedings once enough design patent practitioners are available.

In addition to the current patent practitioners lacking adequate educational backgrounds to decide on matters of ornamentality, originality, novelty, and non-obviousness, the length of time to obtain a design patent is also at issue. However, expanding patent bar eligibility to include those with design backgrounds will expand the available pool of those who can be patent practitioners. Thus, it is likely that implementing the proposal, after a bit of time, will decrease the length of time in which a design patent is acquired.

C. Originality or Non-Obviousness?

Even *if* the proposal to expand patent bar eligibility is implemented, there are potential issues that could still continue given the nature of the fashion industry. As explained above, fashion designers, due to the nature of the fashion industry, find their inspiration in the world around them, including previous clothing designs.

As such, issues may arise as to whether patent examiners, even those with a general design background, will find the design to be non-obvious. The question then becomes whether the strict non-

[242] *Id.*
[243] *Id.*

obviousness requirement should apply to design patents as it does to utility patents.

When compared to the requirements for acquiring a utility patent, a design patent does not require that the invention be "useful," like the utility patent requirements, but requires, unlike utility patents, that the design be "original."[244] As stated by the Federal Circuit, the purpose behind the inclusion of "original" in design patents is unclear, however, it "likely was designed to incorporate the copyright concept of originality – requiring that the work be original with the author. . . "[245] Despite the likely intent behind the original requirement, courts have held that design patents are to be treated the same as utility patents and thus, imposed the nonobvious requirement on design patents.[246]

As indicated by Section 171, unless otherwise provided, all provisions of the title that relate to utility patents apply to design patents,[247] which includes the nonobvious requirement in Section 103.[248] Given the fact that the original requirement in design patents was likely designed to require that the work just be original with the author, it is questionable as to whether the nonobvious requirement for utility patents was meant to be applied to design patents.

The questionable nature of the applicability of non-obviousness to design patents becomes even more questionable when comparing the nature of utility patents with design patents. One of the principal reasons for requiring a utility patent to be non-obvious is because a patent that "only unites old elements with no change in their respective *functions* . . . obviously withdraws what already is known into the field of its monopoly and diminishes the resources available to skillful men."[249] Thus, it can be said that one of the principal reasons for requiring that a utility patent be non-obvious is to prevent old elements from being united with no change in the

[244] *Int'l. Seaway Trading*, 589 F.3d at 1238 (citing 35 U.S.C. §§ 101, 171).
[245] *Id.* (citing 1-2 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 2.01 (2005)).
[246] *Id.*
[247] 35 U.S.C. § 171.
[248] 35 U.S.C. § 103.
[249] KSR Intern v. Teleflex, 550 U.S. 398, 415-16 (2007) (quoting Great Atlantic & Pacific Tea v. Supermarket Equip., 340 U.S. 147, 152-153, 71 S.Ct. 127, 95 L.Ed. 162 (1950)) (emphasis added).

function. If a patent was granted for an invention that combined prior art elements but did not change the function of such prior art, the patent would effectively not progress the useful arts to the public, which is the purpose of providing patents to inventors.

As explained, design patents cover the ornamentation of the product and as evidenced by the exclusion of the "useful" requirement of utility patents, they do not cover the functional aspects of the article that the design is applied to. If the primary principal of requiring non-obviousness is to avoid granting patents to "inventions" that do not change in function and design patents do not cover the functional aspects, how can the primary principal of non-obviousness be met when applying it to design patents?

Just as utility patents are granted to progress the useful arts, design patents are granted to encourage decorative arts. Given the subjective nature of decorative arts, in comparison to useful arts, the question of whether the combination of prior design elements in the applied-for design would be obvious is a difficult inquiry to be made as the combination of elements can be viewed differently depending on one's subjective judgment of aesthetics.

Thus, it is questionable as to whether non-obviousness is a reasonable requirement as it pertains to design patents. However, it is also questionable as to whether copyright's low bar of originality should be applied to design patents. Since design patents do not implement copyright's allowance of an independent creation, where an individual can produce a similar design as long as it is not the product of copying, applying a low bar of originality to design patents without allowing for the independent creation exception may provide the public with less aesthetic designs to choose from and designs that are of lesser quality.

Moreover, since design patents incorporated an originality requirement before the original requirement was inserted into the copyright laws[250] and design patents are granted to anyone who *invents* a new, original, and ornamental design,[251] it is difficult to reconcile copyright's low bar of originality with patents' invention requirement.

[250] *Int'l Seaway Trading*, 589 F.3d at 1238 (citing 1-2 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 2.01 (2005)).
[251] 35 U.S.C. § 171 (emphasis added).

Requiring that design patents be non-obvious likely will not emphasize the decorative arts due to the fact that design elements can be combined in various ways to produce different aesthetics, while only so many *functions*, as applied to utility patents, can be produced by elements of prior art. Thus, in order to further the intent behind granting design patents, the originality requirement should be the focus of design patents, as opposed to its non-obviousness.

However, in order to continue benefitting the public by providing the means to beautify their human experience through clothing, the originality requirement for design patents should be higher than the requirement for copyright protections. How much higher the requirement should be for design patents should be left to those with experience and education in design. Therefore, expanding patent bar eligibility to such individuals with the necessary experience and education in design to determine whether the design is, in addition to ornamental and novel, original to the inventor would provide the applicants with valuable services.

Requiring a higher level of originality for design patents than for copyrights, while maintaining the availability of copyright protections with the low bar of originality and independent creation exception, will foster an environment where the promotion of aesthetics to progress society is flourishing.

Given the subjectiveness of an individual's definition of beauty, copyright's low originality requirement in conjunction with the independent creation exception will provide the public with many options of aesthetically pleasing articles of clothing that will meet their subjective definition of beauty. On the other hand, design patents will continue to promote exceptional designs that are truly original and the product of an invention by granting the inventor/designer the exclusive rights to the invention for fifteen years. Once the design patent protections have extinguished, copyright protections can continue to promote expansions of those previously patented designs. Thus, copyright protections and design patents can, through such a cycle, work together to incentivize designers to provide the public with various options of aesthetically pleasing articles of clothing that are of quality.

IX. THE NEED AND ABILITY OF ADEQUATELY PROTECTING CLOTHING

As explained, individuals, and society as a whole, benefit from having access to aesthetic everyday objects, one of which being aesthetic clothing. As the studies referenced above revealed, women had negative experiences when clothing failed to achieve their desired look and they were concerned that clothes would highlight unflattering parts of their body or would not convey a positive image.[252] Similarly, a study revealed that pregnant women were dissatisfied with the availability of maternity clothes due to the items not reflecting their true selves and rather, projecting someone they did not want to be.[253]

Interestingly, plus-sized women report that they feel ignored by the fashion industry and what is currently offered in the plus-sized arena does not meet their fashionable needs.[254] Moreover, a Huffington Post article from 2013 stated that retailers do not typically carry plus-sized clothing, which may be due to the "misconception that plus-sized women are not trendy shoppers or the idea that these sizes will not sell well."[255] It seems as if designers, due to the misconceptions that the clothes are not desirable or the clothes will not sell, are not incentivized to design clothing that will provide plus-sized women with the abilities to satisfy their fashionable needs. Thus, indicating that designers are incentivized to design various clothing options by its ability to sell.

As Stone indicated, through their investigation of verbal communication, communication includes appearance and "appearance is at least as important in establishment and maintenance of the self" as is verbal communication.[256] Such communications through one's appearance was further emphasized by Virgil Abloh, a fashion designer who has paved the way for the streetwear art movement, when he stated that:

> The upside is it's [streetwear] a sort of international community that never maybe existed in such a

[252] *See* Johnson et al., *supra* note 66, at 17.
[253] *Id.*
[254] *Id.* at 17-18.
[255] *Id.* at 18 (citing Huffington Post, plus-sized clothing, 2013).
[256] *Id.* at 19 (citing Stone 1962).

> cemented way . . . where we can communicate, and we are just a world of young people – no longer just a niche culture in one city of young people. That therein lies I think some sort of new space, you know, the kid in Tokyo and the kid in Kansas are essentially talking to each other.[257]

Thus, it is important that individuals are incentivized to provide the public with the benefits of communicating themselves through their appearance and beautifying their human experience. However, without such incentives, the knockoff industry may further prevent the public from beautifying their human experience through clothing.

In today's world, the knockoff industry is huge due to the ability to easily copy a clothing design that is surfaced on the internet and reach individuals from all over the world.[258] The knockoff industry flourishes due to the lack of adequate intellectual property protections over clothing designs.[259] In fact, studies have revealed that counterfeiters and pirates consider, when determining which products to counterfeit, the risks of detection of the counterfeiting and the potential penalties of copying.[260] Thus, if there are greater risks of detecting the counterfeit products and higher penalties of copying the product due to the design having intellectual property protection, it is likely that counterfeiters and pirates will be less inclined to counterfeit the creation. Not only does the lack of aesthetic clothing in general negatively impact society, but the prevalence of the knockoff industry in and of itself adds to the negative impacts to society for a few reasons.

First, the counterfeit product itself negatively affects the wearer.[261] Since counterfeit products mean that the wearers are pretending to be someone they are not, those participants who

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[257] *See* Hypebeast, *Virgil Abloh Explains Why Streetwear is an Art Movement*, YouTube (Feb. 2, 2018), https://www.youtube.com/watch?v=KLq-0QU0VXo.
[258] *See* Burack, *supra* note 2, at 610.
[259] *Id.*
[260] *See* Organisation for Economic Co-operation and Development (OECD), *The Economic Impact of Counterfeiting and Piracy, Executive Summary,* (2007) https://web-archive.oecd.org/2012-06-15/136568-38707619.pdf.
[261] *See* Johnson et al., *supra* note 66, at 9 (citing Gino et al, 2010)

thought they were wearing a counterfeit product cheated significantly more on tasks than those who thought they were wearing the authentic product.[262] Moreover, those who believed they were wearing the fake product perceived others' behavior as more dishonest and likely to be unethical than those who believed they were wearing the authentic product.[263] Such reactions while wearing the counterfeit, or knockoff product, was due to the inauthentic meaning attributed to the product.[264] One can readily see how knockoff products negatively affect not only the wearer, but the individuals around the wearer as well.

Second, knockoff products are generally of lesser quality.[265] It is questionable as to whether low- quality clothing will satisfy an individual's aesthetic needs as, for example, the fabric or shape of the clothing may not portray the desired look. Although the knockoffs are generally cheaper in cost,[266] the public will end up needing to buy the products more often due to the lack of quality, which could potentially cost the individual more money in the long run.

Lastly, if fashion designers are not incentivized to provide the public with aesthetic clothing, there likely will be no clothing designers for the knockoff industry to copy. In a Congressional hearing before the Subcommittee on Intellectual Property, Competition, and the Internet, individuals discussed the importance of protecting designs in the fashion industry from counterfeits and added how designers lose orders every day, and potentially their businesses, because ". . . copyists exploit the loophole in American law."[267] If the originals are not being produced due to the ease in which their hard work, time, and investments can be copied and sold, the knockoff industry does not have the originals to then copy.

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[262] Although the study focused on counterfeit sunglasses, as opposed to counterfeit clothing, the reasoning can apply equally to both. *Id.*

[263] *Id.*

[264] *Id.*

[265] Scruggs, *supra* note 9, at 134.

[266] *Id.* at 135.

[267] *See Innovative Design Protection and Piracy Prevention Act: Hearing on H.R. 2511 Before the Subcomm. On Intell. Prop., Competition, and the Internet of the Comm. On the Judiciary H.R.*, 112th Cong. 7 (2011), https://www.govinfo.gov/content/pkg/CHRG-112hhrg67397/pdf/CHRG-112hhrg67397.pdf.

As evidenced by the benefits of society being progressed through satisfying one's aesthetic needs and the way in which pregnant women and plus-sized women feel in regards to their clothing choices, the copyright and design patent laws should be adapted in order to meet societies' evolving needs.

As explained in the beginning of the article, the copyright and patent laws have evolved in the past in order to meet societies' evolving needs. Thus, it is clear that these laws have the ability to adapt in order to continue to meet such needs. Within such evolving needs includes the aesthetics and the benefits of beautifying one's human experience. As Virgil Abloh stated, "at the end of the day, what does art do for us when you evoke that feeling that anything is possible just by seeing one work of art? That's why fostering these works are important, that's [evoking the feeling that anything is possible] what it [art] can do for us."[268]

If society wants to continue to progress, the copyright and patent laws need to change in order to incentivize authors and inventors to provide the public with the means to further such a progression in society. What society needed when the copyright and patent laws were first enacted, and even what society needed when such laws were previously amended, are very different than what society needs today. The aesthetic benefits today were likely not contemplated when the constitution was ratified, however, aesthetic benefits are shown to be beneficial and will provide individuals with the means to beautify their human experience.

[268] *See* Sotheby's, *Virgil Abloh on his Creative Connection with Christo*, YouTube (Sep. 17, 2021), https://www.youtube.com/watch?v=_Pg9GEvCa7w&t=573s.