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# IP Protection of Fashion Design: To Be or Not To Be, That is the Question

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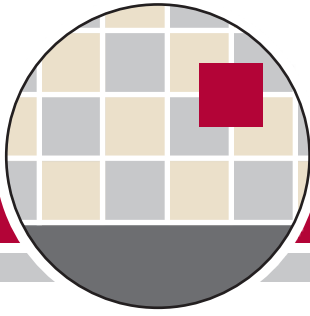
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# IP Protection of Fashion Design: To Be or Not To Be, That is the Question

## **Erratum**

Several of the *supra* citations have been revised to properly reference their antecedents; A quotation on page 24 has been revised to accurately reflect the text from which it came.



## IP Protection of Fashion Design: To Be or Not To Be, That is the Question

Xinbo Li\*

### I. Introduction

Fashion refers to “anything that is the current trend in look and dress up of a person,”<sup>1</sup> especially in clothing, foot-wear and accessories. Today, fashion surrounds our daily life and work; what we wear is a means to express ourselves instead of mere protection from cold and nakedness. Fashion design products relate to aesthetic appeal or innovative ornamentation;<sup>2</sup> they are the center of the fashion industry. “Fashion industry” no longer only refers to a garment or a pair of shoes. Today, the fashion industry earns more than two hundred billion dollars per year.<sup>3</sup>

Fashion design is different from other human creations protected under intellectual property law because of the short life cycle and minor differences in the products of fashion design. In the digital age, with dissemination happening quickly and widely via the Internet,<sup>4</sup> imitators find it much easier to take a “free ride” on creative fashion design, sometimes even before the original fashion products go to the market.<sup>5</sup> Meanwhile, fashion design lacks current intellectual property rights protection, creating a loophole for the protection of fashion design in the legal system.<sup>6</sup>

As a human creation, should we protect fashion design under IP law? What kind of intellectual property right should we choose to protect fashion design - patent, trademark or copyright? Protection of fashion design; to be, or not to be, that is the question.

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1. VALERIE CUMMING, *Introduction to UNDERSTANDING FASHION HISTORY*, (Costume & Fashion Press 2004).

2. See *How Can Intellectual Property Assist the Fashion Industry?* (Aug. 18, 2009), <http://www.internationallawoffice.com/Newsletters/detail.aspx?g=d777c173-befc-4799-bcf2-1cb4c47fba46>.

3. C. Scott Hemphill & Jeannie Suk, *The Law, Culture, And Economics of Fashion*, 61 STAN. L. REV. 1147, 1148 (2009).

4. JAMES BOYLE, *THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND* 60 (Yale Univ. Press, 2008).

5. Shelley C. Sackel, *Art Is In The Eye of The Beholder: A Recommendation For Tailoring Design Piracy Legislation To Protect Fashion Design and the Public Domain*, 35 AIPLA Q. J. 478 (2007).

6. CHRISTINE COX & JENNIFER JENKINS, *BETWEEN THE SEAMS, A FERTILE COMMONS: AN OVERVIEW OF THE RELATIONSHIP BETWEEN FASHION AND INTELLECTUAL PROPERTY* 6 (2005), available at <http://learcenter.org/pdf/RTSJenkinsCox.pdf>.

## II. Labor-Desert Theory

Locke's labor theory states that "when a creator deliberately combines her mental efforts with language, images, techniques, or other ideas in the public domain, the resulting product should be identified as her intellectual property."<sup>7</sup> According to Locke's theory, fashion designers combine their mental effort with images and original design in the public domain and make a new design. Therefore, the designers have a right to possess and to enjoy intellectual property protection for their creative mental works.

The creativity in fashion design, however, is different from other traditional creations in copyright or patent. The level of creativity in fashion design can be relatively low. For example, cutting the length of a skirt, adding sleeves to a T-shirt, or using different patterns for the textile can be treated as a new creation of a fashion design. Some fashion designers, therefore, seemingly spend less labor compared with the inventors of copyright and patent. In Locke's approach, mixing unowned but ownable goods with one's labor is considered an extension of the individual self and treated as a moral project.<sup>8</sup> Should we, however, consider the level of creativity here and decide whether fashion design should be protected under intellectual property law?

### A. Property View of Fashion Design

Is fashion design property? The fashion industry is extremely profitable, earning hundreds of billions of dollars annually. On its own, this fact cannot directly prove that fashion design is property. Property is considered the most fundamental of real rights;<sup>9</sup> an owner of property has a right to use, benefit, transfer or sell the property, and a right to exclude others from doing these things to the property.<sup>10</sup> Property implies the right to complete control of the good.<sup>11</sup> Property rights are not defined as relations between men and things, but behavioral relations among men that arise from the existence of things.<sup>12</sup> The property right is the set of economic and social relations with respect to the utilization of scarce resources.<sup>13</sup> So the question becomes, are fashion designs scarce resources which need to be protected as a property right?

Scarcity is explicitly the rationale for modern law and economics.<sup>14</sup> Scarcity is a problem generated between unlimited human wants and limited resources.<sup>15</sup> There are two kinds

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7. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 287-88 (Peter Laslett ed., Cambridge Univ. Press 1967) (1698).

8. Boudewijn Bouckaert, *What is Property?*, 13 HARV.L. & POL'Y REV. 775, 813 (1990).

9. *Id.* at 794.

10. *Id.* at 774.

11. *Id.* at 794.

12. *Id.* at 775.

13. Svetozar Pejovich, *Towards an Economic Theory of the Creation and Specification of Property Rights*, in ECONOMICS OF LEGAL RELATIONSHIPS 35-52 (H. Manne ed., 1975).

14. Bouckaert, *supra* note 8, at 797.

15. *Id.* at 774.

of scarcity: natural scarcity and artificial scarcity.<sup>16</sup> Today, society requires an almost uninterrupted stream of, new fashion design. Meanwhile, there are a limited number of designers who spend limited time and mental effort to create limited new fashion design. An artificial scarcity exists in the fashion design.

### *B. Intellectual Property View of Fashion Design*

Intellectual property rights must be qualified as property rights.<sup>17</sup> There is a core similarity between physical property and intellectual property—the attempt to use a legally created privilege to solve a potential public goods problem.<sup>18</sup> But, not all intellectual property has acquired property rights. Fashion design is property, but this does not directly lead to providing fashion design with intellectual property rights. Some scholars argue that fashion design is an art and the intellectual property protection it deserves is long overdue.<sup>19</sup> However, other scholars argue that fashion design need not be protected.<sup>20</sup> Does fashion design belong within the subject matter of intellectual property rights?

The U.S. Constitution grants Congress the power “[T]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”<sup>21</sup> The scope of the “science and useful arts” clause is vague and so is the level of creation required. We submit that fashion design protection is not properly within the scope of the intellectual property regime mainly because fashion design falls between the seams of traditional intellectual property protections.<sup>22</sup> Therefore, we do not propose that fashion design is unworthy of intellectual property protection, but that fashion design cannot be protected under the intellectual property legal system.

Although copyright can protect fashion design from being directly copied from others, copyright merely protects the expressions, instead of ideas and functionality, of creations.<sup>23</sup> In fashion design, the artistic form cannot be separated from the functionality.<sup>24</sup> Because of this, copyright can merely protect some elements of fashion design and cannot protect fashion design itself.

Design patents seemingly fit the background of fashion design. If the patent is issued, a design patent offers a broader scope of protection than copyright would. However, fashion

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16. *Id.* at 798.

17. *Id.* at 795.

18. BOYLE, *supra* note 4 at 8.

19. Sackel, *supra* note 5 at 511.

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

21. U.S. CONST. art. I, § 8, cl. 8.

22. COX & JENKINS, *supra* note 6 at 6.

23. *Id.*

24. *Id.* at 10.

design hardly meets the “novelty” and “non-obviousness” prerequisite of a design patent as the creativity of fashion design is lower than the requirements of patents.<sup>25</sup> Furthermore, design patents protect the appearance of an invention instead of the functionality. As mentioned before, the absence of separability of functionality and artistic form in fashion design leads to the absence of patent protection.

Trade dress under trademark law is seemingly another good way to protect fashion design. However, trade dress still has a separability problem.<sup>26</sup> Despite the fact that some appearance of fashion design can be separated from functionality, in order to be protected as trade dress, the owner of fashion design must prove the fashion design has acquired secondary meaning.<sup>27</sup> Secondary meaning is “a specific type of distinctiveness that is acquired through use of the trademark in the market place and requires the formation of a link in the mind of the consumer between the trademark symbol and the company for which it is serving as a signifier.”<sup>28</sup> Since fashion design is a short-life product, it rarely meets the secondary meaning requirement except for a few large fashion manufacturers like Louis Vuitton, Gucci, or Prada.

In recent years, the scope of intellectual property protection has expanded greatly in a variety of fields. Patents now are granted over plants, software, and even business methods.<sup>29</sup> Copyright terms have been extended to life of the author plus seventy years—far longer than the fourteen-year term originally contemplated by the drafters of the Constitution.<sup>30</sup> Software can be registered and protected under copyright as a new intellectual property right[1].<sup>31</sup> Should fashion design be saved from the seams between traditional intellectual property protections? Should fashion design be protected under intellectual property law as a new kind of rights? According to the “labor-desert” theory, the answer is yes, because fashion designs are valuable human creations, and because currently the valuable creations are suffering from an irreparable harm.

Does protection create value or does value create protection? Will the protection of fashion design protect the existing value of fashion design or lead to broader monopoly power among the fashion manufacturers? These questions lead to the scope of the protection of fashion design, but not the existence of the protection of fashion design.

### III. Economy and Intellectual Property Rights

To some extent, the huge economic value plays an important role in the protection of such incorporeal property. Some scholars treat intellectual property rights as a kind of government

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25. *Id.* at 11.

26. 15 U.S.C 1125 (a)(3).

27. 529 US. 211(2000).

28. COX & JENKINS, *supra* note 6, at 13.

29. *Id.* at 5.

30. *Id.*

31. Regulation for Computer Software Protection, Article 5, “The software...shall have copyright under this Regulation, regardless of whether or not it is published.”(2002).

intervention in the market place.<sup>32</sup> It may be appropriate to treat intellectual property rights as such in ethical and economic valuation. The protection of intellectual property rights cannot be separated from the huge economic value of the human creation.<sup>33</sup> Accordingly, since fashion design is the center of a multi-billion dollar industry, should it be protected based on the law and economy evaluation?

#### *A. Economic Format of Fashion Design*

The basic goal for intellectual property rights is promoting incentives to creators by granting monopoly power on the creation for a limited time while still protecting the public interests. Based on the traditional argument, without intellectual property protection, creators will lack incentives to create and the creative industries will wither.<sup>34</sup> Applying this formula to the fashion industry, since fashion design falls between the seams of traditional intellectual property protection, the fashion designers will lack incentives to create new designs and the whole fashion industry will wither. However, the reality is just the opposite; although lacking in protection, designers continue to create new fashion design and the fashion industry continues to grow--The U.S apparel market grew 4 percent in 2011 with total dollar sales of 199 billion dollars.<sup>35</sup> The fashion industry has existed and produced en masse since the beginning of 20th century (followed with the rise of new technologies like the sewing machine) and is still running and expanding today.<sup>36</sup> Since the fashion industry continues to develop without fashion design receiving intellectual property protection, isn't it nonsense to protect the fashion design now?

#### *B. The Internet Threat and Fashion Design<sup>37</sup>*

The rise of the Internet changed the traditional thinking of intellectual property in several ways. As to fashion design, "through the wonders of digital cameras, the Internet, and mass-production facilities in faraway lands," so-called "knockoffs" may enter the market before the original.<sup>38</sup> With internet broadcast of runway shows, being transmitted electronically to low-cost contract manufacturers overseas, these knockoff manufacturers are able to make large-scale, low-cost copies. They can produce thousands of inexpensive copies in six weeks or fewer.<sup>39</sup> Historically, designers accepted the unauthorized copies as a way to show the popularity of their fashion designs. Today, these "fast fashion" designs are copied at such a high rate of speed that it creates another reality entirely.

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32. Bouckaert, *supra* note 8, at 775.

33. *Id.*

34. COX & JENKINS, *supra* note 6, at 16.

35. NPD Reports on the US Apparel Market 2011, see [www.prweb.com/releases/2012/3/prweb9343091.htm](http://www.prweb.com/releases/2012/3/prweb9343091.htm).

36. *Id.*

37. BOYLE, *supra* note 4, at 54.

38. Sackel, *supra* note 5, at 478.

39. Hemphill & Suk, *supra* note 3, at 1171.

One cannot reap from where another has sown. This is the basic morality of intellectual property. In this case, the infringers not only directly reap the benefits of fashion designers' work, but also sell the products of the fashion design before the original can be sold.<sup>40</sup> Intellectual property rights cannot tolerate the phenomenon of knockoffs preempting the market of the originator. Yet, as it stands, the infringers steal the fashion design to sell exactly the same products, and there are no regulations to protect the fashion designers from the piracy. With the rise of the Internet, we should think twice about whether we need to treat fashion design as a sui generis subject matter under intellectual property law.

Because the products of the fast fashion infringers are faster and cheaper to produce than those of the originator of the fashion design, designers fall victim to unfair competition. It is easy to see the result—the true fashion designers lose the game while the infringer benefits from the unfair competition. The fast fashion infringers create nothing but they benefit from the creativity and labor of the original fashion designers. Such conduct is unfair enough that fashion designers will lack incentives to create new fashion design. There is a possibility that the whole fashion industry will wither as fashion designers and their new designs are the center of the fashion industry. Therefore, from the economic aspect of encouraging creativity of fashion designers, we should consider protecting fashion design under intellectual property rights.

### *C. The Tragedy of the Commons and Fashion Design*

The Tragedy of the Commons was discussed by Professor Hardin in 1968.<sup>41</sup> His article focused on a dilemma; multiple individuals acting independently and rationally consulting their own self-interest will ultimately deplete a shared limited resource even when it is clear that it is not in anyone's long-term interest for this to happen.<sup>42</sup> With the real-time information system, if fashion design cannot be properly protected under intellectual property law, it may fall victim to the "tragedy of commons."

Before the "internet threat,"<sup>43</sup> fashion designers created new fashion design referring to elements of original design in the public domain. The designers benefited from their works through selling the products based on the fashion design. The fashion design went directly into the public domain upon publication. Then, other manufacturers might copy the fashion design in the public domain and benefit from the production based on the same fashion design after the genuine innovations went onto market. In such circumstance, there was little harm to the original fashion design. Moreover, the public domain was extended by the new fashion design. Fashion designers endured such copying because it showed that their fashion design was popular. It was more like "comedy" of the commons instead of "tragedy" of the

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40. Raustiala & Sprigman, *supra* note 20, at 1205.

41. Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968).

42. *Id.* at 1243-48.

43. BOYLE, *supra* note 13, at 54.



commons<sup>44</sup> because everyone benefited from the fashion design and no one was infringed or hurt.

In the Digital Age, however, fashion shows are broadcast much easier and faster. Fashion designers create new fashion design, borrowing some elements of original fashion design from the public domain. The infringers immediately copy and send the fashion design to their manufacturer. As a result, the knockoffs based on the fashion design are sold within a few weeks of disclosure. Such conduct results in the infringers benefiting from the same fashion design at the same time as, or even before the original innovator.<sup>45</sup> Consequently, consumers might think that the fashion products from the original innovator were out of fashion as they entered the market later than the infringers. In the fashion industry, being second can be a deathblow. Because fashion products are short-lived, one month later can make a huge difference. The value of the fashion design is diminished by the copying because of the “old” association with the original design. The “old” or “out of fashion” stigma is fatal to a fashion design, and the association with that stigma harms the reputation of the fashion designer. Society normally relies on “Market Signals” to allocate resources.<sup>46</sup> If a fashion design is considered “old”, this fashion design can no longer function as a market signal to attract investments for further production. The value of the fashion design is diminished by the fast fashion infringers.<sup>47</sup> After the fashion design is published, the original fashion designers cannot protect their fashion design because it has already gone into the public domain. Fashion innovators are unlikely to want to create new things and extended the public domain of fashion design because his or her design would get almost no protection after the first publication. As we have already known, fashion design is the center of the fashion industry. Therefore, the entire fashion industry might be harmed by the expiration of the resource in the public domain of fashion design. This is how the fashion design falls into the tragedy of the commons after the appearance of the Internet threat.

Using original innovations created by other fashion designers is in each manufacturers’ best interest - they need not spend money in order to train their own designers. However, with the fast copying, the value of the original fashion design is damaged.<sup>48</sup> The fashion designers may lose the incentive to create more fashion designs or the fashion designers may make less of an effort when creating a new fashion design, as the fashion designers know the fashion design is not protectable. These factors may cause the public domain of fashion design to diminish. This harm would then be related to all the fashion designers and manufacturers. The infringers receive most of the benefits from the literal copying, while the damage to the commons is shared by the entire fashion industry. Without proper regulations,

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44. Hardin, *supra* note 41, at 1243 (1968).

45. Raustiala & Sprigman, *supra* note 20, at 1205.

46. BOYLE, *supra* note 13, at 2.

47. Hemphill & Suk, *supra* note 3, at 1183. (reducing designer profits in the meantime by reducing sales.)

48. *Id.* at 1176. (Designers unprotected against design copying see a disproportionate effect on their profitability.)

we can predict that more and more infringers will literally copy the fashion designs, thus more fashion designs will be harmed since the tools that enable “reuse are becoming more widespread.”<sup>49</sup> The creativity of fashion designers will be depleted at that time, and the public domain of fashion design will be damaged without extension of new fashion design created by the fashion designers. At that point the whole fashion industry may be stifled through the “legal” infringement of the fast fashion infringers.

#### *D. Free Market Competition and Fashion Design*

Will the protection of fashion design create monopolies and hinder competition? Or will the protection of fashion design stop the unfair competition and promote fair market competition? These are the main questions that need to be considered when establishing a proper protection of fashion design.

Traditional Intellectual property rights, like patent and copyright, are a monopoly power granted by the government for a limited time in order to encourage creators disclosing their innovations. The essence of the intellectual property right is monopoly power. If excessive intellectual property rights are granted to the fashion design, a monopoly is likely to be created. Such protection might “hinder competition and drive up prices for consumer goods.”<sup>50</sup> In practice, the large fashion manufacturers have already acquired a strong intellectual property protection for their fashion products. Counterfeiting well-known trademarks is a crime.<sup>51</sup> The large fashion manufacturers usually combine their logos and fashion design together—for example the special decorative patterns on Louis Vuitton or Coach bags.<sup>52</sup> Therefore it is hard to copy the fashion design of the large fashion manufacturers without infringing their trademarks. Since the large fashion manufacturers have already acquired a strong protection, if they are granted excessive protection on their fashion design, they may end up with excessive protective rights and hinder the fair market competition. Actually, the monopoly consideration is one of the main reasons that the policy makers did not like granting additional protection on the fashion design.

If there is no protection on fashion design however, the market competition of fashion industry might be destroyed by the fast fashion infringers. Fast fashion infringers do not need to cultivate their own fashion designers because they “steal” the fashion design from others. Therefore, they do not need to pay for the fashion designers when using their design. Moreover, the fast fashion infringers usually produce the copies of the fashion design in lower quality; the knockoffs are much cheaper than the genuine productions. Since the copies and original models

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49. Hemphill & Suk, *supra* note 3, at 1195.

50. COX & JENKINS, *supra* note 6, at 6.

51. Criminal Law of The People’s Republic of China, Section 7, Article 215(1997) (“Whoever forges or without authorization of another makes representations of the person’s registered trademarks or sells such representations shall, if the circumstances are serious, be sentenced...”).

52. See, e.g. <http://www.louisvuitton.com>; see also <http://www.coach.com>.

enter onto the market at the same time, or sometimes the copies even enter before the originals, there is an issue of unfair competition for the genuine innovators. They have to compete with identical fashion products which are sold for much less than their own original products. Therefore the fast fashion infringers might destroy the fair market competition.

One of the goals for providing protection on fashion design is to maintain the market competition.<sup>53</sup> Intellectual property protection on fashion design shall enhance the competitiveness of small and medium sized enterprises by stopping the infringers reaping from their harvests. At the same time, fashion design protection shall avoid granting monopoly power to the large fashion manufacturers since the large fashion manufacturers already have acquired a strong protection—both in intellectual property and a criminal protection<sup>54</sup>—on their fashion protects.

From an economic point of view, the fashion design should be protected under the intellectual property law as a way to protect the private economic value of the innovation. However, the protection on the fashion design should be limited as a way to protect the public economic interests like the fair market competition.

#### **IV. The Piracy Paradox and the Public Domain**

Although some scholars argue that today fashion design should be protected under intellectual property rights, some scholars make arguments that the protection of fashion design is meaningless. They say only in an environment of weak intellectual property protection of fashion design, the public domain can be extended. One of the most famous of these arguments is called “piracy paradox.”<sup>55</sup>

##### *A. Piracy Paradox Theory and Fashion Design*

Since the creation of intellectual property rights, we have attempted to balance private rights and public interests. However, usually it is hardly to find a proper balance between private rights and public interests in practice. The piracy paradox argues that scholars should pay more attention to public interests and less attention to private rights for fashion design protection.<sup>56</sup> In other words, piracy paradox theory may “[w]eaken individual designers,”<sup>57</sup> but help to “strengthen the industry and [drive] its evolution.”<sup>58</sup>

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53. Sackel, *supra* note 5, at 481.

54. Trademark Law of the People’s Republic of China, Article 52 (2001) “Any of the following acts shall be an infringement of the exclusive right to use a registered trademark:...(3)counterfeiting, or making, without authorization, representations of a registered trademark of another person, or selling such representations of a registered trademark as were counterfeited, or made without authorization. “ Criminal Law of the People’s Republic of China , Section 7, Article 215 (1997).

55. Raustiala & Sprigman, *supra* note 20 at 1203.

56. *Id.* at 1222.

57. *Id.* at 1209.

58. *Id.*

The piracy paradox states that piracy is paradoxically beneficial to the fashion industry in the long run.<sup>59</sup> Copying is helpful, not harmful to the fashion design. Kal Raustiala and Christopher Sprigman argue that first, copying of fashion design contributes to a process of “induced obsolescence.”<sup>60</sup> That is to say, copying helps to diffuse fashion design into the mainstream—where they lose their appeal for fashion cognoscenti.<sup>61</sup> Second, they argue that copying helps “anchor” trends.<sup>62</sup> According to the theory, the function of copying fashion design is similar to the survival of the fittest. The best fashion design will be anchored while the common fashion design will be diffused. Therefore the innovation-diffusion circle offers innovation for the fashion designers to create new fashions.<sup>63</sup> The fundamental tenet of the piracy paradox theory is “the fashion industry operates best in an environment of comparatively weak IP rules.”<sup>64</sup> That is to say, there is no need to protect fashion design under intellectual property law.

This theory worked well before the creation of the real-time information system. It is true that without proper protection of fashion design, the fashion industry has been stable for many years. It is also true that firms continue to make significant investments in the production and distribution of new fashion design although others are perfectly to copy.<sup>65</sup> However, the appearance of the Internet quickens the information diffusion. The difference between current fashion design copying and fashion design copying several decades ago is the time that the copying can reach the market; the knockoffs can reach the market at the same time or even before the originator. Through the wonders of digital cameras, the Internet, and mass-production facilities in faraway lands, knockoffs can come onto the discount stores seemingly before the model.<sup>66</sup> The perfect innovation-diffusion circle is destroyed by the FAST-fashion infringers.

Today, the copies enter into the market simultaneously or even before the models. The diffusion procedure happens before the quicken diffusion procedures. The “innovation-diffusion circle”, which is the fundamental of the “piracy paradox” theory, was destroyed by the generation of the real-time communication technology in the recent years.

In the piracy paradox theory, Kal Raustiala and Christopher Sprigman present two kinds of appropriation. One is “line-by-line copying”; the other is “the creation of derivative works.”<sup>67</sup> Although both of the terms are considered appropriation under the piracy paradox theory, the two terms should be distinguished today. Line-by-line copying is misappropriation<sup>68</sup> and the creation

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59. *Id.* at 1203.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 1207.

64. *Id.* at 1205.

65. *Id.* at 1217.

66. *Id.*

67. *Id.* at 1205.

68. *Id.* at 1209.

of derivative works is an appropriation. Consumers expect to see line-by-line copying because they can pay less money to get the same fashion product. However, the line-by-line copying of fashion design is stealing. It is like copying a book written by other authors, copying a song sung by others, or copying a painting drawn by others, the fast fashion infringers reap from where another has sown. Such conduct cannot be tolerated under today's intellectual property law.

As mentioned before, fashion design is different from the other traditional intellectual property subject matters, as fashion design has less creativity innovation compared with copyright or patent subject matter. Therefore "the creation of derivative works"<sup>69</sup> is an appropriation since the derivative works satisfied the requirements of new as a fashion design. "Derivative' . . . means a work that appropriates certain design elements of a model design, but is nonetheless visually distinguishable to the average observer."<sup>70</sup> The derivative works partake of a common design element and enriched the shared design vocabulary. The creation of derivative works drives the fashion cycle.<sup>71</sup>

Therefore, the "piracy paradox" theory is not proper for the fashion design protection under the current situation.

#### *B. Public Domain and Fashion Design*

*"If you have an apple and I have an apple and we exchange apples then you and I will still each have one apple. But if you have an idea and I have an idea and we exchange these ideas, then each of us will have two ideas."*

- George Bernard Shaw<sup>72</sup>

Public domain refers to works, ideas, and information which are incompatible with private ownership and/or which are available for use by members of the public.<sup>73</sup> Intellectual property rights do not merely produce innovation by rewarding creators. Intellectual property rights create a feedback mechanism that dictates the contours of information and innovation production.<sup>74</sup> The scope of intellectual property infringement has expanded since today the Internet makes copying easier, cheaper and in an unparalleled global scale.<sup>75</sup> Therefore we must face the greater danger with expanded protections in intellectual property rights. Although such expansions may have to reduce the rights that citizens thought they

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69. Berne Convention for the Protection of Literary and Artistic Works, Article 2(1979) "Protected Works...3. Derivative works..."

70. Raustiala & Sprigman, *supra* note 20 at 1205.

71. *Id.* at 1209.

72. Delamothe, Tony, and Richard Smith. "PubMed Central: creating an Aladdin's cave of ideas: We have seen the future, and it works." *BMJ:British Medical Journal* 322.7277(2001):1.

73. Richard H. Stern, *L.H.O.O.Q. Internet-Related Derivative Works*, Computer Law 484 Supplemental Material, GEORGE WASHINGTON UNIV. LAW SCH. (2001), <http://docs.law.gwu.edu/facweb/claw/Lhooq0.htm>.

74. BOYLE, *supra* note 13, at 7.

75. *Id.* at 60.

had in practice like fair use, low-level noncommercial sharing among friends, and resale.<sup>76</sup> However, without an increase in private property rights, “cheaper copying will eat the heart out of our creative and cultural industries.”<sup>77</sup> The situation is exactly the same when dealing with fashion design protection.

The goal for intellectual property protection of fashion design is to offer incentives to fashion designers with the expected result of creating more original and creative fashion designs. And as the protection expired, more fashion designs return to and enrich the public domain. Therefore, we cannot allow so much cheaper copying eat the heart of the creativity of fashion design. In order to protect the future extension of public domain against the Internet threat, expanding intellectual property protections to fashion design is necessary.

However, as mentioned before, fashion design is different from other traditional subject matters of intellectual property rights. Because of the low levels of creativity, fashion designers need to “borrow, imitate, revive, recombine, transform and share design elements”<sup>78</sup> when creating a new fashion design, the creativity in fashion design is so little, some copying should be allowed in the fashion design. If all kinds of copying in the fashion design were forbidden, the consequence would be to stifle all the creativity of the future fashion design.<sup>79</sup> Fashion designers would need to worry about any potential infringement or to pay for the royalties for every element in the fashion design they used. Preventing or permitting all kinds of copying would be an abuse of fashion design protection. If all kinds of copying is permitted, the fashion designers may not like to produce more design since there is no protection on products of their blood and sweat. On the other hand, if all kinds of copying is prevented, the excessive protection of fashion design will also hinder the public interests. Fashion designers need to be able to freely use the elements in the public domain created by prior fashion designers.

From the view of private rights, a fashion designer can both lose and benefit from the public domain.<sup>80</sup> The fashion designer needs to borrow elements from the public domain. At the same time, they do not want their fashion design to go into the public domain immediately after its publication. Therefore, when establishing a protection of fashion design, we need to weigh both the losses and gains. Since the fashion design industry is suffering from irreparable harms, striking a balance is the only way to the protect fashion design. We should protect the fashion design under intellectual property law, but the protection should be limited.

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76. *Id.*

77. *Id.*

78. COX & JENKINS, *supra* note 6, at 16.

79. *Id.* at 6.

80. BOYLE, *supra* note 13, at 62.

## V. Conclusion

Fashion design is created by human beings through the intellectual work of their brains. Does fashion design belong in intellectual property? These problems should be resolved first before deciding whether fashion design deserves intellectual property protection. According to Locke's labor-desert theory, the fashion design is the blood and sweat of fashion designers.<sup>81</sup> It should therefore be protected as an intellectual property right.

However, fashion design has not been protected for decades because fashion design is different from other traditional subject matters of intellectual property rights. First, fashion design is a short life-span product since the old fashion design will be replaced by a new fashion design each season. Second, fashion design has less creativity compared with other intellectual property regimes. For example, cutting the length of a dress or abandoning one or two sleeves of a blouse can be a new creation as a fashion design; but such level of creativity cannot be treated "new" under the design patent standards. Because of these two factors, whether or not we should protect fashion design is still a pending question.

According to the legal and economic analysis, fashion design is a profitable creation since fashion design is the center of the fashion industry, which annually makes hundreds of billions of dollars in profits. Today, the situation is different from decades ago because fashion design has to deal with the Internet threat. Thanks to the Internet which speeds the diffusion of information, the cheap knockoffs are sold on the market simultaneously or even before the models. If no proper intellectual property protections are granted to the fashion design, the fashion design might fall into the "tragedy of the commons" and the fair market competition might be destroyed by these unfair competitors.

The "piracy paradox" theory argues that merely weakened intellectual property protection circumstances are good for the development of fashion design and the fashion industry. However, the piracy paradox theory can only apply to the situation before the Internet threat, it cannot apply to the situation today. However, the piracy paradox theory and public domain theory together indicate that since the creativity in fashion design is relatively low, excessive intellectual property protections on fashion design could hinder the future development of fashion design. They could also hinder the fair market competition as the large fashion manufacturers acquire a monopoly to control the fashion market.

In order to resolve the conflict between the private rights and public interests, we should strike a balance when dealing with intellectual property protection on fashion design. The protection on fashion design shall achieve the goal by "striking a proper balance between the rights of a creator to the fruits of his labor and the right of future creators to free expression."<sup>82</sup>

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81. LOCKE, *supra* note 7, at 287-88.

82. *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959 (10th Cir. 1996).

That is to say, on the one hand, the law should protect the rights of fashion designers based on the constitution. The scope of intellectual property rights has been extended substantially in recent years. For example, the business method has been protected under patents. Software has been protected under copyrights. Trade dress has been protected under trademarks. It is time for the intellectual property to extend its rights to the fashion design.

On the other hand, the standard of protection on the fashion design should be limited to a certain scope. For example, “line-by-line”<sup>83</sup> copying should be avoided while the “the creation of derivative works”<sup>84</sup> copying should not be allowed in order to keep creativity for the future fashion design. The duration of fashion design protection should be limited relatively shorter than the other traditional intellectual property rights since fashion product is short-life product. Intellectual property protection of fashion design should be limited according to the special features of the fashion design. ■

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83. Raustiala & Sprigman, *supra* note 20, at 1205-06.

84. Berne Convention for the Protection of Literary and Artistic Works, Article 2 (1979).