

IP Protection of Fashion Design—

To Be or Not To Be, That Is the Question

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# IP Protection of Fashion Design— To Be or Not To Be, That Is the Question

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## I. Introduction

Fashion refers to “anything that is the current trend in look and dress up of a person<sup>2</sup>”, especially in clothing, foot wear and accessories. Nowadays, fashion surrounds our daily life and work. What we wear is a means to express ourselves instead of merely protecting people from cold and nakedness. Fashion design is products relates to aesthetic appeal or innovative ornamentation<sup>3</sup> and it is the centre of the fashion industry. Fashion industry is no longer just refers to a garment or a pair of shoes, today the fashion industry is a business which earns more than two hundred billion dollar per year<sup>4</sup>.

Fashion design is a creation made by humans. Meanwhile, fashion design is different from other human creations protected under intellectual property law because the short life cycle and minor differences of the product of fashion design. Because of the fast broadcast of the internet in the digital age, imitators are much easier to take a “free ride” on the creative fashion design, sometimes even before the original fashion products went onto the market. Meanwhile, fashion design is not protected under intellectual property rights and lacks IP protection. Therefore, there is a loophole for the fashion design protection in the legal system. As a creation

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<sup>2</sup> Valerie Cumming, *Understanding Fashion History*, "Introduction", Costume & Fashion Press, 2004, ISBN 0-8967-6253-X

<sup>3</sup> See <http://www.internationallawoffice.com/Newsletters/detail.aspx?g=d777c173-befc-4799-bcf2-1cb4c47fba46>

<sup>4</sup> C. Scott Hemphill & Jeannie Suk, *The Law, Culture, And Economics of Fashion*, 61 Stan. L. Rev. 1147, 1148

of human beings, should we protect fashion design? Should we protect fashion design under IP law? What kind of intellectual property right should we choose to protect fashion design-- under patent, trademark or copyright? Protecting the fashion design, to be or not to be, that is the question.

## **II. Labor-Dessert Theory**

Lockean'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>5</sup> According to Lockean'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 the fashion design made by themselves and enjoy intellectual property protection for their creative mental works.

However, the creativity in fashion design is different from other traditional creations in copyright or patent. The creativity in fashion design is relatively small. 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. Fashion designers seemingly spend less labor compared with the inventors of copyright and patent. In the Lockean approach, mixing an unowned but ownable goods with one's labor is considered an extension of the individual self and treated as a moral project<sup>6</sup>. However, should we consider the level of creativity here and decide whether fashion design should be protected under intellectual property law?

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<sup>5</sup> John Locke, *TWO TREATISES OF GOVERNMENT* 287-88 (Peter Laslett ed., Cambridge University Press 1967) (1698)

<sup>6</sup> Boudewijn Bouckaert, *What is Property?*, 13 Harv. J.L. & Pub. Pol'y 775, 813 (1990)

### A. Property View of Fashion Design

Is fashion design property? We mentioned the fashion industry is a profitable business, which annually earns hundreds of billions of dollars. However, such fact cannot directly prove that fashion design is property. Property is considered the most fundamental of real rights<sup>7</sup>; an owner of a 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. Property implies the right to complete control of the good<sup>8</sup>. Property rights are not defined as relations between men and things, but behavioural relations among men that arise from the existence of things. The property right is the set of economic and social relations with respect to the utilization of scarce resources<sup>9</sup>. So here comes the question, are fashion design scarce resources which need to be protected as the property right?

Scarcity is explicitly the rationale for modern law and economics<sup>10</sup>. Scarcity is a problem generated between unlimited human wants and limited resources. There are two kinds of scarcity: natural scarcity and artificial scarcity<sup>11</sup>. Nowadays, people need almost uninterrupted new fashion design. Meanwhile, there are a limited number of designers could spend limited time and mental works to create limited new fashion design. There is an artificial scarcity that exists in the fashion design.

### B. Intellectual Property View of Fashion Design

Intellectual rights have to be qualified as property rights<sup>12</sup>. There is a core similarity between physical property and intellectual property—the attempt to use a legally created

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<sup>7</sup> Id. at 794.

<sup>8</sup> Boudewijn Bouckaert, *What is Property?*, 13 Harv. J.L. & Pub. Pol'y 775, 794 (1990)

<sup>9</sup> Pejovich, *Towards an Economic Theory of the Creation and Specification of Property Rights*, in *ECONOMICS OF LEGAL RELATIONSHIPS* 35-52 (H. Manne ed. 1975).

<sup>10</sup> Boudewijn Bouckaert, *What is Property?*, 13 Harv. J.L. & Pub. Pol'y 775, 797 (1990)

<sup>11</sup> Boudewijn Bouckaert, *What is Property?*, 13 Harv. J.L. & Pub. Pol'y 775, 798 (1990)

<sup>12</sup> Boudewijn Bouckaert, *What is Property?*, 13 Harv. J.L. & Pub. Pol'y 775, 795(1990)

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privilege to solve a potential public goods problem<sup>13</sup>. But not all the intellectual property rights are treated as property rights. In spite of the fact that fashion design is property, this cannot directly result in that fashion design is intellectual property rights. Some scholars argue that fashion design is an art and the IP protection it deserves is long overdue<sup>14</sup>. However, some other scholars argue that fashion design need not to be protected<sup>15</sup>. Does fashion design belong to the subject matter of intellectual property rights?

The U.S. Constitution states that “[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>16</sup>.” Actually, the scope of the “science and useful arts” is pretty vague. Moreover, the level of creation is pretty vague. Here we say fashion design is not belongs to the intellectual property mainly because fashion design fall between the seams of traditional intellectual property protections<sup>17</sup>. Therefore, we don’t say fashion design is not an intellectual property right, but currently, fashion design literally cannot be protected under the intellectual property legal system.

Although Copyright can protect fashion design from directly copying from others, copyright merely protects the expressions instead of ideas and functionality of creations. To fashion design, the artistic form cannot separate from the functionality<sup>18</sup>. Therefore, copyright can merely protect some elements of fashion design and copyright cannot protect fashion design itself. Design patents seemingly fit the background of fashion design. Moreover, design patent

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<sup>13</sup> James Boyle, *The public Domain: enclosing the commons of the mind*, 8, Yale University Press, 2008, ISBN: 978-0-300-13740-8

<sup>14</sup> 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. 473, 511

<sup>15</sup> See Raustiala Kal & Christopher Springman, *The Piracy Paradox revisited*, 61 Stan. L. Rev. (2009)

<sup>16</sup> USCS Const. Art. I, § 8, Cl 8

<sup>17</sup> Christine Cox & Jennifer Jenkins, *Between the Seams, A Fertile Commons: An Overview of the Relationship Between Fashion and Intellectual Property*, The Norman Lear Center, Jan. 29, 2005, at 6.

<sup>18</sup> Christine Cox & Jennifer Jenkins, *Between the Seams, A Fertile Commons: An Overview of the Relationship Between Fashion and Intellectual Property*, The Norman Lear Center, Jan. 29, 2005, at 10.

offers a broader scope of protection if the patent is issued. However, fashion 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. Moreover, design patents protect the appearance of an invention instead of the functionality. As mentioned before, the absence of separability of fashion design leads to the absence of patent protection. Trade dress under trademark law seemingly another good way to protect fashion design, but firstly, there is still a separability requirements for trade dress. Secondly, despite the fact that some appearance of fashion design can separate from functionality, in order to be protected as trade dress, the owner of fashion design should prove the fashion design acquires the Secondary Meaning. Since fashion design is a short-life product, it hardly meets the secondary meaning requirement, except for a few large fashion manufactures like Louis Vuitton, Gucci, or Prada.

Intellectual property rights do not protect a factual and physical control on ideas but rather the monopoly of natural ownership of the owners prevented this monopoly<sup>19</sup>. In recent years, the scope of intellectual property protection has expanded greatly in a variety of fields. Patents now are granted over plants and software, even business methods. Copyright terms have been extended to life plus 70 years – far longer than the 14-year term originally contemplated by the drafters of the Constitution<sup>20</sup>. Software could be registered and protected under copyright as a new intellectual property rights. Should fashion design be saved from the seams between traditional IP protections? Should fashion design be protected under intellectual property law as a new kind of rights? According to the “labor-dessert” theory, the answer is yes because fashion

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<sup>19</sup> Boudewijn Bouckaert, *What is Property?*, 13 Harv. J.L. & Pub. Pol'y 775, 803 (1990)

<sup>20</sup> Christine Cox & Jennifer Jenkins, *Between the Seams, A Fertile Commons: An Overview of the Relationship Between Fashion and Intellectual Property*, The Norman Lear Center, Jan. 29, 2005, at 5.

design is valuable human creations, and because currently the valuable creations are suffering from an irreparable harm.

Do protection created value or do value created protection? This is like a chicken and egg problem under Intellectual property rights. The protection of fashion design will protect the existed value of fashion design or leads to adding broader monopoly power to the fashion manufacturers? This question leads 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 “so-called property rights”, which is qualified as a kind of government intervention in the market place. Thus it would 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 creation of human beings. According to this point of view, since fashion design is the center of a billion worthy 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 limited time of monopoly power to the creator on the creation, while protecting the public interests. Based on the traditional argument, without intellectual property protection,

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creators will lack incentives to create and the creative industries will wither<sup>21</sup>. Under this formula, since fashion design fall into the seams of traditional intellectual property protection, currently fashion design cannot gain intellectual property protection. The fashion designers will lack incentives to create new design and the whole fashion industry will wither. However, the real fact is that although lacking in protection, designers continue to create new fashion design and the fashion industry continues to grow. The fashion industry has existed and mass-produced for hundreds of years since the beginning of 20<sup>th</sup> century, followed with the rise of new technologies like the sewing machine; and the industry is still running and expanding today. Since the fashion industry continues developing without the intellectual property protection of fashion design for hundreds of years, isn't it nonsense to protect the fashion design now?

### B. Internet Threat<sup>22</sup> and Fashion Design

Today, 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”, the knockoffs come onto the market even before the original<sup>23</sup>. With the internet broadcast of the runway show and transmitted electronically to a low-cost contract manufacturer overseas, the large-scale, low-cost copies are rapidly made. Therefore, thousands of inexpensive copies can be produced in six weeks or even less<sup>24</sup>. Historically designers once accepted the unauthorized copies as a way to show how popularity of their fashion designs. Today, the fast fashion copies are totally another story because of the terrible speed of copies.

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<sup>21</sup> Christine Cox& Jennifer Jenkins, *Between the Seams, A Fertile Commons: An Overview of the Relationship Between Fashion and Intellectual Property*, The Norman Lear Center, Jan. 29, 2005, at 16.

<sup>22</sup> James Boyle, *The public Domain: enclosing the commons of the mind*, 54, Yale University Press, 2008,ISBN: 978-0-300-13740-8

<sup>23</sup> 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. 473, 478

<sup>24</sup> C. Scott Hemphill& Jeannie Suk, *The Law, Culture, And Economics of Fashion*, 61 Stan. L. Rev. 1147, 1171



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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 from the benefits fashion designers' work, but also sell products of fashion design before the original. The phenomenon that knock offs pre-empt the market of the originator cannot be tolerated by intellectual property rights. On the contrary, the infringers steal the fashion design and sell exactly the same products, and there are no regulations to protect the fashion designers from the piracy. With the rising of the Internet, today we should think twice whether we need to treat fashion design as a subject matter under intellectual property law.

Go back to the formula mentioned before,, owners of fashion design should compete with the fast fashion infringer without any intellectual property protection. However, the products of the fast fashion infringers are faster and cheaper than the originator of the fashion design. This is obviously an unfair competition, which is easy to see the result-- the true fashion designers will lose the game while the infringer will benefits from the unfair competition. The fast fashion infringers create nothing but they benefit from the sweat and blood of the original fashion designers. Such conduct is unfair enough that fashion designers will lack incentives to create new fashion design. There is a big possibility that the whole fashion industry will wither because fashion designers and their new design are the center of the fashion industry which can never be lost. Therefore, from the economic aspect of encouraging creativity of fashion designers, we should consider protecting the fashion design under intellectual property rights.

### C. Tragedy of Commons and Fashion Design

The Tragedy of Commons was mentioned by Professor Hardin in 1968. His article mainly talked about a dilemma, in which multiple individuals acting independently and rationally consulting their own self-interest will ultimately deplete a shared limited resource even

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when it is clear that it is not in anyone's long-term interest for this to happen<sup>25</sup>. If fashion design cannot be properly protected under IP law, fashion design may fall into the "tragedy of commons" with the real-time information system.

Before the Internet Threat, fashion designers created new fashion design refer to the elements of original design in the public domain. The designers benefited from their fabulous works through selling the products based on the fashion design. At the meantime, the fashion design directly went into the public domain right after the publication. Then other manufacturers might copy the fashion design in the public domain and benefited from the productions based on the same fashion design after the genuine innovations went onto market. In such circumstance, there was no harm to the original fashion design. Moreover, the public domain was extended by the new fashion design. Fashion designers somehow liked such copying because the copying showed that their fashion design was really popular. It was more like "comedy" of commons instead of tragedy of commons because everyone benefited from the fashion design and no one was infringed or hurt.

However, it is another story today. In the Digital Age, the broadcast of a fashion show is much easier and faster. The high speed of the diffusion of information is the background of the protection on fashion design today. Fashion designers created new fashion design. Similarly, they borrowed some elements of original fashion design in the public domain. However, the infringers immediately copied and send the fashion design to the manufacturer right after the publication, in few days, few hours or even in few minutes. Therefore, the knock offs based on the fashion design were sold onto the market in few weeks. Such conduct resulted in that infringers benefited from the same fashion design at the same time with, or even before the original innovator. Consequently, consumers might think that the fashion products from the

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<sup>25</sup> Garrett Hardin, *The Tragedy of the Commons*, Science, Vol. 162, 1243-1248 (1968).

original innovator were out of fashion as they entered the market later than the infringers. In the fashion industry, being second can even be a death blow. Because fashion products were short-life products, merely one month later could make a huge difference. Sometimes, the copies had already sold in the discount area after one month, while the genuine products began to enter onto the market. The value of the fashion design was diminished by the copying because of the “old” association with the original design. An evaluation like “old” or “out of fashion” was fatal for a fashion design. Moreover, the reputation of the fashion designer was harmed by the bad association. Plus, the society normally relies on “Market Signals” to allocate resources<sup>26</sup>. If a fashion design is considered as “old”, this fashion design can no longer be a market signal to attract investments for further producing. The value of the fashion design is diminished by the fast-fashion infringers. And at that time, the fashion designers could not protect their fashion design because the fashion design has already gone into the public domain. Probably hence then the innovator didn’t want to create new things and extended the public domain of fashion design since his or her design got no protections. The entire fashion industry might be harmed by the expiration of the resource in the public domain of fashion design. Above all, this is how the fashion design falls into the tragedy of commons after the appearing of Internet Threat.

Using the original innovations created by the other fashion designers are in each manufactures’ interest. With the speedy copying, the value of the original fashion design is damaged. The fashion designers may lose the incentive to create more fashion design. Or the fashion designers may pay less effort when creating a new fashion design as the fashion designers know the fashion design is not protectable. Thus the public domain of fashion design may diminish. Then this harm is related to all the fashion designers and manufactures. The

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<sup>26</sup> James Boyle, *The public Domain: enclosing the commons of the mind*, 2, Yale University Press, 2008, ISBN: 978-0-300-13740-8

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infringers receive most of the benefits from the literally copying, while the damage to the commons is shared by the entire fashion industry. Without proper regulations, we can predict that more and more infringers will literally copy the fashion design, thus more fashion design will be harmed. 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. Then maybe the whole fashion industry will 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 hinders competition? Or will the protection of fashion design stop the unfair competition and promote fair market competition? These questions are the main questions need to be considered when establishing a proper protection of fashion design.

IPR is a monopoly power granted by the government for a limited time in order to encourage creators disclosing their innovations. The essence of the IPR is monopoly power. If excessive IPR is granted to the fashion design, monopoly is likely to be created. Such protection might “hinder competition and drive up prices for consumer goods.<sup>27</sup>” In practice, the large fashion manufactures have already acquired a strong IP protection on their fashion products. Counterfeiting well-known trademarks is even a crime. The large fashion manufactures usually combine their logos and fashion design together—think about the special decorative patterns on the LV or Coach bags. Therefore it is hardly to copy the fashion design of the large fashion manufactures without infringing their trademarks. Since the large fashion manufactures have already acquired a strong protection, if they are granted excessive protection on their fashion

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<sup>27</sup> Christine Cox& Jennifer Jenkins, *Between the Seams, A Fertile Commons: An Overview of the Relationship Between Fashion and Intellectual Property*, The Norman Lear Center, Jan. 29, 2005, at 6.

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design, as a result, they may acquire excessive monopoly rights and hinder the fair market competition. Actually, the monopoly consideration is one of the main reasons that the policy makers didn't like granting protection on the fashion design.

However, on the contrary, if there is no protection on fashion design, the market competition of fashion industry might be destroyed by the fast-fashion infringers. Fast-fashion infringers need not to cultivate their own fashion designers because they "steal" the fashion design from others. Therefore, they need not to pay for the fashion designers when using their design. Moreover, the fast-fashion infringers usually produce the copies of the fashion design in low quality; the knockoffs are much cheaper than the genuine productions. Since the copies and models enter onto the market at the same time, or sometimes even before the models, there is an unfair competition exist to the genuine innovators. They compete with exactly the same fashion products which are much cheaper than their own products at the same time. Therefore the fair market competition might be destroyed by the fast-fashion infringers.

One of the goals for providing protection on fashion design is to maintain the market competition<sup>28</sup>. IP protection on fashion design shall enhance the competitiveness of small and medium sized enterprises (SME) by stopping the infringers reaping from their harvests. At the same time, fashion design protection shall avoid granting monopoly power to the large fashion manufactures since the large fashion manufactures have already acquire a strong protection—both IP and criminal protection—on their fashion protects.

From the 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.

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<sup>28</sup> 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. 473, 481

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 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. Only in an environment of weak IP protection of fashion design, the public domain can be extended. One of the most famous arguments is called “piracy paradox”.

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

Since the born of intellectual property rights, it has been developing with balancing the private rights and public interests. However, usually it is hardly to find a proper balance point between the private rights and public interests in practice. Piracy Paradox argues that scholars shall pay more attention to the public interests and less attention to the private rights to fashion design protection. In other way, “[w]eaken individual designers and strengthen the industry and drives its evolution.<sup>29</sup>”

Piracy Paradox states that piracy is paradoxically beneficial to the fashion industry in the long run<sup>30</sup>. Copying is helpful, not harmful to the fashion design. Rustiala Kal and Christopher Springman argue that first, copying of fashion design contributes to a process of “induced obsolescence”<sup>31</sup>. That is to say, copying helps to diffuse fashion design into the mainstream—“where they lose their appeal for fashion cognoscenti”<sup>32</sup>. Second, they argue that copying helps

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<sup>29</sup> Raustiala Kal & Christopher Springman, *The Piracy Paradox revisited*, 61 Stan. L. Rev. 1209(2009)

<sup>30</sup> Raustiala Kal & Christopher Springman, *The Piracy Paradox revisited*, 61 Stan. L. Rev. 1203(2009)

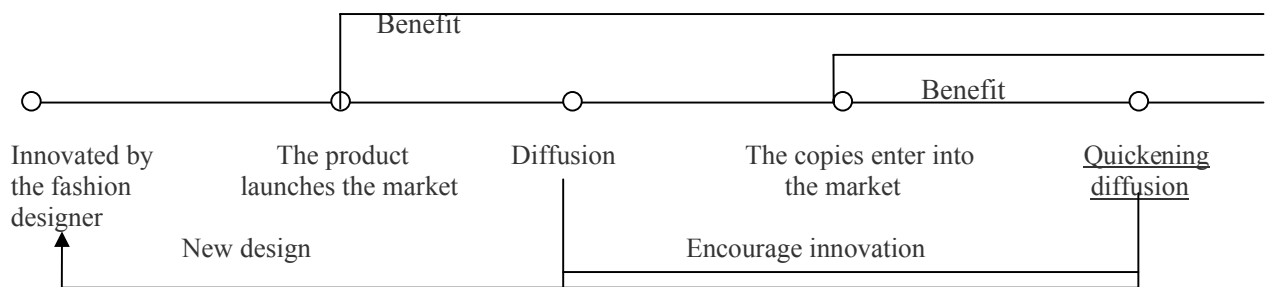
<sup>31</sup> Raustiala Kal & Christopher Springman, *The Piracy Paradox revisited*, 61 Stan. L. Rev. 1203(2009)

<sup>32</sup> *Id.*

“anchor” trends<sup>33</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. The fundamental of the piracy paradox theory is “the fashion industry operates best in an environment of comparatively weak IP rules.<sup>34</sup>” That is to say, there is no need to protect fashion design under IP law.

This theory once worked well before the generation 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’s true that firms continue to make significant investments in the production and distribution of new fashion design although others are perfectly to copy<sup>35</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>36</sup>. The perfect innovation-diffusion circle is destroyed by the FAST-fashion infringers.

The old innovation-diffusion circle works as:



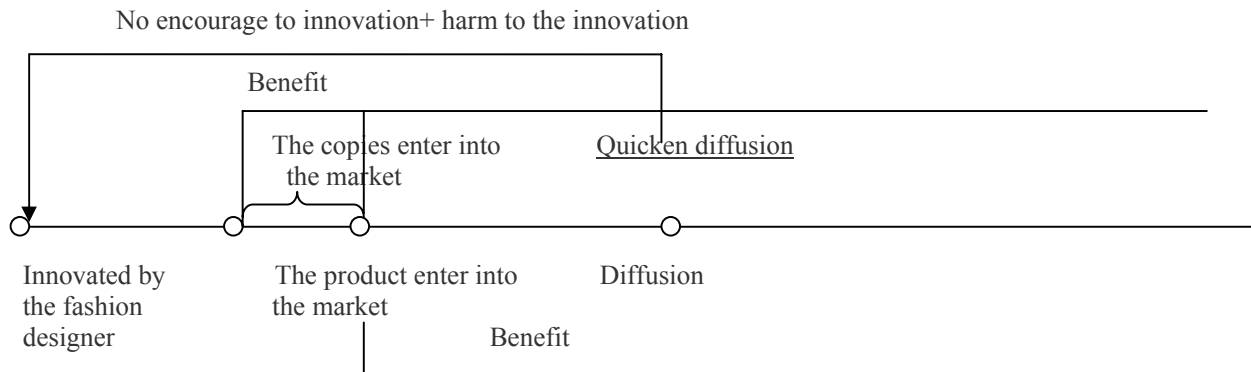
<sup>33</sup> Id.

<sup>34</sup> Raustiala Kal & Christopher Springman, *The Piracy Paradox revisited*, 61 Stan. L. Rev. 1205(2009)

<sup>35</sup> Raustiala Kal & Christopher Springman, *The Piracy Paradox revisited*, 61 Stan. L. Rev. 1217(2009).

<sup>36</sup> Id.

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, Raustiala Kal and Christopher Springman present two kinds of appropriation. One is “line-by-line copying”. The other is “the creation of derivative works”<sup>37</sup>. Although both the two terms are considered appropriation under the piracy paradox theory, the two terms should be distinguished today. Line-by-line copying is misappropriation and the creation 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. Like copying a book written by other authors, like copying a song sung by others, like copying a painting draw by others, the fast fashion infringers reap from where another has sown. Such conduct cannot be tolerated under today’s IP law.

As mentioned before, fashion design is different from the other traditional IP subject matters, as fashion design has less creativity compared with copyright or patent subject matter. Therefore “the creation of derivative works” is an appropriation since the derivative works

<sup>37</sup> Raustiala Kal & Christopher Springman, *The Piracy Paradox revisited*, 61 Stan. L. Rev. 1205(2009).



satisfied the requirements of new as a fashion design. “Derivative means a work that appropriates certain design elements of a modal design, but is nonetheless visually distinguishable to the average observer.<sup>38</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>39</sup>.

Therefore, the “piracy paradox” theory is not proper for the fashion design protection under 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

Public domain refers to works, ideas, and information which are intangible to private ownership and/or which are available for use by members of the public<sup>40</sup>. Intellectual property rights not merely produce innovation by rewarding creators. Intellectual property rights create a feedback mechanism that dictates the contours of information and innovation production<sup>41</sup>. The scope of IP infringement was expended since today the Internet makes copying easier, cheaper and in an unparalleled global scale.<sup>42</sup> Therefore we must face the greater danger with expanded protections on IPR. Although such expansions may have reduce the rights that citizens thought

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<sup>38</sup> Raustiala Kal & Christopher Springman, *The Piracy Paradox revisited*, 61 Stan. L. Rev. 1205-1206 (2009).

<sup>39</sup> Raustiala Kal & Christopher Springman, *The Piracy Paradox revisited*, 61 Stan. L. Rev. 1209(2009).

<sup>40</sup> Stern, Prof Richard H, *L.H.O.O.Q. Internet related Derivative Works*, Supplemental material Computer Law, The George Washington University Law School , 484(2001) see <http://docs.law.gwu.edu/facweb/claw/Lhooq0.htm>.

<sup>41</sup> James Boyle, *The public Domain: enclosing the commons of the mind*, 7, Yale University Press, 2008,ISBN: 978-0-300-13740-8

<sup>42</sup>James Boyle, *The public Domain: enclosing the commons of the mind*, 60, Yale University Press, 2008,ISBN: 978-0-300-13740-8

they had in practice—fair use, low-level noncommercial sharing among friends, resale<sup>43</sup>. However, without an increase in private property rights, “cheaper copying will eat the heart out of our creative and cultural industries.<sup>44</sup>” The situation is exactly the same when dealing with fashion design protection.

The goal for IP protection of fashion design is offering incentives to fashion designers. The expected result is creating more original and creative fashion design. And as the protection expired, more fashion design return to the public domain and enrich the public domain. Therefore we cannot allow such cheaper copying eat the heart of the creative of fashion design. In order to protect the future extension of public domain against the Internet Threat, expanding the IP protection to fashion design is necessary.

However, as mentioned before, fashion design is different from other traditional subject matters of IPR. Because of the little creativity, fashion designers need to “borrow, imitate, revive, recombine, transform and share design elements<sup>45</sup>” when create new a fashion design, the creativity in fashion design is so little, some copying should be allowed in the fashion design. If all kinds of copy in the fashion design were forbidden, the consequence would be stifled all the creativity of the future fashion design<sup>46</sup>. Because fashion designers need to worry about any potential infringement or to pay for the royalties for every elements in the fashion design they used. Preventing all kinds of copying would be an abuse of fashion design protection. No protection of fashion design will reduce the public domain, and vice versa, the excessive

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<sup>43</sup> James Boyle, *The public Domain: enclosing the commons of the mind*, 60, Yale University Press, 2008, ISBN: 978-0-300-13740-8

<sup>44</sup> *Id.*

<sup>45</sup> Christine Cox & Jennifer Jenkins, *Between the Seams, A Fertile Commons: An Overview of the Relationship Between Fashion and Intellectual Property*, The Norman Lear Center, Jan. 29, 2005, at 16

<sup>46</sup> Christine Cox & Jennifer Jenkins, *Between the Seams, A Fertile Commons: An Overview of the Relationship Between Fashion and Intellectual Property*, The Norman Lear Center, Jan. 29, 2005, at 6.

protection of fashion design will also hinder the public interests. Fashion designers need 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>47</sup>. The fashion designer needs to borrow elements from the public domain. At the same time, he or she does not want his or her fashion design goes into the public domain immediately after the publication. Therefore, when establishing a protection of fashion design, we need to weigh both the loss and gain. Since the fashion design is suffering from irreparable harms, striking a balance is the only way to the protect fashion design. We shall protect the fashion design under Intellectual property law, but the protection shall be limited.

## **V. Conclusion**

Fashion design is created by human beings through the intellectual work of their brains. However, does fashion design belong to property? Does fashion design belong to intellectual property? These problems should be resolved first before deciding whether fashion design should acquire IP protection. According to Lockean's labor-desert theory, the fashion design is the blood and sweat of fashion designers. Therefore, it should be protected as IPR.

However, fashion design hasn't been protected for decades of years because fashion design is different from other traditional subject matters of intellectual property rights. First, fashion design is short lifestyle product since the old fashion design will be replaced by new fashion design each season. Second, fashion design has less creativity compared with other intellectual property rights. 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

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<sup>47</sup> James Boyle, *The public Domain: enclosing the commons of the mind*, 62, Yale University Press, 2008, ISBN: 978-0-300-13740-8

be treated “new” under the design patent standards. Because of the two features, whether protecting fashion design or not is still pending in practice.

According to the legal and economic analysis, fashion design is profitable creation since fashion design is the center of the fashion industry, which annually profits hundreds of millions of dollars. Today, the situation is different from decades ago because fashion design has to confront with the Internet Threat. Thanks to the internet which quicken the diffusion of information, the cheap knockoffs are sold on the market simultaneously or even before the models. If no proper IP protections are granted to the fashion design, the fashion design might fell into the “tragedy of commons” and the fair market competition might be destroyed by these unfair competitors.

The “piracy paradox” theory argues that merely weaken IP protection circumstance is 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, 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 IP protection on fashion design can hinder the future development of fashion design. Excessive IP protection on fashion design can hinder the fair market competition as the large fashion manufactures acquire a monopoly to control the fashion market.

In order to resolve the confliction between the private rights and public interests, we should strike a balance when dealing with IP 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>48</sup>” That is to say, on the one hand, the law should protect the rights of fashion designers based on the constitution.

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<sup>48</sup> *Cardtoons, L.C. v. Major League Baseball Players Ass’n* 95 F. 3d 959 (10th Cir. 1996)

## ATRIP 2011 Essay Competition

The scope of intellectual property rights has been extended a lot in recent years. For example, the business method has been protected as patent. Software has been protected as copyright. Trade dress has been protected as trademark. 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>49</sup>” copying should be avoided while the “substantial similar” 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. IP protection of fashion design should be limited according to the special features of the fashion design.

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<sup>49</sup> Raustiala Kal & Christopher Springman, *The Piracy Paradox revisited*, 61 Stan. L. Rev. 1205-1206 (2009).