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Hung Out to Dry: Clothing Design Protection Pitfalls in United States Law

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II. Clothing Design Protection Under Patent Law

"It is with some trepidation that I venture to determine what is the 'ordinary skill' of designers of intimate articles of feminine apparel because such skill, at least to a mere man, seems to have no ordinary limitations." n3

Utilitarian items, such as clothing, are the proper realm of patent law. Under its umbrella of coverage are utility patents, design patents, plant patents, and business method patents. Historically, clothing designs have obtained some protection under both utility patent and design patent protection.

A. Utility Patents

Patents typically protect works of scientific or engineering merit, or in Constitutional language, "discoveries" in the "useful arts." n4 The first patent statute was enacted in 1790, assigning the task of determining whether inventions were "sufficiently useful and important" to merit a patent to a distinguished group of federal officers: the Secretary of State, the Secretary of War and the Attorney General. n5 Patent laws have evolved continually from that time, balancing a delicate tension between "granting a monopoly for every trifling device" n6 and encouraging innovation and the disclosure of trade secrets. In the current patent statute, The Patent Act of 1952 ("The Patent Act"), patentable inventions are divided into four general categories: processes, machines, articles of manufacture, n7 or [*172] compositions of matter. n8 Classification into a category is of little importance to the rights the patent owner obtains; it is generally conceded that the categories of machine, articles of manufacture and composition of matter together include the vast majority of manmade structures, referred to as "product" patents. n9 Examples of utility patents granted for clothing include: "bra with straps for matching clothing," n10 "odor absorbing clothing," n11 and a cape with a special pocket by which the cape can be folded into a pillow or used to store gloves when not so folded. n12

In order to be eligible for utility patent protection, an invention must satisfy several criteria set forth in sections 102 and 103 of The Patent Act. n13 These requirements are generally reduced to four standards: originality, utility, novelty, and nonobviousness. The first requirement, originality, limits the filing of patent applications only to the true inventor of an invention. n14 This requirement restricts patent grants to the first person or persons who discovered the invention and not to a subsequent inventor or someone who has surreptitiously appropriated the invention. This requirement is of particular importance in the U.S. patent system, where patent rights are granted on a "first to invent" basis n15 rather than on a "first to file" basis, the prevailing international standard. The second requirement, utility, mandates that an invention must perform a positive benefit to society. n16 This is measured by a three-part test: the invention must be capable of producing the intended result, perform some minimum human purpose, and not serve a purpose that is illegal, immoral or

contrary to public policy. n17 The third requirement, novelty, "lies at the heart of the patent system" n18 and requires a stringent showing that all of the features of a proposed invention (1) were not patented or otherwise described in a printed publication anywhere in the world more than one year prior to the filing of the patent application, (2) [*173] were not known or used in the U.S. more than one year prior to the filing of the patent application, and (3) were not previously invented by a U.S. inventor more than one year prior to the filing of the patent application. n19 If an invention is not novel, it is unpatentable. n20

Finally, the inventor must also demonstrate a fourth requirement, nonobviousness. n21 Nonobviousness requires that the invention not be "obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains." n22 In other words, the invention should not be readily apparent to the average person skilled in that field based on previously disclosed inventions. n23 To determine whether a claimed invention was obvious, the following factors are considered: the scope and content of the prior art, the differences between the prior art and the patent claims at issue, and the level of ordinary skill in the pertinent art. n24 Secondary factors, such as the degree of commercial success of the invention, whether the invention satisfied a long-felt need, and whether others expressed skepticism that the invention could be made, may also be considered in the obviousness determination. n25

After satisfying the four tests outlined above, the invention must then be disclosed and described in the patent application. The patent must disclose both how to make and how to use the invention in a manner such that a person "skilled in the art" could reproduce and use the invention. n26 In exchange for this disclosure, the inventor receives the exclusive right to manufacture and sell the invention for a period of twenty years. n27 The patent claims determine the scope of protection afforded by a utility patent, with an emphasis on the literal [*174] language of the claims. n28 Claims are therefore of key importance and are drafted as broadly as possible to prevent others from designing around the patent claims to create a non-infringing product. For example, U.S. Patent No. 6,212,686 for an "Expandable shirt collar" has 17 claims. n29 The first claim is broadest and describes the invention as it currently exists. n30 The other 16 claims are narrower dependent claims and describe alternate methods of achieving the same result, including use of different materials and different methods of attaching the collar to the neckline of the shirt. n31

Should the patent issue, the inventor has the right to sue unauthorized manufacturers of the invention for infringement, regardless of whether the infringement is innocent or intentional. In order to determine whether a patent has been infringed, the court conducts an infringement proceeding. During this proceeding, the court will determine the exact meaning of the patent claims n32 and compare the accused device to the patent claims to determine whether every limitation set forth in the patent claim is present in the infringing device either literally or by a substantial equivalent. n33 Therefore, in order to avoid a finding of infringement, a copyist must design around the claims of a utility patent, creating a product that is essentially a good substitute for the patented invention rather than an exact replacement.

Because redesigns of existing patents are often difficult to achieve, clothing designs that qualify for utility patent protection generally receive strong protection, particularly if the underlying utility patent technology dictates the outward appearance of the article. The weakness of utility patents for clothing, however, is that there is nothing to restrict a copyist from designing a garment with a similar appearance but a different underlying technology. For example, in *Flanagan v. Continental Apparel Corp.*, n34 while three of the defendant's sports bras were similar enough to the plaintiff's

to [*175] warrant the plaintiff filing for patent infringement, only one of the bras was ultimately deemed infringing. n35 To obtain a monopoly on the appearance of the invention, inventors must look to design patent law.

B. Design Patents

Congress enacted the first design patent laws in 1841. n36 The subject matter covered by these laws included:

any new and original design for the printing of woolen, silk, cotton, or other fabrics ... any new and useful pattern, or print, or picture, to be either worked into or worked on, or printed or painted or cast or otherwise fixed on, any article of manufacture, or any new and original shape or configuration of any article of manufacture. n37

In order to obtain such a patent, a showing had to be made that the inventor had invested time, effort and expense to develop the design and that the design had not been known or used by others prior to the filing. n38 A design patent initially afforded protection for only seven years, while utility patents received protection for fourteen years. n39 In the latest revision of design patent laws, The Patent Act, Congress changed the lengthy list of covered subject matter to a simple statement that "any new, original, and ornamental design for an article of manufacture" n40 is eligible for protection for a fourteen year term, n41 six years less than the twenty year term granted utility patents. n42

Design patents are a strange compromise between copyright, trademark and patent protections. While the threshold requirement [*176] for a copyright is a minimum standard of originality, n43 design patents require a stricter combination threshold standard of originality, novelty, and nonobviousness, and also require that the design be ornamental. n44 Design patents do not require a showing of utility as is required for utility patents. n45 Indeed, articles dictated solely by considerations of function are barred from design patent protection, n46 similar to functionality restrictions in trademark law. n47 The litmus test for functionality of design patents has been formulated as follows:

the design of a useful article is deemed to be functional when the appearance of the claimed design is "dictated by' the use or purpose of the article... . When there are several ways to achieve the function of an article of manufacture, the design of the article is more likely to serve a primarily ornamental purpose. n48

Just because a design consists of some utilitarian elements will not result in a denial of protection so long as the design viewed as a whole is not dictated by the utilitarian purpose. n49

While demonstrating that a design is not dictated by functionality concerns is one challenge, the primary difficulty clothing designs have faced in achieving design patent protection is demonstrating nonobviousness. In the clothing design field, the standard courts have applied is whether the design would be obvious to a skilled dressmaker "who has, or is chargeable with, knowledge of the prior art." n50 The judiciary developed this standard to set a very high bar for new designs. "More is required for a valid design patent than that the design be new and pleasing enough to catch the

trade; it must be the product of "invention," by which is meant that conception of the [*177] design must demand some exceptional talent beyond the skill of the ordinary designer." n51 Varying the scale of a prior known design is not sufficient, n52 nor is combining known design elements in a novel way. n53 In fact, the nonobviousness standard is so demanding that even new clothing designs that do not incorporate any known design elements can still fail to qualify for design patent protection. n54 Some courts have expressed doubts that clothing could ever qualify for design patent protection, n55 and there is some suggestion that the main use for design patents is not to protect design but rather as a fallback for inventions that cannot obtain utility patent protection. n56

If a clothing design is able to qualify for design patent protection, the scope of protection can be substantial. Design patents have a single claim and the scope of protection "is limited to what is shown [*178] in the application drawings." n57 In order to prove infringement of a design patent, it is not necessary to show that the infringing design is identical to the original, but that it must be similar enough "such that an ordinary observer would be likely to purchase one thinking it was the other." n58 When making the comparison, a court should consider the design in its entirety, and compare the accused design to the claimed design and not to the commercial embodiment of the design in a product. n59 Additionally, infringement of a design patent cannot be disclaimed by prominently labeling a look-alike product with another trademark. n60

This "ordinary observer" test is clearly difficult to apply and the results are often very subjective. In *Avia Group International v. L.A. Gear California, Inc.*, n61 the Federal Circuit upheld the district court's finding that defendant's emulation of the plaintiff's tennis shoe sole was similar enough to infringe the design patent, although not exact in every detail. n62 In *Rockport Company, Inc. v. Deer Stags, Inc.*, n63 the court found that the design patent for walking shoes was infringed even though the defendant's shoes had altered the shape of the mud guard as well as the "double layer of shoe extending from the bottom of the eyestay to between the second and third eyelets." n64 In *Aerogroup International v. Marlboro Footworks*, n65 the court engaged in a detailed comparison of the soles of five of defendant's shoes against plaintiff's design patent and ultimately determined four were not infringing and one possibly was, though the exact reason for this conclusion is not entirely clear. n66

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C. Patent Law as a Model for Design Protection

While utility patents continue to serve a purpose for clothing designs, which are functional in some way beyond mere decoration of the body, this protection covers only a small percentage of the clothing designs created. Design patents, while intended to provide broader protection, are difficult to obtain because of the nonobvious requirement. However, even if design patents were easier to obtain, they are an unattractive form of design protection for the clothing industry for many reasons. First, the expense involved in obtaining a design patent can be considerable. In addition to paying attorney fees to draft the patent application, the applicant must also pay filing and issuance fees. The current fee for filing a design patent application with the U.S. Patent and Trademark Office ranges from \$ 160 to \$ 320 USD and the issuance fee ranges from \$ 220 to \$ 440 USD. n67 Also, each design patent must be subjected to a lengthy examination process before the design patent is issued, with common delays at the patent office. In 1975, the Patent Office had a goal of reducing average pendency for design patent applications to 18 months. n68 In 1997, the average pendency for a patent application was 22.2 months with a goal to reduce pendency to 12 months or less for all

inventions. n69 With the business lifespan of the average clothing design lasting only one season (a few months to a year at most) design patent protection would come far too late to be of much value. n70

[*180] The patent process favors inventions with a long or unlimited commercial life, primarily in the utility patent arena. Utility patent applicants receive several advantages that design patent applicants do not. For example, a utility patent applicant may opt for a one-year provisional patent n71 in which the inventor submits a simpler application containing a description and drawings of the invention and pays a lower fee. n72 Under the provisional patent process, the inventor also gains an experimental period in which to determine the marketability of the invention. No such opportunity to test the waters is afforded for design patent applicants. Likewise, while utility patent applicants are allowed to use their inventions in an experimental way more than one year before filing a patent application without risk of a novelty challenge, no such defense is recognized for design patents. n73

These limitations only add to designers' frustrations with the patent system. After many years of failing to shoehorn clothing designs into the rigid design patent scheme presumably intended for their protection, designers have sought a more sympathetic ear from other forms of intellectual property protection.

III. Clothing and Copyright

"Individual perception of the beautiful is too varied a power to permit a narrow or rigid concept of art." n74

U.S. copyright law applies to "original works of authorship fixed in any tangible medium of expression" that are created under the guise of eight enumerated categories of works recognized by the 1976 Copyright Act ("the Copyright Act"). n75 While clothing does not fit [*181] readily under any category in this list, the best fit would likely be "pictorial, graphic and sculptural works," i.e., clothing as a wearable sculpture. n76 If this classification were available, clothing would be placed on a par with other works of art. Clothing designers would obtain the benefits of a relatively easy and inexpensive registration process and the risk of overprotection and stifling of creativity would be minimized through fair use and independent origination defenses. However, this form of copyright protection is not available to clothing designers, due primarily to a policy known as the "useful articles doctrine" which limits copyright protection for items with a functional as well as artistic purpose. There are also objections on artistic grounds as to whether clothing design really ought to qualify as "art."

A. The Useful Articles Doctrine

Section 113 of the Copyright Act, informs us that there is an important exception to the protection of works in the pictorial, graphic and sculptural category. "This title does not afford, to the owner of copyright in a work that portrays a useful article as such, any greater or lesser rights with respect to the making, distribution, or display of the useful article so portrayed than those afforded to such works under [federal or state] law." n77 This statement is commonly known as the "useful articles" doctrine and expresses Congress' desire to limit the ability of manufacturers to monopolize designs dictated solely by the function the article is to serve, such that the first manufacturer to adopt the design would have the exclusive right to produce those kinds of products. n78 The rationale of the

useful articles doctrine is an attempt to draw a line in the sand between copyright [*182] and patent law.

The useful articles doctrine is an important consideration when dealing with works of "applied art," n79 where artistic works are merged with functional items normally covered under patent law. Examples of applied art include artistic designs printed onto fabrics or wallpaper, tiles, or other media. The concern in applied art situations is whether the work must qualify for protection under patent law, copyright law, or perhaps both. Before the enactment of the 1976 Copyright Act, the leading case on the subject of applied art was *Mazer v. Stein*, in which the Supreme Court determined that a sculptured lamp base could be subject to copyright protection because the base, when separated from the lamp, had artistic merit. n80 Congress adopted the *Mazer* approach in the drafting of the 1976 Copyright Act and devised a "separability" test for useful articles in which one looks at the item in question to determine whether the "pictorial, graphic, or sculptural" parts of the work can be either physically or conceptually separated from the utilitarian, functional parts of the work. n81 The parts of the work that can be physically removed and displayed as works of art or that can be thought of separately as artistic works are protected under copyright law, while the overall combination of the copyrighted and functional parts is not. n82 Congress gives us the example of silver flatware with a floral design on the handle. n83 The design of the eating utensil part of the flatware, being a useful article that does more than convey its appearance or information, is not protected, but the floral design itself is protected. n84 Therefore, a copyist could produce floral flatware [*183] nearly identical to the original without fear of infringement, so long as the handle incorporated a sufficiently different floral design and the flatware was not otherwise protected under design patent or trademark law.

Clothing is clearly a "useful article," whether one considers its function to be protecting its wearer from the elements, ensuring modesty, or symbolizing occupation, rank or status. Clothing is much more than decoration for the body. Thus, in order for a clothing design to qualify as protected under U.S. copyright law, the design must meet the separability test outlined above. Some aspects of clothing design will easily meet this test. For example, a cabled design on a sweater, n85 a geometric design to be printed on fabrics, n86 or an image screen printed on a T-shirt n87 could all be separable from the garment, and therefore, copyrightable. The difficulty with this test for clothing, however, lies in the fact that the majority of skill in designing clothing lies in determining the correct shape and fit of the clothing, i.e. creating a flattering neckline, designing the drape of a sleeve, or tailoring a suit. n88 These are all elements that cannot be physically separated from the clothing itself and are difficult, if not impossible, to separate conceptually.

Conceptual separability is not an easy concept to understand or formulate a consistent test for, as witnessed by the Second Circuit's trio of opinions on the matter. In *Kieselstein-Cord v. Accessories by Pearl, Inc.*, n89 the Second Circuit determined that a belt buckle design could be copyrightable. n90 The court applied a conceptual separability test where an item could be copyrightable if the decorative or aesthetically pleasing aspect was "primary" and the utilitarian function is "secondary." n91 In this case, the belt buckles were at times worn as decorative jewelry on other parts of the body. The court determined that the frequency of the utilitarian use versus the [*184] frequency of aesthetic use was not a factor. n92

Five years after *Kieselstein-Cord*, a dissenting judge in the Second Circuit advanced a second conceptual separability test in *Carol Barnhart Inc. v. Economy Cover, Corp.* n93 In this case, Barnhart had designed dress forms for the display of clothing which the court ultimately deemed

uncopyrightable under the useful articles doctrine. n94 The test for conceptual separability advanced by the dissent was whether "the article [stimulates] in the mind of the [ordinary, reasonable] beholder a concept that is separate from the concept evoked by the utilitarian function." n95 Clearly, this is a very subjective test, involving the ordinary observer's personal conception of what constitutes art. The dissenting judge realized this and could only lament that "as long as 'conceptual separability' determines whether the design of a useful article is copyrightable, some threshold assessment of art is inevitable." n96

Finally, in *Brandir International, Inc. v. Cascade Pacific Lumber Company*, n97 the Second Circuit had to determine whether a curved S-shape bike rack could qualify as a sculpture. n98 The court framed the test for conceptual separability this time as whether the design elements could be identified as reflecting the designer's artistic judgment and not dictated by functional influences. n99 In this instance, there was no copyright protection in the work because the court deemed the S-shaped curves in the bike rack were mandated by its functional purpose and, therefore, did not involve the designer's artistic judgment. n100

This tangled spaghetti of separability tests is confusing and subjective to say the least. A clothing designer choosing to assert copyrightability for her creations therefore has three options: argue for complete copyrightability of the designs addressing each of the separability tests; find a way to define the designs as something other than a useful article and avoid the separability tests altogether or settle for partial copyrightability for judicially recognized separable aspects of the designs. Designers have used all three tactics.

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B. Working Around the Useful Articles Doctrine: Clothing As Art

To avoid the useful articles doctrine, clothing designers have attempted to argue that their designs are not useful articles at all, but rather, works of art that just happen to fit the body. In the Ninth Circuit case of *Poe v. Missing Persons*, n101 the designer of a swimsuit made of clear plastic and filled with crushed rock made for an art exhibition, successfully sued for copyright infringement when a member of a rock band wore the swimsuit on the band's album cover. n102 The Poe court reversed a finding of summary judgment for the band based on the useful articles doctrine finding that the swimsuit was a work of art and not a useful article and therefore protected under copyright law. n103 The court suggested that evidence useful to distinguish between works of art and useful articles includes: expert evidence; the creator's intent when making the work (i.e., did the creator intend to make a work of art that just happens to look like clothing or did the creator intend to create clothing which was eventually recognized as art); custom and usage in the art trade regarding such articles; and the marketability of the item as a work of art. n104

While Poe was a welcome recognition that clothing design can sometimes achieve the status of art, subsequent cases in the Ninth Circuit indicate that Poe is likely to be a rare exception. The recent case of *Lim v. Green*, n105 demonstrates that the Poe exception for clothing will not extend to works that have been mass-produced or that were designed with the intent that they might someday be mass-produced. In *Lim*, Lim claimed that his "Scarf Cap" designed for motorcycle riders was a "soft sculpture." n106 The court quickly dismissed this argument because Lim designed the Scarf Cap with the intent that Harley Davidson might be interested in purchasing the design for its line of motorcycle accessories and because Lim had caused the item to be mass-produced. n107 As much of clothing is [*186] designed to be mass-produced, the Poe argument cannot be used as a pro-

tection mechanism in the large majority of cases. One interpretation of the Poe test, demonstrating its limited coverage, is that copyright protection will only attach to shapes that are "independent of the human body shape (beyond mere accentuation of a feature, such as padded shoulders)." n108

Other circuits have developed their own lines of cases on the issue of clothing as art. In *Whimsicality v. Rubie's Costume Company*, n109 the Second Circuit utilized the separability test developed in *Brandir* to determine that Halloween costumes were not copyrightable because "the very decorative elements that stand out [are] intrinsic to the decorative function of the clothing." n110 *Whimsicality* was cited in *Knitwaves, Inc. v. Lollytogs, Ltd.* for the proposition that "clothes are not copyrightable" because they are useful articles n111 as well as in cases from other circuits. n112 The *Knitwaves* court, however, did recognize copyright infringement for sweater designs of leaves and acorns, because fabric designs are considered "writings" and are therefore protected under copyright law. n113

The Third Circuit has yet another view. In *Masquerade Novelty, Inc. v. Unique Industries, Inc.*, n114 the court determined that animal nose masks were copyrightable as soft sculptures because their only utility was in evoking a humorous response. n115 The court indicated that evoking a human response is a function served by many copyrightable works. n116 "The utilitarian nature of an animal nose mask or a painting of the crucifixion of Jesus Christ inheres solely in its [*187] appearance, regardless of the fact that the nose mask's appearance is intended to evoke mirth and the painting's appearance a feeling of religious reverence." n117 From the diverse opinions of the Second, Third and Ninth Circuits, we see that clothing as art is still very much a judgment of the eye of the beholder.

C. U.S. and International Perceptions of Design as Art

One might reasonably inquire as to why the U.S. is so opposed to granting artistic status to functional objects and seems obsessed with separating the useful from the artistic via stringent separability standards. While a division of copyright and patent law might be one explanation, another explanation comes from the art world.

The line between artist and artisan has always been an indistinct one, ceaselessly renegotiated. On the one hand, it is the job of the artisan to make objects designed for use and convenience, whereas the work of the artist is regarded as non-instrumental - you can't do anything with a painting except look at it - and, when it is successful, it is valued, not simply for the opulence of its materials or its decorative appeal or its technical expertise (although it may share all these qualities with artisanal work), but for its adherence to a set of higher values which have been elaborated by experts in art history and aesthetics. These values, certainly since the time of Kant, have been explicitly defined as non-instrumental, as values of disinterested design, sensibility, style and imagination, removed from the practical concerns of everyday life. n118

Garment design has traditionally been viewed as artisanal rather than artistic and has enjoyed varying degrees of appreciation in the art world throughout history. n119 In early history, garment designers were looked down upon as servants because of the intimate nature of the relationship between the garment and its wearer and valued lower on the social ladder than painters or architects. n120 The status of fashion designers steadily improved, beginning in the 1850's with the rise of couturier Charles Worth and continued into the 1900's with the Arts [*188] and Crafts revival.

n121 However, fashion still remained a curious sort of "art" well into the Twentieth Century. In 1954, when photographer Cecil Beaton wrote a history of fashion and the decorative arts, he felt it necessary to defend himself against the charge of being a "propagandist of frivolity" because "both in England and America, fashion is viewed with a jaundiced eye." n122 Now, in the Twenty-First Century, we are still attempting to define the value of clothing design and much controversy has erupted over the display of fashion retrospectives in traditional art museums. n123

Ironically, adding to the confusion over whether fashion is art is the fashion world's viewpoint that clothing as "art" has a negative connotation. "The suspicion grows that the ... definition of art/fashion is something so avant garde that it is unwearable... . Genuine fashion must be functional and, therefore, can only be classified as applied art or craft. If a garment is not wearable, it is not fashion." n124 Indeed, many fashion designers do not think of themselves as "artists." n125 This non-artist designation, however, is not [*189] an admission that designers are less talented than artists or that their works are any less valuable. Rather, this view recognizes that art and design are different paradigms that serve different purposes and are inspired by different muses. The following comments from fashion designers provide some insight on this view.

What I do is not art - it is a commercial creation. I'm the exact opposite of an artist; everything I do is about what is happening at the last possible second. Fashion is perishable... . Maybe good fashion design ... is a kind of art. It is certainly a form of artistic expression. n126

Our work is only made to be consumed, worn, used. An artist may escape from reality to fantasy. We are not allowed to forget the body. n127

While the U.S. has opted for a function-free standard of "art" under copyright law, other countries have adopted an entirely different approach. France, for example, has adopted a "unity of art" approach in which "every test of aesthetic creation that "would allow industrial art to be separated from real art' [has been rejected]." n128 While France also struggled with the definition of art, attempting to keep a line of demarcation between its sui generis design laws and [*190] copyright laws, ultimately France decided to grant designers protection under both schemes. However, they added incentives to use the design protection by affording evidentiary advantages as to proof of ownership, transfers of title and restricting competition. n129 This decision has not been without controversy, in that "many ... were dismayed to see the laws of literary and artistic property expand to protect the designs of such articles as plastic salad bowls, drinking glasses, fireplace grates, a hair brush, the luggage rack of a motor scooter, and the hexagonal head of a lubricating pump." n130 Opponents of the unity of art approach have generally adopted one of two different schemes. The "duality of art" approach is typified by Italy, where copyright is reserved for art that has an independent existence from functional concerns, while useful articles could be protected under sui generis design laws. n131 The other position is typified by Germany where a limited number of exceptional designs are protected under copyright law but the rest are covered under sui generis design laws. n132

While the intellectual property laws of European countries in particular have evolved to cover functional articles, we are still highly suspicious of such protection in the United States. There are no indications that we will change this policy in the near future. However, there have been some advances in further dissecting useful articles to locate artistic elements worthy of protection.

D. Working Around the Useful Articles Doctrine: Partial Protection

For the lucky few aspects of clothing design that are able to pass the physical and conceptual separability tests of the useful articles doctrine, copyright law provides a good deal of protection. Fabric designs, in particular, have benefited from copyright protection. n133 In *Peter Pan Fabrics v. Brenda Fabrics*, n134 the District Court for the Southern District of New York found that a fabric design consisting [*191] of images suggestive of the Near East was entitled to copyright protection "both as a work of art and as a print." n135 This decision contrasted with historical notions that fabric designs were not protected under copyright law. n136 Sweater designs, such as cable patterns and color motifs, have also had a good deal of protection against infringement, n137 as have lace designs n138 and jewelry. n139

The distinction between protection for separable elements of the clothing design but not for the clothing itself can be quite confusing. Interestingly, in the case of *Eve of Milady v. Moonlight Design, Inc.*, n140 the court, in its off-the-record infringement analysis, went beyond a comparison of the two lace patterns involved in the case to a determination of the similarity of the wedding dresses in which the lace patterns were incorporated, including the fullness of the skirts, the necklines, the kick-pleats, and the V point of the sleeves. n141 This analysis tends to rebut the presumption that comparison of clothing designs as a whole is too difficult and subjective for judges to accomplish.

While fabric patterns and design motifs, such as appliques, sweater embellishments or lace patterns, are protected under copyright law, this is not a great deal of protection for the clothing [*192] designer. A knockoff designer cannot replicate the copyrighted fabric or motif exactly but can design a fabric pattern or motif that is extremely similar. When this similar fabric or motif is used in an identical copy of the overall garment design (which in most cases is not protected and can be copied with impunity), the result is a near-perfect copy of the original garment.

E. The Idea-Expression Dichotomy Hurdle

An interesting side note to the to the disappointing protection for clothing design provided by the useful articles doctrine, is that designers also face copyright protection hurdles under the idea-expression dichotomy in copyright law. Section 102(b) of the Copyright Act provides that "in no case does copyright protection ... extend to any idea, procedure, process, system, method of operation, concept, principle or discovery." n142 This doctrine has been restated as "copyright protects the expression of an idea but not the idea itself." n143 The implications of this doctrine for designers are illustrated in the case of *Russell v. Trimfit, Inc.* n144 In *Russell*, the designer had copyrighted two drawings of unusual sock designs. n145 One sock design had a separate compartment for the big toe. n146 The other design had separate compartments for each toe. n147 *Trimfit*, a major sock manufacturer, began manufacturing socks identical to *Russell*'s drawings and *Rusell* brought suit for copyright infringement. n148 The court determined that *Russell*'s copyright only entitled her to protection against copying of the drawings themselves. n149 Since *Trimfit* did not copy her drawings in the advertising or packaging of their product, *Russell* had no claim for copyright infringement. n150 Thus, courts are not likely to extend copyright protection to clothing surreptitiously through protection of drawings or pattern pieces. n151

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F. Copyright Law as a Model for Design Protection

Clearly, existing copyright law is insufficient to address the needs of the clothing design industry. Some argue that this is entirely appropriate as the danger that copyright law would be used to allow designers to monopolize common design elements and stifle creativity is too great. n152 Copyright law, however, is the most attractive of the existing intellectual property protections for a number of reasons. First, works claiming copyright protection do not need to be registered to be protected, n153 nor are they required to display the copyright symbol. n154 As it is common in the clothing trade to produce a variety of designs (sometimes thousands of designs per year n155) and let the market decide which designs are valuable, n156 this would alleviate the burden on designers to register all of their designs, including the unsuccessful ones, to obtain protection. A designer could simply register the design once it had been infringed and sue for copyright infringement.

A second reason why copyright protection is desirable as the model for design protection is the limited scope of copyright protection. Copyright is not a fourteen year exclusive monopoly on a design or any confusingly similar forms of that design, as would be granted in design patent law. While the length of protection for copyrighted works is considerably longer than that afforded to design [*194] patents, n157 one could argue that registration of designs will not reduce the public domain pool of design elements because copyright protection would extend only to the particular expression or combination of elements and not to the individual design elements themselves. Additionally, under principles of fair use, designers would be free to use the same or similar design elements of others so long as the total combination of the elements is not an exact copy of the original design. Just as copyright law has encouraged and not stifled creativity in the fine arts and music, it is capable of providing the same benefits to clothing design.

Despite the persuasiveness of this argument, current copyright law does not support such protection. Designers, scorned by the copyright system, have resorted to trademark and unfair competition laws.

IV Clothing Design Protection Under Trademark Law

"Regretfully, the body of law relating to the Lanham Act has developed into a tangled morass ... Courts struggling to move mountains often find they have only affected minuscule changes in trademark jurisprudence and occasionally have created their own likelihood of confusion." n158

Trademark protection is a very attractive form of intellectual property protection for clothing designers for two main reasons. First, the duration of protection is potentially unlimited so long as the "word, name, symbol, or device, or any combination thereof" n159 continues to serve as a source indicator for consumers. Secondly, because of the overlap between federal trademark law and common law trademark law, federal registration is not a prerequisite for protection. n160 Clothing designers have typically made use of the [*195] trademark system to police the marks they employ in labeling their goods. For example, Ralph Lauren's trademarks "POLO" and the logo of a polo player have been upheld against infringement on numerous occasions. n161 Since many designers outsource the manufacturing of their clothing to other countries, protection of these marks is critical to prevent international trademark piracy and the importation of gray market goods into the U.S. n162

In addition to protection for labels, trademark law is sometimes employed to protect the design of a product itself, under the rubric of trade dress protection. "Trade dress" refers to either the packaging or dressing of a product or the design of the product itself and has been accorded trademark protection due to the broad definition of registrable marks under 2 of the Lanham Act. n163

While trade dress can be registered as a trademark, n164 trade dress infringement actions are generally brought under 43(a) of the Lanham Act, which functions as an unfair competition law for unregistered goods. n165 In order to achieve protection under 43(a), the trade dress must be nonfunctional n166 and the infringer's product must be likely to cause confusion. n167 Courts have also imposed the requirement that the trade dress be distinctive. n168 Clothing designs have faced hurdles under all three of these requirements.

[*196]

A. The Functionality Barrier

The U.S. Supreme Court clarified the test for trade dress functionality in *Traffix Devices, Inc. v. Marketing Displays, Inc.* n169 Here, the Court reiterated the test established in *Qualitex Company v. Jacobson Products Company*, n170 explaining that functionality is a broad concept, which includes consideration of whether the feature claimed is a competitive necessity but also whether the feature "is essential to the use or purpose of the device or when it affects the cost or quality of the device." n171 If a design is determined to be functional, it will be ineligible for Lanham Act protection, regardless of the secondary meaning it has achieved with consumers. n172

The functionality bar in trademark law applies not only to features of utility, but also to features that are "aesthetically functional." n173 Aesthetic functionality inheres in a product when a "design feature is so important to the value of the product to consumers that continued trademark protection would deprive them of competitive alternatives." n174 When a design is found to be aesthetically functional, courts often severely limit the scope of protection for such designs under trademark law. For example, in *Wallace International Silversmiths, Inc. v. Godinger Silver Art Company*, n175 the court found that a Baroque pattern for silverware could only be enforced as a trademark as to a particular expression of the pattern and not to preclude Baroque silverware patterns in general. n176

Clothing designs are generally found to be aesthetically functional because the "primary purpose is aesthetic - to enhance the [garments'] ornamental appeal - rather than to identify the [garments] as [products of a particular producer.]" n177 As such, a clothing designer cannot obtain a monopoly over the use of design elements in general but can enforce trademark rights to the extent [*197] necessary to prevent consumer confusion. In making the determination between the aesthetically functional elements and the protected trademark elements, it appears that courts have been subconsciously influenced by the useful articles doctrine in copyright law. Trade dress cases often show greater deference to separable design features rather than designs comprised of an overall concept with no separable elements. For example, in *Coach Leatherware Company v. AnnTaylor, Inc.*, the Second Circuit denied a finding of trade dress infringement when AnnTaylor mimicked the details of Coach handbags because the court felt that granting a broad protection to ornamental design elements in the bags would excessively chill competition. n178 Four years later in *Knitwaves*, the Second Circuit held that Knitwaves could not prevent Lollytogs from manufacturing "fall motifs" for sweaters in general but could restrict Lollytogs use of particular combinations of squirrels, acorns and leaves, which were confusingly similar to Knitwaves' designs. n179 Even the recent ruling from the Supreme Court in *Wal-Mart Stores, Inc. v. Samara Brothers, Inc.*, demonstrates this dichotomy. n180 In *Wal-Mart*, the Court denied trade dress protection for the total concept of one-piece children's seersucker outfits decorated with appliques, but yet the lower courts noted the potential challenge of copyright infringement for the appliques. n181 There is no express reason for these distinctions. Seemingly the courts are concerned that with the lengthy protection afforded by

trademark law, it is better to err on the side of caution and limit trade dress protection to design elements that can be concretely identified.

B. The Confusion Barrier

Evidence of consumer confusion, the second requirement in a 43(a) suit, can also be difficult for infringed clothing designs to demonstrate. For some courts, this requirement is intertwined with [*198] the aesthetic functionality determination. n182 The Knitwaves court, for example, found that because some of the design elements were aesthetically functional, they could not serve as source indicators and therefore consumers could not be confused by similar uses of those design elements. n183 Generally, tests for confusion under trademark law involve an analysis of factors set forth by the Second Circuit's Polaroid decision. n184 These factors include strength of plaintiff's mark, degree of similarity between plaintiff's and defendant's marks, proximity of the products; likelihood that plaintiff will bridge the gap, evidence of actual confusion; defendant's good faith in adopting the mark, quality of defendant's product or service, and sophistication of buyers. n185 In Coach Leatherware, the standard for consumer confusion was set very high, with the court indicating that similarity of appearance or consumer surveys were not dispositive of the issue. n186 In *Hermes International v. Lederer de Paris Fifth Avenue, Inc.*, n187 however, the court found that confusion could result even if consumers were not confused at the time of purchase as to whether they were purchasing a genuine item or a knockoff. n188 Post-sale confusion, where an outside observer might think the knockoff purchaser had purchased an original, could also support a finding of consumer confusion. n189 Thus, while the confusion analysis is somewhat unpredictable, it appears to be difficult to demonstrate if the trade dress is not already well known to consumers, a requirement addressed by the third prong of trade dress protection.

C. The Distinctiveness Barrier

The final requirement for trade dress protection is distinctiveness. The United States Supreme Court has determined that trade dress is distinctive when the "intrinsic nature [of the trade dress] serves to identify a particular source." n190 In *Two Pesos, Inc. v. Taco Cabana, Inc.*, [*199] the Court found that the unregistered trade dress of a Mexican restaurant was inherently distinctive and did not require a showing of secondary meaning. n191 This decision provided hope that courts might construe the distinctiveness requirement for trade dress flexibly and incorporate greater design protection within its realm. One commentator suggested that clothing designs would qualify for such protection. n192 These hopes were dashed, however, by the Supreme Court's Wal-Mart decision, which distinguished the Two Pesos case as applying only to cases of product packaging and indicated that product design, including clothing design, is not inherently distinctive and requires secondary meaning. n193 "To establish secondary meaning, a manufacturer must show that, in the minds of the public, the primary significance of a product feature or term is to identify the source of the product rather than the product itself." n194 One commentator has suggested that this bright-line rule that product designs can never be inherently distinctive does not take account of the range of possible designs available and deals clothing manufacturers a "double whammy" in their attempts to obtain design protection. n195 Defenders of Wal-Mart insist that the Court correctly declined to create a test for inherent distinctiveness for trade dress, because such a test would be impossible to apply uniformly. n196

The short-lived nature of most clothing designs makes a showing of secondary meaning nearly impossible and thus most clothing designs will fail to qualify for trade dress protection. Consumers

are very unlikely to be able to attribute a particular clothing design to a particular designer, without the aid of trademarks, labels or a substantial advertising campaign. This would place a tremendous [*200] burden on the clothing designer to advertise extensively the attributes of every design created which could very well be economically impossible. The recent case of *Lim v. Green* demonstrates that in order to satisfy secondary meaning requirements, consumers must associate the design with a particular manufacturer and not merely be aware that the design has existed previously. n197 State unfair competition laws or misappropriation laws may be similarly unavailing. While these laws may have less stringent requirements than those imposed by the Lanham Act, at least one case has held that when the subject matter of protection falls clearly under federal law, the state law is preempted. n198

D. Trademark Law as a Model for Design Protection

The Supreme Court's *Wal-Mart* decision puts trade dress for clothing in a highly suspect position. Perhaps the Court is attempting to foreclose any notion that design protection will be afforded through trademark law. While the Court seems to recognize the need for trade dress protection in certain cases, it is still a highly suspect classification of trademark law. In *Traffix Devices*, the Court "cautions against misuse or over-extension of trade dress" and asserts that "copying is not always discouraged or disfavored by the laws which preserve our competitive economy." n199

Trademark and trade dress protection, however, might not be the ideal remedy for the protection of clothing designs. Unlimited protection for certain features of designs could radically impact competition and unduly limit designer creativity. It is also unclear how trademark or trade dress protection for clothing design would serve a consumer protection function. So long as the knockoff manufacturer identifies his copies with the manufacturer's own label (and not the trademark of the original designer) the likelihood of consumer confusion is small. The price of the garment and the channel of commerce in which it is purchased (retail discount store, street vendor or unofficial websites) would also be further clues as to whether a design is original. The long history of knockoff designs in [*201] the United States is another argument against consumer confusion. Americans are so used to purchasing knockoffs that one could argue that there is an implied presumption that most affordable clothing is a knockoff rather than an original design. Even proponents of the extension of trade dress protection to the fashion industry recognize that there are some practical considerations with the use of design as a trademark and that litigation and enforcement could be difficult under this model. n200

If trademark is the model to be used, however, there are ways to creatively apply existing trademark law to design protection. For example, as trademark rights are generally lost when the mark is no longer used, one could argue that the unlimited protection may not be as much of a threat. Instead of long-term monopolies, the design elements might frequently change hands as designers evolve through different phases of their careers, reviving old fashions and creating new ones. Courts have yet to recognize these possibilities, though, and lacking protection under any established intellectual property scheme, frustrated designers have turned to Congress....

FOOTNOTES:

n1. Merriam Webster OnLine Collegiate Dictionary <<http://www.webster.com/home.htm>> (accessed April 1, 2001).

n2. Id.

n3. H.W. Gossard Co. v. Neatform Co., Inc., 143 F. Supp. 139, 143 (S.D.N.Y. 1956).

n4. U.S. Const. art. I, 8, cl. 8.

n5. Donald S. Chisum, Chisum on Patents, 2 (1997).

n6. Id. at 5 (citing Justice Bradley in *Atlantic Works v. Brady*, 107 U.S. 192 (1883)).

n7. Id. at 1.02. ("It is the residual class of 'product' patent - encompassing all man-made items not found in substantially the same form in nature that are neither machines nor compositions of matter.")

n8. 35 U.S.C. 101 (2000).

n9. Chisum, *supra* n. 5, at 1.02.

n10. U.S. Patent No. 6,186,861 (issued Feb. 13, 2001).

n11. U.S. Patent No. 6,134,718 (issued Oct. 24, 2000).

n12. U.S. Patent No. 4,078,264 (issued Mar. 14, 1978).

n13. 35 U.S.C. 102-103 (2001).

n14. 35 U.S.C. 102(f) (2001); see also Chisum, *supra* n. 5, at 2.01.

n15. 35 U.S.C. 102(g) (2001). In other words, the first person to invent the invention will have priority over a subsequent inventor, even if that inventor was the first to file a patent application.

n16. See *Smith v. Nichols*, 88 U.S. 112, 118 (1874); see also 35 U.S.C. 101 (2002).

n17. Chisum, *supra* n. 5, at 4.01.

n18. Id. at 3.01.

n19. Id. at 3.01; see also 35 U.S.C. 102 (a), (b), (e), and (g).

n20. Id. at 3.01.

n21. 35 U.S.C. 103(a) (2000).

n22. Id.

n23. See *Dann v. Johnston*, 425 U.S. 219, 229 (1975); *Graham v. John Deere Co.*, 383 U.S. 1, 37 (1965).

n24. *Connell v. Sears, Roebuck & Co.*, 559 F. Supp. 229, 234-35 (N.D. Ala. 1983), *aff'd in part, modified in part, rev'd in part*, 722 F.2d 1542, 1545 (Fed. Cir. 1983).

n25. *Graham v. John Deere Co.*, 383 U.S. 1, 17 (1966); *Truswal Sys. Corp. v. Hydro-Air Engr., Inc.*, 813 F.2d 1207, 1212 (Fed. Cir. 1987); *Hybritech, Inc. v. Monoclonal Antibodies, Inc.*, 802 F.2d 1367, 1380 (Fed. Cir. 1986); *Bausch & Lomb, Inc. v. Barnes-Hind, Inc.*, 796 F.2d 443, 450 (Fed. Cir. 1986); *Cable Elec. Prods., Inc. v. Genmark, Inc.*, 770 F.2d 1015, 1026 (Fed. Cir. 1985); see also *Stratoflex, Inc. v. Aeroquip Corp.*, 713 F.2d 1530, 1539-40 (Fed. Cir. 1983).

n26. 35 U.S.C. 112 P 1 (1999).

n27. 35 U.S.C. 154(a)(2) (1999).

n28. *Antonious v. Spalding & Evenflo Co., Inc.*, 98-1478, 1999 U.S. App. LEXIS 22984, 7 (Fed. Cir. 1999) (noting that other aids to interpretation include the written description of the invention and the prosecution history of the patent).

n29. U.S. Patent No. 6,212,686 (issued Apr. 10, 2001).

n30. Id.

n31. Id.

n32. See *Markman v. Westview Instruments, Inc.*, 52 F.3d 967 (Fed. Cir. 1995).

n33. See generally *Vehicular Techs. Corp. v. Titan Wheel Intl., Inc.*, 141 F.3d 1088 (Fed. Cir. 1998); *Markman*, 52 F.3d at 978-80; *Laitram Corp. v. Rexnord, Inc.*, 939 F.2d 1533, 1535 (Fed. Cir. 1991); see also *Circle R, Inc. v. Smithco Mfg., Inc.*, 919 F. Supp. 1272, 1295 (N.D. Iowa 1996).

n34. 1996 U.S. Dist. LEXIS 12102 at 2-3 (S.D.N.Y. Aug. 20, 1996).

n35. Id. at 19.

n36. *Chisum*, *supra* n. 5, at 1.04.

n37. Id.

n38. Id.

n39. Id.

n40. 35 U.S.C. 171 (2000).

n41. 35 U.S.C. 173 (2000).

n42. 35 U.S.C. 154(a)(2) (2000). There is not much legislative history to be found as to how Congress determined the length of design patent protection. In a 1914 hearing on proposed design legislation, The Commission of Patents, who had proposed a period of 20 years of protection, justified his choice as follows: "I do not particularly care as to the length of time, but it seemed to me that perhaps 20 years was not unreasonable." Registration of Designs: Hearing on H.R. 11321 Before the House Comm. on Patents, 63d Cong. (1914) (statement of Hon. Thomas Ewing, U.S. Commissioner of Patents).

n43. Melville B. Nimmer & David Nimmer, *Nimmer on Copyright*, 2.01[A] (Lexis Publg. 1999) ("Originality in the copyright sense means only that the work owes its origin to the author, i.e., is independently created, and not copied from other works."); see also *Alfred Bell & Co. Ltd. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 102 (2d Cir. 1951) ("Nothing in the Constitution commands that copyrighted matter be strikingly unique or novel.").

n44. Chisum, *supra* n. 5, at 1.04[2] (citations omitted).

n45. See *In re Harvey*, 12 F.3d 1061, 1064 (Fed. Cir. 1993) ("Unlike an invention in a utility patent, a patented ornamental design has no use other than its visual appearance.").

n46. Chisum, *supra* n. 5, at 1.04[2] (citations omitted).

n47. See e.g. *Inwood Lab., Inc. v. Ives Lab., Inc.*, 456 U.S. 844, 850 n. 10 (1982); *Kellogg Co. v. National Biscuit Co.*, 305 U.S. 111, 122 (1938).

n48. *L.A. Gear, Inc. v. Thom McAn Shoe Co.*, 988 F.2d 1117, 1123 (Fed. Cir. 1993).

n49. *Id.* (deeming valid a design patent for an athletic shoe even though some of the design elements added to the cushioning and support features of the shoe).

n50. *Neufeld-Furst & Co., Inc. v. Jayday Frocks Inc.*, 112 F.2d 715, 716 (2d Cir. 1940).

n51. *Id.* (citing *Nat Lewis Purses, Inc. v. Carole Bags, Inc.*, 83 F.2d 475 (2d Cir. 1936)).

n52. *Nat Lewis Purses, Inc.*, 83 F.2d at 476 (finding invalid a design patent for a compact purse because "no more was really involved than changing the size" of a prior design).

n53. *Neufeld-Furst & Co., Inc.*, 112 F.2d at 716 (finding that plaintiff's dress design was merely a combination of dress design elements known in the prior art and therefore invalid); see also *H.W. Gossard Co.*, 143 F. Supp. at 143 (denying protection for the novel arrangement of an elastic trim on a girdle which encircled the leg and then angled toward the front panel of the girdle).

n54. *White v. Lombardy Dresses, Inc.*, 40 F. Supp. 216 (S.D.N.Y. 1941) (holding that a style of "junior type" dresses by Syd Novak knocked off by the Defendant for \$ 5 U.S. dollars ("USD") did not satisfy the novelty and nonobviousness standards, even though the dresses did not contain known dress design elements nor were they combinations of prior known dress designs).

n55. H.W. Gossard Co., 143 F. Supp. at 143 ("In fact, it has been said that to invent anything in the way of a new dress design, however temporarily attractive such design may be, becomes almost impossible when one considers the enormous amount of fashion advertising, design service, magazines, and the host of skillful and intelligent dress-makers.") (citations omitted); Lombardy Dresses, 40 F. Supp. at 217 ("In this case alone we have the claim made by Novak that he has conceived dozens of inventions of dresses. Each season, the claim is made, that invention after invention is brought forth, yet, the state of the art makes the correctness of such assertion more than doubtful, and while the granting of the patent carries the weight which is attached to such act of the government, the facts on the trial and the state of the art duly proved, makes one wonder how any patent on such dresses can be obtained provided true invention is required. A dress may be new, original and attractive and yet not be patentable unless this faculty of invention is likewise present.").

n56. H.R. Comm. on Pat., Registration of Designs: Hearing on H.R. 11321, 63d Cong. 97 (May 27, 1914) (statement of E. W. Bradford, Esq., Representing the National Design Registration League, Washington D.C.) (discussing the example of a clothesline holder which had obtained design patent protection but which Bradford could find nothing "ornamental or attractive" about it); see *Levi Strauss & Co. v. Golden Trade S.r.L.*, 1995 WL 710822 at 9 (S.D.N.Y. Dec. 1, 1995) (deeming several claims in a utility patent on stonewashing denim that related to the end appearance of the fabric invalid and more properly the subject of design patent law).

n57. *In re Mann*, 861 F.2d 1581, 1582 (Fed. Cir. 1988) ("Design patents have almost no scope."); see also *L.A. Gear*, 988 F.2d at 1122 ("A patented design is ordinarily claimed 'as shown,' that is, by its drawing.").

n58. *Lee v. Dayton-Hudson Corp.*, 838 F.2d 1186, 1190 (Fed. Cir. 1988).

n59. *Payless Shoesource Inc. v. Reebok Intl. Ltd.*, 998 F.2d 985, 990 (Fed. Cir. 1993).

n60. *L.A. Gear, Inc.*, 988 F.2d at 1125.

n61. 853 F.2d 1557 (Fed. Cir. 1988).

n62. *Id.* at 1565-66 ("We have in the incriminated or accused sole copying of the swirl effect, copying of the separate coloration and configuration of the pivot point, though without the red dot.").

n63. 65 F. Supp. 2d 189 (S.D.N.Y. 1999).

n64. *Id.* at 195-96.

n65. 1997 WL 83395 (S.D.N.Y. Feb. 27, 1997).

n66. *Id.* at 3-4. The court noted the distinguishing aspects of plaintiff's sole were its border, closely spaced horizontal lines and diamond shaped recesses. All of defendant's soles, including the possibly infringing heel, had significant variations, including a large diamond in the middle of each heel. *Id.* at 8-13.

n67. U.S. Patent and Trademark Office, Patent Filing Fees, Patent Post-Allowance Fees <<http://www.uspto.gov/web/offices/ac/qs/ope/1999/fee20001001.htm>> (accessed May 5, 2001). Note that in 1914, when design patent fees were only \$ 10 (\$ 178 in 2001 USD) for a 3-year term of protection, designers considered the fee "absolutely prohibitive" and a proposal to lower the fee to \$ 1 (\$ 17.85 in 2001 USD) was even considered exorbitant. Registration of Designs, *supra* n. 56, at 211.

n68. H.R. Subcomm. on Cts., Civ. Liberties and the Admin. of J. of the Comm. on the Jud., Copy. L. Rev.: Hearings on H.R. 2223, 94th Cong. 168 (1975) (testimony of Rene D. Tegtmeyer, Assistant Commissioner for Patents, Department of Commerce).

n69. U.S. Patent and Trademark Office, Bus. Goals and Objectives, the Pat. Bus. Env. <<http://www2.uspto.gov/web/offices/ac/comp/budg/plan/>> (accessed May 5, 2001).

n70. *Reebok Intl. v. J. Baker, Inc.*, 32 F.3d 1552, 1558 (Fed. Cir. 1994) (The court determined the scope of the remedies for infringement based upon whether the patentee and the infringer were still selling the patented item. Reebok was no longer manufacturing the SHAQ I shoe by the time its design patent was issued. Upon the issuance of the patent, Reebok sued Baker who had begun manufacturing the infringing shoes during the pendency of the design patent. Since neither Reebok nor Baker was manufacturing SHAQ I shoes by the time the suit was instituted, the court found that an injunction against sale of 33,000 pairs of infringing shoes still in Baker's stock was unwarranted. Reebok's reputation would not be harmed by the sale and could be addressed by money damages.).

n71. 35 U.S.C. 111(b) (West 2000); see also *supra*. n. 67.

n72. Currently \$ 75-\$ 150 USD. U.S. Patent and Trademark Office, *supra* n. 67.

n73. *In re Mann*, 861 F.2d at 1582 ("We see no way in which an ornamental design for an article of manufacture can be subject to the 'experimental use' exception applicable in the case of functioning machines, manufactures, or processes. Obtaining the reactions of people to a design - whether or not they like it - is not 'experimentation' in that sense. In the case of a design, if market testing shows that it has no appeal and the design is changed, the result is a new and different design; the original design remains just what it was.").

n74. *Mazer v. Stein*, 347 U.S. 201, 214 (1954).

n75. 17 U.S.C. 102(a) (2000). The eight categories of works are: literary works; musical works; dramatic works; pantomimes and choreographic works; pictorial, graphic and sculptural works; motion pictures and audiovisual works; sound recordings; and architectural works.

n76. Note, however, an argument could be made that clothing designs might be classified as a type of "architectural works" under 102(a)(8). 17 U.S.C. 102(a)(8). However, 101 defines architectural work as "the design of a building" and clothing as a "wearable building" is more of a stretch than clothing as a "wearable sculpture" (although some analogies could be drawn between foundation garments and building frames). 17 U.S.C. 101 (2000).

n77. 17 U.S.C. 113(b) (2000).

n78. While the legislative history does not give an exact rationale for the useful articles doctrine, a "useful article" is defined in 101 of the 1976 Copyright Act as "an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information." See generally H.R. Rpt. 94-1476, at 54 (Sept. 3, 1976) (reprinted in 1976 U.S.C.C.A.N. 5659, 5667 (mentioning the *Mazer v. Stein*, 347 U.S. 201, opinion as a basis for much of the useful articles doctrine)); *Mazer*, 347 U.S. at 217-18 (recognizing that there is some tension between patent law and copyright law as to the protection of useful articles but determining that copyright protection for useful articles can exist regardless of patent law protection).

n79. See 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, 1146 n. 7 (1983) ("Applied art is not defined by any copyright legislation, although nearly all domestic copyright laws expressly mention applied art among the works protected.");

see also H.R. Rpt. 94-1476, at 54 (reprinted in 1976 U.S.C.C.A.N. at 5667) ("In accordance with the Supreme Court's decision in *Mazer v. Stein* ... works of applied art encompass all original pictorial, graphic and sculptural works that are intended to be or have been embodied in useful articles, regardless of factors such as mass production, commercial exploitation, and the potential availability of design patent protection.").

n80. 347 U.S. at 218.

n81. See H.R. Rpt. 94-1476, at 55 (reprinted in 1976 U.S.C.C.A.N. at 5668) ("Unless the shape of an automobile, airplane, ladies' dress, food processor, television set, or any other industrial product contains some element that, physically or conceptually, can be identified as separable from the utilitarian aspects of that article, the design would not be copyrighted under the bill.").

n82. *Id.* ("Copyright protection would extend only to [the copyrighted] element and would not cover the over-all configuration of the utilitarian article as such.").

n83. H.R. Rpt. 94-1476, at 55 (reprinted in 1976 U.S.C.C.A.N. at 5668).

n84. *Id.*

n85. *Banff Ltd. v. Express Inc.*, 921 F. Supp. 1065, 1067 (S.D.N.Y. 1996).

n86. *Peter Pan Fabrics, Inc. v. Brenda Fabrics, Inc.*, 169 F. Supp. 142, 142-43 (S.D.N.Y. 1959).

n87. *Central Mills, Inc. v. Iced Apparel, Inc.*, 1998 U.S. Dist. LEXIS 1798 at 3 (S.D.N.Y. Jan. 7, 1998).

n88. As Germano Celant describes, "The cut is the soul of clothing. It severs the endless thread of a garment as the simple container and portrait of the human figure and transforms it into a creative act, a language that builds new objects." Germano Celant, *To Cut is to Think*, in *Art/Fashion 22* (Germano Celant ed., 1997).

n89. 632 F.2d 989 (2d Cir. 1980).

n90. *Id.* at 993.

n91. *Id.*

n92. *Id.*

n93. 773 F.2d 411, 442 (2d Cir. 1985) (Newman, J., dissenting).

n94. *Id.* at 412.

n95. *Id.* (Newman, J., dissenting).

n96. *Id.* at 423 (Newman, J., dissenting).

n97. 834 F.2d 1142 (2d Cir. 1987).

n98. Id.

n99. Id. at 1145.

n100. Id. at 1148.

n101. 745 F.2d 1238 (9th Cir. 1984).

n102. Id. at 1241.

n103. Id. at 1242.

n104. Id. at 1243.

n105. 2000 U.S. App. LEXIS 29291 (9th Cir. Nov. 13, 2000).

n106. Id. at 3.

n107. Id. Note that this formulation of the useful articles doctrine contradicts the legislative intent. Legislative commentary on the useful articles doctrine states, "works of 'applied art' encompass all original pictorial, graphic and sculptural works that are intended to be or have been embodied in useful articles, regardless of factors such as mass production, commercial exploitation, and the potential availability of design patent protection." H.R. Rpt. 94-1476, at 54 (1976) (reprinted in 1976 U.S.C.C.A.N. at 5667).

n108. Peter K. Schalestock, Forms of Redress for Design Piracy: How Victims Can Use Existing Copyright Law, 21 Seattle Univ. L. R. 113, 124 (1997) (citing a suggestion made by attorney David Gryce in Poe).

n109. 891 F.2d 452 (2d Cir. 1989).

n110. Id. at 455.

n111. 71 F.3d 996, 1002 (2d Cir. 1995), *aff'd*, 1996 U.S. App. LEXIS 30737 (2d Cir. Nov. 22, 1996) (citing *Whimsicality*, 891 F.2d 452, 455 (2d Cir. 1989)); see also *Adelman v. Summers & Gordon, Inc.*, 112 F. Supp. 187, 189 (S.D.N.Y. 1934) ("There are no provisions in the Copyright Law for protecting fashions for dresses. The right to make and sell an artistically designed garment may under proper circumstances be obtained by a design patent issued from the Patent Office but not by copyright.").

n112. *Lim v. Green*, 243 F.3d 548 (table), 2000 WL 1693680 (9th Cir. 2000); *Eve of Milady v. Impression Bridal, Inc.*, 957 F. Supp. 484 (S.D.N.Y. 1997); *H2O Swimwear Ltd. v. Lomas*, 164 A.D.2d 804, 806 (N.Y. App. Div. 1990).

n113. *Knitwaves*, 71 F.3d at 1003 (citations omitted).

n114. 912 F.2d 663 (3d Cir. 1990).

n115. Id. at 669.

n116. Id.at 771.

n117. Id. at 671.

n118. Peter Wollen, *Addressing the Century, Addressing the Century: 100 Years of Art & Fashion* 7 (Hayward Gallery, ed. 1998).

n119. Id. at 8.

n120. Id.

n121. Id. at 8-9.

n122. Jane Ashelford, *The Art of Dress: Clothes and Society, 1500-1914*, 7 (1996).

n123. The "Giorgio Armani" Retrospective (Guggenheim Museum, New York City, N.Y., Oct. 20, 2000 - Jan. 17, 2001); compare Deborah Sugerman, *Behind the Scenes*, MPLS-St. Paul 211 (Aug. 1, 2000) ("[Fashion] is becoming more accepted by academics, whether they look at it as art or more anthropologically." (quoting Mark Schultz, co-curator of Goldstein Gallery at the University of Minnesota)) with Roberta Smith, *Memo to Museums: Don't Give Up on Art*, N.Y. Times 2, at 1 (Dec. 3, 2000) ("I'm not sure that Mr. Armani's development merits a museum exhibition, especially a museumwide one. He seems to be less an innovator than a brilliant tailor."); Judith Shulevitz, *Armani Speaks Softly, Carries Big Stick*, Slate Mag. (Oct. 25, 2000) ("That will probably be the take-away from the Guggenheim show too - they tried to tell you it had something to do with art, but you knew all along it was just about the clothes.").

n124. Suzy Menkes, *Playing to the Galleries: Wannabe Art; Fashion's Crossover Moments*, Intl. Herald Trib. 12 (Oct. 13, 1998); see also *Commercial Interludes*, Women's Wear Daily 6 (Mar. 15, 1999) ("Fashion is a business, and once the exhausted fashion flock disperses and the Carrousel du Louvre lies dormant, everyone wants the clothes to sell.").

n125. See *Snapshot: Introducing the Dutch Masters; Bored of Versace? Tiring of Mcqueen? Fear Not, Says Josh Sims - Holland's New Breed of Conceptual Fashion Designers are out to Save the Day*, Indep. 9 (Jan. 14, 2001) ("Viktor Horsting and Rolf Snoeren of Viktor & Rolf balance out the uneasy art-fashion equation. 'Some experimental fashion can be really ridiculous, but it's important for us that our clothes are wearable,' says Snoeren. 'We trained as fashion designers, but our work has had the attention of the art world. This isn't art for the art world. Perhaps it's art for the fashion world.'"); Menkes, *supra* n. 124 ("Miuccia Prada, who is always prepared to push fashion to its limits, says that she herself is nervous about going over the edge. 'My job is fashion,' she says. 'Any time I feel myself getting too 'artsy,' I go back to my fashion roots. Of course you see what is happening in art and that influences you. But we have our art foundation. Maybe I'm wrong, but I want to keep them separate.'"); CNN Larry King Weekend, *Fashion Designer Karl Lagerfeld Talks about His Friendships with Princess Diana and Gianni Versace* (CNN Sep. 20, 1997) (television broadcast) (quoting Karl Lagerfeld as saying: "You can teach the craft [of fashion], but there has to be a little more than that, the eye, the wish, the desire and to think also that fashion is important without being too serious about it... . When they start to say it's art and personality, I'm easily bored."); Bridget Foley, et al., *Master class: Fashion Group Names Seven Men Masters of Design*, Women's Wear Daily 6 (Sep. 19, 1997) ("As for his own work, is it art? 'I would rather speak of my strengths and advantages as a designer,' [Yohji] Yamamoto says.").

n126. Jessica Kerwin, *Under the Influence: Fashion designers reflect on the stuff that moves them most*, W Magazine, 434 (Sep. 2001) (comment of Tom Ford, designer of Gucci and Yves Saint Laurent).

n127. *Id.* (comment of Christian LaCroix).

n128. 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, 1157 (1983). Note also that French copyright law enumerates clothing designs as one of the types of works it protects. See UNESCO, *Law on the Intellectual Property Code* <<http://www.unesco.org/culture/copy/copyright/france/page1.html#p1>> (accessed May 6, 2001) (translation of French copyright law) ("The following, in particular, shall be considered works of the mind within the meaning of this Code: ... 14. creations of the seasonal industries of dress and articles of fashion. Industries which, by reason of the demands of fashion, frequently renew the form of their products, particularly the making of dresses, furs, underwear, embroidery, hats, shoes, gloves, leather goods, the manufacture of fabrics of striking novelty or of special use in high fashion dressmaking, the products of manufacturers of articles of fashion and of footwear and the manufacture of fabrics for upholstery shall be deemed to be seasonal industries.").

n129. *Id.*

n130. *Id.* at 1159.

n131. *Id.* at 1161.

n132. *Id.*

n133. See *Prince Group v. MTS Prods.*, 967 F. Supp. 121 (S.D.N.Y. 1997) (protection for "mega dot" pattern of irregularly shaped polka dots); *Textile Innovations, Ltd. v. Original Textile Collections, Ltd.*, 1992 U.S. Dist. LEXIS 7695 (S.D.N.Y. 1992) (protection for floral pattern).

n134. 169 F. Supp. 142 (S.D.N.Y. 1959).

n135. *Id.* at 143.

n136. See *Verney Corp. v. Rose Fabric Converters Corp.*, 87 F. Supp. 802 (S.D.N.Y. 1949) ("While the design may have been properly registered as a print for an article of merchandise, plaintiff, by printing it on the fabric from which the dresses are manufactured, uses the design as a part of the article of merchandise itself.").

n137. See *Segrets, Inc. v. Gillman Knitwear Co.*, 207 F.3d 56 (1st Cir. 2000) (granting summary judgment for copyright infringement of a blanket stitch design and a primitive pattern to be used on sweaters), cert. denied, 121 S. Ct. 76 (2000); *Banff Ltd. v. Express Inc.*, 921 F. Supp. 1065 (S.D.N.Y. 1996) (protecting an Aran-style sweater consisting of a "combination of cabled patterns, traditional stitching and hand crocheted roses" against infringement by the Express retail clothing chain); *In Design v. Lauren Knitwear Corp.*, 782 F. Supp. 824 (S.D.N.Y. 1994) (protecting a colored triangle pattern designed by Sasha Kagan against a similar redesign by Lauren Knitwear).

n138. See *Imperial Laces v. Westchester Lace*, 1998 U.S. Dist. LEXIS 18679, at 7 n. 5 (S.D.N.Y. 1998) ("It is undisputed that fabric designs, including lace designs, are copyrightable."); *Eve of Milady*, 957 F. Supp. 484 (S.D.N.Y. 1998) (deeming lace designs incorporated into wedding dresses copyrightable).

n139. See *Boucher v. Du Boyes, Inc.*, 253 F.2d 948 (2d Cir. 1958) (deeming costume jewelry copyrightable subject matter under *Mazer*, 347 U.S. 201); but see *Judith Ripka Designs v. Preville*, 935 F. Supp. 237 (S.D.N.Y. 1996) (determining no infringement for two lines of "ancient inspired" jewelry composed of jewelry elements which had

been around "for ages"); *DBC of N.Y., Inc. v. Merit Diamond Corp.*, 768 F. Supp. 414 (S.D.N.Y. 1991) (denying copyright protection for a diamond ring design composed of elements well-known in the jewelry trade, such as marquise cut diamonds, trillions and a knife-edged shank).

n140. 1998 U.S. Dist. LEXIS 21288 (S.D.N.Y. Aug. 11, 1998).

n141. *Id.* at 13-31.

n142. 17 U.S.C. 102(b).

n143. Craig Joyce et al., *Copyright Law* 125 (5th ed. 2000).

n144. 428 F. Supp. 91 (E.D. Pa. 1977).

n145. *Id.* at 92.

n146. *Id.*

n147. *Id.* at 92-93.

n148. *Id.* at 93.

n149. *Id.* at 93-94.

n150. *Id.* at 95.

n151. Cf. *Galiano v. Harrah's Operating Co., Inc.*, 2000 U.S. Dist. LEXIS 17258 at 11-12 (E.D. La. 2000) (denying summary judgment for copyright infringement when the defendant made clothing similar to Plaintiff's copyrighted drawings).

n152. Jo Carillo, *Protecting a Piece of American Folklore: The Example of the Gusset*, 4 *J. Intell. Prop. L.* 203, 223 (1997).

n153. 17 U.S.C. 408(a) (2000) ("Registration is not a condition of copyright protection."); but see 17 U.S.C. 411 (2000) (requiring registration before institution of a copyright infringement action); 17 U.S.C. 412 (2000) (limiting the availability of statutory damages and attorney's fees to registered copyrights).

n154. See 17 U.S.C. 401(a) (2000) ("[A] notice of copyright as provided by this section may be placed on publicly distributed copies.") (emphasis added). Note, however, that encouragement to provide copyright notice is provided by 401(d) in that notice will negate a defense for the reduction of actual or statutory damages based on innocent infringement.

n155. *Registration of Designs*, supra n. 56, at 211 (statement of Mr. M. Hefti, Vice President of the Embroidery and Lace Manufacturers' Association of New Jersey, estimating the number of designs produced by a smaller designer at 1,500-2,000 per year). The number of designs produced by larger manufacturers of fabric and lace may be as many as 60,000 - 80,000 per year. *Id.* at 89 (statement of W.B. Bradford, representing the National Design Registration League).

n156. *Id.* at 105 (statement of W.B. Bradford, Representing the National Design Registration League) ("Many of the designs we pick out and think are worth registering ... prove unpopular ... and the ones we do not think worth registering are the very ones that the public buy.").

n157. 17 U.S.C. 302 (2000) ("Copyright ... subsists from its creation and ... endures for a term consisting of the life of the author and 70 years after the author's death.").

n158. *Coach Leatherware Co. v. AnnTaylor, Inc.*, 933 F.2d 162, 171 (2d Cir. 1991) (citations omitted).

n159. 15 U.S.C. 1127 (2000).

n160. 15 U.S.C. 1115(a) (2000) ("[This act] shall not preclude another person from proving any legal or equitable defense or defect ... which might have been asserted if such mark had not been registered."). However, the Lanham Act does provide many incentives for registration. See e.g. *id.* (affording prima facie evidence of validity of the registered mark).

n161. *Polo Fashions, Inc. v. Craftex, Inc.*, 816 F.2d 145 (4th Cir. 1987); *Polo Fashions, Inc. v. J&W Enterprises*, 786 F.2d 1156 (4th Cir. 1986); *Polo Fashions, Inc. v. Dick Bruhn, Inc.*, 793 F.2d 1132 (9th Cir. 1986); *Polo Fashions, Inc. v. Branded Apparel Merchandising, Inc.*, 592 F. Supp. 648 (D. Mass. 1984); *Polo Fashions, Inc. v. The Gordon Group*, 627 F. Supp. 878 (M.D.N.C. 1985); *Polo Fashions, Inc. v. Extra Special Products, Inc.*, 451 F. Supp. 555 (S.D.N.Y. 1978).

n162. See *A.V. by Versace, Inc. v. Gianni Versace, S.p.A.*, 126 F. Supp. 2d 328 (S.D.N.Y. 2001) (granting a preliminary injunction against a U.S. manufacturer's sale of goods bearing the marks "Alfredo Versace" and "A.V. by Versace" both in the U.S. and abroad); *Calvin Klein Industries, Inc. v. BFK Hong Kong, Ltd.*, 714 F. Supp. 78 (S.D.N.Y. 1989) (allowing an injunction against sales of jeans labeled with the Calvin Klein label both in the U.S. and abroad when Calvin Klein canceled the manufacturing contract after many of the jeans had been produced. The court deemed that such a broad injunction was necessary to protect Calvin Klein's international licensing contracts.).

n163. See *Wal-Mart Stores, Inc. v. Samara Bros., Inc.*, 529 U.S. 205, 209 (2000).

n164. If trade dress is registered, infringement actions can be instituted under 32 of the Lanham Act.

n165. See *Coach Leatherware Co.*, 933 F.2d at 168.

n166. See 15 U.S.C. 1125(a)(3) (2000).

n167. *Id.* 1125(a)(1)(a).

n168. See *Wal-Mart*, 529 U.S. at 210 ("Nothing in 43(a) explicitly requires a producer to show that its trade dress is distinctive, but courts have universally imposed that requirement, since without distinctiveness the trade dress would not "cause confusion ... as to the origin, sponsorship, or approval of [the] goods,' as the section requires.").

n169. 532 U.S. 23 (2001).

n170. 514 U.S. 159 (1995).

n171. *Traffix Devices*, 532 U.S. at 31-33.

n172. *Id.* at 34-35.

n173. See generally *W.T. Rogers Co. v. Keene*, 778 F.2d 334 (7th Cir. 1985) (finding that a hexagonal design for office supply trays was not aesthetically functional because it was not essential for competition).

n174. *Id.* at 347.

n175. 916 F.2d 76 (2d Cir. 1990).

n176. *Id.* at 78-82. Note that the court's analysis sounds oddly similar to the idea/expression dichotomy in copyright law.

n177. *Knitwaves*, 71 F.3d at 1006.

n178. 933 F.2d at 171.

n179. *Knitwaves*, 71 F.3d at 1006. Note that the court in *Knitwaves* ultimately did not find trade dress infringement had occurred.

n180. 529 U.S. 205. The court did not specifically address the functionality doctrine in this opinion.

n181. 165 F.3d 120, 132 (2d Cir. 1998), rev'd on other grounds, 529 U.S. 205. Note that here, the Second Circuit, possibly evidencing a trend toward greater trade dress protection for clothing, found that Samara's trade dress was distinctive in that it involved the combination of a variety of unique design elements and that consumer confusion was likely based on the extent of the copying done by Wal-Mart.

n182. See e.g. *Knitwaves*, 71 F.3d 996.

n183. *Id.* at 1006.

n184. *Polaroid Co. v. Polarad Elecs. Co.*, 287 F.2d 492, 495 (2d Cir. 1961).

n185. *Id.*

n186. 933 F.2d at 169 (declining to find evidence of confusion even when the President of one of the infringing companies could not identify the differences between an infringing bag and the original).

n187. 219 F.3d 104 (2d Cir. 2000).

n188. *Id.* at 109.

n189. *Id.* at 108 (citing *Mastercrafters Clock & Radio Co. v. Vacheron & Constantin-Le Coultre Watches, Inc.*, 221 F.2d 464, 466 (2d Cir. 1955)).

n190. *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 768 (1992).

n191. *Id.* at 776.

n192. See S. Priya Bharathi, Student Author, *There IS More than One Way to Skin a Copycat: The Emergence of Trade Dress to Combat Design Piracy of Fashion Works*, 27 *Tex. Tech. L. Rev.* 1667, 1679 (1996).

n193. See *Wal-Mart*, 529 U.S. at 212 ("Design, like color, is not inherently distinctive."); *Yankee Candle v. Bridgewater Candle*, 107 F. Supp. 2d 82 (D. Mass 2000) ("The Supreme Court's recent decision in *Wal-Mart* ... crushed most, if not all, of the life out of plaintiff's statutory trade dress claim.").

n194. *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 851 n.11 (1982).

n195. See Stuart M. Riback, *Product Design Trade Dress, Where do We Go from Here?*, 90 *Trademark Rep.* 563, 566 (2000) (The double whammy arises because the nature of the clothing industry is not to package products, therefore disqualifying clothing manufacturers from the easier to obtain product packaging trade dress and raising the bar for product design trade dress.).

n196. See William D. Coston, *Wal-Mart Stores, Inc. v. Samara Brothers, Inc.: The Triumph of Consumer Protection in Lanham Act Litigation*, 90 *Trademark Rep.* 572, 576 (2000).

n197. 243 F.3d 548 (table), 2000 WL 1693680 (finding that consumer association of the plaintiff's Scarf Cap design with the motorcycle industry in general is not sufficient to support secondary meaning).

n198. *Aldridge v. The Gap, Inc.*, 866 F. Supp. 312, 314 (N.D. Tex. 1994) (finding that designs for children's clothing fell within the subject matter of copyright law and that therefore state misappropriation laws were preempted).

n199. 532 U.S. at 29.

n200. See Karina K. Terakura, *Insufficiency of Trade Dress Protection: Lack of Guidance for Trade Dress Infringement Litigation in the Fashion Design Industry*, 2001 *U. Haw. L. Rev.* 569, 615 (2001) ("A distinct style of one designer may be obvious to those who shop at Neiman Marcus, but not so obvious to those who shop at Wal-Mart. Similarly, identification of high-fashion designer clothing may be easy for those who read fashion magazines and are aware of developing trends, yet confusing for those who do not read, watch, or even care about fashion styles. It may be impossible to require every jury to possess such an in-depth and sophisticated appreciation of the fashion world, but that is what is necessary to understand, recognize and distinguish all the various designers' trade dress styles.")

n201. H.R. Comm. on Patents, *Arguments before the House Comm. on Patents on H.R. 20172, To Amend the Patent Laws for Designs*, 59th Cong. 4 (Feb. 14, 1907) (statement of Mr. W. A. Bartlett, Patent Attorney) (referring to the vulture-like nature of design pirates).