



NOTE

## The Copying of Independent Fashion Designers: Perils and Potential Remedies in a Post-*Star Athletica* World

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**Abstract.** Design piracy is a widespread practice in the fashion industry. Individuals and firms across every level of the industry engage in, and benefit from, the taking of others' designs. The copying of small, independent fashion designers, however, poses a unique and significant problem that has yet to be fully addressed by existing intellectual property laws or attempts at reform. This Note pinpoints and evaluates potential remedies for independent designers whose work is copied without attribution or compensation. It first examines the viability of legal action by such designers in the wake of *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, a recent Supreme Court opinion that strengthened copyright protection for clothing designs. It then examines nonlitigation avenues through which designers may seek recourse. Ultimately, this Note concludes that even though *Star Athletica* has strengthened designers' legal claims, there remain practical barriers to the pursuit of litigation, and independent designers may benefit from strategies such as turning to social media and seeking pro bono legal services. On a broader level, this Note illuminates the notion that fashion should not be relegated to the realm of the frivolous and the feminine: It implicates issues including worker exploitation, racial inequity, and social change, and is worthy of greater intellectual attention.

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## Introduction

Fashion is a powerhouse industry. In 2022, the worldwide apparel market generated approximately \$1.53 trillion in global revenue,<sup>1</sup> with U.S. revenues amounting to \$312 billion.<sup>2</sup> In 2018, the industry employed over 75 million individuals worldwide and was valued at over \$2.5 trillion.<sup>3</sup> Fashion is universal: “Everyone wears clothing and inevitably participates in fashion to some degree.”<sup>4</sup>

But fashion is also more than just the clothing a person chooses to wear. It has significant cultural and historical value. The trends of each era “reveal society’s values and aspirations”—from the utilitarian, resource-saving designs that proliferated during both World Wars to the norm-breaking patterns and silhouettes of the 1960s.<sup>5</sup>

Relatedly, fashion can be a tool for social change. Civil rights activists in the United States “wore their ‘Sunday Best’ at protests to demonstrate they were worthy of dignity and respect as they challenged the institutions that kept Black people at the bottom of the social hierarchy.”<sup>6</sup> Women in the 1970s used experimental styles—denim, miniskirts with bloomers, pantsuits—to “challenge the idea of what society regarded as a ‘feminine’ dress.”<sup>7</sup> More recently, demonstrators wore knitted pink “pussy hats” during the 2017 Women’s March on Washington to protest vulgar comments made by President Donald Trump about his predatory actions toward women.<sup>8</sup> T-shirts

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1. Statista, Revenue of the Apparel Market Worldwide from 2014 to 2027 (in Trillion U.S. Dollars) (2022), <https://perma.cc/RGX5-AFCV>.
  2. Statista, Revenue of the Apparel Market Worldwide by Country in 2022 (2023), <https://perma.cc/7XPM-Q3NT>.
  3. *Environmental Sustainability in the Fashion Industry*, GENEVA ENV’T NETWORK, <https://perma.cc/4MF7-PSM9> (last updated Mar. 27, 2023).
  4. C. Scott Hemphill & Jeannie Suk, *The Law, Culture, and Economics of Fashion*, 61 STAN. L. REV. 1147, 1148 (2009). The exception to this statement would be individuals who live in nudist communities. See, e.g., Curiosity, *Welcome to the World’s Largest Nudist Colony*, CHI. TRIB. (Jan. 27, 2016, 2:50 PM), <https://perma.cc/8SWR-2PED>.
  5. See Bel Jacobs, *A New Way of Living and Dressing*, BBC: THE COLLECTION (Sept. 21, 2020) (quoting London College of Fashion Head of Cultural and Historical Studies Caroline Stevenson), <https://perma.cc/2CUT-Q3RK>; see also Karina Reddy, *1910-1919*, FASHION HIST. TIMELINE, <https://perma.cc/NHU8-QP87> (last updated Aug. 18, 2020); Karina Reddy, *1940-1949*, FASHION HIST. TIMELINE, <https://perma.cc/A5XA-4XUA> (last updated Aug. 18, 2020); Lily Rothman, *How the Fashions of the 1960s Reflected Social Change*, TIME (Nov. 21, 2017, 9:00 AM EST), <https://perma.cc/8YDK-XNY3>; Karina Reddy, *1960-1969*, FASHION HIST. TIMELINE, <https://perma.cc/HM4N-KQU6> (last updated Aug. 18, 2020).
  6. Melissa De Witte, *Dress Codes Can Reveal Social Aspirations, Political Ideals, Says Stanford Scholar*, STAN. NEWS (Feb. 10, 2021), <https://perma.cc/7PAR-9QNP>.
  7. Scarlett Newman, *A Brief History of Protest Fashion*, TEEN VOGUE (Nov. 27, 2020), <https://perma.cc/2Z3N-PMGZ>.
  8. *Id.*

with messages such as “Black Lives Matter” and “We Can’t Breathe” have been used to signal support for the ongoing fight against police brutality and systemic racism.<sup>9</sup> And an up-and-coming sector of fashion dubbed “healthwear” is producing garments that are better suited for individuals with disabilities, from shirts that allow for the easy insertion and removal of catheters to gloves made specifically for wheelchair users.<sup>10</sup>

At the same time, the fashion industry is capable of inflicting significant social harm. Environmental damage is one of them: Clothing production is responsible for 10% of global carbon emissions—more than what is created by all international flights and maritime shipping combined.<sup>11</sup> The fashion industry also significantly exacerbates water scarcity in regions around the world<sup>12</sup>: In 2020, it took 3,000 liters of water to produce one cotton shirt and textile dyeing accounted for approximately 20% of wastewater worldwide.<sup>13</sup>

The fashion industry, and in particular, “fast fashion”—clothing that is designed, created, and marketed to be both trendy and cheaply available<sup>14</sup>—has a “human cost” as well.<sup>15</sup> The need for cheap and quick production “contributes to the exploitation of low-wage labor, particularly in the developing world.”<sup>16</sup> A recent study of forty companies, including major brands such as H&M, Zara, and Nike, found that “not a single one of these brands paid a living wage to all workers in their supply chain,” even after “numerous pledges” to do so.<sup>17</sup> Furthermore, this exploitation disproportionately affects women—who make up approximately 80% of garment workers—and children.<sup>18</sup>

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9. *See id.*

10. *See* Vanessa Friedman, *Fashion’s Newest Frontier: The Disabled and the Displaced*, N.Y. TIMES (July 19, 2016) (quoting Care and Wear Founder and Chief Executive Chaitenya Razdan), <https://perma.cc/ZU8U-99JS>.

11. *Environmental Sustainability in the Fashion Industry*, *supra* note 3.

12. *Id.*

13. Ngan Le, *The Impact of Fast Fashion on the Environment*, PRINCETON STUDENT CLIMATE INITIATIVE (July 20, 2020), <https://perma.cc/X3WQ-6RNM>.

14. *See Fast Fashion*, MERRIAM-WEBSTER, <https://perma.cc/2QQZ-AWY7> (archived Apr. 2, 2023).

15. *Environmental Sustainability in the Fashion Industry*, *supra* note 3.

16. *See* Kal Raustiala & Christopher Jon Sprigman, *Faster Fashion: The Piracy Paradox and Its Perils*, 39 CARDOZO ARTS & ENT. L.J. 535, 549 (2021). Notably, Raustiala and Sprigman argue that this problem is not unique to fashion, but rather is endemic in “[a] wide variety of developed-world manufacturing industries [that] utilize cheap labor in the developing world.” *Id.*

17. CLEAN CLOTHES CAMPAIGN, *OUT OF THE SHADOWS: A SPOTLIGHT ON EXPLOITATION IN THE FASHION INDUSTRY 2* (2020), <https://perma.cc/TB3B-AW9M>.

18. *Gender: Women Workers Mistreated*, CLEAN CLOTHES CAMPAIGN, <https://perma.cc/Y6W5-9QH9> (archived Feb. 1, 2023); *see* Josephine Moulds, *Child Labour in the Fashion Supply Chain: Where, Why and What Can Be Done*, GUARDIAN, <https://perma.cc/QD9R-82U5> (archived Feb. 1, 2023).

Fashion also gives rise to disputes over ownership. Some of these disputes concern allegations of cultural appropriation, wherein “a member of a relatively dominant culture [is accused] of taking a traditional cultural expression and repurposing it in a different context, without authorization, acknowledgment and/or compensation, in a way that causes harm to the traditional cultural expression holder(s).”<sup>19</sup> An oft-cited example of such appropriation is the use of Native American headdresses in costumes or fashion shows.<sup>20</sup>

Another form of ownership dispute takes place when one party copies another’s design and passes it off as their own. Otherwise known as “design piracy,”<sup>21</sup> this phenomenon is a longstanding and ubiquitous practice in the fashion industry,<sup>22</sup> made all the easier by the fact that fashion designs have historically been afforded few intellectual property (IP) protections in the United States.<sup>23</sup> While there is disagreement in the literature over the role copying plays in fostering innovation in fashion,<sup>24</sup> it is agreed that copying runs rampant throughout all segments of the industry.<sup>25</sup>

Though each of the aforementioned problems with fashion undoubtedly merits its own line of scholarship, this Note focuses on design piracy in the United States—specifically piracy involving the taking of small, independent designers’ work. The designers who suffer from this type of piracy are likely to be women.<sup>26</sup> Many of them are likely people of color.<sup>27</sup> On average, they earn far less than the celebrity designers we see featured prominently in the media.<sup>28</sup> Thus, when an independent designer is copied, they have much more

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19. Brigitte Vézina, *Curbing Cultural Appropriation in the Fashion Industry with Intellectual Property*, WIPO MAG., Aug. 2019, at 9, 9, <https://perma.cc/2964-WCBE>.

20. Amber Lee, *Homage or Faux Paus: Cultural Appropriation in Fashion Apparel*, CTR. FOR ART L. (June 29, 2020), <https://perma.cc/QF3B-BWNG> (to locate, select “View the live page”).

21. See generally Alice Wickens, *Design Piracy in the United States: Time to Fashion a Remedy?*, 24 J. WORLD INTELL. PROP. 55 (2021).

22. See Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687, 1695-98 (2006).

23. See Wickens, *supra* note 21, at 58.

24. Compare Raustiala & Sprigman, *supra* note 22, at 1717-33 (“[W]e claim that this low-IP system may paradoxically serve the [fashion] industry’s interests better than a high-IP system.”), with Hemphill & Suk, *supra* note 4, at 1180-84 (“The analysis so far shows that copyists [in fashion] reduce the amount of innovation and distort its direction.”).

25. See Raustiala & Sprigman, *supra* note 22, at 1714-15; Hemphill & Suk, *supra* note 4, at 1170-71.

26. See *Fashion Designers*, DATA USA, <https://perma.cc/72FF-4643> (archived Feb. 3, 2023) (stating that, in 2020, 83% of fashion designers were female).

27. See *id.* (stating that, in 2020, 35.7% of designers were Hispanic or nonwhite).

28. See *Fashion Designers: Summary*, U.S. BUREAU OF LAB. STAT., <https://perma.cc/2SEC-3JM3> (archived Feb. 3, 2023) (stating that, in 2021, the median annual wage for fashion designers was \$77,450); Charlotte Gush, *Raf Simons Has Finally Been Confirmed as Chief*  
*footnote continued on next page*

to lose than do the Forever 21s and Zaras of the world. This Note argues that such copying is a unique and problematic phenomenon which does not yet have a simple or ideal remedy, but which may be addressed through multiple avenues—not only litigation, but also alternative enforcement mechanisms.

In the background of this discussion lies the assumption that the fashion industry and its issues are important and deserving of attention. This assumption is far from universal. Despite all of its promises and perils, fashion has long been dismissed as unworthy of significant intellectual attention, relegated to the realm of the frivolous and the feminine.<sup>29</sup> In fact, the House Report for the Copyright Act of 1976 explicitly dismissed the possibility of protecting “ladies’ dress.”<sup>30</sup> This trivialization, I believe, is a serious mistake. As this Note will demonstrate, fashion design piracy implicates important issues such as racial equity, the environment, and moral rights.

The Note proceeds as follows: Part I argues that the copying of independent fashion designers is a widespread phenomenon that raises a number of social and IP considerations. It presents case studies of two real-world designers to illustrate its point. Part II evaluates the potential for victims of copying to seek legal recourse through copyright infringement claims. Specifically, it examines whether the viability of such claims has increased after the Supreme Court’s 2017 decision in *Star Athletica, L.L.C. v. Varsity Brands, Inc.*,<sup>31</sup> which many have viewed as increasing copyright protection for fashion designs. It argues that while at least some in the fashion industry have since used *Star Athletica* to file suit over copied designs, there remain practical barriers to taking legal action, such as cost, that will continue to hinder independent designers. Finally, and in response to the conclusion of the previous Part, Part III evaluates three nontraditional avenues through which designers may seek redress after being copied: social media shaming, pro bono legal services, and the newly established Copyright Claims Board. It concludes that while each avenue has its benefits and limitations, social media shaming can be a particularly effective tactic that approximates at least some of the goals of litigation.

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*Creative Officer at Calvin Klein*, 1-D (Sept. 8, 2016), <https://perma.cc/NGE4-V757> (noting Raf Simons’s \$18 million salary).

29. See Brief of Fashion Law Institute et al. as Amici Curiae in Support of Respondents at 35, *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002 (2017) (No. 15-866), 2016 WL 5349673 [hereinafter Brief of Fashion Law Institute]. The frequent intertwining of these two subjects—that what is feminine is often viewed as frivolous, and vice versa—should itself be the subject of a paper, but it is not my focus here.

30. See H.R. REP. NO. 94-1476, at 55 (1976).

31. 137 S. Ct. 1002 (2017); see *infra* Part II.A.

## I. The Copying of Independent Fashion Designers

This Part argues that the copying of independent fashion designers is a longstanding phenomenon that raises a unique set of utilitarian and moral-rights concerns.

### A. Two Cases of Design Piracy

In this Section, I aim to provide a window into the all-too-common experience of having one's work copied by presenting case studies of two independent designers, both of whom had their designs copied by fashion firms. The case studies draw from telephone interviews with the designers, which I conducted in January 2022 for the purposes of this Note. Unless indicated otherwise by a footnote, the information stated in each case study was provided by the designer during their interview.

#### 1. Case study: K. Tyson Perez, HardWear Style<sup>32</sup>

K. Tyson Perez's journey into the fashion industry began when he was a student at Parsons School of Design in New York City. "I wanted to be a full-on designer designing apparel," he told me. "Then, two or three semesters in, I realized that I was into the styling aspect of fashion. Garments, but also accessorizing and creating a . . . look. So I made a shift into fashion styling and completely fell in love with it."

Thus began a fifteen-year career as a stylist. Along the way, Perez started a digital fashion magazine, *UNVOGUE*, which aimed to "buck the system of fashion." As a Black designer, he felt strongly about this mission. "[T]he fashion industry is very white," he explained. "That starts with the editors and the designers, who then decide to use the models . . . and then everything becomes very white."

Eventually, Perez also began making custom pieces to use when styling looks for editorials. Among his first creations were baseball caps with brass letters on them. Whenever Perez posted photographs on Facebook, he would receive comments from people asking where they could buy the hats.

At first, he was resistant to the idea of selling them. "I didn't really want to design for the masses because I knew the hard work and labor that goes into designing[,] [a]nd then for things to . . . not be received [well] . . . it's just very tumultuous," he said. "As a designer, you get your feelings hurt . . . all the time. . . . I saw how the fashion industry worked and how things would get knocked off."

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32. Telephone Interview with K. Tyson Perez, Founder & Creative Dir., HardWear Style (Jan. 17, 2022).

But over time, the demand for Perez’s hats grew to the point where he could not ignore it anymore. He began making and selling custom caps, using hardware pieces from vintage stores. They began to do well—he received some press attention, and celebrity stylists were requesting his hats for the likes of Kim Kardashian and Kanye West.

In 2014, Perez encountered a “huge zipper” he had never seen on a hat before. That’s when he “decided to wrap it around a hat, just to see what it would look like.” After wearing his handmade prototype out in public, he “got a really great reception.” Then, people began asking whether the zipper could open and close.

After years of searching, Perez found a manufacturer willing to take on the complicated and expensive process of making his hat, but with a functional zipper. In 2018, he began selling the upgraded hats online under his label, HardWear Style.<sup>33</sup> By this point, he had also loaned out samples to stylists and used the hats to shoot numerous editorials. His design had, in other words, “started making its rounds within the industry.”

In December 2020, Perez received a message alerting him to an Instagram post of a man wearing a leather hat with a zipper on it—one that looked very similar to Perez’s product.<sup>34</sup> At first, he brushed it off. “[I]t happens all the time,” Perez explained. “You become desensitized to it because people are always trying to copy and remake and redo. So I was just like, ‘it is what it is.’”

But upon further inspection, Perez saw that the individual who had posted the lookalike hat was Matthew M. Williams, the creative director for Givenchy, a luxury fashion company.<sup>35</sup> That’s when things changed for him. In his eyes, the Givenchy hat had to have been a copy, in part because Perez had “become known [in the fashion industry] for the zipper detail on a leather hat,” but even more so because he and Williams had crossed paths numerous times over the years. “He has seen me with that hat,” Perez insisted.

And for Perez, the misattribution of the design to Williams and Givenchy was the toughest pill to swallow:

I started noticing all of the comments, and even some of . . . the stylists and people I know within the industry who knew this was my design aesthetic, saying . . . the hat was amazing. . . . It’s annoying that [Williams] copied it, but then reading the comments about how genius this is, talking about how hard it is to create such a hat . . . it was just another form of colonialism and suppression . . . . A bigger European brand thinking, I see a smaller Black designer doing it . . . and maybe

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33. See HARDWEAR STYLE, <https://perma.cc/L6MR-D8EV> (archived Feb. 3, 2023).

34. This post is no longer publicly available to view on Instagram.

35. Williams remains in this role as of April 2023. See Matthew M Williams (@matthewmwilliams), INSTAGRAM, <https://perma.cc/P7B2-PKDR> (archived Feb. 12, 2023) (to locate, select “View the live page”).

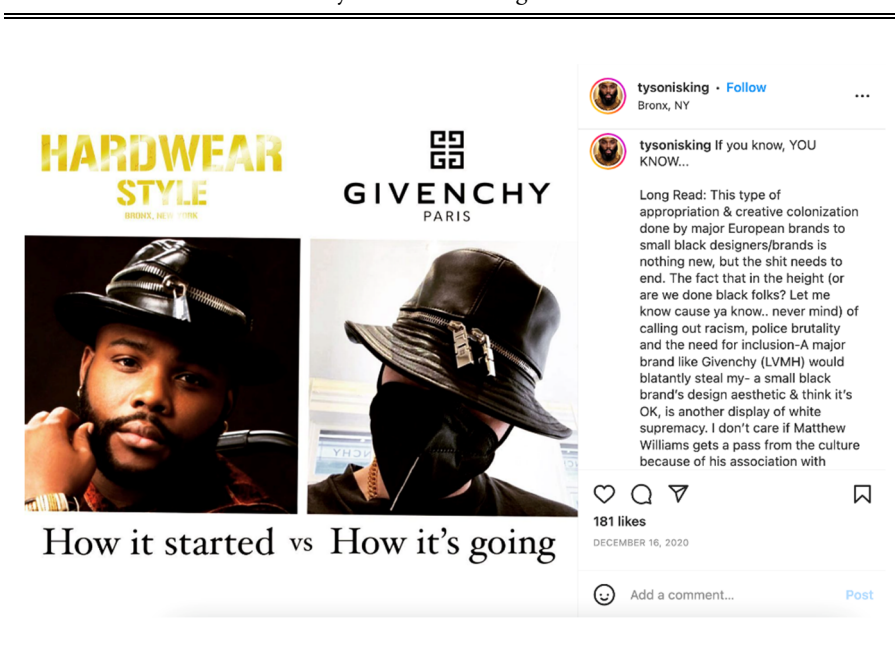
he's not getting all of the sales that this would generate under the Givenchy brand. So I'll just take it from him.

Interestingly, Perez said that he had “almost been anticipating this day for years.” Though he had often been encouraged to pursue design patents or copyrights for his designs, he was aware that “there weren’t a lot of protections available” in the fashion industry. “That’s why [copying] happens all the time,” he explained.

Soon afterward, Perez decided to take action. He uploaded a side-by-side of his hat and Givenchy’s copy on Instagram, shown in Figure 1 below, accusing Givenchy of “blatantly steal[ing] . . . a small black brand’s design aesthetic” and participating in “appropriation & creative colonization.”<sup>36</sup>

**Figure 1**

K. Tyson Perez’s Instagram Post



Perez also posted Instagram stories about the copying, and quickly noticed that Williams’ account was viewing them. To him, this was proof that Williams knew what was going on—and was blatantly choosing to ignore it. “People were like, ‘Do you really think he [Williams] knows who . . . this guy is?’ And it’s like, yes.”

36. See K. Tyson Perez-Harris (@tysonisking), INSTAGRAM (Dec. 16, 2020), <https://perma.cc/5JLV-URAH> (to locate, select “View the live page”).

Perez's posts began to attract buzz, and in the ensuing days and weeks, "the whole thing took on a life of its own." Numerous newspapers covered his story,<sup>37</sup> and multiple IP attorneys reached out. Perez hired one of them, who began communications with Givenchy's legal team.

According to Perez, Givenchy's attorneys initially expressed that "they wanted to make things right." All Perez wanted was for the brand to "acknowledge that this was an attempt to recreate [his] design aesthetic." He remembered that Givenchy appeared amenable to this, promising to issue a public apology. He also recalled that the brand committed to making a charity donation after he pointed out the racial injustices perpetuated by such copying.

As time went on, however, Perez came to the conclusion that neither promise was going to be fulfilled. According to him, Givenchy's attorneys had also promised to remove the hat in question from the brand's website, but that did not happen either.<sup>38</sup> When questioned about it, they "started trying to backpedal, saying, . . . 'We didn't really get [the hat] from you.'" And ultimately, they told his attorney, "We're not willing to settle because your client's hat is a fedora and ours is a bucket hat."

Perez hypothesized that Givenchy's incentive to do right by him vanished after "they noticed that . . . the comments [on social media] . . . started slowing down and the news articles started slowing down." Similarly, Perez recalls that attorneys' interest in the matter began to die down over time. He stated that "one lawyer referred me to another, and they initially went after them [Givenchy], but both fell by the wayside after they realized it wasn't going to be an immediate settlement."

Months later, according to Perez, Givenchy told him it had paused production of the hat—though it continued to maintain that it had not taken the design from him. By then, Perez had largely come to terms with what had happened, taking on a mentality toward design piracy that he continues to hold today. "I can't focus too much on who's going to knock [my designs] off. If someone does it again, I'm going to speak up again. But . . . I don't expect any recourse."

Perez also emphasized that in the fashion industry, piracy is widespread. "[I]t's bigger than me. I know that [brands] are doing this to many young

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37. See, e.g., Carlos Greer, *Bronx Designer Accuses Givenchy of Stealing His Design*, PAGE SIX (Dec. 17, 2020, 7:33 PM), <https://perma.cc/L5PX-ESQP>; Priya Elan, *Givenchy Accused of Stealing Leather Hat Design from New York Designer*, GUARDIAN (Dec. 18, 2020, 2:47 PM EST), <https://perma.cc/4ARZ-Z48M>.

38. The Givenchy website no longer advertises this hat, though it is unclear when the change was made. See GIVENCHY, <https://perma.cc/VGL9-CLEK> (archived Feb. 13, 2023); see also Carlos Greer, *Givenchy 'Paused' Hat After Bronx Designer Alleged Design Copy*, PAGE SIX (Mar. 31, 2021, 12:36 PM), <https://perma.cc/Z4N8-L6YF> (suggesting that production of the hat was "paused" sometime around or before March 2021).

designers of color [and] design students who aren't seen," he said. "I know firsthand that these people have full teams dedicated to just that, to scouring the internet for cool, young, innovative design aesthetics and bringing them back."

Importantly, he condemned copying of any kind, stating that "[e]ven . . . when I see smaller designers replicating bigger brands' design aesthetics, I don't like that either. . . . I don't feel like smaller designers should have the . . . leeway to copy others in the name of making it more affordable." He also did not draw a distinction between intentional and coincidental copying, at least in terms of the recourse that should result: He only wanted Givenchy to "acknowledge there is a similarity [between the hat designs], whether intentional or unintentional."

In Perez's opinion, the pervasiveness of copying warrants stronger IP protections for fashion designs. "[W]ith this design aesthetic that I have been doing for close to ten years, there should be something where I can put in a bid and say . . . 'This is my design.' And anyone who replicates this has to either give me credit or give me a percentage of their proceeds." He proposed a test for determining who should receive ownership over a design: "If a layman sees two hats together, and thinks they're by the same person, that should be enough. If they look aesthetically the same, whoever created the aesthetic first should be credited."<sup>39</sup>

Until the legal landscape changes, Perez will use social media as "proof—proof that this is my design, that this is my timestamp of when I launched it." That way, "if someone tries to come out with it two years later, I can easily come out with a screenshot and show, 'This is when I posted it, and this is when you're posting it.'" At the same time, he remains undeterred by the prospect of being copied in the future. "All I can hope is that people want the original. And some people don't . . . they don't care that it's a knockoff. But those are not my clients or my customer base anyway."

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39. Notably, this test closely tracks the substantial-similarity standard that is currently used in U.S. copyright law to determine whether a defendant has infringed the reproduction right of a copyright. A plaintiff must prove both actual copying and substantial similarity. See Jarrod M. Mohler, Comment, *Toward a Better Understanding of Substantial Similarity in Copyright Infringement Cases*, 68 U. CIN. L. REV. 971, 976-81 (2000) ("One oft-cited and concise definition [of substantial similarity] is 'whether an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work.'" (quoting *Ideal Toy Corp. v. Fab-Lu Ltd.*, 360 F.2d 1021, 1022 (2d Cir. 1966))). The issue is perhaps not that such a standard is lacking, but rather that fashion designs rarely qualify for copyright protection in the first place. See generally *infra* Part II.A.1 (describing the historically weak protections afforded to clothing).

2. Case study: Kari Fry, SUBSURFACE<sup>40</sup>

Though Kari Fry entered the fashion industry relatively recently, she is hardly new to the creative process. Previously, she worked in experiential design, doing “[3-D] installation-type work.” After spending most of her career at a design agency in Brooklyn, she moved to California after her partner relocated for his job.

That’s when Fry decided to take the plunge and begin designing clothing. “I had always wanted to start a brand, but it took me a long time to . . . gain the confidence to do it, because I don’t have a traditional . . . fashion education,” she told me. She did, however, already have a sense of the market and what she wanted to contribute. “[T]here were a lot of sustainable brands that had basics, like denim and t-shirts, in nice materials and produced in really . . . thoughtful, smart ways . . . . But I didn’t feel like I was finding that type of sentiment in . . . specialty wear. Like more specific pieces. . . . [T]hat’s what I felt like my niche in the market was.”

After about a year and a half of preparation, Fry launched SUBSURFACE in April 2020.<sup>41</sup> Almost immediately, it became the subject of design piracy. “[W]hen I saw the first knockoff, I was pretty shocked, because . . . I had such little visibility. . . . [B]ut [I] was already on the radar of these people,” she said.

Now, about two years in, Fry sees her work copied all of the time. Some of her most popular and most copied pieces, shown in Figure 2 below, include the Ribbon Wrap Skirt (left) and the Hostess Pant (right), the latter of which she noted was a “a big, big trend now, and probably my most ripped-off piece.”<sup>42</sup>

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40. Telephone Interview with Kari Fry, Founder & Designer, SUBSURFACE (Jan. 21, 2022).

41. See Sarah Wasilak, *26 Women-Owned Fashion Brands to Shop This Month and Beyond*, POPSUGAR (Mar. 8, 2022), <https://perma.cc/U9CE-67KH>.

42. *Ribbon Wrap Skirt, Moss*, SUBSURFACE, <https://perma.cc/XM9Z-CZAD> (archived Feb. 13, 2023); *Hostess Pant, Black*, SUBSURFACE, <https://perma.cc/JF9V-YGXS> (archived Feb. 13, 2023). Fry did not wish to provide the names of retailers or designers who she believes directly copied her designs. Nonetheless, both of these styles mirroring her pieces were trending at the time of our interview. See Alexis Bennett, *This Summer, the Sarong Skirt Is Going Beyond the Beach and Into the City*, VOGUE (May 30, 2022), <https://perma.cc/K7F3-GLX6> (to locate, select “View the live page”); Nicole Kliet, *The Thong Pant Renaissance: 10 Ways to Wear the Trend*, BYRDIE (updated Apr. 1, 2022), <https://perma.cc/YAF5-UK3X>.

**Figure 2**  
Kari Fry's Most Copied Pieces

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Fry is usually alerted to copyists by others in her circle. “[M]y customers, my friends, my family, whomever it is, they’ll see stuff online, and then they’ll send it to me,” she said. And while many have made knockoffs of her pieces, some have gone a step further and used images from her website and social media to sell their products. “[T]hat’s what I didn’t like, even more so than selling [copies of] my pieces, was them using my images,” she told me. Furthermore, “a lot of people will buy the knockoffs and then tag my brand in their [posts] and pretend it’s from there, but I can tell that it’s not.”

In one notable incident, Fry recalls that her designs were copied and used in a well-known artist’s music video. The artist’s stylist had originally reached out and requested a few SUBSURFACE pieces. But the pants Fry provided were not the color they were looking for, so they ended up recreating the pants in the desired color, as well as one of her tops—without telling her, returning the samples, or compensating her.

Fry told me that she has “never really considered legal action” in response to copying, mostly due to the high cost of hiring an attorney. She is also dubious about whether taking legal action would even help. Once, after a major retailer duplicated both her clothing piece and the style of its editorial, she initiated a conversation with the retailer’s legal team. At first, the piece in question was removed from the website, but a couple of weeks later, it appeared back online. As Fry recounted, “Their lawyer emailed me and was just like, ‘Sorry. . . . I talked to the creative director, and their piece had nothing to do with yours.’ . . . [W]e went back and forth a few times, but what am I [going to] do? . . . I can’t sue [them]. . . . I don’t have the money.”

Without the promise of legal action, Fry relies on other strategies to try to protect her brand. She has called copyists out on social media, although they “usually just wait and then put [the copies] back up.”<sup>43</sup> She is a member of a resources group for small brand owners. And she is much more careful about how much “process work” she shares online. “I’m now . . . very hesitant to share my [creative] process before anything has launched, whereas before . . . I would show what I was doing,” she said. “And that’s a bummer to me because I think the process is the most interesting part.”

When asked for her vision of what protections for fashion *should* look like, Fry responded:

In my ideal world, [protection] would almost stem from . . . a bigger support system in general. . . . We have the CFDA [Council of Fashion Designers of America], but . . . if you look at the CFDA award winners in the past ten years, it’s the same people over and over again. . . . [S]mall brands feel very unsupported. So for me . . . I don’t even know if . . . legal [support] is the first thing I’d think of. . . . [I]t would be absolutely amazing to feel supported in the sense of . . . having access to lawyers . . . but it’s also about access to resources and having . . . a fashion council who is more focused on smaller brands and doing right by the environment as opposed to . . . the brands that everyone already knows and has relationships with.

Ultimately, Fry lamented the “ecosystem” of copying in today’s fashion industry. “I’ve had a few . . . influencers reach out to collaborate, whom I decided not to work with, and . . . now they’re getting paid by [a fast fashion brand] who has created the [knockoff] piece and hired them to post about it,” she explained. “[T]hat was a . . . bit difficult for me . . . especially when I would see the influencers that I didn’t give [the piece] to, now posting the [knockoff piece] as an ad . . . it’s hard not to feel like everyone’s making money off your design but you.”

At the same time, Fry acknowledged that “fashion is so referential”—she explained that her Hostess Pant was inspired by looks from the early 2000s—and that there are instances in which “people can have similar ideas and come out with similar pieces, and it’s not copying.” Because of this, she tries to begin her own design process offline, so as to avoid “pulling stuff from Instagram.”

Fry also stressed that there are still reasons to be optimistic about the future of the fashion industry. Even the experience of being copied, she said, has “brought a lot of positives, just in terms of . . . my customers being like, ‘I support you. Don’t worry about this.’” In addition, she stated, “I genuinely feel

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43. At time of publication, Fry’s Instagram page does not include any posts calling out copyists. See Kari Fry (@bradshhaw), INSTAGRAM, <https://perma.cc/AM95-UK6J> (archived Feb. 13, 2023) (to locate, select “View the live page”). Thus, such callouts were likely either posted as Instagram Stories, which disappear from the user’s profile after twenty-four hours, see *Stories*, INSTAGRAM HELP CTR., <https://perma.cc/NMW9-MCB2> (archived Feb. 13, 2023), or subsequently archived or deleted.

like people care more [now] about what's in their clothes and who's making it. . . . [T]here are so many . . . good people in this world that are working really hard to . . . make [the fashion industry more eco-friendly], . . . and that's really exciting.”

## B. The Ubiquity of Design Piracy

The experiences of Perez and Fry are neither uncommon nor new. Design piracy “has long been a widespread practice in the fashion industry.”<sup>44</sup> In fact, publications dating back nearly a century describe copying as an already pervasive and problematic phenomenon—both across and within different countries.<sup>45</sup>

In the United States, the Fashion Originators' Guild was established in 1932 for the precise purpose of “limit[ing] copying within the small but growing ranks of American designers.”<sup>46</sup> Eventually, however, the Guild “ran afoul of the antitrust laws”; the Supreme Court deemed the Guild’s practices to be “unfair competition and a violation of the Sherman and Clayton Acts” in its 1941 decision in *Fashion Originators' Guild of America, Inc. v. FTC*.<sup>47</sup> Without any regulatory body and with little to no legal protection for clothing designs, piracy continued to run rampant.<sup>48</sup> Large retailers, luxury brands, and individual designers alike copied each others’ designs.<sup>49</sup>

Over the ensuing decades, copying has only become cheaper, easier, and more prevalent. Kal Raustiala and Christopher Sprigman note:

Digital photography, digital design platforms, the Internet, global outsourcing of manufacture, more flexible manufacturing technologies, and lower textile tariffs have significantly accelerated the pace of copying. . . .

The result is the remarkably pervasive appropriation of designs, with firms at every level of the apparel marketplace producing copies and derivatives.<sup>50</sup>

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44. Raustiala & Sprigman, *supra* note 22, at 1695. As this Note demonstrates, much of the discussion of design piracy is based on testimony from individuals in the fashion industry. For a number of reasons, it would be difficult to provide concrete statistics on how often copying actually occurs. Perhaps most critically, it is unlikely that someone would admit to copying and difficult to discern when an accusation of copying is just that—an accusation.

45. *See id.* at 1695-97.

46. *Id.* at 1697.

47. *Id.*; *see also* 312 U.S. 457, 463-65 (1941).

48. *See* Raustiala & Sprigman, *supra* note 22, at 1698; *see also infra* Part II.A.1.

49. *See* Raustiala & Sprigman, *supra* note 22, at 1705-17 (providing examples of design piracy).

50. *Id.* at 1714-15; *see also* Hemphill & Suk, *supra* note 4, at 1171 (“What has changed is not the fact or speed of copying, but the large scale and low cost at which rapid copies can be made.”).

Though copying does take place across “every level” of the industry, fast-fashion retailers in particular are some of “the most prolific offenders,” because their “entire business model revolves around copying trends and bringing them to market quickly.”<sup>51</sup> These retailers are now able to manufacture products in as little as two weeks and add thousands of new styles to their sites each week.<sup>52</sup> In doing so, they are routinely accused of ripping off others’—particularly independent designers’—designs.<sup>53</sup> And some have “openly admit[ted] that Instagram trend scouting fuels their ever-growing business.”<sup>54</sup>

The rest of this Note is dedicated to evaluating why the copying of independent designers is harmful, and how victims of such piracy might be able to respond. Importantly, Scott Hemphill and Jeannie Suk have distinguished between (1) “referencing,” wherein someone interprets an existing trend in a manner that “looks to the prior work as a source of influence,” but “does not pass off the work as the work that is being copied,” and (2) “close copying,” wherein someone creates an essential duplicate of a piece that “can substitute for and reduce the value of the original.”<sup>55</sup> This Note focuses on the latter practice of “close copying.”

### C. Concerns Raised by Close-Copying

Design piracy’s potential to hurt independent designers has long been recognized in the literature.<sup>56</sup> In fact, many have posited that, compared to bigger players in the industry, such designers have much more to lose from being copied.<sup>57</sup> The literature is divided, however, on the extent to which this

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51. Chavie Lieber, *Fashion Brands Steal Design Ideas All the Time. And It's Completely Legal*, VOX (Apr. 27, 2018, 7:30 AM EDT), <https://perma.cc/9LE2-WDB6>.

52. *See id.*

53. *See id.*

54. *See id.*

55. *See* Hemphill & Suk, *supra* note 4, at 1160.

56. Over two decades ago, Peter K. Schalestock warned that, due to modern technology which made it faster and easier to copy fashion designs, “small designers . . . may be driven out of the industry.” Peter K. Schalestock, Comment, *Forms of Redress for Design Piracy: How Victims Can Use Existing Copyright Law*, 21 SEATTLE U. L. REV. 113, 115 (1997).

57. *See, e.g.*, Hemphill & Suk, *supra* note 4, at 1153 (“[T]he primary threat to innovation currently is not to the major fashion conglomerates. . . . [These] are already well protected by the existing trademark and trade dress legal regime, brand investments, and the relatively small overlap between markets for the original and for the copy. The main threat posed by copyists is to innovation by smaller, less established, independent designers who are less protected along all of these dimensions.”); Arielle K. Cohen, *Designer Collaborations as a Solution to the Fast-Fashion Copyright Dilemma*, 11 CHI-KENT J. INTELL. PROP. 172, 182 (2012) (“[T]he lack of copyright protection is especially harmful to mid-level and independent designers who lose out on profit from their designs that are copied by big box fast-fashion copyists or better known designers. This, in turn, reduces their incentive to create new designs.”); Lauren Howard, Note, *An Uningenious*  
*footnote continued on next page*

copying is an important policy concern. In this Subpart, I first address the argument that copying increases the rate of innovation in fashion and is thus beneficial from a utilitarian perspective. I argue that while the effect of copying on the overall rate of *innovation* might be ambiguous, copying does reduce *diversity* in fashion, a fact which should also be considered in the utilitarian calculus. I then argue that there are also moral-rights justifications for viewing the copying of independent fashion designers as problematic.

### 1. A utilitarian perspective

Broadly speaking, utilitarianism aims to produce the greatest good for the greatest number of people.<sup>58</sup> In the United States, IP regimes are grounded largely in utilitarian theory.<sup>59</sup> More specifically, IP protections are justified on the basis that they “provide sufficient incentive to develop new technology and creative products.”<sup>60</sup> The view is that without these protections, “copyists will free-ride on the efforts of creators, discouraging future investments in new inventions and creations” and thus stifling innovation.<sup>61</sup>

But the net effect of stronger IP can decrease innovation, particularly among future innovators who want to use existing works as inputs to new creations. Most prominently, Raustiala and Sprigman have long argued that fashion’s “low-IP” regime, which allows for the rampant copying of designs, might in fact be “paradoxically beneficial for the fashion industry” because it helps promote innovation.<sup>62</sup> In fact, they assert that the prevalence of design

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*Paradox: Intellectual Property Protections for Fashion Designs*, 32 COLUM. J.L. & ARTS 333, 350-53 (2009) (“In order to build . . . a brand, new designers must offer a unique and identifiable image that communicates their point of view to consumers. A young designer’s ability to create such a brand is significantly hindered to the extent she is competing with low-priced knockoffs.”); Aya Eguchi, Note, *Curtailling Copycat Couture: The Merits of the Innovative Design Protection and Piracy Prevention Act and a Licensing Scheme for the Fashion Industry*, 97 CORNELL L. REV. 131, 143-44 (2011) (“[I]ndependent designers and small- and medium-sized enterprises (SMEs) . . . do not have the manufacturing and production capabilities of major fashion houses and retailers. When copyists imitate their designs, the damages they suffer are significant since these designers and SMEs do not have the capital or technology to mass produce their own designs and compete with the copyists.”).

58. See Brian Hilton, Chong Ju Choi & Stephen Chen, *The Ethics of Counterfeiting in the Fashion Industry: Quality, Credence and Profit Issues*, 55 J. BUS. ETHICS 345, 348 (2004).

59. See *id.*; Robin M. Nagel, Comment, *Tailoring Copyright to Protect Artists: Why the United States Needs More Elasticity in Its Protection for Fashion Designs*, 54 U. RICH. L. REV. 635, 659 (2020).

60. Hilton et al., *supra* note 58, at 348.

61. Raustiala & Sprigman, *supra* note 22, at 1688.

62. *Id.* at 1717-34.

copying actually increases the rate of innovation by “accelerat[ing] the diffusion of designs and styles” and thus speeding up the fashion cycle.<sup>63</sup>

In particular, Raustiala and Sprigman have alleged that “the assertion that fashion’s low-IP regime harms small designers lacks empirical support,” since “[e]ven a cursory look at the fashion industry will reveal thousands of new and young designers competing for their place in the industry, seemingly undeterred by the prevalence of fashion copying—and, often, engaging in it.”<sup>64</sup> They have also argued that strengthening copyright protections is more likely to harm rather than help emerging designers, since “fashion’s low-IP equilibrium does at least deprive large fashion firms of one anticompetitive tool that big firms operating in high-IP markets often use to grind down upstarts: lawyers.”<sup>65</sup> In other words, opening the door to increased copyright litigation would merely exacerbate existing power dynamics and resource imbalances between larger fashion firms and smaller designers.

Their argument has been the subject of much debate.<sup>66</sup> For example, Hemphill and Suk have argued that when Raustiala and Sprigman refer to “copying,” they fail to distinguish between close copying and other “remixing and trend-joining” activities that take place in fashion, such as “interpretation, adaptation, [and] homage.”<sup>67</sup> In doing so, they mistakenly use the benefits of the latter to justify the former.<sup>68</sup>

Ultimately, whether Raustiala and Sprigman are correct—whether design copying has a positive effect on the overall rate of innovation in the fashion industry—is an empirical question that has yet to be resolved by the literature and which I will not attempt to resolve here. I will argue, however, that copying limits the amount of diversity in fashion in at least two ways, a fact that should be part of the utilitarian calculus but that has received insufficient attention thus far.

Measurements of the social value of new designs should include not only the quantity but also the overall diversity of designs that are created—including value that stems from designer diversity, a form of diversity that has been largely ignored in the existing literature.<sup>69</sup> Importantly, less established

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63. *Id.* at 1722.

64. Kal Raustiala & Christopher Sprigman, Response, *The Piracy Paradox Revisited*, 61 STAN. L. REV. 1201, 1221 (2009).

65. *Id.* at 1221–22.

66. See, e.g., Hemphill & Suk, *supra* note 4, at 1174–80 (arguing that fast-fashion copying reduces the amount of innovation and distorts its direction).

67. See *id.* at 1180–84.

68. See *id.*

69. See, e.g., *id.* at 1176–77 (discussing diversity only with regard to the “kinds of products” that are created, and not to the backgrounds of the designers themselves).

designers are more likely to be shut out of the industry as a result of copying.<sup>70</sup> This incumbency bias, coupled with the fashion industry's current lack of diversity,<sup>71</sup> means that existing imbalances in racial, socioeconomic, and other forms of representation will only continue to be exacerbated so long as close copying occurs.

Furthermore, Hemphill and Suk have argued that copying decreases the overall breadth of the fashion industry's output by incentivizing the production of goods that are more difficult to copy, which has the distorting effect of "push[ing] creators toward the high-end realm of status and luxury, and away from devoting creative resources to design innovation."<sup>72</sup> That copying limits the diversity of fashion designs in these ways is problematic from a utilitarian perspective, so long as we believe that diversity of fashion is a social good which we want more of, not less.

## 2. A moral-rights perspective

Even assuming, *arguendo*, that Raustiala and Sprigman are correct and the current permissance of copying is beneficial—or at least not harmful—to the fashion industry, are there other reasons we should be concerned about the copying of independent designers? I will argue that the answer is yes: Even if both the fashion industry as a whole and its individual players benefit economically from the current low-IP regime, there remain moral-rights justifications for believing that copying is harmful.

Moral rights in copyright are "the rights of authors generally to preserve the integrity and dignity of their works."<sup>73</sup> They include the rights to "prevent distortion of their work, to be recognized as the author, to control the work's publication, and to withdraw a work after publication."<sup>74</sup> These "rights of attribution and integrity" have been recognized in some form for centuries and across the globe.<sup>75</sup> They have long been protected in many European

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70. *See id.*; *see also supra* note 57 (detailing the particular effects of copying on small designers).

71. *See, e.g.,* Thin Lei Win & Nellie Peyton, *Black Designers Lead Push for a More Diverse Fashion Industry*, THOMSON REUTERS FOUND.: LONG READS (Aug. 6, 2020), <https://perma.cc/QLA4-WSFY> (stating that only 4% of the members of the Council of Fashion Designers of America are Black); Jenna Ryu, *White Men Still Run the Fashion Industry: Report Shows There's a Long Road Ahead Toward Inclusion*, USA TODAY (Feb. 1, 2021, 1:29 PM ET), <https://perma.cc/N2U3-HJDP> (reporting that less than 10% of the undergraduate students in the class of 2020 at the top six U.S. fashion schools are Black).

72. *See Hemphill & Suk, supra* note 4, at 1179-80.

73. Nagel, *supra* note 59, at 641.

74. *Id.*

75. U.S. COPYRIGHT OFF., *AUTHORS, ATTRIBUTION, AND INTEGRITY: EXAMINING MORAL RIGHTS IN THE UNITED STATES* 10-13 (2019).

countries,<sup>76</sup> a result of the fact that they have underpinnings in the teachings of German philosophers Immanuel Kant and Georg Wilhelm Friedrich Hegel.<sup>77</sup> In particular, the moral rights framework is supported by Hegel's personality theory, which posits that "creative works are manifestations of the personalities of their creators,"<sup>78</sup> so the ability for creators to control their works is "valuable 'for self-actualization, for personal expression, and for dignity and recognition as an individual person.'"<sup>79</sup>

The moral-rights argument against fashion design piracy, then, is as follows: If fashion designers can be thought of as possessing moral rights in their works, which seems plausible based on the European example, then the unauthorized copying of their designs is an infringement of these rights—a desecration of the dignity and integrity of their works—and thus undesirable.

But though this argument is recognized in Europe, it has not gained as much traction in the United States, where IP protection focuses primarily on the economic rights rather than the moral rights of fashion designers.<sup>80</sup> Interestingly, the United States does grant certain moral rights to artists through the Visual Artists Rights Act (VARA).<sup>81</sup> However, VARA applies only to "work[s] of visual art" as defined in 17 U.S.C. § 101, which do not include fashion designs.<sup>82</sup>

This has caused some scholars to lament that "Congress wants to protect only the moral rights of authors who create a specific type of fine art."<sup>83</sup> Indeed, there also appears to be some connection between a creator's identity as

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76. Irina Oberman Khagi, *Who's Afraid of Forever 21?: Combating Copycatting Through Extralegal Enforcement of Moral Rights in Fashion Designs*, 27 *FORDHAM INTELL. PROP., MEDIA & ENT. L.J.* 67, 89-90 (2016); see also Nagel, *supra* note 59, at 658.

77. See Nagel, *supra* note 59, at 659.

78. Keyon Lo, *Stop Glorifying Fashion Piracy: It Is Time to Enact the Innovative Design Protection Act*, 21 *CHI.-KENT J. INTELL. PROP.*, Nov. 2021, at 159, 199-200 (2021).

79. Elizabeth L. Rosenblatt, *Intellectual Property's Negative Space: Beyond the Utilitarian*, 40 *FLA. ST. U. L. REV.* 441, 456 (2013) (quoting Justin Hughes, *The Philosophy of Intellectual Property*, 77 *GEO. L.J.* 287, 330 (1988)).

80. See Nagel, *supra* note 59, at 641-43, 657-59 (stating that "[c]opyright regimes in the United States seem to be based in Lockean labor theory and general utilitarian theory," and that "[l]egal scholars have long discussed the differences between the economic rights protected in . . . the United States and the moral rights protected by a variety of European countries"); see also U.S. COPYRIGHT OFF., *supra* note 75, at 3 (stating that the United States has a "lack of strong [moral rights] protections").

81. See Visual Artists Rights Act of 1990, Pub. L. No. 101-650, § 603, 104 Stat. 5128, 5128-29 (codified as amended at 17 U.S.C. § 106A); see also Nagel, *supra* note 59, at 642.

82. 17 U.S.C. § 101; see Nagel, *supra* note 59, at 642-43.

83. Nagel, *supra* note 59, at 643; see also Justin Hughes, *American Moral Rights and Fixing the Dastar "Gap"*, 2007 *UTAH L. REV.* 659, 672-73 ("[T]he real problem with VARA is not the strength of its provisions, but their limited scope.").

an *author* of a written work and their ability to claim moral rights in their work. Stina Teilmann-Lock has argued:

Being recognized as an “author” entails not merely an esteemed social status. Emphatically, it is a position with a claim to legal rights. . . . [A]uthors have “moral rights” in their work. . . . [T]he concept of the author as an individual creator remains the cornerstone of copyright law; copyright exists *because* books and other works have “authors.”<sup>84</sup>

According to Teilmann-Lock, fashion designers are not afforded the same protections, including the claim to moral rights, as certain other creators because designers are not viewed as *authors* of works in the same way that, say, writers and fine artists are.<sup>85</sup> This suggests that a shift toward treating fashion designers as “authors”—as creators whose works of art incorporate their personhood, in the Hegelian sense—would increase the likelihood that the piracy of their designs would be viewed as harmful from a moral-rights perspective.<sup>86</sup>

## II. The Viability of Legal Claims After *Star Athletica*

In Part I, I argued that the copying of independent fashion designers is a ubiquitous and unresolved IP problem that raises both utilitarian and moral-rights concerns. This Part discusses the potential for victims of copying to seek legal recourse via copyright infringement claims. Specifically, it examines the viability of such claims after the Supreme Court’s 2017 decision in *Star Athletica LLC v. Varsity Brands, Inc.*,<sup>87</sup> which was viewed by many as increasing copyright protection for fashion.<sup>88</sup> It finds that while the available data on

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84. Stina Teilmann-Lock, *The Fashion Designer as Author: The Case of a Danish T-shirt*, DESIGNISSUES, Autumn 2012, at 29, 32-33.

85. *See id.* at 39-41.

86. Not everyone believes that fashion designers and their work can be characterized in this way. Irina Oberman Khagi, for example, has pointed to interviews by Gwen Stefani and Michael Kors to argue that “[s]ome designers may not even feel that they have invested their personhood in the designs at all.” Khagi, *supra* note 76, at 83-84. By her own admission, however, these examples are of “celebrity fashion designers” who sit at the helm of large businesses. *See id.* at 83. Intuitively, it seems more likely that independent designers would treat their process of creation as an exercise of personal expression. In fact, Khagi herself recognized that “a great number of fashion designers—big names and small—[do] view their designs as intensely personal,” pointing to testimony from numerous independent designers in support of this claim. *See id.* at 86-87; *see also* Margaret E. Wade, Note, *The Sartorial Dilemma of Knockoffs: Protecting Moral Rights Without Disturbing the Fashion Dynamic*, 96 MINN. L. REV. 336, 364 (2011).

87. 137 S. Ct. 1002 (2017).

88. *See, e.g.*, Lili Levi, *The New Separability*, 20 VAND. J. ENT. & TECH. L. 709, 713-14 (2018) (“[M]any in the traditional fashion industry see the Court’s approach as an invitation to significantly expanded copyright protection for apparel.”).





























































