

UNRAVELING THE THREADS OF INTELLECTUAL PROPERTY'S INADEQUATE PROTECTION OF THE FASHION INDUSTRY

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Introduction

The fashion industry is one of the most coveted fields, admired by A-list celebrities and everyday working-class individuals. Designer labels and high-end fashion pieces hold universal appeal, largely thanks to the widespread reach of social media, which broadcasts the latest trends to a broad audience. Consequently, many seek alternatives or “dupes” to keep up with these trends. Designs that were once exclusive luxury items have now become attainable by the general public.

How did the high fashion industry, initially tailored for the elite upper class, transition into one accessible to all? The answer lies in inadequate intellectual property protection within the fashion realm, which has increased the proliferation of more affordable, mass-produced imitations bearing modest price tags. These budget-friendly reproductions have ushered in the rapid ascent of the fast fashion sector. Pieces created by designers and unveiled on the runway are quickly replicated and put into production, making them available for widespread consumption, often preceding the original designer’s seasonal line.¹

Why does the law not adequately protect the fashion industry? This paper aims to explore the limitations of the application of intellectual property to the fashion industry. This paper will begin by examining the traditional perception of designers and the fashion industry, inquiring into how this perspective might be connected to the present-day deficiencies of legal protection. This paper will also analyze the hierarchical structure within the fashion industry through the fashion pyramid, illustrating how garments originating on the runway eventually find their way into the inventories of fast-fashion retailers. Moreover, I will provide an overview of how the inadequacy of intellectual property protection within the fashion industry prompted the establishment of the Fashion Originators’ Guild in the United States. Finally, to highlight the growing necessity for heightened protection, I will examine the effects of replication on brand identity.

The second section of this paper aims to provide an in-depth examination of intellectual property in the fashion industry and its deficiencies by exploring patents, trademarks, and copyrights. I will explore the theoretical functions of these legal instruments, explaining their intended roles and applications within the fashion industry. Furthermore, I will critically evaluate their practical applications, highlighting their limitations and constraints. Throughout this analysis, I will integrate case law to provide examples that illustrate the failures of these legal protections within the fashion industry.

¹ Cassandra Elrod, "The Domino Effect: How Inadequate Intellectual Property Rights in the Fashion Industry Affect Global Sustainability" (2017) 24:2 *Ind J Global Leg Stud* 573 at 577 [Elrod].

The third section of this paper will delve into the compelling policy rationales advocating for increased protection in the fashion industry. It will focus on sustainability concerns linked to the fast fashion industry, specifically waste generation and sustainability. This section will also shed light on the poor labour conditions associated with the fast fashion industry, emphasizing its impact on labourers. Finally, this section will touch on illegal activities that may arise from the fashion industry due to the inadequate protection offered by intellectual property. Overall, this section aims to explore how a lack of protection impedes the fashion industry and contributes to a myriad of legal and ethical dilemmas outside of the fashion landscape.

The final section of this paper will center on the complex task of finding a balance between safeguarding the rights of designers, ensuring consumer access, and nurturing creativity within the fashion industry. It will delve into the legislative intentions behind intellectual property laws and their role in governing the fashion domain. Furthermore, this section will propose additional avenues and potential strategies for fortifying protection measures within the fashion industry. This includes discussions on adapting and evolving legal frameworks and exploring alternative models from other jurisdictions.

1. Understanding the Fashion Industry

1.1 *The Original Perception*

The fashion industry has evolved over the decades to become one of the most beloved industries; however, this was not always the case. Historically, garment designers were not the infamous, well-known names they are today but were considered servants in society.² Over the years, society has changed its perception of the fashion industry. The industry has become a significant source in the global economy, employing millions of people.³ The fashion industry has also created some of the most publicized events in the world. Fashion Week is one of the most highly regarded events in the fashion industry. With its occurrence twice a year in major cities such as New York, Milan, and Paris,⁴ this event is adored and attended by many. What was once a means to showcase a selection of clothes to prospective clients has now become one of the most significant worldwide events.⁵ Additionally, an increase in technology has allowed for

² Alissandra Burack, “*Is Fashion an Art Form That Should Be Protected or Merely a Constantly Changing Media Encouraging Replication of Popular Trends*” (2010) 17 Jeffrey S Moorad Sports LJ [Burack].

³ *Elrod*, *supra* note 1 at 576.

⁴ *Ibid* at 577.

⁵ *Ibid*.

these shows to be viewed not only by their exclusive guests but also by anyone with access to the internet. The increase in accessibility to these coveted events has, unfortunately, created a problem for designers. By allowing these newly showcased designs to be viewed by all, companies have quickly begun the cheap manufacturing and replication of these pieces.⁶ As there are no adequate safeguards available to limit the scope of the reproduction, these glorified designs have only a moment in the spotlight before they quickly become available to the masses.

Despite the modern prominence of high-end fashion designers, a question persists: has society's perception of garment makers truly evolved? This question arises from the observation that, notwithstanding the prestige associated with the fashion industry, it continues to struggle with a deficiency in legal protection. Despite its undeniable impact on culture and aesthetics, fashion seems to occupy a position in the legal landscape that is not afforded the same level of protection as other creative disciplines.⁷ This paradox invites us to reflect on whether fashion is a field significant enough to merit the safeguards granted to other forms of artistic expression in the eyes of the law.

1.2 *The Nature of the Fashion Industry*

The fashion industry operates as a complex system shaped significantly by societal norms and a hierarchical framework. Trends in the fashion industry reflect the preferences society collectively deems fashionable at a given time. In modern times, the influence of social media accelerates the rise and fall of trends, leading to sudden surges and subsequent declines in the popularity of particular designs and articles.⁸ The swift rise and fall of trends, as characterized by social desires, depicts the cyclical nature of the fashion industry.

The fashion industry can be divided into several categories, reflecting price and quality. The three major categories from top to bottom are high fashion, "better" fashion, and basic or commodity fashion.⁹ The top of the pyramid, the high fashion category, includes designers like Chanel, Louis Vuitton, and Yves Saint Laurent. This

⁶ *Ibid.*

⁷ The examination of the *Copyright Act* on pages 15 and 16 of this paper underscores a notable discrepancy in the level of protection extended to the fashion industry in contrast to other artistic domains. The disparity lies in the absence of explicit inclusion of fashion designers' creations, contrasted with the inclusion of other artistic works, such as sculptures, which are expressly enumerated and thus afforded protection under the *Copyright Act*.

⁸ Kal Raustiala & Christopher Sprigman, "Faster Fashion: The Piracy Paradox and its Perils" (2021) 39:2 *Cardozo Arts & Ent LJ* (<https://ssrn.com/abstract=3846990>) at 552 [*Faster Fashion*].

⁹ Kal Raustiala & Christopher Sprigman, "The Piracy Paradox: Innovation and Intellectual Property in Fashion Design" (2006) 92:8 *Va L Rev* 1687–1777 at 1693 [*Piracy Paradox*].

category also includes a subdivision wherein these prominent fashion designers also create their fashion lines that are more affordable than their top-tier lines (e.g., Emporio Armani).¹⁰ The middle tier, or “better” fashion tier, consists of brands such as Banana Republic that are better priced than more affordable designer brands.¹¹ The bottom tier consists of brands sold by retailers like Walmart that offer affordable items.¹² As described above, clothing manufacturers begin to replicate these designs once high fashion designers exhibit their items on the runways during Fashion Week. These items are then sold to middle- and bottom-tier retailers, inevitably at lower prices than those originally purchased at a designer’s store.¹³

The nature of the fashion industry is brilliantly portrayed in the movie *The Devil Wears Prada*.¹⁴ In a critical scene, Miranda Priestly, the editor-in-chief of a prestigious fashion magazine, imparts a valuable lesson to her fashion-illiterate assistant. Her assistant does not seem to understand the importance of a decision between two seemingly similar belts. Miranda explains that the “lumpy blue sweater” her assistant is wearing is more than just “blue”; it’s cerulean, a shade popularized by a 2002 Oscar de la Renta collection, subsequently embraced by numerous brands like Yves Saint Laurent. Miranda expresses that this colour journeyed from high-end fashion to department stores, and, as she bluntly puts it, the assistant likely discovered it in a clearance bin. Miranda’s ultimate message is that seemingly inconsequential choices in fashion are deeply intertwined with a vast industry, representing millions of dollars and countless jobs. She highlights the irony in the assistant’s belief that her choice is an exemption from the fashion industry, emphasizing that even the assistant’s sweater was selected for her by fashion professionals like those “in this room”.

This scene serves as a compelling illustration of the profound influence forged by the high-end fashion industry, showcasing how the creative concepts of famous designers resonate throughout the fashion industry, eventually giving rise to imitations in the bottom tiers of the fashion market. This scene also exemplifies the cyclical patterns of the fashion industry, demonstrating how even an essential element like a colour becomes part of a trend adopted by numerous designers and manufacturers, only to be promptly replaced by the next popular trend. These connections emphasize the issue of inadequate intellectual property protection in the fashion industry.

¹⁰ *Ibid.*, at 1694.

¹¹ *Ibid.*

¹² *Ibid.* See figure A.

¹³ *Elrod, supra* note 1 at 576.

¹⁴ *The Devil Wears Prada*, 2006, DVD (United States: 20th Century Fox, 2000).

Without robust legal safeguards for designers' creations, the industry promotes a culture of imitation and fast-paced replication, negatively impacting the fashion industry's capacity for creativity and originality. The saturation of identical designs in the market may also diminish the value of the original designer's work and discourage creation, especially when manufacturers tend to prioritize on-trend designs. This, in turn, could lead to a diminished incentive for designers who invest their time and efforts into creating new designs.

1.3 The Fashion Originators' Guild

The fashion industry's grievance with limited legal protection is not a new issue. The ongoing lack of protection has spurred individuals to attempt to address the problems independently. A prominent case is the establishment of the Fashion Originator's Guild in the 1930s.¹⁵ The Guild, established in the US, operated to combat "style piracy" by urging retailers to avoid selling items from brands known to copy designs.¹⁶ Retailers were asked to sign a 'declaration of cooperation', and the members of the Guild boycotted those who failed to comply.¹⁷ Similarly, Guild members were discouraged from replicating designs under the threat of potential fines.¹⁸ The Guild survived for nearly a decade before the Supreme Court considered their practices unfair competition.¹⁹ Many decades have passed, and the persisting issues related to design replication due to inadequate intellectual property protection remain unchanged. Despite an apparent demand for more robust safeguards, as exemplified by the Fashion Originators' Guild, the legal domain has shown limited progress in addressing these concerns.

1.4 The Impact of Replication

A question that may arise is why designers should be entitled to greater legal protection. One might argue that the fashion industry has thrived without such safeguards, showcasing their redundancy. Moreover, advocates of this viewpoint may challenge that, despite the deficiencies of intellectual property protection, designers continue to build their brands successfully and consumers continue to purchase high-end products, even in the face of readily available cheaper replicas.

¹⁵ Nicole Giambarrese, "The Look for Less: A Survey of Intellectual Property Protections in the Fashion Industry" (2012) 26:1 *Touro L Rev* 243 at 252 [*Giambarrese*].

¹⁶ *Ibid.*

¹⁷ *Piracy Paradox*, *supra* note 9 at 1697.

¹⁸ *Giambarrese*, *supra* note 15.

¹⁹ *Piracy Paradox*, *supra* note 9 at 1697.

However, the absence of adequate protection in the fashion industry presents a multifaceted challenge that impacts various stakeholders. It leads to copying and replicating designs, thus hindering relationships between designers and retailers. This is because, rather than allowing designers to sell their collections to retailers, retailers will pay for imitations of their designs.²⁰ Some have suggested that this makes it harder for new designers to enter the market,²¹ as many retailers and manufacturers are more interested in copying existing trends from the runway rather than supporting fresh and original ideas. Frequently, the imitations bought by retailers suffer from subpar manufacturing. When these replicas bear striking resemblances to their high-end counterpart, their low-quality manufacturing can harm the designer brand's reputation.²² This tarnishing of the brand's image may discourage consumers from investing in their high-end products, for only a few would willingly spend substantial amounts on items perceived as poorly made.

Luxury goods are often characterized by their exclusivity, with limited availability. When high-end designer products become widely accessible and ubiquitous, it significantly diminishes the brand's value and reputation.²³ A prime illustration of a coveted and exorbitantly priced fashion item is the Birkin bag, a signature offering from Hermès which can have a resale value reaching up to \$300,000 depending on the style.²⁴ These bags are sought after, primarily due to their unprocurable nature. Hermès exercises rigorous control over the production number of Birkin bags.²⁵ The acquisition process requires a prolonged engagement with the brand, necessitating the purchase of various other products before a sales representative may consider presenting an Hermès bag, particularly the highly sought-after Birkin bag. While some fortunate individuals may secure a Birkin after a few attempts, others invest thousands of dollars before gaining access to these highly-priced and sought-after bags. The Birkin's allure is primarily attributed to its scarce availability, although its high-quality production adds to this allure.

The lack of robust intellectual property protection in the fashion industry is not merely a matter of legal concern but an issue with far-reaching implications.

²⁰ Julie Zerbo, "Protecting Fashion Designs: Not Only What, but Who" (2017) 6:3 Am U Bus L Rev 595 at 604 [Zerbo].

²¹ *Ibid.*, at 605.

²² *Ibid.*

²³ *Ibid.*

²⁴ Madison Avenue Couture, "Why Are Birkin Bags So Expensive? And Worth the Price" (7 March 2022), online (blog): *Madison Avenue Couture* <madisonavenuecouture.com/blogs/news/why-are-birkin-bags-so-expensive-and-worth-the-price>.

²⁵ *Ibid.*

Without adequate safeguards, the rapid replication and mass production of innovative designs cast a shadow over the creative endeavours of designers and diminishes the industry's capacity to nurture new talent. Moreover, this shortfall in protection risks diluting the reputation of established brands and leads to the overexposure of designs, thereby hindering the integrity of their creations.

2. Intellectual Property and Protection in the Fashion Industry

To understand the evident gaps in the legal protection of the fashion industry, an examination of the existing intellectual property mechanisms is essential. This inquiry, which involves analyzing patents, trademarks, and copyrights, will uncover the inadequacies within these frameworks and subsequently delve into the implications of this protection deficit. This section aims to highlight the current legal frameworks that offer protection to the fashion industry to a limited extent. Ultimately, as this paper aims to delineate, patents, trademarks, and copyrights present an inadequate shield for safeguarding the creations within the fashion industry for various reasons.

2.1 Patents

2.1.1 Overview

Patents are a category of intellectual property that pertains to the protection of ideas. These rights are acquired through a formal application, ultimately bestowing a monopoly over a concept.²⁶ The term of a patent extends 20 years from the date of filing.²⁷ To secure a patent successfully, specific prerequisites must be met, including the criterion of novelty, utility, and non-obviousness.²⁸ Novelty refers to the notion that the idea must be new.²⁹ Patents can be easily searched in a database, enabling access for individuals to ascertain the existence of prior patents for a specific idea.³⁰ Utility requires that the patent be useful, deriving some form of value.³¹ Non-obviousness denotes that a patent will not be granted for an idea that would have inevitably surfaced

²⁶ *American Cyanamid Co v Berk Pharmaceuticals, Ltd*, [1976] RPC 231, 234 (Ch D), Whitford J.

²⁷ *Patent Act*, RSC 1985, c P-4, s 44.

²⁸ Business Development Bank of Canada, "How to get a patent" (last visited 2 January 2024) online: *BDC* <[bdc.ca/en/articles-tools/business-strategy-planning/innovate/intellectual-property-how-patent-product](https://www.bdc.ca/en/articles-tools/business-strategy-planning/innovate/intellectual-property-how-patent-product)>

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ *Ibid.*

without the patent application.³² There is also a creativity threshold embedded in patent law, wherein patents are only issued when it is deemed essential to stimulate the invention's development.³³

2.1.2 *The Problems with Patents*

Various issues arise in applying patents across intellectual property, extending beyond the fashion industry. One significant concern involves "Big Fish Entities" which hold a limited number of patents directly pertinent to significant corporations. These entities initiate lawsuits against large businesses, demanding substantial financial compensation.³⁴ The second issue pertains to "Bottom Feeders," which are essentially patent trolls holding numerous ambiguous patents with unclear enforceability. These entities target small-end-users, seeking minor monetary settlements; as litigation over such amounts is often impractical, parties settle. While patent law is not without its imperfections, the fashion industry magnifies these shortcomings, unearthing a host of unique challenges and complexities.

In the fashion industry, patents are utilized to guard against design replication. However, their application is constrained due to impracticalities in the process of patent acquisition. The process, which can exceed 19 months,³⁵ entails rigorous examination by the patent office. This extensive timeframe presents a severe obstacle, especially in an industry characterized by rapid trends and fleeting consumer preferences. Fashion is ever-evolving; what is trendy today might not be in two seasons.

Consequently, by the time an idea is registered, its novelty may have faded, or others may have simultaneously conceived and implemented it, rendering it unable to meet the novelty requirement. Furthermore, many designs may falter in meeting the criteria of novelty and non-obviousness, as they may be perceived as conventional by the patent office. Even if designers can meet these difficult thresholds, courts have

³² *Ibid.*

³³ *Amazon.com, Inc v Canada (Attorney General)* 2010 FC 1011 at paras 40-41.

³⁴ For more information see the *Blackberry* case: *NTP, Inc v Research in Motion, Ltd*, 261 F Supp 2d 423 (ED Va 2002). This case involved a Big Fish Entity situation where a patent was held over wireless technology. NTP, a small business, accused Research in Motion, the creator of Blackberry devices, of patent infringement. NTP held the patent rights to several patents relating to wireless technology that were imperative in smartphone designs, such as that in a Blackberry phone. The case was eventually settled with Research in Motion paying an exorbitant amount to NTP for the use of their patents.

³⁵ *Zerbo*, *supra* note 20 at 608.

often hesitated to uphold the validity of patents,³⁶ further making their application to the fashion industry all the more ineffective.

Considering the inherently cyclical nature of the fashion industry, where designs frequently draw from prior inspirations,³⁷ it could be argued that this sector's 20-year protection period granted by patents is excessively lengthy. The extended protection period can stifle creativity, inhibit the flow of ideas, and hinder the industry's ability to build upon and reinterpret past concepts, potentially limiting innovation. In the United States, designers can seek design patents, which offer protection for their ideas for 14 years.³⁸ Although this patent is intended for designs, its lengthy protection period still poses the same issues as an ordinary patent.

2.1.3 *A Way Forward*

An enhanced understanding of the intricate dynamics of the fashion industry by legislative bodies could pave the way for the development of patent protection mechanisms that are tailored to the industry. Such a paradigm shift might warrant the implementation of a more agile system. To this end, the standard 20-year patent protection might be reconsidered in favour of a shorter span, ranging from 2 to 3 years. This shorter protection period aligns harmoniously with the rapid pace of fashion trends and consumer preferences, ensuring that innovative designs remain relevant in the market. Simultaneously, addressing the delayed patent application processing timeline is imperative.³⁹ To better suit the fashion industry's needs, expediting the processing of patent applications within a condensed timeframe, such as 6 to 8 months, would significantly enhance the relevance and utility of patent protection in this dynamic landscape. By streamlining the bureaucracy, designers could effectively safeguard their creations and respond promptly to shifting market demands, bolstering both innovation and the industry's competitiveness. A restructured system, characterized by shorter protection periods and expedited application processing, could better accommodate the ever-changing dynamics of the fashion industry and provide designers with a more responsive and effective safeguard for their creative endeavours.

2.2 *Trademarks*

³⁶ Danielle E Gorman, "Protecting Single Color Trademarks in Fashion after Louboutin" (2012) *Cardozo Arts & Ent LJ* at 397.

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ Note that on pages 19-20, the approach of slow fashion is discussed.

2.2.1 Overview

Trademark law serves as a safeguard for the connection between a particular mark and the source.⁴⁰ A trademark is intricately linked to the reputation and identity of the goods' source.⁴¹ It is crucial to understand that trademarks do not protect the functionality of a product.⁴² Granting trademark protection for functionality would essentially create a monopoly based on the trademark itself.⁴³ Trademarks fulfill a dual role, functioning not only to shield the source from unauthorized replication of their products but also to provide assurance to consumers.⁴⁴ Through trademarks, consumers can confidently identify and purchase goods from their intended and trusted sources, thus preserving the integrity of commerce and brand recognition.

Trademarks in Canada can exist in registered and unregistered forms, with registration conferring the advantage of national protection under the federal *Trademarks Act*.⁴⁵ Before embarking on the trademark registration process, a crucial preliminary step involves conducting a search via the Canadian Intellectual Property Office (CIPO) to establish the absence of identical existing trademarks. Trademarks can take various forms, including words, phrases, and designs.⁴⁶ Following the selection and finalization of a trademark, an application is submitted to CIPO, initiating the examination phase. If no conflicts or issues are identified during this process, the trademark proceeds to the publication stage, inviting public scrutiny to ensure the mark's distinctiveness.⁴⁷ Upon successfully completing the examination and publication stages, the trademark is formally registered, bestowing protection upon the mark for ten years, with the option for renewal.⁴⁸

Trademark infringement in Canada encompasses three primary forms, defined by sections 19, 20, and 22 of the *Trademarks Act*.⁴⁹ Section 19 pertains to the

⁴⁰ Norman Siebrasse, "Comparative Advertising, Dilution and of Section 22 of the Trademarks Act" (2001) 18 CIPR 277 [*Siebrasse*].

⁴¹ *Ibid.*

⁴² *Kirkbi AG v Ritvik Holdings Inc*, [2002] FCJ No 793.

⁴³ *Ibid.*

⁴⁴ *Siebrasse*, *supra* note 40.

⁴⁵ *Trademarks Act*, RSC 1985, c T-13 [*Trademarks Act*].

⁴⁶ *Ibid.*, s 2 (definition of "sign" and "trademark").

⁴⁷ *Ibid.*, s 38(1).

⁴⁸ *Ibid.*, s 46(1).

⁴⁹ *Ibid.*, ss 19, 20, 22.

use of a mark in connection with the same goods.⁵⁰ Counterfeit goods are a prominent example, where an unauthorized party replicates a trademarked brand's products to deceive consumers. Section 20 addresses instances where a mark is employed in a manner that could potentially confuse consumers.⁵¹ This occurs when a mark resembles a registered trademark, creating the impression of a connection to a particular brand, even when no such affiliation exists. Section 22 deals with cases where a trademark is utilized to disparage or dilute the goodwill of a company.⁵² This concept, akin to dilution in U.S. law, occurs when a mark tarnishes the reputation or distinctiveness of a well-established brand.⁵³ An illustrative instance involves using a famous luxury brand's logo on low-quality products,⁵⁴ thereby damaging the high-end brand's reputation. These three sections collectively address a spectrum of trademark infringement scenarios, ensuring that the integrity and exclusivity of trademarks are upheld in Canada.

With a well-defined system of protection and a less cumbersome application process compared to patents, trademarks stand as one of the most suitable forms of intellectual property in the fashion industry. Nevertheless, despite their suitability, challenges persist in their implementation.

2.2.2 *Application to the Fashion Industry*

2.2.2.1 *Counterfeits*

Trademark law may appear to be the ideal avenue for safeguarding the iconic logos of high-end designers, as few fast fashion brands would risk copying these registered trademarks. Moreover, with an expedited processing duration compared to patents, trademark law can conform to the demands inherent within the cyclical dynamics of the fashion industry. This accelerated process aligns well with the industry's rapid trend changes, facilitating better adaptation to the swift transformations within the fashion domain. However, even trademark law appears to fall short of effectively protecting these renowned trademark logos. A conspicuous illustration of this limitation is the issue of counterfeits.

⁵⁰ *Ibid*, s 19.

⁵¹ *Ibid*, s 20.

⁵² *Ibid*, s 22.

⁵³ John C Osborne, "Trademark Law and Practice in Canada" (1964) 54:3 Trademark Rep 149 at 158.

⁵⁴ *Louis Vuitton Malletier SA v Haute Diggity Dog, LLC*, 507 F 3d 252, 84 USPQ2D (BNA) 1969, Copy L Rep (CCH) P29,476 (4th Cir Va Nov 13, 2007). Louis Vuitton filed a lawsuit against a manufacturer producing pet chew toys and dog beds that bore a striking resemblance to Louis Vuitton's handbags and designs.

The difference between counterfeit products and knockoffs lies in the realm of legality: while one violates the law, the other operates within a legal gray area.⁵⁵ A knock-off imitates the design or elements of a product, resembling the original without being an exact copy. Conversely, a counterfeit duplicates the original product so convincingly that it misleads consumers into believing it is the authentic product sold by the original company. Hence, one may ask: given the illegality of counterfeit products, how do numerous renowned venues known to sell these products exist? A prime example of such a venue is Canal Street in New York.⁵⁶ Canal Street hosts many vendors retailing high-fashion counterfeits at markedly reduced prices compared to those available just a few blocks away on Fifth Avenue.⁵⁷ Individuals flock to Canal Street with the full awareness that they will be acquiring more affordable renditions of the latest Prada bags or Louis Vuitton wallets, purposefully seeking this marketplace. A pertinent question then follows: why has the legal framework yet to take measures to curtail this practice?

The standard response to this Inquiry often pivots around the inefficacy of pursuing individual vendors, as such action would likely not dissuade others from continuing similar practices.⁵⁸ Moreover, court rulings in New York have suggested that as consumers are knowingly purchasing counterfeits, there appears to be minimal concern regarding consumer confusion.⁵⁹ As discussed, trademarks operate not only to protect consumers from inadvertently purchasing the wrong product but also to ensure that consumers can easily discern the origin of goods or services. When confusion arises in the marketplace, it infringes upon the rights of the trademark owner. It undermines the very purpose of trademarks, which is to provide consumers with accurate information about the source of the product they are buying.⁶⁰ However, the purpose of trademarks extends beyond safeguarding against consumer deception; they

⁵⁵ *Giambarrese*, *supra* note 15 at 244.

⁵⁶ *Ibid.*

⁵⁷ Jonathan M Barnette, "Shopping for Gucci on Canal Street: Reflections on Status Consumption, Intellectual Property, and the Incentive Thesis" (2005) 91:6 Va L Rev 1381-1423 at 1381.

⁵⁸ *Ibid.*, at 1396.

⁵⁹ *Ibid.*, at 1394.

⁶⁰ *Louis Vuitton Malletier v Dooney Bourke*, 454 F 3d 108 (2d Cir 2006). In this case, Louis Vuitton filed a lawsuit against Dooney & Bourke, another fashion company, for trademark infringement and dilution. Louis Vuitton alleged that Dooney & Bourke's handbags, featuring a multicoloured pattern with a repeating "LV" monogram, closely resembled Louis Vuitton's distinctive trademarks. The court examined the similarity between the two companies' designs and considered whether consumers might be confused by Dooney & Bourke's use of a pattern resembling Louis Vuitton's iconic design. Despite differences in the overall look and arrangement of elements, the court found that there was a possibility of confusion among consumers regarding the source of the products due to the similarity in appearance. Louis Vuitton's reputation for luxury and its distinctive monogram significantly influenced this decision.

also shield a brand's identity. While an individual might consciously buy a knockoff from Canal Street, the issue arises when others assume it is genuine. A consumer of a counterfeit failing to clarify that their item is counterfeit could negatively impact the brand's reputation if the design or quality appears substandard. Misleading others to believe the item is authentic can lead to unjustly blaming the original designer for any perceived shortcomings due to their unawareness. While the New York Court seems to have considered the confusion element of the trademark, they have failed to inquire whether these sales are harming the brand's reputation.

The shortcomings of trademark law, exemplified in Canal Street's widespread sales of counterfeit items, reflect a focus on consumer awareness rather than addressing the broader impact on brand reputation and authenticity. As such, the current legal measures inadequately combat these illegal sales practices, underscoring the limitations in protecting the authenticity of high-end brands against counterfeits.

2.2.2.2. Lack of Creativity

An inherent limitation in applying trademark law pertains to its limited protection of only marks and distinctive elements within a design. Under this legal framework, designs created without their trademarked logos or elements fall outside the purview of trademark law's protective reach. While trademark law is the most effective intellectual property avenue for designers, its primary emphasis on logos can inadvertently create constraints on creative expression. Constrained by the need to feature their trademarks for legal safeguarding prominently, designers might face a dilemma when balancing brand identity with consumer preferences.⁶¹ The desire to qualify for trademark protection while maintaining creativity in designs can create tension for designers aiming to accommodate consumers who prefer subtle, understated designer pieces over bold, loud branding.

2.2.3 Case Law Analysis: *Christian Louboutin v Yves Saint Laurent*

Although trademarks are intended to protect the wears and marks associated, their inadequacy to do so is evident. Even when trademarks are granted, it does not ensure protection. This is exemplified in the 2011 case of *Christian Louboutin v Yves Saint Laurent*.⁶² The iconic red bottom shoe has evolved into a signature emblem of the Christian Louboutin brand. The red lacquered sole has become recognized globally and instantly identifies the Louboutin brand. In 2008, the United States Patent and

⁶¹ Elrod, *supra* note 1 at 583.

⁶² *Christian Louboutin SA v Yves Saint Laurent Am. Inc.*, 778 F Supp 2d 445 (SDNY 2011) [*Louboutin*].

Trademark Office recognized its distinction and connection to Louboutin, which granted registration of the Red Sole Mark.

The legal dispute of this case emerged between the two fashion powerhouses due to Louboutin's belief that Yves Saint Laurent (YSL) was creating confusion by featuring a red sole in their 2008 Cruise Collection,⁶³ a hallmark reminiscent of Louboutin's trademark. Initially, Louboutin attempted to resolve the issue by requesting YSL to discontinue a specific design showcasing monochromatic shoes that included soles in matching hues. The shoe in question was red, which bore a striking resemblance to Louboutin's trademarked red. Following YSL's refusal to withdraw the shoe from their line, Louboutin, concerned about potential consumer confusion arising from the analogous shade, initiated legal action under the *Lanham Act*,⁶⁴ alleging trademark infringement based on distinctiveness concerns. In response, YSL countersued in the New York District Court, challenging the distinctiveness of Louboutin's Red Sole Mark while also asserting claims of unfair competition and interference with business relations.

To successfully claim trademark infringement against YSL, under the *Lanham Act*, Louboutin had to establish that its Red Sole Mark merited protection and that YSL's use of a similar mark likely caused consumer confusion about the origin or sponsorship.⁶⁵ The District Court noted that the existence of Louboutin's trademark registration⁶⁶ for the Red Sole Mark gives rise to the presumption that the mark is valid. Referencing *Qualitex Co v Jacobson Prods. Co*,⁶⁷ the District Court noted that colour could potentially qualify for trademark protection if it acquired 'secondary meaning', signifying its ability to uniquely identify and differentiate a specific brand.⁶⁸ The District Court also emphasized that a colour might not obtain trademark protection

⁶³ *Ibid.* Per the case: "Cruise" in this context refers to the fashion season between winter and spring, which is sold in stores beginning in November of each year."

⁶⁴ The *Lanham Act*, 15 USC § 1051 (1946). Note that all the claims asserted under the trademark infringement section of the Lanham Act by Louboutin are as follows: (1) trademark infringement and counterfeiting, (2) false designation of origin and unfair competition and (3) trademark dilution, as well as state law claims for (4) trademark infringement, (5) trademark dilution, (6) unfair competition and (7) unlawful deceptive acts and practices.

⁶⁵ *Louboutin*, *supra* note 62. As outlined in *Louboutin*, these cases provide further elaboration on claims under trademark infringement and unfair competition: see *Starbucks Corp v Wolfe's Borough Coffee, Inc*, 588 F 3d 97 (2d Cir 2009); and *Louis Vuitton Malletier v Dooney Bourke*, 454 F 3d 108 (2d Cir 2006).

⁶⁶ The *Lanham Act* (15 USC § 1127) defines "trademark" as, "...any word, name, symbol, or device, or any combination thereof ... [,] which a person has a bona fide intention to use in commerce and applies to register ..., to identify and distinguish his or her goods ... from those manufactured and sold by others and to indicate the source of the goods."

⁶⁷ *Qualitex v Jacobson Prods Co*, 514 US 159, 167 (1995) [*Qualitex*].

⁶⁸ *Ibid.*

if it serves a “functional” purpose, such as being crucial to the product and influencing its cost or quality.⁶⁹ In the District Court’s analysis, they emphasized that these principles have been approved and applied to trademarks of industrial products. The question faced by the District Court was whether these products could apply to products in the fashion industry.

In analyzing the protectability of the trademark of a single colour, the District Court reasoned that in some circumstances, colour alone might be a protectable trademark. In *Louboutin*’s case, the District Court found the trademark complicated because it was applied to “an article of wear produced in the fashion industry”.⁷⁰ The District Court referenced instances where trademarks of other fashion brands based on colour were approved. These approvals were based on the colours representing a specific arrangement that was identifiable and ornamental, expressive, or decorative, rather than abstract concepts.⁷¹ As was previously highlighted, a trademark may face challenges in obtaining protection if it serves merely a functional purpose. The District Court specifically acknowledged that the red sole associated with *Louboutin* not only serves as an identifier of the shoe’s origin but also impacts the cost of the shoe. Due to its functional role, the District Court highlighted that granting legal recognition on the use of the red colour could potentially restrict competition by confining its utilization solely to *Louboutin*.⁷² Additionally, the District Court noted that *Louboutin*’s trademark encompassed various shoe styles, and because of this broad scope, they further emphasized the competition issue. Ultimately, the District Court determined that a successful claim would significantly impede and restrain other fashion designers and their creative expressions within the industry in relation to the use of this colour. Consequently, the District Court dismissed *Louboutin*’s motion for an injunction against Yves Saint Laurent, citing concerns about potential hindrances to competition and creativity in the fashion sector.

The case of *Christian Louboutin v Yves Saint Laurent* presents a compelling example illustrating the limitations of trademarks in safeguarding fashion designers’ creations. Despite *Louboutin* obtaining a trademark for the Red Sole Mark, the District

⁶⁹ *Louboutin*, *supra* note 62. The District Court once again references the case of *Qualitex*, where the Court noted that “A design is functional because of its aesthetic value only if it confers a significant benefit that cannot practically be duplicated by the use of alternative designs.”

⁷⁰ *Ibid.*

⁷¹ *Louboutin*, *supra* note 62. One of the cases referenced by the District Court in this part of the analysis included *Burberry Ltd v Euro Moda, Inc*, No 08 Civ 5781, 2009 WL 1675080. In this case, the court noted that the combination of various colours and lines that created the distinct checkered print was entitled to statutory presumption of validity.

⁷² *Louboutin*, *supra* note 62. The District Court in *Louboutin* also specifically noted that a trademark for a single colour does not readily align with the needs of the fashion industry. It furthered this by noting that creativity, aesthetics, preferences, and the cyclic nature of the fashion industry would be inhibited through trademarks of a single colour.

Court ultimately ruled that their claim was unenforceable. This case underscores fashion designers' challenges in relying solely on trademarks to protect their distinctive elements. This case showcases the deficiencies in intellectual property protection and explains the intricate interplay between a court's decision and the type of safeguard extended to creative works.

2.3 Copyright

2.3.1 Overview

Copyright is a form of intellectual property that allows for the protection of original works. The goal of copyright law is to find a balance between competing interests. As described in *Sayer*:

*... to guard against two extremes equally prejudicial; the one that men of ability, who have employed their time for the service of the community, may not be deprived of their just merits, and the rewards of their ingenuity and labour; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded.*⁷³

The Supreme Court furthered this statement in the decision of *Cinar v Robinson*,⁷⁴ where the Court stated that the *Copyright Act*⁷⁵ strives to strike a balance by simultaneously fostering the public interest in the widespread dissemination of both artistic and intellectual works while ensuring creators receive fair compensation for their endeavours.⁷⁶ When original works are replicated without compensating the original creators, the drive to produce original works diminishes and causes a decreased incentive to create.

⁷³ *Sayer v Moore* (1785) 1 East 361n (King's Bench) [*Sayer*]. This early legal case involved disputes between map and chart publishers contending for copyright protection against a rival publisher. The quote underscores the delicate equilibrium required in intellectual property, emphasizing that excessive protection could stifle creative advancement, while insufficient protection might discourage creators who invest time and effort if others can claim credit for their works.

⁷⁴ *Cinar Corporation v Robinson*, [2013] 3 SCR 1168, 2013 SCC 73 [*Cinar*].

⁷⁵ *Copyright Act*, RSC 1985, c C-42 [*Copyright Act*].

⁷⁶ *Cinar*, *supra* note 74.

2.3.2 *Application and Protection*

The Canadian *Copyright Act*⁷⁷ outlines the parameters for copyright protection and the rights and remedies afforded to creators of original works. This legal framework aims to safeguard the rights of creators across various forms of expression. When a work is protected by the *Copyright Act*,⁷⁸ the creator is offered long-term protection over their work, which is the creator's life plus fifty years.⁷⁹ Section 5 of the *Copyright Act*⁸⁰ enumerates the general works protected under the legislation and extends protection to an array of original expressions, including literary, dramatic, artistic, and musical creations, offering creators exclusive rights to control the use and dissemination of their works.⁸¹ For the purposes of this paper, our focus lies in the definition of artistic work. Section 5 defines artistic work as "... paintings, drawings, maps, charts, plans, photographs, engravings, sculptures, works of artistic craftsmanship, architectural works, and compilations of artistic works."⁸² Similarly, the American *Copyright Act* provides a parallel categorization of artistic works eligible for copyright protection.⁸³ Both the Canadian Act and the American Act lack specific provisions that recognize the works of fashion designers or clothing designs as enumerated grounds for protection. This absence reflects a gap in the legislative frameworks that fails to address the unique challenges faced by the fashion industry in safeguarding its creations.

Reflecting upon our earlier discussion of the initial outlook on garment creators, examining whether this perspective has evolved comes to the forefront of copyright law legislation. It raises inquiries into the shifting dynamics over time, questioning whether the legislative approach has adapted to the significance of the fashion industry, particularly in recognizing and protecting the creative works of designers. While the creations of fashion designers might embody "artistic craftsmanship", as per the definition of the *Copyright Act*,⁸⁴ the absence of a specific

⁷⁷ *Copyright Act*, *supra* note 75.

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*, at s 5-6.

⁸⁰ *Ibid.*, at s 5.

⁸¹ *Ibid.*

⁸² *Ibid.*, at s 2.

⁸³ 17 USC § 102(a) (1947). The American Copyright Act enumerates the following grounds to be protected subject matters under the Copyright Act: "(1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works."

⁸⁴ *Copyright Act*, *supra* note 75 at s 2.

enumeration for fashion creations forces designers to fit their work into these broader categories. This situation can be remarkably detrimental and frustrating for designers, compelling them to navigate a legal landscape that does not inherently accommodate their unique creative expressions.

In the United States, while not explicitly tailored to enumerate the fashion industry, copyright laws can extend to the protection of utilitarian articles, particularly those elements that enhance the attractiveness or distinctiveness of the item.⁸⁵ This often includes the protection of fabric patterns, drawings, and photographs integrated into articles to serve a utilitarian or functional purpose, extending beyond mere aesthetics.⁸⁶ An important distinction is that copyright law does not protect useful articles in their entirety, but separability of the design is necessary for copyright protection to apply.⁸⁷ This means that a design must have separate elements or features that can be distinguished from its utilitarian aspects to be protected by copyright law.⁸⁸ This form of protection, therefore, can be very limited in its application to articles created by fashion designers. The following case law demonstrates how narrowly construed this protection is and how it can leave designers vulnerable to infringements.

The case of *Kieselstein-Cord* provides an excellent example of how a court uses separability to protect some aspects of an article.⁸⁹ In this case, the Court of Appeals for the Second Circuit deemed that copyright protection was afforded to a belt buckle due to the nature of its manufacturing and the “separable sculptural elements”.⁹⁰ It is noteworthy that the Court of Appeals cited the “sculptural elements” of the belt buckle to justify copyright protection. This further exemplifies how the fashion industry needs to align with other protected categories, even implicitly, to receive legal protection. An example of the shortcomings of copyright protection is depicted in the case of *Jovani Fashion*.⁹¹ In this case, the Court of Appeals for the Second Circuit ruled that copyright protection could not be granted to Jovani’s popular prom dresses

⁸⁵ *Burack*, *supra* note 2 at 611.

⁸⁶ *Ibid.*

⁸⁷ *Zerbo*, *supra* note 20 at 609.

⁸⁸ *Ibid.* This article also includes an excerpt from the House of Representatives Senate Report No. 94-473, 94th Cong., 1st Sess. (1975), that provides insight into what the Copyright Act in America was attempting to protect: “The shape of an industrial product may be aesthetically satisfying and valuable, [but] the Committee’s intention is not to offer it copyright protection under the bill. 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.”

⁸⁹ *Ibid.*, at 613.

⁹⁰ *Kieselstein-Cord v Accessories by Pearl, Inc.*, 632 F 2d 989 (2d Cir 1980).

⁹¹ *Jovani Fashion, Limited v Fiesta Fashions*, No 12-598-cv (2d Cir 2012).

as their design primarily served the functional purpose of enhancing the dress for special occasions.⁹² The Court of Appeals noted that the artistic judgment exercised by the designers at Jovani “blended aesthetic and functional aspects”.⁹³ Thus, it did not meet the standard of separability required to qualify for copyright protection against the imitating manufacturer.⁹⁴ The designs were curated to be functional for special occasions, but the design’s elements were not distinct enough to warrant protection.

While copyright offers a potential safeguard for the fashion industry, the barriers it imposes on securing protection can impede designers’ creativity and the copyright acquisition process. Even upon obtaining a copyright, legal protection is not guaranteed. The mere possession of a copyright does not always translate to comprehensive legal recourse for designers.

2.3.3 *The Piracy Paradox*

In exploring the intricate dynamics of the fashion world, Raustiala and Springman have introduced an intriguing concept—the “piracy paradox.”⁹⁵ This concept emerged from an attempt to decipher how the fashion industry survives and seems to thrive in the face of extensive copying and infringement.⁹⁶ Contrary to the popular belief that copyright infringement should be minimized, this paradox suggests that copying accelerates trend creation and swift turnover.⁹⁷ This interesting perspective articulates that less protection is more beneficial to the fashion industry. This paradox proposes that copying ignites consumer demand by offering more comprehensive access to trends for all, which in turn prompts the cyclical nature of the fashion industry.⁹⁸ As individuals constantly seek the latest trends, the accelerated availability of new items unavoidably intensifies the industry’s cyclical nature. Ultimately, the piracy paradox finds its roots in the social element intrinsic to the fashion industry. This paradox holds that imposing restrictions on copying within the fashion industry might adversely affect consumer access, potentially leading to increased prices.⁹⁹ It asserts that such limitations could restrict certain socio-economic groups from participating in current

⁹² *Ibid.*

⁹³ *Ibid.*

⁹⁴ *Ibid.*

⁹⁵ *Piracy Paradox, supra* note 9.

⁹⁶ *Faster Fashion, supra* note 8 at 536.

⁹⁷ *Ibid.*

⁹⁸ *Ibid* at 540.

⁹⁹ *Ibid* at 544.

trends, creating barriers to engagement with the latest fashion offerings.¹⁰⁰ However, as previously explored, the consequences of replicas have implications that affect a designer's reputation and ability to be innovative.

A fashion brand's identity plays a crucial role in portraying its essence to the world. When a designer's work is misrepresented through poor copies or wrongly attributed to others, it poses significant challenges to the designer's brand and identity. The impact that replicas can have on a designer's creativity and integrity is overlooked in the piracy paradox.¹⁰¹ While brands manage to endure the challenges of imitations, it does not imply they are exempt from negative realities associated with these replicas. As highlighted above, the deficiencies in intellectual property protection within the fashion industry create barriers that impede the entry of new talent into the field. The piracy paradox has further overlooked the broader policy implications arising from the lack of protection, which has enabled excessive copying.¹⁰² In the next section, this paper will explore these implications and their relevance to the fast fashion industry.

3. Policy Considerations

Several policy considerations emphasise the arguments for heightened protection of the fashion industry by intellectual property. While various aspects have been addressed within this paper, the focus will now shift toward exploring the broader implications of the insufficient protection afforded to the fashion industry and its ramifications beyond the confines of the fashion world. These policy considerations include sustainability concerns and illegal activity relating to both labour laws and the evasion of tax laws.

3.1 Sustainability Concerns

In recent years, a rising concern for our environment has become evident, with the fashion industry among the culprits contributing to increased carbon emissions. Particularly, the fast fashion sector is primarily responsible for the escalating

¹⁰⁰ *Ibid* at 544.

¹⁰¹ Understanding the background of the *Faster Fashion* article is crucial to grasp why certain aspects were overlooked. Initially, scholars Kal Raustiala and Christopher Sprigman wrote a paper titled "The Piracy Paradox: Innovation and Intellectual Property in Fashion Design" (92 VA. L. REV. 1687, 2006). In this article, their focus was on how the fashion industry flourishes despite clear instances of copying and replication. In *Faster Fashion*, they revisit their initial thoughts concerning the piracy paradox and shed light on crucial elements they previously overlooked, discussing potential consequences arising from the paradox within the context of fast fashion.

¹⁰² *Faster Fashion*, *supra* note 8 at 545.

environmental concerns within the fashion industry. This aspect of the industry emphasizes the rapid production of poor-quality items which leads to increased waste, resource depletion, and environmental degradation.¹⁰³ Fast fashion's emphasis on quick turnover and low-cost clothing has significantly amplified the industry's ecological footprint, fueling increasing environmental concerns.¹⁰⁴ Trend after trend, items flood the market, basking in fleeting fame before being discarded for the next big thing. Others suffer a different fate: their poor-quality leads to a short lifespan, causing them to be discarded instead of donated to second-hand stores or clothing drives.

Another contributing factor to waste generated by the fashion industry is designers attempting to protect their brand's image by destroying unsold clothes to prevent them from appearing on discounted shelves.¹⁰⁵ According to the Environmental Protection Agency's 2018 report, out of the thirteen million tons of clothing and footwear manufactured, approximately 2.2 million tons were incinerated, while over nine million tons ended up in landfills, with only 1.7 million tons being recycled.¹⁰⁶ If designers find alternative means to safeguard their brand identities, it might dissuade them from generating substantial yearly waste, which could change their approach to production. This practice is currently motivated by the fear of brand devaluation. However, with increased intellectual property protection, designers may be inclined to offer their out-of-style designs at lower prices. By avoiding competition from manufacturers producing cheaper replicas, designers could sell these items at reduced prices, ultimately curbing the waste generated.

Further, Raustiala and Springman have suggested a "slow fashion" approach to mitigate the sustainability concerns of the fast fashion industry. This approach encourages consumers to invest in higher-priced clothing crafted from sustainable materials, known for its superior quality and longer lifespan.¹⁰⁷ Individuals can reduce their overall consumption by opting for durable, well-made garments, thus diminishing the rapid turnover cycle of cheaply produced clothing items. This concept has evolved into a trend for specific individuals and has been coined as the "capsule wardrobe" trend. This trend underscores the significance of possessing essential, high-quality

¹⁰³ *Faster Fashion*, *supra* note 8 at 546.

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*, at 547.

¹⁰⁶ Alexandra L. Bernard, "The Hidden Costs Behind Cheap Clothing: Addressing Fast Fashion's Environmental and Humanitarian Impact" (2023) 25 *Vand J Ent & Tech L* 541.

¹⁰⁷ *Faster Fashion*, *supra* note 8 at 550.

pieces in one's wardrobe over owning numerous trendy items.¹⁰⁸ It showcases how these few items can be worn in various ways, creating diverse looks.¹⁰⁹ The move towards "slow fashion" represents a positive step toward slowing down the clothing production process, aiming to decrease carbon emissions and waste generation in the fashion industry.

While waste is an inherent by-product of the fashion industry, the disproportionate volume generated by fast fashion necessitates some measures aimed at reduction. Effective strategies exist outside legal interventions, such as advocating for "slow fashion". However, bolstering the intellectual property rights of designers can play a pivotal role. Limiting the extent of replicas permitted could decelerate the rapid pace of the fast fashion sector, ultimately assisting in mitigating the industry's waste production.

3.2 Labour Concerns

With the relentless pace of fast fashion fueling an insatiable demand for new styles, a dedicated group works tirelessly, racing against time to meet the ever-increasing need for timely fashion releases. The labourers, seated for hours under poor lighting at their sewing machines, bear the brunt of the fast fashion industry's relentless pace. This becomes particularly disheartening when considering the numerous workers that are paid low wages for this labour.¹¹⁰ The fast fashion industry often relies on manufacturing practices that prioritize cost-cutting measures over fair wages and working conditions.¹¹¹ Consequently, workers in developing countries frequently face exploitative labour practices, enduring long hours, low pay, unsafe working environments, and minimal job security.¹¹² The limitless appetite for quick and inexpensive fashion perpetuates a cycle of exploitation for those on the frontlines of production, highlighting the ethical concerns deeply rooted in the fashion supply chain.

Another pressing concern within this scope revolves around the involvement of child labour in the production processes. This concern pertains to situations where

¹⁰⁸ LUXlife Magazine, "Capsule Wardrobes Are TikTok's Latest Trend – Why Do You Need One?" online (blog): *LUXlife Magazine* <www.lux-review.com/capsule-wardrobes-are-tiktoks-latest-trend-why-do-you-need-one/>.

¹⁰⁹ *Ibid.*

¹¹⁰ *Faster Fashion*, *supra* note 8 at 549.

¹¹¹ Harriet Daisy Smith, "Intersectional Discrimination and Exploitation Within the UK Fast Fashion Industry" (2022) 2 LJMU Student LJ at 4.

¹¹² *Ibid.*, at 5.

children are thrust into labour-intensive roles to support the relentless demands of fast fashion. This practice not only violates fundamental human rights, but also perpetuates cycles of poverty. Additionally, it denies these children the opportunity for proper development and education, casting a darker shadow on the industry's ethical landscape.¹¹³ While most significant companies profess their opposition to child labour, the intricate nature of the supply chain, full of numerous intermediaries, often conceals these critical issues from plain sight.¹¹⁴

Recently, heightened awareness has emerged regarding the pervasive issue of labour exploitation within the fast fashion industry. This growing consciousness has been fueled by alarming discoveries linked to major fast fashion brands like Shein, where purchasers have come across clandestine messages, possibly originating from labourers manufacturing the items.¹¹⁵ After videos revealing messages of distress arriving in Shein orders went viral, consumers grew increasingly alarmed, which led to a surge in users sharing the hashtag "#boycott" in connection with other Shein videos.¹¹⁶ The scrutiny faced by this brand following the viral video raised awareness about the harsh realities experienced by labourers in developing countries.

Further scrutiny and awareness of the hardships created by the fast fashion industry could sustain the momentum of movements promoting sustainable clothing and endorsing the "slow fashion" cycle. Additionally, as mentioned earlier, enhancing the protection of designs and apparel would contribute to fostering a slow fashion cycle, ultimately encouraging consumers to develop a heightened conscience of their buying habits in more than one avenue.

3.3 *Illegality*

Beyond the exploitation of workers and the production of excessive waste, the absence of intellectual property protection within the fashion industry raises various concerns regarding illicit activities. These challenges primarily stem from the fashion industry's limited legal protection, which leaves ample room for the infringement of other laws.

One primary problem emerges from counterfeit products. As discussed in the previous section, counterfeit items often go unnoticed and evade legal consequences.

¹¹³ *Faster Fashion*, *supra* note 8 at 549–550.

¹¹⁴ *Ibid.*, at 549.

¹¹⁵ Meredith Clark, "Shein responds to viral claim workers are hiding 'Help Me' messages in clothes" (16 June 2022), online: *Independent* <www.independent.co.uk/life-style/fashion/shein-help-me-messages-tags-b2102095.html>.

¹¹⁶ *Ibid.*

The overwhelming quantity of unauthorized copies saturating the market makes it difficult for authorities to effectively tackle every instance of infringement, rendering the pursuit of individual vendors ineffective. The influx of counterfeit products not only jeopardizes intellectual property rights but also acts as a gateway for organized crime and human trafficking.¹¹⁷ Some organized crime groups consider the trade of counterfeit goods to be more profitable than dealing with illegal drugs¹¹⁸. The reduced risk of penalties associated with selling counterfeit goods, in contrast to trafficking illegal drugs, significantly heightens the attractiveness of this trade, guaranteeing greater profits for these criminal organizations.¹¹⁹ As aforementioned, the allure of selling counterfeits gives rise to concerns, particularly regarding the treatment of labour workers and the potential use of child labourers.¹²⁰ Counterfeits present yet another issue by serving as a means for transporting illicit drugs. Criminal networks exploit the distribution of counterfeit goods to covertly move illegal drugs, complicating law enforcement efforts and exacerbating the challenges associated with tackling both counterfeit goods and drug trafficking simultaneously.¹²¹ One specific instance refers to the discovery of illegal drugs concealed within the lining of handbags.¹²² This convergence of illegal activities amplifies the complexity of combating organized crime networks and underscores the multifaceted dangers posed by counterfeit products.

Another repercussion of the fast fashion industry relates to economic implications, specifically counterfeit sales. The proliferation of counterfeit goods not only undermines the sales and profits of legitimate brands but also extends to tax revenues.¹²³ Counterfeit goods evade taxation, leading to substantial losses for government funding worldwide. As the market for counterfeit goods has expanded significantly over the years, it deprived governments of crucial tax income that could otherwise contribute to public services, infrastructure, and societal development.¹²⁴ Moreover, the significance of the counterfeit industry has contributed to job loss. In

¹¹⁷ *Giambarrese, supra* note 15 at 278.

¹¹⁸ Sam Cocks, "The Hoods Who Move the Goods: An Examination of the Booming International Trade in Counterfeit Luxury Goods and an Assessment of the American Efforts to Curtail Its Proliferation" (2006) 17 *Fordham IP Media & Ent LJ* 501 at 508.

¹¹⁹ *Ibid.*, at 509.

¹²⁰ *Giambaresse, supra* note 15 at 279.

¹²¹ *Ibid.*, at 279.

¹²² *Ibid.*

¹²³ *Ibid.*, at 282.

¹²⁴ *Ibid.*

2012, counterfeiting inflicted losses ranging from \$200 to \$250 billion on American businesses, resulting in subsequent budget cuts and job losses.¹²⁵

Ultimately, enhancing intellectual property safeguards within the fashion sector becomes crucial in bridging the gap that enables illicit behavior in the industry. Counterfeiting, particularly in the context of fast fashion, significantly disrupts both economic and societal dimensions, undermining the sales of authentic brands and skewing consumer decisions. Lawmakers must recognize that increasing protection within the fashion industry is not solely aimed at protecting designers and their brand's reputation; it is equally imperative to safeguard the world from the wide-ranging repercussions that stem from the legal loopholes in this sector.

4. The Need to Strike a Balance

The likelihood of legal change concerning the inadequate protection of the fashion industry seems improbable. None of the negative implications stemming from inadequate protection—impacting designers, consumers, the environment, the economy, and labourers—have led to significant catastrophes, thus failing to capture the attention of lawmakers. While these issues may not warrant major legal intervention, they do exacerbate existing global issues and therefore ought to be addressed. Convincing lawmakers to bring about a change towards better protection will not be easy, but it must start by finding a balanced approach that acknowledges these concerns.

When examining the existing Canadian legislation in the intellectual property sector, it becomes evident that these laws were created not only to safeguard the rights of creators but also to foster and preserve innovation. At times, these interests appear to be conflicting. On one hand, these laws strive to fortify the rights of creators by offering them a safeguard against unauthorized use or replication of their works. As discussed, the *Copyright Act*,¹²⁶ for instance, grants authors and artists exclusive rights to their original works, ensuring they benefit from their creations. On the other hand, these rights strive not to be expansively interpreted, aiming to avoid potentially hindering innovation by limiting the utilization of existing ideas or obstructing the development of derivative works. Therefore, these laws also incorporate provisions that promote fair use, public access to knowledge, and a framework for the use of protected works. These aspects balance protection and the broader public interest in accessing and building upon existing knowledge. Maintaining a balance is crucial to fostering a climate of availability and creativity.

¹²⁵ *Ibid.*

¹²⁶ *Copyright Act*, *supra* note 75.

While striving to find this balance is theoretically possible, practical implementation poses significant challenges. Within the fashion landscape, this would require a nuanced approach that acknowledges the industry's unique characteristics. One strategy, as mentioned earlier, involves crafting legislation that aligns more closely with the pace of the fashion industry. I initially discussed this concept within the context of patent law, which indicated that this approach might involve expediting patent approvals for shorter durations. Another avenue to explore is explicitly incorporating fashion designs as a distinct category within copyright laws. This step could offer substantial benefits by imparting legal clarity, delineating the parameters of infringement, and empowering more effective enforcement mechanisms. A clear definition in the legislation could facilitate legal recourse against individuals or entities engaging in unauthorized replication of fashion designs.

Another strategy might involve examining how other jurisdictions have endeavoured to balance fostering innovation and ensuring the protection of designers. Generally, legislation within the European Union tends to provide more extensive intellectual property protection to designers than in North America.¹²⁷ This inclination might stem from the prevalence of numerous high-end designers originating from Europe, prompting the European Union to prioritize offering ample protection to its creators. An instance illustrating this protection is the copyright safeguard in the European Union, extending to fashion designs through registered and unregistered designs exhibiting distinctive novelty.¹²⁸ This protection encompasses an entire garment,¹²⁹ differing from the American model that focuses on parts of a garment. Another instance of this contrast emerges concerning counterfeits. In the European Union, purchasing and selling counterfeit products are deemed criminal activities, whereas in America, only selling counterfeit products is considered a crime.¹³⁰ In essence, turning to the European Union might offer a more effective means of ensuring enhanced protection for designers. These laws have not hindered innovation or creativity, considering Europe is home to most of the world's major fashion houses.

In summary, while it may be unlikely that the laws regarding the protection of the fashion industry will change, it is essential to continue advocating for them. Achieving a balance between innovation and protection may seem daunting, but numerous effective methods exist to attain this equilibrium. Establishing well-defined legislation is a crucial step towards enhanced protection, leading to emulating models from jurisdictions that prioritize safeguarding designers' rights more effectively. Ultimately, this shift promises not only a more equitable balance but also serves as a

¹²⁷ *Elrod, supra* note 1 at 592.

¹²⁸ *Ibid.*

¹²⁹ *Ibid.*

¹³⁰ *Giambarrese, supra* note 15 at 278.

safeguard for other industries and stakeholders affected by the fashion industry's insufficient protection.

Conclusion

In this paper, I have attempted to underscore the deficiencies of intellectual property protection within the fashion industry, highlighting a need for improved safeguards. I have highlighted the importance of protection while acknowledging the challenges and consequences of seeking more protection in this industry. The need for this protection boils down to a fundamental premise: fashion designers, akin to all forms of creators, deserve the right to protect their artistic works and be duly acknowledged as the rightful proprietors. Moreover, upon receiving protection, designers should be assured that they can shield their creations from infringement and that those who infringe on their works will be held liable.

The inescapable impact of the fashion industry ripples across diverse realms. Its influence is driven by its cyclical nature, fueled by consumers' perpetual desires for the next best thing. The fashion industry has managed to thrive in the face of replication, but at what cost? The adverse effects on designers, their credibility, and emerging talents' barriers to entering this field are evident. The call for enhanced protection extends beyond safeguarding designers' creativity; it's intricately tied to broader concerns surrounding our environment, sustainability, and discouraging illegal activity. The purpose of highlighting the rippling impacts of the fashion industry is this: if the lawmakers cannot be convinced that designers deserve more protection, perhaps it can be shown why other sectors affected by the industry deserve safeguarding through the fashion industry.