

**GIVE ME A ©:**  
**Refashioning the Supreme Court’s Decision in**  
***Star Athletica v. Varsity* Into an Art-First Approach**  
**to Copyright Protection for Fashion Designers**

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ABSTRACT

Fashion designers have struggled to establish their works as expressions that qualify for copyright protection. The U.S. Supreme Court’s decision in March 2017 in *Star Athletica v. Varsity* was less of a victory for fashion designers than it might appear. The Court’s effort to clarify and apply the “separability test” stopped short of providing the clarity needed to protect the works of fashion designers. This Article contends that this confusion can be resolved by conceptualizing fashion designs as forms of art that are often applied to useful objects, rather understanding them as useful items that, if their designs can be conceptually separated from the object, can receive protections.

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## INTRODUCTION

Fashion designers are generally recognized as artists who produce creative works. However, they differ from most other artists in one crucial way: Their creations are almost always utilitarian. Fashion designers’ works typically take the form of clothing and other wearable items, which make them different than more traditional forms of artistic expression, such as painted artwork on canvas, written material in books, or recorded music. Crucially, canvases and books are not considered utility items. Other than propping open a door or a window, books, for example, have seldom been understood as anything more than receptacles for the creations of authors. Clothing and accessories, however, are used as and are commonly categorized as functional items.<sup>1</sup> Quite problematically when it comes to copyright law, clothing and accessories can be both utility items, performing the task of covering the body and protecting it from the environment, and media through which fashion designers express their art. The courts have struggled to consistently separate this dual nature of fashion as both art and useful item in their interpretation of United States copyright law. The Copyright Act outlines that “useful articles” can be protected only if “such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.”<sup>2</sup> The designs of utility items—such as spoons and tabletop tea lighters, for example—are not considered copyrightable under the law because they are categorized as useful items.<sup>3</sup> Traditional artistic creations such as songs, novels, and paintings lack a clearly utilitarian element and have generally been wholly accepted as protected under the Copyright Act.

Thus, copyright law splits works into either purely artistic creations or items that are both useful and artistic, ultimately creating different standards of evaluation for each. Fashion designers, because of the useful nature of their

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1 Mazer v. Stein, 347 U.S. 201, 202 (1954); *Star Athletica v. Varsity Brands*, 137 S. Ct. 1002, 1007 (2017); see also Samson Vermont, *The Dubious Legal Rationale for Denying Copyright to Fashion*, 21 TEX. INTELL. PROP. L.J. 89, 91–92 (2013); Aya Eguchi, *Curtailing 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, 139–140 (2011).

2 Copyright Act of 1976, 17 U.S.C. § 101 (2012).

3 *Bonazoli v. R.S.V.P. Int’l*, 353 F. Supp. 2d 218 (D.R.I. 2005); *Design Ideas, Ltd. v. Yankee Candle Co., Inc.*, 889 F. Supp. 2d 1119, 1119 (C.D. Ill. 2012).

creations, have struggled to establish their works as among the types of expression that “deserve rewards commensurate with services rendered” within copyright law, as Justice Reed reasoned in his opinion for the Court in *Mazer v. Stein* in 1954.<sup>4</sup> In other words, their works have often left them with one foot in each of the two copyright-related groups—purely artistic expression and useful items with artistic elements. Scholars have devoted extensive attention to the question of whether fashion is a form of art, something that is more akin to a musical composition or painting than to a table or chair.<sup>5</sup> While their conclusions have not led to a consistent answer, the idea that works of fashion can be understood as *works of art* that are applied to useful articles provides a potential lens through which the labors of designers can be understood. In practice, however, the protections that are traditionally associated with fashion designs have ended up somewhere between the front-and-center sales display and the clearance rack in the back of the store. They remain unclear, even after the Supreme Court’s decision in *Star Athletica v. Varsity* in 2017. The case, which involved a massive cheerleading uniform designer and retailer that claimed a rival company had stolen its designs, represented the first time the Court specifically addressed the rights of fashion designers to copyright their works. The rival company, Star Athletica, contended cheerleading uniforms are useful items, and therefore Varsity’s designs cannot be protected by copyright.<sup>6</sup> The Court sided with Varsity, finding the designer’s works to be copyrightable. The ruling, however, was less of a victory for designers than it appears.

Justices from the outset recognized that the line between useful works and art “is often difficult to draw.”<sup>7</sup> Justice Thomas, who wrote the Court’s opinion, explained that the justices took up the appeal from the Sixth Circuit to “resolve widespread disagreement over the proper test for implementing § 101’s separate identification and independent-existence requirements.”<sup>8</sup> Justice Thomas was referring to the “separability test,” which was devised in the 1950s as part of a case that involved a dancing figure that was part of a lampstand. The test was ultimately integrated into the Copyright Act of 1976.<sup>9</sup> The two-part separability standard that the Court used in *Star Athletica* first asks whether a part of a useful item can be understood as a two- or three-dimensional piece of art when it is separated from the useful item.<sup>10</sup> The second

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4 *Mazer*, 374 U.S. at 219; see also Eguchi, *supra* note 1, at 136–40; Lynsey Blackmon, *The Devil Wears Prado: A Look at the Design Piracy Prohibition Act and the Extension of Protection to the World of Fashion*, 35 PEPP. L. REV. 107, 127–31 (2007).

5 Valerie Steele, *Fashion*, in *FASHION AND ART* 13, 23–25 (Adam Geczy & Vicki Karaminas eds., 2012); Sung Bok Kim, *Is Fashion Art?* 2 *FASHION THEORY* 51, 53–55 (1998); Sanda Miller, *Fashion as Art; Is Fashion Art?* 11 *FASHION THEORY* 25, 26–28 (2015).

6 *Star Athletica*, 137 S. Ct. at 1008.

7 *Id.* at 1007.

8 *Id.*

9 *Mazer*, 374 U.S. at 201.

10 *Star Athletica*, 137 S. Ct. at 1007.

step in the test considers whether the object would qualify as a “protectable pictorial, graphic, or sculptural work — either on its own or fixed in some other tangible medium of expression — if it were imagined separately from the useful article.”<sup>11</sup> The Court concluded that Varsity’s cheerleading designs met that standard because the designs, a series of chevrons, stripes, and other shapes, could be removed from the garment and affixed to another form of media, such as a painter’s canvas. The Court’s reasoning, however, does little to resolve the persistent questions regarding copyright protections for the works of fashion designers, who are part of a \$1.75-trillion global fashion industry that includes nearly \$370 billion in the United States.<sup>12</sup> At best, it provides the precedent that some elements of some designs can be protected.<sup>13</sup>

This Article explores the relationship between copyright law and fashion design. It first examines the definition of fashion and its role in culture, society, and business before analyzing the Court’s majority, concurring, and dissenting opinions from *Star Athletica*. The Article then considers other relevant fashion-related intellectual property cases as well as copyright law, its roots, the fashion industry’s unsuccessful efforts to encourage lawmakers to include fashion-specific protections within federal law, and relevant precedents regarding protections for original works. Ultimately, the Article proposes an alternative approach to how the courts can conceptualize copyright protections for fashion designs, one that remains relatively closely aligned with the Court’s opinion in *Star Athletica* and with traditional interpretations of federal law while at the same time providing simplicity and clarity to an area of creative expression that has, thus far, received little protection.

## I. FASHION AS ART AND BUSINESS

The fashion industry is a trillion-dollar global business that first emerged as a powerful force during the fourteenth and fifteenth centuries.<sup>14</sup> It was not until the nineteenth century, however, when English designer Charles Frederick Worth set up his own fashion house in Paris that the designer-dominated fashion system we know today was born.<sup>15</sup> His was the first true designer

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11 *Id.*

12 *Id.* at 1011–12; JOINT STAFF OF J. ECON. COMM., 114TH CONG., THE ECONOMIC IMPACT OF THE FASHION INDUSTRY (Comm. Print 2015).

13 Steff Yotka, *What the Supreme Court’s First Ruling on Fashion Copyright Means for the Runway*, VOGUE (Mar. 23, 2017, 01:42 PM), <http://www.vogue.com/article/supreme-court-star-athletica-varsity-brands-ruling-fashion-industry> [https://perma.cc/HC8B-JSZY]; *Supreme Court Sounds Off on Copyright in Cheerleading Uniform*, THE FASHION LAW (Mar. 22, 2017), <http://www.thefashionlaw.com/home/supreme-court-says-cheerleader-uniform-is-protectable-by-copyright-law> [https://perma.cc/5Q34-G3TN].

14 FRÉDÉRIC GODART, UNVEILING FASHION: BUSINESS, CULTURE, AND IDENTITY IN THE MOST GLAMOROUS INDUSTRY 15 (2012).

15 PHYLLIS G. TORTORA & KEITH EUBANK, SURVEY OF HISTORIC COSTUME 354 (2010).

atelier.<sup>16</sup> After the wife of Napoleon III, Empress Eugénie, became a client, Worth's business flourished. He was the first to show clothes on live models and the first to present a new collection every year. Worth's gowns were customized to each client, and, like a true artist, he even signed his work. Late in the nineteenth century, Worth formed the *Chambre Syndicale de la Couture*, the precursor to the organization the group that today stages the couture shows in Paris every season.<sup>17</sup> These shows continue to highlight the meticulous work of some of fashion's most expert craftspeople.<sup>18</sup>

For decades, the high-fashion industry followed what is often referred to as the "craft" business model, where one designer oversaw the labor-intensive process from creation to manufacturing for made-to-order clothing. For years, the structure of the fashion industry remained relatively consistent following this craft model. Yet there is an inherent tension in this model. Beyond the typical schedule of fashion, which requires releasing new collections for each season, there is an intrinsic need for balance between artistic and monetary demands. Designers with strong business perspectives are not necessarily more successful: at times, the business side can stifle the originality that a label is known for in an attempt to make money. The key to a brand's success is managing both innovation and business awareness in order to form survival strategies.<sup>19</sup>

In the twentieth century, designers realized that other models might serve them better than the traditional craft model. One researcher contended that different organizational methods coevolved in France, Italy, and the United States. France developed the "umbrella holding" company, Italy developed the "flexible embedded network," and the United States developed the "virtual organization" model.<sup>20</sup>

France's "umbrella holding" model, which developed after World War II, consisted of a large haute couture house diversifying its product—venturing into perfumes, cosmetics, accessories, and most importantly, into ready-to-wear lines of clothing for men, women, and sometimes children. Each product line varied and functioned relatively autonomously. Many companies, among them

16 Jessa Krick, *Charles Frederick Worth (1825–1895) and the House of Worth*, in *HEILBRUNN TIMELINE OF ART HISTORY* (Metropolitan Museum of Art, 2004), [https://www.metmuseum.org/toah/hd/wrth/hd\\_wrth.htm](https://www.metmuseum.org/toah/hd/wrth/hd_wrth.htm).

17 *The House of Worth*, *VOGUE* (Sep. 18, 2010), <https://www.vogue.co.uk/shows/spring-summer-2011-ready-to-wear/house-of-worth>; Mary Lynn Stewart, *Copying and Copyrighting Haute Couture: Democratizing Fashion, 1900–1930s*, 28 *FRENCH HISTORICAL STUDIES* 103, 109 (2005).

18 *Id.*

19 Wendy Malem, *Fashion Designers as Business: London*, 12 *J. FASHION MARKETING & MGMT.* 398, 412 (2008).

20 Marie-Laure Djelic & Antti Ainamo, *The Coevolution of New Organizational Forms in the Fashion Industry: A Historical and Comparative Study of France, Italy, and the United States*, 10 *ORG. SCI.* 622, 625–26 (1999).

Christian Dior and Yves Saint Laurent, began to subcontract work for subsidiary lines.<sup>21</sup>

In the 1970s and 1980s, the industrial aspect of the business changed dramatically, creating the “flexible embedded network,” a model first recognized in Italy.<sup>22</sup> A young Marco Rivetti, a renowned Italian designer, started to involve designers from his company at the product-planning stage, changing the way industrial work was conceived in the process. His company set up a huge assembly line-style factory and set a new precedent by hiring workers with tailoring experience. Rivetti recognized the need for better tailoring expertise at the product-planning and assembly stages as demand for his manufacturing services grew.<sup>23</sup> At the time, designers’ creations couldn’t easily make it into the market through time-honored production methods established in the atelier, where garments were constructed largely by hand. Overhead was simply too high. This level of craftsmanship was reserved for haute couture garments, produced by a select few brands. In contrast, the vast majority of designers began to produce their clothing lines through licensing agreements with manufacturers.<sup>24</sup>

This provided designers with industrial abilities so their commodities could be produced on a large scale, and gave them additional financial resources.<sup>25</sup> As one researcher summarized it, this model functions as “a combination of coherent brand management with high-quality manufacturing, subcontracted to a tight network of regular partners.”<sup>26</sup>

The American “virtual organization” model functions as the opposite of the French. While French haute couture brands such as Christian Dior and Chanel had to “downgrade” their pieces to produce ready-to-wear clothing, American brands like Ralph Lauren and Calvin Klein have “upgraded” their works over the years.<sup>27</sup> The United States’ sheer size and purchasing power easily gave way to assembly-line production. However, few steps of the design production process have remained in-house beyond strategic decisionmaking. The company remains responsible for designing “the brand,” but most everything else is subcontracted out.<sup>28</sup>

All of these models came into being within the past century, as fashion grew into a multitrillion-dollar international business. Today the fashion industry has evolved far beyond the small craftsman-like workshops that produced

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21 *Id.* at 628–29.

22 *Id.* at 630.

23 Elisabetta Merlo, *Italian Fashion Business: Achievements and Challenges (1970s–2000s)*, 53 *BUS. HISTORY* 344, 345–60 (2011).

24 *Id.*; Djelic & Ainamo, *supra* note 20, at 632.

25 *Id.*

26 *Id.*

27 *Id.* at 632.

28 *Id.* at 633.

luxury goods for the courts of preindustrial Europe and gave birth to such legendary brands as Louis Vuitton and Gucci. Driven in large part by changing market forces, including globalization and new technologies, fashion has become an integral part of contemporary consumer culture. Fashion designers now create clothes not only for haute couture, but also for mass production. Elite and mass fashions still differ significantly in terms of the quality of fabrics and levels of designers and tailors, as well as accessories and price. However, such global names as Armani, Prada, and Chanel dictate global fashion trends at both the high and low ends. Thus, clothing designers play a crucial role not only in creating haute couture, but in influencing the mass production of clothing, leading to economic growth.<sup>29</sup>

As with many other industries, the evolution of the Internet made fashion truly global. The speed of the industry has increased, fueled by a constant desire for “the next big thing.” Where cities like New York and Paris were once fashion meccas, exclusively defining what is or is not “fashionable,” those living in smaller cities now have access to the same styles online. In addition, while designs from high-end labels once took months to make their way from the runway to the racks of a storefront, now fast-fashion knockoffs can be in stores almost immediately—sometimes before the original designs themselves. Fast-fashion brands have managed to take designs and reproduce them rapidly, shipping them out to stores within days or weeks. With such a large market at stake, those wishing to get a piece of the pie have jumped in—copycats.

#### A. *The Fast-Fashion Industry, Counterfeits, and Copycats*

Copying in fashion can range from deliberate copying, illegally counterfeiting trademarked logos, imitating runway garments for mainstream customers, or simply producing unintentional similarities from following popular trends.<sup>30</sup> With the increased speed and production of the fashion industry, the ease of copying and counterfeiting has increased as well.

Many designers have sought legal protection against rip-offs of their work in the form of patents, trademarks, and copyrights.<sup>31</sup> Despite existing protections, many designers say that they are not enough or are not easily attainable. Even with legal protections, knockoffs are rampant because these activities are extremely profitable. The profit comes at a cost for the designers, however. Each year, U.S. brands lose an estimated \$250 billion when consumers purchase counterfeit goods instead of legitimate products.<sup>32</sup> These counterfeit

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29 Mindaugas Laužikas & Rasa Mokšėckienė, *The Symbiosis of Art and Business in the Fashion Design Industry*, 7 INTELL. ECON. 101, 110 (2013).

30 V. ANN PAULINS & JULE L. HILLERY, ETHICS IN THE FASHION INDUSTRY 94–95 (2009).

31 Lanham Act of 1946, 15 U.S.C. § 1051; *see also* LESLIE DAVIS BURNS, KATHY K. MULLETT & NANCY O. BRYANT, THE BUSINESS OF FASHION: DESIGNING, MANUFACTURING, AND MARKETING 57–62 (5th ed. 2016).

32 PAULINS & HILLERY, *supra* note 30, at 91.

goods do not benefit the country's economy and damage the legitimate brand's reputation by providing shoddy work.<sup>33</sup>

Some designers, especially smaller designers who cannot afford legal protections or court fees, have turned to social media to combat copycats. In March 2017, Spanish brand M2Malletier shared images on Instagram of CH by Carolina Herrera handbags, alleging that the bags copied M2Malletier's "signature" handles.<sup>34</sup> Designer Aurora James of Brother Vellies has frequently called out popular lower-price point brands like Zara, Steve Madden, and Jeffrey Campbell for copying her designs.<sup>35</sup> Following James's public complaint against Steve Madden, the offending brand's shoes were pulled off its website the next day. These smaller brands lack not only the finances but also the time and capacity to take on larger companies that hijack their designs. While some designers have lobbied for greater legal protections, others believe their best defense is the sort of public shaming applied in the Madden case.<sup>36</sup>

### B. *More Than a Piece of Clothing*

Beyond the concept of fashion as an "industry," fashion has functioned in the lives of individuals and societies as a form of art, of identity, and of value—fashion is more than a piece of clothing. Over the past few centuries, clothing has evolved from a purely utilitarian product to a form of applied art. When clothes were something used simply to cover the body and keep it warm, "fashion" was a craft. Today, however, the public seems to agree that fashion is a form of creative expression, a form of "wearable art."<sup>37</sup> According to Brussels-based intellectual property attorney Eveline Van Keymeulen, "Fashion designers are artists and the medium they work in is clothing."<sup>38</sup>

For the purposes of this Article, clothing is defined as a general garment, such as a plain white T-shirt. These garments serve the basic function of protecting people from the environment and providing a sense of modesty.<sup>39</sup> Fashion goes beyond the basic utilitarian function of clothing to convey certain

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33 *Id.* at 93–94.

34 Chantal Fernandez, *Designers Take Copyright Infringement into Their Own Hands*, BUS. OF FASHION (June 28, 2017), <https://www.businessoffashion.com/articles/news-analysis/designers-take-copyright-infringement-into-their-own-hands> [https://perma.cc/PZQ7-JGYQ].

35 Ana Colon, *Brother Vellies' Aurora James on Her Sandals Getting Ripped Off . . . Again*, REFINERY 29 (Jan. 13, 2017), <http://www.refinery29.com/2017/01/136147/brother-velles-steve-madden-sandals-knock-off> [https://perma.cc/QG38-F2UA].

36 Fernandez, *supra* note 34; Lisa J. Hedrick, *Tearing Fashion Design Protection Apart at the Seams*, 65 WASH. & LEE L. REV. 215, 233–39 (2008).

37 Eveline Van Keymeulen, *Copyrighting Couture or Counterfeit Chic? Protecting Fashion Design: A Comparative EU-US Perspective*, 7 J. INTELL. PROP. L. & PRAC. 728, 728 (2012).

38 *Id.*

39 TORTORA & EUBANK, *supra* note 15, at 1; Clothing, Merriam-Webster Online Dictionary (Dec. 7, 2017), <https://www.merriam-webster.com/dictionary/clothing> [https://perma.cc/2R9G-87EJ].

ideas, statuses, and customs. Fashion is a trend, recognized and adopted by a group of people for a limited amount of time.<sup>40</sup> These fashion trends reflect designers' original intellectual conceptions. Fashion, unlike clothing, is acquired out of desire rather than necessity. Despite this simple explanation, the distinction itself "lends conflict to the purpose of apparel and the role of design innovation presented through clothing."<sup>41</sup> While individuals choose different styles for different reasons, ultimately fashion is chosen because the wearer gives the garment in question *value*. That value could be of a personal, cultural, or religious nature.

One group of scholars contended that fashion should be categorized as being a part of "creative industry."<sup>42</sup> A creative industry can include popular music or media, though the performing or fine arts are generally not included. A creative industry is defined "in terms of a class of economic choice theory in which the predominant fact is that because of inherent novelty and uncertainty, decisions both to produce and to consume are determined by the choice of others in a social network."<sup>43</sup> Creative industries rely largely on influence from this social network, with individuals prioritizing outside influence over other signals like price points and individual preferences, because these networks of influence provide informational feedback. Based on economist Jason Potts's definition, fashion as a creative industry gives preference to others' choices—because of the inherent novelty and uncertainty of fashion, choices made by others provide information and context.<sup>44</sup> In simplified terms, this means that individuals do not decide what is "fashionable" the same way they do not decide what is "good art." Instead, the leading social group—in this case the web of fashion designers, editors, stylists, and other insiders—makes these decisions for the individual.<sup>45</sup>

Creative industries represent the intersection of art, culture, business, and technologies that together fuel the cycle of creativity. Engineering, architecture, design, art, and music are those areas where the birth of new ideas and technologies occurs. Creative design is expressed as decorative, luxurious, and unique works, such as fashion, jewelry, architecture, interiors, etc. In

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40 TORTORA & EUBANK, *supra* note 15, at 8–9; SANDRA KEISER, DEBORAH VANDERMAR & MYRNA B. GARNER, *BEYOND DESIGN: THE SYNERGY OF APPAREL PRODUCT DEVELOPMENT* 83 (4th ed. 2017); "Fashion, Merriam-Webster Online Dictionary (Dec. 7, 2017), <https://www.merriam-webster.com/dictionary/fashion> [<https://perma.cc/KJT8-UFCU>].

41 PAULINS & HILLERY, *supra* note 30, at 78.

42 Jason Potts, Stuart Cunningham, John Hartley & Paul Ormerod, *Social Network Markets: A New Definition of the Creative Industries*, 32 J. CULTURAL ECON. 167, 168–69 (2008).

43 *Id.* at 169.

44 *Id.*

45 *Id.* at 169–70.

many countries, a nation's cultural heritage is represented in its creative design, including its clothing design.<sup>46</sup>

### C. *Fashion and Art*

In some cases, fashion serves a purpose that extends far beyond wearability. For example, Canadian artist Jana Sterbak created her now seminal *Vanitas: Flesh Dress for an Albino Anorectic* in 1987.<sup>47</sup> The piece was composed, or rather decomposed, of rotting meat sewn into a dress, modeled against the artist's naked flesh. While not a piece for the squeamish, it certainly held value as art, filled with the artist's feminist anger regarding women's treatment as "hunks of flesh."<sup>48</sup> As philosopher Theodor Adorno wrote in his *Aesthetic Theory*, "great artists since Baudelaire have conspired with fashion."<sup>49</sup> Yves Saint Laurent's Mondrian dress turned high art into wearable art, redefining the original modern painting by Piet Mondrian as a separate, independent, and thus derivative work that incorporates major copyright-protected elements of an original piece.<sup>50</sup> The A-line shift featuring Mondrian's graphic lines, white spaces, and primary colors was released in the fall of 1965 and became an iconic symbol of the decade.<sup>51</sup> This context removes fashion from its industrial connotations and gives it a new value as a commodity with the same sensibilities as art.<sup>52</sup> Although the work of Dutch designer Iris van Herpen can be worn—and has been, by high-profile women at red-carpet events—her intellectually complex designs were initially meant to be examined. The exhibit *Iris van Herpen: Transforming Fashion*, which includes forty-five pieces of her fashion designs, has made stops at major American museums in recent years.<sup>53</sup> The complex designs, including an intricately printed dress that takes on the

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46 Laužikas & Mokšėckienė, *supra* note 29, at 109.

47 Jennifer McLerran, *Disciplined Subjects and Docile Bodies in the Work of Contemporary Artist Jana Sterbak*, 24 FEMINIST STUD. 535, 537 (1998).

48 FASHION AND ART, *supra* note 5, at 1.

49 Theodor W. Adorno, AESTHETIC THEORY 192 (Gretel Adorno & Olf Fiedemann, eds., Robert Hullot-Kentor, trans., Continuum 1997).

50 Nancy J. Troy, *Mondrian's Dress: Yves Saint Laurent, Copying (and) the Couture Copy*, 63 BULLETIN OF THE GERMAN HISTORICAL INSTITUTE 27, 27–30 (2018). Yves Saint Laurent's use of a recognizable and recognized piece of high art in a dress design contributed to the phenomenon of fashion representing ideas and aesthetics more than simply functioning as utilitarian garments.

51 *Id.* at 45.

52 Kim, *supra* note 5, at 57.

53 Iris van Herpen: Transforming Fashion, CARNEGIE MUSEUM OF ART (last visited Mar. 8, 2019), <https://cmoa.org/exhibition/iris-van-herpen> [<https://perma.cc/B33E-NE3M>]; Iris van Herpen: Transforming Fashion, DALLAS MUSEUM OF ART (last visited Mar. 8, 2019), <https://www.dma.org/art/exhibitions/iris-van-herpen-transforming-fashion> [<https://perma.cc/BX9J-Y5LZ>]; Iris van Herpen: Transforming Fashion, CINCINNATI ART MUSEUM (last visited Mar. 8, 2019), <https://www.cincinnatiartmuseum.org/transformingfashion> [<https://perma.cc/84VT-LXUU>].

appearance of a skeleton and a dress that creates the illusion of water splashing off the wearer, elevate fashion. They are meant to inspire and to contemplate. As noted above, van Herpen's pieces can be worn, and they have been. However, more than most couture clothing, the esoteric nature of a gown designed to resemble a skeleton begs the question: How truly functional is it?

Despite the lack of wearable utility of these pieces, some artists argue that functional fashion serves an artistic and valuable purpose. As art historian Anne Hollander contended in *Seeing Through Clothes*, "dress is a form of visual art, a creation of images with the visible self as its medium."<sup>54</sup> Like the Yves Saint Laurent Mondrian dress, patterns, designs, and accessories can be artistic—creating an ideal image of the wearer in the process. This ideal image projects how the wearer perceives herself and wishes to present herself to the world. In turn, one could argue that the fashion that enables this creative self-expression should be copyrightable, much like creative genius in any other artistic endeavor.

#### D. *Fashion and Identity*

Fashion is intrinsically tied to the concept of portraying an individual's "identity signals," indicating social affiliations, likes, dislikes, and cues.<sup>55</sup> Fashion forms a central element in providing these identity signals about the wearer, along with other signals such as culinary habits, travel destinations, and education levels.<sup>56</sup> Some choose fashion to portray their individuality or distinction from others. Notably, according to the Simmelian theory of fashion, fashion is used as a social tool to distinguish the upper class from the lower classes.<sup>57</sup> When the upper class adopts a particular style, the lower classes rapidly imitate the style in an attempt to match the prestige of the upper class. This pushes members of the upper class to shift away from said style to a new one to distinguish themselves from the lower classes. The result is a never-ending cycle of social class-driven fashion.

Economist Adam Smith argued that the desire for the lower classes to imitate is out of a natural desire, a need to imitate the rich to participate in their perceived happiness.<sup>58</sup> Several studies have found that the purchase of luxury brands can elicit an emotional response from the consumer, like pleasure or excitement.<sup>59</sup> Select individuals reject this notion as a form of protest against the bourgeoisie and instead adopt "oppositional fashion."<sup>60</sup> This anti-fashion

54 ANNE HOLLANDER, *SEEING THROUGH CLOTHES* 311 (1993).

55 GODART, *supra* note 14, at 19.

56 *Id.* at 20.

57 *Id.* at 23.

58 ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* 3–5 (1853).

59 Franck Vigneron & Lester W. Johnson, *Measuring Brand Luxury Perceptions*, 11 J. BRAND MGMT., 484, 484–508 (2004).

60 Ilona Mikkonen, Handan Vicdan & Annu Markkula, *What Not to Wear? Oppositional Ideology, Fashion, & Governmentality in Wardrobe Self-Help*, 17 CONSUMPTION, MKT., &

stance takes the current trend or fashion and inverts it—akin to the goth or punk subcultural attitudes. However, this counterculture is limited, as sociologist Fred Davis points out: Oppositional fashion is entirely dependent on its definition as reactionary. In essence, oppositional fashion is solely a secondary effect of fashion itself.<sup>61</sup>

Even with subcultures, a concept of “fitting in” still exists, whether by having a certain hairstyle or wearing certain clothes in order to reflect attitudes or identities. For example, goths call non-goths “trendies” to reflect the group’s distaste for conformity. Reflexively, the concept of a “fashion victim” exists: those who attempt to follow mainstream fashion, and yet fall short. An essential trait follows fashion victims: excess. A sense of hubris is attached to the fashion victim, who piles on trend after trend until collectively, his or her appearance is out of fashion. The fashion victim is unaware of this and continues to think he or she is in vogue. Whether an individual is part of an anti-fashion subculture or a fashion victim following the trends, both these groups are important from an economic and ideological perspective.<sup>62</sup>

While some subcultures have developed out of a desire to counter popular culture, others exist outside of Western popular culture. For example, hijabi culture within the Muslim community, while culturally developed in the Middle East, exists as an “other” in much of Western society and culture. Islamic dress code calls on women to dress “modestly,” often resulting in dress that covers the head. This stands in opposition to modern Western fashion, which often rewards women who dress provocatively. However, the idea that women can follow religious dress codes and be fashionable under Western standards is a concept that has emerged in recent years. These women have been dubbed “hijabistas”—a portmanteau of the words hijab and fashionista. Following the advent of the Internet, these communities have developed exclusively in a digital context. Many of these hijabistas have avid followings online, forming a space where faith and fashion co-exist as part of the “Islamic culture industry.”<sup>63</sup>

Broadly, fashion occupies a uniquely impactful position in society. Decisions that relate to fashion design carry with them certain amounts of economic, personal identity, and cultural weight. Such widespread influence, which ranges far beyond simple utility, provides important perspectives when considering the conditions under which fashion or clothing items can be protected by copyright.

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CULTURE 254, 256–57 (2013).

61 GODART, *supra* note 14, at 28.

62 Bjørn Schiermer, *Fashion Victims: On the Individualizing and De-individualizing Powers of Fashion*, 14 J. DRESS, BODY & CULTURE 83 (2010).

63 Elif Kavakci & Camille R. Kraeplin, *Religious Beings in Fashionable Bodies: The Online Identity Construction of Hijabi Social Media Personalities*, 39 MEDIA, CULTURE, & SOC’Y 850, 850–53 (2016).

## II. CHEVRONS AND SEPARABILITY: *STAR ATHLETICA v. VARSITY*

Varsity Brands (Varsity) and Star Athletica (Star) were more than ordinary rivals before their copyright lawsuit began in 2011. Star was founded in January of 2011 by the Liebe family, which also owns R.J. Liebe Athletic Lettering Company. R.J. Liebe was one of Varsity's suppliers until the company terminated the agreement.<sup>64</sup> The Liebe family responded by creating Star Athletica and hiring away some of Varsity's employees. During the earliest stages of the case, Varsity contended in its arguments before a federal district court that some of the employees that Star hired took Varsity's proprietary designs, lettering, and monographing.<sup>65</sup> It was for these reasons that the case initially included, alongside the copyright violation claims, claims for trademark violation, unfair competition, breach of contract, and civil conspiracy. Five years later, only the copyright claim reached the Supreme Court.

The district court ultimately ruled with Star regarding its copyright claim and, through a series of decisions, dispatched Varsity's other claims.<sup>66</sup> The Sixth Circuit overturned the district court's copyright conclusion by a two-to-one vote in 2015, contending that the district court "erroneously concluded that Varsity's designs were not copyrightable."<sup>67</sup> In reversing the lower court's decision, the judges outlined the longstanding difficulties in determining whether a useful item can be protected by copyright, recognizing that "courts have struggled mightily" to find a solution.<sup>68</sup> The opinion lists nine approaches judges and scholars have put forth regarding how courts can determine whether a "pictorial, graphic, or sculptural work" can be identified before articulating its own approach, which included a series of questions about the nature of the work.<sup>69</sup> The judges concluded that the cheerleading uniform arrangements were more like fabric designs than dress designs.<sup>70</sup> A dress design, according to the circuit judges, revolves around its cut and physical design, while a "fabric design" deals with the creative arrangement on the garment. Ultimately, the Supreme Court paid rather limited attention to Sixth Circuit's careful analysis, hardly citing the court's reasoning in the opinion, concurrence, or dissent.

From the opening passage of the decision, Justice Thomas framed the Court's task as clarifying the foundational aspects of the two-step

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64 Erin Geiger Smith, *Who Owns Cheerleader Uniform Designs? It is up to the Supreme Court*, N.Y. TIMES (Oct. 29, 2016), [https://www.nytimes.com/2016/10/30/sports/who-owns-cheerleader-uniform-designs-its-up-to-the-supreme-court.html?mcubz=1&\\_r=0](https://www.nytimes.com/2016/10/30/sports/who-owns-cheerleader-uniform-designs-its-up-to-the-supreme-court.html?mcubz=1&_r=0) [https://perma.cc/6LB7-42NK]; *Varsity Brands, Inc. v. Star Athletica, LLC*, No. 2:10-cv-02508, 2011 U.S. Dist. LEXIS 159413, at \*5–6 (W.D. Tenn. 2011).

65 *Varsity Brands*, 2011 U.S. Dist. LEXIS 159413, at \*6.

66 *Id.* at \*20–24; *see also* *Varsity Brands v. Star Athletica, LLC*, 2014 U.S. Dist. LEXIS 26279, at 2–4 (W.D. Tenn. 2014).

67 *Varsity Brands, Inc. v. Star Athletica, LLC*, 799 F.3d 468, 494 (6th Cir. 2015).

68 *Id.* at 484.

69 *Id.* at 484–85.

70 *Id.* at 493.

separability test that was created in *Mazer v. Stein* in 1954.<sup>71</sup> The test was created to determine whether utility items that have artistic elements can be copyright protected, since U.S. law does not extend such safeguards to purely utility items. In particular, the separability test and the Court's questions considered the cheerleading uniform designs as "pictorial, graphic, and sculptural works," as outlined in Section 101 of the Copyright Act.<sup>72</sup> The separability test is applied to useful objects, in this case a cheerleading uniform, to determine if design elements can be copyrighted. First, the test requires that a pictorial, graphic, or sculptural element must first be perceivable as "a two- or three-dimensional work of art" that is separable from the useful article.<sup>73</sup> Second, the feature in question must be capable of existing as a form of art when affixed to "to some other tangible medium of expression."<sup>74</sup>

In a 6–2 decision, the Court held that, according to the separability test, the designs on the cheerleaders' uniforms can be copyrighted because the arrangement of chevrons, lines, and other shapes can be conceptually separated from their utilitarian function.<sup>75</sup> The artistic design could be protected by copyright because the placement of the chevrons, lines, and shapes was not inherently part of the function of the cheerleading uniform and the designs could be removed and placed on another form of media, such as a painter's canvas, and remain definable as a form of art. Thus, in the Court's understanding of the separability test, the designs that were placed on the uniforms were protected. In explaining the Court's interpretation of the test, Justice Thomas characterized Section 101 of the federal copyright code as a mirror image of Section 113. Section 101 focuses on the utility item that includes artistic considerations, seeking to define the creative aspects separately from utility items by classifying them as "pictorial, graphic, and sculptural works" which include "... two-dimensional and three-dimensional works of fine, graphic, and applied art."<sup>76</sup> Section 113 focuses on art that was initially affixed to a traditional form of media, but was later applied to a utility item.<sup>77</sup> Using this line of reasoning, Justice Thomas concluded that the crucial question in the separability test is whether the item, if it had "originally been fixed in some tangible medium other than a useful article before being applied to a useful article," was eligible for copyright protection. Importantly, Justice Thomas concluded his opinion

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71 *Star Athletica v. Varsity Brands*, 137 S. Ct. 1002, 1010 (2017) (citing *Mazer*, 347 U.S. at 201).

72 17 U.S.C. § 101.

73 *Star Athletica*, 137 S. Ct. at 1007.

74 *Id.*

75 *Id.* at 1012.

76 17 U.S.C. § 101.

77 *Id.* § 113.

for the Court by emphasizing that the decision does not extend to copyright protections for “the shape, cut, and physical dimensions” of garments.<sup>78</sup>

Justice Ginsburg wrote a separate opinion, concurring in judgment only, to suggest abandoning the separability test and, instead, viewing the cheer uniform designs as a work of art reproduced on the uniform.<sup>79</sup> In reference to the separability test, Justice Ginsburg emphasized, “[c]onsideration of that test is unwarranted because the designs at issue are not designs of useful articles. Instead, the designs are themselves copyrightable pictorial or graphic works reproduced on useful articles.”<sup>80</sup> Essentially, Justice Ginsburg concluded that when Varsity registered for the copyright of its two-dimensional graphic designs, they were guaranteed the legal rights associated with copyright, including the exclusive right to reproduce the copyrighted designs.<sup>81</sup> When Varsity reproduced the two-dimensional designs on the three-dimensional uniforms, it was using its right, as the copyright holder, to reproduce and create derivative works. Justice Ginsburg included Varsity’s copyright paperwork in the appendix of her opinion, highlighting that under the section “Nature of this work” on the copyright form, Varsity listed it as “2-dimensional artwork.”<sup>82</sup> She explained that the copyright was for the design on the uniform only—not for the structure or measurements of the garment itself. In this sense, the uniform is the tangible form of media to which the art was affixed. Her conclusions overlap with Justice Thomas’s discussion of the mirrorlike qualities of Sections 101 and 113 in the copyright law. While Justice Ginsburg did not substantially refer to Section 113, the passage, much like her opinion, emphasizes that a copyright holder has “the exclusive right to reproduce a copyrighted pictorial, graphic, or sculptural work” in any type of “article, whether useful or otherwise.”<sup>83</sup> Justice Ginsburg found that the physical uniforms Varsity manufactured were a reproduction of the two-dimensional designs the company registered for copyright. This interpretation of the copyright law does not call for revisions in the law, but it suggests a different way for courts, lawyers, and designers to use existing law in order to protect fashion designs.

In the dissenting opinion, Justice Breyer, who was joined by Justice Kennedy, contended the design features Varsity was trying to secure were not eligible for copyright protection.<sup>84</sup> He illustrated this point with Van Gogh’s painting of an old pair of shoes. Justice Breyer explained that Van Gogh’s painting was copyrightable, but it would not qualify as a copyrightable shoe design.<sup>85</sup>

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78 *Star Athletica*, 137 S. Ct. at 1016.

79 *Id.* at 1019 (Ginsburg, J., concurring).

80 *Id.*

81 *Star Athletica*, 137 S. Ct. at 1019 (Ginsburg, J., concurring).

82 *Id.* at 1020–21.

83 17 U.S.C. § 113.

84 *Star Athletica*, 137 S. Ct. at 1030 (Breyer, J., dissenting).

85 *Id.* at 1032–33.

Justice Breyer applied the same separability test the majority did but came to a different conclusion. He interpreted the test as requiring that the item in question remain useful after the artistic elements are removed. He explained that “if extracting the claimed features would necessarily bring along the underlying useful article, the design is not separable from the useful article.”<sup>86</sup> While Justice Breyer did not apply his understanding of the test directly to the cheerleading uniforms in question, his concern cohered with Judge McKeague’s dissent from the Sixth Circuit decision. Judge McKeague contended that a plain skirt and crop top, essentially a cheerleading uniform absent the chevrons, stripes, and wording, would no longer be recognizable as a cheerleading uniform. Removing the artistic elements, to Judge McKeague, meant taking the utility away from the uniform. In that sense, the artistic items were tied to the utility of the uniform and, therefore, not copyrightable.<sup>87</sup> Justice Breyer contended that separability, the effect of removing the artistic elements from the utility object, must be a part of the separability test. Without such a requirement, which the Court’s opinion rejected, Justice Breyer maintained that any utility item could receive copyright protection. The observer merely must picture a frame or the item’s placement in a gallery to declare it as copyrightable.

Finally, Justice Breyer concluded his dissent by highlighting that Congress has never, despite the fashion industry’s efforts, extended specific protections to clothing and accessories. He asserted that “Congress had rejected every one of approximately 70 design protection bills that had been introduced since 1914.”<sup>88</sup> Justice Breyer supported his conclusions by indicating that, despite the lack of specific protection for designs, the fashion industry continues to thrive. Ultimately, all three opinions presented fundamentally different conceptualizations regarding the nature of clothing designs, the intended meaning of copyright laws, and the applicability of the separability test.

### III. ORIGINALITY, MONOPOLIES, AND MAZER’S MEGAPHONE

The Supreme Court’s decision in *Star Athletica* was substantially guided in two different and crucial ways by the justices’ reasoning in *Mazer v. Stein* in 1954. First, *Mazer* was decided using the Copyright Act of 1909. In Congress’s major revision of the Act in 1976, it adopted the Court’s wording from *Mazer* regarding “pictorial, graphic, and sculptural works.”<sup>89</sup> Thus, the precedent from the case led to an expansion in the range of the categories of protected works from “works of art or designs for works of art” in 1909 to the “pictorial, graphic, and sculptural works” definition that was added in 1976 and applied in *Star Athletica*. Second, the Court in *Mazer* formulated the separability test

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86 *Id.* at 1033.

87 *Varsity Brands*, 799 F.3d at 495 (McKeague, J., dissenting).

88 *Star Athletica*, 137 S. Ct. at 1034.

89 Melville Nimmer, *The Subject Matter of Copyright Under the Act of 1976*, 24 UCLA L. REV. 978, 998 (1976); see also 17 U.S.C. § 102.

that the justices in *Star Athletica* sought to clarify.<sup>90</sup> The test was established when Mazer copyrighted statuettes that were used as lamp bases and Stein and others copied the designs of the statuettes for their own lamps. Mazer sued for copyright infringement, contending that the dancing figure that constituted the lamp stand was artistic as well as practical.<sup>91</sup> It was this dual quality of utility and creativity that made the justices wary of extending copyright protection to statuettes while they also functioned as patentable lamp bases. The justices communicated in the decision that they were concerned about extending intellectual property-based monopolies to certain otherwise everyday, useful items. Ultimately, the Court concluded that granting copyright protection to the artistic aspects of the lamp did not halt others from creating lamps that included statuettes; it simply gave Mazer the power to control the use of copies of his statuettes “as such or as incorporated in some other article.”<sup>92</sup> Thus, the originality of the statuette was protected, despite its functional nature.

Justice Reed, who wrote the Court’s opinion, emphasized that the statuettes were created separately from the lamps. He outlined Mazer’s contentions that the statuettes were made in clay, then crafted into production molds, at which point Mazer registered his creations with the U.S. Copyright Office as “works of art.”<sup>93</sup> Mazer sold the statuettes as standalone works and as a part of the lamp. Justice Reed explained that “[t]he dichotomy of protection for the aesthetic is not beauty and utility but art for the copyright and the invention of original and ornamental design for design patents,” which grants equal protection for the artist and the inventor.<sup>94</sup> Thus, the separability test established that the dual nature of designs does not automatically create an either/or scenario; instead, it allows for two types of intellectual property protection to coexist for one product. The Court ultimately granted protection to the works that were involved in the *Mazer* case, creating the precedent that artistic items *can* receive copyright protection when they are incorporated into utility items.

#### A. *Ownership and the Monopoly of Ideas*

The petitioners in *Mazer* contended that extending copyright protection to the lampstands would lead to certain designers gaining monopolies (in the form of controlling distribution rights) over certain types of useful items. The petitioners argued that such a decision would be “a misuse of copyright as to make the registration invalid.”<sup>95</sup> Despite the Court’s decision in *Mazer* and the creation of the separability approach, similar concerns about the ownership of useful designs have persisted in cases that involve works that are associated

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90 *Star Athletica*, 137 S. Ct. at 1007.

91 *Mazer*, 347 U.S. at 202–03.

92 *Id.* at 218.

93 *Id.* at 202–03.

94 *Id.* at 218.

95 *Id.* at 206.

with utilitarian purposes. The U.S. Court of Appeals for the District of Columbia made its concern regarding the monopolization of designs central to its decision in a case in which parties disagreed whether a light fixture's design was copyrightable.<sup>96</sup> Similarly, a federal district court struck down a candle seller's claim that its store design could be copyrighted. The judge concluded that the court "will not grant the plaintiff enduring monopoly control over the functional characteristics of a colonial-style shop."<sup>97</sup> Justice Breyer raised a similar concern in *Star Athletica*, claiming in his dissent that allowing designers to copyright their fashion creations would lead to the higher prices associated with copyright monopolies.<sup>98</sup> Some sixty years earlier, the key question in *Mazer* had been whether a designer could copyright one part of his product and patent the other. If so, he could monopolize the lamp market through intellectual property protection. The Court held that "the patentability of the statuettes, fitted as lamps or unfitted, does not bar copyright as works of art."<sup>99</sup> The Court emphasized that granting a copyright to *Mazer's* lampstand-bound statuettes did not preclude other companies from making their own statuette-based lamps. The decision simply gave *Mazer* the power to copyright *his* lampstand and statuette combination.

This point is crucial when considering copyright protections for fashion designs. Copyright and patent protection would not necessarily lead to a monopoly because even similar lamp designs could be granted equal intellectual property protection. In *Mazer*, Justice Reed used an anecdote from a 1924 case that involved two mapmakers to illustrate this phenomenon. He explained that that case spoke "of two men, each a perfectionist, independently making maps of the same territory. Though the maps are identical, each may obtain the exclusive right to make copies of his own particular map, and yet neither will infringe the other's copyright."<sup>100</sup> In other words, ownership of the copyright is not the equivalent of a monopoly on the idea because "absent copyright there can be no infringement of copyright."<sup>101</sup>

## B. *Originality*

Before the courts can begin to resolve whether artistic elements of a utility item can be separated and, ultimately, protected by copyright, the non-useful elements must be deemed copyrightable in the first place. Justice Thomas emphasized this concern in the Court's opinion in *Star Athletica*, writing that "[t]he first element of a copyright-infringement claim is 'ownership of

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96 *Esquire, Inc. v. Ringer*, 591 F.2d 796, 801 (D.C. Cir. 1978).

97 *Yankee Candle Co. v. New England Candle Co.*, 14 F. Supp. 2d 154 (D. Mass.), *vacated pursuant to settlement sub nom.*, 29 F. Supp. 2d 44 (D. Mass. 1998).

98 *Star Athletica*, 137 S. Ct. at 1034 (Breyer, J., dissenting).

99 *Mazer*, 347 U.S. at 217.

100 *Id.* at 218; *see also Fred Fisher, Inc. v. Dillingham*, 298 F. 145, 151 (S.D.N.Y. 1924).

101 *Mazer*, 347 U.S. at 218.

a valid copyright.”<sup>102</sup> Similarly, in *Mazer*, Justice Reed emphasized that the copyright law does not attempt to define art. Instead, it requires that the artist’s idea be affixed to a tangible expression of an idea.<sup>103</sup> These concerns are grounded in the Copyright Act itself, which instructs that “[i]n no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form.”<sup>104</sup> The Supreme Court examined this concern most directly in *Feist Publications v. Rural Telephone Service* in 1991.<sup>105</sup> Feist Publications sought to license the telephone listings that were contained in Rural Telephone Service’s directories. When Rural refused to license the listings to Feist, the company used the listings anyway. Many of the listings were identical to the originals in Rural’s directory.

Justice O’Connor wrote in the Court’s opinion that “[t]he *sine qua non* of copyright is originality,” meaning that an item is not eligible for copyright protection without originality.<sup>106</sup> A work is original, according to the Court, when it is “independently created by the author” and “possesses at least some minimal degree of creativity.”<sup>107</sup> Under this definition, the section of the phone book that Feist reproduced was ineligible for copyright protection on its own because the material was not original; it was a simple list of facts. Rural’s employees may have collected the information that Feist used, but they did not *create* the information. They also could not be credited for creating an original work using the facts they accumulated. They merely gathered the facts from another source. If the “phonebook standard” for originality is applied to fashion design, the utility items are comparable to facts, while the designs could be understood as similar to the projection of ideas onto a tangible form of media, whether they are conceptualized as new arrangements of original facts, such as what is found in commentary on works in the public domain, or entirely new works expressed on a useful medium. Problematically, the combination of utility and the derivative nature of what has preceded it make it “difficult to create a design that is sufficiently original to prevent others from creating one that is strikingly similar.”<sup>108</sup> Thus, defining originality joins separability as a crucial challenge for the courts when it comes to determining whether designs can be protected under copyright.

Similarly, the questions from *International News Service v. Associated Press* provide a similar, and helpful, parallel regarding the originality

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102 *Star Athletica*, 137 S. Ct. at 1008.

103 *Mazer*, 347 U.S. at 214.

104 17 U.S.C. § 101–02.

105 *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 364 (1991).

106 *Id.* at 348.

107 *Id.* at 345.

108 David M. Adler, *Fashion Law: Protecting Brands and Designs*, 5 LANDSLIDE 21, 22 (2013).

questions that arise regarding copyright protections for fashion designs. *Associated Press*, which was decided in 1918, just short of a century before *Star Athletica*, revolved around International News Service's practice of obtaining information from the Associated Press through bribery, persuasion, and copying.<sup>109</sup> Both organizations gathered news and distributed it to newspapers that subscribed to their services. When it was found that the International News Service was simply rewriting the Associated Press's news bulletins and transmitting them to its subscribers, the Associated Press contended its copyright was violated. While the Court ultimately ruled in the Associated Press's favor, Justice Pitney emphasized in the Court's short opinion that "the substance of the information and the particular form or collocation of words in which the writer has communicated it" are two different considerations.<sup>110</sup> Thus, facts cannot be copyrighted, but the presentation of facts in the form of a news story can be. No one owns the news, but they can own the packaging and retelling of the news. News articles are eligible for copyright protection because, similar to literary copyright protection, the articles are the result of the author's work. In a parallel sense, we can conclude that a shirt or a dress cannot be copyrighted because it is essentially a *fact* with insufficient originality, while a fashion design—a collection and presentation of *facts*, if we follow the Court's reasoning in *Associated Press*—can qualify for copyright. The clothing design, essentially, is like a news story in this instance. The choices and arrangement of different elements, or facts, elevates it to an original work, despite its composition being substantially of utility items such as cloth, thread, or plastic.

#### IV. PHOTOGRAPHY, BELT BUCKLES, AND THE COURTS

As America's understanding of art evolves, copyright protections evolve with it. In the 1880s, photography was a relatively new concept. The photography process was technical, so there was extensive debate about whether or not photographs could ever be perceived as high art and, by extension, eligible for copyright protection. In 1884, even before the Copyright Act of 1909, the Supreme Court found in *Burrow-Giles Lithographic v. Sarony* that certain photographs were eligible for copyright protection.<sup>111</sup> Using the Constitution's wording regarding copyright protections and the Copyright Act of 1790, which only specifically referred to "authors," the Court concluded that the photographer had employed his "own intellectual conception" in the photograph, which was enough to satisfy the justices' criteria for meriting copyright protection.<sup>112</sup> The Court suggested that the photographer's costume selection, careful posing of his subject, addition of draperies, and use of light proved a degree

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109 *Int'l News Serv. v. Associated Press*, 248 U.S. 215, 231 (1918).

110 *Id.* at 234.

111 *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 53 (1884).

112 *Id.* at 58; U.S. CONST. art. I, § 8.

of intellectual conception.<sup>113</sup> Similarly, fashion designs are intellectual conceptions of the designers, and the characteristics of their works share substantial similarities to the types of claims that other artists have made. A designer's use of silhouette, fabric selection, color, and aesthetic effect can be compared to the choices a photographer or painter makes. If the logic of the *Burrow-Giles* opinion extends to other mediums of artwork, fashion designs should be considered in a similar light with regard to copyright law. The *Burrow-Giles* case also demonstrates that the legal understanding of art can evolve to include new media. The Court accepted the photographer's argument that he was the *author* of the image, thus allowing the existing wording of the law to stretch to a medium that was not explicitly protected at the time.

Just over a century later, another photography-related case examined the extent to which a photographer's ideas and conceptual execution of an image can be protected. In *Rogers v. Koons*, a federal appeals court examined which elements of a work of art were copyrightable.<sup>114</sup> Art Rogers, a California-based photographer who had published his images in books and showed them in exhibitions, was paid to take a photograph of a husband and wife and their puppies in 1980.<sup>115</sup> Years later, he worked with a publisher to make postcards of the black-and-white image. In 1987, Jeff Koons, an artist who had exhibited and sold his at-times controversial works, created a sculpture that copied the composition of Rogers's photograph.<sup>116</sup> Rogers sued Koons for copyright infringement and unfair competition. Koons explained that he encountered Rogers's postcard in a "very commercial, tourist-like card shop."<sup>117</sup> He understood the image as "mass culture."<sup>118</sup> Essentially, he interpreted the image as a statement regarding society rather than an image of a couple with their dogs. Despite the different intent and form of media, the court sided with Rogers. The judge found that copyright protected the original *components* of a work of art. While the idea of a couple and their dogs could not be copyrighted, the specific way the people and dogs were arranged could be.<sup>119</sup> Thus, the decision in *Rogers* communicates a legal rationale for how the conceptualization and execution of an idea can be protected without at the same time extending a monopoly regarding that concept or idea to the copyright holder.

#### A. *Fair Use and Parody in Fashion*

Those who use copyrighted works without permission can, in many instances, claim that their creations are a fair use or a parody of the original.

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113 *Burrow-Giles*, 111 U.S. at 60.

114 *Rogers v. Koons*, 960 F.2d 301, 307 (2d Cir. 1992).

115 *Id.* at 303–04.

116 *Id.* at 304–05.

117 *Id.* at 305.

118 *Id.*

119 *Id.* at 304.

The doctrine of fair use was designed to support the original intent of copyright protections, which was to encourage “productive thought and public instruction.”<sup>120</sup> In other words, by temporarily limiting a copyright holder’s claim to the copyrighted creation in certain instances, society benefits from a variety of public goods, such as inspiration, education, and innovation. Section 107 of the U.S. copyright code specifically states that fair use allows for the use of copyrighted works without permission for the purposes of criticism, comment, news reporting, teaching, scholarship, and research.<sup>121</sup> When evaluating copyright violation claims in which a person has used another’s work without permission but contends it was a fair use, the courts generally consider: (1) the purpose and character of the use, (2) the nature of the copyrighted work, (3) the amount of the work used, and (4) the effect on the market value of the original.<sup>122</sup> Courts have used the fair use test in a number of cases to determine the validity of a copyright infringement claim.<sup>123</sup> Unlike fair use, parody is not explicitly listed in the Copyright Act. The Supreme Court, however, has upheld the parody defense, which generally incorporates elements of legal expectations for fair use. In particular, the Court has recognized that a parody must bear resemblance to the original work in order to function; thus, parody has been categorized alongside fair use.<sup>124</sup>

In *Campbell v. Acuff-Rose Music* in 1994, the Court concluded that the rap group 2 Live Crew’s unlicensed use of Roy Orbison’s “Oh, Pretty Woman” was a parody and therefore a protected use.<sup>125</sup> Justice Souter, in opening the Court’s opinion, explained that “we hold that a parody’s commercial character is only one element to be weighed in a fair use enquiry, and that insufficient consideration was given [by the lower court] to the nature of parody in weighing the degree of copying.”<sup>126</sup> The Court understood parody as being intertwined with fair use. Later in the opinion, Justice Souter wrote that “[p]arody needs to mimic an original to make its point, and so has some claim to use the creation of its victim’s (or collective victims’) imagination.”<sup>127</sup> Similarly, in 2001, the Eleventh Circuit concluded that Alice Randall’s *The Wind Done Gone*, a book that told Margaret Mitchell’s *Gone With the Wind* from the perspective of the slaves, was a fair use because it was a critique and parody of the original.<sup>128</sup>

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120 Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1110 (1990).

121 17 U.S.C. § 107.

122 *Id.*

123 *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 569 (1994); *Keep Thomson Governor Comm. v. Citizens for Gallen Comm.*, 457 F. Supp. 957 (D.N.H. 1978); *Elsmere Music, Inc. v. Nat’l Broad. Co.*, 492 F. Supp. 741 (S.D.N.Y. 1980); *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150 (N.D. Cal. 2008).

124 *Campbell*, 510 U.S. at 569, 580–81.

125 510 U.S. 569, 572 (1994).

126 *Id.* at 572.

127 *Id.* at 580–81.

128 *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1283 (11th Cir. 2001).

The court concluded that “[a] parody is a work that seeks to comment upon or criticize another work by appropriating elements of the original.”<sup>129</sup> In both of these instances, courts recognized the value of copyright claims for the creators of original works but emphasized the importance of allowing others to comment upon, criticize, or otherwise transform the works. Within the context of fashion designs, such conclusions help allay concerns that granting copyrights to fashion works will lead to monopolies on utility items rather than unique executions of ideas on a form of media.

Fair use and parody protect certain media presentations of fashion designers’ designs. An example of this would be a newspaper covering a fashion show and publishing photographs of the designs. The publication of the photos, which facilitates the ability of others to copy a design, falls under the fair use news-reporting exemption. Designers cannot exercise exclusive control over the public portrayals of their work. Beyond seeing reports about upcoming fashion designs, copyists have used fair use and parody as defenses for substantially drawing their designs from the works of other brands and designers. One of the most significant fashion-related cases of alleged copyright infringement that effectively employed a fair use legal defense was *Louis Vuitton Malletier v. Haute Diggity Dog* in 2007.<sup>130</sup> Haute Diggity Dog, a company that manufactures dog toys that parody luxury brands, created products such as “Chewnel No. 5,” “Sniffany & Co,” and “Chewy Vuiton.”<sup>131</sup> Louis Vuitton Malletier (LVM) sued Haute Diggity Dog alleging trademark infringement, trademark dilution, and copyright infringement.<sup>132</sup> The Chewy Vuiton dog toys were designed to look like LVM handbags. Haute Diggity Dog changed Louis Vuitton to Chewy Vuiton, the traditional “LV” monogram to a “CV” monogram, and printed loose imitations of the other LVM symbols on the dog toys.<sup>133</sup> The Fourth Circuit concluded that the Chewy Vuiton toys were not likely to confuse consumers. A person would not reasonably purchase a Chewy Vuiton item instead of a Louis Vuitton item. Furthermore, the court found that the Chewy Vuiton and LVM marks were not sufficiently similar, were sold at different price points, and were not likely to impair the distinctiveness of the LVM brand.<sup>134</sup> Ultimately, the Chewy Vuiton product was a successful parody because it created an association with the famous mark but intentionally communicated that it was not the famous mark.<sup>135</sup> Much as Justice Souter explained in *Campbell*, the dog-related products included “just

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129 *Id.* at 1271.

130 *Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC*, 507 F.3d 252, 266 (4th Cir. 2007).

131 *Id.* at 258.

132 *Id.* at 256.

133 *Id.* at 256–57.

134 *Id.* at 260.

135 *Id.*

enough of the original design to allow the consumer to appreciate the point of parody.”<sup>136</sup>

Additionally, the Chewy Vuitton dog toys were an acceptable parody because the LVM products did not exist in the same market. LVM does not manufacture dog toys. The difference in the markets confirms that this is not a blatant design copy. The differences between the products and their potential markets in *Haute Diggity Dog* leave questions regarding the extent of parody work that is permissible when the products share the same potential customers. In 2016, LVM sued another company for copyright and trademark infringement. My Other Bag is a company that sells tote bags with cartoon drawings of famous handbags, including Louis Vuitton bags, with the text “My Other Bag . . . ”<sup>137</sup> The district judge ruled in favor of My Other Bag, citing the popular joke “my other car . . . ” as evidence that the tote bags were created as a jest.<sup>138</sup> The judge evaluated the fair use factors and found no harm on the ultimate market value of a Louis Vuitton bag.<sup>139</sup> In both of the LVM cases, the courts found the parody exception for fashion design acceptable when the parody does not confuse consumers or dilute the market value of the original work. Both *Haute Diggity Dog* and *My Other Bag* sold at substantially lower price points than any LVM product. Additionally, the parody works were not intended to confuse consumers; rather, they poked fun at the popularity and price point of the fashion giant. Parody and other fair use-related defenses provide an avenue for designers and others to incorporate the ideas of others into their work in certain circumstances. Such defenses essentially act as a safeguard, along with strict conceptualizations of the copyright law more generally, against designer-related monopolies.

#### B. *Art and Utility in Copyright Cases*

Parody cases such as *Haute Diggity* and *My Other Bag* include clear commentary or humor-related uses of existent copyright claims. In many other instances, courts have faced copyright claims in which other designers, as in *Star Athletica*, clearly produced substantially similar works in their efforts to reap commercial gain. In *Peter Pan Fabrics v. Dan River Mills*, a 1969 decision from the U.S. District Court for the Southern District of New York, rival companies disagreed regarding whether or not a fabric pattern titled “Daisies” could be protected under copyright law.<sup>140</sup> Dan River Mills copied the pat-

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136 *Id.* at 261 (quoting *People for Ethical Treatment of Animals v. Doughney*, 263 F.3d 359, 366 (4th Cir. 2001)).

137 *Louis Vuitton Malletier, S.A. v. My Other Bag, Inc.* 156 F. Supp. 3d 425, 430 (S.D.N.Y. 2016).

138 *Id.*

139 *Id.* at 435–39.

140 *Peter Pan Fabrics, Inc. v. Dan River Mills, Inc.*, 295 F. Supp. 1366, 1367–68 (S.D.N.Y. 1969).

tern, and when Peter Pan Fabrics learned about the duplication, it sued for an injunction that would halt any use of the pattern by Dan River Mills. The pattern, Dan River Mills claimed, lacked originality, contending that a series of daises on white fabric was not unique enough to warrant protection. The judge upheld Peter Pan's copyright, explaining that "[p]laintiffs do not argue that a daisy or any reproduction of it or its features is original. Their argument is that 'the juxtaposition of these flowers and their arrangement on the plain background . . . and the layout and combination of separate features are completely original.'"<sup>141</sup> Finally, Dan River Mills contended that if Peter Pan's pattern was original, their own daisy fabric was substantially different. The judge found the patterns were too similar to be separated from one another, concluding, "the similarities are so great that an ordinary observer would easily detect them."<sup>142</sup> The original design was considered a work of art, which is copyrightable under Section 101 of the U.S. copyright code. Crucially, and quite similarly to Justice Ginsburg's concurring opinion in *Star Athletica*, the subsequent fabric prints were considered reproductions of a work of art. The fabric itself was a derivative work, which the copyright holder had the right to produce, having registered the copyright for "Style 2464, Range 11, 'Daisies'" with the Copyright Office.<sup>143</sup> Similarly, the cheerleading uniforms in *Star Athletica* were first registered as two-dimensional drawings and then made into garments.

Just over a decade later, the same court expanded on the reasoning and interpretation of *Peter Pan*. In *Kieselstein-Cord v. Accessories by Pearl*, the court determined whether or not the design on a belt buckle could be copyrighted.<sup>144</sup> Drawing substantially from *Mazer*, the court reasoned that legal and precedential guidance in this area erred on the side of allowing commerce, rather than exclusive ownership of designs. The judge explained that "[t]hus far Congress and the Supreme Court have answered in favor of commerce and the masses rather than the artists, designers and the well-to-do. Any change must be left to those higher authorities."<sup>145</sup> Thus, the court concluded that any artistic feature incorporated into a useful object needs to be separately identifiable and capable of existing as a work of art. Such a conclusion is substantially similar to Justice Breyer's dissent in *Star Athletica*. He contended the cheerleading uniform, or any item, must remain functional after the artistic element is removed.<sup>146</sup> In *Kieselstein-Cord*, the rival company, Accessories by Pearl, admitted it had intentionally copied the exact designs of two different Kieselstein-Cord belt buckles. It claimed, however, that the belts were utility items, not art. The district court agreed, concluding that "[a]lthough

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141 *Id.* at 1368.

142 *Id.* at 1369.

143 *Id.* at 1367.

144 *Kieselstein-Cord v. Accessories by Pearl, Inc.*, 632 F.2d 989, 990 (2d Cir. 1980).

145 *Id.* at 999.

146 *Star Athletica*, 137 S. Ct. at 1031–33 (Breyer, J., dissenting).

plaintiff asserts that the buckles are jewelry or sculpture, they appear to be primarily belt buckles. Belt buckles are utilitarian objects designed to fasten belts.”<sup>147</sup> In contrasting the case with *Mazer*, the judge explained that the statuettes could be identified as art separately from the lamps, while the belt buckles and their designs were not severable. Even if they could be separated, the judge explained, the buckle would no longer function.<sup>148</sup> Of course, the Court in *Star Athletica*, aside from Justice Breyer’s dissent, rejected the functionality requirement. The limited scope of the *Star Athletica* opinion means that the separability of the design from the utility item remains an important concern. Ultimately, however, the court of appeals in *Kieselstein-Cord* overturned the district court’s ruling, concluding that the belt buckles were “conceptually separable sculptural elements.”<sup>149</sup>

The district court in *Kieselstein-Cord* contrasted the belt buckles involved in the case before it with a 1960 decision about glassware design. The judge in *Kieselstein-Cord* explained that in *Syracuse China Corp. v. Stanley Roberts*, the designs on a fine-china manufacturer’s plates and glassware were copyrightable, while the utility items themselves were not.<sup>150</sup> In the actual *Syracuse China* decision, however, the judge made no mention of such a distinction. Instead, the judge in the case emphasized the risk of economic harm to Syracuse China’s business if the copies from a competitor were allowed to flood the market.<sup>151</sup> The judge in *Kieselstein-Cord* continued by relegating the belt buckles to the “world of fashion design,” which he contended was not related to literature or art.<sup>152</sup> He continued, explaining that a design “superimposed upon fabric is copyrightable, whereas the style of the dress . . . in which the fabric is used is not [copyrightable], no matter how original, ornamental, or nonessential for the function of that design may be.”<sup>153</sup>

*Kieselstein-Cord* and *Star Athletica* encountered some of the same difficulties. In both cases, the companies sought protection for designs that were deliberately created for a useful article. Without the belt buckle itself, the engraving design would retain the shape of a belt buckle, the same way the designs on the cheerleading uniform retained the shape of a cheerleading uniform. These cases were decided using the same separability test established in *Mazer* and had similar facts, but the courts provided different results. In 1995, however, the Second Circuit developed a substantially different rationale

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147 *Kieselstein-Cord v. Accessories by Pearl*, 489 F. Supp. 732, 734 (S.D.N.Y. 1980), *rev’d*, 632 F.2d 989 (2d Cir. 1980).

148 *Id.*

149 *Kieselstein-Cord*, 632 F.2d at 993.

150 *Kieselstein-Cord*, 489 F. Supp. at 736 (citing *Syracuse China Corp. v. Stanley Roberts, Inc.*, 180 F. Supp. 527, 528 (S.D.N.Y.1960)).

151 *Syracuse China Corp.*, 180 F. Supp. at 528.

152 *Kieselstein-Cord*, 489 F. Supp. at 737.

153 *Id.*

in *Knitwaves v. Lollytogs*.<sup>154</sup> Knitwaves created a collection of sweaters with fall motifs, including two sweaters that had copyright protection: the “Leaf Sweater” and the “Squirrel Cardigan.” Two years later, Lollytogs released a competing line of sweaters with similar designs to the Leaf Sweater and Squirrel Cardigan. A Lollytogs design executive directed the manager of the design department to create sweater sets with the “same feel” as the Knitwaves Leaf Sweater and Squirrel Cardigan.<sup>155</sup> The manager of the Lollytogs design department made changes to the original Knitwaves sweater, including rearranging the placement of the leaf appliques and adding acorns to the design.<sup>156</sup> The case does not mention *Mazer*, the separability test, or any of the district court’s reasoning in *Kieselstein-Cord*. Instead, the court used the substantial similarity test to decide the case. The test asked if an average person would observe the same aesthetic appeal from both designs even if the observer did not set out to detect similarities. The court concluded, despite the limited differences between the two sweaters, that Lollytogs’s arrangement was “substantially similar.”<sup>157</sup> Quite uniquely, the court recognized that clothes are “useful items” and are not copyrightable, but “fabric designs, such as the artwork on Knitwaves’ sweaters, are considered ‘writings’ for the purpose of copyright law.”<sup>158</sup> Thus, the court essentially shifted fashion design from the “pictorial, graphic, and sculptural works” category to the far less complex “literary works” part of Section 102 of the Copyright Act. According to this reasoning, a blank garment is a utility item and either not copyrightable or only considerable under the “pictorial, graphic, and sculptural works” category, while a fashion design is comparable to a work of fiction, a type of art that includes no equivalent to the separability test.

### C. *Trade Dress and “Aesthetic Functionality”*

Historically, in the absence of clear copyright protections for fashion designers, they have turned to trade dress, a part of trademark law, to defend their works from being pirated.<sup>159</sup> Trade dress, however, comes with substantial limitations, particularly because it requires that “the matter sought to be protected is not functional.”<sup>160</sup> Thus, the trade-dress approach finds itself caught up in some of the same questions that arise in copyright cases. Courts are therefore left, once again, to wrestle with the artistic-or-practical dichotomy that has dominated the reasoning behind the separability test for more than sixty years. In addition to functionality concerns, the trademark aspects that

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154 *Knitwaves v. Lollytogs*, 71 F.3d 996 (2d Cir. 1995).

155 *Id.* at 1000.

156 *Id.*

157 *Id.* at 1004.

158 *Id.* at 1002.

159 15 U.S.C. § 1125 (a)(3) (2012).

160 *Id.*

are inherent in trade dress require that the aspect the designer seeks to protect, such as a red sole on Louboutin brand shoes, must have acquired a secondary meaning. It cannot simply be a shoe. It must also be a symbol that individuals associate with a certain product or designer. If a company can establish that there is a secondary meaning, the unique brand identifier is protected in the same way as a trademark. Such a concern was at the center of *Louboutin v. Yves Saint Laurent*, which started in the same New York–based federal district court as *Knitwaves*, *Kieselstein-Cord*, and *Peter Pan*. This case reached the Second Circuit, like *Knitwaves*, and was decided in 2012. Since the early 1990s, fashion designer Christian Louboutin has made the lacquered red-gloss soles on the high-heeled shoes he creates his calling card. He applied for a trademark for the design and received it in early 2008. Three years later, Louboutin learned that Yves Saint Laurent planned to release a line of single-colored shoes, including one that was entirely red, even the sole. Louboutin sued for trademark violation and sought an injunction to halt Yves Saint Laurent from bringing the shoe to market.<sup>161</sup> The federal district court rejected the injunction request, concluding that the soles of shoes are functional and that a designer cannot claim the rights to a single color.<sup>162</sup> The circuit court rejected this logic, ruling that the district court had made its decision “based on an incorrect understanding of aesthetic functionality.”<sup>163</sup> The court further concluded that the red-sole mark had taken on a secondary meaning associated with the designer.

Importantly for this Article, the court’s articulation of “utilitarian” versus “aesthetic” functionality provides an alternative to attempting to separate utility from art in copyright cases. The court explained that, according to the Supreme Court’s ruling in *Inwood Laboratories v. Ives Laboratories*, traditional functionality is related to the “essential purpose of the article” and if that usefulness “affects the cost or quality.”<sup>164</sup> If the product falls under such purpose and cost concerns, as articulated in *Inwood*, the potential for trademark can be resolved there. The court, however, explained that if “the aesthetic design of a product is *itself* the mark for which protection is sought,” a different standard is needed.<sup>165</sup> The court thus laid out a three-part test that included considering whether the aspects in question were “essential to the use or purpose” and if such aspects affected “the cost or quality.”<sup>166</sup> Both of these prongs were

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161 *Christian Louboutin S.A. v. Yves Saint Laurent Am. Holdings, Inc.*, 696 F.3d 206, 213 (2d Cir. 2012).

162 *Christian Louboutin S.A. v. Yves Saint Laurent Am. Inc.*, 778 F. Supp. 2d 445, 458 (S.D.N.Y. 2011), *aff’d in part, rev’d in part and remanded sub nom.*, 696 F.3d 206 (2d Cir. 2012).

163 *Louboutin*, 696 F.3d at 228.

164 *Id.* at 219 (quoting *Inwood Labs, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 850 (1982)).

165 *Id.* at 219–20.

166 *Louboutin*, 778 F. Supp. 2d at 451.

taken from the *Inwood* standard, as well as a third prong, which considered the effect on competition. Drawing from the Supreme Court's decision in *Qualitex v. Jacobson Products* in 1995, the circuit court explained that the final step in its aesthetic-functionality approach evaluates the impact that upholding a trademark claim on a function-related feature would have on competitors.<sup>167</sup> The circuit court drew its reasoning from Justice Breyer, who would conclude in his dissent in *Star Athletica* that the uniform designs could not be copyright protected because their function could not be separated from their design. In writing for the Court in *Qualitex*, he explained that trademark law does not preclude a business from owning exclusive rights to a certain color when it is used as part of a functional item.<sup>168</sup> In the *Qualitex* opinion, which upheld a dry cleaning supplier's use of green and gold on its press pads, Justice Breyer concluded that the color "acts as a symbol. Having developed secondary meaning (for customers identified the green-gold color as Qualitex's), it identifies the press pads' source. And, the green-gold color serves no other function."<sup>169</sup> Thus, if the color is nonfunctional to the product and does not halt rival companies from competing in the market, the trademark of an otherwise ubiquitous element, such as a color, can be upheld. Such a conclusion, and the court's decision in *Louboutin* to uphold the red-sole mark as a valid trademark, suggests that the separability test, with its utility-versus-art dichotomy, is not the only approach possible in fashion-design cases.

## V. FASHION AND THE DEVELOPMENT OF U.S. COPYRIGHT

The separability test that the Supreme Court applied in *Star Athletica*, while finding its roots in the *Mazer* decision, is also foundationally based in traditional conceptualizations of copyright law. While this Article has touched upon different incarnations of the Copyright Act, this Part focuses on the law itself and what it communicates regarding protections for designers. American copyright law is based in Article I, Section 8, of the Constitution, which establishes that Congress has the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."<sup>170</sup> Congress built upon this twenty-seven-word description when it passed the Copyright Act of 1790, which protected books, charts, and maps, but did not mention music, painting, or other popular forms of expression from the time.<sup>171</sup> Importantly, the law started by framing its purpose as being "for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors

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167 *Qualitex Co. v. Jacobsen Products Co., Inc.*, 514 U.S. 159, 166 (1995).

168 *Id.* at 164–67.

169 *Id.* at 166.

170 U.S. CONST. art. I, § 8.

171 Copyright Act of 1790, 1 Cong. Ch. 15, 1 Stat. 124.

of such copies.”<sup>172</sup> Thus, the initial impetus for copyright protection found in the Constitution, as well as the Copyright Act of 1790, made no distinction between useful and artistic items, despite the inclusion of maps and charts, which it could be argued can have both functional and artistic qualities.

Similarly, the Copyright Act of 1909, the first major revision of the law after 1790, does not address whether useful items can be protected. It does, however, introduce the explicit requirement that a work be original.<sup>173</sup> Four decades later, however, the official Copyright Office regulations guide included a revised definition for the “works of art” section of the Copyright Act. In the new version, it defined such items as including “works of artistic craftsmanship, in so far as their form *but not their mechanical or utilitarian aspects are concerned*.”<sup>174</sup> This revision was not missed in the crucial *Mazer* decision in 1954. The Court brought together a series of cases that had touched upon copyright protections for useful items, as well as the relatively new Copyright Office regulations, to construct the separability test and the murky, dichotomous effort to split artistic and utilitarian aspects of certain items. The Court in *Star Athletica* credited the Court’s decision in *Mazer* as essentially writing parts of what became the Copyright Act of 1976, the most recent major overhaul of the law.<sup>175</sup> Justice Thomas explained that “Congress essentially lifted the language governing protection for the design of a useful article directly from the post-*Mazer* regulations and placed it into § 101 of the 1976 Act.”<sup>176</sup> The *Mazer* Court concluded that works “must be original, that is, the author’s tangible expression of his ideas.”<sup>177</sup> It furthermore found that artistic elements that are a part of useful items could receive copyright protection.<sup>178</sup> The 1976 revision shifted the “works of art” category to “pictorial, graphic, and sculptural” works and added Section 113, which is solely devoted to outlining the boundaries of such protections for copyright holders. Crucially for the questions posed by this Article, Section 113 affords the copyright holder the right to reproduce copyrighted “pictorial, graphic, or sculptural work in copies . . . in or on any kind of article, whether useful or otherwise.”<sup>179</sup> The section, however, proceeds

172 *Id.* The Statute of Anne, passed by Britain’s Parliament in 1710, also started with a substantially similar passage, which framed it as a law that protects learning. See *The Statute of Anne; April 10, 1710*, YALE L. SCH., (last visited Mar. 21, 2019) [http://avalon.law.yale.edu/18th\\_century/anne\\_1710.asp](http://avalon.law.yale.edu/18th_century/anne_1710.asp) [<https://perma.cc/FZE4-U57A>].

173 Copyright Act of 1909 § 7, Pub. L. No. 60-349, ch. 320, 35 Stat. 1075, *superseded by* 17 U.S.C. § 103(b) (1976).

174 Richard Pogue, *Borderland—Where Copyright and Design Patent Meet*, in COPYRIGHT AND RELATED TOPICS: A CHOICE OF ARTICLES, 363, 374–75 (L.A. Copyright Soc’y & UCLA Sch. of L. eds., 1964).

175 *Star Athletica*, 137 S. Ct. at 1011–12.

176 *Id.*

177 *Mazer*, 347 U.S. at 214.

178 *Id.* at 218.

179 17 U.S.C. § 113(a).

in the passages that follow this statement to narrow the scope of copyright protections for “useful articles.”<sup>180</sup> For example, it outlines that when a work of art is reproduced in or on a useful item, the artwork’s copyright holder does not receive “any greater or lesser rights with respect to the making, distribution, or display of the useful article so portrayed than those afforded to such works.”<sup>181</sup> The Court in *Star Athletica* emphasized that these passages protect works of art that are first affixed to a tangible form of media and then later reproduced on or in a useful item.<sup>182</sup> The Court continued, however, by contextualizing Section 101 as protecting art that is first placed on a useful item. The difficulty with such an understanding of the two different sections of the law, however, is that it reinforces a false dichotomy between an item being entirely classifiable as useful or artistic, when many items are shades of both. It also ignores that the artistic aspects of the cheerleading uniforms in *Star Athletica* and the lamp in *Mazer* were conceptualized as art in traditional forms of media, thus making them far more applicable to Section 113 than Section 101. In other words, works such as Yves Saint Laurent’s Mondrian dress should be understood under Section 113, because the design was first created in a non-useful medium, a painting canvas, and later applied to a useful object, a dress. Justice Thomas mentioned Section 113 in only one passage of his opinion for the Court in *Star Athletica*.<sup>183</sup> He instead constructed much of its reasoning on Section 101, which, under his explanation, would have evaluated the Mondrian dress based first and foremost on the separability test, focusing on whether the artistic elements on the dress could be removed and placed in another form of media. Conversely, Justice Ginsburg, in her concurring opinion, contended that Section 113 should have been controlling in the Court’s reasoning. She wrote, “I would not take up in this case the separability test appropriate under 17 U. S. C. § 101. Consideration of that test is unwarranted because the designs at issue are not designs of useful articles.”<sup>184</sup> Justice Ginsburg’s approach would also connect works of fashion that were conceptualized as art and later applied to Section 106, which gives artists the exclusive right to prepare derivative versions of their original works.<sup>185</sup> Thus, even within the Copyright Act’s sections, jurists have not come to consistent understandings regarding how to classify the works of fashion designers.

#### A. *From a Plain White T-Shirt to a “Smoke Dress”*

Fashion designs are not explicitly included in any part of the Copyright Act. They are, however, as was the case in *Star Athletica*, generally classified

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180 *Id.* § 113(b)–(c).

181 *Id.* § 113(b).

182 *Star Athletica*, 137 S. Ct. at 1011–12.

183 *Id.* at 1010–11.

184 *Id.* at 1019 (Ginsburg, J., concurring).

185 *Star Athletica*, 137 S. Ct. at 1019 (Ginsburg, J., concurring); 17 U.S.C. § 106(2).

as part of the “pictorial, graphic, and sculptural work” category, which is one of eight listed in Section 102 of the Act.<sup>186</sup> As indicated earlier, the category requires that “[t]he design of a useful article . . . shall be considered a pictorial, graphic, or sculptural work only if . . . such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.”<sup>187</sup> Such a definition immediately creates two challenges. First, it assumes that works of fashion are useful articles that can potentially include artistic elements. Second, it assumes that art and utility can be neatly separated.

Fashion designer Iris Van Herpen’s work, for example, challenges the feasibility of such a process. She created a line of dresses that were inspired by refinery smoke. In creating the dresses, the artist sought to “give the viewer this mixed feeling about the collection by manipulating the unpleasant industrial material metal mesh into something soft and lively.”<sup>188</sup> Thus, the art and the message the artist intended to communicate are difficult to separate from the fact that it is wearable. If, however, we think of utility and fashion as being on a spectrum, with basic, noncopyrightable clothing items such as a plain white T-shirt on one end and creations like Van Herpen’s “Smoke Dress” or the “Meat Dress” Lady Gaga wore at the 2010 Video Music Awards on the other, the challenge the courts face shifts from the assumption that the item is useful, and therefore must be examined regarding whether it includes separable artistic elements, to identifying at what point on the spectrum items move from being unoriginal to being artistic, copyrightable works. At that point, the challenge the courts would face would not be much different than the situation justices faced in *Feist*.<sup>189</sup> The Court had to identify where, on a spectrum between a list of names and numbers and a creative work, copyright protection begins. Such a shift to a spectrum-based system requires that fashion be moved from being understood as part of the “pictorial, graphic, and sculptural works” section of the law to the more arts-focused sections, which do not require an initial assumption that the work is useful and might potentially have separable artistic elements.

The courts’ traditional placement of fashion designs within Section 102 also creates a challenge for works that are not “capable of existing independently of” the clothing in which they are incorporated. This distinction bars many fashion designs from copyright protection.<sup>190</sup> Additionally, a work of visual art cannot include a technical drawing or diagram, which would

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186 *Id.* § 102(5).

187 *Id.* § 101.

188 *Refinery Smoke*, IRIS VAN HERPEN (last visited Mar. 11, 2019), <http://www.irisvanherpen.com/haute-couture/refinery-smoke> [<https://perma.cc/496U-ZHFC>].

189 *Feist Publ’ns v. Rural Tel. Serv. Co.*, 499 U.S. 340, 363–64 (1991).

190 17 U.S.C. § 101.

likely include a fashion design or garment pattern.<sup>191</sup> Another challenge fashion designers face is that copyright protection cannot extend to an idea; it can only extend to the execution of an idea.<sup>192</sup> If a fashion designer created a red, floor-length dress, the designer could not sue another designer for copyright infringement if that designer also created a red, floor-length dress. The idea of a red, floor-length dress is not novel or original. The execution of the dress can be. A designer could embellish the dress with embroidery or motifs, use innovative fabric, or incorporate a combination of new ideas. These creative decisions are part of the execution of an idea and are, in theory, copyrightable. They are, once again, difficult to separate from the functional aspect of the piece, such as a gown.

### B. *Fashion's Efforts for Separate Protections*

In 2012, New York Senator Chuck Schumer introduced the Innovative Design Protection Act, which would have amended the copyright code to extend protection to fashion designs.<sup>193</sup> For the purposes of this legislation, “fashion design” was defined as the original elements and overall appearance of the article.<sup>194</sup> Clothing, undergarments, outerwear, gloves, footwear, handbags, belts, eyeglass frames, and headgear would have been protected under this amendment. The bill defined “substantially identical” as “an article of apparel which is so similar in appearance as to be likely mistaken for the protected design.”<sup>195</sup> The bill was assigned to the U.S. Senate Judiciary Committee in 2012 but went no further. It faced criticism for the ambiguity it would have created regarding how designers, lawyers, and courts would define “design similarity.”<sup>196</sup> The definitions were too ambiguous and threatened to harm smaller brands that lack the legal or financial resources to compete with industry giants.<sup>197</sup> Since then, Congress has not made any substantial efforts toward creating specific protections for fashion designs.

A part of the challenge that comes with increasing protections for designers is known as the “Piracy Paradox” argument. The argument states that

191 *Id.* § 101(A)(i).

192 *Id.* § 102(b).

193 Innovative Design Protection Act of 2012, S. 3523, 112th Cong. (2012); *see also* Innovative Design Protection and Piracy Prevention Act, H.R. 2511, 112th Cong. (2011); Design Piracy Prohibition Act, H.R. 2196, 111th Cong. (2009); Design Piracy Prohibition Act, H.R. 2033, 110th Cong. (2007); Design Piracy Prohibition Act, S. 1957, 110th Cong. (2007).

194 S. 3523, 112th Cong. (2012).

195 *Id.*

196 Lauren E. Purcell, *A Fashion Flop: The Innovative Design Protection and Piracy Prevention Act*, 31 J.L. & COM. 207, 221–24 (2013); Ashley Marshall, *Free Fashion*, 17 MARQ. INTELL. PROP. L. REV. 123, 140–41 (2013); Casey E. Callahan, *Fashion Frustrated: Why the Innovative Design Protection Act is a Necessary Step in the Right Direction, but Not Quite Enough*, 7 BROOK. J. CORP. FIN. & COM. L. 195, 214–22 (2012).

197 Purcell, *supra* note 196, at 221.

designers create clothing that certain individuals purchase to distinguish themselves as fashionable people. Copiers recreate the designs and make them accessible to everyone. This creates a demand from the fashion elites for newer styles in order to maintain their fashionable image.<sup>198</sup> Essentially, copiers fuel the cyclical nature of the fashion industry. Fast-fashion copies accelerate the fashion cycle, which leads to more production and profits for brands.<sup>199</sup> As legal scholars Kal Raustiala and Christopher Sprigman explained, “[c]opying and derivative reworking produce a faster creative cycle and more consumption of fashion due to the quicker deterioration of apparel’s status-conferring value.”<sup>200</sup>

Of course, copying original designs for profit is not new to fashion. During the nineteenth century, France, and Paris in particular, established itself as the center of modern haute couture.<sup>201</sup> Supporters of copyright protection for American fashion throughout the twentieth century have noted that “art [is] an economic history of the practical French,” and linked Paris’s rise as a fashion capital to the Parisian understanding of the connection between the economy and industrial design, the belief that products of industrial design can be protected as art, and the importance of providing protection for that art.<sup>202</sup>

By the turn of the century, the big American department stores—Saks Fifth Avenue, Bergdorf-Goodman, Neiman Marcus, etc.—were sending scouts to the Paris fashion shows to sketch the latest styles. These designs would then be copied and produced as part of the store’s next seasonal collection. In the 1920s, women began dressing in a simpler manner, best symbolized by the low-waisted chemise “flapper” dress. As fashion became more accessible, it also became easier to copy from sketches.<sup>203</sup> Today, the advent of “fast fashion”—or clothing brands like Zara, H&M, and Forever 21 that reproduce the latest trends quickly and cheaply—has made piracy a significant issue for luxury fashion brands.

The Piracy Paradox argument fails to account for the havoc the accelerated fashion cycle brings to designers. Beginning in the 1970s, most American designers produced and presented collections twice a year, at New York Fashion Week in February and again in September. In the twenty-first century, fashion houses have begun to increase the pace of their design and production schedules to meet growing customer demands. A growing number of luxury

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198 Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687, 1775–76 (2006).

199 *Id.* at 1693–95.

200 Kal Raustiala & Christopher Sprigman, *The Piracy Paradox Revisited*, 61 STAN. L. REV. 1201, 1207 (2009).

201 Meaghan McGurrin Ehrhard, *Protecting the Seasonal Arts: Fashion Design, Copyright Law, and the Viability of the Innovative Design Protection & Piracy Prevention Act*, 45 CONN. L. REV. 285, 290 (2012).

202 *Id.*

203 Mary Lynn Stewart, *Copying and Copyrighting Haute Couture: Democratizing Fashion, 1900–1930s*, 28 FRENCH HISTORICAL STUDIES 103, 109 (2005).

brands today no longer follow the fashion calendar, instead using a see-now, buy-now strategy in which clients purchase clothing right off the runway. Also contributing to the increased pace, large conglomerates such as Louis Vuitton Moët Hennessey (LVMH) and the Gucci Group have consolidated much of the luxury goods market by building portfolios across industries. As a result, brands are more focused than ever before on earnings and profits for shareholders.<sup>204</sup> These factors together lead to increased stress on fashion designers. As a result, the average tenure for a creative director at high-end fashion houses has grown shorter and shorter. For instance, a few months before designer Oscar de la Renta died in 2014, he had hired his artistic heir apparent, the seasoned British designer Peter Copping. Less than two years later, Copping had been dismissed.<sup>205</sup> This rate of turnover, in which high-profile designers stay with big-name fashion brands for just one or two years before leaving or being pushed out, is the norm in today's competitive fashion and retail environment.

However, profit should not be the only thing considered when analyzing the fashion industry. The accelerated fashion cycle causes environmental stress as well, as more natural resources are used in production each year. People also throw away more articles of clothing as they go out of style. In North America, consumers are buying—and getting rid of—five times as many items of clothing as they did twenty-five years ago, according to the *Huffington Post*. Much of that clothing—a whopping 85 percent—will end up in a landfill.<sup>206</sup> While copying can be beneficial in many respects because it allows for collaboration and creativity within the fashion industry, there is clearly a downside. The harmful effects of the accelerated fashion cycle, including designer and environmental stress, can be mitigated by increased copyright protection. Likewise, in a vulnerable industry, when one company's collection succeeds, others will attempt to capitalize on the trend. The key legal question is, at what point does copying go too far?

## VI. THE ART-FIRST INTERPRETATION OF FASHION DESIGN

The Supreme Court explained at the start of its opinion in *Star Athletica* that it agreed to hear Star's appeal of the Sixth Circuit decision to extend copyright protection to athletic-uniform giant Varsity in order to “resolve

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204 Bharat N. Anand, Elizabeth Lea Carpenter & Samhita Patwardhan Jayanti, *Oscar de la Renta*, HARV. BUS. SCH. (Mar. 2005), <http://www.hbs.edu/faculty/Pages/item.aspx?num=30914>.

205 Matthew Schneier, *Coming Back Home to Oscar de la Renta*, N.Y. TIMES (Sep. 2, 2016), [https://www.nytimes.com/2016/09/04/fashion/coming-back-home-to-oscar-de-la-renta.html?\\_r=0](https://www.nytimes.com/2016/09/04/fashion/coming-back-home-to-oscar-de-la-renta.html?_r=0) [https://perma.cc/DDC3-6LZC].

206 Craig Kielburger & Marc Kielburger, *We Shouldn't Be Filling up Our Landfills with Clothing*, HUFFINGTON POST (June 23, 2016), [http://www.huffingtonpost.ca/craig-and-marc-kielburger/clothing-waste-canada\\_b\\_10634478.html](http://www.huffingtonpost.ca/craig-and-marc-kielburger/clothing-waste-canada_b_10634478.html) [https://perma.cc/99QA-7HFE].

widespread disagreement” regarding the meaning of Section 101 of the Copyright Act.<sup>207</sup> Section 101, as discussed earlier, requires that artistic elements that are incorporated into useful items be separately identifiable from the functional aspects of the item.<sup>208</sup> While the decision was lauded as a victory for the fashion industry, this Article contends that the Court did not achieve its objective in clarifying copyright law as it applies to works of fashion.<sup>209</sup> Quite conversely, the Court’s first decision regarding works of fashion muddied the waters regarding the rights of fashion designers to protect their creations. Essentially, we can draw from the Court’s decision that the separability test, which was developed in 1954 in a case that involved a lamp, only requires that the artistic element of a functional item be *imaginable* as appearing on another, nonfunctional form of media, such as a painter’s canvas. Furthermore, it is not required that the item remain functional when the artistic elements are removed, as the dissent contended.<sup>210</sup> Such a restatement of the separability test provides that nearly any artistic aspect of a functional item can receive copyright protection. More important, however, than the questions that the decision raised regarding the practical applicability of the separability test to fashion designs were justices’ assumptions regarding the very nature of such creations.

The Court framed the question before it as a matter of clarifying the separability test. Such a choice of frames carried with it a mass of assumptions that substantively channeled the Court’s thinking. Crucially, the Court automatically placed works of fashion into the “pictorial, graphic, and sculptural works” category, which essentially married such designs to the artistic-useful dichotomy that directed the Court’s thinking in *Mazer*. Such a designation also linked fashion designs with the provisions regarding useful items in Section 113.<sup>211</sup> Relatedly, the decision dealt with the case from the outset as a matter of separability regarding the artistic aspects of a functional item. The Court thus communicated a fundamentally limited conceptualization of the nature of fashion design as something more comparable to manufacturing car

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207 *Star Athletica*, 137 S. Ct. at 1007.

208 17 U.S.C. § 101.

209 Daniel Fisher, *Fashion Industry Wins as Supreme Court Says Cheerleader Uniform Design May Be Copyrighted*, FORBES (Mar. 22, 2017), <https://www.forbes.com/sites/danielfisher/2017/03/22/fashion-industry-wins-as-supreme-court-says-cheerleader-uniform-design-may-be-copyrighted/#2e73250be28e>; <https://fashionlawinstitute.com/cutting-edge-articles/supreme-court-varsity-wins> [https://perma.cc/UBC6-HPLW]; Zameena Mejjia, *The Supreme Court Says the Iconic American Cheerleading Uniform Design is Protected by Copyright Law*, QUARTZ (Mar. 22, 2017), <https://qz.com/939637/the-supreme-court-ruled-that-varsity-brands-cheerleading-uniform-designs-are-protected-by-copyright-law> [https://perma.cc/W4YG-83LG].

210 *Star Athletica*, 137 S. Ct. at 1031–1032 (Breyer, J., dissenting).

211 17 U.S.C. § 113.

engines than to works such as the Mondrian dress, which incorporate art *into* the design of a potentially useful item.

This Article contends that the longstanding confusion regarding copyright protections for works of fashion can only be resolved by conceptualizing them as a form of art that is often applied to useful objects, an understanding that is more associated with Section 106 of the Copyright Act, which allows copyright holders to control how their works are used, including extending the right of creating derivative works.<sup>212</sup> Such an understanding is substantially similar to Justice Ginsburg's conclusion in her concurring opinion. She found that the cheerleading uniform designs were registered as two-dimensional drawings that were later applied to functional items, and thus there was no need for the separability test.<sup>213</sup> Section 113 provides that a copyright holder, as is outlined more generally in Section 106, has the right to reproduce the copyrighted "work in or on any kind of article, whether useful or otherwise."<sup>214</sup> Thus, if fashion designs are first and foremost understood as artistic creations that *can* be applied to useful items, the traditional criteria for copyright protection, such as originality or application to a tangible form of media, then apply.

Indeed, many modern works of fashion make little or no claim to be functional items. Perhaps the most famous example was Lady Gaga's "Meat Dress," which was composed of about forty pounds of raw meat affixed to a corset. It was intended to register shock, even outrage. Certainly, such garments can be worn, but the baseline of functionality that individuals associate with clothing, such as covering the body and providing protection from the elements, is not always achieved. In many cases, a person cannot wear such items to work or school, for example. In these instances, fashion designs are most classifiable as art that can be worn, much as if a painter created a series of original paintings on canvases and, rather than initially hanging them on a gallery wall, first had several people carry them around the streets. Many fashion creations are similar to such canvases, except they are worn rather than carried.

The art-first approach to fashion design does not claim that all clothing items are copyrightable. The definitions provided within Section 101 of the Copyright Act remain crucial. Section 101 defines a useful item as "an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information."<sup>215</sup> Thus, the challenge of the art-first approach to copyright protection for fashion designs is clarifying where copyright protection should begin on the spectrum between purely useful items, such as a plain white T-shirt, and the mostly artistic, such as the "Meat Dress." As indicated earlier, such a challenge is not terribly different than the concerns the courts consider in copyright cases that involve music or

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212 *Id.* § 106.

213 *Star Athletica*, 137 S. Ct. at 1019–29 (Ginsburg, J., concurring).

214 17 U.S.C. § 113.

215 *Id.* § 101.

photography. A part of their evaluation must include considering whether the original work was indeed *original* enough to receive protection. In *Feist Publications v. Rural Telephone Service*, the Supreme Court concluded that simply taking a series of phone numbers and addresses from one phonebook and placing them into another phonebook was not a copyright violation.<sup>216</sup> The phone listings lacked even a minimal amount of originality. Similarly, a clothing producer could not claim copyright protection over a white T-shirt. The creation lacks the originality element.

For this reason and others, the art-first approach avoids traditional concerns regarding granting design monopolies to certain clothing companies. As with questions regarding originality, the courts have dealt with such concerns regarding artistic works for centuries. In *Time v. Bernard Geis* in 1968, a federal district court ruled that a book publisher that used *Time's* copyright-protected footage of the Kennedy assassination to create sketches for a new book could qualify as a fair use.<sup>217</sup> The court found that the work, since it posed no true competition to the copyright holder, would, if anything, “enhance the value of the copyrighted work.”<sup>218</sup> Similarly, in *Alexander v. Haley*, a federal district court found that the author of *Roots* could not successfully claim that another author, who wrote a similarly themed work titled *Jubilee*, violated copyright.<sup>219</sup> Thus, recognizing fashion designers’ works as artistic rather than functional does not create any new problems in copyright law.

In many cases, the courts have ruled that commentaries, parodies, and other recreations of original items can be understood as fair uses and are therefore protected from findings of copyright violation. Furthermore, the precedential history of “aesthetic functionality” provides a relatively clear line for the courts regarding when a designer can claim protection for a certain creation. The courts allowed a fashion designer to protect a certain color on the soles of the shoes he designed and a dry-cleaning company supplier to secure exclusive rights to the color it used on its pads.<sup>220</sup> In each of these cases, the courts reasoned essentially that the provision of such protection did not substantially damage competition. The same can be said for the art-first approach. Similarly, it is possible to protect artistic creations made by fashion designers without harming the marketplace. If a designer creates an original work, the designer can claim protection for that work. Such reasoning overlaps

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216 *Feist Publ'ns v. Rural Tel.*, 499 U.S. 340, 363–64 (1991).

217 *Time Inc. v. Bernard Geis*, 293 F. Supp. 130, 146 (S.D.N.Y. 1968).

218 *Id.* at 146.

219 *Alexander v. Haley*, 460 F. Supp. 40, 46–47 (S.D.N.Y. 1978); *see also Suntrust Bank*, 268 F.3d at 1283 (Marcus, C.J., specially concurring); *Campbell*, 510 U.S. at 594.

220 *Louboutin*, 696 F.3d at 229 (holding that a fashion designer could protect a red lacquered outsole on the soles of the shoes he designed); *Qualitex*, 514 U.S. at 174 (holding that a dry-cleaning company supplier could secure exclusive rights to the color is used on its press pads).

significantly with the conclusions put forth in *Mazer*, which has cast an outsized shadow on copyright law for more than sixty years. In extending copyright protections to the lamp designs, Justice Reed wrote that such rights come from a “conviction that encouragement of individual effort by personal gain is the best way to advance public welfare . . . . Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered.”<sup>221</sup>

Ultimately, the art-first approach to copyright protections for fashion designers lacks the catchiness of the “separability test” or the step-by-step process that is often associated with tests from the courts. This is for good reason. The art-first approach seeks to simplify copyright law by reclassifying fashion designs as artistic elements that are *often* applied to useful items. Such a reclassification more accurately accounts for modern fashion creations, more naturally aligns with existing copyright law, and neatly flows with existing precedents regarding the copyrightability of artists’ works.

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221 *Mazer*, 347 U.S. at 219.

