

# THE FASHION EMERGENCY: PROTECTION AT A PRICE

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*By interpreting copyright law to provide protection to useful articles in fashion, has the Supreme Court inadvertently exposed the fashion industry to harm? This Note explores the implications of a recent Supreme Court case as applied to the fashion industry and proposes a legislative solution to the potentially sweeping impact to one of the world's largest industries.*

INTRODUCTION .....	242
I. THE BACKGROUND OF FASHION AND COPYRIGHT.....	243
A. <i>Star Athletica v. Varsity Brands—Changing the Game for Copyright in Fashion</i> .....	243
B. <i>Copyright Jurisprudence Prior to Star Athletica</i> .....	244
C. <i>Legislative History of “Useful Article” in Copyright</i> .....	249
II. COPYRIGHT IN THE DOCTRINAL CONTEXT.....	250
A. <i>Distinguishing Copyright Law from Patent Law</i> .....	250
B. <i>The Merger Doctrine</i> .....	252
III. WHY CONGRESS NEEDS TO ADDRESS <i>STAR ATHLETICA</i> WITH LEGISLATION .....	254
A. <i>Who Bears the Cost of the Supreme Court’s Decision?</i> ...	255
B. <i>Market Monopolization</i> .....	256
C. <i>The Piracy Paradox</i> .....	258
IV. A PROPOSAL: SUI GENERIS PROTECTION FOR THE FASHION INDUSTRY .....	262
A. <i>Vessel Hull Design Protection Act: A Model for Copyright Protection in the Fashion Industry</i> .....	263
B. <i>Sui Generis Application to Fashion Copyright</i> .....	264
CONCLUSION .....	265

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## INTRODUCTION

By interpreting copyright law to provide protection to fashion, has the Supreme Court inadvertently exposed the fashion industry to harm? This Note explores the negative implications that the Supreme Court's holding in *Star Athletica, L.L.C. v. Varsity Brands, Inc.*<sup>1</sup> has for the fashion industry and proposes a legislative solution to counteract the potentially sweeping impact to one of the world's largest industries.<sup>2</sup>

Specifically, this Note proposes that Congress reconsider the Innovative Design Protection and Piracy Act<sup>3</sup> (IDPPA) proposal to provide *sui generis*<sup>4</sup> protection to the fashion industry. Congress should do so because (1) *Star Athletica* provides protection that Congress has specifically chosen not to provide to fashion, (2) there are other protections available to industry players that better suit the maintenance of the industry, and (3) the opinion has the potential to decimate the “knockoff” industry.

In Section I, this Note will juxtapose the key holdings of the *Star Athletica* opinion against copyright jurisprudence to show how the Court departed from precedent to broadly and categorically change the game for copyright protection of industrial designs. This Note will then recap the legislative history of the Copyright Act of 1976 (“Copyright Act”),<sup>5</sup> the term “useful article” in copyright law, and the relevant case law concerning copyright protection of fashion designs—dating from the 19th century to modern jurisprudence, which has served as the backdrop for recent legislation and the *Star Athletica* opinion.

In Section II, this Note will discuss the different areas of intellectual property law—copyright, trademark, and patent—analyzing how each provides a particular set of protections in the fashion industry. Against this background information, this Note will analyze examples of existing *sui generis* protections to

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1. 137 S. Ct. 1002 (2017).

2. *Id.* at 1035 (Breyer, J., dissenting) (“[A] decision by this Court to grant protection to the design of a garment would grant the designer protection that Congress refused to provide. It would risk increased prices and unforeseeable disruption in the clothing industry, which in the United States alone encompasses nearly \$370 billion in annual spending and 1.8 million jobs.”).

3. S. 3728, 111th Cong. (2010).

4. “*Sui generis*” means “[o]f its own kind or class; unique or peculiar. The term is used in intellectual-property law to describe a regime designed to protect rights that fall outside the traditional patent, trademark, copyright, and trade-secret doctrines. For example, a database may not be protected by copyright law if its content is not original, but it could be protected by a *sui generis* statute designed for that purpose.” *Sui generis*, BLACK’S LAW DICTIONARY (10th ed. 2014).

5. Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended in scattered sections of 17 U.S.C.).

demonstrate how sui generis protection offers the most effective intellectual property protection for the fashion industry.

Section III will provide a high-level analysis of the fashion industry, considering how the *Star Athletica* holding may adversely impact different industry stakeholders and, in particular, consumers. This analysis will segue into a discussion of two important, but distinct, fashion industry phenomena. The discussion of these phenomena—market monopolization and the “piracy paradox”—will simultaneously underscore the benefits of limited intellectual property protection in the fashion industry and demonstrate why the counterarguments of heightened copyright protection for fashion designs are porous. Ultimately, this discussion will show why congressional intervention is both timely and necessary.

Finally, in Section IV, this Note will propose that Congress legislate to prevent the *Star Athletica* holding from circumventing Congress’s clear intent to withhold certain copyright protections from the fashion industry and from dismantling the efficacy of intellectual property protections in the fashion industry.

## I. THE BACKGROUND OF FASHION AND COPYRIGHT

Congress has considered whether to include the fashion industry within the Copyright Act’s purview but has declined to ever do so.<sup>6</sup> The fashion industry has, as a result, evaded copyright protection for many years, until the Supreme Court’s *Star Athletica* decision. Subsection A will provide a brief overview of the *Star Athletica* opinion, outlining the key holdings, while Subsections B and C will juxtapose *Star Athletica* against the historical backdrop of copyright protection in the fashion industry.

Specifically, Subsection B will survey copyright jurisprudence, considering seminal cases from the 19th century through the present that deal with copyright protections in the fashion industry. This survey will provide historical context for the *Star Athletica* opinion. Subsection C will recap the legislative history of the Copyright Act, focusing particularly on the IDPPA and the term “useful article.”

### A. *Star Athletica v. Varsity Brands*—*Changing the Game for Copyright in Fashion*

In *Star Athletica*, the Supreme Court broadly and categorically

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

changed the game for copyright protection of fashion designs.<sup>7</sup> In the majority opinion, Justice Thomas used statutory interpretation to apply the Copyright Act's Section 101 test for the separability requirement in a markedly different manner than courts have traditionally applied that doctrine.<sup>8</sup> And now, if a design "[has] pictorial [or] graphic . . . qualities [and can be] applied . . . on a painter's canvas," the threshold for copyright protection is met.<sup>9</sup>

Under the Copyright Act, "a pictorial, graphic, or sculptural feature" incorporated into the "design of a useful article" is eligible for copyright protection if it (1) "can be identified separately from," and (2) is "capable of existing independently of, the utilitarian aspects of the article."<sup>10</sup> Historically, courts have used a handful of circuit-generated tests focused on analyses of "physical" and "conceptual" separability to interpret this provision,<sup>11</sup> but *Star Athletica* created a new test in which courts must focus on "separate identity" and "independent existence" requirements.<sup>12</sup>

### B. Copyright Jurisprudence Prior to *Star Athletica*

Prior to *Star Athletica*, there were at least ten different tests used in the lower courts or advocated for in legal scholarship to determine separability.<sup>13</sup> At a minimum, *Star Athletica*'s holding may provide some clarity to fashion companies as to what test the industry can expect courts to apply when a separability analysis is required.

This Subsection will first analyze *Baker v. Selden*,<sup>14</sup> a 19th century Supreme Court case, to show how the Court has previously delineated the relationship between functional articles and copyright. This Subsection will then discuss *Mazer v. Stein*,<sup>15</sup> the seminal separability case, and the circuit courts' subsequent treatment of the separability doctrine.

At issue in *Baker v. Selden* was the copyrightability of an

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7. See David E. Shipley, *All for Copyright Stand Up and Holler! Three Cheers for Star Athletica and the U.S. Supreme Court's Perceived and Imagined Separately Test*, 36 CARDOZO ARTS & ENT. L.J. 149, 174 (2018).

8. *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1008 (2017) (asking whether expressions "can be identified separately from and are capable of existing independently of" a useful article).

9. *Id.* at 1012.

10. 17 U.S.C. § 101 (2012).

11. See *infra* Section I.B.

12. See *infra* Section I.B.

13. See, e.g., Mark Walsh, *A "View" from the Courtroom: Dress for Success*, SCOTUSBLOG (Oct. 31, 2016, 8:14 PM), <http://www.scotusblog.com/2016/10/a-view-from-the-courtroom-2/> [<https://perma.cc/7D2G-A6PC>].

14. 101 U.S. 99 (1879).

15. 347 U.S. 201 (1954).

accounting ledger book.<sup>16</sup> The two ledger books at issue were predominantly the same, although their respective headers were different.<sup>17</sup> The Court held that the plaintiff had a copyright for the material in his particular ledger book but not for the technique the ledger book utilized.<sup>18</sup> Specifically, the plaintiff could not claim an exclusive right over the idea of double-ledger accounting.<sup>19</sup> To quote the Court: “blank account-books are not the subject of copyright; . . . the mere copyright of [the plaintiff’s] book did not confer upon him the exclusive right to make and use account-books, ruled and arranged as designated by him and described and illustrated in said book.”<sup>20</sup> Thus, the Court emphasized the attenuated relationship between functional articles (like accounting ledger books) and copyright.

The separability doctrine originated in *Mazer v. Stein*, a 1954 Supreme Court case.<sup>21</sup> There, the copyright holders of a statuette registered the work with the United States Copyright Office.<sup>22</sup> When the copyright owners began mass-producing lamps made with the statuettes as the base, they sued alleged infringers who were also producing statuette-based lamps.<sup>23</sup> The Court reasoned that simply because an article was not patentable—there, the lamp statuettes—it did not preclude that article from potentially receiving copyright protection.<sup>24</sup> The Court qualified, however, that copyright protection would only cover the statuette, not the concept of a statuette and lamp combined.<sup>25</sup> This case established the concept of physical separability because it allowed for copyright protection as long as one could strip the utility aspects of an article and still be left with a “work of art.”<sup>26</sup>

The Fifth and Seventh Circuits adopted disparate variations of the separability test: the “market test”<sup>27</sup> and the “designer motivation test.”<sup>28</sup> Delineating the “market test,” the Fifth Circuit focused on the aesthetic marketability of an article in isolation.<sup>29</sup> For example, in *Galiano v. Harrah’s Operating Co.*, the court held

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16. *Baker*, 101 U.S. at 101.

17. *Id.* at 104–05.

18. *Id.* at 105.

19. *Id.* at 107.

20. *Id.*

21. *Mazer v. Stein*, 347 U.S. 201, 202 (1954).

22. *Id.* at 202–03.

23. *Id.* at 203–04.

24. *Id.* at 217.

25. *Id.* at 218.

26. *See id.*

27. *Galiano v. Harrah’s Operating Co.*, 416 F.3d 411, 419–22 (5th Cir. 2005).

28. *Pivot Point Int’l, Inc. v. Charlene Products, Inc.*, 372 F.3d 913, 930–32 (7th Cir. 2004).

29. *Galiano*, 416 F.3d at 420.

that the relevant inquiry must ask if “there is substantial likelihood that even if the article had no utilitarian use it would still be marketable to some significant segment of the community simply because of its aesthetic qualities.”<sup>30</sup>

In contrast, the Seventh Circuit applies a “designer motivation test,” which looks not to the market but rather to the source of the article: the designer.<sup>31</sup> In *Pivot Point Int’l, Inc. v. Charlene Products, Inc.*, for example, the court held that the relevant inquiry requires an attempt to enter the designer’s mind by asking “whether the design elements can be identified as reflecting the designers’ artistic judgment exercised independently of functional influences.”<sup>32</sup>

The Second Circuit applies neither the market test nor the designer motivation test and instead asks whether the ornamental and utilitarian aspects are primary and secondary, respectively.<sup>33</sup> In *Whimsicality, Inc. v. Rubie’s Costumes Co.*, the same court denied copyright protection to the works at issue.<sup>34</sup> Notably, the court explained “[w]e have long held that clothes, as useful articles, are not copyrightable.”<sup>35</sup>

In *Animal Fair, Inc. v. AMFESCO Indus., Inc.*, the District of Minnesota ruled that a manufacturer’s “bear’s paw” slipper was not excluded from copyright protection as a useful article because the design features of the slipper, which was not a mere copy of an actual bear’s paw, “were conceptually separate from the utilitarian aspects of [the] slipper.”<sup>36</sup> The court applied the principle that design features, in order to be protectable themselves, “need not be physically separable from [a] useful article” (which is otherwise exempt from copyright protection) and that “it is enough that they can be conceptually separated.”<sup>37</sup> The court found persuasive that “one could draw a line drawing of the whole shape and design which would be recognizable as a fanciful artistic rendition of a bear’s paw, regardless of what type of functional or utilitarian object it was

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30. *Id.* at 419 (quoting 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.08[B][3], at 2-101 (2005)).

31. *Pivot Point*, 372 F.3d at 931.

32. *Id.* (quoting *Brandir Int’l, Inc. v. Cascade Pac. Lumber Co.*, 834 F.2d 1142, 1145 (2d Cir. 1987)).

33. *Kieselstein-Cord v. Accessories by Pearl*, 632 F.2d 989, 991–92 (2d Cir. 1980).

34. *Whimsicality, Inc. v. Rubie’s Costumes Co.*, 891 F.2d 452, 455–56 (2d Cir. 1989) (declining to find copyright infringement where defendant created knockoffs of plaintiff’s costumes).

35. *Id.* at 455.

36. 620 F. Supp. 175, 187 (D. Minn. 1985), *aff’d without opinion*, 794 F.2d 678 (8th Cir. 1986).

37. *Id.*

used to adorn.”<sup>38</sup>

The court determined that “[t]he impractical width and shape of the [slipper’s] sole, the artwork on the sole, the particular combination of colors, the profile of the slipper, the stuffed aspect of the slipper, and the toes [were] all sculptural features which comprise[d] the artistic design and which [were] wholly unrelated to function,” and therefore concluded “that the entire exterior design of the plaintiff’s slipper [was] protectable under the Copyright Act.”<sup>39</sup>

More recently, the Southern District of New York created yet another test under the separability doctrine when it considered the design of leggings in *Elastic Wonder, Inc. v. Posey*, incorporating aspects of both the Fifth Circuit’s market test and the Second Circuit’s utility and secondary function analysis.<sup>40</sup> Notably, in its analysis of whether the fit of the leggings was physically or conceptually separable from the leggings themselves, the court considered whether the fit of the clothing could be sold separately from the leggings themselves.<sup>41</sup> Recognizing the traditional approach codified in the Copyright Act, which treats clothes as useful articles not typically copyrightable, the court held that because the fit of the leggings were neither physically nor “conceptually separable from the useful article[.]” and because “[t]he designs with regard to the fitting of clothing are . . . not copyrightable,” the design of the leggings at issue was not copyrightable.<sup>42</sup> Noting that the fit of the clothing could not be sold separately from the clothing itself, the court explained that “the functional purpose of covering the body in an attractive and comfortable way . . . motivate[d] the designs of fittings of certain shapes, and the utilitarian function of the leggings as clothing [wa]s primary over the ornamental aspect.”<sup>43</sup>

*Elastic Wonder* is particularly significant because although it appeared to apply aspects of the Fifth Circuit’s market test, it also borrowed from the Second Circuit’s primary utility and secondary function analysis.<sup>44</sup> As such, yet another test to apply the separability doctrine was born: essentially, a hybridization of the Fifth and Second Circuits’ approaches to the doctrine. But despite the foregoing, lengthy menu of tests the Supreme Court *could* have applied, it nonetheless engaged in a new line of inquiry in *Star*

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38. *Id.*

39. *Id.* at 187–88.

40. 179 F. Supp. 3d 307 (S.D.N.Y. 2016).

41. *Id.* at 316–17.

42. *Id.*

43. *Id.* at 317.

44. *See id.*

*Athletica.*

Forgoing analyses of physical and conceptual separability, the Court instead delineated a two-part test that examines whether requirements of (1) separate identity, and (2) independent existence, have been met.<sup>45</sup> At issue in *Star Athletica* was “whether the arrangements of lines, chevrons, and colorful shapes appearing on the surface of [Varsity Brands’] cheerleading uniforms [were] eligible for copyright protection as separable features of the design of those cheerleading uniforms.”<sup>46</sup>

In *Star Athletica*, under the test’s first prong—the separate identity requirement—the Court held that the chevron decorations constituted features having pictorial, graphic, or sculptural qualities.<sup>47</sup> Under the test’s second prong—the independent existence requirement—the Court held that, “if the arrangement of colors, shapes, stripes, and chevrons on the surface of the cheerleading uniforms were separated from the uniform and applied in another medium . . . they would [independently] qualify as ‘two-dimensional . . . works of . . . art.’”<sup>48</sup>

Holding that the decorative chevrons (shapes reminiscent of arrows) on a cheerleading uniform were separable from the uniforms themselves and therefore eligible for copyright protection, the Court departed from the circuit courts’ treatment of the test.

The Court, in what appeared to be an effort to limit the inevitably chaotic impact on precedent, attempted to narrow its holding, stating:

To be clear, the only feature of the cheerleading uniform eligible for a copyright in this case is the two-dimensional work of art fixed in the tangible medium of the uniform fabric. . . . [Varsity Brands does not have the] right to prohibit anyone from manufacturing a cheerleading uniform of identical shape, cut, and dimensions to the ones on which decorations in this case appear. They may prohibit only the reproduction of the surface designs in any tangible medium of expression—a uniform or otherwise.<sup>49</sup>

Nevertheless, *Star Athletica* departs from the many tests employed by the circuit courts and announces a new, two-part inquiry. Now, courts must ask whether the separate identity and independent existence requirements of the *Star Athletica*

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45. *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002 (2017).

46. *Id.* at 1008–09.

47. *Id.* at 1012.

48. *Id.* (citing 17 U.S.C. § 101 (2018)).

49. *Id.* at 1013.

framework have been met.

### C. Legislative History of “Useful Article” in Copyright

At the time of the Copyright Act, Congress had rejected every one of the approximately seventy design protection bills that had been introduced since 1914.<sup>50</sup> Congress rejected proposals for fashion design protection within the Copyright Act and has rejected every proposal for such protections since then.<sup>51</sup>

Until as recently as 2010, members of Congress have proposed legislation to protect fashion designs, but these bills have never passed.<sup>52</sup> The most notable bill was the IDPPA, which was nearly—but not actually—passed by Congress in 2010.<sup>53</sup> The IDPPA proposed an amendment to the Copyright Act which would have provided a three-year monopoly right to creators of new fashion designs. The IDPPA defined “creators of new fashion design” broadly and sought to give creators the ability to sue for infringement within the three-year monopoly period.<sup>54</sup> The legislation failed to pass and “[t]hus, as the fashion industry entered the second decade of the 21st century with the rise of ‘fast fashion’ like Forever 21, the legal environment and the business environment seemed to favor either ‘inspiration’ or knockoffs—depending upon whom you ask.”<sup>55</sup>

Prior to *Star Athletica*, the Copyright Office, through its Compendium of U.S. Copyright Office Practices (the “Compendium”), offered the following insight regarding refusal to register clothing: “because clothing provides utilitarian functions, such as warmth, protection, and modesty . . . the U.S. Copyright Office will not register a claim in clothing or clothing designs.”<sup>56</sup> However, the Copyright Office acknowledged that “a fabric or textile design may be registered if the design contains a sufficient amount of creative expression.”<sup>57</sup> On June 1, 2017, the Copyright Office deleted from the Compendium a seven-page list, which had outlined examples of things that were and were not sufficient to receive protection as useful articles.<sup>58</sup> The Copyright Office

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50. *Esquire, Inc. v. Ringer*, 591 F.2d 796, 800 n.12 (D.C. Cir. 1978).

51. *Star Athletica*, 137 S. Ct. at 1034 (Breyer, J., dissenting) (citing 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2A.08[H][3][c] (2010)).

52. Larry C. Russ & Nathan D. Meyer, *Fashion Forward*, L.A. LAW. 20 (2017).

53. *Id.* at 22.

54. *Id.*

55. *Id.*

56. U.S. COPYRIGHT OFFICE, COMPENDIUM OF U.S. COPYRIGHT OFFICE PRACTICES § 924.3(A) (3d ed. 2017).

57. *Id.* § 924.3(A)(1).

58. Russ & Meyer, *supra* note 52, at 22–23.

replaced the original list in the Compendium “with three short paragraphs, quoting the standard from *Star Athletica*, and stating “[t]he U.S. Copyright Office is developing updated guidance on the registration of pictorial, graphic, and sculptural features incorporated into the design of useful articles.”<sup>59</sup>

Until Congress legislates (and the Copyright Office, guidance) to address the ambiguity that *Star Athletica* has created, the Court’s holding will reign supreme. As a result, “certain types of clothing that were earlier refused by the Copyright Office, and therefore would have been deemed uncopyrightable by the courts, now would likely pass muster under the Court’s test.”<sup>60</sup> Under *Star Athletica*’s analysis, “combinations of simple shapes that are integral to a piece of clothing probably would qualify as conceptually separable from the garment now, whereas they would not have before.”<sup>61</sup>

## II. COPYRIGHT IN THE DOCTRINAL CONTEXT

This Section will analyze the critical differences between the areas of intellectual property law—copyright, trademark, and patent—and discuss how they pertain to the fashion industry. Against this legal framework, this Section will then highlight the merger doctrine, as it applies in the copyright context.

### A. Distinguishing Copyright Law from Patent Law

Copyright law covers expression and aesthetics, whereas patent law covers utility and functionality.<sup>62</sup> Congress has historically excluded utilitarian aspects of useful articles from copyright protection because copyright protection (1) lasts for decades longer than patent protection, and (2) can be obtained much more easily than patent.<sup>63</sup> As Justice Breyer suggested in his *Star Athletica* dissent, Congress decided that utilitarian aspects should be protected for only (relatively) short periods of time and, moreover, should only be protected when able to satisfy patent law’s more demanding requirements for protection.

Specifically, copyright, as applied to many industries, operates on an incentive-based theory,<sup>64</sup> meaning that copyright protection

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59. *Id.* at 23.

60. *Id.* at 24.

61. *Id.*

62. Christopher Buccafusco & Jeanne C. Fromer, *Fashion’s Function in Intellectual Property Law*, 93 NOTRE DAME L. REV. 51, 62 (2017).

63. See *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1034 (2017) (Breyer, J., dissenting).

64. ROBERT BRAUNEIS & ROGER E. SCHECHTER, COPYRIGHT: A CONTEMPORARY

exists to encourage the creation and dissemination of expression.<sup>65</sup> In contrast, patent law protects an inventor's labor or personality<sup>66</sup> and "establishes relatively high standards for obtaining [patent] protection."<sup>67</sup> Inventors must demonstrate that their inventions are useful, novel, and nonobvious during an expensive patent examination by the United States Patent and Trademark Office (USPTO).<sup>68</sup> Novelty and nonobviousness require "that the inventions had never existed before and that other people in the relevant field would not have easily [come up with the same idea]," respectively.<sup>69</sup> The USPTO issues utility patents to only seventy-five percent of patent applicants; those seeking a utility patent can expect to spend more than \$20,000 in the process of obtaining patent protection, which lasts for only twenty years.<sup>70</sup>

In contrast, copyright protection is both easier to obtain and lasts for considerably longer than patent protection.<sup>71</sup> No formal registration is required before an author can obtain a copyright for a work.<sup>72</sup> In fact, "copyright vests . . . the moment that a work is fixed in a tangible medium of expression—as soon as it is filmed, drawn, or written down."<sup>73</sup> Copyright registration is only important as it is a prerequisite for an individual to bring a copyright infringement claim.<sup>74</sup> While patent law requires an invention to be "useful,"<sup>75</sup> "novel,"<sup>76</sup> and "nonobvious,"<sup>77</sup> copyright law requires only a threshold demonstration of "originality" which has been characterized as a demonstration of some "modicum of creativity."<sup>78</sup>

Given the differences between patent and copyright protections, the courts and Congress, via the Copyright Act, have been wary of "copyright creep."<sup>79</sup> Section 102(b) of the Copyright Act

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APPROACH 9–12. (2d ed. 2012).

65. Stuart K. Kauffman, *Motion Pictures, Moral Rights, and the Incentive Theory of Copyright: The Independent Film Producer as "Author,"* 17 CARDOZO ARTS & ENT. L.J. 749, 752–53 (1999).

66. BRAUNEIS & SCHECHTER, *supra* note 64, at 8.

67. Buccafusco & Fromer, *supra* note 62, at 62.

68. *Id.*

69. *Id.*

70. *Id.* at 62–63.

71. *Id.* at 52.

72. Copyright Act of 1976, 17 U.S.C. §§ 201, 408 (2012); BRAUNEIS & SCHECHTER, *supra* note 64, at 539–58.

73. Buccafusco & Fromer, *supra* note 62, at 63.

74. 17 U.S.C. § 412 (2012); BRAUNEIS & SCHECHTER, *supra* note 64, at 517.

75. 35 U.S.C. § 101 (2012).

76. *Id.* § 102 (2012).

77. *Id.* § 103 (2012).

78. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 346 (1991).

79. Copyright creep occurs when copyright protections are extended to areas of law not intended to be within the purview of copyright protection. See Jeremy Malcolm, *Stop the Copyright Creep: New Restrictions are Not the Answer to Challenges of Digital*

emphasizes this point when it states: “[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 in which it is described, explained, illustrated, or embodied in such work.”<sup>80</sup>

Now, more than ever, copyright law has crept into patent law territory, wielding its low threshold for, and astonishingly lengthy duration of, protection of original works of authorship.<sup>81</sup> Reflecting on the differences between these two areas of intellectual property—and considering these differences in light of the aforementioned theories behind each—emphasizes how *Star Athletica*’s holding has fueled the copyright creep.

Ultimately, copyright is not designed to protect useful articles—that is the territory of patent law, for more than a few reasons. First, because of the duration of protection afforded in copyright law’s domain and the low threshold for the originality that a work must have to qualify for protection, extending protection to the separable, albeit useful, designs of clothing articles that are otherwise functional opens the door for copyright creep to occur on an even grander scale.<sup>82</sup> After all, why should an inventor spend the money and time pursuing patent protection for her design when she could simply claim copyright protection?

### B. *The Merger Doctrine*

At least one doctrinal approach seeks to prevent extending copyright protection to functionality. In an attempt to grapple with the tension between useful and functional articles in the copyright and patent arenas, courts have applied the merger doctrine<sup>83</sup> to works in which the expression and the function are intertwined to the extent that “protecting the expression would essentially provide copyright coverage to the function.”<sup>84</sup> Under the merger doctrine, “copyright protection is denied to expression that is inseparable from or merged with the ideas, processes, or discoveries underlying

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*Publishing*, EFF (April 8, 2016), <https://www.eff.org/deeplinks/2016/04/stop-copyright-creep-new-restrictions-are-not-answer-challenges-digital-publishing> [<https://perma.cc/9GN8-JGWD>]; see, e.g., *Baker v. Selden*, 101 U.S. 99, 102 (1879).

80. Copyright Act of 1976, 17 U.S.C. § 102(b) (2012).

81. See, e.g., *Malcolm*, *supra* note 79.

82. *Id.*

83. See, e.g., *Gates Rubber Co. v. Bando Chemical Indus., Ltd.*, 9 F.3d 823, 838 (10th Cir. 1993) (“Under the merger doctrine, copyright protection is denied to expression that is inseparable from or merged with ideas, processes, or discoveries underlying expression.”)

84. *Buccafusco & Fromer*, *supra* note 62, at 66; see also *Lexmark Int’l v. Static Control Components, Inc.*, 387 F.3d 522, 535–38 (6th Cir. 2004).

the expression.”<sup>85</sup> Thus, the merger doctrine denies copyright protection to the expressions whose function serves the utility of the article.

When considered in light of the cheerleader uniforms at issue in *Star Athletica*, application of the merger doctrine could have been appropriate—especially if the copyrighted “work” at issue had been framed differently. It is important to remember that the cheerleading uniform itself was not the “copyrighted work” that Varsity Brands was claiming *Star Athletica* had infringed. Given copyright law’s aversion to extending protection to clothing, Varsity Brands took a creative and necessary angle when it argued for copyright protection. Rather than argue for the protection of their clothing, Varsity Brands argued that its chevrons, and in particular Varsity Brands’ *placements* of the chevrons on cheerleading uniforms, were the infringed “works”; these placements served as the crux of the controversy.<sup>86</sup> Designers’ use of chevrons in cheerleader uniforms is ubiquitous. In *Star Athletica*, both parties agreed about the purpose of chevrons: to create an optical illusion that flatters the shape of the wearer.<sup>87</sup>

Specifically, Varsity Brands (and other cheerleader uniform manufacturers) place chevrons, stripes, and other shapes on their uniforms to create certain optical illusions, which yield a slimming effect on the wearer’s waist.<sup>88</sup> The shapes typically accomplish this by drawing the eye in toward the center of the body.<sup>89</sup> Shapes are also used on the uniforms to draw the eye out, the effect of which is to create an optical illusion that enhances—rather than slims—areas like the chest.<sup>90</sup>

Thus, the chevrons serve both an expressive *and* a functional purpose. In other words, had the merger doctrine governed the Court’s analysis in *Star Athletica*, Varsity Brands would likely have been *denied* copyright protection altogether.

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85. *Gates Rubber Co.*, 9 F.3d at 838 (first citing *Concrete Machinery Co. v. Classic Lawn Ornaments, Inc.*, 843 F.2d 600, 606–07 (1st Cir. 1988); then citing *Apple Computer, Inc. v. Microsoft Corp.*, 799 F. Supp. 1006, 1021 (N.D. Cal. 1992), *order clarified*, 821 F. Supp. 616 (1993); and then citing Steven R. Englund, *Note, Idea, Process, or Protected Expression?: Determining the Scope of Copyright Protection of the Structure of Computer Programs*, 88 MICH. L. REV. 866, 877 (1990)).

86. Brief for the Respondents at 18, *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002 (2017) (No. 15-866).

87. Brief for the Petitioner at 48, *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002 (2017) (No. 15-866); *see id.* at 33.

88. Brief of Professors Christopher Beccafusco and Jeanne Fromer as Amici Curiae in Support of Petitioner at 24–29, *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002 (2017) (No. 15-866)).

89. *See id.*

90. *Id.*

### III. WHY CONGRESS NEEDS TO ADDRESS *STAR ATHLETICA* WITH LEGISLATION

Section I of this Note recapped the legislative history of the Copyright Act, the term “useful article” in copyright law, and the relevant case law concerning copyright protection of fashion designs—dating from the 19th century to modern jurisprudence, which served as the backdrop for recent legislation and for the *Star Athletica* opinion. Section II provided background information to outline the critical differences between copyright and other areas of intellectual property, as they pertain to intellectual property protections afforded to the fashion industry, namely, copyright law and patent law and their respective protections, as well as copyright’s merger doctrine.

This Section explains why Congress needs to legislate to prevent the *Star Athletica* holding from circumventing clear congressional intent to withhold such protection from the fashion industry. In making this argument, Subsection A first provides a high-level analysis of the industries and consumers most acutely impacted by *Star Athletica* and then segues into a discussion of two important, but distinct, fashion industry phenomena: market monopolization (Subsection B) and the “piracy paradox” (Subsection C).

*Star Athletica* has the potential to disrupt the fashion industry in a way that could gravely impact the economy.<sup>91</sup> In his dissent, Justice Breyer warned that the “[d]ecision by this Court to grant protection to the design of a garment would grant the designer protection that Congress refused to provide. It would risk increased prices and unforeseeable disruption in the clothing industry, which in the United States alone encompasses nearly \$370 billion in annual spending and 1.8 million jobs.”<sup>92</sup> Justice Breyer’s dissent highlights some of the devastating implications of *Star Athletica* from an economic perspective.

Moreover, the Court’s departure from a traditional doctrinal application of the separability test was not necessary; other protections are available that do not carry the threat of anticompetitive practices.<sup>93</sup> Foreshadowing possible anti-competition litigation strategies, “Varsity [sought] to do indirectly what it [could not] do directly: bring along the design and cut of the dresses by seeking to protect surface decorations whose ‘treatment

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91. *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1035 (2017) (Breyer, J., dissenting).

92. *Id.*

93. Possible alternative means of protection include design patent, copyright in a *textile* design, and trademark protection. *Id.*

and arrangement' are *coextensive with that design and cut*.”<sup>94</sup> Despite the protections Varsity could have pursued—including design patent protection, copyright protection for a textile design<sup>95</sup>—the Court chose to extend copyright law to this case, and, unnecessarily, to fashion more broadly.

To avoid a flood of litigants seeking to copy Varsity's strategy, Congress must amend copyright law to explicitly deny its applicability to the fashion industry. Specifically, because copyrights are cheaper to obtain than patents and because it seems that copyright protection for those in the fashion industry is now easier to obtain than it was pre-*Star Athletica*, some lawyers have encouraged those seeking protection for “clearly articulated design choices” to “file aggressively” and “often.”<sup>96</sup>

Indeed, less than two weeks after *Star Athletica*, Puma sued Forever 21, alleging that the latter had knocked off Puma's shoes.<sup>97</sup> Although “[t]he core [of the] case was based on previously issued design patents and allegations of trade dress,” Puma “took photographs of the shoes, sent them into the Copyright Office as copyright applications, and asserted the knockoffs were infringing on their copyrights under *Star Athletica*.”<sup>98</sup> Puma's claim pushes the boundaries of *Star Athletica*.<sup>99</sup> However, courts will “likely see similar actions until the Copyright Office issues meaningful guidance.”<sup>100</sup> Although interpretive tension in this area of copyright law existed pre-*Star Athletica*,<sup>101</sup> the decision invites frequent and aggressive claims, which will perpetuate judicial inefficiency and interpretive tensions developing in the district and circuit courts.

#### A. *Who Bears the Cost of the Supreme Court's Decision?*

While the Supreme Court's holding in *Star Athletica* provides a more clearly delineated test to stand among those that had proliferated among the circuits and legal scholars, subsequent uncertainty within the industry as to the reach of this holding creates its own set of challenges.

In recent history, many companies have operated on (and made their profits from the exploitation of) an assumption that useful

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94. *Id.* at 1036.

95. *Id.* at 1035.

96. See, e.g., George Lyons, *Practice Tips for Copyright Owners in the Wake of Star Athletica v. Varsity Brands*, 24 WESTLAW J. INTELL. PROP. 3 (2017).

97. *Puma SE v. Forever 21, Inc.*, No. CV17-2523, 2017 WL 4771004 (C.D. Cal. June 29, 2017); Russ & Meyer, *supra* note 52, at 23.

98. Russ & Meyer, *supra* note 52, at 23.

99. *Id.*

100. *Id.*

101. See *supra* Section I.B.

designs were not copyrightable.<sup>102</sup> In the past, this worked well for the knockoff industry (think Forever 21 and H&M); so long as copycat designers avoided use of the original designers' trademarks, logos, or copyrighted prints, they could comfortably exploit the lack of copyright protection afforded to fashion, often capitalizing on the ambiguity surrounding the little protection that was traditionally available to original designers.<sup>103</sup> Thus, the Supreme Court's holding in *Star Athletica* may have serious implications for the fashion industry and, more specifically, both the knockoff and sports apparel industries.

For example, just as the cheerleader uniform has developed from simply a skirt and top to an immediately recognizable—if not iconic—symbol in American culture, so too have sports uniforms developed from humble beginnings to ubiquity and importance in American culture.<sup>104</sup> And against this backdrop, applying the foregoing principles to this niche of the fashion industry creates more questions than answers.<sup>105</sup> Are baseball uniforms slim-fit leggings and a buttoned-up top—or are they more? For example, what if a baseball uniform designer claims the pinstripes and the piping along the seams of these jerseys as “copyrighted works?” Under the *Star Athletica* holding, would the claimant or the alleged copyright infringer prevail in litigation? And if the claimant prevails—what does this mean for baseball uniforms?

### B. Market Monopolization

This Note focuses on *Star Athletica*'s impact on the fashion industry—namely, the players operating within that industry from a manufacturing, production, and vending perspective. This focus makes sense when considering the incentive theory of copyright law: copyright protection exists to encourage the creation and dissemination of expression.<sup>106</sup> More formally, the instrumentalist and economic approaches to the theory of copyright define the goal

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102. Amanda Ciccattelli, *Star Athletica, LLC vs. Varsity Brands Case Continues to Spark Fashion Law Controversy*, INSIDE COUNSEL (May 18, 2016), <https://www.mintz.com/sites/default/files/media/documents/2018-04-10/Star%20Athletica%2C%20LLC%20vs.%20Varsity%20Brands%20case%20continues%20to%20spark%20fashion%20law%20controversy.pdf> [https://perma.cc/JPH9-9Y4D].

103. *Id.*

104. For an historical account of the prevalence of sports uniforms in the United States, see Susan L. Sokolowski, *Sports Uniforms*, LOVETOKNOW, <https://fashion-history.lovetoknow.com/clothing-types-styles/sports-uniforms> [https://perma.cc/S3CQ-LK5Y].

105. See 1 ALEXANDER LINDEY, LINDEY ON ENTERTAINMENT, PUBLISHING AND THE ARTS § 1:5.50 (3d ed. 2018) (“*Star Athletica* leaves many questions open. Take basketball shorts, for example . . . [A]re the stripes that run down the side protectable?”).

106. See Kauffman, *supra* note 65, at 752–53.

of copyright as “not to protect an author’s labor or personality, but to further the creation and dissemination of knowledge and culture.”<sup>107</sup> Viewed in this light, it becomes necessary to focus on the impact of judicial and legislative action on creators of the works protected by copyright.

In the context of cheerleader or sports uniforms, or other areas where the general appearance of the functional item is essential to its utility, separating—and extending copyright protection to—the graphic elements of a uniform from the overall piece of clothing is pointedly debilitating for competitors of the victor (e.g., Varsity Brands’s competition in the domain of cheerleader uniforms). When society has long associated a general shape, design, and aesthetic effect to the appropriate appearance of cheerleader uniforms, consumers will seek similar products from the market.

However, if companies are suddenly left exposed to unanticipated liability and scrambling to develop an adequately non-infringing alternative to their previously unchallenged iterations of Varsity Brands’s designs, there may not be a market from which consumers may choose. Absence of free market competition—especially within fashion markets that assumed copyright protection did *not* extend to fashion, based on widely-supported assertions from the Copyright Act, the Copyright Register’s Office, a majority of federal circuit courts, and legal scholars—exposes the market to the threat of monopolization.<sup>108</sup>

Brands that are in the position to assert copyright protection over the original designs of iconic sports uniform designs very well might race to the judicial system—ultimately, with the potential of securing for themselves a potent monopoly in one of the most lucrative clothing industries in the country.<sup>109</sup> Copyright infringement liability carries with it a shockingly wide range of potential damages: pursuant to section 504 of the Copyright Act, for *each* individual finding of copyright infringement, an infringer may be on the hook for a minimum of \$750 and a maximum of \$30,000.<sup>110</sup> This penalty likely deters many potential market contenders that lack the deep pockets to carry on in the face of uncertain liability. Moreover, when a court finds an act of infringement to be willful, the maximum penalty jumps to a staggering \$150,000 per infringement.<sup>111</sup>

Of course, the reviewing court has discretion within this wide

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107. BRAUNEIS & SCHECHTER, *supra* note 64, at 8.

108. See Haochen Sun, *The Distinctiveness of a Fashion Monopoly*, 3 N.Y.U. J. INTELL. PROP. & ENT. L. 142, 173–76. (2013).

109. *Id.*

110. 17 U.S.C. § 504(c)(1) (2012).

111. *Id.* § 504(c)(2).

range of liability damages and will consider many factors in assessing the final damage award to the plaintiff.<sup>112</sup> Nevertheless, a market contender toeing the line of infringement—given the Supreme Court’s holding and application of the separability doctrine—is not likely to gamble in the face of potentially ruinous pecuniary liability.

### C. *The Piracy Paradox*

Market monopolization is an important phenomenon, but it is distinct from what has been coined the “piracy paradox.” Both help flesh out the benefits of *sui generis* protection in the fashion industry, and this subsection explores the latter in greater detail.

For Little League baseball teams, Amateur Athletic Union basketball teams, and more, hesitant market contenders may cause a sharp decline in the generic alternatives to the name-brand jersey supplier. Notwithstanding the economic implications for the “little guys,” increasing copyright protections to the benefit of the originators in this context may also paradoxically disadvantage those whose interests the *Star Athletica* holding sought to protect.

Nearly a decade before the Supreme Court handed down the *Star Athletica* holding, two well-respected legal scholars in the intellectual property arena, Kal Raustiala and Christopher Sprigman, rationalized as to why fashion had not fought more valiantly for copyright protection.<sup>113</sup> Their article *The Piracy Paradox* first lays out the traditional, utilitarian justification for intellectual property rights and protections.<sup>114</sup> In summary, this justification notes that innovation is difficult—both conceptually and economically—to create but relatively easy to copy.<sup>115</sup> Without property rights available for their innovations, creators lack incentive to innovate when they can otherwise expend considerably less effort by simply copying the works of others (especially where creators face the prospect of copyists capitalizing on the creator’s efforts—for free).<sup>116</sup>

The crux of Raustiala and Sprigman’s article, however, lies in the paradox identified by the authors that seems to cut against the standard justification for intellectual property right protection.<sup>117</sup> The fashion industry, specifically, presents a “significant empirical

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112. *See id.*

113. Raustiala & Sprigman, *supra* note 6.

114. *Id.* at 1688.

115. *Id.*

116. *Id.*

117. *Id.* at 1689.

anomaly” in this context.<sup>118</sup> Fashion is a global industry that generates vast amounts of creative goods, and its markets are larger than the markets for movies, books, music, and other products with considerable copyright protection; the fashion industry thrives despite the absence of strong intellectual property protection.<sup>119</sup>

Given the legal climate at the time the article was published, the authors’ assertion that fashion was largely outside the domain of copyright protection was accurate. *Star Athletica* has since altered this equilibrium. Characterizing fashion’s “principal creative element” as its “apparel designs,” the article explores how—and why—a formidably sized industry has managed to survive and flourish<sup>120</sup> (notably, without the protections that the Supreme Court, a decade later in *Star Athletica*, seemed to consider wanting in the fashion industry).

Notwithstanding its publication a decade before the *Star Athletica* holding, the article highlights rational explanations for why (until recently) copyright protection has simply not been needed nor extended to the fashion industry.<sup>121</sup> Specifically, the authors pose the following questions: “Why is copying in the fashion industry treated so differently from copying in other creative industries? Why, when other major content industries have obtained and made use of increasingly powerful IP protections for their products, does fashion design remain mostly unprotected?”<sup>122</sup>

Ultimately, *The Piracy Paradox* argues that copying fails to deter innovation in the fashion industry because copying isn’t actually harmful to creators (a.k.a. “originators”); rather, copying “may actually promote innovation and benefit originators”—a phenomenon appropriately dubbed the “piracy paradox.”<sup>123</sup>

Globally, the fashion industry has exceeded apparel sales of more than \$750 billion annually.<sup>124</sup> The unique makeup of the fashion industry—which is highly segmented and operates in a pyramid-like dichotomy—requires designers to create new, innovative styles on a predictably seasonal timeline.<sup>125</sup> In an effort to summarize the top-down pyramid inherent in the fashion industry, an over-simplification must suffice.

Imagine a pyramid with three tiers. At the very top is the upper

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118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at 1691.

122. *Id.*

123. *Id.*

124. *Id.* at 1693.

125. *Id.* at 1693–94.

echelon of fashion's wealthiest consumers—the purveyors of the exclusive, the custom, and the unattainable. For these consumers, exclusivity is critical.<sup>126</sup> Why pay thousands of dollars (if not astonishingly more) for an *avant garde* or highly-coveted article of clothing if others can readily access the same product (or very similar products) almost simultaneously—and for a far more reasonable purchase price?

In the middle of the pyramid are fashion consumers. These consumers cannot afford the custom designs of the top tier but will still pay considerable sums for off-the-rack merchandise of perceived quality and “of-the-moment” style. Here, too, consumers are concerned with the status communicated by their clothing. *The Piracy Paradox* describes the labels (a.k.a. the “better fashion” tier) that cater to these consumers as the Banana Republics and Ann Taylors of clothing vendors.<sup>127</sup>

At the bottom of the pyramid is the commodity apparel.<sup>128</sup> Here, the clothing is the least expensive, the most basic, and the slowest to change.<sup>129</sup> Vendors at this level include Old Navy, Walmart, and Target.<sup>130</sup>

It may be helpful to revisit the difference between trademark protection and copyright protection—while both are under the umbrella of intellectual property protection, they operate very differently. For example, trademark protection within the fashion industry remains relatively strong where applicable, but as it relates to the actual fashion designs like those at issue in *Star Athletica*, trademark applicability is quite limited.<sup>131</sup> Certain, distinctive patterns are so iconic as to be trademarked.<sup>132</sup> Examples include the Burberry plaid, the Louis Vuitton “LV” mark, and the Chanel logo. These are all trademarks of their respective labels and—because labels often incorporate these trademarks into the design of a fashion article—can often serve as adequate protection against *design* (in addition to trademark) copying.<sup>133</sup>

As it turns out, there is also an important difference between “counterfeits” and “knockoffs,” which critics have often overlooked.<sup>134</sup> As Julia Zerbo, founder and editor-in-chief of *The*

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126. *See id.* at 1694 fig.A.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* at 1701.

132. *Id.*

133. *Id.*

134. Julie Zerbo, *In Response: Is Counterfeiting Actually Good for Fashion?*, FASHION L. BLOG, (Aug. 28, 2017), <http://www.thefashionlaw.com/home/in-response-is-counterfeiting-actually-good-for-fashion> [<https://perma.cc/3RGJ-3WWL>].

*Fashion Law*, a blog that seeks to serve as “an independent source for fashion law, business, and culture,”<sup>135</sup> explains, the paradox makes “an argument in favor of knockoffs, a copyright-specific term that refers to garments and accessories that are copies but that do *not* make illegal use of others’ trademarks.”<sup>136</sup> Zerbo makes a critical distinction between knockoffs and counterfeits and explains that “[u]ses of others’ trademarks - which is absolutely required in order for something to be called a counterfeit (another fun little Google-able fact) - falls under the umbrella of trademark law.”<sup>137</sup>

Outside the confines of this limited means of trademark protection creatively extending to design copying, appropriation of designs runs rampant within the fashion industry.<sup>138</sup> For example, H&M, Topshop, Zara, and Forever 21 are behemoth stores with hundreds of locations across the country, and their primary business model in some sense operates to bring “runway trends” (i.e., the works of other designers, since none of the aforementioned “fast-fashion” firms are runway designers) to lower-price-point online and retail stores nationwide.<sup>139</sup> These stores operate on business models designed to copy—and copy quickly.

So why has there not been more litigation over the ubiquitous copying that runs (and for decades has run) rampant in the fashion industry? Unlike the fashion industry, other industries have spent millions of dollars lobbying legislators to enact laws protecting from this kind of copying (notably, the movie and music industries).<sup>140</sup> The answer, according to some, lies in two “twin” phenomena: induced obsolescence and anchoring.<sup>141</sup> Induced obsolescence occurs when a new fashion is copied: once copying occurs, the next fashion cycle begins— high-end designers “drop” the first design (now obsolete) in favor of the next “it” design.<sup>142</sup> Anchoring is created by widespread copying across the fashion industry and ultimately serves as the foundation for fashion trends.<sup>143</sup>

Extensive copying, absent the risk of liability or litigation, rapidly diffuses trends from the top of the pyramid down to its base. This creates an incentive for fashion creators—most often at the top of the pyramid—to constantly produce new and innovative designs

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135. *About*, FASHION L. BLOG, <http://www.thefashionlaw.com/about/> [https://perma.cc/KKU7-J8TY].

136. Zerbo, *supra* note 134.

137. *Id.*

138. *Id.*

139. Raustiala & Sprigman, *supra* note 6, at 1705.

140. *Id.* at 1695.

141. *Id.* at 1718, 1728.

142. *Id.* at 1722.

143. *Id.* at 1728–29.

in order to stay ahead of the diffusion rate.<sup>144</sup> An important economic incentive for these fashion creators is the impact this diffusion rate also has on consumers, ultimately contributing to a market from which “consumers purchase apparel at a level well beyond that necessary simply to clothe themselves” and changes to consumer habits affected by the degree of protection afforded.<sup>145</sup> “More fashion goods are consumed in a low-[intellectual property] world than would be consumed in a world of high-[intellectual property] protection,” a phenomenon explained at least in part by the rationale that “copying rapidly reduces the status premium conveyed by new apparel and accessory designs, leading status-seekers to renew the hunt for the next new thing.”<sup>146</sup>

Notwithstanding the above discussion regarding who is truly affected by *Star Athletica*, proponents of the piracy paradox theory contend that—even if we were to have the high-fashion houses and creators’ interests in mind—a low-intellectual property protection industry quite arguably serves their interests the best. And, if we accept this argument, a question echoes in its wake: is there anyone who actually benefits from *Star Athletica*’s holding?

#### IV. A PROPOSAL: SUI GENERIS PROTECTION FOR THE FASHION INDUSTRY

Where Congress has recognized a particularized need for intellectual property protection, it has provided such protection. For example, in 1998, Congress added the Vessel Hull Design Protection Act (the “Vessel Hull Act”) to the Copyright Act, providing protection for the designs and shapes of vessel hulls.<sup>147</sup>

This Note argues that the Vessel Hull Act—unique in the types of protections that it provides—serves as the model that will most effectively protect the fashion industry. Specifically, the Vessel Hull Act offers unique protections that differ from other types of intellectual property law—such as copyright, trademark, and design patent law (discussed above)—and a similarly tailored Act for the unique needs of the fashion industry serves as the most effective framework for its protection.

First, Subsection A provides a high-level overview of the Vessel Hull Act’s sui generis protections. Then, Subsection B discusses how, when considered together, the IDPAA and the Vessel Hull Act illustrate that sui generis protection is a viable alternative means of providing protection to the fashion industry.

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144. *Id.* at 1722.

145. *Id.* at 1733.

146. *Id.*

147. Vessel Hull Design Protection Act, 17 U.S.C. §§ 1301–32 (2012).

*A. Vessel Hull Design Protection Act: A Model for Copyright Protection in the Fashion Industry*

Unlike copyright law generally, the Vessel Hull Act requires that parties, in order to receive protection, register boat designs with the Copyright Office within two years of the date that a boat embodying those designs becomes public.<sup>148</sup> If a party fails to register a design within two years, then no protection is afforded.<sup>149</sup> Copyright, in contrast, protects ownership from the moment that a copyrightable work is created—that is, as soon as it is “fixed in any tangible medium of expression.”<sup>150</sup>

The Vessel Hull Act also differs from design patent law. Specifically, patent law requires a design to be non-obvious to a designer of ordinary skill to receive patent protection.<sup>151</sup> Under the Vessel Hull Act, on the other hand, a design need only be original (it cannot be a simple geometric shape or function).<sup>152</sup>

However, the originality requirement of the Vessel Hull Act is similar to the requirement of the Copyright Act’s section 102, which requires a work to be original in order to be eligible for copyright protection.<sup>153</sup> Courts consider the originality requirement to be a low bar, which mandates only independent creation plus a modicum of creativity.<sup>154</sup>

Scholars of copyright law have found it significant that the Vessel Hull Act speaks broadly about protection for “useful articles.”<sup>155</sup> The definition of “useful article” in section 1301(b)(2), however, is the only place in the Copyright Act where the term is used and then further limited to include only vessel hulls.<sup>156</sup> To some, this drafting choice suggests that Congress anticipated that it might later broaden the Vessel Hull Act to incorporate protections for other industrial designs.<sup>157</sup> While the legislative efforts behind the IDPAA have lost momentum, the text of the Vessel Hull Act suggests that sui generis protection can ultimately be extended to include “useful articles” like fashion designs. Considered together, the IDPAA and the Vessel Hull Act illustrate that sui generis protection is a viable alternative for providing

148. *Id.* § 1302.

149. *Id.*

150. Copyright Act of 1976, 17 U.S.C. § 102(a) (2012).

151. Jason J. Du Mont, *A Non-Obvious Design: Reexamining the Origins of the Design Patent Standard*, 45 GONZ. L. REV. 531, 532 (2010).

152. 17 U.S.C. § 1301(a)(1).

153. *Id.* § 102(a).

154. See *Feist Pub’ns v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991) (“To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice.”).

155. BRAUNEIS & SCHECHTER, *supra* note 64, at 190.

156. 17 U.S.C. § 1301(b)(2).

157. BRAUNEIS & SCHECHTER, *supra* note 64, at 190.

protection to the fashion industry.

*B. Sui Generis Application to Fashion Copyright*

Sui generis protection is a special form of protection that falls outside of copyright, patent, or trademark law.<sup>158</sup> Members of Congress have introduced bills that would amend the Vessel Hull Act by expanding the law to include fashion designs, but such bills have yet to pass.<sup>159</sup> By enacting shorter-term sui generis protection for clothing designers, similar to the ten-year period of protection under the Vessel Hull Act, Congress could ensure that it tailors intellectual property protection to accommodate the unique needs of the fashion industry. Moreover, fashion, like the boat manufacturing industry, is a highly specialized industry, and it has struggled to find an adequate way to protect its intellectual property.

For example, imposing a temporary delay on knockoff designers serves the interests of both the high-fashion designers and the stores that mass-produce knockoffs. This temporary delay would provide copyright protection to the original designers but only for a short period of time. Consumers, too, will benefit from this approach. Notwithstanding some form of copyright protection for the originators of the fashion, sui generis protection would shorten the window of protection for these designers. Ultimately, this enables some designs to develop eligibility for trademark protection while still allowing the knockoff designers to remain current enough to continue business. Moreover, it incentivizes fashion designers to develop new designs on a regular basis to encourage consumers to buy what's on-trend and new instead of resorting to knockoffs available nearly simultaneously with the designers' products.<sup>160</sup>

Moreover, the imposition of a sui generis protection scheme does not deter (at least, in any significant manner) the induced obsolescence phenomenon that is inherently beneficial to all fashion industry players. This is especially true when contrasted with the impact of heightened intellectual property protection to fashion suggested by *Star Athletica's* holding.

Given the recent shake-up to the fashion industry caused by the Court's opinion, enacting sui generis legislation would provide the fast-fashion firms clearer parameters under which they can perform their important copyist functions. This type of legislation

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158. See *supra* note 4.

159. Russ & Meyer, *supra* note 52, at 22.

160. See Raustiala & Sprigman, *supra* note 6, at 1722.

would mitigate the H&Ms of the fashion industry from worries of bankruptcy-inducing litigation, afford the high-fashion retailers a slightly longer window of time to enjoy the profits from the exclusivity of their most recent products, and still lead to the inevitable induced obsolescence once the short window of copyright protection for these designs closes.

#### CONCLUSION

Congress should act swiftly to provide sui generis protection to the fashion industry to avoid the negative implications of *Star Athletica* and furnish appropriate protection to an industry with identifiably unique copyright needs. Specifically, because (1) *Star Athletica* provides protection Congress specifically chose not to extend to fashion, (2) there are other protections available to industry players that better suit the maintenance of the fashion industry, and (3) the opinion has the potential to decimate the knockoff industry, Congress should reconsider the IDPPA proposal and enact a similar provision.

