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Defining Fashion

INTERPRETING THE SCOPE OF THE DESIGN PIRACY PROHIBITION ACT

I. INTRODUCTION

At the 2006 Academy Awards Show, actress Felicity Huffman wore a black gown created by twenty-seven-year-old fashion designer Zac Posen.¹ Earlier that year, her television show co-star, Marcia Cross, wore a \$3,800 coral dress by emerging designer Marc Bouwer to the Golden Globe Awards.² Within weeks of the two award shows, copies of both dresses were being sold in department stores, at a fraction of their original prices, by manufacturers that specialize in creating “knockoffs” of designer dresses worn by celebrities on the red carpet.³ While these manufacturers flourish,⁴ the emerging designers behind the original gowns are operating their businesses at a loss.⁵ Although it may seem unfair that retail companies exploit the design investment of struggling young designers by copying their works, the practice is entirely legal today.⁶

¹ *Design Piracy Prohibition Act: Hearing on H.R. 5055 Before the Subcomm. on Courts, the Internet and Intellectual Property*, 109th Cong. 3, 12 (2006) [hereinafter *Hearings*] (statement of Jeffrey Banks, fashion designer); Ruth La Ferla, *Night of a Thousand Knockoffs*, N.Y. TIMES, Mar. 9, 2006, at G11.

² Anne Bratskeir, *The Foldinspiring Dresses: Pathway to the Prom*, NEWSDAY, May 18, 2006, at A42.

³ *Id.* The dress copied from Bouwer’s design sold for less than \$300. *Id.*

⁴ See La Ferla, *supra* note 1 (noting the proliferation of companies that specialize in “cranking out replicas” of dresses worn by celebrities to the Academy Awards show, with sales of such apparel totaling around \$300 million a year).

⁵ Teri Agins, *Designer Can Generate Buzz But Not Profits*, STARTUP J., WALL ST. J. ONLINE (Wall St. J. Cent. for Entrepreneurs) (Sept. 19, 2005), <http://www.startupjournal.com/runbusiness/survival/20050919-agins.html> (reporting on the “new generation of rising fashion stars struggling to follow the path of financial success” and noting the difficulties of turning a profit in the high-end fashion industry, in which designers cannot profit from economies of scale since only a relatively small number of garments are produced per design).

⁶ For a discussion of the current lack of legal protection against the unauthorized copying of fashion designs, see *infra* Part II.A.

The current copyright law, governed by the Copyright Act of 1976, does not explicitly protect “fashion,” although the Act does provide protection for “pictorial, graphic and sculptural works,”⁷ so long as the works are not “useful article[s].”⁸ Nor does current copyright law protect “design,” with the exception of the Architectural Works Copyright Protection Act of 1990,⁹ which provides copyright protection for architectural designs; the Semiconductor Chip Protection Act,¹⁰ which provides protection for semiconductor chips; and the Vessel Hull Design Protection Act of 1998 (“VHDPA”), a recently enacted amendment to Title 17 that provides protection for the designs of vessel hulls.¹¹

To close what appears to be a gap in the scope of copyright protection, on March 30, 2006, U.S. Representative Robert Goodlatte introduced the Design Piracy Prohibition Act (“DPPA”), amending Title 17 to provide sui generis copyright protection for fashion design.¹² Senator Charles Schumer introduced the Bill in the Senate on August 2, 2007.¹³ Under the terms of the DPPA, the VHDPA would be amended to include protection for fashion designs in addition to the vessel

⁷ 17 U.S.C. § 102(a) (2000). “Pictorial, graphic, and sculptural works” include two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans.” *Id.* §101.

⁸ *Id.* § 113; see *infra* notes 28-33 and accompanying text. Protection has been provided to a broad range of works, ranging from portrait photographs, *Burrow-Giles Lithographic Co. v. Saroni*, 111 U.S. 53, 54-55 (1884), to real estate ownership maps, *Mason v. Montgomery Data*, 967 F.2d 135, 135 (5th Cir. 1992), to statuettes of dancers used as bases of table lamps, *Mazer v. Stein*, 347 U.S. 201, 202, 213-14 (1954).

⁹ 17 U.S.C. § 102(a)(8) (2000).

¹⁰ *Id.* § 901-914.

¹¹ *Id.* §1301. The VHDPA was enacted in response to the Supreme Court’s decision in *Bonito Boats v. Thunder Craft Boats*, in which the designer of a fiberglass recreational boat unsuccessfully sought redress for the alleged unlawful duplication of the boat’s hull design under a Florida statute that prohibited copying another’s vessel design for commercial purposes without consent. 489 U.S. 141, 143 (1989). The Court invalidated the Florida statute on the grounds of federal preemption. *Id.* at 145. The VHDPA defines “vessel” as a “craft . . . designed and capable of independently steering a course on or through water through its own means of propulsion; and . . . designed and capable of carrying and transporting one or more passengers.” 17 U.S.C. § 1301(b)(3) (2000). A “hull” is defined as “the frame or body of a vessel, including the deck of a vessel, exclusive of masts, sails, yards, and rigging.” *Id.* § 1301(b)(4).

¹² Design Piracy Prohibition Act, H.R. 5055, 109th Cong. (2d Sess. 2006); *Goodlatte Introduces Legislation Granting Protection to Fashion Designs*, 71 PAT., TRADEMARK & COPYRIGHT J. 615, 615 (2006).

¹³ Design Piracy Prohibition Act, S. 1957, 110th Cong. (2007). References throughout this Note cite to H.R. 5055, the bill introduced in the House of Representatives; however, since the two bills are identical the analysis applies equally to S. 1957, the bill introduced in the Senate.

hull designs currently protected under the Act.¹⁴ “Fashion design” is defined under the proposed amendment as “the appearance as a whole of an article of apparel, including its ornamentation.”¹⁵ The Bill further specifies that “[t]he term ‘apparel’ means . . . an article of men’s, women’s, or children’s clothing, including undergarments, outerwear, gloves, footwear, and headgear; handbags, purses, and tote bags; belts; and eyeglass frames.”¹⁶ As of this writing, Congress has not yet voted on the DPPA.

The Bill, however, seems to raise more questions than it answers. For example, what constitutes “fashion design” under the DPPA? What constitutes “apparel”? While the Bill purports to define these terms, there remains a risk that the legislation, if interpreted broadly, will protect too much in light of its purpose.¹⁷ At the same time, there is also a risk that, if interpreted narrowly, the legislation will not cover enough—that it will miss some items that *should* be protected.¹⁸ If the Bill is enacted, courts will need to undertake a case-by-case analysis to determine whether a given item constitutes a “fashion design” under the legislation. This case-by-case analysis will lead to unpredictable outcomes. For example, one court might take a narrow approach to interpreting the legislative language by protecting a designer’s rainboots as “footwear,” but denying protection to the same designer’s umbrellas because “umbrellas” are not explicitly listed under the definition of “apparel.”¹⁹ Another court might take a

¹⁴ H.R. 5055.

¹⁵ *Id.* § 1.

¹⁶ *Id.*

¹⁷ *See infra* Part III.

¹⁸ *See infra* Part III. It is not clear whether from a policy perspective fashion design should be protected at all. Commentators have expressed mixed opinions about the effect copyright protection would have on the fashion industry. *See, e.g.*, Jonathan M. Barnett, *Shopping for Gucci on Canal Street: Reflections on Status Consumption, Intellectual Property, and the Incentive Thesis*, 91 VA. L. REV. 1381, 1422 (2005) (questioning “the assumption that counterfeiting unambiguously harms incentives to invest in the fashion-goods industry by depriving producers of a portion of their investment proceeds”); Anne Theodore Briggs, *Hung Out to Dry: Clothing Design Protection Pitfalls in United States Law*, 24 HASTINGS COMM. & ENT. L.J., 169, 171 (2002) (arguing that “the enactment of clothing design protection laws would benefit both U.S. consumers and clothing designers”); Safia A. Nurbhai, Note, *Style Piracy Revisited*, 10 J.L. & POL’Y, 489, 494 (2002) (recommending that “Congress extend the boundaries of copyright protection . . . to reward the efforts of fashion designers”). This Note will not address the normative question of whether fashion *should* be copyrighted, but rather will examine the ways courts may interpret the DPPA if it is enacted into law.

¹⁹ H.R. 5055; *see infra* note 183 and accompanying text.

broader approach when interpreting the legislation to decide that although a man's wallet is not on the list of items defining "apparel," it is nevertheless covered under the statute's provision for accessories.²⁰ Such different treatment of the designer umbrella and the wallet would be arbitrary and unfair. Moreover, if the court in either scenario had taken the other court's interpretive approach, the outcome would likely be different: the umbrella may have received protection under the second court's broad approach, and the wallet may not have received protection under the first court's narrow approach. It is difficult for litigants to predict how a given court will interpret the statute with regard to their specific case.

This Note will therefore examine the potential problems relating to the scope of the legislation and the various approaches courts will likely take in interpreting the term "fashion design" if the Bill is enacted into law. Part II will review the background of the DPPA, including the current state of copyright law protection for fashion design. It will provide a brief overview of the fashion industry, as well as the history and purpose of the proposed legislation. Part III will suggest that there are significant risks that the proposed legislation will be interpreted in ways that are both over-inclusive and under-inclusive in light of its purpose. Part IV will address the various approaches courts may take in interpreting the legislation. Part V will discuss the likely outcomes under each approach. Part VI will predict that courts will use a variety of interpretive approaches in any given case, and will offer suggestions as to how Congress can provide courts with greater guidance in interpreting the statute so that judicial outcomes under the legislation will be more predictable and consistent with its purpose.

II. BACKGROUND OF THE DPPA

Currently, there is minimal copyright protection for fashion and designers face what are often insurmountable hurdles in obtaining protection for their designs.²¹ The lack of legal protection is greatly reflected in the fashion industry, in which there is a substantial amount of copying within and between various parts of the industry.²² In response to this

²⁰ See *infra* Part IV.C.3.

²¹ See *infra* Part II.A.

²² See *infra* Part II.B.

state of affairs, the DPPA was introduced to protect fashion designers from piracy.²³

A. *Copyright Protection for Fashion: The Current State of the Law*

At present, fashion designers have practically no redress in the courts if someone copies their designs, as fashion designs are rarely protected by copyright law or any other area of intellectual property law.²⁴ The current Copyright Act seems to sweep broadly, providing protection for “original works of authorship fixed in any tangible medium of expression”²⁵ and stipulating a list of categories of “works of authorship” subject to copyright protection.²⁶ While neither “fashion” nor “design” is included on that list, clothing apparel would seem to fall within the “pictorial, graphic and sculptural works”²⁷ category. However, the Act specifically limits the scope of copyright protection under this category, providing that designs of “useful articles” are not protected.²⁸ “Useful articles” are works that have “an intrinsic utilitarian function that is not merely to portray the appearance of the article or to

²³ See *infra* Part II.C.

²⁴ See generally Briggs, *supra* note 18, at 170-71 (outlining “the shortcomings in current patent, copyright, and trademark laws with respect to clothing designs”); Samantha L. Hetherington, *Fashion Runways Are No Longer the Public Domain: Applying the Common Law Right of Publicity to Haute Couture Fashion Design*, 24 HASTINGS COMM. & ENT. L.J. 43, 44 (2001) (“Under present United States intellectual property law, clothing design is not protected by federal copyright, trademark/trade dress, or patent law, nor is it protected by any state intellectual property regime.”); S. Priya Bharathi, Comment, *There Is More Than One Way to Skin a Copycat: The Emergence of Trade Dress to Combat Design Piracy of Fashion Works*, 27 TEX. TECH L. REV. 1667, 1672 (1996) (noting that current focus on copyright protection for fashion design is “due to the ineffectiveness of other bodies of law in handling the problem”); Julie P. Tsai, Note, *Fashioning Protection: A Note on the Protection of Fashion Designs in the United States*, 9 LEWIS & CLARK L. REV. 447, 452 (2005) (providing overview of trademark, patent, and copyright law and discussing how these areas of the law “are currently problematic when applied to protection of fashion designs”).

²⁵ 17 U.S.C. § 102(a) (2000).

²⁶ *Id.* § 102(a) (“Works of authorship include the following categories: (1) literary works; (2) musical works . . . ; (3) dramatic works . . . ; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works.”).

²⁷ *Id.*

²⁸ *Id.* § 101(7) (“[T]he design of a useful article, as defined in this section, shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, 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.”); see 18 AM. JUR. 2D *Copyright and Literary Property* § 31.

portray information.”²⁹ For example, at least one court has held that automobile hubcaps are not protected as “sculptural” works because hubcaps are useful articles.³⁰ An exception is made for aspects of a work that “can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.”³¹ In the case of the hubcaps, the court found that the ornamental aspects of the wheel coverings could not be separated from their utilitarian aspects.³² These provisions of the Copyright Act, commonly referred to as the “useful articles doctrine,” reflect Congress’ desire to restrict from copyright protection articles that serve utilitarian or functional purposes.³³

Generally, courts have considered clothing to be “useful articles” and therefore not protected by the Copyright Act.³⁴ Although in a few fringe cases designers have attempted to bypass the useful articles doctrine by arguing that the item in question was actually art (rather than clothing),³⁵ or that the aesthetic elements of the item in question were separable from the useful quality of the item,³⁶ the results of these rare cases

²⁹ *Id.*

³⁰ *Norris Indus., Inc. v. Int’l Tel. & Tel. Corp.*, 696 F.2d 918, 923-24 (11th Cir. 1983).

³¹ 17 U.S.C. § 101 (2000).

³² *Norris*, 696 F.2d at 923.

³³ *See Briggs, supra* note 18, at 181. The rationale is that these types of works are more valuable to the public and so should not be given the same monopoly-like protection as other copyrighted works. Useful works are more properly the subject of patent protection. *Id.* at 181-82.

³⁴ *See, e.g., Lim v. Green*, 243 F.3d 548, 2000 WL 1693680 *1 (9th Cir. 2000) (“[I]t has long been established that clothing designs are not subject to copyright protection.”); *Whimsicality, Inc. v. Rubie’s Costume Co., Inc.*, 891 F.2d 452, 455 (2d Cir. 1989) (“We have long held that clothes, as useful articles, are not copyrightable.”); *Morris v. Buffalo Chips Bootery*, 160 F. Supp. 2d 718, 720 (S.D.N.Y. 2001) (“[I]tems of clothing are, as a general rule, uncopyrightable ‘useful articles.’”); *Eve of Milady v. Impression Bridal, Inc.*, 957 F. Supp 484, 489 (S.D.N.Y. 1997) (“It is firmly established in the Second Circuit that clothes are not copyrightable.”).

³⁵ In *Poe v. Missing Persons*, the plaintiff, “an artist and fashion designer whose clothing styles are recognized in the fashion world,” argued that his creation was a “three-dimensional work of art in primarily flexible clear-vinyl and covered rock media,” a sculpture that qualified for copyright protection. 745 F.2d 1238, 1240 (9th Cir. 1984). The defendant argued that the item was actually a bathing suit, which served a useful purpose. *Id.* at 1239. The Ninth Circuit recognized that a genuine issue of material fact existed as to whether the work was a copyrightable piece of art or a non-copyrightable swimsuit. *Id.* at 1243. *But see Morris*, 160 F. Supp. 2d at 720-21 (flatly rejecting plaintiff-designer’s argument that the items in controversy, the leather But-N Up Vest and Apron Dress, were actually art, not clothing, and therefore subject to copyright protection).

³⁶ Courts have developed various approaches to determine whether a given work that contains both aesthetic and utilitarian features constitutes a “useful article” under the Copyright Act. When the functional part of the work can be physically

are confusing and inconsistent.³⁷ Thus, under current copyright law, fashion designers face an uphill battle in acquiring copyright protection for their creations. Because of the useful articles doctrine their chances for success in infringement claims are slim.³⁸

B. *The Fashion Industry and Copying*

The fashion industry is a distinctive, sprawling and highly profitable sector of the United States and global economies, the parameters of which cannot be concisely defined.³⁹ The industry includes everything from haute couture

separated from the non-functional part of the work, courts will simply recognize protection in the non-functional part of the work. *See, e.g.*, *Mazer v. Stein*, 347 U.S. 201, 213-14 (1954). However, when the functional aspect of the work cannot be physically separated, courts determine whether the non-functional aspect can be separated *conceptually*. *See, e.g.*, *Kieselstein-Cord v. Accessories by Pearl, Inc.*, 632 F.2d 989, 994 (2d Cir. 1980). Numerous tests have been suggested for determining whether non-functional aspects of a work may be conceptually separated from the overall work as a whole. *See, e.g.*, *Brandir Int'l, Inc. v. Cascade Pacific Lumber Co.*, 834 F.2d 1142, 1145 (2d Cir. 1987); *Carol Barnhart Inc. v. Economy Cover Corp.*, 773 F.2d 411, 423 (2d Cir. 1985); *Kieselstein-Cord*, 632 F.2d at 993. Fashion designer plaintiffs have succeeded in gaining at least partial copyright protection for their works on conceptual separability grounds in a handful of cases. *Id.* (copyright protection recognized in belt buckles because “[t]he primary ornamental aspect of the . . . buckles is conceptually separable from their subsidiary utilitarian function”); *Animal Fair, Inc. v. Amfesco Indus., Inc.*, 620 F. Supp. 175, 177, 187 (D. Minn. 1985) (finding that the design features of a “slipper resembling a bear’s paw” are conceptually separable from the utilitarian aspect of the slipper and therefore subject to copyright protection).

³⁷ A number of cases involving the copyrightability of costumes and masks illustrate the lack of consistency and predictability in these cases. In *Nat'l Theme Productions v. Beck, Inc.*, the court found that certain costumes (the Tigress, Rabbit In Hat, Magic Dragon, and Pampered Pup) were copyrightable because their design and form did not have much to do with their suitability as “apparel.” 696 F. Supp. 1348, 1353 (S.D. Ca. 1988). However, in *Whimsicality, Inc. v. Rubie's Costume Co.*, 1998 WL 178856, at *2 (E.D.N.Y.), and *Whimsicality, Inc. v. Battat*, 27 F. Supp. 2d 456, 458, 466 (S.D.N.Y. 1998), the courts declined to recognize copyright protection for similar costumes (Lion, Bee, Stegosaurus, Frog, Ladybug, Turtle, and Lion); *see also* *Chosun Int'l, Inc. v. Chrisha Creations, Ltd.*, 413 F.3d 324, 325-29 (2d Cir. 2005) (remanding this case addressing copyrightability of plush animal-themed Halloween costumes on the grounds that the trial court erroneously failed to apply the conceptual separability analysis because it found the separability tests to be incoherent); Briggs, *supra* note 18, at 184 (“This tangled spaghetti of separability tests is confusing and subjective to say the least.”).

³⁸ *See* Briggs, *supra* note 18, at 180-84; Tsai, *supra* note 24, at 460.

³⁹ *See* David Bollier & Laurie Racine, *Ready to Share: Creativity in Fashion & Digital Culture*, in *READY TO SHARE: FASHION & THE OWNERSHIP OF CREATIVITY* 29, 39 (David Bollier & Laurie Racine eds., 2006) [hereinafter *READY TO SHARE*] (“It is difficult to find reliable numbers to describe the scale and scope of the fashion industry. It is a sprawling global enterprise consisting of many specialty clusters (apparel, accessories, fabric, etc.) with many interconnected and irregular players (designers, manufacturers, merchandisers, marketers, etc.).”); *see also* Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in*

design houses,⁴⁰ such as Chanel and Gucci, to mass-produced brands of apparel, such as those sold at discount stores, like Wal-Mart and Target.⁴¹ In their article on intellectual property and fashion design, Kal Raustiala and Christopher Sprigman provide a helpful overview of the basic structure of the fashion industry.⁴² They view the fashion industry through a pyramid structure with three broad categories: a small “designer” category at the top, which includes haute couture and, just below it, designer ready-to-wear;⁴³ a larger “better” fashion category in the middle, which includes moderately priced apparel (for example, Banana Republic); and an even larger “basic” or “commodity” fashion category at the bottom (for example, Old Navy, Wal-Mart).⁴⁴ Raustiala and Sprigman recognize that “[t]he borders between product categories are indistinct,”⁴⁵ but generally, “design content” and “design turnover” are greater toward the top of the pyramid, and price “increases as one ascends the pyramid.”⁴⁶ Many fashion designers design apparel within multiple categories of the pyramid.⁴⁷

Within the trend-driven fashion industry, copying and “referencing” other designers’ work are exceedingly prevalent, both within and between the categories of the pyramid.⁴⁸ Some

Fashion Design, 92 VA. L. REV. 1687, 1693 (2006) (“The global fashion industry sells more than \$750 billion of apparel annually.”).

⁴⁰ “Couture” design houses produce “custom clothing designed almost entirely for women and sold at very high prices.” Raustiala & Sprigman, *supra* note 39, at 1693.

⁴¹ “There is no such thing as a ‘typical’ fashion enterprise—the sector consists of a broad spectrum of companies in apparel, textile and accessories ranging from the high-end couture houses to mass-produced, low-priced commodity goods.” Aram Sinnreich & Marissa Gluck, *Music & Fashion: The Balancing Act Between Creativity and Control*, in *READY TO SHARE*, *supra* note 39, at 47, 60.

⁴² Raustiala & Sprigman, *supra* note 39, at 1693-95.

⁴³ For definition of “haute couture,” see *supra* note 40. Designer ready-to-wear includes prestige collections (e.g., Giorgio Armani, Dolce & Gabbana, Calvin Klein) and lower-priced bridge collections (e.g., Emporio Armani, D+G, CK Calvin Klein) of famous designers. Raustiala & Sprigman, *supra* note 39, at 1693-94.

⁴⁴ Raustiala & Sprigman, *supra* note 37, at 1693-94.

⁴⁵ *Id.* at 1694 n.11.

⁴⁶ *Id.*

⁴⁷ *Id.* “For example, Giorgio Armani produces couture apparel, a premium ready-to-wear collection marketed via its Giorgio Armani label, differentiated bridge lines marketed via its Armani Collezioni and Emporio Armani brands, and a ‘better clothing’ line distributed in shopping malls via its Armani Exchange brand.” *Id.*

⁴⁸ *Winning Ways, Inc. v. Holloway Sportswear Inc.*, 903 F. Supp. 1457, 1459 (D. Kan. 1995) (“Utilizing competitors’ design features is common practice in the fashion industry.”); Raustiala & Sprigman, *supra* note 39, at 1727-28 (“Original ideas are few, and the existence of fashion trends typically means that many actors copy or rework the ideas of some originator Some may originate more than others, but all

clothing producers directly and intentionally copy the works of other fashion designers, often marketing the copies at substantially lower prices.⁴⁹ Fashion magazines routinely feature articles instructing readers on where to purchase “knockoffs” of high-end fashion and couture pieces at prices well below those of the originals.⁵⁰ Other clothing producers more subtly allude to the works of other designers by reinterpreting or reinventing existing fashion designs.⁵¹ Many high-end fashion designers themselves admit to reinventing and elaborating on other designs.⁵²

It is unclear exactly how the prevalence of copying has affected the fashion industry and specific designers within it. Designers themselves have a range of views about copying.⁵³

engage in some copying at some point—or, as the industry prefers to call it, ‘referencing.’”); see also Sinnreich & Gluck, *supra* note 41, at 56 (“Fashion is a chaotic if highly stratified industry, and the directional flow of aesthetics is now top-down, bottom-up, and side-to-side. Ideas flow in every direction . . .”).

⁴⁹ For example, Allen Schwartz, founder and designer of A.B.S., produces apparel such as evening gowns closely modeled after the designs of high-end fashion designers. According to his website, “He is revered and applauded for the extraordinary job he does of bringing the latest trends to the stores in record time.” A.B.S. by Allen Schwartz, <http://www.absstyle.com> (select “About Us” hyperlink) (last visited Mar. 3, 2008). A New York Times journalist has noted that “fashion designers do not design so much as swipe from fashion industry” while reporting on the popularity amongst elite fashion designers of a Greenwich Village shop with a large collection of vintage fashion magazines. Guy Trebay, *Ideas & Trends: Fashion Replay; Imitation Is the Mother of Invention*, N.Y. TIMES, July 7, 2002, at 4.

⁵⁰ Eric Wilson, *O.K., Knockoffs, This Is War*, N.Y. TIMES, Mar. 30, 2006, at G1; Raustiala & Sprigman, *supra* note 39, at 1706-11 (illustrating this phenomenon with *Marie Claire*’s regular feature titled “Splurge or Steal”).

⁵¹ Some fashion experts argue that no new fashion design is truly unique—that all new fashion is influenced by prior and existing designs. David Wolfe of the Doneger Group—a company specializing in “global market trends and merchandising strategies to the retail and fashion industry,” Doneger Group, <http://www.doneger.com/web/231.htm> (last visited Jan. 27, 2007)—claims that “[a]ll fashion designs are merely rearrangements of existing elements that are used by all designers.” Anandashankar Mazumdar, *Witnesses Clash on Need for Granting Copyright Protection to Fashion Designs*, 72 PAT., TRADEMARK & COPYRIGHT J. 360, 360 (2006).

⁵² See Trebay, *supra* note 49 (reporting on various instances of designers copying other designers: design house Balenciaga copied a vest from designer Kaisik Yoon’s collection; Marc Jacobs admitted to copying an Oscar de la Renta coat design; Yves Saint Laurent sued Ralph Lauren, accusing the design house of copying a tuxedo design; Adolfo copied Coco Chanel; Tom Ford copied Halson; Alexander McQueen copied Vivienne Westwood; Miuccia Prada copied a Balenciaga coat). As to the Balenciaga coat, Trebay quotes a photographer saying, “I mean copied it exactly.” *Id.*; see also Cathy Horyn, *Is Copying Really a Part of the Creative Process?* N.Y. TIMES, Apr. 9, 2002, at B10.

⁵³ Wilson, *supra* note 50 (citing the National Retail Federation: “There is not a consensus on this issue [the permissibility of copying in fashion].”); Ben Winograd & Cheryl Lu-Lien Tan, *Can Fashion Be Copyrighted?* WALL ST. J., Sept. 11, 2006, at B1 (noting that “designers . . . are hotly debating the issue”).

Some view it as flattering,⁵⁴ some find it annoying, offensive, or just plain wrong,⁵⁵ while others find it to be an unavoidable aspect of fashion design.⁵⁶ Scholars have suggested various theories about the effects of fashion design piracy on the United States fashion industry. Some propose that copying is part of the nature of fashion design,⁵⁷ the inevitable result of a trend-driven industry, or that it may even benefit the designers and the industry as a whole.⁵⁸ Others argue that copying reduces designers' incentives to create new designs (especially for emerging designers),⁵⁹ generates inefficiencies in the industry resulting in higher costs for consumers and lower profits for designers,⁶⁰ and threatens the United States' position in the global fashion industry.⁶¹

⁵⁴ Eric Wilson, *Designers Take Legislative Aim at Knockoff Producers*, CHI. TRIB., Apr. 12, 2006, at 6 (noting that for many years "leading designers" have considered copies of their work the "sincerest form of flattery"); see also Jenifer Johnston, *Bitchiness Takes Centre Stage at Fashion Festival Catwalk: Edinburgh Matthew Williamson Wows Crowds with Collection*, SUNDAY HERALD (Glasgow, UK), Apr. 30, 2006, at 17 (quoting Matthew Williamson, fashion designer and creative director of Italian fashion house Pucci, "I think in a way if someone bought a copy or a design that shows elements of my work it is quite flattering . . .").

⁵⁵ Wilson, *supra* note 50 (naming offended designers Behnaz Sarafpour, Diane Von Furtstenberg, Narcisco Rodriguez, and Zac Posen and noting that "leading designers are acknowledging that inexpensive copies . . . have negatively affected the luxury business"); Winograd & Tan, *supra* note 53 (reporting that designer Tracy Reese's first thought upon discovering that her design was copied was "Can I sue them for this?").

⁵⁶ For example, designer Jeffrey Chow, whose \$1000 gown was copied and sold for \$245 by A.B.S., "sees only futility in trying to fight such copying." Wilson, *supra* note 50. And designer Carmen Marc Valvo reports that he's "been copied so much he now shrugs it off when he sees styles that imitate his work. He finds the idea of legislation 'insane.'" Winograd & Tan, *supra* note 53.

⁵⁷ See, e.g., Bollier & Racine, *supra* note 39, at 33 ("Fashion . . . always has been a form of creativity based on lineage. The individual designer may have his own distinctive talents, but he also participates in a recognized tradition.").

⁵⁸ Raustiala & Sprigman, *supra* note 39, at 1689-92 (noting the "empirical anomaly" that despite a lack of intellectual property rights, "fashion firms continue to innovate at a rapid clip," and advancing the "piracy paradox" theory, in which copying promotes innovation and benefits the original designers because (1) "the value of fashion items is partly status-based" and (2) "fashion is cyclical"); Barnett, *supra* note 18, at 1382 (noting that "the fashion industry appears to sustain robust levels of investment in new product development even with widespread unauthorized imitation").

⁵⁹ *Hearings*, *supra* note 1, at 83 (statement of Professor Susan Scafidi, Southern Methodist University, noting that "there is strong anecdotal evidence that design piracy is harmful to the U.S. fashion industry" and describing the "race to the bottom in terms of price and quality" that designers lose to "knockoff artists").

⁶⁰ Professor Scafidi argues that the lack of protection against piracy for fashion designs "has led to multiple inefficiencies in the development of the U.S. fashion industry," including designers bearing the costs of seeking legal remedies by attempting to stretch trademark, trade dress, and patent law to cover fashion. *Id.* at 80; see also Briggs, *supra* note 18, at 210 (suggesting that "with no design protection

C. *The DPPA and the VHDPA*

Against this backdrop of unregulated copying and conflicting views on the effects of fashion design piracy, proponents of copyright protection for fashion design, including high-end designers such as Diane Von Furstenberg, Narciso Rodriguez, and Zac Posen, along with the Council of Fashion Designers of America,⁶² began lobbying Congress to implement sui generis copyright protection for fashion design.⁶³ On March 30, 2006, Representative Goodlatte introduced the DPPA in the House of Representatives.⁶⁴ The proposed legislation would amend the VHDPA, which provides sui generis design protection for vessel hulls.⁶⁵

The VHDPA is drafted in a way that makes it relatively straightforward to add a new category of design to its scope of protection.⁶⁶ The statute first sets out broad protection for “designs” of “useful articles” that are “attractive or distinctive

laws, a designer must act quickly and charge a premium for new designs before the goods are copied and sold at lesser cost”); Jennifer Mencken, *A Design for the Copyright of Fashion*, B.C. INTELL. PROP. & TECH. F. 121201, 45 (1997) (“The denial of copyright protection in garment designs sanctifies the outright theft of a designer’s creative work. This threat to marketplace viability actually drives up the cost of designer goods, resulting in fewer consumers being able to purchase the garments.”).

⁶¹ *Hearings*, *supra* note 1, at 82 (statement of Professor Susan Scafidi, Southern Methodist University, noting that “the U.S. can no longer compete with China and other centers of low-cost production on price alone” and therefore “the future of the U.S. economy will rest on the ability to develop and protect creative industries, including fashion design”); Briggs, *supra* note 18, at 211-12 (“Without action of any kind toward protection of clothing design, the U.S. risks the further deterioration of its already struggling apparel industry.”). Perhaps Congress will hold hearings to better determine the true effect of design piracy on the fashion industry if the Bill moves forward through the legislative process.

⁶² “The Council of Fashion Designers of America . . . is a not-for profit trade association of over 300 of America’s foremost fashion and accessory designers” with a mission “to advance the status of fashion design as a branch of American art and culture; to raise its artistic and professional standards; to define a code of ethical practices of mutual benefit in public and trade relations; and, to promote appreciation of the fashion arts through leadership in quality and aesthetic discernment.” Council of Fashion Designers of America, http://www.cfda.com/index.php?option=com_cfda_content&task=about_the_cfda_display (last visited Feb. 18, 2008).

⁶³ Wilson, *supra* note 50.

⁶⁴ *Goodlatte Introduces Legislation Granting Protection to Fashion Designs*, *supra* note 12, at 615. As noted above, Senator Charles E. Schumer (D-NY) introduced a parallel bill that mirrors H.R. 5055 in the Senate on August 2, 2007. Design Piracy Prohibition Act, S. 1957, 110th Cong. (2007). See *supra* note 13 and accompanying text.

⁶⁵ 17 U.S.C. § 1301 (2000). See *supra* note 11 (discussing the VHDPA).

⁶⁶ See Pamela Samuelson & Suzanne Scotchmer, *The Law and Economics of Reverse Engineering*, 111 YALE L.J., 1575, 1594 n.85 (2002) (“For the moment, the Act covers only vessel hulls, but some commentators suggest that only minor changes would be necessary to convert it to a more general intellectual property law to protect the configuration of manufactured products.”).

in appearance” so long as they comply with and are subject to the statute.⁶⁷ Section 1301(a)(2) then specifies that the designs protected by the statute include “[t]he design of a vessel hull, including a plug or mold.”⁶⁸ Under the DPPA, a subsection would simply be inserted directly below § 1301(a)(2), under the “Designs protected” heading, to add “fashion design” to the subject matter protected.⁶⁹ In addition, three subsections would be added to the VHDPA’s “Definitions” section:

- (7) A ‘fashion design’ is the appearance as a whole of an article of apparel, including its ornamentation.
- (8) The term ‘design’ includes fashion design, except to the extent expressly limited to the design of a vessel.
- (9) The term ‘apparel’ means –
 - (A) an article of men’s, women’s, or children’s clothing, including undergarments, outerwear, gloves, footwear, and headgear; (B) handbags, purses, and tote bags; (C) belts; and (D) eyeglass frames.⁷⁰

Thus, the Bill would simply add “fashion design” to the type of designs listed as subject to protection under the statute, which currently includes only the designs of boat hulls, and would provide a definition of the term to qualify the scope of that protection.

Moreover, under the proposed legislation, in order to receive protection a fashion design must be registered with the Copyright Office within three months after the design is “first made public.”⁷¹ Although the Copyright Office “is responsible for registering copyright claims submitted by authors or other copyright claimants,”⁷² an infringement suit may be brought even if the Office rejects the application, so long as the requisite formalities are complied with.⁷³ A valid copyright registration is only treated by the courts as “prima facie evidence of the validity of the copyright and the facts stated in

⁶⁷ 17 U.S.C. § 1301(a)(1) (2000) (“The designer or other owner of an original design of a useful article which makes the article attractive or distinctive in appearance to the purchasing or using public may secure the protection provided by this chapter upon complying with and subject to this chapter.”).

⁶⁸ *Id.* § 1301(a)(2).

⁶⁹ Design Piracy Prohibition Act, H.R. 5055, 109th Cong. § 1 (2d Sess. 2006).

⁷⁰ *Id.* (paragraph breaks omitted).

⁷¹ *Id.*

⁷² Reconsideration Procedure, 69 Fed. Reg. 133 (July 13, 2004) (to be codified at 37 C.F.R. pt. 202, 211, 212).

⁷³ *See* 17 U.S.C. § 411(a) (2000).

the certificate.”⁷⁴ Thus, it is ultimately up to the judiciary to determine whether an item is subject to the protection of Title 17 when infringement suits are brought, as the courts may reverse the Copyright Office’s determination of copyrightability.⁷⁵

The DPPA is currently only in the early stages of the legislative process, and thus a fuller legislative record is yet to be developed.⁷⁶ The Bill’s preamble simply states that the Bill is meant “to provide protection for fashion design.”⁷⁷ But the justifications advanced by Representative Goodlatte suggest that the Bill is intended to boost global promotion of the United States fashion industry, as well as to protect individual fashion designers, particularly up-and-coming designers, who have invested heavily in their work, from piracy that may cause damage to their reputation and financial profitability.⁷⁸ In his speech introducing the Bill to the House, Goodlatte emphasized the short “production life cycle of fashion designers” and referred to the popularity of fashion designs garnered from “a fashion show or other event.”⁷⁹ Short production cycles and fashion shows are most commonly associated with fashion in the “designer” category (that is, high-end designers) identified by Raustiala and Sprigman.⁸⁰ Moreover, Goodlatte’s arguments

⁷⁴ *Id.* § 410(c).

⁷⁵ *Id.*

⁷⁶ As of this writing, the Bill has been introduced in the House and referred to the Subcommittee on Courts, the Internet and Intellectual Property. Subcommittee hearings were held on July 27, 2006. *A Bill to Provide Protection for Fashion Design: Hearing Before the Subcomm. On Courts, the Internet, and Intellectual Prop. on H.R. 5055*, 109th Cong. (2006), available at <http://judiciary.house.gov/media/pdfs/printers/109th/28908.pdf>. On August 2, 2007, the Bill was introduced in the Senate in identical form to the House bill, and referred to the Committee on the Judiciary. GovTrack.us, <http://www.govtrack.us/congress/bill.xpd?bill=s110-1957> (last visited Feb. 18, 2008). No further legislative actions have been taken.

⁷⁷ Design Piracy Prohibition Act, H.R. 5055, 109th Cong. § 1 (2d Sess. 2006).

⁷⁸ Upon introducing the bill in the House, Representative Goodlatte, invoking the United States Constitution, emphasized the need to provide incentives for fashion designers in order “to maintain America’s position as the world leader in innovation.” Speech of Hon. Bob Goodlatte to the House of Representatives, Mar. 30, 2006, available at <http://pub.bna.com/ptcj/HR5055remarks.htm>. He pointed out that “[m]ost industrialized nations provide legal protection for fashion designs,” while the United States does not. *Id.* In addition to focusing on America’s standing in the global market of creativity, he also emphasized the need to protect individual designers—their economic profits as well as their reputations. The current lack of protection, he argued, “prevents designers in our country from reaping a fair return on their creative investments.” *Id.*

⁷⁹ *Id.*

⁸⁰ Raustiala & Sprigman, *supra* note 39, at 1694 (“Apparel in the designer categories (couture, designer ready-to-wear apparel, and bridge) is characterized by . . . faster design turnover. Generally, apparel in the ‘better’ and basic categories . . .

that the legislation is needed to protect the profits and reputation of designers is most applicable to lesser-known designers within that category, since more established design houses are less likely to lose profits or suffer damage to their reputations when their designs are pirated.⁸¹ Testimony from the hearings and written statements submitted on behalf of the Bill also support the notion that the legislation's purpose would be primarily to protect the fashion designs in the "designer" category of the fashion pyramid, especially those of young designers.⁸² Indeed, many of the Bill's most ardent supporters are young, emerging designers,⁸³ while many retailers who profit from pirated designs oppose it.⁸⁴

experience slower design change."). Although, in principle, anyone can hold a fashion show during New York's annual fashion week if they are willing to pay for it, "[t]he anchor brands of American fashion are accommodated first." Josh Patner, *Fashion Week FAQ: Your Nagging Questions Answered*, SLATE, Feb. 7, 2005, <http://www.slate.com/id/2113109>.

⁸¹ Tsai, *supra* note 24, at 448 ("As small business owners, new designers are the most vulnerable to piracy of their designs. . . . Larger businesses realize the advantage they have over smaller businesses with respect to design piracy."); Winograd & Tan, *supra* note 53 ("[T]he U.S. bill's supporters say that copying hurts young designers in particular.").

⁸² See *Hearings*, *supra* note 1, at 82-83 (statement of Prof. Susan Scafidi) ("Young designers attempting to establish themselves are particularly vulnerable to the lack of copyright protection for fashion design, since their names and logos are not yet recognizable to a broad range of consumers. . . . [T]hey struggle each season to promote their work and attract customers before their designs are copied by established competitors."); *Hearings*, *supra* note 1, at 12 (statement of Jeffrey Banks, fashion designer) ("The famous designer with an established and substantial business might be able to withstand that assault, but it can absolutely derail the career of a young designer."). These arguments have also been made by legal scholars advocating for stronger intellectual property rights for fashion design. See, e.g., Leslie J. Hagin, *A Comparative Analysis of Copyright Laws Applied to Fashion Works: Renewing the Proposal for Folding Fashion Works into the United States Copyright Regime*, 26 TEX. INT'L L.J. 341, 366 (1991) ("Copyright protection would most help . . . innovative, yet unestablished, fashion designers."); Tsai, *supra* note 24, at 448 ("Piracy is . . . likely to be most detrimental to new designers," who are also "most vulnerable to piracy of their designs.").

⁸³ Wilson, *supra* note 50. Zac Posen, a member of the Council of Fashion Designers of America, is only 27. Cathy Horyn, *Fashion; Romance is in the Spotlight as Zac Posen Comes of Age*, N.Y. TIMES, Sept. 16, 2006, at B7. Also lobbying for the legislation is Gela Taylor, designer for Juicy Couture. Council of Fashion Designers of America, http://www.cfda.com/index.php?option=com_cfda_content&task=about_the_cfda_display&category_id=58 (last visited Mar. 30, 2008). Juicy Couture is a fashion line that has recently taken off and is growing rapidly since the company was purchased by Liz Claiborne, Inc. in March 2003 as part of its "strategy of buying fledgling retailers' brands." Christopher Palmeri and Nanette Byrnes, *To Live and Thrive in L.A.: Juicy Couture's Founders are Spinning Gold from Valley Girl "Casual Chic"*, BUS. WEEK ONLINE, Mar. 28, 2005, http://www.businessweek.com/magazine/content/05_13/b3926094.htm; see also Rose Apodaca, *On the Right Track: Juicy Couture*, WOMEN'S WEAR DAILY, Mar. 27, 2006, at 38B.

⁸⁴ "Retailers have been concerned that they would be held liable as infringers if a registered design becomes part of their goods without the authority of the owner[.]

Therefore, in order to predict the ways in which courts may interpret the DPPA, and what is meant by the term “fashion design,” it is necessary to keep in mind that the Bill has been introduced largely to provide protection for top-tier designers, especially emerging designers, at a time when apparel receives little to no protection under current copyright law.

III. POTENTIAL PROBLEMS WITH THE PROPOSED LEGISLATION

With this background information in mind, would the proposed legislation, as currently written, effectively achieve its goal of protecting “fashion design”?⁸⁵ How would the courts determine whether a given item falls within the protection of the proposed legislation? Although at first glance the scope of the Bill’s protection seems obvious, as most people have an intuitive understanding of what constitutes “fashion design” and the meaning of the terms listed under the definition of “apparel” (for example, “clothing,” “handbags,” and “belts”),⁸⁶ potential interpretive issues will likely emerge.

On the one hand, the DPPA may be interpreted to provide copyright protection for too many items—articles that clearly are “apparel” but that nobody intended to protect.⁸⁷ For example, sporting apparel such as skiwear, and protective clothing such as surgery apparel, could inadvertently fall within the scope of the Bill if interpreted narrowly, since technically a ski helmet is a form of “headgear” and surgical

Some manufacturers do not believe that there should be protection because of the fickleness of public sentiment about fashions and the fear that [free] use of designs as a basis for newer fashions would be hindered if a fashion design law is enacted.” *Protecting Clothing Designs—Fashion Design Law Proposed*, WORLD PAT. & TRADEMARK NEWS, May 17, 2006, http://wptn.com/Mailing/May_17/details/crights/notaro.html; see also Briggs, *supra* note 18, at 208 (noting that many apparel manufacturers have resisted opportunities for increased design protection in the past).

⁸⁵ Design Piracy Prohibition Act, H.R. 5055, 109th Cong. § 1 (2d Sess. 2006).

⁸⁶ Indeed, the Copyright Office has issued a statement endorsing the legislative language of the Bill, which completely overlooks the potential problems surrounding the language defining the Bill’s scope. *Hearings, supra* note 1, 197-98 (statement of U.S. Copyright Office). While the report lauds the administrative aspects of the copyright scheme (i.e., “term of protection” and “time frame for registration”) it does not comment on the merits of the definition of the terms “apparel” and “fashion design.” *Id.* at 208-12. Moreover, opponents of the Bill have yet to raise the scope issue as a potential weakness of the proposed legislation. See, e.g., *Hearings, supra* note 1, 85-89 (statement of Prof. Christopher Sprigman); *Hearings, supra* note 1, 13-15 (statement of David Wolfe, Creative Director, The Doneger Group).

⁸⁷ See *supra* Part II.C for purpose of the legislation.

apparel “clothes” its wearers.⁸⁸ As such, cheap, mass-produced items from the lower categories of the fashion pyramid that do not entail much investment of time or energy from the designer could conceivably receive protection. Moreover, these items are not likely to increase the stature of the United States as an innovator in the global fashion industry. Will courts recognize copyright protection in these types of items if they satisfy the other requirements of the legislation?⁸⁹ Where will courts draw the line as to what constitutes apparel that is “fashion” subject to protection, and what is merely plain and simple apparel? There is a significant risk that the Bill, as written, is over-inclusive.

On the other hand, the DPPA may be interpreted in a way that misses some items that clearly should receive copyright protection in light of both our intuitive notions of “fashion design” and the purpose of the Bill. Items into which designers have invested much time and energy and which undoubtedly fall into the “designer” category of the fashion industry pyramid could conceivably be discriminated against under the proposed statutory language. For example, designer unisex clothing⁹⁰ and pet apparel⁹¹ could conceivably fail to qualify as “men’s, women’s, or children’s clothing,” but are designed by people who are recognized fashion designers, displayed on runways, and sold alongside other items of fashion design.⁹² Similarly, luggage items,⁹³ men’s wallets,⁹⁴ and

⁸⁸ See Raustiala & Sprigman, *supra* note 39, at 1740 (questioning whether “protective clothing” and “sport apparel” “count as ‘fashion designs.’”).

⁸⁹ The design must also be “original” and “attractive or distinctive” in order to receive protection. 17 U.S.C. § 1301 (a)(1) (2000).

⁹⁰ See Joelle Diderich, *Runways of Europe Sport Daring, Unisex Outfits*, BUFFALO NEWS, July 5, 2006, at C1 (reporting on fashion collections by designers such as Jean Paul Gaultier and Kris Van Assche who “blur the distinctions between the genders”); Constance C.R. White, *Review/Fashion; Touches of Spice in a Tepid Stew*, N.Y. TIMES, Jan. 27, 1998, at B9 (“The idea of unisex clothing is now as hackneyed as the boyfriend jacket . . .”).

⁹¹ See Jill P. Capuzzo, *Creatures Bask in High-End Comforts*, N.Y. TIMES, Nov. 27, 2005, at 14NJ (reporting on the development of the pet industry and noting that “growth has been strongest in the high end of the market—[including] designer clothes”); Alex Kuczynski, *Critical Shopper; A Boutique for Obedient Humans*, N.Y. TIMES, Sept. 14, 2006, at G4 (describing a pet store in Bridgehampton, N.Y., as a “miniature Neiman Marcus for dogs” offering designer dog “hoodies” and high-priced collars and accessories).

⁹² For example, Kris Van Assche, recognized as a “young designer” in the media, included unisex suits in his runway show in Paris 2006. Diderich, *supra* note 90. Fashion for dogs has been developed by designers such as Nicole Miller, Alice + Olivia, and Burberry, and has been displayed in runway shows. See *NBC Today Show* (NBC Universal Inc. Apr. 6, 2006) (reporting on Paws for Style celebrity pet fashion show); see also Stephen G. Henderson, *Beauty and the Leash; Pet Fashion Week Gives*

backpacks⁹⁵ designed by recognized fashion designers do not clearly fall within the category “handbags, purses, and tote bags.” Would such items receive protection? Or would courts interpret the statutory language in a broader way such that the legislation does not arbitrarily discriminate against these articles of fashion?

IV. JUDICIAL APPROACHES TO INTERPRETING THE SCOPE OF THE STATUTE

If the DPPA is enacted, courts could take a variety of approaches to interpreting the meaning of the term “fashion design,” and, within the definition of fashion design, “apparel.”⁹⁶ As yet, the VHDPA has not generated enough litigation to provide precedent for interpreting the terms of the statute. Only a small number of vessel hulls have been registered thus far,⁹⁷ and only one case regarding infringement of a hull design has been litigated.⁹⁸ Moreover, currently there

Four-Footed Friends a Chance to Embrace Style, BALT. SUN, Aug. 27, 2006 (reporting on a fashion show for dog apparel “that either met or exceeded haute couture quality”). Burberry sells its dog trench coat on its website along with its signature coats for men and women, Burberry, Dog Trench Coat, <http://www.burberryusaonline.com/product/index.jsp?productId=1892739> (last visited Jan. 27, 2007), while Neiman Marcus carries velour dog hoodies by Juicy Couture alongside versions for humans, Neiman Marcus Online, http://www.neimanmarcus.com/store/catalog/47/search.jhtml?ip_state=&ip_autoSummarize=true&ip_perPage=15&orgUrl=%2Fstore%2Fcatalog%2F47%2Fsearch.jhtml&srcText=dog (last visited Feb. 18, 2008).

⁹³ See Vanessa Friedman, *FT Weekend—Style: Showcase For Your Desires If You’re a Self-Respecting Globetrotter, You don’t Just ‘Need’ a Suitcase*, FIN. TIMES (UK), May 27, 2006, at 7 (reporting that Prada’s “bubblegum pink alligator wheelie bag made a runway appearance” and Chanel had a “cream or black quilted version”); Edwina Ings-Chambers, *FT Weekend—Style: Everyone Gets in on the ‘Big Bag is Better’ Thing Despite the Danger of Looking Like Santa’s Little Helper, the Supersized, ‘Sexy’ Accessory is Selling All Over*, FIN. TIMES (UK), Oct. 21, 2006, at 10 (noting that “luggage has featured in fashion shows”).

⁹⁴ For example, see designer Jack Spade’s collection of wallets for men. Jack Spade, Small Goods, <http://www.jackspade.com/shop/home.php?cat=309> (last visited Feb. 18, 2008).

⁹⁵ Designer Miuccia Prada included backpacks in a recent fashion show. Suzy Menkes, *Sporty Marni Beats Prada’s Surgical Sexiness*, INT’L HERALD TRIB., Sept. 28, 2006, at 9.

⁹⁶ Design Piracy Prohibition Act, H.R. 5055, 109th Cong. § 1 (2d Sess. 2006).

⁹⁷ From July 1999, when the first vessel hull was registered under the Act, to October 2003, only 156 designs had been registered, six were “in-process pending clarification of certain matters related to those claims,” and eight had been rejected by the Copyright Office. U.S. COPYRIGHT OFFICE & U.S. PATENT AND TRADEMARK OFFICE, THE VESSEL HULL DESIGN PROTECTION ACT: OVERVIEW AND ANALYSIS 10 (2003) [hereinafter *Report*].

⁹⁸ *Maverick Boat Co. v. American Marine Holdings, Inc.*, 418 F.3d 1186 (11th Cir. 2005).

are very few statutes that refer to “fashion design.”⁹⁹ As a result, there is little precedent as to how courts will interpret the meaning of fashion.¹⁰⁰ This section of the Note therefore suggests different approaches to statutory interpretation that courts may pursue based on the way courts in the past have made determinations about art and aesthetics in various other areas of the law.¹⁰¹

A. *Approaching Aesthetics in the Law*

Professor Alfred Yen, in his article “Copyright Opinions and Aesthetic Theory,” poses the questions “What is art, and how should art be interpreted?” at the outset of his piece.¹⁰² His examination of the way in which courts approach this broad question in the context of copyright law provides a useful model

⁹⁹ There is currently only one federal statute that lists the term “fashion design”: 20 U.S.C. § 952(b) (2000) (including “fashion design” in a list of terms defining the term “the arts”). There are eleven state statutes with the term “fashion design.” ARK. CODE ANN. § 13-8-102(2)(N) (2007) (under definition of “[t]he arts”), CAL. ED. CODE § 52485(a) (West 2006) (legislative findings about importance of home economics education); D.C. CODE § 39-202(3) (2007) (under definition of “arts”); FLA. STAT. § 287.012(3) (2003) (under definition of “artist”); HAW. REV. STAT. § 9-1 (2006) (under definition of “[a]rts”); KY. REV. STATE. ANN. § 153.210(1) (West 2006) (under definition of “the arts”); MINN. STAT. § 129D.01(a) (2000) (under definition of “Arts”); *id.* § 471.941 (2001) (under definition of “artistic organization”); OR. REV. STAT. § 316.838(2) (2005) (under definition of “art object”); *id.* § 359.010(2) (2005) (under definition of “[a]rts”); WYO. STAT. ANN. § 9-2-903(a)(ii)(B) (2006) (listed as type of “arts and crafts” that department of state parks and cultural resources must oversee).

¹⁰⁰ There are no cases interpreting the meaning of “fashion design” under 20 U.S.C. § 952(b) (2000). Nor are there any cases interpreting the term in any of the state statutes listed *supra* in note 99.

¹⁰¹ This writer believes that comparing fashion design to art in the law is an intuitively reasonable analogy since both fashion design and art are creative, aesthetic forms of expression. Various statutes implicitly recognize the relationship between art and fashion, often including “fashion design” as a type of art in the statutory definitions. For examples, see *supra* note 99. In addition, legal commentators have suggested the comparison. See, e.g., Hetherington, *supra* note 24, at 56-57 (“It is clear that both designers and the public consider haute couture to be art.”); Bharathi, *supra* note 24, at 1668 (arguing that “fashion designers are comparable to artists”); Tsai, *supra* note 24, at 461 (arguing that “[f]ashion designers are artists and the medium they work with is clothing”). Professor Susan Scafidi explains the distinction between “clothing,” which is merely something that covers the body, and “fashion”—“a form of creative expression.” *Hearings*, *supra* note 1, at 79 (statement of Susan Scafidi). She analogizes fashion designers to “visual artists,” explaining that both designers and artists have “blurred the distinction between art and fashion by designing unique works of art in the shape of clothing.” *Id.* at 80. She points out that fashion is not based merely on utilitarian or functional goals, but is a form of creative expression. *Id.* at 79. She notes a recent cultural shift in recognizing fashion design as a type of art form, as evidenced by recognition from institutions like the Smithsonian, Sotheby’s, the National Arts Club, and the Cooper-Hewitt Design Museum. *Id.* at 81.

¹⁰² Alfred C. Yen, *Copyright Opinions and Aesthetic Theory*, 71 S. CAL. L. REV. 247, 252 (1998).

with which to approach the issue of how courts would answer the more specific question: “what is fashion design, and how should fashion design be interpreted under the DPPA?”¹⁰³ In answering the question he sets for himself, Yen presents an overview of major movements from aesthetic theory—formalism, intentionalism, institutionalism, and reader-response theory—and illustrates “the striking parallels between aesthetic reasoning and the legal reasoning of copyright opinions.”¹⁰⁴

The three main theories of how courts determine what is art outlined by Yen—formalism, intentionalism, and institutionalism—may be instructive in terms of how courts will likely interpret the meaning of “fashion design.” In the context of interpreting whether a given work is “art” under the formalist approach, a court looks at a particular work and determines its status as art based on the work’s inherent identity as an art object. In other words, “Interpretation becomes an objective empirical inquiry devoid of personal views.”¹⁰⁵ Under the intentionalist approach, a court looks at the intention of the creator of the object and classifies the object as “art” based on whether that person perceives the object to be art.¹⁰⁶ Under the institutionalist approach, a court defines “art” based on what the “art world” deems to be art.¹⁰⁷ Yen recognizes that each theory has its shortcomings, and courts are not consistent in their use of one theory over another; rather, they intuitively adopt one or another depending on the facts of the case.¹⁰⁸ Which approach(es) would courts take in interpreting the meaning of “fashion design”

¹⁰³ See *supra* note 101 (discussing the connection between art and fashion design).

¹⁰⁴ Yen, *supra* note 102, at 251-52. Yen examines the applicability of aesthetic theory specifically to the copyright law doctrines of originality, useful articles, and substantial similarity. *Id.* at 252.

¹⁰⁵ *Id.* at 262; see *infra* Part IV.B.1 (discussing cases taking this approach).

¹⁰⁶ Yen, *supra* note 102, at 263. “Activity becomes artistic only if those who participate in it perceive it that way.” *Id.* at 256. See *infra* Part IV.C.1 for discussion of cases taking this approach.

¹⁰⁷ Yen, *supra* note 102, at 259 (“[O]bjects become art when someone who believes that he is a member of the artworld invites others to view the object aesthetically.”). See *infra* Part IV.C.2 for discussion of cases taking this approach.

¹⁰⁸ Yen, *supra* note 102, at 260 (“[T]he theories will continue to exist in tension with each other, ready for use by viewers of art as circumstances may dictate.”); see also Christine Haight Farley, *Judging Art*, 79 TUL. L. REV. 805, 845-46 (2005) (“Examples of almost every aesthetic theory can be found employed by a court that must decide whether an object is art. . . . Their invocation of these theories is intuitive, not deliberate.”).

under the DPPA? This will depend on whether the courts interpret the statute narrowly or broadly.

B. Interpreting the Statutory Language Narrowly

If courts interpret the DPPA narrowly, finding the definition of “apparel” to include an exhaustive list of items qualifying for protection, and interpreting each item on the list literally, (for example, “belt” and “handbag”), these courts will likely employ the formalist approach.¹⁰⁹ The Copyright Office has made clear that the VHDPA is to be interpreted narrowly.¹¹⁰ A report prepared by the Copyright and Patent and Trademark offices in 2003 addresses “the scope of protection for an original design vessel hull.”¹¹¹ It notes that although “[m]asts, sails, yards and rigging are components typical of a sailboat . . . the statute does not speak to other components of most boats” beyond the “hull of a vessel, ‘including the deck.’”¹¹² The report then states that the Copyright Office’s approach “in making registration has been to interpret § 1301 strictly,”¹¹³ and therefore sailboat components such as masts, sails, yards, and rigging are not included within the scope of the statute. Although courts may make their own independent interpretations regarding the copyrightability of particular works,¹¹⁴ courts often give deference to the Copyright Office’s determination.¹¹⁵ Since under the DPPA the definitions of “fashion design” and “apparel” fall within § 1301 as well, the proposed legislation may also be construed strictly.¹¹⁶

In addition, the proposed legislation may be interpreted narrowly if courts consider the legislative intent regarding the interpretation of 17 U.S.C. § 1301 when it was originally

¹⁰⁹ See *infra* Part IV.B.1 (discussing the formalist approach).

¹¹⁰ Report, *supra* note 97, at 14.

¹¹¹ *Id.*

¹¹² *Id.* at 16.

¹¹³ *Id.*

¹¹⁴ See *supra* note 75 and accompanying text.

¹¹⁵ *De Sylva v. Ballentine*, 351 U.S. 570, 577-78 (1956) (Courts “ordinarily give weight to the interpretation of an ambiguous statute by the agency charged with its administration.”). See, e.g., *Southco, Inc. v. Kanebridge Corp.*, 390 F.3d 276, 286-87 (3d Cir. 2004) (deferring to the Copyright Office’s “longstanding practice of denying registration to short phrases”).

¹¹⁶ Further emphasizing that Congress intended the VHDPA to be interpreted narrowly, legislation was recently passed in the Senate that clarifies which parts of the vessel are subject to protection. The drafting approach is thus to be very explicit about the scope of the statute. Vessel Hull Design Protection Amendments of 2005, S. 1785, 109th Cong. § 2-3 (1st Sess. 2005).

enacted as the VHDP. Although the legislative history of the DPPA has yielded little debate thus far over its scope of protection, the Congressional Record for the enactment of the VHDP reveals that Senators were concerned with scope issues and worried that the legislation would open the door for protection of industrial design on a broader level.¹¹⁷ Thus, if the DPPA is enacted, the statute may continue to be construed strictly in order to provide the most limited protection for design.

1. The Formalist Approach

Courts interpreting statutes narrowly often take a strict, formalistic approach to interpreting whether a given object falls within a list-like definition of a term.¹¹⁸ Staying within the realm of aesthetics, it is helpful to examine cases in which courts interpret statutes defining “art” using the formalist approach identified by Professor Yen.¹¹⁹ Sometimes, courts just declare that a particular object qualifies as an item listed under the scope of the statute without much explanation (presumably in those cases the status of the article was not questioned by the litigants).¹²⁰ Similarly, courts sometimes assert that an object falls within the scope of a statute governing art-related items because of the object’s beauty and aesthetic qualities, or they make other subjective assessments

¹¹⁷ 144 CONG. REC. S11887, S11889 (1998) (Senator Hatch expressing his concern “that this bill is not like traditional industrial design protection in that [it] protects the functionality of vessel hulls, not only its aesthetic aspects,” but stating that “because [it] is limited only to boat hulls . . . [he] could acquiesce in including it . . . as a limited experiment in design protection”).

¹¹⁸ See, e.g., *Pollara v. Seymour*, 344 F.3d 265, 267 (2d Cir. 2003); *Martin v. City of Indianapolis*, 192 F.3d 608, 615 (7th Cir. 1999); *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 84 (2d Cir. 1995); *Petry Co. v. United States*, 11 Ct. Cust. App. 525 (Ct. Cust. App. 1923); *Lilley v. Stout*, 384 F. Supp. 2d 83, 86 (D.D.C. 2005); *Scott v. Dixon*, 309 F. Supp. 2d 395, 400 (E.D.N.Y. 2004); *Tiffany v. United States*, 66 F. 736, 736-37 (S.D.N.Y. 1895).

¹¹⁹ Farley, *supra* note 108, at 820-21 (“Oftentimes ‘art’ is statutorily defined as a list of subcategories of art, such as painting, sculpture, drawing, and photography, without any further definition. These statutes employ extensional definitions of art—they simply define art by listing the things that are included under the term.”). Similarly the DPPA defines “apparel” by listing items included in the term, such as clothing, belts, and eyeglass frames. Design Piracy Prohibition Act, H.R. 5055, 109th Cong. § 1 (2d Sess. 2006).

¹²⁰ See, e.g., *Martin*, 192 F.3d at 615 (referring throughout the opinion to an object depicted in a photograph admitted into evidence as a “sculpture” without discussing its qualifications as sculpture); *Scott*, 309 F. Supp. 2d at 396 (referring to a fifty-two-foot-tall plywood and steel structure as a “tall sculpture” and “work of art” under VARA without discussing its qualifications as sculpture).

about the artistic merits of the work.¹²¹ Courts also invoke “common meaning” understandings of statutory terms, as well as dictionary definitions, to determine whether the object qualifies as an item listed in the statute.¹²² And courts are often reluctant to expand the meaning of a term listed in a definition to include “subcategories” of the term.¹²³

Phillips v. Pembroke Real Estate provides a good example of how courts may narrowly interpret an aesthetic term defined in a statute with a list of items.¹²⁴ In that case, a sculptor brought suit under the Visual Artists Rights Act (“VARA”) and the Massachusetts Art Preservation Act (“MAPA”), seeking to prevent the destruction of his “public sculpture park.”¹²⁵ Both statutes protect artwork against destruction in certain circumstances; VARA applies to “work[s] of visual art” while MAPA covers “fine art.”¹²⁶ The plaintiff argued that the park as a whole, which contained sculptures

¹²¹ See, e.g., *Tiffany*, 66 F. at 736. The court found that “paintings upon fans made of silk and other materials” were dutiable as “paintings” rather than “silk” under customs statute. *Id.* The court explained: “No one who has the slightest knowledge of art can fail to see that in drawing, coloring, grouping and in attention to minute detail it is a painting of great beauty and merit. To call such a work of art ‘a manufacture of silk’ seems almost as irrational as to call the Venus of Milo ‘a manufacture of marble.’” *Id.* at 737; see also *Carter*, 71 F.3d at 84 (court found that parts of a sculpture were a single interrelated work after “the district court’s own inspection of the work”).

¹²² See, e.g., *Pollara*, 344 F.3d at 267 (in determining whether banner was a “work of visual art” subject to protection under VARA, the district court looked at dictionary definitions of “advertising,” citing the American Heritage Dictionary); *Petry Co.*, 11 Ct. Cust. App. at 527 (in finding that mosaics are not “works of art” under Tariff Act of 1913, the court consulted a dictionary definition of “mosaic”); *Lilley*, 384 F. Supp. 2d at 86 (“[T]he statutory term ‘still photographic image’ in Section 101 has a plain and unambiguous meaning. It is clear from a plain reading of the statute and the specific context in which the language is used that both photographic prints and negatives qualify as ‘still photographic image[s]’ and that both therefore are eligible for protection as ‘work[s] of visual art’ under VARA.”).

¹²³ See, e.g., *Petry Co.*, 11 Ct. Cust. App. at 528 (declining to interpret the category of “works of art” under the Tariff Act of 1913 to include mosaics since they are “not specially provided for in the law”); *NASCAR v. Scharle*, 356 F. Supp. 2d 515, 529 (E.D. Pa. 2005) (declining to interpret “sculpture” under the 1976 Copyright Act to include plans for a trophy because the Act “excludes both ‘models’ and ‘technical drawings’ from the definition of works of visual art”); *Jacobs, Inc. v. Westoaks Realtors*, 205 Cal. Rptr. 620, 624 (Ct. App. 1984) (declining to interpret “fine art” under the Art Preservation Act to include architectural plans because, “[e]ven if the inspiration that produces an architect’s plans may be ignited by the same creative spark that inspires poetry or music,” the Act does not list architectural plans and specifically excludes works “prepared under contract for commercial use by its purchaser”).

¹²⁴ *Phillips v. Pembroke Real Estate*, 288 F. Supp. 2d 89 (D. Mass., 2003).

¹²⁵ *Id.* at 92-93.

¹²⁶ *Id.* at 96, 100.

that he had designed and placed within the space, was protected under both statutes.¹²⁷

The court first held that VARA did not protect the park as a whole.¹²⁸ “Visual art” under VARA is defined in the Copyright Act as including “a painting, drawing, print or sculpture, existing in a single copy” or limited edition.¹²⁹ Taking a narrow approach, the court found that the park was not “visual art” under the statute because it was not listed under the definition of the term, and it did not qualify as a subcategory of any of the terms listed.¹³⁰ The park did not constitute “sculpture,” the court reasoned, because “a park does not fit within the traditional definition of sculpture” (citing Random House Webster’s College Dictionary) and because “the definitions in VARA are to be construed narrowly.”¹³¹ Thus the court took a formalistic approach in finding that the park was not “visual art” under VARA.

Underscoring the significance of the limiting quality imposed by a “list definition” of a statutory term, the court nevertheless found “a reasonable likelihood of success”¹³² regarding the plaintiff’s argument that the park was protected under MAPA, which defines “fine art” as “any original work of visual or graphic art of any media which shall include, *but [is] not limited to*, any painting, print, drawing, sculpture, craft object, photograph, audio or video tape, film, hologram, or any combination thereof.”¹³³ The court explained, “The definition of ‘fine art’ in MAPA is significantly more expansive than the definition of ‘work of visual art’ in VARA because it is not limited to the specific enumerated types of art.”¹³⁴ Thus the court found that MAPA applies much more broadly than VARA.

The DPPA bears striking similarity to VARA. Like VARA, the proposed legislation protects a broad aesthetic term that is subject to multiple interpretations (“fashion design”) and then defines that term with a list of specific items without language such as “including, but not limited to” or a “catch-all”

¹²⁷ *Id.* at 98-99, 101.

¹²⁸ *Id.* at 99.

¹²⁹ *Id.* at 97.

¹³⁰ *Id.* at 99.

¹³¹ *Id.*

¹³² *Id.* at 102.

¹³³ *Id.* at 100 (emphasis added).

¹³⁴ *Id.* at 101.

category such as “and similar such items.”¹³⁵ There is a strong likelihood that Congress will express its intention that the Bill’s definitions are to be construed narrowly, like the definitions in the VHDP, just as Congress intended the definitions in VARA to be interpreted narrowly.¹³⁶ Moreover, if the DPPA were enacted, it would become part of the same part of the United States Code as VARA—Title 17. Thus, courts may follow *Phillips* by construing the DPPA’s definition as an exhaustive list of items subject to copyright protection and take a strict formalist approach when determining whether an item falls within one of the explicit subcategories of “apparel” by referring to dictionary definitions and common understandings of each term.

Although the *Phillips* court declined to find a park to be a type of sculpture under VARA, courts sometimes do recognize subsets of items listed in the definition of a term even under a narrow formalistic approach.¹³⁷ For example, in *Botello v. Shell Oil Co.*,¹³⁸ the court held that “mural” is a subset of “painting” under California’s Art Preservation Act, which provides protection to “fine art” and defines that term as “an original painting, sculpture or drawing, or an original work of art in glass, of recognized quality.”¹³⁹ The court reasoned, based on dictionary definitions of the term “mural,” that a “mural is a subset of painting. Much as a rose is to a flower, or ring to jewelry, or sonnet to poetry.”¹⁴⁰ Thus, the narrow approach leaves some flexibility for courts to find that certain items not specifically listed in a statute are protected, so long as these items can be understood to be subsets of items that are enumerated. In the case of the DPPA, a court may find that an evening clutch¹⁴¹ is protected under the term “handbag” or

¹³⁵ Design Piracy Prohibition Act, H.R. 5055, 109th Cong. § 1 (2d Sess. 2006).

¹³⁶ See *supra* Part IV.B. The *Phillips* court noted that “Congress has provided a ‘narrow definition of works of visual art.’” 288 F. Supp. 2d at 98 (quoting *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 84 (2d Cir. 1995)).

¹³⁷ See, e.g., *Tiffany v. United States*, 66 F. 736, 737 (S.D.N.Y. 1895) (“In ordinary parlance it is, perhaps, true that a painting is understood to mean a picture in oil or water colors, painted on canvas or paper, inclosed in a suitable frame and intended to be hung on the walls. . . . But such a definition is manifestly too narrow.”); *Botello v. Shell Oil Co.*, 280 Cal. Rptr. 535, 538 (Ct. App. 1991).

¹³⁸ 280 Cal. Rptr. 535 (Ct. App. 1991).

¹³⁹ *Id.* at 537.

¹⁴⁰ *Id.* at 538.

¹⁴¹ Samantha Thompson Smith, *It’s Big, Big, BIG: The Latest Gotta-Have-It Handbag Can Stop a Train in Its Tracks*, NEWS & OBSERVER (Raleigh, N.C.), Nov. 6, 2006 (discussing the popularity of the expensive designer clutch as part of a woman’s handbag collection).

“purse” if it determines that a clutch qualifies as a subset of one of those terms.

In sum, if courts take a narrow formalist approach to interpreting the DPPA, they will find that all items (but only those items) that are explicitly included on the list under the definition of “apparel” fall within its scope of protection. They will interpret those terms listed by referring to their intrinsic meanings, common understandings, and dictionary definitions, yet they may recognize that certain terms contain subcategories not explicitly listed.

C. *Interpreting the Statutory Language Broadly*

Courts may also take a broader approach to interpreting the DPPA by treating the list of items in the definition of “apparel” as merely suggestive of categories of protection. The Copyright Act specifically provides that the term “including” (which is part of the Bill’s definition of “apparel”¹⁴²) is not meant to be a word of limitation.¹⁴³ Courts have thus at times interpreted the Act liberally to provide protection for items not specifically listed in order to avoid inequitable results.¹⁴⁴ If the DPPA were enacted into law, courts might similarly interpret it broadly to further the purposes of the statute and to avoid the problems associated with arbitrarily excluding certain types of fashion were the statute to be interpreted strictly. Yen identified two such methods as the “intentionalist” and “institutionalist” approaches.¹⁴⁵

1. The Intentionalist Approach

Courts interpreting the DPPA may take the broad “intentionalist” approach identified by Professor Yen in order to determine whether something that is not explicitly included

¹⁴² Design Piracy Prohibition Act, H.R. 5055, 109th Cong. § 1 (2d Sess. 2006) (“The term ‘apparel’ means—(A) an article of men’s, women’s, or children’s clothing, *including* undergarments, outerwear, gloves footwear, and headgear.” (emphasis added)).

¹⁴³ See 17 U.S.C. § 101 (2000) (defining “including”).

¹⁴⁴ For example, software is protected under the Copyright Act even though it is not listed in § 102 as a work of authorship. *Aharonian v. Gonzales*, No. C 04-5190 MHP, 2006 WL 13067, at *8 (N.D. Cal. Jan. 3, 2006) (rejecting plaintiff’s argument that software is not protected because it is not explicitly listed in 17 U.S.C. § 102, noting that “the language of section 102(b) is deliberately open-ended, permitting flexible application of copyright law to evolving technology.”).

¹⁴⁵ See *supra* Part IV.A.

in the statute should nevertheless fall within its scope.¹⁴⁶ Under this approach, courts consider the creator's intention in determining the item's identity or purpose and thus whether it falls within the meaning of a statutorily defined term.¹⁴⁷ Courts may listen to the creator's testimony at trial¹⁴⁸ or may look to external signs of his or her intent at the time of creation.¹⁴⁹

For example, in *NASCAR v. Scharle*, the court looked at both the plaintiff's characterization of his work as well as his external conduct regarding its creation in determining that his trophy designs did not qualify as "visual art" within the scope of VARA.¹⁵⁰ The court noted that in his testimony, the plaintiff disclosed that he never expected his trophy designs to be displayed as independent works of art but that he viewed them merely as preliminary sketches to be used in the process of creating a three-dimensional trophy.¹⁵¹ Also significant to the court's finding that the plaintiff's designs were not "works of visual art" was the fact that he had created the designs "with extreme exactness" in order to be more useful to technicians "later in the manufacturing process."¹⁵² The court found this to

¹⁴⁶ See *supra* Part IV.A.

¹⁴⁷ See, e.g., *Pollara v. Seymour*, 344 F.3d 265, 270 (2d Cir. 2003); *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 84 (2d Cir. 1995); *Lilley v. Stout*, 384 F. Supp. 2d 83, 88-89 (D.D.C. 2005); *NASCAR v. Scharle*, 356 F. Supp. 2d 515, 529 (E.D. Pa. 2005); *Phillips v. Pembroke Real Estate*, 288 F. Supp. 2d 89, 94 (D. Mass. 2003).

¹⁴⁸ See, e.g., *Carter*, 71 F.3d at 84. (noting that the trial court found that installation art in the lobby of a commercial building satisfied the Copyright Act's "positive definition of a work of visual art" as a single work based partly "on testimony . . . of the artists themselves"); see also *NASCAR*, 356 F. Supp. 2d at 529; *Phillips*, 288 F. Supp. 2d at 94 (in determining whether a sculpture park was protected under VARA, considering the plaintiff-artist's belief that his sculptures were "visual art"); *Lilley*, 384 F. Supp. 2d at 86, 87 (in finding that photographic prints were not produced "for exhibition purposes only" under VARA, noting that "[w]hile it may appear simple to distinguish between an amateur photographer taking snapshots on vacation and an artist producing photographs 'for exhibition only,' few artists would characterize their work as the latter").

¹⁴⁹ See, e.g., *Pollara*, 344 F.3d at 270 ("[T]he directions given by [the commissioner of the work] evidence the promotional and advertising purpose that bring the banner outside the scope of VARA."); *Lilley*, 384 F. Supp. 2d at 88-89 (noting that a photographer's actions evidenced that certain prints were not created solely for exhibition purposes); *Phillips*, 288 F. Supp. 2d at 99 (in determining whether a sculpture park was protected under VARA, noting plaintiff-artist's promotional brochures describing his "artistic vision" and his artistic input into the creation of the park). *But see* *Peters v. United States*, 41 Cust. Ct. 195, 199 (Cust. Ct. 1958) (finding that a collage was not protected as a painting under the Tariff Act of 1930 even though there was "documentary evidence indicating that it [was] regarded by the artist . . . as a painting").

¹⁵⁰ *NASCAR*, 356 F. Supp. 2d at 528-29.

¹⁵¹ *Id.* at 529.

¹⁵² *Id.*

be objective evidence that at the time of creation the artist did not intend to produce a “work of visual art.”¹⁵³

Courts could similarly take into account an apparel designer’s intent with regard to whether an item falls under the scope of the DPPA. Designers could be called upon to testify as to whether they think of their creations as “fashion designs,” whether they intend to include the items in their runway shows or as part of one of their seasonal collections, or whether they intend to market the item as designer fashion apparel. Courts could also consider objective evidence of a designer’s creative input and the purpose for which the garment was designed, following the approach in *NASCAR*.¹⁵⁴

2. The Institutional Approach

In addition to considering the intent of an item’s creator, courts frequently consider the opinions of experts to determine whether a particular item falls within the scope of a statute. This is the “institutionalist” approach identified by Professor Yen.¹⁵⁵ Under this approach, courts take into account the opinions of those with expertise in the relevant field to determine whether an item falls within the scope of a statutorily defined term.¹⁵⁶ For example, when courts interpret statutes governing art, they often look to what the “art world” considers to be art.¹⁵⁷ They may look at whether the item has been displayed in a museum or gallery,¹⁵⁸ whether it has

¹⁵³ *Id.*

¹⁵⁴ For example, a dress designed specifically for a celebrity to wear to the Academy Awards Show, an event where celebrities are expected to wear “top-tier” fashion, would clearly evince the creator’s intent to produce a “fashion design.” See Guy Trebay, *Fashion Diary: For Designers, an Image-Making Bonanza That Is Priceless*, N.Y. TIMES, Mar. 6, 2006, at E1 (“[T]he Oscars are a designer bonanza.”).

¹⁵⁵ See *supra* Part IV.A.

¹⁵⁶ See, e.g., *United States v. Perry*, 146 U.S. 71, 74 (1892); *Martin v. Indianapolis*, 192 F.3d 608, 610 (7th Cir. 1999); *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 84 (2d Cir. 1995); *Peters v. United States*, 41 Cust. Ct. 195, 198-99 (Cust. Ct. 1958); *Hunter v. Squirrel Hill Assoc.*, 413 F. Supp. 2d 517, 518 (E.D. Pa. 2005); *Scott v. Dixon*, 309 F. Supp. 2d 395, 396 (E.D.N.Y. 2004); *Phillips v. Pembroke Real Estate*, 288 F. Supp. 2d 89, 92 (D. Mass. 2003).

¹⁵⁷ See, e.g., *Perry*, 146 U.S. at 74; *Martin*, 192 F.3d at 610; *Carter*, 71 F.3d at 84; *Hunter*, 413 F. Supp. 2d at 518; *Scott*, 309 F. Supp. 2d at 396; *Phillips*, 288 F. Supp. 2d at 93.

¹⁵⁸ See, e.g., *Perry*, 146 U.S. at 74 (noting that stained-glass windows are “ordinarily classified in foreign exhibits as among the decorative and industrial, rather than among the fine, arts” in finding that they did not qualify as “paintings” under the Tariff Act of 1890 in this case); *Martin*, 192 F.3d at 610 (considering the plaintiff-creator’s evidence that “his works have been displayed in museums” in finding that a sculpture was protected as a work of “recognized stature” under VARA); *Scott*, 309 F.

received an award for artistic achievement,¹⁵⁹ or whether the item or its creator has been recognized in some way by the art world.¹⁶⁰ They also may give significant weight to the testimony of art experts.¹⁶¹

The United States Customs Court took an institutionalist approach in *Peters v. United States*,¹⁶² holding that a “collage”—“executed in the medium of burlap pieces, sewn, the whole pasted or otherwise affixed to a back, and with oil paints applied”¹⁶³—was an “original work of art.”¹⁶⁴ The court relied on

Supp. 2d at 396 (considering the plaintiff’s testimony that galleries exhibited her work in its determination of whether an object was a work of recognized stature under VARA); *Phillips*, 288 F. Supp. 2d at 93 (considering that the creator’s “work is exhibited in galleries and museums in New York City, Maine, and elsewhere” in its determination of whether a sculpture park fell within the scope of VARA and MAPA).

¹⁵⁹ See, e.g., *Martin*, 192 F.3d at 610 (noting that plaintiff-creator received a prize from the Annual Hoosier Salem Art Show in finding that a sculpture was a work of recognized stature under VARA); *Hunter*, 413 F. Supp. 2d at 518 (in recognizing that a mural qualified as a work of recognized stature under VARA, noting that it “enjoyed media attention and several public commendations, including a landscape design award from the American Society of Landscape Architects . . . [.] first prize in the Pennsylvania Horticultural Society’s City Garden Contest. . . . [and], the City Council of Philadelphia recently honored Plaintiff for her work on the mural”).

¹⁶⁰ See, e.g., *Perry*, 146 U.S. at 75-76 (noting that the stained-glass windows in question were not distinguished from other types of stained-glass windows “in the catalogues of manufacturers and dealers in stained glass” and that they were “advertised and known to the trade as painted or stained glass windows”); *Martin*, 192 F.3d at 610-12 (noting that plaintiff-creator held “various art degrees,” that the sculpture received attention from the “art community,” and that plaintiff proffered “newspaper and magazine articles, and various letters, including a letter from an art gallery director and a letter to the editor . . . in support of the sculpture” in finding that the sculpture was protected under VARA); *Scott*, 309 F. Supp. 2d at 396 (noting that plaintiff-artist had been referred to in a periodical as a “contemporary American artist” and “achieved a measure of local notoriety as an artist” in determining whether his paintings were protected under VARA); *Phillips*, 288 F. Supp. 2d at 93-94 (noting that the creator “earned numerous commissions for sculptures at universities, private companies, and public spaces,” was “featured in art magazines,” and “enjoys a national reputation” in determining whether a sculpture park fell within the scope of VARA and MAPA).

¹⁶¹ See, e.g., *Martin*, 192 F.3d at 610; *Carter*, 71 F.3d at 84 (noting, without reaching the issue, that the trial court found that installation art in the lobby of a commercial building satisfied the Copyright Act’s “positive definition of a work of visual art” based partly on the testimony of expert witnesses); *Scott*, 309 F. Supp. 2d at 397 (noting that the plaintiff failed to “call any expert witness to testify as to whether the Sculpture had ever been reviewed by any member of the artistic community” in determining whether an object was work of recognized stature under VARA); *Phillips*, 288 F. Supp. 2d at 92-96 (relying on testimony from “the Executive Director of the Urban Arts Institute at the Massachusetts College of Art . . . [and] the Director of the Architect Resource Group at Pembroke” to determine that “modern sculpture does not exist separate from its context,” that “the notion of *sculpture* has undergone a radical redefinition,” and that the park has been treated as a “sculpture of the environment” in determining whether a sculpture park fell within the scope of VARA and MAPA).

¹⁶² *Peters*, 41 Cust. Ct. at 195.

¹⁶³ *Id.* at 198.

the expert testimony of the director of museum collections of the Museum of Modern Art (“MOMA”) in New York and of a modern art dealer and gallery owner from New York to determine that the object qualified as “an original work of the free fine arts, within the modern art field.”¹⁶⁵ The court credited the plaintiff’s reputation in the art world, noting that his works had been exhibited in several museums, that a MOMA bulletin listed his work among the work of other renowned artists, and that a MOMA book featuring twenty-two painters and sculptors included the plaintiff as one of the artists.¹⁶⁶ Emphasizing the experts’ qualifications to testify about modern art, the court concluded that the collage was an “original work of art.”¹⁶⁷

Under the DPPA, courts may take an analogous approach in determining whether an item is a “fashion design,” relying on the testimony of fashion industry experts and other external evidence of the industry’s validation of the work. Just as courts interpreting statutes about art look at whether the object in question has ever been displayed in a museum or gallery, courts interpreting the Bill may look at whether the item in question has ever been sold in “fashionable” department stores, such as Bergdorf Goodman in Manhattan and Barneys New York, or included in an elite fashion show. Courts may also look at whether the fashion design or designer has been recognized in the fashion media or received any awards.¹⁶⁸

3. Consideration of the “Type” of Item Protected

Some courts interpreting the DPPA broadly may not follow either the intentionalist or the institutionalist approach. Rather, they may infer that a particular item is protected as a “fashion design” even when it is not explicitly listed under the definition by analogizing to other cases or finding that the item falls within the general “type” of item protected by the Bill.

¹⁶⁴ Yet the collage did not qualify as an original painting under the Tariff Act of 1930, which did not classify “collage” as a type of work subject to the statutory provision. *Id.* at 199.

¹⁶⁵ *Id.* at 198.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 199.

¹⁶⁸ For example, the CFDA awards. Ginia Bellafonte, *Front Row; Rousing a Fashion Award Show*, N.Y. TIMES, Apr. 25, 2000, at B9 (reporting on fashion award ceremony).

Under one approach, courts may interpret the statutory language in a looser manner by treating the list of terms included under the definition of “apparel” (for example, “handbags,” “belts,” “eyeglass frames”) as merely suggestive of the types of works subject to the Bill’s protection, and by making broad interpretations of each individual term on the list. In *Friedrich v. Chicago*, Judge Posner took this approach in holding that expert witness fees were recoverable under a civil rights attorney fee statute providing that “the court, in its discretion, may allow the prevailing party . . . a reasonable attorney’s fee as part of the costs” paid by the loser.¹⁶⁹ Although the statute explicitly granted *attorney’s* fees, and said nothing about fees for *experts*, Posner noted that the U.S. Supreme Court had held that paralegal fees and lawyers’ out-of-pocket expenses, which are not “attorney’s fees” within the plain meaning of the term, nevertheless fell within the scope of the statute.¹⁷⁰ He reasoned that given this broad approach to interpreting the term “reasonable attorney’s fees” to include such other expenses, Congress must have used the term “as a shorthand expression for such fees and other expenses as the district court might in the exercise of its equitable discretion reasonably believe should be reimbursed to the prevailing party.”¹⁷¹ Thus, expert witness fees are recoverable, even though they are not literally “attorney’s fees” or a subset of that term.

In the case of the DPPA, the terms employed in the statutory definition of “apparel” could also be interpreted as shorthand expressions for the fashion items they represent, as well as other fashionable apparel a court might believe is meant be protected. For example, a court might find that a suitcase falls within the scope of the statute because the term “tote bag” is a shorthand expression for all large bags used to carry around personal belongings.

¹⁶⁹ *Friedrich v. Chicago*, 888 F.2d 511, 513, 519 (7th Cir. 1989), *vacated*, *Chicago v. Griedrich*, 499 U.S. 933 (1991). Although *Friedrich* was vacated in light of a contemporaneous Supreme Court case that limited recovery of experts’ fees under § 1988 to stipends for testimonial services, Congress amended the statute to accord with Posner’s interpretation. See *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 102, *superseded by statute*, Civil Rights Act of 1991, Pub. L. 102-166, § 113(a)(2), 105 Stat. 1071, 1079 (1991) (amending 42 U.S.C. § 1988(c) (“[T]he court, in its discretion, may include expert fees as part of the attorney’s fee.”) (emphasis added)).

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 518.

Similarly, courts may read between the lines of a statute in interpreting a defined term by looking at the items listed in the definition of the term in conjunction with one another to determine what “type” of item falls within its meaning. For example, in one state court case, the court was required to determine whether a kitten was a “domesticated animal” under a statute that provided that “[d]omesticated animals’ includes, but is not limited to, sheep, goats, cattle, swine, and poultry.”¹⁷² Noting that the only animals listed in the statute were livestock, the court held that the term “is limited to livestock and does not cover domestic pets.”¹⁷³ Kittens simply did not fall within the type of animal suggested by the list of animals included in the definition of the term. Conversely, items that *are* within the type suggested by the list but that are not explicitly enumerated may be protected.¹⁷⁴

A court could also interpret the term “fashion design” in the DPPA as including all apparel that falls within the same type as the items listed under the definition of the term “apparel.” Thus, a court could determine that if a rain hat is protected as “headgear,”¹⁷⁵ a raincoat is protected as “outerwear”¹⁷⁶ and rainboots are protected as “footwear,”¹⁷⁷ then so too should umbrellas, a type of raingear like the other items, be protected. Or a court could determine more generally that the type of item listed in the statute includes accessories, and therefore a man’s wallet should be covered even though it is not explicitly listed since a wallet is a type of accessory.

In sum, if courts interpret the DPPA broadly, they may find that an item not explicitly listed under the definition of “fashion design” and “apparel” nonetheless falls within the Bill’s scope of protection. In so doing, they may consider the intent of the item’s creator in producing the work. They may

¹⁷² *McKinney v. Robbins*, 892 S.W.2d 502, 503 (Ark. 1995) (internal quotation marks omitted) (citing ARK. CODE ANN. §§ 20-19-102).

¹⁷³ *Id.* at 504.

¹⁷⁴ *But see Petry Co.*, 11 Ct. Cust. App. at 527 (finding that mosaics are not paintings under the Tariff Act of 1913 even though the statutory list definition of art should not be interpreted as exhaustive, and even though “[i]t is probably true that mosaic pictures like the present one are more nearly allied than other mosaic articles to works of art such as are specified in [the Act’s provision protecting paintings]”); *Peters v. United States*, 41 Cust. Ct. 195, 199 (Cust. Ct. 1958) (holding that although a collage was an “original work of art,” it does not fall within the scope of the statute, which does not include “collage” as one of its enumerated art forms).

¹⁷⁵ Design Piracy Prohibition Act, H.R. 5055, 109th Cong. § 1 (2d Sess. 2006).

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

also consider the opinions of experts or other outside institutions from the fashion world with regard to the item. Or they may infer that the item was meant to be protected based on the other types of items that, per the case law or the statute's plain meaning, are already protected.

V. THE POTENTIAL OUTCOMES UNDER EACH OPTION

No single approach outlined above will avoid all the potential scope problems of over-inclusiveness and under-inclusiveness. If the Bill is interpreted using a narrow, strictly formalist approach, the results could be either under-inclusive or over-inclusive.¹⁷⁸ If the Bill is interpreted broadly, a strictly intentionalist approach would primarily be too broad, leading to significantly over-inclusive results,¹⁷⁹ while a strictly institutionalist approach would lead to under-inclusive results and would be difficult for courts to implement consistently.¹⁸⁰

A. *Potential Outcomes Under the Formalist Approach*

If courts interpret the DPPA in a strictly formalist way, the results would potentially be both over- and under-inclusive in light of the Bill's purpose.¹⁸¹ Yen recognized this problem with the formalist doctrine as applied to art, posing four hypothetical scenarios, each of which "catches the formalist in a contradiction."¹⁸² In the case of the DPPA, under a strictly formalist approach, the Bill would discriminate against types of fashion not enumerated on the list, and many items would be arbitrarily unprotected. For example, luggage, umbrellas, and pet wear by recognized designers of "top-tier" fashion would not receive protection¹⁸³ since none of these items is explicitly listed under the definition of "apparel," and they likely would not qualify as subcategories of any of the items listed under a strict

¹⁷⁸ See *infra* Part V.A.

¹⁷⁹ See *infra* Part V.B.

¹⁸⁰ See *infra* Part V.C.

¹⁸¹ See *supra* Part III for potential problems of over- and under-inclusiveness.

¹⁸² Yen, *supra* note 102, at 254-55.

¹⁸³ See Polly Blitzer, *What's Hot Now: Umbrella Stands*, IN STYLE, Oct. 2006, at 400 (reporting on umbrella fashion trend amongst celebrities); Nadine Brozan, *Chronicle*, N.Y. TIMES, June 28, 1996, at 7 (reporting on the popularity of umbrellas designed by fashion designer Nicole Miller); Maryellen Gordon, *PULSE; Burberrys Downsizes Classic Brolly*, N.Y. TIMES, Dec. 28, 1997, at 9 (discussing a new style of umbrella by fashion designer Burberry); *supra* notes 91-92 and accompanying text (fashion for pets), 93 and accompanying text (designer luggage).

interpretation. Therefore, if Burberry sent models down the runway clad in the design house's signature trench coats, rainboots, and umbrellas, the coats and boots would fall within the scope of the statute while the umbrellas would not. The statute would be under-inclusive as there is no logical reason why umbrellas should be left vulnerable to copying while coats and boots receive protection. Meanwhile, the Bill might provide protection to items that were never meant to be protected, such as cheap mass-produced tote bags or belts sold on the street or in discount stores, as well as sporting apparel and protective apparel, since these items fall specifically within the list under the definition of "apparel."¹⁸⁴ Thus, under a strictly narrow, formalist approach, the Bill would be arbitrarily over-protective in some areas and under-protective in others.

B. Potential Outcomes Under the Intentionalist Approach

If courts employ a strictly intentionalist perspective to interpret the DPPA, the result would likely be a significant amount of over-inclusion, as well as a minor amount of under-inclusion, of items protected. Yen criticized the intentionalist approach in the context of art, explaining that "the definition of art will become too broad," thus "cheapening" the meaning of the term.¹⁸⁵ He also pointed out that as a practical matter, "evidence of an author's intention is often missing or unclear."¹⁸⁶ Similarly, in the context of the DPPA, *all* creators of apparel from all levels of the fashion pyramid seeking protection under the statute could claim that they intended their creation to be "fashion."¹⁸⁷ Objective evidence of intent may be difficult to establish and not very credible since the creator's intent is seldom reflected in the finished product of the fashion design.¹⁸⁸ Therefore, cheap, mass-produced items,

¹⁸⁴ See *supra* Part III.

¹⁸⁵ Yen, *supra* note 102, at 258.

¹⁸⁶ *Id.* at 264.

¹⁸⁷ For an analogous situation, see *Poe v. Missing Persons*, 745 F.2d 1238, 1239-43 (9th Cir. 1984), and *Morris v. Buffalo Chips Bootery*, 160 F. Supp. 2d 718, 720-21 (S.D.N.Y. 2001). In both cases, the plaintiffs argued that their creations were not useful articles of clothing, but rather non-utilitarian objects of art and therefore qualified for copyright protection. *Poe*, 745 F.2d at 1239; *Morris*, 160 F. Supp. 2d at 720-21. In *Poe*, the court remanded the case to the trial court to make the factual determination, 745 F.2d at 1243, while in *Morris* the court flat-out rejected the creator's intent argument, 160 F. Supp. 2d at 721.

¹⁸⁸ In contrast, objective evidence of the author's intent may be available for other aesthetic works, such as the design plans for the trophy in *NASCAR v. Scharle*,

which are not intended to be protected, may nevertheless fall within the statute's scope¹⁸⁹ so long as the creator of the item can show that he or she intended to create fashion. Moreover, at least one well-known designer of top-tier fashion, Manolo Blahnik, does not identify himself as a fashion designer at all, but as an artist.¹⁹⁰ His designs, as well as those of like-minded designers, would arbitrarily fall outside the scope of the legislation, even though most would agree that regardless of his intentions, Blahnik's creations certainly qualify as fashion.¹⁹¹ Thus, at least some items from within the top tier of the fashion pyramid would be excluded from protection if courts focused solely on the intent of the creator. Under a strictly broad, intentionalist approach, the Bill would be largely over-protective and also in some cases under-protective as well.

C. *Potential Outcomes Under the Institutional Approach*

If courts employ a strictly institutionalist approach in interpreting the DPPA, the likely result would be under-inclusion of items that should receive protection to further the purposes of the Bill, as well as significant unpredictability.¹⁹² Many young, emerging designers—the designers that the statute is most clearly meant to protect¹⁹³—may not receive immediate recognition and validation from the fashion industry, leaving their designs vulnerable under the statute. Moreover, some cheap, mass-marketed apparel that was not intended to be protected may nevertheless be recognized by the fashion media, thus posing a threat of over-inclusiveness if such items were recognized as “fashion design” merely because

where the court found that the “extreme exactness” of the designs indicated that they had been created in order to be used as plans for a trophy, not simply as drawings. 356 F. Supp. 2d 515, 529 (E.D. Pa. 2005).

¹⁸⁹ See *supra* Part III (discussing the purpose of the Bill and risk of over-inclusiveness).

¹⁹⁰ Jae-Ha Kim, *Well-Heeled Stars Love Their Manolos*, CHI. SUN-TIMES, Aug. 30, 2000, at 57 (quoting Manolo Blahnik saying “My shoes are not fashion. They are gestures; objects that happen to be fashion.”)

¹⁹¹ Blahnik's stiletto shoes are regularly featured in fashion magazines and they have been recognized as “footwear icons.” In 1996, Blahnik received a special “Stiletto Award” from the Council of Fashion Designers of America. Sarah Lyall, *Talking the High-Heel Walk*, N.Y. TIMES, Feb. 8, 1998, at 91; Saul Hansell, *High Fashion Goes on Sale on the Web*, N.Y. TIMES, Sept. 18, 2000, at C1; see also Phoebe Eaton, *Who Is Jimmy Choo?*, N.Y. TIMES, Dec. 1, 2002, at 6102 (noting that “Blahnik remains the visionary against whom all other high-end shoemakers are judged”).

¹⁹² See *supra* Part II.C (discussing the purposes of the DPPA).

¹⁹³ See *supra* Part II.C.

of such publicity. For example, some women's fashion magazines feature articles on clothing that looks like top-tier fashion, but which in reality comes from the lower tiers of the fashion pyramid.¹⁹⁴

However, the most significant problem that a court taking a purely institutionalist approach would face is determining how to define the "fashion world." Yen acknowledges that in the case of art, "[t]o classify [objects] as artworks just because they are called art by those who are called artists because they make things they call art is not to classify at all, but to think in circles."¹⁹⁵ Similarly, in the context of fashion, defining "fashion design" as something that is recognized by the "fashion world" begs the question: what is the fashion world? Who qualifies as a fashion "expert" in the United States fashion industry, which is sprawling and difficult to define?¹⁹⁶ While the fashion industry would seem to have the most institutional competence to make determinations about what constitutes "fashion," courts may face significant difficulties in defining the industry, thereby making a solely institutionalist approach difficult to implement as well as potentially under-inclusive.¹⁹⁷

D. *No Perfect Solution*

Thus, no single interpretive approach will yield results entirely consistent with the DPPA's objectives. If courts choose to employ a single approach for all interpretations of the Bill, this would inevitably result in protection for items that were never meant to be protected (the formalist approach and the intentionalist approach), or would leave unprotected items clearly meant to be protected (all three approaches), or would

¹⁹⁴ For example, the items featured in the "steal" section of *Marie Claire's* "Splurge or Steal" column, which often includes exact copies, such as A.B.S. by Allan Schwartz's dresses, are featured by a women's fashion magazine but are clearly not meant to receive protection. See Raustiala & Sprigman, *supra* note 39, at 1705-11.

¹⁹⁵ Yen, *supra* note 102, at 260 (quoting Monroe C. Beardsley, *An Aesthetic Definition of Art*, reprinted in *AESTHETICS AND THE PHILOSOPHY OF ART—THE ANALYTIC TRADITION* 55, 60 (Peter Lamarque & Stein Haugom Olsen eds., 2003)).

¹⁹⁶ See *supra* Part II.B (discussing the U.S. fashion industry).

¹⁹⁷ Similarly, unpredictability may result if courts choose to interpret the statute based on the type of items that are clearly already protected, the approach taken by Judge Posner in *Friedrich*. See *supra* Part IV.C.3. To what levels of abstraction would courts interpret the meaning of the items already protected in order to find that a particular item is also protected? This would depend on the discretionary judgment of the courts and therefore would be difficult for litigants to determine in advance.

lead to unpredictable judicial outcomes (the intentionalist approach). Formalism may be the most predictable approach, since litigants would be assured that those items that are explicitly listed in the Bill would be protected, but this approach does not account for items such as umbrellas and luggage that would seem to be fashion and thus deserving of protection.¹⁹⁸ Intentionalism would more likely protect those items, since their creators could testify that they intended to create “fashion,” but this approach is so broad that virtually anything could be protected, even mass-produced items with low design content.¹⁹⁹ Institutionalism would avoid this overbreadth since it requires confirmation of the items’ status as fashion from fashion “experts” and institutions, but the approach may fail to protect emerging artists—one of the central purposes of the Bill—and would lead to unpredictable outcomes for litigants.²⁰⁰ Thus, the Bill has been drafted in a way that risks undermining the purpose of the proposed legislation by providing protection for those who do not need it, while denying protection to those most vulnerable to piracy, such as emerging designers.

VI. LIKELY RESULT AND RECOMMENDATIONS

A. *The Interpretive Approach Employed Will Depend on the Case*

Given that no one interpretive method will consistently lead to results that further the DPPA’s purpose,²⁰¹ courts will likely apply whatever approach (or approaches) they feel to be most appropriate in any given case. Yen recognized this in the context of cases involving art, observing that the “overlapping pattern of strengths and weaknesses” of each aesthetic approach “practically guarantees that none of these theories will emerge as the comprehensive, authoritative definition of art.”²⁰² Indeed, in most cases involving a statute governing “art,” courts have invoked varying, sometimes multiple approaches, emphasizing one perspective over another

¹⁹⁸ See *supra* Part V.A.

¹⁹⁹ See *supra* Part V.B.

²⁰⁰ See *supra* Part V.C.

²⁰¹ See *supra* Part V.D.

²⁰² Yen, *supra* note 102, at 260.

depending on the facts of the case and the purpose of the statute being invoked.²⁰³

For example, in *Botello v. Shell Oil Co.*, the court predominantly used formalist reasoning in holding that a mural was a “painting” under the California Art Preservation Act,²⁰⁴ while in *Pollara v. Seymour*, the court emphasized the intentions of the work’s creator in holding that a banner was not a “work of visual art” under VARA because it was an advertisement, and advertisements are explicitly excepted from VARA protection.²⁰⁵ The intentionalist approach was more appropriate in *Pollara* than in *Botello* since there the decision turned on the purpose of the work (whether it was meant as an advertisement). Conversely, in *Botello*, the artist’s intent to create a mural did not answer the question of whether a “mural” fell within the definition of “painting” and thus a formalist approach was more appropriate. The *Phillips* court invoked all three interpretive approaches in determining whether a public sculpture park was a “work of visual art” under VARA, although the analysis focused on the formalist approach.²⁰⁶ In addition to invoking dictionary definitions of “sculpture” to determine that the park did not qualify for the statute’s protection (a formalist approach),²⁰⁷ the court also took an intentionalist perspective, noting the artist’s intent regarding the identity of his sculptures,²⁰⁸ as well as an institutionalist perspective, citing art experts’ opinions on whether the park was sculpture.”²⁰⁹ However, the court emphasized the legislative intent that VARA be construed narrowly in ultimately focusing the bulk of its analysis on formalist reasoning.²¹⁰

In the case of the DPPA, courts may similarly employ the approach(es) most appropriate to a particular case, given the case’s facts and the purpose of the legislation. For example,

²⁰³ Yen notes that in copyright cases courts employ the analytical perspective based on how “subjective and aesthetically controversial” it is compared to the other approaches, given the facts of a particular case. *Id.* at 298.

²⁰⁴ *Botello v. Shell Oil Co.*, 280 Cal. Rptr. 535, 538 (Ct. App. 1991).

²⁰⁵ *Pollara v. Seymour*, 344 F.3d 265, 265-66, 270 (2d Cir. 2003).

²⁰⁶ See *Phillips v. Pembroke Real Estate, Inc.*, 288 F. Supp. 2d 89, 99 (D. Mass. 2003).

²⁰⁷ See *supra* Part IV.B.1.

²⁰⁸ “[He] believes that his sculptures . . . are works of visual art . . . and are meaningful only if they remain in [the park].” *Phillips*, 288 F. Supp. 2d at 94.

²⁰⁹ “[The artist’s expert] concedes that a park does not meet the traditional definition of sculpture.” *Id.* at 99.

²¹⁰ *Id.*

courts may decline to use an institutionalist approach when the case involves a work by a young designer who has not yet been recognized within the fashion community. Instead they could adopt a formalist or intentionalist perspective in determining whether the work qualifies for protection to avoid undermining the Bill's goal of protecting emerging designers. By contrast, courts may emphasize institutionalist or intentionalist rationales in cases involving items not explicitly listed under the Bill's definition of "fashion design," such as umbrellas and garments designed for pets. Moreover, just as the *Phillips* court cited the legislative intent that VARA be interpreted narrowly to justify its formalist reasoning, courts are likely to look to the congressional intent behind the DPPA, as yet to be articulated and debated through the legislative process, to determine which approach best furthers the purpose of the statute.²¹¹

B. *Recommendations*

Given the variety of approaches courts might take to interpreting the Bill, Congress should address its scope as well as the way it should be interpreted in order to promote predictability for litigants and to reduce the likelihood that courts will undermine its purpose. Congress should debate these issues and revise the proposed statutory language to provide guidance to the courts.

First, Congress should be explicit about the purpose of the legislation and whether it is meant to be interpreted broadly or narrowly, perhaps in an expanded preamble.²¹² Courts have frequently considered congressional intent in determining how to construe VARA, citing the House Reports as evidence that Congress intended the statute to be interpreted narrowly and noting that congressional debate indicated that the statute's scope was to be "limited to certain carefully defined types of works and artists."²¹³ In the case of the DPPA, Congress should similarly address whether the

²¹¹ The current legislative intent of the DPPA is to protect fashion designers, especially emerging designers from the top tier of the fashion pyramid, and to promote the United States' fashion industry. *See supra* Part II.C. This Note presumes that this will remain the purpose of the proposed legislation if it is enacted.

²¹² Instead of just "to provide protection for fashion design," as the Bill currently reads, *see supra* text accompanying note 77, the preamble could say something that would more specifically reflect the Congressional intent behind the Bill, such as: "to provide protection for fashion design to protect the United States' fashion industry and its high-end designers."

²¹³ *See, e.g., Pollara v. Seymour*, 344 F.3d 265, 269 (2d Cir. 2003).

legislation should be interpreted narrowly or broadly, and whether it is meant to be limited to “certain carefully defined types of works and [fashion designers],” such as designers of top-tier fashion and emerging designers. Indeed, Congress should explicitly state how the law is to be interpreted in the statutory text, thereby illuminating its position even more clearly than in the case of VARA, so that courts do not have to divine intent from debate records. This would help courts decide whether to view a particular case through a formalist, institutionalist, or intentionalist lens. It would also promote predictability as courts could decide cases in ways that consistently reflect the articulated legislative goal.

Second, the proposed legislation should be amended to leave more flexibility in the statutory language defining “apparel” in order to reduce the harshness of the formalist approach and prevent inequitable results,²¹⁴ especially if Congress indicates that the Bill should be interpreted narrowly. For example, a “miscellaneous” category could be added under the definition of “apparel.” After stating “apparel means . . . an article of men’s, women’s, or children’s clothing, . . . handbags, purses, and tote bags; belts; and eyeglass frames,”²¹⁵ the phrase, “and all similar items” could be added to the end of the list. Or the definition could be amended to read “the term ‘apparel’ *includes, but is not limited to*” This construction would allow courts to interpret the statutory language literally while preventing the strict exclusion of items not explicitly listed but which *should* sometimes be protected, such as luggage and briefcases.²¹⁶ It would also invite courts to interpret the term “fashion design” as including apparel that falls within the same type as the items listed under the definition of the term “apparel.”²¹⁷ Although allowing courts more discretion may lead to greater unpredictability for litigants, the potential uncertainty would be reduced if Congress clearly articulates its goals for the legislation and as case law interpreting the legislation develops. Congress could also reduce the likelihood of inequitable outcomes resulting from formalist interpretations of the legislation by expressly

²¹⁴ See *supra* Part V.A. (discussing the potential problems with the formalist approach).

²¹⁵ See *supra* text accompanying notes 66-70 (describing the structure of the VHDPA).

²¹⁶ See *supra* Part V.A.

²¹⁷ See *supra* Part IV.C.3.

excluding certain items from the Bill's protection, such as mass-produced apparel.²¹⁸ This would codify the congressional intent and thereby lower the risk that items such as sporting apparel and protective clothing would unwittingly be granted protection under the Bill.²¹⁹

Third, Congress should provide guidance as to what sources courts should consult to interpret its terms, such as the designers themselves or experts from the industry especially if Congress indicates that the Bill should be interpreted broadly. For example, regarding VARA, Congress specified, "[C]ourts should use common sense and generally accepted standards of the artistic community in determining whether a particular work falls within the scope of the definition."²²⁰ Congress could similarly specify whether courts should use "common sense," "generally accepted standards of the [fashion] community," or the designer's intentions to determine whether a particular item falls within the scope of the DPPA.²²¹ These types of specifications would lead to more predictable outcomes for litigants, who could then foresee in advance which interpretive approach(es) the courts would be most likely to rely on.

²¹⁸ For example, VARA is limited by the definition of "visual art" in Title 17, which explicitly provides that a "work of visual art does not include . . . any merchandising item or advertising, promotional, descriptive, covering, or packaging material or container." 17 U.S.C. § 101 (2000). The *Pollara* court cited this definition in finding that the banner at issue was not protected by VARA. 344 F.3d at 265-66. Moreover, VARA also specifically excludes mass-produced objects, providing that in order to receive protection, the item must exist in no more than 200 copies. 17 U.S.C. § 101 (2000). Congress could provide a similar limitation on the protection granted to fashion items under the DPPA.

²¹⁹ See *supra* note 88 and accompanying text. A more drastic option to eliminate some of the problems associated with a narrow interpretation of the legislation would be for Congress to cut out the definition of "apparel" altogether and let courts decide, based on their own understanding of the term, what constitutes "apparel." One commentator recently proposed an amendment to Title 17 that would provide protection for apparel designs. In her mock amendment, which would serve "[t]o strengthen the intellectual property laws of the United States by providing apparel protection of original apparel designs," the author proposed that "[t]he design of a garment" be subject to protection, but unlike the DPPA, the amendment does not define "garment" or "apparel." Nurbhai, *supra* note 18, at 525-37. However, Congress may wish to give courts and litigants an idea of the types of items that certainly are covered, just as many legislatures define "art" by providing a list of what is included within this broad term. See *supra* note 119.

²²⁰ *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 84 (2d Cir. 1995) (citing H.R. Rep. No. 514, at 11 (1990)).

²²¹ *Id.*

VII. CONCLUSION

This Note explores the question of what is “fashion design” under the Design Piracy Prohibition Act. Because the answer is not as clear as it may initially seem, Congress should give greater guidance to courts as to the Bill’s scope of protection if it is enacted into law. As written, the Bill risks being both over-inclusive by providing protection for items that were likely not meant to be protected, and under-inclusive by failing to provide protection for items that fall within what seems to be the primary purpose of the Bill. Just as courts judging art take a variety of approaches to interpreting the meaning of “art,” courts interpreting the meaning of “fashion design” under the Bill could employ various interpretive perspectives, each potentially resulting in different, possibly problematic, outcomes. Both to avoid the risk of over-inclusiveness and under-inclusiveness and also to promote greater predictability for litigants, Congress should give greater guidance to the courts as to how the legislation is to be interpreted.

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