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## In Luxury Fashion, The United States Is a Pirate

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Luxury fashion is all about design. After design, come quality materials and workmanship, execution, branding, marketing and sales. But it starts and ends with the creative vision—the design—the protection of which is the lifeblood of the industry.

China, for years the epicenter of fakes and copies of fashion products—especially luxury products—is not alone. Because of a huge, unclosed gap in domestic intellectual property laws, the United States is itself a pirate nation.

Contrary to public perception, most designers are constantly on the edge of failure. First, they seek money to get their initial collections up and running. Then, they need money to get the goods made (factories live on this basis). Having passed these barriers, more established designers immediately start working on next season's collection and, they hope, have earned



at least some money from their initial efforts to keep the lights on. It is often touch and go.

Making the process, and achieving success, more difficult, the fashion world is remarkably fast-paced and seasonal. Trends and designs rapidly evolve. Designers have little time to protect themselves or build a brand. Waiting in the wings, so-called fast fashion companies are quick to pounce. The

Internet and other technology have removed time from the equation. Within weeks of the original appearing on a fashion week runway or other product launch, fast fashion will have a copy on the shelves. Bear in mind, we are not talking about counterfeits, but what are known as knock-offs, “red carpet copycats” or “our version of ... .” Perhaps even more harmful, when the legitimate designer goods arrive on retail shelves,

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they are already perceived as stale by consumers exposed to the fast-fashion knock-offs.

IP protection in the United States for designers and their creations simply does not reflect today's reality of lightning fast digital applications to copy, manufacture and sell others' designs via e-commerce platforms. The common thread among U.S. intellectual property rights is time. Unfortunately, unlike for Mick Jagger and Keith Richards, time is not on fashion's side.

Trademark rights attach to names, and some design elements of a product, as soon as they are used. But the designer's "look"—the assembly of elements into a unique whole or recognizable components of a product line—*could* be protectable with time. The Hermes Birkin bag is noticeably and instantly identifiable, for instance, but that identity and consumer recognition take years and marketing resources to develop. Design patents covering the ornamental features of products also take time to obtain and can often be designed around to avoid any infringement. Copyrights, although available upon creation of the design, are not generally extended to fashion products because of their functional nature; a coat or a dress, for example, simply covers the body. The copyright law requires that original art be severable from function. Thus, a little black dress would not be protectable even if a version is original with a given designer. There has been some evolution in extending protection to 2D items such as dress art or lace patterns, but copyright remains unavailable to the vast majority of designers under U.S. law.

The Supreme Court has agreed to consider this most vexing issue in granting cert in *Star Athletica v. Varsity Brands*, where plaintiff is asserting protection over the design of its cheerleading uniforms. Nonetheless, it is doubtful anything will come close to realistically closing the gap between the moment of creation and the time a designer has obtained protectable rights. Missing in the United States is a specific law eliminating time as a factor.

Other countries have recognized, and have addressed, this time warp. A notable example is the European Design Rights law (See EU Reg. 6/2002), which protects product design at inception (whether registered or unregistered) and covers items that may otherwise have function. The burden falls on the party asserting such rights to prove originality, but if it does, the product is protected, with no time or registration element. Protection accrues from day one, providing designers and manufacturers ample time to develop the underlying protective rights. The law is enormously effective with no fall off in creativity.

Efforts in the United States to plug the hole in fashion protection, focused on amending the U.S. Copyright Act, have failed. In 2010, Sen. Charles Schumer (D-N.Y.) introduced the Innovative Design Protection and Piracy Prevention Act (S. 3728), which was crafted in an attempt to protect unique and original fashion designs and which was strongly supported by the fashion and design industry due to its practical nature. The proposed bill provided a short, three-year term of protection to new and original fashion designs, while

leaving in the public domain every design ever created prior to enactment of the bill. The bill failed to get to a floor vote. Each year thereafter, a similar effort has failed, for lack of bipartisan support and/or by reason of the lobbying efforts of those who benefit from the status quo and who falsely argue that copying promotes creativity.

The lack of IP protection in the United States continues to damage and hinder growth of the domestic fashion industry. The speed of fast fashion virtually guarantees successful designers will be copied before they can get their goods to retail. The consequences extend well beyond that of the individual designer: Why introduce your goods or launch your new line in the United States? Why not in Europe, where you can be better protected? Why use runway shows at all when doing so makes your designs available to be copied well before you can produce your originals to order? (Runway shows are, parenthetically, now imperiled.) Designers are grappling with this issue worldwide, but it all comes down to the United States closing the intellectual property gap and protecting one of its most important industries. Until that happens, the United States is, and will remain, a pirate nation and risk its place as an industry leader.