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How the Lack of Copyright Protections for Fashion Designs Affects Innovation in the Fashion Industry

By

Serena Elavia

A Thesis Submitted to the Department of Economics
of Trinity College in Partial Fulfillment of the
Requirements for the Bachelor of Arts Degree

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Abstract

The fashion industry is a multibillion dollar industry that continues to grow. Currently, there is an ongoing debate on whether or not fashion designs should be able to receive copyright protections due to a phenomenon called fast fashion. Fast fashion is when low end designers copy high end designs from both the spring and fall Fashion Weeks, produce the copied product quickly and sell before the high end good is released to stores. Copying in the fashion industry is possible because there are no copyright protections granted to fashion designs. With recent legislation introduced in the U.S. House of Representatives proposing copyright protection for high end designs, the low end designers of the industry are threatened. Many fast fashion retailers (Zara, H&M, Forever 21) would go out of business, which would destroy thousands of jobs and drastically reduce the number of options consumers have to shop at. This paper will examine if the presence of copyright laws in the fashion industry would help or hurt the consumer and the industry. The methods of research in this paper are a case study on the global fashion industry, a second case study on industries that have copyright protection and those that do not, and a duopoly model showing the fashion industry.

My results conclude that numerically there is an optimum level to set copyright protections at, but that this is difficult to translate into words for legislation. Therefore, copyright laws are not recommended for the fashion industry.

Acknowledgements

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Table of Contents

Part I: Introduction	5
Part II: The Global Fashion Industry	10
Part III: A Comparison of the Food, Film and Fragrance Industries	32
Part IV: Economic Model of the Fast Fashion	59
Part V: Conclusion	63
References	65

I. Introduction

The fashion industry is a multibillion dollar, global creative industry, with sales in the U.S. generating over \$200 billion (Hemphill, 2009). The U.S. fashion industry is made up of thousands of designers and includes clothing, handbags, shoes, jewelry and accessories. Embodying the ideals of sociology, culture and even economics, fashion affects everyone and all people interact with fashion on a daily basis. Over the last 20 years, though, there has been a growing debate in the fashion industry on copyright protections. A new concept called fast fashion has arisen which has opened the debate for granting copyright protection for fashion designs. But granting fashion designs copyright protections may have an impact on innovation in the industry and this argument has continued to fuel the debate on copyright protections.

A. Designers in the Fashion Industry

The industry can be categorized into two types of designers. The first is those who produce high quality, luxury goods. A few examples of luxury brands are Diane von Furstenberg, Michael Kors, and Ralph Lauren. These designers innovate new designs and showcase them at Fashion Week. Fashion Week occurs twice a year in New York: once in February to showcase the spring/summer collections and once in September to showcase the fall/winter collection. In 1943, prominent fashion publicist Eleanor Lambert hosted a series of fashion shows called Press Week in New York at the Plaza Hotel. At the time, the attention of the global fashion industry was on French designers and not American designers. American journalists, buyers and designers would travel to Paris twice a year to see the new fashions, which would set the trends in America. But at the onset of World War II, access to France was completely cut off (Diliberto, 2009). In order to build a culture of American fashion, Lambert hosted Press Week to call attention to American designers who were overshadowed by European designers (Mell, 2011). Not only were American designers in attendance, but also American fashion magazine editors were present. Lambert's goal of Press Week was to have American fashion magazines feature and report more on

American designers. After the first Press Week, American designs began to be featured in the pages of American fashion magazines.

Today, Press Week is known as Fashion Week, the flashiest and most important event in the fashion industry. Sponsored by Mercedes-Benz, New York Fashion Week is held at Lincoln Center and allows over 80 of the top designers the opportunity to showcase their upcoming collections to over 100,000 people including other designers, editors, retail buyers, models and celebrities from around the world (MBFashionWeek.com). While there are no restrictions as to who can show at Fashion Week, it can cost up to \$1 million dollars to host a show. This large price tag does not allow designers with small budgets to participate in Fashion Week. As a result, presenters at Fashion Week are high end, established designers.

At Fashion Week, a high end designer shows the upcoming season's collection to prospective department and boutique store buyers. The buyers then make choices on which pieces from the collection they want to retail in stores. After making buying decisions, the pieces are available for sale slightly before the season starts. The delay between Fashion Week and when the products arrive in stores has allowed designers to be copied. It is easiest to illustrate this by showing a real life example. February Fashion Week happens in the first week of February. Designers show their spring/summer collections to prospective buyers. The buyers then make decisions on what they want to retail and the merchandise arrives in stores anywhere from mid to late March. There is approximately a four week gap between the initial show of product to when it arrives in stores for consumption. In this gap, high end designers are vulnerable to being copied by other designers.

The second type of designers is those who imitate the designs made by high end designers. The fashion industry does not have copyright laws protecting designs and thus this has allowed for rampant copying and imitation in the industry. This has led to a concept called fast fashion.

B. Fast Fashion

Over the last twenty years, the fashion industry has changed tremendously. The number of fashion seasons has increased, mass production has dwindled and a retail model called “fast fashion” has emerged. Up until the 1980s, designers would attempt to predict consumer demand and preferences before their products were released in stores. But over the last 30 years, designers have begun to compete with each other by being the first to release a trend to the market (Bhardwaj and Fairhurst, 2009). Consumers now want to buy the latest fashion items as soon as possible and do not only shop twice a year for the fall/winter and spring/summer season. Instead, the number of shopping seasons has increased and thus consumers shop more frequently. The three most famous fast fashion retailers are Swedish retailer H&M, Spanish retailer Zara and American retailer Forever 21. Fast fashion retailers wait until a high end designer showcases their designs at Fashion Week. The fast fashion retailer (also referred to as a low end designer throughout this paper) then imitates the design, produces it rapidly and delivers it to store shelves, before the high end designer has a chance to sell his or her product. Now with smart phone technology, email and the option to stream fashion shows online, fast fashion retailers can quickly obtain photos of high end designs and transmit them to manufacturers. These manufacturers then create cheap, lower quality versions of the original design. The fast fashion retailer boasts a large profit as they have low production per unit costs and do not have the added cost of research and design as they simply imitate products (Hemphill, 2009). The only consequence of participating in fast fashion is that the retailer cannot wait and see how well an original design does in stores and then determine which particular items to copy. Instead, fast fashion retailers copy multiple items from a designer’s collection hoping that they will sell (Hemphill, 2009).

C. The Current State of Copyrights in the U.S.

The current state of receiving fashion design protection in the U.S. is that there are very little intellectual property rights given to designers. The debate over allowing copyright protection for fashion designs dates back to the early 1900s, when U.S. designers were constantly knocking off European

designs during inter-world war times. When copying became rampant in the industry, manufacturers established the Fashion Originators' Guild of America in 1932 to monitor knock offs (Eguchi, 2011). In 1941, the Supreme Court heard a case against the Fashion Originators' Guild, which claimed that having designers register their sketches was "an unreasonable restraint of trade" (Eguchi, 2011). The Court agreed with this claim and the Guild was subsequently dissolved, eliminating any form of protection for fashion designs.

While the film, music and publishing industries enjoy broad IP protections, many ask why the fashion industry does not receive the same protections. Economic theory claims that the more centralized film, music and publishing industries do not need as much IP protection, but that the decentralized fashion industry does (Eguchi, 2011). Still, the fashion industry has not been able to receive protection. There have been attempts at copyright legislation for fashion designs, but they have all failed due to ambiguity in the language of the law. Many have claimed that the lack protection hurts the industry, while others have said that imitation products allow the fashion industry to survive. This will be further discussed in Part II.

D. The Goals of this Thesis

This thesis will explore whether or not copyright protections for fashion designs would help or hurt innovation in the fashion industry. The methods in answering this question are two case studies and developing a theoretical model of fast fashion. The first case study is a review of the global fashion industry and comparing copyright standards in other countries to potential standards in the U.S. The second case study compares the fashion industry to the highly protected film industry and to the low protected food and fragrance industries. The theoretical model is made up of two firms, one high end designer and one low end designer, where each firm produces a differentiated product. The model then explores how the presence of copyright laws would impact innovation in the industry.

The results suggest that there is an optimum level of copyright protection that would encourage innovation in the industry. However, if the standard is set too low or too high, this will hurt innovation.

This thesis is organized as follows. In Chapter II, I will outline the U.S. fashion industry and past attempts at copyright legislation. I will then discuss fashion copyright protections in the European Union and how that system has worked. Lastly, I will discuss the copyright protection system in Japan. In Chapter III, I will show how the film industry has been able to receive generous copyright protections and how protection has helped the industry. I will then discuss the food and fragrance industries which do not have copyright protection. Finally, I will compare all three of these industries to the fashion industry. In Chapter IV, I will outline my theoretical model. I will then show how there is an optimum copyright standard for fashion designs. Chapter V will conclude the thesis and provide suggestions and recommendations.

I. The Global Fashion Industry

The global fashion market is a multibillion dollar industry. Currently, the European Union and Japan have protection for fashion designs. Japan and the European Union have developed comprehensive protection legislation for designs. Other countries like India claim that they have design protection, but there is no documented legislation to support the supposed protection. In the U.S., there are no copyright protections for fashion designs.

Why do so many people obsess over and spend billions of dollars on fashion? According to German sociologist Georg Simmel, fashion is a struggle over social class (Hemphill, 2009). This status theory claims that social elites adopt fashion to differentiate themselves from the lower class. Fashion also has a trickle-down effect as the upper class uses fashion to distinguish their group, while the lower class attempts to imitate fashion of the upper class. Changes in fashion trends are motivated by social stratification and social mobility (Hemphill, 2009).

Another sociological theory called collective selection can be applied to fashion and is credited to the sociologist Herbert Blumer. Collective selection in fashion is when many people gather around one taste or preference in fashion. This gathering around one preference creates trends in fashion (Hemphill, 2009). Contrary to the status theory, collective selection claims that fashion is motivated by people who have a desire to be involved in fashion. People join fashion trends to be involved in the changing trends and because they desire to be in fashion (Hemphill, 2009).

Fashion has a symbolic function and can be used to communicate information about oneself. Social theorists believe that fashion can communicate a person's personality, values and identity among other social meanings; people choose their fashion based on what it will communicate about themselves. While fashion is an individual choice, all decisions aggregate into collective trends (Hemphill, 2009). So as a result, people attempt to be distinct through their fashion choices while affiliating with a common trend.

The U.S. Fashion Industry

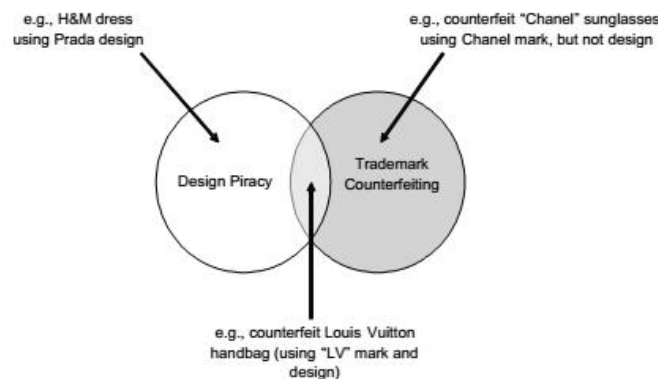
A. Differences between Copying and Counterfeiting

It is important to distinguish between the different types of copying that happens in the fashion industry. Currently, trademark protection is the only type of protection that a designer can obtain. Designers who have registered trademarks experience high levels of protection regarding use of their logo or trademark (Raustiala, 2006). For example, the “LV” logo is trademarked by luxury French designer Louis Vuitton. Other protected trademarks include athletic brand Nike’s “swoosh” and the reverse, intertwined Cs of French fashion house Chanel.

The first major copying difference in the industry stems from original versus counterfeited goods. There are counterfeit goods and trademark counterfeiting. Counterfeit goods are when a designer’s protected trademark and their design are used and reproduced by someone or a company that is not the original designer. This is illegal as it violates trademark protection for a designer. Trademark counterfeiting is when someone else uses a designer’s trademark but not their design. For example, someone else could produce a pair of sunglasses and use the Chanel trademark, but not any particular sunglass design of Chanel (Raustiala, 2006).

Outside of counterfeit goods, there is design piracy, which is the subject of this paper. This is where a designer uses another designer’s design, but not their trademark. The beneath venn diagram shows the breakdown of design piracy, counterfeited goods and trademark counterfeiting (Figure 1).

Figure 1 (Raustiala, 2006)



B. Trends versus Copies

In the fashion industry, there is an important distinction to be made between exact copies and trends. Defined by the Merriam-Webster dictionary, a copy is “something that is or looks exactly or almost exactly like something else: a version of something that is identical or almost identical to the original” (Merriam-Webster, 2014). A trend is defined as “something that is currently popular or fashionable” (Merriam-Webster, 2014). Many argue that trends are copies of designs and thus this makes differentiating between the two difficult. This begs the question of whether or not joining a trend is grounds for copying (Eguchi, 2011). Designers may choose to interpret, reference, “quote, comment upon and refer to prior work” or other designs (Eguchi, 2011). Interpreting a design or trend does not necessarily mean that it will result in an exact copy. Interpretations can be seen as complements or derivatives of current trendy, fashionable items. Additionally, designers seek their interpretation and influence from many of the same sources including visual arts, films, cultural events and travel. As a result, many designers converge around one trend, but they do not produce identical copies of fashion items (Hemphill, 2009).

C. Copying in the Fashion Industry

Copying has been in the U.S. fashion industry’s past for quite some time. In the 20th century, both French and American designers were copied and copied designs were produced and sold before the original design reached the market. What is different about fast fashion now is not only the speed that a copy can be made, but also that copies can now be made on a large scale and at a low cost (Hemphill, 2009). Fashion shows are now streamed online and allow copycats to quickly access designs capable of being copied. Copycat designers can transmit designs electronically to factories and rapidly produce copied items at a low cost. They then sell copycat designs of the original design at a lower price due to the lower quality and earn a profit because of lower unit costs. As well, they do not have the added expense of research and design which allows them to lower their price (Hemphill, 2009). However, the only consequence in this model of fast fashion is that a copycat cannot wait and see how well an original

design would fare in the market. A fast fashion retailer has to guess which designs will do well and it runs the risk of having an item that flops.

D. The Fast Fashion Model

Fast fashion systems combine two aspects: quick response and enhanced design. A fast fashion system works best when the fashion items are produced and sold quickly (quick response) and are trendy and fashionable (enhanced design) (Bhardwaj and Fairhurst, 2009). Consumers want to buy the latest, trendiest items every few months, instead of just twice a year.

There are two types of fast fashion retailers: fast fashion designers and fast fashion copyists (Hemphill, 2009). Fast fashion designers rely on interpretation and adaptation of current trends and original designs (Hemphill, 2009). Swedish retailer H&M and Spanish retailer Zara are both well known fast fashion retailers that engage in design rather than copying. While they do rely on a quick response tactic of moving product quickly to the market, the two retailers rely on in-house designers to create their merchandise that follows current trends. Fast fashion designers do not make direct copies but they do follow trends. On the other hand, American fast fashion retailer Forever 21 is known notoriously as a fast fashion copyist. The firm retails almost exact copies of original designs and relies on a quick response to move product to market (Hemphill, 2009). One important difference to note here is that H&M and Zara are based in Europe where there are laws guarding fashion protection, whereas Forever 21 is based in the U.S., which lacks any protection. The differences in copying versus designing may stem from the legal environment in a fast fashion retailer's country. Because Zara and H&M are based in Europe, their designs are subject to copyright protection. With copyright protection for fashion in Europe, Zara and H&M avoid close copying of designs, as seen by the few number of lawsuits filed against them (Hemphill, 2009). Between 2003 and 2008, H&M was only sued twice by a designer while Zara had zero lawsuits. On the contrary, American based fast fashion retailer Forever 21 was sued 53 times in this period (Hemphill, 2009). With the lack of copyright protections in the U.S., designers who have sued Forever 21 have been unsuccessful.

E. How High End Designers Deter Copyists

High end designers continue to argue that fast fashion copyists will hurt innovation in the industry. This argument will be further discussed in the following chapter. However, until they receive design protection, high end designers have devised ways to combat copyists and continue to innovate. High end designers work to innovate new products and ones that are difficult to be copied. For example, high end designers enjoy strong trademark protection and use their trademarks to deter copycats. Logos and brand names can deter copycats if the logo is prominently included in a design. A fast fashion copyist cannot copy an item that has the logo interwoven in a pattern and thus high end designers rely on their trademark protection (Hemphill, 2009). High end designers also enjoy other benefits including a difficulty in being copied. Copycats selectively choose designs that are easy to be copied. For example, they choose designs that do not have exotic fabrics, complex stitching or overly fancy embellishments (Hemphill, 2009). But because high end designers use expensive materials, they are more difficult to copy and thus copycats are deterred from doing so (Hemphill, 2009).

F. The Piracy Paradox

Consumers of fashion want to buy the latest trendy and fashionable items as they are released. No consumer wants to be seen wearing something from a previous season. This concept is called the Piracy Paradox, named by intellectual property (IP) professors at UCLA Law School, Kal Raustiala and Christopher Sprigman. The paradox stems from a phenomenon called induced obsolescence (Eguchi, 2011). In December 2006, UCLA Law professors Kal Raustiala and Chris Sprigman published a paper featuring the Piracy Paradox. The inspiration for their research came from the fact that intellectual property theory states that copying will destroy innovation, but that the fashion industry has proven to be an exception to that theory. The authors argue in the Piracy Paradox that:

Copying fails to deter innovation in the fashion industry because, counter-intuitively, copying is not very harmful to originators. Indeed, copying may actually promote innovation and benefit originators (Raustiala, 2006).

Raustiala and Sprigman have two prominent, supporting points to their theory as to why a low copyright protection environment provides stability for the industry: induced obsolescence and anchoring. Fashion goods are considered to be a status-conferring good, meaning that their value is “closely tied to the perception that they are valued by others” (Raustiala, 2006). Raustiala and Sprigman write “A particular fast car is most desirable when enough people possess it to signal that it is a desire object, but the value diminishes once every person in the neighborhood possesses one” (Raustiala, 2006). Regarding fashion, when a trend becomes widespread and available to the broader public as a result of copycats or “inspired by” items (these are items where the copycat designer credits the original design and creates a similar looking one), the trend ultimately dies out. The process of “accelerated diffusion of designs and styles” (trends dying out) is called induced obsolescence (Raustiala, 2006). After the trend dies out, designers have to innovate and create new styles. The lack of IP protection in the industry allows copying and diffusion of styles to happen and then designers create new designs, thus moving the cycle of fashion forward; “In short, piracy paradoxically benefits designers by inducing more rapid turnover and additional sales” (Raustiala, 2006). The authors argue that original designers could engage in a single-firm price discrimination strategy where they produce variations of their original designs at lower price points and compete with the copycats. For example, Italian fashion houses Armani and Dolce & Gabbana both have lower cost lines called Emporio Armani and D & G respectively (Raustiala, 2006). As well, many high end designers are producing lower cost lines for mass market stores and engaging in the licensing tactic as previously stated. But this has not happened on a large scale in the industry because many high end designers do not want to lose exclusivity over their brands or tarnish their trademark (Raustiala, 2006).

The authors also argue that a phenomenon called anchoring is a result of the low IP environment in the fashion industry. Anchoring is what allows consumers to know when certain trends have died out and when new styles are introduced each season (Raustiala, 2006). New trends emerge each season and customers need to know when trends die out. During each season, there are a number of major trends and in order for them to become trends, more than one designer must produce items within that trend. When many designers gather around a preference or taste, suddenly it becomes a popular trend and appears in

the collections of multiple designers. Copying, referencing and interpreting designs, all made possible by the lack of copyright protections, help to provide “design coherence,” which promotes trends (Raustiala, 2006). This design coherence informs consumers of the current trends, the timeframe that they are trendy in and what kinds of items they need to purchase in order remain in the trend. Raustiala and Sprigman write “The fashion industry’s low-IP environment is constitutive of this induced obsolescence/anchoring dynamic: designers’ frequent referencing of each other’s work helps to create (and then exhaust) the dominant themes, and these themes together constitute a mode that consumers reference to guide their assessments of what is “in fashion” (Raustiala, 2006).

G. Potential Reasons for Low IP Protection for Fashion Designs in the U.S.

Raustiala and Sprigman cite three reasons for the why the U.S. has continued to have a low-IP regime regarding the fashion industry: (1) the useful article’s doctrine in U.S. copyright law prevents coverage of fashion designs; (2) the fashion industry historically has not been able to organize itself; and (3) the first-mover advantage allows for tolerance of copying in the industry (Raustiala, 2006).

- (1) As useful articles cannot be given copyright protection, this has been cited as a reason for why designs have not been eligible to receive protection. This however is not likely to be a major blockage for designers who want protection. U.S. copyright law was amended in 1990 to include architecture under protection laws, a form of sui generis protection. Copyright laws could be amended to have a separate section on fashion industry as the law currently does for other industries including architecture, semiconductors and boat hulls (Raustiala, 2006).
- (2) Political barriers have also been mentioned as why the industry has not been able to lobby for protection. The fashion industry is quite decentralized with no central body that could lobby on behalf of the whole industry. Noted American economist and social scientist Mancur Olson concluded that small groups can organize themselves better than large groups can (Raustiala, 2006). In small organizations, individual members have a large stake in what happens, whereas in large groups, individual members have a lower stake and are in a

difficult situation when it comes to paying the transaction costs. Most industries with copyright protection are highly concentrated and exhibit stronger organization and lobbying power. As will be discussed in the following chapter, the American film industry has only six major studios represented by the Motion Picture Association of America (MPAA), making it much easier to lobby for protection against piracy. However, there is the Council of Fashion Designers of America led by Diane von Furstenberg, which represents over 400 designers (CFDA, 2014). It has only been in the last few years though that designers are testifying on Capitol Hill and making a stronger push in lobbying for protection.

- (3) A third reason for the low IP environment in America is the benefit of the first mover advantage. The first mover advantage is when a designer is able to sell many units of their original design before the copyist makes copies and sells them (Raustiala, 2006). The original designer can then gain the majority of profits and earn back their investment in addition to a profit. However, this gap almost does not exist. With modern technology and the gap between Fashion Week and retailers selling those products, copyists produce copycats very quickly and eliminate whatever gap there exists for the first mover advantage. But as copying becomes faster and faster, this could further hurt rather than help original designers. Currently, original designers are helped to an extent by copies because it helps to exhaust trends. However, if copying becomes almost instantaneous, in theory, it will be very difficult for original designers to distinguish themselves as innovators of a particular design and establish their brand presence (Raustiala, 2006). Raustiala and Sprigman dispute this claim though by stating that the time gap has been nonexistent, since the fax machine in the 1980s began widespread copying. As technology has advanced, Congress has repeatedly denied protection for designs at all points of the timeline on technological advancement. Therefore, advancements in technology are not related to legislative change (Raustiala, 2006). One area where the first mover advantage still applies is in how successful a given design will be. A fast fashion copyist does not wait to see which original designs appeal to consumers and sell

well. Rather, fast fashion copyists have to guess which designs will sell and hope that whichever design they choose to mimic sells. If fast fashion designers were to wait and see how well an original design sells, this would allow the original designer to maintain their first-mover advantage (Raustiala, 2006).

H. The Current Status of Protection in the U.S.

Currently, fashion designs in the U.S. cannot receive copyright protection under intellectual property laws. Fashion designs are considered useful and functional items and thus cannot be copyrighted under U.S. intellectual property law (Eguchi, 2011). It is difficult to separate the functional aspect of a fashion item from its design and thus fashion designs have not been granted copyrights. Only logos and trademarks of designers can be protected. Consequently, copycats can copy the exact construction and design of a fashion item. Currently, designers have three methods of obtaining some form of design protection: (1) trademarks; (2) patents; and (3) copyright protection. However, each law provides many obstacles for designers causing most designers to forego any type of protection.

- (1) A trademark is a “word or symbol used by a manufacturer to identify and distinguish his or her goods from those manufactured or sold by others” (Eguchi, 2011). Current trademark law applies to logos, name and other symbols on fashion items, but it does not apply to an entire article of clothing (Eguchi, 2011). Trademark law is governed by The Lanham Act of 1946 (also known as the Trademark Act) which is the first comprehensive, federal legislation regarding trademark law. The Act gives trademark users exclusive rights to their marks, which allows the owner to protect their time and money invested in the trademark (Legal-Dictionary, 2008). Additionally, trademarks help consumers distinguish between goods and services. This allows designers to protect the integrity of their design, but not the entire product. However, if a designer continually produces a unique design element that becomes associated with that particular designer, then they can receive trademark protection for that element.

- (2) For designers, patent law provides the most intellectual property protection for original designs if they receive a design patent. Design patents protect the “configuration or shape of an article, to the surface ornamentation applied to an article, or to the combination of configuration and surface ornamentation” (Eguchi, 2011). While design patents may seem like they provide all encompassing protection for designs, the criteria for qualifying for a patent is that a design must be a new invention and “must present a non obvious improvement over prior art” (Eguchi, 2011). Many courts have ruled that fashion designs cannot be considered new inventions as the majority of them are not substantially different from previous designs to be deemed new inventions. For example, American fashion designer is widely credited for inventing the wrap dress in 1974 (DVF). However, the wrap dress has influences of the Japanese kimono, which also looks similar to the Indian sari. It is difficult to say if Diane von Furstenberg can be considered the original creator of the wrap dress when it may have been influenced by the kimono and the sari. For many designers, meeting these criteria is too difficult and thus they avoid applying for patents. As well, the long process of obtaining a patent is also a reason that designers avoid patent protection. On average, the U.S. Patent and Trademark Office takes over 25 months to complete the whole process of granting a patent. Given that most designers produce different collections over three to six month seasons, waiting 25 months is not effective for designers, and thus they avoid patents.
- (3) Copyright law is the most logical path for designers to take and would allow designers to protect “original works of authorship fixed in any tangible medium of expression” (Eguchi, 2011). Unlike receiving patent protection, copyright protections can be obtained immediately when the design is produced in a concrete form, instead of waiting for months. Copyrights protect designs with original expression, including graphics and text, but they do not protect “useful articles that have intrinsic utilitarian functions” (Eguchi, 2011). Fashion designs are considered to be decorative pieces, which qualify for copyright protection, but their shape is considered functional and utilitarian, which prevents them from obtaining copyright protection. For example, a long sleeve

shirt with a picture is eligible for copyright protection because of the design on the shirt, but the whole unit cannot receive protection because a basic long sleeve shirt is considered functional and utilitarian. Only the image on the shirt can receive copyright protection, but not the entire shirt itself. As a result, designers do not apply for copyright protection because it only protects a part of the design.

I. Proposed U.S. Legislation for Fashion Copyright Protection

All proposed U.S. legislation regarding fashion design protections has never been enacted into law. On March 30, 2006, Rep. Robert Goodlatte proposed H.R. 5055 the Design Piracy Prohibition Act (DPPA) which would give designers a three year period of protection for their design. It protects the entire structure and ornamentation of a design.

The DPPA was reintroduced in the Senate in 2007 and the House in 2009, but the bill was blocked as the American Apparel and Footwear Association (AAFA) (the manufacturing and retail core of the industry, which represents over 700 manufacturers and suppliers, accounting for 75% of the industry's business) claimed that the law would encourage lawsuits and put burdens on designers, especially regarding the registration process. The DPPA would also create a secondary liability. According to the AAFA, designers may choose to not innovate if the threat of a lawsuit is higher, and thus innovation would be curbed by the DPPA (Eguchi, 2011). All three attempts to pass the DPPA failed due to ambiguity in the language of the legislation and opposition lobbying from the AAFA.

On July 13, 2011, Rep. Bob Goodlatte (R-VA6) introduced H.R. 2511 the Innovative Design Protection and Piracy Prevention Act (IDPPPA). This revised bill modifies the definition of a "useful article" that now includes apparel, handbags, purses, wallets, tote bags, belts and eyeglass frames (GovTrack, 2014). This bill would give fashion designs protection for three years and determines the standard of copying. Designers would have to register their designs within three months of production (Eguchi, 2011). In order to deem a copycat design as not having copied a protected design, the copied design cannot be "substantially identical in overall visual appearance to and as to the original elements of

a protection design, or is the result of independent creation” (GovTrack, 2014). Many have argued that proving a design is “substantially identical” is much more difficult than proving that a design is “substantially similar.” A designer would have to prove that their work was original, that the copycat’s design is an infringement and that the copier knew of the original design. Similarities in colors and patterns would not qualify a design as being a copycat (NYTimes, 2011). Currently, the bill is dead and has been referred to the House Judiciary Committee where the Committee Chair will determine its next steps.

Support for the bill came from prominent designers and the Council of Fashion Designers of America, which is the core of the fashion industry. Opposition once again came from the AAFA, (Eguchi, 2011). The AAFA claimed that the Copyright Office would not be able to review the large numbers of protection applications if the bill was passed. As well, the AAFA argued that the standards for protection were too vague under the bill and that courts would spend more time in frivolous lawsuits defining the law rather than enforcing it (Eguchi, 2011). After adjustments were made to the Bill in 2012, the AAFA reversed its original opposition and now supports the Bill (AAFA, 2014).

While many have claimed that copyrights will hurt innovation in the industry, the IDPPPA aims to prevent this from happening by setting the bar high enough to allow protection only for original designs. Designers would then have an incentive to innovate create original designs that would meet the differentiating standards. Additionally, by setting a high threshold for designs, it claims that it will ensure that only original designs receive protection and thus other designers can participate in referencing and interpreting to create items within specific trends (Eguchi, 2011).

On the contrary, there are multiple shortcomings with this proposed legislation. Legal services are costly and would put a burden on designers to spend on legal counsel. As well, enacting and implementing the IDPPPA would add administrative costs, which may outweigh the benefits of passing the Bill. Given how narrow the standards for achieving protection are, the IDPPPA will only guarantee protection for a few designs deemed to be so unique and original (Eguchi, 2011). As fashion relies on trends and designers share from each other, it would be very difficult to prove if something is unique and

novel. For example, in 1954, Coco Chanel created the four pocket women's jacket. Men already wore suit jackets at this time and one could argue that Chanel simply added 2 pockets to the men's suit jacket and changed the women's neckline; thus, one could say that this is not truly innovative and is an interpretation of the men's suit jacket. It can become tricky to determine what items are novel and unique. A major argument against the IDPPPA is that the words "substantially similar" are too vague. Would a fast fashion copyist be able to produce a high end designer's design, change the colors and have it be considered substantially similar or different? It will be very difficult to determine the similarity between items.

J. Proposed Licensing and Contracting Options for High End Designers

Similar to the music industry, scholars have proposed that the fashion industry could engage in a licensing agreement between the designers and fast fashion retailers. The music industry relies on intellectual property law to not only protect original songs and creations, but also to determine which outlets can sell its creations. Musical artists belong to various organizations (for example, Broadcast Musical, Inc, the American Society of Composers) and these organizations determine, collect and distribute licensing fees for their members from the various retail outlets. This licensing scheme has worked for the music industry and has boosted revenue for its members (Eguchi, 2011). Scholars have proposed that this similar licensing tactic could be extended to the fashion industry and this trend is catching on quickly. In the fashion industry, a high end designer would create a trendy but lower priced line for a mass market/fast fashion outlet. The designer would innovate and design the product, while the mass market/fast fashion outlet would produce and retail the designs (Eguchi, 2011).

For example, noted Nepalese America fashion designer Prabal Gurung designed a limited-edition collection for mass market retail store Target in February 2013 (Target, 2013). The pieces were priced from \$20 to \$200, as opposed to Gurung's normal pricing anywhere upwards of \$1,000. Target also partnered with Italian luxury knitwear designer Missoni in September of 2011 for a limited edition, low priced collection of women's and men's clothing, baby wear, home wares, and accessories (Target, 2011). Demand for the line was so large that Target's website crashed when the collection premiered (Clifford,

2011). Target stated that demand for this line was “higher than it was on a typical day after Thanksgiving” referencing the infamous Black Friday shopping day which is the busiest U.S. shopping day of the year (Clifford, 2011).

Fast fashion retailers have also caught onto this trend. In November 2009, acclaimed shoe designer Jimmy Choo partnered with fast fashion retailer H&M to offer a limited edition line of shoes, accessories and both women’s and men’s clothing (H&M, 2009). According to Tamara Mellon, the co-founder and former Chief Creative Officer of Jimmy Choo, the entire collection sold out within 24 hours. Eager shoppers reportedly lined up outside of H&M’s stores between three and four a.m. the morning before the collection was released. “H&M said it was the most successful collaboration they’d ever done” Mellon wrote in her 2013 memoir *In My Shoes* (Mellon, 2013).

While these collections were only available on a temporary basis, other outlets have partnered with high end designers for permanent, lower priced collections. Famed bridal designer Vera Wang has worked with mass market store Kohls since 2006 and has created a permanent line of lower priced items (Kohls, 2006).

These licensing agreements allow consumers who would normally turn to fast fashion stores to instead buy lower priced, brand name fashion products. All of the fast fashion consumer’s demands are met. They get a trendy, brand name item for a low cost. As well, this allows the high end designer to receive credit for their original designs, broaden their consumer base and generate more revenue (Eguchi, 2011). Having a licensing scheme would attempt to fill in the gaps of the IDPPPA. A licensing managing agency would “streamline the licensing process and distribute costs across the industry” (Eguchi, 2011). To prevent liability costs, licensing would “provide a simple and effective means of forming alliance partnerships with other players in the industry, providing robust protection against infringement litigation” (Eguchi, 2011). The primary goal of the licensing agreements is to promote partnerships and alliances between designers and fast fashion retailers instead of rivalries.

One problem that persists though is that the majority of these licensing agreements so far have been for a limited time. There are few licensing agreements that have become permanent fixtures in fast

fashion or mass market stores. Thus, the consumer can only buy these items at a certain time. When these items are not available, consumers will turn to fast fashion retailers. Furthermore, licensing agreements could raise the price of individual items for consumers. When high end designers charge licensing fees, this may cause mass market stores like Kohls and Target to raise their prices (Eguchi, 2011). A solution to this potential problem would be for designers who want to license out their creations to form a management organization (similar to the film industry) that could manage licensing fees and keep costs low (Eguchi, 2011).

Another problem with licensing agreements is that few designers have engaged in these models. Many designers want to maintain their elite, wealthy consumer base and do not want their brand name to be tarnished or dilute into mass market/fast fashion customers. For example, two of the world's most luxurious brands, Louis Vuitton and Chanel, burn all unsold merchandise at the end of each season. The two designers do not want their products trickling down into lower income consumers through clothing charities or discount stores. They want to hold onto the exclusivity of their brand name as do many other designers. High end designers who do engage in licensing models have to tread a fine line of maintaining their wealthy customers and preserving their brand name.

K. What Do Fashion Designers Want Regarding Legal Protection?

Many designers want protection for their fashion designs. American fashion designer Diane von Furstenberg and President of the Council of Fashion Designers of America (the governing body of the fashion industry with over 200 members) is leading the movement to obtain protection for fashion designs. On August 24, 2007, Furstenberg published an editorial in the *Los Angeles Times* touting the benefits of design protection. She writes that the European fashion industry, which has had stringent copyright protections since 1988 has thrived and survived and that copycats may discourage young designers from entering the market. The article also notes that other industries including writing, film and the visual arts all receive protection, and thus the fashion industry should be able to do so (Furstenberg, 2007).

On the other hand, some designers have protested copyright regulations citing the importance of maintaining innovation in the industry. Shoe designer Stuart Weitzman said that copycats forced him to innovate when making his Bowden-Wedge shoe in 2008. He used titanium and steel to make the heel, whereas a copycat would use cheaper materials like plastic that are more susceptible to cracking (Blakely, 2010).

L. Current Protection Laws in the European Union

In the global fashion market, the European Union (E.U.) historically has had copyright protections for fashion designs. European copyright protection dates back to the 18th Century in the United Kingdom. The original intent of design law in Europe was to protect linens and cottons, but the laws have been amended since to cover more fashion items. The first copyright protection law was the Designing & Printing of Linen Act in 1787 which provided limited protection to those “designing and printing linens, cottons, calicos and muslin” (IPO.gov.uk, 2014). Owners of those designs had the primary rights of printing and reprinting for a two month period as long as the owner’s signature was marked on their pieces. In 1794, the protection period was lengthened to three months. Starting from 1839, more laws were passed to broaden protection laws. In 1839, The Copyright and Design Act broadened protection laws to encompass “fabrics composed of wool, silk or hair and mixed fabrics” (IPO.gov.uk, 2014). As well, this Act extended protection to a design’s ornamentation and shape and allowed the Board of Trade to create a registration database overseen by a Registrar. This Act is credited with providing the basis for current European design protection law. Three years later, The Design Act of 1842 was passed which compiled all previous protection laws, heightened the penalties for copying and divided articles into categories. After being governed under the Board of Trade since 1839, in 1875, all matters regarding protection law were transferred to the Patent Office (IPO.gov.uk, 2014) and in 1883, one Act was passed that included all Design, Patents and Trade Marks and was overseen by the Patent Office. From 1911 to 1949, designs received their protection under the specific designs portion of the Patents & Design Acts 1907-1946. Designs were once again separated from the Patent Office in 1949 and instead were governed

by the Registered Design Act of 1949. This law further amended the definition of a design and eliminated design classification in order to avoid previous issues regarding the validity and scope of registered designs (IPO.gov.uk, 2014). This Act still applies to today's European fashion protection, but was amended by the Copyright, Designs, and Patents Act of 1988, which is the current law used in the European Union. As well, in 1998, the European Council passed the European Directive on the Legal Protection of Designs (Raustiala, 2006). In 2001, the Copyright, Designs, and Patents Act of 1949 was amended to include the Directive and become the basis of protection law.

The new law gives designers "exclusive rights to use their designs in commerce, to enforce those rights against infringers, and to claim damages" (Eguchi, 2011). A design is defined as "the appearance of the whole or a part of a product resulting from the features of, in particular, the lines, contours, colours, shape, texture and/or materials of the product itself and/or its ornamentation" (European Directive, 1998). This definition cites that design protection extends to not only the shape and function of a design, but also any ornamentation on the design. European copyright protection applies to E.U. member states and other international arrangements that apply to a member state. It is the member states' duty to protect registered designs and a design can qualify for protection if it is "new and has individual character" (European Directive, 1998). This phrase is ambiguous and the Directive attempts to clarify what "new" means. It states:

A design shall be considered new if no identical design has been made available to the public before the date of filing of the application for registration or, if priority is claimed, the date of priority. Designs shall be deemed to be identical if their features differ only in immaterial details (European Directive, 1998).

The Directive states that only the most novel and unique designs would be given protection. As well, stating that differences only in irrelevant details would characterize a design as identical to something else. What exactly does irrelevant details in fashion items mean? Are irrelevant details zippers, buttons, bows or sequins? Many designers would claim that buttons are relevant details. This shows that it is very difficult to determine protection standards in the language of the law.

Currently, all member states in the E.U. have to follow these laws regarding design protection. A design can enjoy the benefits of protection laws if it meets 4 standards:

- a) A design must be registered in order to receive protection;
- b) The owner of the design has exclusive rights to the specific design; these rights protect the original designs from copies and “substantially similar designs;” (Raustiala, 2006)
- c) Protection for a design covers “lines, contours, colours, shape, texture, and/or materials and ornamentation” of the design; (Raustiala, 2006)
- d) A design can receive a total 25 years of protection.

After passing the Directive, the European Council created a Council Regulation for industrial designs which sets design protection in all member states.

The Directive also provides E.U. wide protection against unregistered designs. Designers do have the option to not register their designs, but unregistered designs do not receive the same stringent protection that protected designs do (Raustiala, 2006). As well, certain designs in Europe cannot be registered. According to the U.K.’s Intellectual Property Office website, a design cannot be registered if it is “offensive, consists of or includes certain protected flags and international emblems or is solely dictated by the product’s technical function” (IPO.gov.uk).

In order to register a design, owners of a design must fill out an application and mail a completed application, fee sheet forms and one copy of the illustration of the design to the Intellectual Property Office in South Wales, United Kingdom. Registering one design costs GBP €60, approximately \$100. If a designer registers multiple designs in one application, the first design would cost €60 and all other designs would cost €40, approximately \$66. After sending in the application and fee forms, an examiner reviews the application within one month of receiving the application, according to the U.K.’s IPO website (IPO.gov.uk, 2014). An application can then be accepted or denied. If an application is accepted, the owner is sent a certificate of registration and their design is registered in the U.K. Designs Register, listed in the on-line database and published in the Electronic Designs Journal. If an application is denied, the examiner sends a letter detailing why it was denied. Then the applicant has two months to defend their design via a telephone conversation or a hearing with a Hearing Officer in the Designs Registry (IPO.gov.uk, 2014).

In the European law, if a designer feels that another designer is infringing on their work, it is the designer’s responsibility to seek legal counsel; the patent office does not involve itself in a designer’s

legal concerns. Therefore, this would support the notion that copyright protections could increase litigation activity.

In Europe, designs can be renewed five times for five years each, totaling a 25 year period of protection for one item. If the owner of a design seeks to renew their design, it must be done within six months or on the fifth anniversary of the registration date and every five years after that. When renewing designs, the fee increases each time a designer chooses to renew their protection. The first renewal is €130 (\$216.16), the second is €210 (\$349.19), the third is €310 (\$515.47) and the fourth is €450 (\$748.26). If a designer chooses to not renew their design, they can transfer ownership of a design by selling it, or they can license it to another designer. A designer can completely transfer ownership by selling it to another designer. Or, similar to what is happening in the U.S., a designer can license their design to be used by another designer. The European IPO office has determined that all licensing agreements must be determined between the two parties and the IPO office will only be in charge of granting the license (IPO.gov.uk, 2014).

European protection rules do not apply abroad. If a European designer wants to protect their designs abroad, they can choose to apply to individual countries with protection laws, or they can apply through the Hague organization. The Hague organization allows a designer to file one application to the World Intellectual Property Organization (WIPO) to 61 countries with industrial rights protections. The U.S. is not included in this list (IPO.gov.uk, 2014). It is important to note that the majority of countries on this list are not major fashion markets. Therefore, a European fast fashion designer like Top Shop or Zara can copy an American design. With large success in Europe, stores like Top Shop and Zara have expanded their operations into America and do mimic American designs (Raustiala, 2006).

M. The Effectiveness of Copyright Laws in the E.U.

While there is an abundance of legal protection in Europe, fashion designers have not been engaged in litigation. Raustiala and Sprigman measured the number of registered designs in Europe from January 1, 2004 to November 1, 2005 and saw that only 1,631 designs had been registered in the E.U.

fashion design registration database (Raustiala, 2006). When I conducted a search of the past registered designs of just garments, there are only 2,059 designs registered, a relatively small increase from 10 years ago. The majority of designs registered is not by prominent label designers and are items that do not have trademarks on them. In other words, it seems that designers who do not have well known trademarks and strong trademark protection choose to register their designs in the E.U. database so they can receive protection. When doing a search for designs by owner, I saw that well known high end designers either do not register their products or register very few. For example, noted French fashion house Chanel has only a few watches and handbags registered and no garments are registered, while the Italian designer Prada only had a few pieces of jewelry registered. British designer Burberry had only 14 pieces registered, all of which were handbags. This may suggest that designers who enjoy strong trademark protection do not find it necessary to register their designs, whereas mid-level or new designers who do not have strong trademark protection register their designs in order to receive protection. Raustiala and Sprigman concluded that if European designers greatly valued protection, then there would be more designers registering, but this is not the case (Raustiala, 2006).

Raustiala and Sprigman note that if protection was essential to investment in the fashion industry, then the European fashion market would be strong while the U.S. market would be weak. However, both the low IP European and high IP American markets are multibillion dollar industries. The authors write “That fashion firms do not exhibit marked differences in behavior despite these very different legal environments is consistent with our claim that the industry operates profitably in a stable low-IP equilibrium” (Raustiala, 2006). If the U.S. were to implement protection laws, there would most likely be more litigation given that the U.S. is more of a litigious society. An increase in litigation could hurt innovation and prevent designers from “referencing or interpreting” designs as they freely do now (Raustiala, 2006). Overall, Raustiala and Sprigman conclude that going from no protection to full protection will not have a drastic change in innovation as seen by the European practices.

All in all, while Europe does have a protection system, high end European fashion designers are not taking advantage of the law. This may be because many designers already enjoy strong trademark

protection. As well, the protection standards in Europe can be considered weak and thus designers do not see the benefit in registering their designs if designs that are similar looking to theirs are allowed to exist.

N. Fashion Copyright Protection Laws in Japan

Japanese protection law grants 20 years of design protection to registered designs. Protection for a design extends to the “shape, patterns, colors or any combination thereof,” or “graphic images in an article” (Designs Act, 2006). A design can only be granted protection if it meets three criteria. First, a design that was known in Japan or another country before an application has been filed is not eligible for design registration. Second, a design that is shown in a distributed publication or was made available through electronic communications in Japan or another country before filing for an application is not eligible to be registered. Third, a design must have not been easy to create. More specifically, if “a person ordinarily skilled in the art of the design would have been able to easily create the design based on shape, patterns, or colors, or any combination thereof” it would not be granted protection (Designs Act, 2006). Whether or not a design could be easy to make is something very difficult to prove and shows the stringency of Japanese protection standards. As well, there are three types of designs that cannot receive protection under any circumstance: “a design which is liable to injure public order or morality, a design which is liable to create confusion with an article pertaining to another person’s business, and a design solely consisting of a shape that is indispensable for securing functions of the article” (Designs Act, 2006). When applying for registration, if one’s article is too similar to an already registered design, the said application will be denied (Designs Act, 2006). But if there are multiple applications filed with substantially similar designs, protection will be granted to whichever designer filed their application first. Unlike European law, Japanese law does aid in determining the scope of a design and whether or not it would be infringing on other designs. The law states “Whether a registered design is identical with or similar to another design shall be determined based upon the aesthetic impression that the designs would create through the eye of their consumers” (Designs Act, 2006). This differentiating criterion is highly

confusing, and thus the Commissioner of the Patent Office will assign three examiners upon request to determine similarities between designs.

Designers also have the option to file for a secret protection. An application can be filed to keep a design secret for a certain period of time, provided that the time frame does not exceed three years from the initial filing date (Japanese Design Law, 2006). While this only applies to designs registered in Japan, if a designer wanted to prevent copycats from eliminating their first-mover advantage, a designer could register their designs, have a fashion show and not worry about copyists making imitation products immediately after the fashion show. Similar to European law, if a design is rejected, the designer can request a trial to make their case.

Under Japanese Design law, designers pay an annual fee based on the years of protection: first year to third year costs 8,500 yen (\$84), fourth to tenth year costs 16,900 yen (\$166.87), and the eleventh to twentieth years cost 33,800 yen (\$333.74) (Japanese Design Law, 2006).

Given how stringent and costly Japanese protections are, it is no surprise that designers choose to not register their designs. When I did a search in the Japanese Design Gazette, the Patent Office's online database, for registered designs, there were no fashion designs registered. Clearly, Japanese Design Law has not been effective.

III. A Comparison of the Film, Food and Fragrance Industries to the Fashion Industry

Copyright protection extends to various other industries in the U.S., but not every industry is capable of receiving protection for reasons similar to those in the fashion industry. The film industry has enjoyed widespread copyright protection, while the food and fragrance industries are not eligible to receive protection. Other creative industries that do not have copyright protections are hairstyles, jokes and tattoos among many others. These industries will not be discussed in this paper.

A. The Film Industry

The film industry is a multibillion dollar industry and the Motion Picture Association of America (MPAA), which represents the six largest film studios, claims that it supports 2.4 million jobs and annually contributes \$180 billion to the U.S. economy and \$15 billion in federal and state taxes (MPAA, 2014). In the last decade, the debate and focus on copyright protection in the film industry has sharply increased due to the rise of online piracy. The film industry has been plagued by online piracy sales ever since the Internet became host to rampant illegal file sharing. Film studios claim that their revenues suffer because of the widespread availability of free, pirated copies online and thus need stringent copyright protection. Given the high fixed cost nature of film production, studios are concerned that falling revenues and in turn falling profits will lower the incentive to invest in the film industry and that the quality of media products may diminish over time (Danaher and Smith, 2013).

In 1976, The Copyright Act of 1976 was passed and this broadened what items could be protected under copyright law. Regarding television, the Act created an American Television and Radio Archives section of the Library of Congress where the Librarian of Congress exercised control over the Archives.

The Act states:

The purpose of the Archives shall be to preserve a permanent record of the television and radio programs which are the heritage of the people of the United States and to provide access to such programs to historians and scholars without encouraging or causing copyright infringements.
(Copyright Act, 1976)

The Archives aimed to deter piracy by making them publicly available. In 1982, the Piracy and

Counterfeiting Amendments Act was passed which further heightened criminal penalties for copyright

infringement. A person is punishable if they commit copyright infringement in order to achieve financial gain, reproduce or distribute any copyrighted works with a value of more than \$1,000, or post via a computer network a work that will be commercially distributed (Copyright.gov, 2014). In the law, a work that can be commercially distributed is one of two things: a computer program or a motion picture. Specifically, motion pictures that have been made available in a movie theater or motion pictures that are not available for sale to the public outside of a movie theater are considered works that will be commercially distributed. As well, adding a false copyright protection to a motion picture, or removing an approved copyright from a motion picture is grounds for copyright infringement (Copyright.gov, 2014).

In order to update copyright laws based on growing internet use and to meet the World Intellectual Property Organization's (WIPO) requirements, Congress passed the Digital Millennium Copyright Act (DMCA) in 1998. The law's primary goal is the concept of anti-circumvention, meaning that those who attempt to bypass technical protection measures and access controls would be punished for copyright infringement. Even if someone is not successful in producing a pirated product, simply the attempt to do so is punishable. As well, the law sets limitations for liabilities on online service providers. If a service provider is simply a data conduit and an outside party chooses to illegally share a copyrighted work on the service provider's site, the data conduit's liability for copyright infringement is lowered (DMCA, 1998). There are many requirements for the service provider if they want to receive the benefits of liability limitations including that it did not know that specific material was infringing, the service provider did not post the material themselves, it will eliminate accounts of users who continue to infringe and that service providers will not interfere with current copyright protections. In 2005, Congress passed the Family Entertainment and Copyright Act. This Act's main provision criminalizes anyone who attempts to film a motion picture in a movie theater with a camcorder or other audiovisual recording device (Family Entertainment and Copyright Act, 2005). The law also gives movie theater owners the right to reasonably detain anyone who is suspected of recording a motion picture and eliminates liability for movie theater owners.

In October 2011, Rep. Lamar Smith (R-TX21) introduced the Stop Online Piracy Act (SOPA) to continue the fight against online piracy, and specifically to target overseas websites. The Bill authorized the Attorney General (AG) to seek a court order against any foreign internet site directed towards the U.S. that was committing or facilitating online piracy. The court order would:

require the owner, operator or domain name registrant, or the site or domain name itself if such persons are unable to be found, to cease and desist further activities constituting specified intellectual property offenses under the federal criminal code including criminal copyright infringement (SOPA, 2011).

As well, the Act created a system that allowed owners of copyright protection to notify authorities of a website infringing on copyright protections. When an online service provider is notified that their site is engaging in copyright infringement, they must engage in various preventative steps as laid out in the Act. This Act however may increase the liability for U.S. service providers as the language of the bill broadly states “facilitates copyright infringement” (SOPA, 2011). One example of a foreign site that facilitates illegal file sharing and was the target of this bill is Pirate Bay, which is based in Sweden. Given that the U.S. cannot take much action against foreign sites, the goal of the Act is to prevent U.S. search engines, advertising networks and other providers from showing links to Pirate Bay postings and thus making more difficult for U.S. users to access pirated works from foreign websites. The Bill was met with strong opposition with opponents claiming that this bill would threaten free speech and stifle innovation (Pepitone, 2012). As well, internet giants like Google and YouTube said that the broadly defined nature of “facilitates” would hold them at a much higher risk of liability. The Bill quickly became a battle between the MPAA and Silicon Valley, with Silicon Valley winning. Sites like Wikipedia imposed a blackout day in opposition to the bill, while Google collected over seven million signatures on an online petition (Pepitone, 2012). The Bill died in response to the overwhelming opposition and thus has stalled the fight against internet piracy.

B. How the Film Industry has Been Able to Achieve Protection

I will argue that the film industry has been able to achieve stringent copyright protections because of three reasons: (1) the film industry has spent more years lobbying for protection; (2) the film industry has garnered media attention on the issue; and (3) being a concentrated industry has allowed the film industry more lobbying power.

(1) Years Spent Lobbying

The film industry has spent over 30 years lobbying the U.S. Congress for copyright protection against pirated works. The industry's primary defense has been to constantly claim that piracy will lower the "incentive to engage in creative labor" which is standard IP theory (Raustiala, 2006). Various players in the industry have supported legislation that has passed and become laws. Not only has the film industry presented their case to Congress, but it has also had private battles with content providers in the courts and taken the online piracy battle international. In 1994, there was a landmark treaty called the Agreement on the Trade-Related Aspects of Intellectual Property Rights (TRIPS) which sets minimum requirements for signatories to enforce (Raustiala, 2006). In order to obtain protection, the film industry has fought for protection at all levels and has had a concerted effort in place for over 30 years. This is in contrast to the fashion industry which has only begun lobbying for protection since the early 2000s, even though fast fashion has existed since the 1980s.

(2) Publicity

The film industry has had the benefits of media coverage to advance its agenda over the last 30 years. In doing a cursory Google News search, when the terms of online or film piracy are entered, I found that the number of articles are in the tens of thousands. When I entered the terms of "fast fashion" or "fashion law," the number of news article results is only in the hundreds or low thousands. The fashion industry, led by the Council of Fashion Designers (CFDA), has not made a concerted media effort in bringing light to their cause, even though fast fashion has existed since the 1980s. As well, the MPAA website has

devoted an entire page to a discussion and frequently asked questions section on internet piracy including subsections on what the organization has done to prevent piracy, why preventing piracy is important and the current status of copyright protection for films in America is (MPAA, 2014). Most recently to date, the media has constantly produced a stream of articles concerning the ongoing situation regarding Megaupload, a file hosting and sharing site previously operated out of Hong Kong that was shut down in January 2012 by the U.S. Department of Justice (DOJ). The DOJ claimed that Megaupload was operating as a website solely devoted to copyright infringement. The case has received widespread media attention, and the site's founder, Kim Dotcom, a native of New Zealand, may face extradition to the U.S. (Wellington, 2014). The Megaupload case will be further discussed later in this paper. On the other hand the CFDA has had a weak media presence regarding fast fashion and no such page on its website devoted to its interests exists. Even in its most recent annual report, only a small graphics box towards the end of the report is devoted to updating designers on the status of bills and legislation (CFDA, 2012).

By using the media to garner national attention, the film industry has made the concept of film piracy relevant to people's lives. People are more informed of the problems in the film industry than they are in the fashion industry and this helps the film industry push its agenda forward.

(3) Film is a Concentrated Industry

The film industry is a much more concentrated industry than many other creative industries and all of the film studios have the same shared goals. The MPAA is an organization that has existed since 1922 and represents six of the largest and major film studios which produce 90% of all films in the U.S.: Walt Disney Studios Motion Pictures, Paramount Pictures Corporation, Sony Picture Entertainment, Inc., Twentieth Century Fox Film Corporation, Universal City Studios LLC, and Warner Bros. Entertainment (MPAA, 2014). The MPAA has been able to effectively lobby on behalf of the major studios in the film industry in an orderly fashion. According to economic theory though, more concentrated groups need less IP protection because fewer firms in an industry means less competition for each one. In that case, the film industry would require less protection, while a large industry like fashion would require more

protection (Raustiala, 2006). But contrary to this fact, history shows us that the film industry has been able to receive widespread protection, while the fashion industry has not. This may be attributed to the smaller numbers in the film industry. As previously stated in chapter two, sociological theory outlines that smaller groups are better at organizing themselves and their interests as opposed to larger groups. In small organizations, individual members have a large stake in what happens, whereas in large groups, individual members have a lower stake and are in a difficult situation when it comes to paying the transaction costs (Raustiala, 2006). For the film industry, there are only six members that constitute almost all of the industry's output. Because they are represented by one organization, this has made lobbying efforts easier and more coordinated. As well, all film studios are negatively impacted by online piracy and file sharing, and thus they have the common goal of ending online piracy.

The fashion industry, on the other hand, is composed of thousands of designers, only of which approximately 400 are members of the CFDA (CFDA, 2014). As the CFDA is the only governing body in the industry, it does not adequately represent all types of designers as entry and mid level designers do not qualify for membership. Furthermore, as previously stated, not all designers share the common goal of achieving copyright protections, which hurts the push to obtain rights. Noted shoe designer Stuart Weitzman says that the lack of copyright laws forces innovation in fashion.

C. Piracy Hurts the Film Industry

There has been a substantial amount of literature published on the impact of piracy on the film industry. Within this literature, the majority of publications conclude that piracy has a negative impact on the film industry. It is important though to divide the literature into two categories: (1) studies that examine the impact piracy has on movie theater attendance; and (2) studies that examine the impact piracy has on digital movie sales and rentals (Danaher, 2013). Across all of these categories, the literature has concluded that piracy has a negative impact on all three situations.

In May 2013, Brett Danaher of Wellesley College and Michael Smith of Carnegie Mellon University conducted an empirical study of how two major film studios' digital revenues would react to a shutdown

of a major file sharing website. There were three reasons for conducting an empirical study. First, the authors note that shutting down one file sharing website does not necessarily lead to an automatic increase in sales for a film studio. There are other file sharing websites and the shutdown of one site may lead users to use another site. Second, studios will not be able to determine any sales gain if consumers of pirated films reservation prices (the highest price willing to be paid) are lower than the market price. Third, by eliminating major file sharing websites, some consumers may turn towards legal channels and thus increase studios' revenues. For these conflicting reasons, the authors determined that they must do an empirical study instead of posing a theoretically ambiguous question. Their empirical study used the January 2012 shutdown of piracy website Megaupload. Megaupload was one of the largest and most popular cyber lockers (an online forum where users can either pay for or be given space to upload content) on the Internet and according to Alexa Internet (a company that measures web traffic) the site at one point was the 13th most visited website on the Internet (Danaher, 2013). Not surprisingly, many cyberlockers, including Megaupload, become havens for illegal content and copyright infringement. The U.S. government was successfully able to indict Megaupload and shut down the cyber locker.

The authors' study did not simply measure the rise in digital sales for the studios after the shutdown, but instead did a 12 cross country variation in pre-shutdown usage of Megaupload. Danaher and Smith controlled for country specific trends and Christmas and saw no relationship between Megaupload activity and changes in digital sales before the shutdown. But after the shutdown, the authors saw a statistically significant positive relationship between Megaupload activity and digital sales for the two film studios; for each 1% unit of Megaupload activity before the shutdown, this accounted for a 2.5-3.8% increase in legal digital sales post shutdown (Danaher, 2013). Countries that had high pre-shutdown usage of Megaupload saw larger increases in digital sales compared to countries with lower pre-shutdown usage did. Many would think that a country with rampant illegal file sharing usage would react to a shutdown by using other illegal websites, but Danaher's and Smith's analysis prove otherwise. The study also concluded that digital revenues for the two studios were 6-10% higher spanning an 18 week period after the shutdown (Danaher, 2013). The authors concluded that "the shutdown of a major

online piracy site can increase digital media sales, and by extension we provide evidence that Internet movie piracy displaces digital film sales and rentals” (Danaher, 2013).

The study did note its setbacks and limitations. First, the Megaupload shutdown was highly publicized and may have influenced other cyber locker behavior. Second, this specific study only measured the impact on digital sales, but other studies have been conducted to show the negative impact piracy has on theater attendance and physical sales of films.

In January 2013, Liye Ma, an assistant professor at the Smith School of Business at the University of Maryland, Vir Singh and Alan Montgomery, both professors at the Tepper School of Business and Michael Smith, a professor at the Heinz College and Tepper School of Business, published a study on the effects of pre release movie piracy. Pre-release piracy is when a copy of a film becomes available before a film is released in theaters. In this case, piracy can serve as a substitute for paying to watch the films in theater. Pre-release can happen when a film premieres overseas and then pirated copies are created and sold, or a copy of the film can be leaked from the studio. In the film industry, box office revenue is important in determining DVD sales and other deals. The authors proposed two options for piracy: (1) that it cannibalizes theater attendance; and (2) that it promotes the film through word-of-mouth (Ma, 2013). Pre-release piracy can serve as a substitute for a paying customer seeing the movie in theaters. There is also the argument though that pre-release piracy can help promote a film through word-of-mouth advertising. The authors conducted the study using two approaches: (1) adapting standard forecasting models to see the impact of pre-release piracy on movie revenue; and (2) a structural framework on how marketing, word-of-mouth and piracy affect sales (Ma, Singh, Montgomery, 2013). The study only determined the impact piracy had on box office sales, not subsequent DVD sales, rentals or online purchases. They used data from 2006 to 2008 on 533 major movie releases in the U.S, 61 of which experienced pre-release piracy (Ma, 2013). The study concluded that pre-release piracy negatively affects box office revenue. Specifically, revenues would increase by 24% if there was no film piracy in the world (Ma, 2013). When pre-release piracy happens one week before a film’s opening, revenues decrease by 4% and piracy that happens four weeks before a film’s release lowers revenue by 8% (Ma,

2013). The authors also determined that factors like extremely high quality films (e.g. those in 3D) are deterring factors to those who wish to watch pirated copies. One tactic that filmmakers can use to combat piracy is to make more films in 3D which are difficult to watch at home without the proper equipment.

D. The Effectiveness of Copyright Protections

In some cases, like the Megaupload case, copyright laws have provided effective protection against film piracy. When the government can target a website and rely on the law, it does help film studios maintain their revenues. But there are still thousands of illegal file sharing websites both in the U.S. and around the world that continue to promote illegal file sharing. The industry continues to be plagued by piracy as the internet becomes harder to regulate and powerhouse data providers like YouTube and Google continue to fight against broad regulations.

E. The Food Industry

On June 26, 2007, the owner and executive chef of the Pearl Oyster Bar in lower Manhattan of New York City, Rebecca Charles filed a lawsuit against her former sous chef, Edward McFarland. Charles claimed that when McFarland left and opened his own restaurant, Ed's Lobster Bar, he copied her entire menu and the physical presentation of dishes. Given that Charles could not file for copyright infringement in this case, she resorted to using trade dress protection (I will further discuss trade dress protection in this chapter as it relates to food), which could protect her menu and dish presentation. Charles also claimed that McFarland stole her family recipes, but copyright laws explicitly state that recipes cannot receive protection, and thus this argument did not serve Charles' purpose (Broussard, 2008). The case was settled one year later for an undisclosed amount and opened a new debate on whether or not chefs should be able to receive protection for their culinary creations.

It is important to note that the debate for food copyrights is still relatively new and that many chefs have not joined the debate. As well, there has been no attempt to introduce legislation regarding food protection laws in the history of the U.S. Congress.

F. The Current Status of Copyright Protection in the Food Industry

Next to the U.S. Government, the restaurant industry is the largest U.S. employer and employs 12 million people and is worth \$1.2 trillion (Reebs, 2011). Currently, culinary creations, food and recipes are not eligible for copyright protection in the U.S. under current intellectual property laws. The food industry shares a similar conflict with the fashion industry regarding separation of its aesthetic value from its functional purposes. Is it acceptable to say that culinary creations can be considered works of art? Or rather is food simply a functional item that only serves to feed people? The crossroads of having both aesthetic and functional purposes has prevented the food industry from obtaining protection rights.

Chefs who are interested in protecting their works are interested in either achieving copyright protection for recipes, or food patents. Currently, there are five types of protection law that chefs can pursue: (1) trademark; (2) patent; (3) trade secret; (4) copyright; and (5) trade dress.

(1) Food items with a specific name are eligible for trademark protection. For example, the two signature burgers from America's largest fast food chains, McDonald's "Big Mac" and Burger King's "Whopper," have trademark protection and thus no other company or person can cite their product as a Big Mac or Whopper. However, other people can still create these types of burgers, provided that they do not use the trademarked name.

(2) Regarding patents, the Office of Innovation Development has stated that a food item has three components: a list of ingredients, how to prepare the ingredients into a final product, and the final product (USPTO, 2013). Additionally, under current patent law, a list of ingredients can qualify as patentable material as it is considered "composition of matter" and the way a product is created can be patented under "process" (USPTO, 2013). However, in order to receive a patent for a food product, that product must be "novel and non obvious" meaning that the item can never have existed before, or be an extension of a well known food product (USPTO, 2013). Given that food has existed since the beginning of humanity, it is almost impossible to claim that food products are completely novel and new. Still, food patents are

- issued yearly, but generally to pre made mixes with chemical compounds created in laboratories as opposed to kitchens. These patents are given because the “combination of ingredients used, or the way they are processed results in a food product totally unexpected” (USPTO, 2013). Essentially, it is very difficult for the average chef to obtain a food patent.
- (3) Trade secret protection is another option for chefs who want to protect their product without disclosing the recipe. Trade secrets protect recipes and processes forever and can be used as a marketing tool for companies regarding the secretive nature of their products. For example, Coca-Cola and Kentucky Fried Chicken (KFC) have employed trade secret protection to safeguard their recipes (USPTO, 2013). In order to qualify for trade secret protection, a product “must be used in business, and give an opportunity to obtain an economic advantage over competitors who do not know or use it” (USPTO, 2013). When applying for trade secret protection, inventors do not need to detail the product’s formula and in most cases those who have worked on the creation sign non-disclosure agreements. Trade secret protection only guards against unauthorized disclosure. However, trade secret protection does not prevent someone else from reverse engineering a recipe and learning how to create the product (USPTO, 2013).
- (4) The fourth option for chefs is to obtain a copyright protection for a recipe. Copyright protection extends to granting protection of original authorship of a variety of works. Current U.S. copyright law explicitly states that recipes “that are mere listings of ingredients” are not eligible for copyright protection (U.S. Copyright Law, 2011). If a recipe has “substantial literary expression—a description, explanation, or illustration” accompanying a recipe (similar to what would be found in a cookbook) then that can be protected under copyright laws (U.S. Copyright Law, 2011). Furthermore, only original works can receive copyright protection, meaning that a cook cannot have copied a recipe from elsewhere. But given that U.S. copyright law has been amended previously to include additional works of art, chefs could lobby and argue their case with the pursuit of changing the law.

- (5) The fifth and final option of trade dress law is an avenue that owners of restaurants can pursue. Trade dress is “the overall commercial image (look and feel) of a product or service that indicates or identifies the source of the product or service and distinguishes it from those of others (INTA, 2014). This can include labeling and packaging of a good, an environment that services are provided in or the design of a product. Restaurant owners can rely on trade dress law in order to protect their menu layout, décor or style of serving. However, this type of protection does not extend to safeguarding recipes or food.

Overall, it is highly difficult to obtain any form of comprehensive protection for a culinary creation. The current options for protection all have significant drawbacks and there is no law that would protect all aspects of a food creation including aesthetics, functionality and its name.

For example, in early 2013, New York baker Dominique Ansel created a dessert called the “Cronut,” a hybrid between a croissant and a doughnut. The dessert quickly became a global craze which in turn spawned imitation cronuts with many other chefs calling their creations cronuts. In order to protect the name of his creation and the bakery’s reputation, Ansel applied for a trademark for the name cronut, Ansel could not apply for a copyright given food’s functional nature. Regarding a food patent, a chef would have to argue that their creation was novel, but Ansel did not argue this. The bakery stated that the cronut may not be a novel item in an official post on their Facebook page: “Chef [Dominique Ansel] has never claimed he invented all fried-laminated dough recipes nor stated he was the first to ever fry laminated dough” (Dominique Ansel Facebook Page, 2013). This would have ruled out the option for obtaining a food patent, as it is not a novel creation. But when he applied for a trademark, Ansel was met with mass criticism from other chefs claiming that his trademark would lower innovation in culinary creations. In the same Facebook post, the bakery stated that trademarking the cronut would not hurt food creativity and that the bakery was simply attempting to protect its reputation and prevent others from claiming affiliation to the bakery (Dominique Ansel Facebook Page, 2013). The post also stated that

“Protecting one’s intellectual property and working towards the growth and continued innovation in the culinary arts are not positions that are diametrically opposed” (Dominique Ansel Facebook Page, 2013).

G. The Arguments for Food Copyrights

Chefs have relied on three arguments for why food should receive copyright protections: (1) food is a work of art; (2) moral rights; and (3) molecular gastronomic creations qualify as innovative works.

- (1) Many chefs claim that their culinary creations qualify as art and that they should be able to receive copyright protection like all other works of art do. They believe that the artistic aspects of food can be separated from its functional nature. While U.S. Copyright Law currently does not explicitly state food as an art, section 102 of the Copyright Act of 1976 states that “the Act does not intend to freeze the scope of copyrightable subject matter” (Reebs, 2011). However, this does not mean that the scope of copyrightable material is unlimited and open to everything and anything. Because U.S. Customs allows art to enter the U.S. duty-free, the Customs Office has determined a legal definition of art. The legal definition of art requires that a work of art meets two standards. First, a work of art must fall under one of these categories: original paintings and drawings, collages and decorative plaques, original prints, engravings and lithographs, sculptures and statuary, postage stamps, collectors’ pieces and antiques (Reebs, 2011). It is clear that food does not fall under any of these categories, with the exception of a sculpture. If a chef chooses to create a dish with an elaborately crafted and artistically created food product (a form of haute cuisine), this creation could be considered a sculpture. The second aspect to determining if something is a work of art would be to determine if the product is from an artist. An artist can qualify as an artist based on academic standards and whether or not they are regarded as an artist by peers and critics in their industry (Reebs, 2011). Chefs claim that if they can meet these two criteria, then their work should be considered works of art and be eligible for protection.

- (2) Chefs have also cited moral rights as a reason for why they should be able to receive protection. Enacted by the U.S. in 1988, the Berne Convention is an international treaty that details moral rights (Reebs, 2011). The treaty states that “protection must include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression” (WIPO, 1988). This statute would protect food and any other industry that currently does not receive copyright protection. However, in a court of law, litigants must use U.S. statutes and U.S. laws to argue their point, not international treaties (Reebs, 2011). This undermines the Berne Convention and thus it does not hold in protecting food creations in the U.S.
- (3) Another argument that is beginning to gain steam is that the merger of food with scientific techniques (also called molecular gastronomy) should qualify as innovation, and the results of that merger should qualify for patent protection. In the last decade, chefs have experimented with liquid nitrogen cocktails, potato foams, and one example includes “dehydrated bacon threaded on a wire and decorated with ribbons of dehydrated apple puree” (Cunningham, 2009). Given this new form of highly creative and scientific cooking, chefs who employ this method have proposed receiving protection for their creations. Because only a few chefs are highly trained in these methods, the argument for obtaining protection rights due to molecular gastronomy is still being established.

Overall, if chefs want to obtain comprehensive protection for their dishes, they can pursue only a few options. The first option is that they can attempt to prove that their creation is unique and novel and obtain a patent protection. The second option is that chefs can propose legislation, lobby and convince the U.S. Congress that culinary creations and recipes are works of art and can be covered under copyright law.

H. Arguments Against Food Copyright

The primary argument against extending protection laws to include food is the current status of the law. Food is not eligible for copyright protection not only because it is a functional product, but also because food is not considered creative expression and thus does not qualify as a work of art. Furthermore, patent law requires that the item being patented is new and novel, never having existed before. It has been difficult for chefs to prove that their creations are new and novel since food has been in existence for thousands of years. Under current laws, food cannot receive copyright protection.

The most likely option for a chef would be to obtain a copyright protection for a recipe. However, there are three reasons as to why recipes cannot receive copyright protection: a list of ingredients is not copyrightable; recipes are not considered original creations; and recipes are utilitarian.

Currently, a simple listing of ingredients is not considered copyrightable, and must be accompanied by literary expression. The second reason that recipes cannot be copyrighted is that they are considered as non original creations. For example, a recipe for macaroni and cheese cannot be copyrighted because the “dish’s composition did not originate with the author of the recipe” (Broussard, 2008). Noodles and cheese are required to make macaroni and cheese, but noodles and cheese have been around for hundreds of years. Therefore, because the chef most likely did not invent noodles or cheese, he or she cannot claim that their recipe is original (Broussard, 2008). The third reason is that recipes have a utilitarian nature. Recipes are used in cooking and to create food, not as revered works of art (Broussard, 2008). Thus, their utilitarian nature disqualifies them from protection.

Another reason opposing food copyrights is that protection standards would harm innovation in the industry. Despite the current status of the law, one effect that protection laws could have on the industry is that it would prevent new chefs from imitating or creating derivative or advanced versions of an existing dish. In the kitchen, cooking education is seen as something passed down from experienced and educated chefs to apprentices: “executive chefs teach their cooks everything they know—recipes and techniques—hoping that the cooks will successfully recreate the cuisine in order to keep a restaurant

operating consistently” (Cunningham, 2009). New chefs learn techniques by creating classic dishes and can also expand on current dishes. The culinary industry relies on an open source education system to train its new chefs. As well, student chefs may not be able to practice preparing certain dishes or using recipes if they are protected (Broussard, 2008). New cooks learn in an open source model drawing on other dishes for inspiration and learning techniques. The current model of education in the food industry would have to be majorly altered from the traditional system that has been in practice for hundreds of years. As well, if chefs cannot expand on or derive dishes, innovation in the food industry may be sharply reduced if the free exchange of ideas concept is eliminated (Broussard, 2008). While chefs could work on heightening or differentiating a copyrighted dish, this would lead into the debate (similar to the fashion industry) of how a dish is substantially similar or different from the copyrighted version.

I. Self Regulation in the Food Industry

Despite the lack of protection in the industry, various organizations have promoted a culture of respect and professionalism among chefs. The International Association of Culinary Professionals (IACP) is a non-profit organization with approximately 4,000 members including chefs and culinary educators. The IACP has stated that it expects its members to:

“respect the intellectual property rights of others and not knowingly use or appropriate one’s own financial or professional advantage any recipe or other intellectual property belonging to another without the proper recognition” (Broussard, 2008).

The code of ethics also cites honesty, morality, respect, and accuracy towards other chefs as model behavior for its members (IACP, 2014). The United States Personal Chef Association (those who make in-home meals for their clients) also has a code of ethics instructing its members to respect other chefs’ culinary works and intellectual property (Broussard, 2008). For both organizations, the code of ethics has its own page and is prominently displayed on their respective websites, citing the importance of this issue in the culinary world. Some have argued that legislation is not necessary if chefs have created a culture of ethics and professionalism within the industry.

J. Social Norms Based Regulations in the Food Industry

In addition to self regulation, social norms may provide some form of regulation in the culinary industry. In 2006, two professors, Eric von Hippel of the Massachusetts Institute of Technology in Massachusetts (M.I.T.) and Emmanuelle Fauchart of the Conservatoire des Arts et Metiers (CNAM) in France, conducted an empirical study regarding social norms as it relates to protecting recipes among elite French chefs. They concluded that accomplished French chefs adhere to three social norms: (1) one chef cannot exactly copy another chef's recipe; (2) if one chef tells another chef about a recipe, the recipient chef is not to share that information with anyone else; and (3) chefs must credit other chefs who have created significant recipes (Broussard, 2008). When interviewing the chefs, the authors learned that chefs were likely to share their recipes if they knew that these norms would be followed by the receiving chef. These norms prove that there is a culture sharing and a free exchange of ideas in the culinary industry because of a social norms system. This suggests that the concepts of originality and ownership are perceived differently in the food industry. A drawback of this study is that it only followed the behaviors of accomplished chefs and not of inexperienced chefs. One must wonder if this code of ethics exists among those ranked lower in the culinary world.

K. The Fragrance Industry

Throughout this paper, the terms fragrance and perfume will be used interchangeably. Perfume production began in Ancient Egypt and was present in Europe starting in the fourteenth century. At first, perfume was a luxury good and only available to European royals and the wealthy. Now, the global fragrance market is worth approximately \$10 billion, with France being the largest market (Seville, 2007). The only protection that perfumes have been able to receive is trademark protection for a fragrance's brand name and trade dress protection for its packaging. Still, perfume creators cannot copyright a scent and thus "smell-a-likes" have emerged in the market (Seville, 2007).

L. Protections Currently Available in the Fragrance Industry

In the U.S., fragrances cannot receive copyright protection given the lack of originality and perfume's functional purpose. It is important to note that there has been no U.S. campaign to gain copyright protections for perfumes. In Europe, however, there has been a push by fragrance companies to achieve copyright protection for scents. While companies have attempted to obtain olfactory copyrights based on a perfume's chemical composition, the European Court of Justice (ECJ) has repeatedly ruled that a consumer must be able to "perceive it [the scent] independently of the product itself" (Seville, 2007). Therefore, a consumer would need to be able to recognize a scent on its own, without the aid of any brand name or trademark. Currently, there are no copyright laws granted to American fragrance manufacturers.

There are four types of protection that are available to fragrance makers in the U.S.: (1) trademark; (2) trade dress; (3) trade secret; and (4) patents

(1) Currently, fragrance makers who operate under a trademark can receive trademark protection for their brand name. Trademark protection will only protect a brand name, not the scent, composition or packaging of a product. For example, one of the most famous perfumes in the world, Chanel No. 5, has trademark protection for the brand name of Chanel. Trademark protection stops blatant trademark counterfeiting of perfumes (Field, 2004).

(2) Fragrances are also eligible to receive trade dress protection. Trade dress protection safeguards "the total image of a product" possibly including "features such as size, shape, color or color combinations, texture and graphics" (Hammersley, 1998). When applying for trade dress protection, the trade dress of a product must be used as a way to identify the source or producer of the product: "trade dress needs to be used "in such a manner as to denote product source" (Hammersley, 1998). For example, fashion designer Marc Jacobs has a fragrance named Lola where the bottle is a bright purple cylinder with a large multi petaled flower on the top. He also makes another fragrance called Daisy, where the bottle is rectangular and the top has large white

and yellow daisies. These two bottles have become eponymous in the industry with the designer Marc Jacobs and qualify for trade dress protection. However, not all aspects of product's packaging and image can receive protection. Aspects that are functional or utilitarian (for example, a bottle shape) are not always eligible to receive protection. But if a functional aspect is "essential to the use of the purpose of the product" then it can receive protection (Hammersley, 1998). Courts have set functionality standards by determining how many other designs would remain for other competitors' use if one particular design was protected.

- (3) Fragrances can also receive trade secret protection. Perfumes are made from a variety of compositions ranging from the most basic to advanced. Reverse engineering the composition of a perfume requires being highly trained in the field of organoleptic (the senses) properties. If a fragrance manufacturer wanted to exactly imitate another fragrance, they would have to employ a costly scientist with this knowledge. If it is very difficult or impossible to determine the composition of a perfume, then that fragrance experiences trade secret protection. For example, "complex blends derived from natural oil are unlikely to be duplicated exactly" (Field, 2004). Furthermore, more elite perfumes use expensive materials when making a fragrance. Jasmine essence, an essence used in high end fragrances, comes from the very expensive naturally occurring jasmine blossom. A more inexpensive perfume would use a synthetic compound which would not exactly mimic the expensive fragrance. As the cheaper perfume wants to keep its cost and price low, it will not use high quality essences and the high end fragrance maintains its trade secret protection (Field, 2004).
- (4) While perfume as a whole cannot receive a patent protection because it is not a new item, a fragrance's composition can receive patent protection. Under U.S. patent law "perfume compositions intended to impart a pleasant odor, scent or aroma or processes of making or using a perfume composition" can be patented (USPTO, 2000). But by patenting a perfume, the fragrance maker would have to release every ingredient in the fragrance, which would give

competitors' access to their methods. For this reason, fragrance makers have refrained from patent protection.

M. Arguments for Copyright Protection in the Fragrance Industry

In June 2004, the Dutch Appeals Court in the Netherlands ruled that scents, and not just compositions, of fragrances fall under acceptable works in the Dutch Copyright Act of 1912 and thus fragrances are copyrightable. Copyrightable works must be original and the Court ruled that in order to be original a perfume “does not need to be new in the objective sense, but only subjectively novel as viewed by its creator” (WIPO, 2006). Essentially, if a perfumist (one who makes fragrances) was creating a scent based on the smell of roses, they would have to incorporate their own unique twist to the scent in order for it to qualify as original. The case was Lancôme, a French cosmetics company, versus Kecofa, a Dutch firm. Lancôme claimed that Kecofa was copying its fragrance, *Trésor* (Treasure) by manufacturing another fragrance called *Female Treasure*. The Court denied Lancôme's claims of trademark infringement, but ruled that a scent could be copyrighted (WIPO, 2006).

Furthermore, in June 2006, the Cour d'Appel de Paris (the Parisian Court of Appeals) ruled that perfume was copyrightable in the case L'Oréal v. Bellure. L'Oréal claimed that Bellure was selling smell-alike copies of three of its major perfumes (*Trésor*, *Romance* and *Miracle*). Unlike in past cases, L'Oréal did not file for trademark or trade dress infringement as Bellure changed the names and packaging of its smell alike fragrances. Instead, L'Oréal argued for copyright protection of scents (Seville, 2007). French Intellectual Property Code states that “copyright protects the rights of authors in all works of the mind, whatever their type, form of expression, merit or purpose” and thus this does not exclude smells (Seville, 2007). The Court ruled that a scent could be considered a work of the mind provided that the creative process came from the author's mind and that it was original.

While the Dutch and French Courts did rule in favor of copyrighting a scent, the argument appears to be weak and redefines originality to something more subjective and difficult to argue. The movement for fragrance protection in the U.S. has not gained steam, but has been discussed.

N. Arguments Against Copyright Protection in the Fragrance Industry

There are three reasons to oppose copyright protections for fragrances: (1) protection may lead to monopolies in the fragrance industry; (2) redefining the concept of originality would create confusion; and (3) protection for fragrances may extend into other olfactory industries.

- (1) Copyright for perfumes may lead to monopolies in the perfume market. Many similarities can be found among perfumes and this may lead to only a few perfumes (that won infringement cases) to be sold in the perfume market (WIPO, 2006). Larger companies with more money to spend on legal counsel would win copyright cases and this would limit the amount of perfume sold in the industry and reduce the number of options for consumers.
- (2) Altering the definition of “originality” would bring in a slew of cases of products claiming to be unique and novel. The concept of originality would end up being debated more in courts than being enforced in the industry, a problem similar to the language in past U.S. legislation regarding fashion copyright. Making originality a subjective decision will ultimately be a concept that is highly debatable and will vary from court to court.
- (3) Being able to copyright a scent extends to areas beyond the fragrance market. Would being able to copyright a scent also allow someone to copyright spices or flavorings? Allowing copyrights for scents would open up a series of cases where anyone who works in an industry with scent as a component could argue for legal protection.

How the Presence or Absence of Copyright Laws Impacts Innovation in the Film, Food and Fragrance Industries

O. The History of Copyright Protections

Intellectual property rights can be dated back to the *Philosophy of Right*, written by famous German philosopher Georg Hegel. Justin Hughes, a professor of IP law at Loyola College, derived from Hegel's work that IP systems should grant legal protection to "the fruits of highly expressive intellectual activities, such as the writing of novels, than to the fruits of less expressive activities, such as genetic research" (Fisher, 2011). While many European IP systems have shaped themselves around Hegel's work, American IP law has not. American IP law protects pharmaceuticals and films, citing the industry's high fixed cost of production and the many years invested in research and development. Other than copyright protection for works of visual art (sculptures, paintings, drawings etc) and for books, the American IP system does not protect all works of expressive art, including food and fashion.

For modern IP systems, protection rights stem from the desire to promote authorship and invention in the American economy and rely less on moral rights (Oliar, 2012). Standard intellectual property theory claims that protection promotes the "incentive to engage in creative labor" (Raustiala, 2006). The International Chamber of Commerce (ICC) states that:

By according these rights, society provides an incentive for people and organizations to invest time, resources and original thinking to develop innovative products and technologies and expand knowledge and culture. This encourages the production of a wide range of quality goods and services, and helps maintain fair competition (ICC, 2005).

Protection rights help the owner of a specific product to protect their works and give them an incentive to innovate. As well, if one product is protected, this would provide an incentive for another individual to think more creatively and invent a different product. Businesses continue to invest in order to innovate as they must stay ahead of the game and remain competitive (ICC, 2005). However, an inventor's incentive can be eliminated and thus would harm innovation. Industries like pharmaceuticals invest large amounts of money into new products, and expect the return on their investment to be guarded by protection laws. This industry enjoys wide protection laws citing that if they cannot recoup their

investment, then there will be no innovation in pharmaceuticals (ICC, 2005). The fashion industry has also claimed that original designers lose the incentive to innovate when fast fashion copyists produce almost exact replicas of their product. But in some industries, the typical relationship between intellectual property rights and innovation is a complicated one. The economic tradeoff between authorship and promoting innovation becomes more difficult to determine in industries like fashion, food and fragrance. While many industries can spend the time and money to achieve copyright protection, having protection laws may not always serve well for the industry and standard IP theory does not apply in certain industries. I will attempt to outline the differences in the food, fragrance and fashion industries from the film industry that have allowed these three industries to survive and continue innovating without protection laws. The three primary differences are: (1) food, fashion and fragrance have a segmented consumer base; (2) piracy in these industries is never an exact replica; and (3) these industries rely on sharing to survive.

(1) Differentiated Consumer Base

Films are watched by everyone in all income brackets in the U.S.; all film studios cater to the same consumer. While many people will not turn to a pirated copy of a film because they want to have the theater experience or watch a high quality picture, there are a percentage of people who will watch a pirated version. By striving to eliminate piracy, a film studio can keep all of its consumers within the realm of purchasing theater tickets or watching movies through an accepted licensing agreement.

In other industries, though, piracy and copycats do not appeal to all consumers. For industries that have a differentiated consumer base based on income level and brand preference, the affluent consumer is unlikely to switch to a pirated or copycat version of a luxury product given their desire for quality and brand affinity. Therefore, industries that claim to lose money to copycat products will not lose their core consumer base.

In the food industry, elite restaurants only cater to the wealthy. For example, The French Laundry, a California based restaurant, is considered to be one of the finest and most expensive in the

world, with prices starting at \$240 per person. Alinea, a Chicago restaurant known for its highly innovative cooking methods, starts its pricing at \$195 per person (Broussard, 2008). Because their desires for quality and brand affinity are so strong, wealthy consumers are unlikely to dine at low end dining establishments on a regular basis. As a result, high end restaurants do not lose their customers. They continue to innovate new recipes in order to keep their customers.

Similar to the food industry, the fashion industry has a differentiated consumer base based on income and brand preference. As will be illustrated by the following chapter, high end, wealthy consumers of fashion are defined by their high preference for brand affinity and product quality. Someone who shops at Prada, for example, is unlikely to switch to shopping at Forever 21 given their brand affinity and desire for high quality products. In 2005, Tom Ford, the former creative director for the luxury brand Gucci, participated in a forum on fashion copyrights at the University of Southern California. When asked how high end designers have remained in business and continue to innovate despite fashion copycats, he said “After simple research, we determined that the counterfeit customer is not ours” (Ford, 2005). The high end designers know who their consumer is and know that they will not lose that customer to a copycat product. High end designers continue to innovate new products in order to keep their customers coming back for more purchases.

The fragrance industry also has a differentiated consumer base based on income and brand preference. Luxury fragrances are expensive and cater to the affluent customer, while copycat fragrances cost much less and are retailed to the less affluent consumer. For example, a one ounce bottle of Chanel No. 5, widely considered as the world’s greatest fragrance, costs \$325. Comparably, an eight ounce bottle of any fragrance at Bath and Body Works costs \$14. Women who wear Chanel No. 5 are unlikely to switch to a copycat fragrance given their strong brand affinity and desire for high quality scented products.

(2) The Copycat Product is Never an Exact Replica

When films are pirated, they look quite similar to the original film. There are always differences in quality, picture and image, but many pirated copies are strikingly similar to the original film. While it is never a high quality picture, pirated copies do come close to the real film. As a result, many people who do not desire the theatrical experience will switch to pirated copies of a film. This substitution effect causes film studios' revenues to fall.

However, in the food, fashion and fragrance industries, finding a very similar or exact replica of a product is difficult.

High end restaurants use more expensive ingredients from various parts of the country and the world. These restaurants invest in high grade meats, exotic fruits and vegetables, all of which are priced much higher than average ingredients. On the other hand, lower quality restaurants might use faux ingredients (like imitation caviar or imitation crab) or use frozen, manufactured desserts instead of making them in house. Low end restaurants cannot exactly replicate the products that the high end restaurant does because they choose to not use the same ingredients. The affluent consumer values high quality, brand name food and will thus continue to dine at the high end restaurant. It is highly unlikely that the affluent consumer will substitute high quality food for the low quality option.

In the fashion industry, high end designers use expensive materials like fur, silk, wool and Egyptian cotton. Consumers of brand name products are willing to pay for clothing with expensive materials. On the other hand, fast fashion retailers want to maintain a low price charged on their products and thus they do not use high quality materials. A fast fashion retailer would use faux leather, or low quality cotton in its products. As a result, it is difficult for the fast fashion retailer to produce an exact replica. The high end consumer, which buys high quality products, would not switch to a cheap, fast fashion version of an item. Furthermore, this has been cited as a means of innovation in the industry. Designers have cited that they invest in high quality materials to deter exact copies from being produced by fast fashion copyists.

In the fragrance market, very expensive fragrances use high quality materials, whereas a cheaper smell-a-like uses synthetics or a less expensive, natural scent. For example, a luxury fragrance may use orchid flowers, an expensive plant, while a cheaper fragrance will use a less expensive flower like a carnation. Because it is very difficult and expensive to determine the chemical composition of a fragrance, finding the exact composition of a fragrance is nearly impossible. Therefore, producing an exact replica of a fragrance is nearly impossible.

(3) Industry Norms Promote a Sharing Culture

Members in the film industry operate independently from one another and do not share concepts and ideas. Studios may share actors with each other, but they do not share ideas. Producers in film studios all come up with their own ideas and do not rely on idea sharing to create new films.

In the food, fashion and fragrance industries, there is an open culture of sharing and this is a norm of the industry. Protection laws would harm the sharing culture in these industries.

The food industry relies on chefs sharing their recipes among one another. As well, chefs draw inspiration from recipes and dishes in order to practice them or build on them. For example, the traditional form of milk and cookies has been around for decades. Recently, New York baker Dominique Ansel created a chocolate chip cookie shot glass which he then pours milk into. This is a new twist on the traditional combination of milk and cookies. The industry relies on this type of sharing in order to promote innovation in recipes and dishes. Experienced chefs mentor younger chefs by showing them techniques and introducing them to recipes. This allows for new chefs to learn and innovate.

In the fashion industry, many styles are based upon others. The little black dress was first made famous by the American actress and beauty icon Audrey Hepburn in the film *Breakfast at Tiffany's* and has become an iconic design since its creation by famed fashion designer Coco Chanel in the 1920s. Since then, countless designers have gone on to modify, improve and innovate new little black dresses. This is just one example of the hundreds of designs that fashion designers have shared since clothing design started. Both up and coming and experienced designers rely on the open source and sharing model in the

industry. Coco Chanel also created women's suit jackets and almost every single designer includes women's suit jackets in their collections. Designers interpret, reference and credit their inspiration for new designs from past designs and trends. This can only happen because the industry norm is to share and this is what promotes innovation in the fashion industry.

In the fragrance industry, there are a few basic scents that all perfume makers share. They are floral, oriental, citrus, chypre, and fougere. No one fragrance maker can copyright a basic scent and all designers use these scents as the basis of their fragrances. While they may add other ingredients and create "new" compositions based on the building block scents, fragrance makers use and share these basic scents. The sharing norm in this industry among basic scents allows for fragrance designers to start with a base and then innovate and create new products.

From these three characteristics (differentiated consumer base, replicas are never exact, and industry norms), it is evident that the food, fashion and fragrance industries have survived and continue to innovate without copyright protections. There is a strong argument that these industries do not need protection to survive. The differentiated consumer base allows these industries to survive, refuting the argument that piracy hurts their business. Copycat products in this industry are never exactly the same as the original and thus the high end consumer of the food, fashion and fragrance industries will not switch to a copycat product. This also forces these industries to innovate in order to differentiate their product from a copycat product. Lastly, industry norms of sharing would complicate how these industries operate and provides difficulty in writing protection laws. Historically, it has been difficult to define what it means to have a substantially similar or a substantially different product.

III. A Duopoly Model of the Fashion Industry

In this chapter, I model the fashion market as a duopoly market with a differentiated product. There are two product varieties, a high quality/ high end product denoted by H and a low quality/ low end product denoted by L . There are two product attributes that consumers care about, quality or uniqueness denoted by ω_i and brand image denoted by α_i where $i=H$ or L . I assume that the high end product has a higher quality, i.e., $\omega_H > \omega_L$ and also a more favorable brand image, $\alpha_H > \alpha_L$. These two varieties represent the difference between luxury, brand name products and fast fashion products.

Consumers vary with respect to their preferences for brand image, denoted by θ_i where $0 < \theta_i < 1$. Consumers derive utility from both quality and brand image. The utility of a consumer of type i is given by

$$V_{\theta=i}^i = \theta \alpha_i + \omega_i - P_i \quad (1)$$

Where P_i is the price of product i

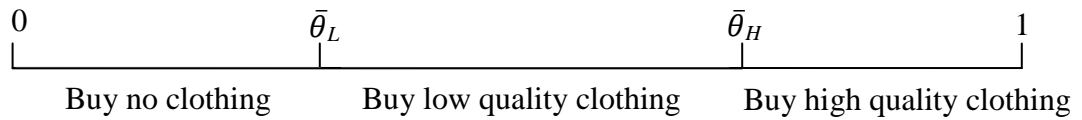
$$\begin{aligned} \text{Solve} [\{ Q_L = ((P_H - P_L - \omega_H + \omega_L) / (\alpha_H - \alpha_L) - (P_L - \omega_L) / \alpha_L) , \\ Q_H = (\alpha_H - \alpha_L - P_H + P_L + \omega_H - \omega_L) / (\alpha_H - \alpha_L) \} , \{ P_H, P_L \}] \\ \{ \{ P_H \rightarrow \alpha_H - Q_H \alpha_H - Q_L \alpha_L + \omega_H, P_L \rightarrow \alpha_L - Q_H \alpha_L - Q_L \alpha_L + \omega_L \} \} \end{aligned}$$

$$P_i = \alpha_i - Q_H \alpha_i - Q_L \alpha_L + \omega_i \quad (2)$$

And π_i is the profit of product variety i

$$\pi_i = (P_i - C_i) * Q_i \quad (3)$$

The beneath diagram shows the segmentation of this market. Consumers who $\theta_i > \bar{\theta}_H$ will buy the high quality product from $\bar{\theta}_H$ to 1.



The quantity demanded for both the high and low quality products are determined by: α , P , and ω :

$$Q_H = \frac{(\alpha_H - \alpha_L - P_H + P_L + \omega_H - \omega_L)}{(\alpha_H - \alpha_L)} - \frac{P_H + P_L + \alpha_H - \alpha_L + \omega_H - \omega_L}{\alpha_H - \alpha_L} \quad (4)$$

$$Q_L = \frac{(P_H - P_L - \omega_H + \omega_L)}{(\alpha_H - \alpha_L)} - \left(\frac{(P_L - \omega_L)}{\alpha_L} \right) - \frac{P_L - \omega_L}{\alpha_L} + \frac{P_H - P_L - \omega_H + \omega_L}{\alpha_H - \alpha_L} \quad (5)$$

It is given in these equations that both Q_L and Q_H have to be greater than 0. As well, both ω_H and ω_L are greater than 0.

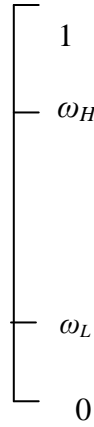
A. The Effect of Copyright Laws

The current state of this market does not have copyright laws. The laws would be set so that fast fashion retailers cannot produce exact replicas of a high end designer's design and that the low end product must be visibly different. But the laws would still allow for fast fashion retailers to join trends provided that they do not directly copy any high end designer's item. Copyright laws would directly affect quality/uniqueness and indirectly affect price. Without copyright laws, both firms determine their ω and P exogenously. With the existence of the low end firm, the high end firm has to invest more in research and design to distinguish their product from the low end copycat, or make it more difficult for the copycat to produce a very similar looking product. A more distinguished design could include different fabrics, including trademarked logos, or a more intricate design. Without copyright laws, the high end designer is forced to innovate and develop new trends while the low end simply copies.

The low end firm seeks to produce a mimicked copy of the high end product, while still maintaining a low price. The low end firm keeps a low price by not using expensive building materials, and they do not have to invest in research and design as they simply copy. The lack of copyright laws shrinks the gap between ω_L and ω_H , allowing the low end firm to set ω_L as close to ω_H as it chooses to.

Currently, ω_L does not equal ω_H because the low end firm produces a low quality product, but ω_L can be close to ω_H because it mimics the overall appearance and style.

If copyright laws were put into place, the presence of them would determine the space between ω_L and ω_H . An outside governing body would set the ω limit that the fast fashion firm could produce at. The government would set a fixed maximum ω for the fast fashion firm and would determine how much of a design a fashion firm can mimic and copy from. The laws would determine how much ω_L has to differ from ω_H . As seen by the beneath diagram, this would be an example of a market with copyright laws and how ω_L would be set beneath ω_H .



As a result, the high end designer would be able to set their ω_H exogenously based on c (cost of production of the whole item), α , z (the cost of producing the design) and ω_L :

$$Q_H = \text{Simplify} \left[- \frac{-1 + 2 c_H^2 - c_H c_L - 2 c_H \alpha_H + c_H \alpha_L + c_H \omega_L}{c_H (4 \alpha_H - \alpha_L)} \right]$$

$$\frac{1 - 2 c_H^2 + c_H c_L + 2 c_H \alpha_H - c_H \alpha_L - c_H \omega_L}{4 c_H \alpha_H - c_H \alpha_L}$$

$$\omega_H = - \frac{-2 c_H + c_L + 2 \alpha_H - \alpha_L - \omega_L}{2 (1 - 4 z \alpha_H + z \alpha_L)}$$

$$- \frac{-2 c_H + c_L + 2 \alpha_H - \alpha_L - \omega_L}{2 (1 - 4 z \alpha_H + z \alpha_L)}$$

It is given in this equation that $Z > 0$ and that ω_H must be positive. This equation will only look at results where ω_H is greater than 0.

When solved, for values greater than 0, the slope of this line is always positive. Provided that ω_L does not exceed ω_H , the slope will be positive and thus ω_H will continue to rise. When ω_L is set low, then ω_H is also low. Setting ω_L at a low standard means that the high end designer does not have to innovate to a high degree. As ω_L increases, this forces ω_H to increase. We can conclude that raising the standard of imitation for the low end designer forces the high end designer to innovate, while setting the standard of imitation too low pulls down ω_H and designers do not innovate as much. While ω_L will never exceed ω_H , the higher ω_L is set, the less ω_H will increase. If ω_L becomes very high and the low end designer starts producing high quality, highly innovative clothing, the high end firm will not innovate at an increasing rate. This is unlikely to happen though as the low end firm does not produce high quality products in order to maintain a low price. Thus, there is an optimum level to set ω_L at in order to encourage innovation from the high end firm. Still, ω_L cannot be set too low as it will pull down ω_H but also ω_L cannot be set too high as this will dissuade high end designers from innovating.

The fast fashion firm would not be allowed to set their ω , but the high end designer would. This is the current status of the fashion industry in Europe, where the European Union has protections for designs. Giving high end designers copyright protection would not allow fast fashion retailers to directly copy high end designers and thus they would have to produce a different looking product. As a result, ω_L is pushed further away from ω_H .

V. Conclusion

The fashion industry is a multibillion dollar industry and the current debate over copyright protections could threaten innovation in the industry.

Chapter II of this paper examined the current state of the U.S. fashion industry. This chapter explored The Piracy Paradox and how copying in the fashion industry helps innovation and does not hurt it. While designers may lobby for legal protection based on the fact that designs should be considered works of art, giving protection rights may have more drastic consequences on the industry. In order for U.S. fashion copyright laws to pass, designers would have to successfully convince lawmakers that the aesthetic values of fashion can be separated from its utilitarian purposes. When writing legislation, lawmakers will have to determine specific language that can determine how two items differ from one another. Given the subjective nature of differences in fashion items, it has historically been difficult to write legislation determining the copyright standard. Courts will spend more time debating the law rather than enforcing it. Lawmakers will also have to ensure that the copyright standard is set optimally in order to maintain innovation from high end designers. In Europe, the standards are seen as too weak and in Japan the standards are too high. As a result, few European and Japanese designers have registered their designs. Innovation in the European and Japanese fashion markets has not stalled with copyright protections. This has happened because the laws are not seen as effective in Europe and Japan with their levels of copyright standards. If copyright laws were to be passed in the U.S., fast fashion copyists could change to fast fashion designers, similar to what has happened in Europe. However, this cannot be known for sure unless laws are put into place. From a comprehensive review of the European and Japanese fashion protection systems, it would not be wise for the U.S. to implement fashion protection standards as they would most likely not be effective.

Chapter III of this paper discussed industries where copyright protection may not be essential to maintain innovation and survival in particular creative industry. I found three common characteristics across the food, fragrance and fashion industries that have allowed them to survive and innovate: (1) a differentiated consumer base; (2) piracy in these industries is never an exact replica; and (3) industry

norms promote a culture of sharing. These three characteristics have allowed these industries to survive and thus continue innovating. It is clear that piracy in these industries helps rather than stifles innovation. On the other hand, the film industry does not have these characteristics and thus has proven that film piracy hurts the industry. They have been able to lobby for protection and enjoy widespread protection.

Chapter IV focused on a duopoly of the fast fashion model. My results conclude that numerically there is an optimum level that regulators could set copyright protections at for fashion designs in order to maintain innovation from the high end designers. If the standard is set too low, high end designers will not innovate as much. If the standard is set too high though, high end designers will have little incentive to innovate. Regulators would need to determine linguistically how they can interpret a numerical standard. This is difficult given the subjective nature of differences in fashion.

All in all, copyright protections are not recommended for the fashion industry as they would hurt innovation. The industry continues to survive due to the three characteristics of a differentiated consumer base, copycat products are not an exact replica and there is a culture of sharing in the industry. Innovation is promoted in the fashion industry because of the Piracy Paradox and the culture of sharing. As seen by Japan and Europe, implementing protection laws can be difficult regarding language of the legislation and setting an optimum standard in order to promote and maintain innovation.

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