Protecting Fashion Design under Copyright Law in China – A Comparative Study in China, the United States and European Union

by

JUNYU XIE

Master of Law in International Business Law

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Faculty of Law

University of Macau

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SUPERVISOR: DU LI

DEPARTMENT: Faculty of Law

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DECLARATION

I declare that the thesis here submitted is original except for the source materials explicitly acknowledged and that this thesis as a whole, or any part of this thesis has not been previously submitted for the same degree or for a different degree.

I also acknowledge that I have read and understood the Rules on Handling Student Academic Dishonesty and the Regulations of the Student Discipline of the University of Macau.

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ABSTRACT

The explosive development of fast fashion has bought huge interests for fast fashion companies but also has aggravated the piracy issue in the fashion industry at the same time. The knock-offs are everywhere in China, copying in fashion industry has harmed the designers' benefits and raised concerns for the protection of fashion design. Although there is no doubt that fashion designs are the fruits of intellectual labor, and thus should be protected by intellectual law, the reality is that fashion designs receive little legal protection in China. The main reason is that design patent, trademarks, and anti-competition law have their drawbacks in preventing clothing piracy and they cannot provide adequate protection for fashion designs. Moreover, the ambiguous specification in copyright law excludes fashion designs from protecting with concern extent copyright protection to utility function.

This thesis first analyzes the legitimacy of the copyright protection of fashion design in China by using the protection system of the United States copyright law for reference. On this basis, it defines the copyright objects of fashion designs and the corresponding reproduction right. After that, strengthen the fashion design protection by analyzing the infringement rules in the judicial level. It defines the standards for

copyright and protection scope. Based on the analysis of three cases in China, this study examines the fashion design protection problems in judicial practice. By comparing with the United States and the Europe Union, it explores possibilities in building infringement rules in the Chinese copyright law. At last, this thesis provides two suggestions to establish the legal framework protection for fashion design in China: confirming the independent legal status of fashion design in copyright law and coordinating copyright law and patent law in fashion design protection.

Key words: fashion design, design piracy, applied art works, China, the United States, European Union, copyright law, reproduction right, infringement rules

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Chapter One　Introduction

I.　Research Background and Purpose of the Thesis

Fashion design is a form of human civilization expression. Fashion design works are created through thinking and reusing elements to achieve certain artistic forms, which is not only a simple practical tool, but also a symbol of human development and progress. It is also an important part of culture and art of a country, a nation and an era.[1]

China's fashion design industry has developed rapidly with its own advantages in labor and raw materials. However, due to the late development of fashion design and the lack of relevant protection system construction, China is not a strong fashion design country and the industry's copying behavior is endless. Firstly, the reasons lie in the lack of legal awareness of intellectual property protection in the industry;[2] secondly, under the situation that market dominated by brand power, China's fashion design enterprises are still in the low-end business model without its world-famous brand,

[1] Li Xiujuan 李秀娟, "Discussion on Intellectual Property Protection of Fashion Design Innovation 时尚设计创新的知识产权保护探讨," *Electronic Intellectual Property* 电子知识产权, 11 (2015): 72.

[2] Wang Xiuli and Guo Yan 王秀丽，郭燕, "Investigation and Analysis of Intellectual Property Protection of Clothing Enterprises and Solutions 服装企业知识产权保护状况调查分析及解决对策," *Journal of Beijing Institute of Clothing* 北京服装学院学报, 2 (2006): 60-65.

leading to copying international well-known brands;[3] moreover, due to the prevalence of piracy in the market, knockoffs blindly follow the trend while ignoring the occurrence of copyright and patent infringement, which leading to a vicious circle in the industry;[4] Finally, there are no specific legal provisions in the intellectual property law system to protect the field of fashion design, leading to insufficient and less targeted protection of intellectual property rights in the industry, and seriously hinders the healthy development of the fashion design industry in China.[5]

As one of the fastest-growing industries in China, fashion design industry has huge development potential, which plays a very important role in economic development and employment. At present, the competition in fashion design industry has also been transformed from quantity and price to non-price competition means such as technology, quality, service and brand.[6] The protection of intellectual property rights is very important in the era of emphasizing innovation. Therefore, the research on the protection of China's fashion design intellectual property is helpful to optimize the structure of industry and realize the vision of a clothing power. At the same time, it can

[3] He Mu 和睦, "The Protection of Intellectual Property in China from the Disillusionment of Xiushui Street Market 从秀水街市场的幻灭看中国知识产权保护," *Journal of Xinjiang Normal University: Natural Science Edition* 新疆师范大学学报:自然科学版, 3 (2006): 440-444.

[4] Guo Yan and Lu Yang 郭燕, 陆杨, "An Investigation on the Supervision of Intellectual Property Rights in the Large Clothing Wholesale Market in Beijing 北京大型服装批发市场知识产权监管情况调查," *Contemporary Academic Forum* 当代学术论坛, 3 (2009): 78-83.

[5] Li Xiujuan 李秀娟, *supra* note 1, at 75-76.

[6] Fan Ran 范然, " Enlightenment of IDPPPA Act on China's Garment Industry IDPPPA 法案对我国服装产业的启," *Shang* 商, 19 (2011): 146-148.

improve the legal awareness of the protection of intellectual property rights in fashion design and provide effective legal means for fashion designers to protect their intellectual achievements. Finally, the research on the protection of intellectual property rights in fashion design is also conducive to improving the theoretical accuracy of China's intellectual property law, as well as the improvement of legislation, justice and law-abiding in the protection of intellectual property rights in fashion design in China.

This paper attempts to start from the basic concepts of fashion design to explore the relevant legal protection modes inside and outside the domain, and to conduct in-depth research on the copyright law protection modes of fashion design. On the basis of clarifying the legitimacy of copyright protection, this paper analyzes the object elements and content elements of fashion design copyright protection one by one. At the same time, the case analysis method is adopted to analyze the well-known judicial cases in the field of fashion design, so as to express opinions on the specific infringement judgment principle and its application. Finally, based on the consideration of the comprehensiveness and coordination of the protection of fashion design, this paper puts forward the legislative suggestions of fashion design copyright protection and the coordination mechanism with design patent protection.

II. Literature Review

In China, academic research on fashion design protection is rare, among them, there is a consensus among Chinese scholars that fashion design lacks legal protection in China and these researches focus on the comparison of copyright protection and design patent protection. Most of Chinese scholars suggest putting the fashion design protection under copyright law.[7] There are a few scholars who suggest design patent protection for fashion design.[8] Few articles put forward the way to better protect fashion design under the framework of existing laws and regulations by comprehensively examining the current situation of the protection for fashion design in China's existing intellectual property system.[9] However, very little work has be done in the field about the question:

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[7] *See* Chen Yizhuoning 陈依卓宁, "Research and Analysis on the Copyright Protection of Clothing 服装设计作品的著作权司法保护探析," *Electronic Intellectual Property* 电子知识产, 1-2 (2017); Fei Yang 费氧, "The Research on Copyright Protection Issue of Apparel Design 服装设计中的著作权保护问题研究," master's thesis of China University of Political Science and Law (2016); Wang Limin 王莉敏, "The Current Protection Situation and Improvement of Intellectual Property Law for Clothing Design in China 我国服装知识产权保护现状及完善," *Law and Society* 法制与社会, 11(2017); Liu Kechen 刘珂辰, "Research on the Protection Mode of Intellectual Property Law of Clothing Design in China 我国服装设计保护模式的研究," *Economic and Law Research* 经济法学研究, 3 (2017); Jiang Qin 蒋琴, "论时装设计的版权保护 Copyright Protection of Fashion Design," master's thesis of the Southwest University of Political Science and Law (2013); Ren Fei 任斐, "Research on the Protection of Costume Works 服装作品保护问题研究," master's thesis of Soochow University (2017); Liu Yuhui and Zheng Youde 刘宇晖, 郑友德, "Copyright Protection of Fashion Design 服装设计的著作权保护," *China Copyright* 中国版权, 5 (2002).

[8] Guo Yan and Wang Xiuli 郭燕, 王秀丽, "Analysis of Current Situation and Problems of the Patent Protection of the Clothing Design Products in China 我国服装类产品外观设计专利保护现状及问题分析," *Intellectual Property* 知识产权, 1 (2005): 30-33.

[9] *See* Li Bai 李柏, "Patent Protection of Clothing Industry 服装行业专利保护," *Global Market Information Report* 环球市场信息报道, 17 (2016): 16-17; Liu Shijie 刘世杰, "Intellectual Property Protection Practice of Clothing and Clothing Design 服装及服装设计的知识产权保护实务," *Annual Meeting of Intellectual Property Committee of all China Lawyers Association and Papers Collection of China Lawyers Intellectual Property Forum, 2019* 2019 中华全国律师协会知识产权专业委员会年会暨中国律师知识产权高层论坛, October 1, 2009, 451-454; He Min 赫敏, "Research on the Mode of Intellectual Property Protection Related to Fashion Design 服装设计相关的知识产权保护模式探析," *Intellectual Property* 知识产权, 9 (2019); Feng Yilan 冯一兰, "Intellectual Property Protection in Fashion Design 服装设计的知识产权保护," *Law and Society* 法制与社会, 2 (2019); Lou Jiarong 楼佳蓉, "A Preliminary Study on the Law of Intellectual Property Protection of Clothing Design 服装设计的知识产权保护之法律初探," *Intellectual Property* 知识产权, 4 (2002); Lu Yang 陆杨, "Discussion on the Theoretical Basis of Intellectual Property Protection of Garment Enterprises 服装企业知识产权保护的理论依据探讨," *Contemporary Academic Forum* 当代学术论坛, 5 (2009): 23-25.

why copyright law protection is more suitable for fashion design than the other intellectual law regulations such as trademark and patent?[10] Thus, further research on protection mode choice for fashion design under Chinese condition is still needed. In the United States, this issue has been further studied: in view of the lack of legal protection of fashion design, only a few scholars are opposed to strengthening the protection of fashion design.[11] Most American scholars support strengthening the protection of fashion design to curb the phenomenon of design counterfeiting,[12] learning from the *EU Design Law* and proposing an independent fashion design protection bill under the US copyright law. What's more, these American scholars who advocate independent copyright protection also evaluate trademark, trade dress, design patent and EU sui generis law and come to a stronger point of view for independent copyright act protection in the US, such research is blank in China and the US study provides some references.

The exist research on copyright protection of fashion design in China focus on specific

[10] *See* Huang Xuchun 黄旭春, "Clothing Products Difficult to be Protected by Copyright Law 难为著作权保护的服装产品," *Electronic Intellectual Property* 电子知识产权, 9 (2008); Zhuang Zhen 庄臻, "The Legal Protection Mode of Fashion Design 服装设计的法律保护模式," *Legal Forum* 法制论坛, 2 (2008): 200-210.

[11] *See* Kal Raustiala and Christopher Sprigman, "The Piracy Paradox: Innovation and Intellectual Property in Fashion Design," *Va. L. Rev* 92, no. 8 (2006).

[12] *See* Nicole Giambarrese, "The Look for Less: A Survey of Intellectual Property Protections in the Fashion Industry," *Touro Law Review* 26, no.1 (2012); Tiffany F. Tse, "Coco Way Before Chanel: Protecting Independent Fashion Designers' Intellectual Property Against Fast-Fashion Retailers," *Cath. U. J. L. & Tech* 24, no. 2 (2016); Susanna Monseau, "European Design Rights: A Model for the Protection of All Designers from Piracy," *American Business Law Journal* 48, no.1 (2011); Irene Tan, "Knock it off, Forever 21! The Fashion Industry's Battle Against Design Piracy," *J.L. & Pol'y* 18, no.2 (2010); Lauren E. Purcell, "A Fashion Flop: The Innovative Design Protection and Piracy Prevention Act," *Journal of Law and Commerce* 31, (2013): 203-220; Laura Fanelli, "A Fashion Forward Approach to Design Protection," *St. John's Law Review* 85, no.1 (2011); Brittany West, "A New Look for the Fashion Industry: Redesigning Copyright Law with the Innovative Design Protection and Piracy Prevention Act," *Business Entrepreneuship & the Law* 5, no.1 (2011).

regulations, but these studies are not deep enough. This part focuses on the analysis of the object composition (effect design drawings, cutting drawings and clothing) and content (reproduction right) of fashion design under the framework of copyright law. All research agreed on that the effect fashion design drawings and cutting drawings could be regard as fine artworks and graphic woks respectively under copyright law. But as for clothing copyright protection, there are some controversies: some suggest that fashion design should be considered as the fine artwork,[13] some suggests creating applied art works as new objective to cover fashion design.[14] Thus, this is the main task that my paper is going to work on. Besides, as for the content of copyright (reproduction right), whether the reproduction between two-dimension and three-dimension carrier constitutes reproduction also needs to be further defined.

As for the infringement rules, because of the lack of clear protection provisions in Chinese law and few relevant judicial practice, the problem of establishing infringement rules for fashion design has not be well addressed.[15] Among the limited researches, only three papers have discussed the "original" criteria for fashion design protection under copyright law.[16] Additionally, few scholars discuss the application

[13] Huang Xuchun 黄旭春, *supra* note 10, at 14; Jiang Qin 蒋琴, *supra* note 7, at 20-21.

[14] Chen Yizhuoning 陈依卓宁, *supra* note 7, at 117; Fei Yang 费氧, *supra* note 7, at 17; Ren Fei 任斐, *supra* note 7, at 6-10.

[15] *See* Huang Xuchun 黄旭春, *supra* note 10.

[16] Fei Yang 费氧, *supra* note 7, at 32-33; Cai linxiao and Hu Binbin 蔡凌霄, 胡滨斌, "The Definition of Fashion Design's Copying in the View of Copy Right Law 版权法视角下的服装设计抄袭认定," *Case Study* 个案点击, 8 (2012): 83; Wu Xuanrun 吴宣润, "On the 'Counterfeit Design' of Clothing 论服装的'仿冒设计'," *Fashion*

of “separability principle” in the copyright protection of fashion design and have not given any further discuss about specific standards for the application of this principle in China.[17] Whether the “separability principle” is suitable for fashion design protection under copyright law and the specific conditions for application needs further analyze and this is one of a key problems the US scholars are looking into all the time.[18] What’s more, the current EU regulation provides an example for fashion design protection without the rule of separability. Those research results and relative laws are helpful for building fashion design infringement rules in China, and this question is going to be discussed in my paper sequentially. Additionally, the current Chinese scholars pay little attention to the similarity judgement problem for fashion design and reiterate the old rule in the existing Chinese copyright law. This is one of the important issues in the fashion design infringement rules and really needs much research.

III. Research Aims and Methodology

My research is based on previous studies but further analyze the problems of choice of protection mode for fashion design, enhance the copyright’s protection effort and

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Designer 服装设计师, 7 (2002): 18-21.

[17] Fei Yang 费氧, s*upra* note 7, at 30-31.

[18] Monseau, *supra* note 12, at 39-65; Fanelli, *supra* note 12, at 285-289; Katelyn Brandes, “Design Protection in the United States and European Union: Piracy’s Detrimental Effects in the Digital World,” *Brook. J. Int’lL* 37, no. 3 (2012): 1126-1130.

build the fashion design infringement rules. To achieve my research goals, I will conduct the analysis through the following three research methods, they include: comparative study, case study and literature research.

Under the comparative study, different intellectual property law frameworks are going to be viewed with a focus in the US and EU context. As we known Europe is the origin of the fashion and still severs as the leading figure in this creative industry. As the most developed area of fashion industry, the protection rules of fashion design in Europe is relatively perfect. In particular, the *EU Design Law* provides a more comprehensive protection for fashion design. Similarly, in the US emphasizing on the innovation and fashion design protection has been a concern all the time. Although the US also emphasizes the protection of fashion design, there are different ways to protect fashion design in the US. Thus, it is meaningful to analyze those two different ways for fashion design protection and take them as references for Chinese legal improvement.

The case study is conducted by studying the cases bought to the Chinese court. This paper not only discusses the legal provisions for fashion design protection in copyright law, but also summarizes the existing problems of fashion design protection in judicial practice through the research of relevant infringement cases in reality, which is conducive to propose the infringement rules suitable for fashion design in China. On the one hand, the practical problems are more complex than the theory, and the

substantive protection of fashion design is realized in judicial practice. On the other hand, it is necessary to see how the court applies these rules and finding out the existing problems from the existing judicial practice, which is conducive to the construction of fashion design protection.

Literature research is conducted through the network, library materials and other ways. Relevant papers and materials are collected and sorted out, and many excellent scholars' relevant theories and opinions will be examined, so as to enrich the content and credibility of this paper.

IV. Outline

My thesis is divided into six parts.

Part one is an overview about the theme of this thesis, including the purpose and significance of writing.

Part two briefly introduces the fashion design and the legal assessment of current protection for fashion design in China. In this part, the creativity of the fashion design will be discussed as well as the prevailing ethos of design piracy and its following negative effects, which is going to show why we should give fashion design protection in China. Then, This part will deeply evaluate how much the Chinese IP law gives

protection to fashion design by looking into copyright, trademark and patent, and to find out the problems in current intellectual protection: copyright law lacks of clear legal regulation for fashion design; design patent law and trademark gives a thin and limited protection and the relevant judicial practice is weak.

Part three discusses the legislative practice of fashion design protection in the US. By combining the legislative practice of the US and the copyright system of China, this paper analyzes the legitimacy of fashion design protection in China. At the same time, this chapter mainly studies the right elements of copyright protection for fashion design, defines the type of work under copyright law for effect design drawings, structure design drawings and the clothing. In addition, with the right of reproduction as the core, this paper analyzes the content elements of the right protected by copyright law for fashion design.

Part four explores fashion design infringement rule. In this part, the current judicial practice problems in China will be discussed. At the same time learning from American and European Union's judgment rules of fashion design infringement, the standards and scope of fashion design copyright protection and the specific infringement judgment rules which is suitable for China will be proposed.

The last chapter proposes suggestions for the improvement of the copyright protection

system for fashion design in China. On the one hand, putting forward specific suggestions on the copyright legislation for fashion design in China; on the other hand, solving the problems of coexistence and conflict coordination of copyright law protection and design patent protection.

Part six is a conclusion of this thesis.

Chapter Two Fashion Design in the Context of Intellectual Property Law

I. The Definition of Fashion Design

"Fashion" refers to the expression of a popular aesthetic in a certain time and background, which is reflected in clothing, footwear, lifestyle, accessories, cosmetics, hair style and body proportion.[19] With the change of people's aesthetic, fashion has a process from rise and prosperity to decline.[20] Therefore, fashion has not only the performance of beauty, but also the characteristics of popularity. As far as "design" is concerned, design is a process of making a certain pattern, scheme or sample through reasonable planning and research. It is a targeted technical and creative activity of designers. Therefore, "design" represents a creative intellectual activity and is the object of intellectual property law protection in many countries. "Fashion design" refers to the process that designers use design elements to create popular products in the current season according to people's aesthetic needs and their own design concepts in a certain social environment. The results can be regarded as intellectual achievements combining aesthetic characteristics, popular trends and practicability, which belong to product appearance design.[21]

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[19] *See* Susan B. Kaiser, *Fashion and Cultural Studies* (London: Bloomsbury Visual Arts, 2019).

[20] Fei Yang 费氧, *supra* note 7, at 5.

[21] He Min 赫敏, *supra* note 9, at 27.

From the perspective of scope, fashion design is usually used as an industrial concept, covering clothing, leather goods, luggage, jewelry and other fields. As a legal concept, fashion design is limited to clothing products including shoes, hats, luggage and bags.

Although there is no specific definition of fashion design in Chinese law, the scope of fashion design which is regulated in the *Bill*: *Innovative Design Protection and Piracy Prevention Act*[22] is available to reference to. This *Bill* as a new try in US to give fashion design copyright protection, which is introduced in house in 2011, and its mainly purpose is to protect fashion design in US by using an independent regulation under copyright law. According to section 2.(7)[23]

> A 'fashion design'—
>
> "(A) is the appearance as a whole of an article of apparel, including its ornamentation; and
>
> "(B) includes original elements of the article of apparel or the original arrangement or placement of original or non-original elements as incorporated in the overall appearance of the article of apparel that—
>
> "(i) are the result of a designer's own creative endeavor; and
>
> "(ii) provide a unique, distinguishable, non-trivial and non-utilitarian variation over prior designs for similar types of articles.

and in section 2.(9)[24]:

---

[22] *The Innovative Design Protection and Piracy Prevention Act* (hereafter "*IDPPPA*") S. 3728, 111th Cong. § 2 (2d Sess. 2010) would amend the Vessel Hull Design Protection Act, by adding "Fashion Designs" to the statute.

[23] *H.R.2511* — 112th Congress (2011-2012). Section 2.(7). *available at:* https://www.congress.gov/bill/112th-congress/house-bill/2511/text (last accessed 14 September 2020).

[24] *H.R.2511* — 112th Congress (2011-2012). Section 2.(9). *available at:* https://www.congress.gov/bill/112th-

"The term 'apparel' means—

(A) an article of men's, women's, or children's clothing, including undergarments, outerwear, gloves, footwear, and headgear;

(B) handbags, purses, wallets, tote bags, and belts; and

(C) eyeglass frames."

Undoubtedly fashion design in the future will have a new definition and broader scope with the development of social concept, but this is not the question this paper is going to discuss. The definition which is given in *IDPPPA* has put forward to a clear classification. At present, the scope of fashion design that this thesis discusses covers all kinds of apparel including Section.2 (9) (A) and (B) in *IDPPPA*.

II. Fashion Design Piracy

i. The Phenomenon of Fashion Design Piracy[25]

In the fashion industry, the design piracy is not new.[26] In recent years, the rapid development of science and technology, along with the emergence of digital social media not only promotes the vigorous development of fashion industry, but also aggravates the phenomenon of piracy in the fashion industry. Some retailers, known as fast fashion brand companies, conform to the modern fast-paced life and operate a

congress/house-bill/2511/text (last accessed 14 September 2020).

[25] *See* Rostam J Neuwirth, "Counterfeiting and piracy in international trade: the good, the bad and the oxymoron of 'real fakes'," *Queen Mary Journal of Intellectual Property Vol.* 7, No.4 (2017): 458. Counterfeiting is the unauthorized production of goods that are legally protected by trademarks, copyrights or patents, while piracy is the unauthorized use of copyrighted or patented goods or ideas. That is, counterfeiters are engaged in manufacturing perse, whereas pirates are engaged in all processes of IPR theft including.

[26] Scott C. Hemphill and Jeannie Suk, "The Law, Culture and Economics of Fashion," *Stanford Law Review* 61, no.5 (2009): 1147-1200.

huge production line with fast turnover and low price. They can supply a large number of low-cost replicas to the market every quarter by copying others' designs, so as to obtain huge profits. Moreover, the development of technology makes piracy more and more quickly, resulting in instant design piracy. When designs appear in fashion shows or stores, detailed design pictures can be found on the Internet in a few hours, and these designs can be easily copied through computer programs. The final copy will be available in the store four to six weeks after the original design appears on the catwalk.[27]

Although fashion design comes from the intellectual labor of designers, industrial products such as clothing and bags are usually difficult to be recognized as the carrier of copyright works, so fashion products are difficult to be protected by copyright.[28] In addition, this kind of design piracy, which intentionally copying the designer's original design or concept,[29] is considered as "a way of life in the clothing industry."[30] There is a clear opposition to the protection of intellectual property rights in fashion design. This view of anti-fashion design intellectual property protection is called "piracy

[27] Eric Wilson, Before Models Can Turn Around, Knockoffs Fly, *N.Y. TIMES*, Sept. 4, 2007, available at: https://www.nytimes.com/2007/09/04/us/04fashion.html?searchResultPosition=1 (last accessed 14 September 2020).

[28] Li Xiujuan 李秀娟, *supra* note 1, at 70.

[29] Leslie J. Hagin, "A Comparative Analysis of Copyright Laws Applied to Fashion Works: Renewing the Proposal for Folding Fashion Works into the United States Copyright Regime," *Texas International Law Journal* 26, no. 2 (1991): 364-366.

[30] Jeannette A. Jarnow, Miriam Guerreiro and Beatrice Judelle, *Inside the Fashion Business: Text and Readings* (New York: John Wiley, 1987), 150. Discussing style piracy: "Within the trade, this practice is known as 'knocking off' and some courts refer to it as "style piracy."; Hagin, *supra* note 28, at 345.

paradox". According to Kal Rausitala and other scholars who hold the "piracy paradox" opinion[31], fashion design must inherit fashion elements, which forces designers to keep up with fashion trends and reflect fashion elements in fashion design. Based on this, if a strong intellectual property protection is given to fashion design, it will limit the absorption and utilization of fashion elements, affect fashion communication, and then hinder the stability of fashion trend. Piracy and imitation make fashion industry is more prosperous.[32]

However, piracy and reference are different behaviors.[33] As C. Scott Hemphill and other scholars think, reference is conducive to the formation of fashion trend, and piracy is not only difficult to stimulate innovation, but also causes the fashion industry to fall into the strange circle of piracy.[34] The rampant phenomenon of pirated design does not mean that piracy can be tolerated or even ignored in the fashion industry,[35] on the contrary, it essentially means that the norms of the fashion industry are not perfect and the relevant legal protection is missing. Increasingly serious fashion piracy caused the opposition of original designers, and they began to resort to legal protection.[36] Copying is not a freedom in fashion industry, the ubiquitous piracy will

[31] *See* Raustiala and Sprigman, *supra* note 12.

[32] *Ibid*.

[33] Cathy Horyn, "Is Copying Really Part of the Creative Process?," *N.Y. Times*, Apr.9, 2002, available at https://www.nytimes.com/2002/04/09/nyregion/is-copying-really-a-part-of-the-creative-process.html (last accessed 14 September 2020).

[34] *See* Raustiala and Sprigman. *supra* note 12.

[35] *See Ibid*.

[36] *See* Safia A. Nurghai, "Style Piracy Revisited," *J.L.& Pol'y* 10, no. 2 (2002).

have a negative impact on the whole fashion industry.

ii. The Harm of Fashion Design Piracy

1) Hurt the original

Mass copyists undermine the fashion market. Copies reduce the profitability of originals and further damage the incentive to develop new designs in the first place.[37] In the fashion industry, some designers use "inspiration" as an excuse for piracy. But as Picasso said, "good artists copy, great artists steal."[38] Piracy and reference are different behaviors, because art comes from inspiration and has nothing to do with imitation that shows the lack of inspiration.[39] Allowing the fashion industry to copy will hinder designers' creative activities. Fashion design is the result of intellectual labor. Designers use their professional knowledge to express and present artistic concepts, which requires a lot of time and money. Imitation, by contrast, is much easier and can be done in a short time based on technology, making it difficult for fashion designers to recoup their investment before their designs become obsolete.[40] Design piracy and cheap copies not only damage the economic interests of the designer, but also irreparably damage the brand reputation of the original design when it is difficult

[37] Hemphill and Suk, *supra* note 25, at 1174.

[37] Evan Brown, "Inspiration vs. Imitation: Where To Draw The Line?," *Designmantic,* Aug. 11, 2014, available at: https://www.designmantic.com/blog/inspiration-vs-imitation/ (last accessed 14 September 2020).

[39] *Ibid*.

[40] A Bill to Provide Protection for Fashion Design: Hearing on H.R. 5055 Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary, 109th Cong. 82 (2006) (testimony of Susan Scafidi). Further, design piracy and the dissemination of cheaper copies not only injures designers financially, but may also irreparably harm their reputations because knockoffs are typically made from inferior materials.

for consumers to distinguish between the original design and the inferior pirated design. What is worse is that based on modern technology, replicas can produce products with better and cheaper quality than original designs.[41] When the fashion industry no longer relies on fine materials or handicrafts and pays more attention to brand and design instead, high-quality and low-price replicas will be a huge threat to original designers and their companies. It can be seen that if fashion design is not protected and piracy is not curbed, the incentives for creativity will be damaged.

2) Industry negative impact

Fashion design piracy will not only directly damage the creativity, but also have a negative impact on the whole fashion industry. Firstly, the fashion industry's laissez faire copying will leave small independent design companies without a foothold. Usually these companies do not have the support of brand and production, they have to build their own style to survive in this competitive market. If the piracy in fashion design is not contained, the small independent original companies will lose the consumer market soon.[42] Secondly, big brand companies will also weaken their brands because of fashion design piracy. When consumers buy clothes at a price far beyond the practical value, their purpose is the design ideas behind them, which is the consideration of the designer's intellectual achievements. When such design ideas

[40] Brown, *supra* note 37.

[42] *See* Nurghai, *supra* note 35.

come from piracy rather than brand originality, the brand will no longer occupy an important position in the hearts of consumers, which will lead to brand dilution. Therefore, design piracy is an obstacle to the healthy development of the whole clothing industry and market.

3) Infringing the intellectual property rights of the originator

In addition to the negative impact of design piracy on the industry, from a legal point of view, piracy directly infringes the intellectual property rights of the original author. Modern clothing has gone beyond the basic function of protecting the body from cold and is more about decorative and beautiful. It is a creative wisdom crystal with the designer's unique style and personal expression which should be protected by intellectual property rights. The piracy of fashion is a violation of the intellectual achievements contained in the design. In practice, there are more and more cases of fashion design infringements. For example, only Forever 21, a fast fashion brand notorious for design piracy, has been involved in more than 50 cases of fashion design infringement in the past few years.[43] Although China's garment processing technology and large-scale production capacity are becoming mature, as an independent innovation capability in garment design, it still cannot compete with developed countries such as Europe and the United States in the field of fashion.[44] In

[43] *See* Julie Zerbo, "Forever 21 Sues Other Brands for Copying," *The Fashion Law*, Jul. 11, 2017, available at: http://www.thefashionlaw.com/home/forever-21-sues-brands-for-copying?rq=forever%2021 (last accessed 14 September 2020).

[44] *See* He Min 赫敏, *supra* note 9.

the clothing design industry, piracy still exist in China, which reflects the lack of protection of fashion design in the intellectual property law system. Therefore, to explore the innovation incentive and protection of fashion design is not only helpful to improve the innovation ability of China's fashion industry, but also to improve the innovation protection system of China.

III. Existing Legal Framework for Fashion Design Protection in China

i. Copyright

In China, the national regulations about copyright mainly include the *Copyright law of the People's Republic of China (2010)*[45] and *Regulations for the Implementation of Copyright Law of the People's Republic of China (2013)*[46].

The *Copyright Law of P.R.C.* does not clearly specify which objects in the field of fashion design can be protected. Article 3 of copyright law stipulates that for the purpose of the copyright law, the "works" includes: "works of literature, artistic and natural sciences, social sciences, engineering techniques, etc.".[47] And the non-

[45] The *Copyright Law of the People's Republic of China (2010)* version (hereafter the "*Copyright Law of the P.R.C.*").

[46] The *Regulations for the Implementation of Copyright Law of the People's Republic of China (2013)* version (hereafter the "*Implementation of Copyright Law of P.R.C.*").

[47] The *Copyright Law of P.R.C.* Article 3: The works referred to in this Law include works of literature, artistic and natural sciences, social sciences, engineering techniques, etc. in the following forms: (1) written works; (2) oral works; (3) music, drama, art, dance (4) works of fine art and architectural works; (5) photographic works; (6) film works and works created by methods similar to filmmaking; (7) engineering design drawings, product design drawings, maps, schematics, etc. Graphic works and model works; (8) Computer software; (9) Other works as prescribed by laws and administrative regulations.

exhaustive list of protectable works includes the followings:

> "(1) written works;... (4) works of fine art and architectural works;... (7) engineering design drawings, product design drawings, maps, schematics, etc. Graphic works and model works;...Other works as prescribed by laws and administrative regulations."[48]

Fashion design is not among the eight categories of protected works listed above. Although the last category of this article is the "bottom cover" provision, it is rarely used in judicial practice in order to avoid confusion, which means that fashion design is not usually interpreted as a work in the miscellaneous provisions of Article 3. Therefore, in the copyright law of China, there is no clear provision for the protection of fashion design.

Although there is no relevant regulation on fashion design in the copyright law, fashion design is not completely excluded from copyright protection in judicial practice. In the case that the practical function of fashion design can be ignored, fashion design with high artistic value can be recognized as fine art works protected by copyright.[49] According to Article 4, Item (8) of the *Implementation of Copyright Law of P.R.C.*: "fine art works refer to paintings, calligraphy, sculptures, etc., which are composed of lines, colors, or other forms of plane or three-dimensional plastic art works."[50] The fashion design with high artistic beauty pays more attention to its artistic value and

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[48] *Ibid*.

[49] Guo Yan 郭燕, *Analysis on cases of Clothing Intellectual Property Protection and Infringement* 服装知识产权保护及侵权案例分析 (Beijing: Intellectual Property Press 知识产权出版社, 2012), 176.

[50] Article 4(8) of the *Implementation of Copyright Law of P.R.C. (2013).*

transcends the function of general clothing, thus is attractive due to its unique style. For example, the function of costume and haute couture is not limited to daily wearing but has the aesthetic or artistic function of conveying social and cultural characteristics.[51] This type of fashion design is in line with the provisions of the above articles on three-dimensional plastic art works. Therefore, some fashion designs with high artistic value can be classified as fine art works and protected by copyright.

For fashion design where some practical functions cannot be ignored, the judicial practice in our country classifies them as works of applied art, which are different from fine art works and belong to the protection category of fine art works.[52] For example, in the case of *Hu Sansan v Qiu haisuo and the China National Art Museum*[53], the Second Intermediate People's Court of Beijing pointed out that: "in the categories of works protected by the copyright law of China, there is no clear list of applied works of art, but in Item (8) of Article 4 of the *Implementation of Copyright Law of P.R.C.*, the definition of works of fine art adopts the non-exhaustive enumeration method: "works of fine art refer to painting, calligraphy, sculpture, architecture, etc., which are composed of lines, colors or other forms, and also include applied art works. Therefore, the protection of fine art works should be applicable to the protection of clothing

[51] Courtney Doagoo, "The Use of Intellectual Property Laws and Social Norms by Independent Fashion Designers in Montreal and Toronto: An Empirical Study," PhD Thesis of University of Ottawa (2017), at 87.

[52] There is no legal term of "applied art works" in Chinese copyright law, and the "works of fine art" listed in Article 3 (4) of the *Copyright Law of P.R.C.* is usually treated including fine art works and applied art works.

[53] *Hu Sansan v Qiu Haisuo and the National Art Museum of China*, [1999] Beijing's Second Intermediate People's Court 145 [Hu Sansan].

works."[54]

However, due to the lack of clear provisions in the law, there is no uniform standard for incorporating fashion design into the protection scope of copyright law in judicial practice. Whether fashion design can be protected by copyright law, and the corresponding applicable rules and protection standards are still controversial. Due to the lack of relevant regulations on applied works of art in China's intellectual property law system, there is also uncertainty in interpreting fashion design as applied works of art protected by copyright law.

Thus, it can be seen that fashion design is not the protected object of copyright law of China in both legislative and judicial practice, and as a result, it leads to limited protection of the current copyright law on fashion design. At the same time, fashion design, as a kind of appearance design, is the third kind of object protected by patent law in China, which can obtain the protection of appearance design patent.

ii. Design Patent

In China, the national legislation that is applicable for fashion design protection includes: the *Patent Law of the People's Republic of China (2008)*[55] and the

[54] See *ibid*.

[55] The *Patent Law of the People's Republic of China (2008)* (hereafter the "*Patent Law of P.R.C.*").

Implementation of the Patent Law of the People's Republic of China (2010).[56]

From the perspective of patent law, three types of protection are provided: invention patent, utility model patent and design patent.[57] The design patent can give protection to fashion design. In Article 2 of the *Patent Law of P.R.C.*:

> "The term 'appearance design' refers to a new design of a product's shape or pattern or its combination and the combination of color with shape or pattern, which is full of beauty and suitable for industrial application."[58]

This article manifests that besides new inventions and utility models, "design" can be patented, only if it is designed for a product and the product is suitable for industrial production.

Fashion design is a kind of product combining practicality and artistry. Because it is difficult to separate the aesthetic part and practical part, with fear that the protection of aesthetic part will expand the scope of protection to practical functions, it is usually not easy to obtain copyright protection. However, fashion design usually takes clothing and other products as the carrier, and the design space is limited by the practical functions of the carrier. For example, fashion design needs to consider human body

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[56] The *Implementation of the Patent Law of the People's Republic of China (2010)* (hereafter the "*Implementation of Patent Law of P.R.C.*").

[57] Article 2 of the *Patent Law of the P.R.C.*: "The inventions referred in this Law is inventions, utility models and designs patent..."

[58] *Ibid.*

shape, clothing thermal function, materials and other factors. Therefore, fashion design can be regarded as a product with aesthetic significance and applied to industrial production, so that it overlaps with the protection of industrial product design and is protected by design patents.

China is a contracting party to the *Locarno Agreement on the Establishment of an International Classification of Industrial Design* (1979)[59], which adopts the LOC classification table to register industrial designs. On March 1, 2007, the State Intellectual Property Office officially used the 11th edition of *the International Patent Classification* (*IPC*) to classify patent applications for design. Under this classification, the second category refers to clothing and clothing supplies, such as headwear, clothing, underwear, footwear. The third category includes travel goods, bags, parasols and personal items, including handbags, wallets, etc.[60]

Therefore, in China, fashion design can be classified as product design and protected by patent law. Through consulting the website of the State Intellectual Property Office, we can find that some fashion designs have applied for registered design patents. For example, Bosideng, a famous down clothing brand, has applied for about 50 design

[59] *Locarno Agreement* of October 8, 1968 establishing the International Classification for Industrial Designs, World Intellectual Property Organization Publication No.501(E), (Geneva: WIPO, 1981) (hereafter, "*Locarno Agreement*"). China is one of the agreement party and adopt the Locarno Classification for patent registration.

[60] *See* the "Classes and Subcategories of Design Classification Tables", official website of the State Intellectual Property Office of the People's Republic of China, available at: http://pss-system.cnipa. gov.cn/sipopublic search / portal/uiIndex.shtml (last accessed 14 September 2020).

patents in the past year.[61]

In order to obtain a design patent, it is necessary to meet the three conditions of novelty, creativity, and non-conflict with prior rights stipulated in Article 23 of the *Patent Law of P.R.C.*,[62] and obtain the patent right after examination. The clothing design right holder who has obtained the patent protection may prohibit others from manufacturing, selling or importing the same or similar clothing products without permission.[63] The protection period is 10 years and cannot be renewed.[64] In addition, application fee and annual fee are required to obtain the protection of design patent. A design costs 600 yuan a year from the first to the third year, 900 yuan a year from the fourth to the fifth year, 1200 yuan a year from the sixth to the eighth year, and 2000 yuan a year from the ninth to the tenth year.[65] This is a big expenditure for fashion design to obtain patent protection, which reduces the protection effect of appearance patent to a certain extent.

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[61] The National Intellectual Property Administration, available at: http://www.sipo.gov.cn/ (last accessed 14 September 2020).

[62] The *Patent Law of P.R.C.* Article 23: "The design of the patent granted shall not belong to the existing design; nor shall any unit or individual submit an application to the patent administration department under the State Council before the filing date for the same design, and record it in the patent documents announced after the filing date..."

[63] See the *Patent Law of P.R.C.* Article 11.

[64] The *Patent Law of P.R.C.* Article 42: The term of the invention patent is 20 years, and the duration of the utility model patent and design patent rights is ten years, all calculated from the date of filing.

[65] *See Patent Payment Guide of State Intellectual Property Office of the P.R.C.*, available at: http://www.sipo.gov.cn/, last visit Jun. 10, 2020.

In addition to the above copyright law and patent law, China's trademark law can also provide a certain degree of protection for some fashion design.

iii. Trademark and Unfair Competition

The World Intellectual Property Organization interprets the "trademark" as: "Trademarks can be any brand, symbol or pattern that conveys information of particular commercial source of a commodity or service on the market to a consumer, even if the name of the source is not known. Thus, the trademark may include two-dimensional or three-dimensional brands, labels, slogans, packages, colors or shades, but is not limited thereto."[66] From the definition of trademark of the World Intellectual Property Organization, fashion design is not excluded from the protection of trademark law, and the *Trademark Law of P.R.C* does not explicitly deny the protection of fashion design.

According to Article 8 of the *Trademark Law of the People's Republic of China (2013)*[67]:

> "Any mark that distinguishes the commodities of natural persons, legal persons or other organizations from commodities of others, including words, figures, letters, numbers, three-dimensional signs, color combinations and sounds, etc., and combinations of the above

[66] Kong, Xiangjun 孔详俊, *New Theory of Anti-Unfair Competition Law* 反不正当竞争法新论 (People's Court Press 人民法院出版社, 2001), 310.

[67] The *Trademark Law of the People's Republic of China (2013)* (hereafter the "*Trademark Law of P.R.C.*").

elements, can be registered as trademarks."[68]

Therefore, whether fashion design can be protected as a trademark by trademark law depends on whether the design can become a registered trademark or a non-registered trademark according to the *Trademark Law of P.R.C.*[69] Theoretically, the combination of pattern, pattern, and color in fashion design can be protected as a plane trademark. At the same time, the whole fashion design can also be protected as a three-dimensional logo.

To obtain trademark protection, fashion design needs to meet the "distinctiveness" standard of trademark law.[70] The "distinctiveness" standard refers to the trademark being used in a particular good or service, and the consumer may consider the trademark to be related to or actually related to the particular source of the good or service.[71] The distinctiveness of a trademark comes from the nature of a trademark as a source of distinguishing goods or services,[72] which is inherent or can be obtained through constant use.[73] In order to obtain the protection of trademark law, a fashion design itself must be significant enough and have a certain degree of recognition, which is a higher protection standard than the "novelty" in design patent. If the fashion

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[68] The *Trademark Law of P.R.C.*, Article 8.

[69] Zhang, Guangliang 张广良, *Judicial Protection of Industrial Designs* 外观设计的司法保护 (China: Law Press 法律出版社, 2008), 95.

[70] *See* the *Trademark Law of P.R.C.* Article 9: A trademark applied for registration shall have distinctive features that are easily identifiable and shall not conflict with the legal rights previously obtained by others...

[71] Huang Hui 黄晖, *Trademark Law* 商标法 (Law Press 法律出版社, 2004), 56.

[72] Zhang Guangliang 张广良, *supra* note 68, at 87.

[73] *Ibid.* At 98.

design itself is not significant enough, it needs to be used for a long time and widely publicized to make the design reach the distinctiveness standard, which is not easy for the fashion design with short popular time and strong seasonality.

Same as design patents, trademark rights need to be registered.[74] Once the trademark right is determined, the obligee may prohibit the third party from using or imitating the trademark.[75] The trademark protection period is ten years.[76] Different from the design patent, after the expiration of the protection period of the registered trademark, the trademark owner can apply for renewal of registration. Each renewal is valid for ten years. Theoretically, a registered trademark can become a permanent right through renewal registration.[77] Trademark law seems to give fashion design a very powerful protection, but the fashion design that can become a trademark is limited: only those designs with strong logo significance can obtain trademark registration. In a word, trademark law can protect a small part of fashion design, however, there are only a limited number of fashion designs that can become trademarks. Trademark law is not the best choice for clothing design protection. The limited protection of trademark law will be further analyzed in the next section.[78]

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[74] *See* the *Trademark Law of P.R.C.* Article 22: "The applicant for trademark registration shall fill in the commodity category and commodity name of the trademark in accordance with the prescribed commodity classification table, and file an application for registration..."

[75] *See* the *Trademark Law of P.R.C* Article 57.

[76] The *Trademark Law of P.R.C* Article 39: The registered trademark is valid for ten years from the date of approval of the registration.

[77] Zhang Guangliang 张广良, *supra* note 68, at 108.

[78] *See* "iii. Limited Protection Scope from Trademark and Unfair Competition Law" in Chapter Two.

In addition, according to the Article 6 of the *Anti-Unfair Competition Law of the People's Republic of China (2019)*[79]:

> "The operator shall not implement the following confusing behavior, which may be misunderstood as being a product of another person or having a specific connection with others: (1) Unauthorized use of the same or similar identifiers of other people's names, packaging, and decoration that have certain influence;..."[80]

When fashion design becomes the unique packaging and decoration of products with certain influence, it can also be protected by anti-unfair competition law. But there are two conditions to get this protection:[81] first of all, fashion design must constitute the packaging or decoration of products. Product packaging refers to the auxiliary materials and containers used to identify products, transport and storage; the decoration of products refers to the words, patterns, colors and their arrangement used to mark and beautify the products on the products or packaging.[82] Secondly, as a fashion design of this packaging and decoration, it needs to be a product with certain influence. Factors that measure product impact including: sales time, sales area, sales volume, time of continuous promotion and geographical scope. It is not easy for fashion design to satisfy both requirements. Even though design can become the packaging or decoration of clothing products, clothing is not easy to become an

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[79] The *Anti-Unfair Competition Law of the People's Republic of China (2019)* (hereafter, the "*Anti-Unfair Competition Law of P.R.C.*").

[80] The *Anti-Unfair Competition Law of P.R.C.* Article 6.

[81] *See* Zhang Guangliang 张广良, *supra* note 68, at 104.

[82] *See* Provisions on the Prohibition of Counterfeiting of Unique Names, Packaging, and Decoration of Well-known Commodities Article 3. State Administration for Industry and Commerce.

influential product.

The purpose of the anti-unfair competition law is to curb unfair competition, maintain market order, and protect the legitimate rights and interests of operators and consumers,[83] and the common unfair competition behaviors in the field of fashion design mainly include: (1) use the same or similar words or graphics as the registered trademark of the obligee as commodity packaging; (2) use the text part of the registered trademark of the right holder as the enterprise name registration, and emphasize and highlight the enterprise name on the trademark and package of the commodity.[84] Therefore, the anti-unfair competition law is often used in combination with copyright law, trademark law and design patent law in unfair competition situation,[85] for the protection of fashion design, the anti-unfair competition law is only a supplementary tool, and the protection of fashion design is weak. The limitations of the *Anti-Unfair Competition Law of P.R.C.* on fashion design protection will be discussed in the next section.[86]

IV. The Problems of Fashion Design Protection in China

[83] *See* the *Anti-Unfair Competition Law of P.R.C.* Article 1.

[84] Guo Yan 郭燕, *supra* note 48, at 110.

[85] *Ibid.*

[86] *See* "iii.Limited Protection Scope from Trademark and Unfair Competition Law" in Chapter Two.

i. Lack of Clear Legal Regulations for Fashion Design

In China, the problem of fashion design protection is the lack of clear legal norms. For example, there is no definition of "fashion design" in the whole intellectual property law system. In the absence of a clear definition, fashion design needs legal interpretation in judicial practice to become the object of intellectual property protection, which will split the protection of fashion design. On the one hand, fashion design can be interpreted as product design protected under the patent law, on the other hand, fashion design can also be interpreted as fine art works or applied art works protected by the copyright law, but there is no uniform guiding rule for when it is interpreted as design patent and when it is art works or applied art works. At the same time, whether it is a design patent, art work or applied art work, they are different in the content, scope and conditions of protection, which will lead to different degrees of protection for fashion design.

Secondly, the attitude of Chinese copyright law to applied art works is not clear. There has been no consensus on whether to give copyright protection to applied artistic works, which makes it uncertain whether fashion design can be interpreted as applied art works to obtain copyright protection. In this regard, although the *Berne Convention for the Protection of Literary and Artistic Works* stipulates the obligations of Member States to protect applied art works, the protection mode is left to Member States to

choose, and takes the protection of copyright law as the default rule.[87] That is, in the absence of a specific design law to protect the case, such works must be protected by the copyright law.[88] The *Agreement on Trade-Related Intellectual Property Rights (TRIPS Agreement)*, on the one hand, accepts the provisions of the *Berne Convention*, on the other hand, provides guidelines for the application of copyright law to industrial designs, especially to textile designs.[89] It can be concluded that whether the applied art works are compatible with the copyright law depends entirely on the legislative choices in many countries.

The *Copyright Law of P.R.C.* does not explicitly exclude or comprehensively stipulate the protection of applied works of art. China joined the *Berne Convention* in 1992 and in order to fulfill its obligations, the State Council promulgated the provisions on the *Implementation of International Copyright Treaties (1992)*[90]. According to Article 6 of the regulation: "the protection period of foreign applied art works is 25 years after

[87] Article 2 of the Convention explicitly regards "works of applied art" as a type of "literary and artistic works". However, in Article 2(7): "Subject to the provisions of Article 7(4) of this Convention, it shall be a matter for legislation in the countries of the Union to determine the extent of the application of their laws to works of applied art and industrial designs and models, as well as the conditions under which such works, designs and models shall be protected. Works protected in the country of origin solely as designs and models shall be entitled in another country of the Union only to such special protection as is granted in that country to designs and models; however, if no such special protection is granted in that country, such works shall be protected as artistic works." It can be seen that the Convention regards copyright protection as the default rule.

[88] Uma Suthersanen, *Design Law: European Union and United States of America*, Second Edition (England: Thomson Reuters (Legal) Limited Press, 2010), 31.

[89] According to Article 25(1) of *TRIPS Agreement*: Members shall provide for the protection of independently created industrial Designs that are new or original. The protection conditions of industrial product design are selective, and the relationship between novelty and originality is juxtaposed. The second paragraph directly points out that textile design can be protected by copyright law, and the application of copyright law is not the priority, but the choice.

[90] The *Implementation of the provisions of International Copyright Treaty (1992)* (hereafter the "*Implementation of International Copyright Treaty"*).

the completion of the works..."[91] According to terms, foreigners' applied art works can obtain copyright protection in China. According to Article 21 of the regulation: "the State Copyright Administration shall be responsible for the interpretation of these provisions."[92] The National Copyright Administration put forward in the *Reply to the Request for Instructions on whether the Reproduction of Black Pottery Arts and Crafts is Applicable to "Reproduction"*[93]: "...there are differences between China and the member countries of Berne Convention. In China, only the works of applied art works from other Berne Convention countries are protected."[94] This causes the copyright law of China to violate the principle of national treatment defined in Article 5, paragraph 1 of Berne Convention in the protection of applied works of art, resulting in discrimination against foreign applied works of art.[95]

In the third revision of the *Copyright Law of P.R.C.*, the draft of the copyright law (the First Draft for Comments), as a suggestion for the revision of the current copyright law,[96] brings applied artistic works into the scope of the copyright law. After further

[91] The *Implementation of International Copyright Treaty (1992)* Article 6: The period of protection for foreign applied art works is 25 years after the completion of the work. Works of fine art (including animation design) are used for industrial products, the provisions of the preceding paragraph shall not apply.

[92] Article 21 of the *Implementation of International Copyright Treaty*.

[93] *Response to the request for the reproduction of black pottery arts and crafts 'Copy'*, National Copyright Division [1998] No. 21.

[94] *Ibid*.

[95] *See* Zhou Lin 周琳, "The Patent, Copyright, and Unfair Competition Dispute Case between Intel Corporation, Lego Overseas Company and Dongguan Fun Toy Industry Co., Ltd.," published on *References on Intellectual Property Handling* 6 (China Founder Press, 2003), 118.

[96] In July 2011, the National Copyright Administration officially launched the third revision of *the Copyright Law*. In March 2012, the National Copyright Administration published a draft of *Draft for Comment* to the public. In October, the third draft of *Draft for Comment* was issued. In December 2012, the National Copyright Administration officially submitted a draft of *Draft Review* to the State Council for review, and the approval of the State Council,

revision, in June 2014, Article 5(9) of the *Revised Draft of the Copyright Law (Draft for Review)*[97] defined the applied art works as "plane or three-dimensional plastic art works with practical functions and aesthetic significance such as toys, furniture and ornaments"[98] and obtained a special protection period of 25 years.[99] But throughout the article, clothing products are not included in the list of applied art works. Therefore, if fashion design wants to obtain copyright protection, it needs further legal interpretation, which means that the amendment does not substantially solve the problem of fashion design copyright protection.

ii. Design Patent Gives a Thin Protection

(i) High Protection Criteria for Fashion Design.

The purpose of design patent is to protect the appearance of products. By giving design patent right, it can set up limited industrial monopoly, so as to balance the private interests and public interests of industrial property owners.[100] In order to obtain the protection of design patent, three essential conditions need to be met: novelty, creativity and non-conflict with priority.[101]

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submitting to the Standing Committee of the National People's Congress for deliberation.

[97] *Ibid*.

[98] The *Copyright Law of the P.R.C. (Draft for Review)* Article 5(9).

[99] The *Copyright Law of the P.R.C. (Draft for Review)* Article 29: applied art works...The period of protection of property rights in copyright is twenty-five years after the first publication, but this work is not protected if it has not been published within twenty-five years after the completion of the creation.

[100] Li Mingde 李明德, *Intellectual Property Law* 知识产权法(China: Law Press 法律出版社, 2008), 114.

[101] Article 23 of the *Patent Law of P.R.C.*: The design of the patent right shall not belong to the existing design; nor does any unit or individual submit an application to the patent administration department under the State

The expression "not belonging to the existing design" in Article 23 of the *Patent Law of P.R.C.* can be understood as the requirement for "novelty".[102] According to the *Interpretation of the Patent Examination Guidelines2010 (Revised 2019)*, "not belonging to existing design" refers to neither the same design as the patent involved nor the same design as the patent involved in essence.[103] For fashion design, the "novelty" standard in design patent is obviously a high protection standard. First of all, the "novelty" standard emphasizes to increase the attractiveness of products in appearance as much as possible from the perspective of industrial design, so as to stimulate consumers' desire for purchase.[104] Therefore, compared with the importance of artistry to the value of works, design patents pay more attention to the "new" in product design and the market opportunities brought by it.[105] This emphasis on "new" design and fashion design emphasis on "beauty" is not completely consistent. At the same time, fashion design has a strong popularity, which not only represents a design

Council before the filing date for the same design, and record it in the patent documents announced after the filing date. A patented design should have a significant difference from an existing design or a combination of existing design features. The design of the granted patent may not conflict with the legal rights that others have obtained before the filing date. The current design referred to in this Law refers to the design known to the public at home and abroad before the application date.

[102] This means that fashion design must not be the same or similar to the existing international design, and is no longer limited to the domestic.

[103] The *Guidelines for Patent Examination of the State Intellectual Property Office of the People's Republic of China 2010 (Revised 2019)*, (Beijing: Intellectual Property Pres, 2019), (hereafter "the *Patent Examination Guidelines 2010* (Revised 2019)). There is an updated version of the patent review guidelines for 2020, but there are no new provisions in this section.

[104] Yang Yongmei and Wang Xiao 杨咏梅, 王晓, "Connotation Comparison and Scope Division of Protective Objects of Applied Artworks and Design Patents: Discussing the Trial Ideas of the Applied Artworks Litigation 实用艺术品与外观设计专利在保护对象上的内涵比较与范围划分:兼论实用艺术品侵权诉讼审理思路," *Journal of Law Application* 法官说法, no. 13 (2018): 78.

[105] *Ibid.*

that is easy to go out of date, but also shows that similar designs can be used by designers again to create a new season of fashion trend, so under the "novelty" standard, the recreation of classical style cannot be protected by the design patent. Secondly, in the third amendment of Chinese patent law, the requirement of "novelty" on design has been raised to the standard of "absolute novelty", which means that fashion design must not be the same and similar to the existing design in the world, and no longer limited to domestic design.[106]

In addition, Article 23 of the current patent law improves the standards for the protection of designs. In addition to the provisions that do not belong to the existing designs, it must also meet the requirements of "creativity" which are obviously different from the existing designs.[107] According to the *Patent Examination Guidelines2010* (Revised 2019), "obvious difference" (creativity) refers to the following three situations: (1) there is no significant difference in the same or similar products in the existing design; (2) it is obtained from the conversion of existing design; (3) it belongs to the combination of existing design features,[108] which is a higher requirement than "novelty" for fashion design practitioners. Because fashionable design achievement is numerous and miscellaneous, its epidemic is strong and change

[106] Zhang Fanzhong 张凡忠, " Research on the Problem of Patent Law Protection of Sportswear Design," master thesis of Xiamen University (2018), 9.

[107] *See* the *Patent Law of P.R.C.* Article 23: A patented design should have a significant difference from an existing design or a combination of existing design features...

[108] *Guidelines for Patent Examination of the State Intellectual Property Office of the People's Republic of China 2010* (Revised 2019), (Beijing: Intellectual Property Pres, 2019), 264. There is an updated version of the patent review guidelines for 2020, but there are no new provisions in this section.

is fast, besides the fashionable design protection emphasis originality rather than novelty, it is extremely difficult and unnecessary for a designer to prove that the design is "novel" (never invented before) and "obviously different" (creative).[109] Therefore, "novelty" and "creativity" standards can exclude most fashion designs from patent protection.

(ii) Unsuitable Protection Term

When a fashion design becomes a classic, it will be reused for a long time, and its aesthetic value will not disappear with the change of seasons. For these excellent fashion designs worth long-term protection, the 10-year patent protection period is far from enough. After the 10-year protection period, fashion design will enter the public domain and be freely used by other designers, which is obviously unfair to the design results obtained by spending a lot of intellectual labor. However, the 10-year protection period is too long for popular designs. Although fashion design with strong popularity is also worthy of protection, but these designs will be quickly launched into the consumer market with the change of seasons, and they do not have the aesthetic value of long-term protection, so the 10-year protection period will lead to over-protection, which is not conducive to competition.

[109] Zhang Fanzhong 张凡忠, *supra* note 105, at 10.

(iii) High Cost for Registration Process

In order to obtain the patent protection of fashion design, it is necessary to apply for registration, which hinders fashion design from obtaining effective patent protection in terms of time and cost. Generally, the average time of applying for authorizing design patent is about six months, sometimes even more than one year.[110] In the fashion industry, most fashion designs have a popularity period of less than three months. Therefore, the long application process of design patent is not conducive to the protection of fashion design with strong popularity, because a fashion design may have withdrawn from the consumer market without obtaining the design patent authorization.

In addition, applying for a registered design patent costs a certain amount of money. Application fee and maintenance fee of design patent (see table A) are cost factors that designers and enterprises cannot ignore. A fashion brand usually creates a large number of different fashion products in a popular season. If every fashion design is applied for registration, it will be a tedious work and a huge expense. Some large companies even have independent departments to deal with the application and registration of design patents. In contrast, for small and medium-sized companies and independent designers, this cumbersome registration process has become an obstacle to the protection of their designs. It can be seen that the time-consuming and laborious

[110] The consequence is reached by searching registered design patent in China on the website of the Nation Intellectual Property Office, available at: http://www.sipo.gov.cn/ (last accessed 14 September 2020).

application procedure in patent law is not only disadvantageous to the protection of fashion design, but also to the development of design companies.

According to the 2018 statistics released by the State Intellectual Property Office, the number of design patents applied for registration in category two of the LOC Classification Table (clothing, clothing supplies and sewing supplies) is 56812, ranking the fourth in the number of applications for registration.[111] This number is still relatively low compared to category six (furniture and household goods), which has the highest number of applications (92282).[112] From the perspective of clothing industry alone, its application volume ranks ninth compared with other national economic industries, among which the application volume of Chengdu Kameiqi Shoe Industry alone is as high as 1136. It can be seen that the number of patent applications for fashion design in China is not only small, but also concentrated. In addition, these data do not represent the design that has been effectively authorized, and the actual number of design patents obtained is less than the above published data. To sum up, most fashion designers and enterprises, especially independent designers and small and medium-sized companies, will not choose to apply for design patents to protect the original design in view of the short popularity of fashion design and high registration fees.

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[111] "Brief Statistics of Industrial Designs in 2018", published by State Intellectual Property Office, available at http://www.cnipa.gov.cn/docs/20190528164111863119.pdf (last visit 14 September, 2020).

[112] *Ibid*.

Applying Fee(Yuan)	Maintaining Fee (Yuan)			
656	1-3 Years	4-5 Years	6-8 Years	9-10 Years
	600	900	1200	2000

Table A. The Applying Fee and Maintaining Fee of Design Patent[113]

iii. Limited Protection Scope from Trademark and Unfair Competition Law

The limited protection of the trademark law for fashion design comes from the higher protection standard of "distinctiveness". This requirement is far higher than the standards of "novelty" and "creativity" in design patents and "originality" in copyright law. "Distinctiveness" emphasizes non-universality and individuality, but fashion designs that worthy of protection are not necessary required to meet the distinctive high standards of trademark law, which makes it possible for only a few fashion designs to be successfully registered as trademarks. For example, if the patterns, words or ornaments on clothing have enough significance, it is possible to obtain trademark registration, while most designs that lack distinguishing the source of clothing may be refused trademark registration.

[113] *Patent Payment Guide of State Intellectual Property Office of the P.R.C.*, available at http://www.sipo.gov.cn/ (last accessed 14 September 2020).

Secondly, even if some fashion designs have successfully registered trademarks, this kind of fashion design protected by trademark law is limited to pattern, text, and their design of clothing or shoes, and this is still difficult to be effectively protected fashion design as a whole. If the fashion design as a whole wants to be protected, it needs to apply for registration of three-dimensional trademark.[114] Because fashion design such as clothing and footwear cannot get rid of their natural form as practical clothing products, it is not easy for fashion design to obtain three-dimensional trademark registration. There are no successful cases of fashion design obtaining three-dimensional trademark registration in judicial practice in China.

Thirdly, the trademark is different from the design on clothing. Trademark is the symbol of brand value behind fashion design, so it is fixed, while fashion design emphasizes the aesthetic design that changes with the trend. Therefore, unless a design can be fixed as the logo of a product, designers usually do not apply for a registered trademark for fashion design.

Finally, the function of trademark law is to prevent the production and sale of

[114] The *Trademark Law of P.R.C*. Article 12: Where a trademark is applied for registration with a three-dimensional mark, the shape produced only by the nature of the product itself, the shape of the product required to obtain the technical effect, or the shape that makes the commodity of substantial value may not be registered.

counterfeits,[115] which is limited to prevent the piracy of fashion design.[116] If the piracy of design does not involve the use of trademarks, it will not involve the infringement of trademark rights, so even if the same design style is completely plagiarized, this kind of behavior is still legal under the trademark law. Trademark law is an effective tool to prevent counterfeiting and the protection of registered well-known trademarks is more powerful and can be extended to different products.[117] However, the piracy of fashion design is more a piracy of style design, rather than trademark counterfeiting. In the case that trademark law can give strong protection to the use of trademarks, but patent law and copyright law cannot effectively protect fashion design, this will lead more and more fashion companies to pay more attention to the establishment of trademarks, and integrate trademarks into fashion design, which may weaken the creative design activities of fashion industry. In addition, application fee and maintenance fee are also required in trademark registration (see table B). Compared with the cost of design patent, the cost burden is lighter.

Applying Fee (Yuan)	Renewal Fee (every 10 years)(Yuan)
300	500

[115] *See* "Qipu Road Sells Fake Burberry and Prada", *XINMIN.CN*, available at: http://shanghai.xinmin.cn / xm sq /2013/04/25/19947054.html (last accessed 14 September 2020).

[116] The *Trademark Law of P.R.C*. Article 57.

[117] The T*rademark Law of P.R.C.* Article 13: A trademark applied for registration in different or not similar products is a copy, imitation or translation of a well-known trademark that has been registered in China, misleading the public and causing the interests damage of the registrant of the well-known trademark to be harmed will not be registered and prohibited.

Table B. Applying Fee and Renewal Fee in Trademark Law[118]

The unfair behaviors stipulated in the *Anti-Unfair Competition Law of P.R.C.* include counterfeiting, commercial bribery, false advertising, infringement of trade secrets, improper sales of prizes, damage to goodwill, etc.[119] Among them, the unfair competition related to fashion design is counterfeiting,[120] which is stipulated in Article 6 of the *Anti-Unfair Competition Law of P.R.C*. "Counterfeiting" refers to the act of using the same or similar marks, such as product name, package and decoration without permission, which may cause confusion.[121] The protection of fashion design in the anti-unfair competition law is similar to that in the trademark law. The difference is that the former protects packaging and decoration, while the latter is a registered trademark or well-known trademark. Usually, fashion design is difficult to be defined as the packaging and decoration of a product, so it is usually not used alone to prevent fashion design piracy. Since design piracy is a kind of unfair competition behavior that disturbs the market order, the anti-unfair competition law is often combined with copyright law, trademark law and design patent law as a supplementary tool.[122]

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[118] *See* the *Document [1995]2404 of the former State Planning Commission and the Ministry of Finance on Price;* the *National Development and Reform Commission [2015] 2136 Document*; the *Document [2017] 20 of the Ministry of Finance and the National Development and Reform Commission on Finance and Taxation.*

[119] The *Unti-unfair Competition Law of P.R.C.* Article 6-12.

[120] Guo Yan 郭燕, *supra* note 48, at 22.

[121] The *Unti-unfair Competition Law of P.R.C.* Article 6.

[122] Guo Yan 郭燕, *supra* note 48, at 110.

iv. Weak Judicial Practice

The absence of legislation on the protection of fashion design will inevitably bring difficulties and confusion in the application of law to the settlement of design infringement disputes in judicial practice. In China, the weak judicial practice of fashion design is reflected in the small number of judgments and the disunity of court decisions. As a country of civil law system, statute law is the foundation of judicial activities. In the absence of relevant provisions, the corresponding judicial practice is bound to be difficult to carry out. Different from common law countries, case law plays an important role, judges have greater power, even if there is no clear definition and provisions in legislation, the judicial decisions of the court can still play a role in filling the gap.

On the contrary, judges in the countries with statute law can only carry out judicial activities according to the statute law and its interpretation, and the power of judges is limited. What's worse, without a clear definition, the explanations are different and cannot form a unified standard of practice and operation. Therefore, it is not feasible for China to construct the protection system of fashion design through judicial practice in the absence of clear legal provisions. In short, without clear legislation, the relevant judicial practice must be limited. With the different interpretations of the court, the judicial practice is also in confusion. This undoubtedly creates a vicious circle of

fashion design protection in China.

Chapter Three　Using Copyright Law to Protect Fashion Design

In China, the key to breaking through the dilemma of fashion design protection is to affirm its protection status in legislation. Fashion design, as a kind of design, belongs to the protection scope of the patent law of our country, but as mentioned above, the design patent system is not suitable to the protect fashion designs. Similarly, the United States does not have an independent design law and use patent law to protect the design. However, in the face of the fashion design piracy cases, when patent law, trademark law and anti-unfair competition law cannot effectively protect fashion design, hence, the United States establishes copyright protection status for fashion design through legislation and develops a set of infringement judgment rules in judicial practice. In China, fashion design is not an object protected by copyright law. Therefore, in order to put forward the system arrangement that applies our country fashion design protection, the practice of the United States is worth learning from.

I. Background – the US Legislation

In the United States, the scope of the object of copyright law presents an expanding trend, specific to the copyright protection of fashion design, the United States copyright law has experienced a development process from scratch and simple to rich.[123] According to the legal protection record of copyright works in the United

[123] Lu Haijun 卢海君, *Copyright Object Theory* 版权客体论 (Beijing: Intellectual Property Publishing House

States, copyright protection under the *1790 Copyright Ac*t was limited to maps, charts, books and printed matter.[124] It was not until 1870 that copyright protection was extended to paintings, drawings, statues, sculptures, models and models and designs as works of art.[125]

But the emphasis of the *Copyright Act* 1870 on fine art works still kept copyright protection from being extended to practical objects.[126] The main barrier to the protection of applied art works was removed by the 1909 *Copyright Act*[127], which extended the object of copyright protection to three-dimensional artifacts and removed the expression of fine art works,[128] where the scope of copyrighted works included: "works of art, models or designs of works of art".[129]

In response, in 1947 the United States Copyright Office defined artistic works as artefacts and works of art. Copyright protection for the former was limited to form rather than functional aspects, such as artistic jewelry, glassware and tapestries,[130] and

知识产权出版社, 2011), 316.

[124] The *US Copyright Act* of May 31, 1790, Ch. 15, 1 Stat. 124; Act of April 29,1802. ch. 36, 2 Stat. 171.

[125] The *US Copyright Act* of July 8, 1870, Ch. 230, § 86, 16 Stat. 198, 212 (repealed 1916).

[126] Suthersanen, *supra* note 87, at 229.

[127] The *Copyright Act of 1909*, Pub. L. No. 60-349, 35 Stat. 1075, 1077 (hereinafter the "*1909 Act*").

[128] Suthersanen, *supra* note 87, at 230.

[129] The *Copyright Act 1909*, 35 Stat. 1075 § 5 (g).

[130] 37 Code of *Federal Regulation* (*C.F.R.*) § 202. 8 (1949).

in the years that followed it received a number of registrations for three-dimensional works of applied art. The legal status of fashion design was established in 1976 after a major revision of the *Copyright Act*[131] in the United States. The act introduces a new category of works: "paintings, graphic and sculptures,"[132] which includes two-dimensional or three-dimensional works of fine art, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings. Now, according to the definition of "useful article" in section 101 of the *Copyright Act* 1976 and the definition of "painting, graphic and sculptural work" in section 102., fashion design can be interpreted as applied art works under the *Copyright Act* and protected by copyright,

Because the protection scope of copyright law does not extend to the functional aspect, the United States uses the "separability" standard to determine the scope of copyright protection for applied art works. By this way, excluding the functional part from the copyright protection. The standard of "separability" includes "physical separability" and "conceptual separability." "Physical separability" means that if a fashion design can truly separate the practical part from the artistic part, the artistic part will be protected by copyright law.[133] For example, the animal sculpture on Jaguar car safety covers can be physically separated from the car or safety covers. The "conceptual

[131] The *US Copyright Act 1976*, 17 *U.S.C.* §§ 101-810 (1976). The Act is published on http:/thomas.loc.gov (last accessed 14 September 2020).

[132] 17 *U.S.C.* § 102(5).

[133] Lu Haijun 卢海君, *supra* note 122, at 334-335.

separability" means that when the aesthetic elements of fashion design cannot be separated from the practical part but can be separated from the practical function in theory, the separated aesthetic part can also be protected by copyright law.[134] For example, the painting design on the vase can be separated from the vase in concept, because its artistic value is different from the function of the vase in concept. On this basis, a series of methods and standards for interpreting "conceptual separability" have been developed in American judicial practice in an attempt to better realize the purpose of copyright law, which including kieselstein core method, Carol Barnhart method, brand method, etc.[135]

The statutory language of the "separability" criterion lies within the definition of pictorial, graphic and sculptural works.

> "Pictorial, graphic, and sculptural works include two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans. Such works shall include works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned; the design of a useful article, as defined in this section, shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article."[136]

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[134] *Ibid*, at 335-336.

[135] *Ibid*, at 336-354.

[136] 17 *U.S.C.* § 101. Emphasis added.

Under current *Copyright Act*, most fashion designs are subject to a three-step test:[137]

(a) First, does the fashion design falls within the first part of the definition;

(b) Secondly, if it does, dose the work qualify as a useful article;

(c) Thirdly, if the work is a useful article, dose the work satisfy the second part of definition, i.e. the separability.

In short, in the United States, fashion design can be regarded as a "useful article" protected by copyright law. However, in order to avoid copyright protection for its functionality, the United States uses the "separability" standard to separate artistic and practical aspects of fashion design to define the scope of protection.

On August 5, 2010, the New York democratic senator Charles Schumer introduced the *Innovative Design Protection and Piracy Prevention Act (IDPPPA)*[138] to protect designers from piracy. The bill was first introduced in 2006 as the *Design Piracy Prohibition Act*.[139] The proposal aims to establish independent fashion design protection rules under copyright law in order to strengthen fashion protection on the basis of existing regulations. For example, the bill proposes to protect the overall

[137] *See* Suthersanen, *supra* note 87, at 234.

[138] The *Innovative Design Protection and Piracy Prevention Act*, S. 3728, 111th Cong. (2010); Scott C. Hemphill and Jeannie Suk, "Schumer's Project Runway," *WALL ST. J.*, Aug. 24, 2010, 13.

[139] *See H.R. 5055,* 109th Cong. (2006). The Act was revised and re-proposed in 2007 as the *Design Piracy Prohibition Act,* S. 1957 110th Cong.§2(c) (2007), and again in 2009, H.R. 2196, 110th Cong. (2009).

appearance of fashion design; divided into registered and non-registered protection methods. Although the bill failed to pass, it may signal a future direction for fashion design protection – it is the general trend to give more comprehensive protection to fashion design.

II. The Legitimacy for Using Copyright Law to Protect Fashion Design

Before constructing the copyright protection system of fashion design in China, it is necessary to analyze its legitimacy for copyright protection. The following will demonstrate the legitimacy of fashion design copyright protection from two aspects: firstly, from the perspective of the copyrightable elements of the copyright law, I analyzes the copyrightability of fashion design under those copyrightability elements; secondly, demonstrating the legitimacy of copyright protection from the reverse side by refuting that fashion design belongs to the extrajudicial space of intellectual property protection, which is applicable to the theory of low-level intellectual property protection.

i. Copyrightability

Generally speaking, the object of copyright law is the expression of intellectual achievements in literature, art, science and other fields. There are similar expressions in the Article 2 of the Implementation of Copyright Law in China: “the works in the Copyright Law refer to intellectual achievements that are original in the fields of

literature, art and science and can be reproduced in some form of tangible form."[140] However, it is difficult to define the creative activities of human beings in advance. The protection of the expression of original intellectual achievements should not be limited to specific fields.[141] Moreover, Article 2 is suspected of conflict with the upper law, as the scope of works in the upper law also covers engineering works.[142] In other words, in defining the scope of the object of copyright law, the specific fields and forms of works listed in Article 3 of the *Copyright Law of P.R.C.* are not the key factors to be considered first. On the contrary, it should examine the copyrightability issue from the material requirements of the works in the copyright law.

To determine the scope of the object of copyright, the "dichotomy of thought and expression" and the "originality" are the two basic principles of copyright law.[143] The principle of "dichotomy of thought and expression" defines the object of copyright law protection, while the "originality" principle solves the problem of what protection conditions need to be met to get copyright protection.[144] The application of the two principles defines the scope of the object of copyright. According to the above two principles, copyright law only protects the forms of expression including the

[140] The *Implementation of Copyright Law of P.R.C.* Article 2.

[141] He Huaiwen 何怀文, *The Chinese Copyright Law: Case Studies and Normative Analysis* 中国著作权法:判例综述与规范解释 (Beijing: Peking University Press 北京大学出版社, 2016), 4.

[142] *See* Article 3 of the *Copyright Law of P.R.C.*: The works referred to in this Law include works of literature, art and natural sciences, social sciences, engineering techniques, etc.

[143] Lu Haijun 卢海君, *supra* note 122, at 1.

[144] *Ibid.*

originality of the author. The forms of expression of works are the material ways in which the author objectively and externally expresses the invisible abstract content with language, color, symbol, etc.[145] At the same time, works must reflect certain thoughts or emotions, have originality and can be reproduced in some tangible form.

Therefore, the essential conditions of copyrightability are "originality" and "replicability".[146] Only works that meet these two conditions can be the object of copyright protection. Separately, "originality" includes two aspects: independent completion and creativeness.[147] Independent completion means that the work is created by the author independently, not from piracy. Creativeness means that the work expresses the author's personality. The "replicability" in the *Copyright Law of P.R.C.* means that the work can be fixed on the carrier in some form.

First of all, from the perspective of the process of fashion design creation, it is a special process in which designers express their own unique thoughts or emotions in fashion design by using their own understanding of aesthetic elements in the form of color, line and structure, which reflecting the wisdom and personality of designers.[148] As long as this kind of individual expression is created by the designer independently

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[145] *Ibid.*

[146] Huang Qinnan 黄勤南, *Intellectual Property Law* 知识产权法 (Law Press 法律出版社, 2000), 301-303.

[147] He Huaiwen 何怀文, *supra* note 140, at 5.

[148] Jiang Qin 蒋琴, *supra* note 7, at 14.

rather than plagiarized, it belongs to the protection scope of copyright law. Secondly, as a form of intellectual expression, fashion design can obviously be fixed on different carriers such as clothing, bags and shoes, which shows that fashion design as a kind of work meets the "replicability" criteria. Therefore, from the analysis of the essential elements of copyrightability, fashion design can be identified as one of the objects protected by copyright law. Finally, even if fashion design has a certain practical function compared with fine art works, it cannot be denied the possibility it becomes a copyrightable work as an aesthetic expression.[149]

ii. Anti-IP's Negative Space Theory

Some scholars hold negative opinions on the copyright protection for fashion design.[150] However, those people who hold this opinion do not deny that fashion design can be regarded as the object of copyright law, but advocate that in the absence of copyright protection, this weak protection is the basis for the development of fashion industry. Among them, Professors Kal Raustiala and Christopher Sprigman as the representative, put forward the theory of "negative space of intellectual property" to demonstrate that in the field of fashion industry, there is a lack of intellectual property rights to protect innovation, or most of the innovation does not have intellectual property protection or the protection intensity is not high, or although it is possible to

[149] Fei, Yang 费氧, *supra* note 7, at 13.

[150] *See* Kal Raustiala and Christopher Sprigman, *supra* note 12; Kal Raustiala and Christopher Sprigman, "The Piracy Paradox Revisited," *Stan. L. Rev.* 61, no.5 (2009).

introduce intellectual property protection but innovators tend not to make such a choice, In this case, innovation continues to emerge and flourish in the field. If the mode of intellectual property protection is introduced, innovation will be prevented.[151] Therefore, some scholars, from the purpose of stimulating innovation, think that whether an industry is suitable to use intellectual property rights to promote its innovation, needs to conduct empirical research on the situation of the industry, that is, to determine the specific situation of different industries to determine the intensity of intellectual property protection.[152]

The industrial characteristics of fashion design seem to meet the requirements of the theory of "negative space of intellectual property".[153] Fashion design has not been strongly protected by intellectual property laws for a long time, and innovation in this area continues to occur despite the industry's practice of copying and borrowing from each other.[154] Fashion design industry creates a kind of "trends" by "inducing obsolescence"[155] and "anchoring"[156]. In this process, piracy and reference is a way to

[151] Zhong Ming 钟鸣, "Fashion Design, Extra-Legal Space and Intellectual Property Model 时装设计，法外空间与知识产权模式," *Zhichanli* 知产力, available at: http://news.zhichanli.com/article/1814.html (last accessed 14 September 2020).

[152] Dan L. Burk and Mark A. Lemley, *The patent crisis and how the courts can solve it* (Chicago: University of Chicago Press, 2009), 149-158.

[153] Elizabeth L. Rosenblatt, "A Theory of IP's Negative Space," *COLUM. J.L. & ARTs* 34, no.3 (2011).

[154] *Ibid.*

[155] "Inducing obsolescence" is that when a fashion design is copied to a cheap derivative product, the purchase crowd increases, the spread of the design begins to erode its own value, this fashion product for those fashion sensitive people become a curse, thereby promoting the elimination of the product. "Inducing obsolescence" forces designers to start the innovation process again.

[156] "Anchoring" refers to piracy that brings together a wide variety of goods in the field of fashion design into a limited trend, and the emergence of trends let most people know what to wear in this season or year, so piracy can

achieve “trend”. Fashion design industry is driven by piracy. Once piracy is stopped by law, the innovation and motivation of fashion practitioners will be affected, thus slowing down the speed of “fashion cycle.”[157]

However, it is not convincing to use the theory of “negative space of intellectual property” to prove that fashion design does not have the legitimacy of copyright protection. There is no “transcendental” space that is not protected by law in any field or industry, especially when practitioners in this field and industry need to pay special intellectual labor to obtain corresponding returns.[158] In addition, the theory of “negative space of intellectual property” doesn’t advocate that intellectual property protection is impossible, but on the premise of confirming the existence of intellectual property protection, actors in all walks of life can take a variety of choices according to their own industry characteristics: they can choose to use intellectual property to protect their own innovation achievements; they can also give up this protection and choose other ways such as ethics.[159] In other words, the theory of “negative space of intellectual property” provides a choice, rather than a justification for unprotection.

At the same time, piracy is actually not an innovation motivation. From the perspective

"anchor" the fashion season within a limited range of themes.

[157] “Fashion cycle” refers to the popular fashion design will become obsolete in a very short period of time, but will regain popularity in a longer period of time.

[158] Fei Yang 费氧, *supra* note 7, at 14.

[159] *See* Zhong Ming 钟鸣, *supra* note 150.

of creators, piracy will not be regarded as an “incentive” for further innovation. Many designers denounce piracy publicly and use the limited legal measures to stop piracy. The objective “feeling” of “piracy promoting innovation” is the result of countless original designers’ helpless compromise in the “infringing” experience. From the designer’s point of view, it is a healthy and long-term creative incentive source to ensure that the works will not be copied.

III. The Object of Right – Analysis Based on the Type of Works

After demonstrating the legitimacy of fashion design copyright protection, the following part will further analyze the types of fashion design works under the framework of copyright law. To define the types of works in copyright law accurately, it must first understand the creation process of fashion design and the types of works produced in each stage.

Fashion design creation process is generally divided into three stages, each stage produces different types of works, i.e., the fashion design effect drawing, cutting drawing and finished product): the first stage is the visualization process of design concepts: designers express their creative ideas and design concepts on the renderings by selecting design elements such as color, materials and drawing skills, which is a process from abstract to concrete. The second step is to transform the design concept and intention expressed on the renderings into cutting drawings through the plate

making experience and process of the plate maker, so as to prepare for the production of finished products. Finally, according to the cutting drawings formed in the second step, through the cutting process, the fashion finished product manufacturing process from plane to three-dimensional is completed. The whole process is simply expressed as: abstract – concrete – plane – three-dimensional or concept – effect drawings – cutting drawings – finished products.[160] The following part will take clothing as an example to define the three types of works produced in the process of fashion design.

i. Fashion Design Effect Drawings

Fashion design effect drawing is the initial stage of fashion design creation process. The designer expresses the creative concept on the effect drawing in the form of painting through his own choice and arrangement of design elements such as color, textile material and fashion outline. The style, shape and characteristics of clothing can be seen directly through the effect picture. Figure D is an example of effect design drawing, which includes the overall shape of the suit, the color is mainly yellow, the pattern is all over the suit, and there are red roses as bow tie decoration.

From the perspective of copyright law, effect design drawings belong to the category of fine art works. According to Article 4 (8) of the *Implementation of the Copyright*

[160] Jones Sue Jenkyn. *Fashion Design Course.* Chinese Edition (Beijing: Intellectual Property Press: China Water Resources and Hydropower Press, 2006), 115-126.

Law of P.R.C, fine art works refer to paintings, calligraphy, sculptures, etc., which are composed of lines, colors or other forms of plane and three-dimensional forms.[161] From the perspective of the result presentation, the clothing effect drawing is also a painting presented by lines and colors. When meeting the condition of "originality", it can be considered that the clothing effect design drawing belongs to the fine arts works regulated by the current copyright law of China.

Effect Fashion Design Drawing[162]

ii. Fashion Design Cutting Drawings

[161] *See* the *Implementation of Copyright Law of P.R.C.* Article 4(8).

[162] "Effect Fashion Design Drawings," available at: https://www.duitang.com/blog/?id=1012273494 (last accessed 14 September 2020)..

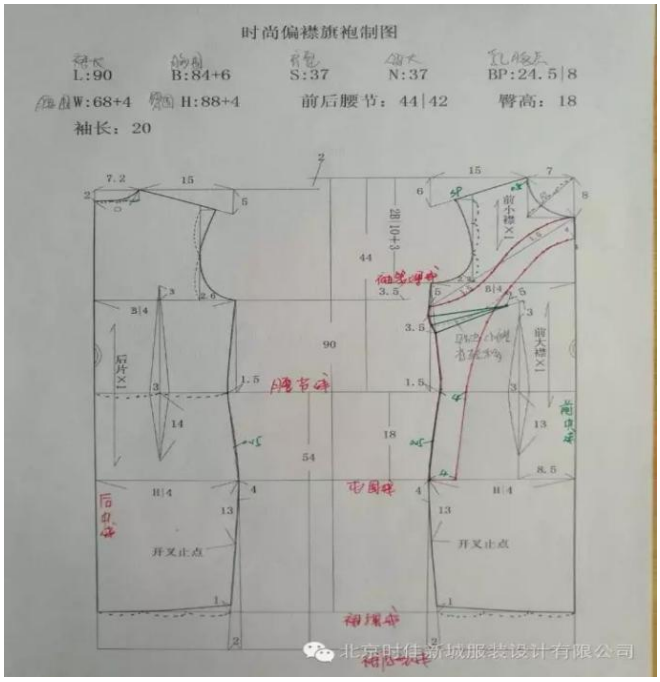
The plate-making process is usually the second stage of fashion design creation process and is very important for the final garment design, and the cutting drawings produced in this process are the media and technical conditions for designers to transform creative ideas into final garment modeling.[163] Cutting design drawings are usually represented by lines and structures with corresponding text and numerical descriptions. Figure E is an example of a cutting drawing. The production of cutting design drawing needs the relevant skills and experience of the pattern makers, which embodies certain skills. This process is not a simple transition process of effect drawings, sometimes it needs to be completed by other professionals. According to Article 4(12) of the *Implementation of the Copyright Law of P.R.C.*: "Graphic works refer to engineering design drawings and product design drawings drawn for construction and production, as well as maps and schematic diagrams that reflect geographical phenomena and explain the principle or structure of things." [164] Therefore, the cutting drawings can be interpreted as graphic works.

The controversial question is whether the original designer is still the copyright owner of the cutting design drawing when the cutting drawing is made by others. In fact, although the cutting design drawing embodies the beauty of science and can be regarded as a graphic work, it lacks "originality" so the copyright owner is still the

[163] Liu Ruipu and Liu Weihe 刘瑞璞, 刘维和, *Clothing Structure Design Principles and Techniques* 服装结构设计原理与技巧 (China Textile Press 中国纺织出版社, 1993), 1.

[164] The *Implementation of Copyright Law of P.R.C.* Article 4 (12).

original designer.[165] I do not deny the labor expended by the plate maker, but the plate making mainly serves for the production of ready-to-wear clothes. Although the cutting design represents the skills of the plate maker, the copyright law does not protect the skills.[166] Moreover, the cutting drawing is made based on the effect drawing, and the expression of the plate maker is limited and not original. To sum up, in the case that no new originality is formed, the creativity of the cutting drawing comes from the effect drawing, and the copyright subject belongs to the original designer.



Cutting Fashion Design Drawing[167]

[165] He Huaiwen 何怀文, *supra* note 140, at 360.

[166] *Ibid.*

[167] "Cutting Fashion Design Dawings," available at: http://www.sohu.com/a/205067110_230851 (last accessed 14 September 2020).

Figure E

iii. Clothing

China's copyright law does not list three-dimensional clothing design as the protected object, and there is no consensus on the protection of clothing design in China's judicial practice. Some ready-to-wear clothes are classified as applied art works, some are regarded as model works, and most of them are excluded from copyright protection. Whether from the current law or judicial practice, it is uncertain that the finished product of clothing or fashion design becomes the object of copyright law.

According to the above analysis of the legitimacy of fashion design copyright protection, ready-to-wear clothes can be regarded as applied works of art protected by copyright law. A feasible way to protect clothing by copyright law is to classify clothing design as works of applied art, and then protect the aesthetic elements of clothing through the provisions of applied art works by copyright law.

For applied works of art, there is no corresponding provision in the current copyright law of China. However, in the third revision of the copyright law officially launched by the State Copyright Administration in 2011, the provisions on applied works of art were added.[168] According to Article 5 (9) of the *Copyright Law of the P.R.C. (Draft*

[168] Yang Lihua and Feng Xiaoqing 杨利华, 冯晓青, *Research and Legislative Practice of Chinese Copyright Law*

for Review): "Applied works of art refer to toys, furniture, jewelry of plane or three-dimensional plastic art works with practical functions and aesthetic significance, etc."[169] Although the copyright law has not yet been amended, there are already cases in judicial practice of using the copyright law to protect applied art production, such as *Ningbo Juyang Daily Chemical Products Co., Ltd. v Ninghai Jinchang Stationery Factory*,[170] and the Ningbo Intermediate People's Court regards the "queen's brush" in this case as a applied art works. However, most of these cases are related to toys, daily necessities, stationery and jewelries, and rarely involve fashion design. It is a pity that the draft revision does not clearly mention fashion design. In such a case, the protection for fashion design needs to be interpreted as a miscellaneous provision of Article 5(9) of the *Copyright Law of the P.R.C. (Draft for Review)*, which undoubtedly increases the difficulty of judicial practice. Obviously, it is necessary to put fashion design under applied works of art such as toys, furniture and jewelries in the draft. In addition, the manufacturing methods and application fields of fashion design should not be considered within the scope of whether the fashion design is copyrighted or not. Whether the fashion design is handmade or industrial production, the only factor to consider is the "originality".[171]

中国著作权法研究与立法实践 (China University of Political Science and Law Press 中国政法大学出版社, 2014), 54.

[169] The *Copyright Law of the P.R.C.* (Draft Review) Article 5(9).

[170] *Ningbo Juyang Daily Products Co., Ltd. v Ninghai Jinchang Stationery Factory*, [2013] Ningbo Intermediate People's Court 142.

[171] Yang Lihua and Feng Xiaoqing 杨利华, 冯晓青, *supra* note 167, at 78.

In addition, it is of great significance to interpret ready-to-wear clothes as applied works of art and distinguish it from fine art works. There are differences between applied works of art and fine art works in function and protection content. The basic function of fine art works is to convey people's static visual experience, while the basic function of applied works of art is to meet the needs of daily life, with the aesthetic effect.[172] The fundamental difference between those two lies in their functions, and the difference in function determines that fine art works have the right of exhibition, but applied art works as commodities, the value lies in the circulation and the right of exhibition is not conducive to the circulation of commodities. Both the *Draft for Review of Copyright Law and the Copyright Law of P.R.C.(2010)* recognize the right of exhibition of fine art works, but they do not think that applied art works have the right of exhibition.[173] In the protection period, there are also differences between fine art works and applied art works. In practice, applied works of art shall be protected for a shorter period. According to Article 29 of the *Copyright Law of P.R.C. (Draft for Review)*[174], the copyright of applied art lasts for 25 years from the date of its first publication, and the term of protection is far less than that of a work of fine art.

[172] He Huaiwen 何怀文, *supra* note 140, at 109.

[173] *Ibid.*

[174] For applied works of art, the period of protection of the right to publish is twenty-five years. However, if the work is not published within twenty-five years after the completion of the creation, this law will no longer be protected; The period of protection of property rights in its copyright is twenty-five years after the first publication, but this work is not protected if it has not been published within twenty-five years after the completion of the creation.

IV. The Content of Right – Focus on Reproduction Right

In the field of fashion design, the most important property right of works is the right of reproduction.[175] China's copyright owners enjoy personal rights and property rights.[176] The property rights include the right to copy, the right to issue, the right to rent, etc.[177] the right to copy is not only the basis of the issue right, rent right and other property rights, but also the most important right to prevent design piracy, as piracy is the infringement of the reproduction right. By imitating the original design, the infringer becomes the substitute of the original works to a certain extent, guides and confuses the consumers' choice, thus intensifies the competition of the original design market and infringes the interests of the copyright owner. Therefore, the recognition of the right of reproduction can protect the competitive advantage of the copyright owner.[178]

The reproduction right is stipulated in the Article 10 (5) of *the Copyright law of P.R.C. (2010)*: "The right of reproduction, that is, the right to make one or more copies of a work by means of printing, copying, rubbing, recording, video recording, reproducing, or duplicating."[179] However, this definition is misleading because it overemphasizes

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[175] Fei Yang 费氧, *supra* note 7, at 20.

[176] See the *Copyright Law of P.R.C.* Article 10.

[177] *Ibid.*

[178] Feng Xiaoqing and Fu Jicun 冯晓青，付继存, "Research on Reproduction Right in Copyright Law 著作权法中的复制权研究," *JURIST* 法学家, no. 3 (2011): 105.

[179] The *Copyright Law of P.R.C.* Article 10(5).

copies.[180] The *Copyright Law of P.R.C. (Draft for Review)* has made a major adjustment to it. Article 13 (3) of the *Copyright Law of P.R.C. (Draft for Review)* stipulates: "The right of reproduction refers to the right to fix a work on a tangible carrier by means of printing, reproduction, recording, remaking and digitization."[181]

In fact, the right of reproduction emphasizes "representation" rather than making "copies".[182] The key of the right of reproduction lies in whether the works can be fixed on the material carrier to realize the representation of the works, but has nothing to do with whether the works carrier can be reproduced. For example, although the growth of bonsai depends on water, fertilizer and construction, and cannot be copied, this kind of non-replicability refers to the works carrier rather than the works itself. Bonsai can constitute three-dimensional modeling of fine art works.[183] Moreover, the works embodied in potted plants can be fixed on other carriers, which means replicability.[184] As for fashion design, the right of reproduction must also meet this requirement. As mentioned in the previous section, fashion design can be fixed on different carriers, including plane and three-dimensional carriers. Therefore, the piracy of fashion design occurs not only between plane works, but also between plane works and three-dimensional works. In the next part, we will analyze the reproduction right of fashion

[180] He Huaiwen 何怀文, *supra* note 140, at 349.

[181] *See* the *Copyright Law of the P.R.C. (Draft for Review)* Article 13 (3).

[182] He Huaiwen 何怀文, *supra* note 140, at 350.

[183] *Huang Jiale v Guangdong World Book Publishing Co*., [2004] Guangzhou Intermediate People's Court 253.

[184] *Ibid.*

design under different carriers.

i. Reproducing Between Plane Carriers

The reproduction between plane carriers refers to that the original design and the reproduction are fixed on the same or different plane carriers through copying, printing, scanning, photo reshooting, etc. The reproduction of fashion design between plane carriers occurs between the effect design drawings as fine art works and the cutting drawings as graphic works. In case that plagiarizing other people's clothing design (including effect drawings and cutting drawings) to form their own effecting drawings and cutting drawings respectively, the works before and after piracy are all fixed on the same plane carrier, which constitutes a reproduction from one plane to another.[185] This is the most common copy behavior in fashion industry, and there is no dispute on the definition of this behavior as the infringement of reproduction right.

As for this kind of piracy that copying cutting design drawings based on effect drawings, because the copy occurs between two different plane carriers, there is possibility to deny the copy behavior. As mentioned above, when using the "originality" standard to judge whether a work is "representation," it is easy to find that the cutting design drawing is another form of expression of the effect drawing.[186] Although the

[185] *Ibid.*

[186] He Huaiwen 何怀文, *supra* note 140, at 360.

cutting drawings concentrate the knowledge, understanding and labor achievements of the plate maker, they are limited in expression and lack of new original expression, which is the reproduction of the original works.[187] Therefore, copying effect design drawings to form cutting design drawings also forms plane to plane copying.

ii. Reproducing from Plane Carriers to Clothing

This kind of reproduction not only occurs between different plane work carriers, but also between plane and three-dimensional work carriers, which makes the identification of reproduction more complex.

China's judicial practice recognizes the reproduction from the plane to the three-dimensional carries. Taking sculpture as an example, in the case of *Nanjing Modern Sculpture Center v Nanjing Times Sculpture Art Co., Ltd.*[188], the court pointed out that "making three-dimensional sculpture based on plane computer effect drawings does not need to recreate, but only the representation of plane sculpture effect drawings."[189] Based on this, it is also a kind of copying behavior to make clothing according to effect drawings, because there is no new independent creation. Although effect drawings and ready-to-wear clothes belong to fine art works and applied art works respectively, due

[187] Feng Xiaoqing and Fu Jicun 冯晓青，付继存, *supra* note 177, at 107.

[188] *Nanjing Times Sculpture Art Co., Ltd., Nanjing Modern Sculpture Center*, [2003] Nanjing Intermediate People's Court 30.

[189] *Ibid.*

to the fact that reproduction is not limited to the same kind of work carriers, thus there is no substantial impact on the definition of reproduction behavior whether it is plane carriers or three-dimensional carriers. We can also say that the design of ready-to-wear clothes is embodied in the effect design drawing, once the effect design drawing is completed, the design of ready to wear as an applied art work has also been completed and is protected by the copyright law.[190] In essence, the three-dimensional ready-to-wear work and its corresponding plane effect drawing are the same work.[191] The difference between them is that they are fixed on different carriers, so they have different forms of expression.

The controversial copying behavior definition lie in whether three-dimensional clothing made by cutting drawing is also constitutes copying. Cutting design drawing is a graphic work under the copyright law, and this problem concerns whether the production of industrial products in accordance with engineering design, product design drawing and its specification is a copy under the copyright law. In the case of *Shanghai NewFox Auto Parts Co., Ltd. v Shanghai Sorea Automotive Products Co., Ltd*.,[192] the court pointed out: "copying engineering design drawings and product design drawings only refers to printing, copying, remaking and other forms of using drawings, and copying does not include manufacturing and producing industrial

[190] He Huaiwen 何怀文, *supra* note 140, at 354.

[191] *Ibid.*

[192] *Shanghai NewFox Auto Parts Co., Ltd. v Shanghai Sorea Automotive Products Co., Ltd*., [2006] Shanghai Higher People's Court 25.

products according to engineering design drawings and product design drawings."[193] According to this interpretation, making three-dimensional finished products by cutting design drawings is a manufacturing behavior, not a copying behavior in the copyright law.

How to distinguish replication behavior from industrial manufacturing is the key to solve the problem.[194] The essence of reproduction in copyright law is to represent the original features of a work. No matter what kind of carrier it is reproduced on, the act of representation is the reproduction of the original works, and infringing the right of reproduction. The product design drawings are graphic works, the scope of copyright protection is the original expression of design elements, no matter whether the product reflected in the product design drawing has the originality or even whether it can be actually manufactured.[195] The production and manufacturing of products are not the reproduction of the selection and arrangement of design elements, but the scheme of implementing product design drawings instead of copying "product design drawings". On the other hand, the product modeling embodied in the product design drawing is not necessarily protected by copyright. Only when the product modeling is original can it be protected as an applied art work. Therefore, if the design of the cutting design drawing has the aesthetic form (originality), the cutting design drawing itself is the

[193] *Ibid.*

[194] He Huaiwen 何怀文, *supra* note 140, at 357.

[195] *Ibid.*

two-dimensional expression of the applied art works. In this regard, manufacturing is the process of transforming the two-dimensional cutting design drawing that embodies the applied art works into the three-dimensional works, which is the process of reproducing the original aesthetic expression, belonging to reproduction. In short, when three-dimensional clothing design meets the requirements of the works stipulated by the copyright law, the process of making three-dimensional clothing by cutting design drawings is reproduction. On the contrary, when this kind of manufacturing behavior does not involve the expression of aesthetic concepts of works, but only involves the use of technical means, it is an industrial product manufacturing and has nothing to do with reproduction.[196]

As for the reproduction from three-dimensional to plane, the judicial practice in China generally recognizes this kind of reproduction behavior. However, fashion design piracy rarely involves such replication, so this paper does not make in-depth discussion. But for the behavior of directly copying the design results of one garment to another, there is no doubt that it is a violation of the right of reproduction. Through

the qualitative analysis of the reproduction behavior between different carriers of fashion design is the recognition of the reproduction right of fashion design, and whether a design infringes on the right of reproduction needs further judgment of infringement, which will be discussed in the next part.

[196] Feng Xiaoqing and Fu Jicun 冯晓青，付继存, *supra* note 177, at 108.

Chapter Four Establishing Copyright Infringement Rules

The above discussion is based on the copyright law provisions on the fashion design of the copyrightability, which is the object of the right (effect drawings, cut drawings, clothing) and the content of the right (reproduction right). The following part will summarize the problems of fashion design copyright infringement in China's judicial practice through three typical cases. At the same time, puts forward some suggestions on the infringement judgment rules in China's judicial practice by referring to the relevant provisions of the European Union and the United States.

I. Copyright Infringement Cases of Fashion Design in China

In China, the phenomenon of piracy and infringement in fashion industry is endless. Although fashion design is not the object of Chinese copyright law, there are still a few cases involving piracy infringement of copyright in judicial practice. Due to the lack of the provisions of the copyright law on fashion design, coupled with the small number of fashion design copyright infringement cases that are concentrated in the clothing industry, different courts in China have given different infringement judgments, and no uniform infringement judgment rules have been formed in judicial practice. The following three typical cases of clothing copyright infringement will be analyzed.

i. Hu Sansan Case[197]

This case is the first case of piracy of clothing design infringing copyright in China. Hu Sansan, a fashion designer, once worked as an intern in China Academy of Fine Arts (Hangzhou). At the end of 1999, she filed a lawsuit with the Beijing No.2 intermediate people's court, accusing her teacher (Qiu Haisuo) of plagiarizing her design and infringing the copyright of her clothing works. The main information of the case is as follows:

From September 1998 to July 1999, during the training period of China Academy of Fine Arts, Hu Sansan, the plaintiff, designed and completed the creation of corset. As an associate professor of the Department of Clothing of China Academy of Fine Arts (Hangzhou), Qiu Haisuo once witnessed Hu Sansan's design of corset. With this corset as the prototype, Hu Sansan also designed three sets of dresses, further using Chinese knot, peony flower, 45 degree oblique cutting on silk fabric, stripe, tangle, three-dimensional cutting, manual sewing, color gradual change and contrast combination to create clothing style. The above dress participated in the "1999 China Textile City Textile Expo - 2000 spring and summer fashion show" held in Shaoxing in April 1994. Qiu Haisuo also witnessed the above dress at the conference.

[197] *Hu Sansan v Qiu Haisuo and the National Art Museum of China*, [1999] Beijing's Second Intermediate People's Court 145. *Hu Sansan v Qiu Haisuo and the National Art Museum of China*, [2001] Beijing Higher People's Court 18.

In July 1999, the defendant Qiu haisuo completed the design of eight sets of clothing series. The main design elements used in this series of clothing are peony flowers, and the main crafts are hand-painted, striped seams, Chinese knots, etc. which is similar to Hu Sansan's. This series of clothing took part in the ninth national first art design exhibition with the theme of "the story of spring" and won the gold medal for clothing, and then was exhibited in the China Art Museum on December 6, 1999.

The focus of this case is how to define the work type of clothing design in the copyright law. According to the court of first instance, the expression form of performance clothing has artistry and expansibility, which goes far beyond the practical function of public clothing. For practical but more artistic clothing, it should be treated as applied works of art.[198] At the same time, the court of first instance pointed out that the fine art works stipulated in Article 4 (8) of the *Implementation of the Copyright Law of P.R.C*. are listed in a non-exhaustive way,[199] so the fine art works not only refer to the pure art works, but also include the applied art works, and the protection of the fine art works should be applied to the protection of clothing. Therefore, each garment independently designed by Hu Sansan and Qiu Haiso is the object protected by copyright law.

[198] *See Hu Sansan v Qiu Haisuo and the National Art Museum of China*, [1999] the Second Intermediate People's Court 145.

[199] *Ibid.*

In the infringement determination, the court of first instance held that: "Although the process and design elements used in the works of both parties are roughly the same, in the view of ordinary connoisseurs, the overall color, shape, combination and decoration of the two are different, bringing different visual effects and feelings to the audience. Thus, there is no imitation of the former by the latter. Even if the two styles are the same, they are reasonable reference and inspiration, and do not constitute piracy."[200]

The court of second instance directly determined that clothing design was a work of fine art and was protected by copyright. For the judgment of infringement, the court of second instance said:

> "The scope of protection of clothing art works by copyright law should include the overall form of expression formed by color, pattern, shape, combination and decoration. Although both sides use roughly the same design elements, but the overall form of clothing works designed by both sides is different, which brings different feelings to the audience, and their expressions are also different, so there is no piracy of the former by the latter."[201]

Therefore, in this case, although both the court of first instance and the court of second instance agreed that fashion design should be protected by copyright, in the case of clothing those two courts were not consistent in the object identification in copyright law, and respectively determined fashion design was applied art works and fine art

[200] *Ibid.*

[201] *Hu Sansan v Qiu Haisuo and the National Art Museum of China*, [2001] Beijing Higher People's Court 18.

works respectively.

In terms of standards and scope of protection, the standards of both courts are very vague. The court of first instance adopts the standard of "art is higher than practicality," and the court of second instance adopts the standard of "strong art" and "aesthetic expression." At the same time, the court of second instance mentioned that the scope of copyright protection for clothing is the overall form of expression.[202] Does this mean that the scope of protection not only includes the pattern and decoration on clothing, but also the overall cutting shape of clothing? This issue has not been further explained by the court of second instance.

In terms of infringement judgment, the court of second instance uses the perspective of ordinary observers: "Although clothing art has its own special rules of creation, experts are more professional than ordinary viewers in judging the artistry of this field. However, the judgment of the artistic quality of clothing cannot be equal to the standard of infringement of the clothing works in law."[203] At the same time, the court of first instance adopts the standard of "visual effect," that is, producing different visual effect, while the second instance court involves not only visual judgment but also emotional and sensory judgment.

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[202] *Ibid.*

[203] *Ibid.*

Therefore, in this case, the court of second instance has differences in the recognition of the type of clothing design works, the standards and scope of copyright protection and the specific rules of infringement judgment, reflecting the difficulties in judicial activities in the absence of legislation in China, which makes it difficult for clothing design to obtain the protection of copyright law in reality.

ii. Jinhe Company Case[204]

This case involves not only the recognition of the type of copyright works of fashion design, but also the recognition of the right of reproduction of fashion design.

From the facts of the case, the two plaintiffs are the relevant holders of the effect drawings, cutting design drawings and sample clothes of "99112 integrated protective clothing". Gu Qing, one of the defendants, is a former employee of the plaintiff, while the other defendant, Shanghai Jida Clothing Factory, has been processing garments for the plaintiff for a long time. It has several sets of models including "99112 integrated protective clothing" and has the obligation of confidentiality. Gu Qing left to work for Shanghai Zhengbo Clothing Co., Ltd., one of the defendants, and placed an order with Shanghai Jida Clothing Factory on behalf of the Shanghai Zhengbo Clothing Co., Ltd.,

[204] *Shanghai Jinhe Protective Products Co., Ltd., Shanghai Jinzecheng Industrial Protective Products Co., Ltd. v Gu Jing, Shanghai Zhengyi Garment Co., Ltd., Shanghai Jida Garment Factory*, [2005] Shanghai Pudong New Area People's Court 53.

asking the latter to use the plaintiff's model to produce 780 sets of “99112 integrated protective clothing”. Without the consent of the plaintiff, Shanghai Jida Clothing Factory used the plaintiff's model to process the clothes for Zhengbo Clothing Company. The two plaintiffs believed that the defendants copied, produced and sold “99112 integrated protective clothing” without the consent of the plaintiff, which infringed the plaintiff's copyright of the effect design drawing, cutting design drawing and sample clothing of “99112 integrated protective clothing”.[205]

One of the disputes in this case is whether the effect design drawing, cutting design drawing and clothing sample of “99112 integrated protective clothing” are protected by copyright law.

In the determination of the protection object of copyright law, the court determined that the effect design drawing in this case is the product design drawing which is the graphic works expressly stipulated by the copyright law. When determining the cutting design drawing, the court held that the cutting design drawing is a graphic work specially made for the industrial production of ready-made clothes and should also be protected by copyright law. However, the court did not further discuss the ownership of copyright in the cutting design drawings.[206] According to this analysis, although

[205] *See ibid.*

[206] *See ibid.*

the court holds that both the effect drawing and the cutting drawing belong to the graphic works and are protected by copyright, it is not considered that making the cutting design drawing according to the effect design drawing is a kind of copying behavior.

As for the sample clothing, the court did not identify it as the object protected by the copyright law:

> "The clothing design (such as the overall 'T' shape of the clothing, the 'X' shape of the waist tightening, the hidden door zipper, the patch bag, etc.) embodies the aesthetic feeling stated by the plaintiff, and inevitably embodies the practical function. The designer must take the functionality into account in the above aesthetic design processing, which leads to the inseparable aesthetic function and utilitarian function of clothing. Therefore, the aesthetic and practical function of clothing in this case are inseparable. Because the aesthetic cannot be separated from the practical function of clothing and exist independently, the functional part of clothing should be adjusted by the industrial property law. Therefore, ready-made clothing is practical product and cannot be recognized as applied art works protected by the copyright law."[207]

Based on the above judgment, the Shanghai Court further analyzed whether the defendant's behavior constituted copyright infringement or not. As far as the effect drawing is concerned, the court holds that:

> "The construction or manufacturing of products according to such graphic works does not involve the reproduction of aesthetic or artistic expressions, and does not belong to the reproduction in the sense of copyright law. In this case, the defendant's production of clothing according to the effect drawing does not constitute

[207] *Ibid.*

infringement."[208]

Therefore, according to this way of thinking, we can draw the same conclusion, that is, when the defendant makes the ready-made clothes according to the cutting design drawings that belong to the same graphic works, it does not constitute duplication. But according to the court: "Tailoring the fabric according to the shape and specification of the cutting drawing is actually a copy of the cutting drawing. When the defendant makes the integrated protective clothing, he completely copies the plaintiff's cutting design drawing, which constitutes an infringement of copyright."[209]

The contradiction of this case lies in that the design drawing and cutting drawing of integrated protective clothing are recognized as graphic works at the same time. However, the court's conclusion on making of ready-made clothes based on these two design drawings (both graphic works) constitutes the infringement of the right of reproduction is not the same. It can be seen that the recognition of the right of reproduction of fashion design has not formed a unified understanding in judicial practice. In addition, in this case, on the issue of protection standards, the court mentioned that "the aesthetic part and the practical part cannot be separated". On the surface, the court adopted the principle of "separability" to judge whether to grant copyright protection to the applied art works. However, the court did not further analyze how the "separability" principle was used in this case, and directly gave a

[208] *Ibid.*

[209] *Ibid.*

conclusion that the aesthetic elements and practical functions of the clothing involved in the case cannot be separated. Thus, the issue of fashion design protection standards in this case has not been resolved.

iii. Huasi Company Case[210]

This case mainly involves the standard of copyright protection of fashion design. The courts of first and second instance have given different copyrightability standards, which reflects the confusion of this problem in the judicial practice of our country, and to some extent hinders the copyright protection of fashion design.

In September 2003, the plaintiff, Huasi Company, designed and completed the graphic design drawings of the fur jacket type clothing of HS-65 and HS-12 models. Subsequently, on October 19, 2004 and December 31, 2004, Huasi Company purchased two fur garments produced by Mengyan Company from Dongfang Company. According to Huasi, the two garments produced by Mengyan are similar to their effect design drawings and infringe the relevant copyright.[211]

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[210] *Huasi Industrial Group Suning Huasi Tannery Products Co., Ltd. v Wuxi Mengyan Garment Co., Ltd.*, [2006] Shijiazhuang Intermediate People's Court 99. *Huasi Industrial Group Suning Huasi Tannery Products Co., Ltd. v Wuxi Mengyan Garment Co., Ltd*., [2007] Hebei Higher People's Court 16.

[211] *See ibid.*

The court of first instance pointed out:

> "The two suede jackets in this case reflect the concept of returning to the original, with the characteristics of smooth lines, beautiful appearance and personalized beauty. This clothing mainly embodies the practical function, and its aesthetic feeling of clothing and practical function itself cannot be separated and exist independently. What the copyright law protects is the form of artistic expression, not the practical product itself. In this regard, as the garment made by Huasi company in this case is practical product, it is not the object protected by the copyright law and should be regulated by the industrial property law."[212]

According to the court of first instance, the condition for plaintiff's clothing to obtain copyright protection is to meet the principle of "separability".

In the second instance, although the court recognized the artistic value of fashion design, it put forward the protection requirements higher than the "originality" standard in copyright law. The court of second instance worried that if every change and innovation embodied in clothing is monopolized by designers, it is impossible to balance the interests of individuals and society. Therefore, the court of second instance pointed out that:

> "Only those clothing with strong artistry can obtain copyright as applied artwork, and the object of protection is the unique artistic expression of the designer's thoughts and emotions embodied in this kind of clothing. In this case, the company claims that the design of the two kinds of clothing reflects the idea of returning to basics. The way of expression of the idea is to use the natural colors on the whole animal fur on the basis of the ordinary jacket clothing style, the lace to make a large square decoration, and the fur to decorate the

[212] *Huasi Industrial Group Suning Huasi Tannery Products Co., Ltd. v Wuxi Mengyan Garment Co., Ltd.,* [2006] Shijiazhuang Intermediate People's Court 99.

> neckline and cuffs, etc. From the perspective of the artistry required by the applied works of art, these two kinds of clothing only make use of some conventional elements in the clothing design. Therefore, HS65 and HS-12A clothing designed by Huasi Company are only practical products and cannot be protected by the copyright law of China as applied works of art."[213]

In this case, although the court of the first and second instances held that the clothing involved in the case was not protected by copyright law, they gave different standards of protection. From the perspective of "originality" of works, the court of second instance put forward the protection standard of "strong artistry", while the court of first instance adopted the standard of "separability", excluding the clothing involved in the case that the artistic beauty and practical function cannot be separated from the copyright object. Therefore, even if we admit the possibility that clothing constitutes the object of copyright in judicial practice, without establishing the corresponding infringement judgment rules, it is difficult for clothing design to obtain substantive protection of copyright.

iv. Summary

The above three cases are all related to copyright infringement in the field of fashion design in China. From the above analysis, we can see that there are the following problems in the judicial practice of copyright infringement in fashion design: first, the definition of object type in fashion design is confused under the copyright law, which

[213] *Huasi Industrial Group Suning Huasi Tannery Products Co., Ltd. v Wuxi Mengyan Garment Co., Ltd.*, [2007] Hebei Higher People's Court 16.

leads to the identification of copying behavior is also contradictory. Secondly, the protection conditions and scope of clothing design are not clearly defined. Not only the judgment of the “originality” standard of fashion design is different, but also the “originality” standard and the “separability” principle are confused; in terms of the scope of protection, there is no unified conclusion whether the protection of copyright law covers the overall shape of fashion design. Finally, in the case of inconsistent protection standards, the judgment of infringement inevitably falls into confusion. The specific rules of infringement judgment need to be further determined, including the standard of "substantial similarity" and the determination of the subject of infringement judgment, etc.

Due to the lack of attention to fashion design in China, the relatively late development of intellectual property law, and the unclear attitude towards the copyright protection of clothing design and the lack of legislative provisions, resulting in a small number of relevant judicial practices and the confusion of judgments. Therefore, it is necessary to strengthen the research on the protection standard of copyright law and the rule of copyright infringement in this field. At the same time, it is necessary to learn from the experience of other countries in clothing design and protection. The following will discuss the judgment of copyright infringement in this field based on the special features of fashion design and the experience of the United States and the European Union.

II. Developing Copyright Infringement Rules in China – draw on the experience from US and EU

In fact, there are two issues to be discussed in the judgment of fashion design infringement: the first one concerns the standards and scope of protection. Only when the conditions and the scope of copyright protection are clear, can we further judge whether the piracy is an infringement; the second one is the application of specific rules in the judgment of fashion design infringement. In view of the above two problems, the judgment rules of fashion design infringement in the United States and the European Union have certain significant reference for China. These two issues are discussed separately below.

i. The Criterion Constitute A Work under Copyright Protection

(i) Criteria 1: Industrial Characteristic is not the Consideration

This standard refers to that the industrial characteristics of design, such as patentability, the intention of creators, manual production or industrial manufacturing, and the number of products that can be copied should not be taken into account when judging whether fashion design is protected by copyright. This standard has been confirmed in the United States and the European Union. According to the United States Copyright Office, the following factors are irrelevant in determining whether copyright can be registered: the author's intention of creation, the number of copies and whether it can

obtain the registration of design patent.[214] The current provision of the Regulations still states as following:

> "The registrability of such a work is not affected by the intention of the author as to the use of the work or the number of copies reproduced. The availability of protection or grant of protection under the law for a utility or design patent will not affect the registrability..."[215]

The same as the United States, the industrial characteristics are not considered in *European Union Design Law*[216] as well. According to the "product" definition in *CDR* Art. 3(b)[217], "design" can include any industrial and handicraft item. And according to Art. 8(1)[218] of the *CDR*, this means the functional features are not the main obstacle for giving protection to fashion design except some highly functional or technical designs which design features are solely dictated by technical and there is no other alternative design features. Thus the tradition between fine art, applied art, and industrial design is to be discarded.[219] Additionally, there is nothing within the *CDR* or *Design Directive* which prevents the co-existence of parallel protection under

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[214] *See* 37 *C.F.R.* § 202.10(b) (1956).

[215] 37 *C.F.R.* § 202. 10(a) (accessed as e-C.F.R., current at September 27, 2019).

[216] In order to unify the protection of the intellectual property law of EU Member States on the design, the EU formulates a special and independent design law within the community, including (*Design Directive 98/71/EC of the European Parliament and Council of 13 October 1998 on the Legal Protection of Design*, [1998] OJ L289 (hereinafter referred to as the *Design Directive*); and *Regulation 6/2001 of 12 December 2001 on Community Designs*, [2002] OJ L3/1,amended by *Regulation 1891/2006 of 18 December 2006 amending Regulations 6/2002 and 40/94* [2006] OJ L386/14 (hereinafter referred to as the *Community Design Regulation or CDR*). The protection of fashion design is regulated by these two laws.

[217] The *Community Design Regulation* Article 3(b): "product" means any industrial or handicraft item, including inter alia parts intended to be assembled into a complex product, packaging, get-up, graphic symbols and typographic typefaces, but excluding computer programs.

[218] Article 8(1) of the *Community Design Regulation*: 1. A Community design shall not subsist in features of appearance of a product which are solely dictated by its technical function.

[219] Suthersanen, *supra* note 87, at 96.

copyright, design, patent, trade mark or unfair competition laws (whether under national or community regimes), which means a multi-faceted protection regime in Europe Union for fashion design.[220]

This standard has its significance in the identification of copyright protection conditions for fashion design. Generally, fashion design is excluded from copyright protection because of its practical function, application in industrial manufacturing, application of patent law and other industrial characteristics.[221] However, the boundary between art creation and industrial design is often very thin, especially when industrial design is integrated with art elements. Therefore, considering the industrial characteristics of fashion design and blindly classifying fashion design as design patent protection scope cannot fully protect fashion design.

At the same time, regardless of the industrial characteristics of fashion design, it means the possibility of double protection from copyright law and design patent law. A fashion design can also obtain copyright protection when it meets the requirements of

[220] This multi-faceted regime is recognised in Recital 16 of CDR: Some of those sectors produce large numbers of designs for products frequently having a short market life where protection without the burden of registration formalities is an advantage and the duration of protection is of lesser significance; and in Recital 31: This Regulation does not preclude the application to designs protected by Community designs of the industrial property laws or other relevant laws of the Member States, such as those relating to design protection acquired by registration or those relating to unregistered designs, trade marks, patents and utility models, unfair competition or civil liability; and Recital 32 : it is important to establish the principle of cumulation of protection under the Community design and under copyright law, whilst leaving Member States free to establish the extent of copyright protection and the conditions under which such protection is conferred.

[221] Lv Bingbin 吕炳斌, "The Theoretical Logic of the Copyrightability of Practical Art Works 实用艺术作品可版权性的理论逻辑," *Comparative Study* 比较法研究, no. 3 (2014): 70.

copyright law after obtaining the design patent right, which is beneficial to the obligee. As mentioned above, neither the United States nor the European Union object to the dual protection of fashion design, but the right holder can only choose to exercise one right to prevent abusive legal action between the same party based on the infringement of the same litigation cause.[222]

(ii) Criteria 2: the "Originality" Standard

In addition to the above non-considerations, the requirement for copyrightability of fashion design should be the "originality" standard. Although the United States and the European Union have different standards for "originality" in fashion design, both show lower standards of protection:

The "originality" standard in the United States was established in *Feist Publications Inc v Rural Telephone Service Co.*[223]. In this case, the Supreme Court ruled that in order for an author to qualify for copyright protection, the work must have been created independently, not copied from other works, and be minimally creative.[224] This requires very little originality, even a small amount is enough. Most works can meet this requirement very easily.[225]

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[222] *CDR* Article 95.

[223] *Feist Publications, Inc. v Rural Tel. Serv. Co.*, 499U.S. 340 at 345 (1991).

[224] Suthersanen, *supra* note 87, at 242.

[225] Lu Haijun 卢海君, "The Connotation of Originality from the Development of Original Case Law 从原创性

The European Union puts forward lower requirements for the protection of fashion design, and even avoids any artistic or aesthetic substantive requirements. A protected fashion design does not need to be beautiful, artisitc or visually attractive.[226] A protected design is any element that can be visually perceived, such as the weight or flexibility of a product or the tactile impression given by a textile.[227] The *European Union Design Law* does not use the word "originality", but uses the standards of "novelty" and "individual character". "Novelty" standard is stipulated in Article 5 of *CDR*[228], which means that fashion design must be different from the original design in important details. When the features of the two designs are different only in non-important details, it can be concluded that the two designs are similar. Which design features should be regarded as important details depends on the judgment in courts. From OHIM's judgment, it can be seen that in general, the court tends to make a judgment by comparing the features of the two designs one by one.[229] The "individual character" is specified in Article 6 of *CDR*[230], which means that it can give the

判例法的发展看原创性的内涵," *Journal of SWUPL* 西南政法大学学报 11, no. 1 (2009): 65.

[226] Suthersanen, *supra* note 87, at 95.

[227] *Green Paper on Design*, preliminary draft, draft art.3(a).

[228] Article 5 of the *Community Design Regulation*: 1. A design shall be considered to be new if no identical design has been made available to the public:

(a) in the case of an unregistered Community design, before the date on which the design for which protection is claimed has first been made available to the public;

(b) in the case of a registered Community design, before the date of filing of the application for registration of the design for which protection is claimed, or, if priority is claimed, the date of priority.

2. Designs shall be deemed to be identical if their features differ only in immaterial details.

[229] Suthersanen, *supra* note 87, at 112.

[230] Article 6 of the *Community Design Regulation*: 1. A design shall be considered to have individual character if

informed user an overall different impression from the existing design. Different from the judgment of "novelty" that he key point is to judge through the comparison in details, the "individual character" emphasizes to consider two designs as a whole.[231] To sum up, as long as a fashion design is new in important details and the overall visual impression is different, it can obtain the protection of the *European Union Design Law.*

The originality requirements of copyright for different kinds of works should be different. For fashion design, its "originality" standard should be consistent with its protection goal, rather than directly comparing with other works, which is the basic position required by the nature of originality.[232] As the protection of fashion design has the goal of protecting artistic aesthetic expression and preventing fashion piracy, the "originality" standard of fashion design should not be too high. At the same time, fashion design has practical use or function. Practical function can limit the space of artistic creation, thus limiting the existence of originality. Then, for the fashion design with more practical factors, only when the original features are obvious, that is, it has

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the overall impression it produces on the informed user differs from the overall impression produced on such a user by any design which has been made available to the public:

(a) in the case of an unregistered Community design, before the date on which the design for which protection is claimed has first been made available to the public;

(b) in the case of a registered Community design, before the date of filing the application for registration or, if a priority is claimed, the date of priority.

2. In assessing "individual character", the degree of freedom of the designer in developing the design shall be taken into consideration.

[231] Suthersanen, *supra* note 87, at 114.

[232] Feng Xiaoqing and Fu Jicun 冯晓青，付继存, "The independence of applied art works in copyright law 实用艺术作品在著作权法上之独立性," *Legal Studies* 法学研究, no. 2 (2018): at 152.

a higher height, can it show the existence of its artistry. In other words, the required height of originality and practical factors should show a positive correlation, which is the particularity of originality judgment of applied art works.[233]

(iii) Criteria 3: the "Separability" Standard

As mentioned above, fashion design is the unity of practicality and artistry. As the copyright law only protects some original aesthetic feeling, that is, artistic expression, but not any practical function, therefore, the artistic component and functional component of fashion design should be separable, and only when the artistic component can be separated independently, can copyright protection be obtained.[234] The "separability" standard aims to delimit whether the copyright protection of applied art works is feasible or not, which becomes a basic principle of copyright protection of applied art works.[235] This principle was first established in the *Maze Case*[236], in which the Supreme Court of the United States held that sculpture as the base of a table lamp can be separated from practicality in concept and protected by copyright.

In the process of the development of the copyright protection of applied art works, the

[233] *Ibid.*

[234] Lv Bingbin 吕炳斌, *supra* note 220, at 73.

[235] *Ibid.*

[236] *Maze Case*, 347 U.S. 201 (S. Ct., 1954).

"physical separability" standard occupied the main position at the beginning.[237] With the continuous improvement of the protection system of applied works of art, the "concept separability" standard began to show its important role.[238] The purpose of the separation, whether physical or conceptual, is to distinguish the aesthetic aspect from the practical aspect, so as to avoid the improper consequences of the protection of the functionality of the products by copyright law.[239] The application of the principle of "separability" can be divided into two steps: firstly, the separated aesthetic part must exist independently from the practical function, both physically and conceptually; secondly, the separable aesthetic part can be fixed on other carriers and protected by copyright as a picture, figure and sculpture work.[240]

The principle of "separability" developed from the judicial practice of the United States has certain significant reference for China, but there are trade-offs. The determination of fashion design copyright protection should be based on its artistic and practical inseparability in physics. Because the fashion design that can be separated physically is actually the fact that fine art works are used in the design of practical products. Without such distinction, it will face the overlap and conflict of protection: on the one hand, the individual art works as fine art works are protected by copyright

[237] Lu Haijun 卢海君, *supra* note 122, at 334.

[238] *Ibid.*

[239] *Ibid.*

[240] 17 *U.S.C.* § 101. Emphasis added.

law; On the other hand, the combined applied works of art are protected by copyright law, but the term of protection and the content of rights are different between the applied art works and the fine art works, which in fact confuses the boundary between the works and the works carrier.[241] Therefore, the more appropriate criterion for copyrightability is that practicality and artistry cannot be separated physically, but the two attributes can be distinguished on the level of people's consciousness, that is, concept separability.[242] On the contrary, if the fashion design practicability and artistry are inseparable in concept, it means that the forms of expression of artistic elements also have practical functions, or artistic and practical forms of expression overlap together, and copyright protection should not be granted, otherwise the scope of protection will be improperly expanded.[243]

ii. The Criterion Constitute Infringement

(i) The Protection Scope

In order to establish the infringement judgment rules for fashion design, it is necessary to analyze the scope of protection given by copyright law at first place. In response to this problem, the regulations of the United States and the European Union are different: the United States protects fashion design in the framework of copyright law, and the

[241] *See* Lv Bingbin 吕炳斌, *supra* note 220, at 68.

[242] Feng Xiaoqing and Fu Jicun 冯晓青，付继存, *supra* note 231, at 145.

[243] *Ibid.*

scope of protection is limited by copyright law, while the European Union expands the scope of protection to the overall cutting shape through independent *European Union Design Law*, which puts forward a more comprehensive protection for fashion design and has more reference significance.

Under the framework of copyright law, the United States gives copyright protection to fashion design through the principle of "separability", and at the same time limits the protection to the separated pictures, graphics and sculptures. Therefore, in the United States, the overall shape of fashion design is not protected by copyright. According to *Esquire v Ringer*[244], refusing the overall shape protection was stated by the DC Circuit Court: "The overall design or configuration of a utilitarian object, even if it is determined by aesthetic as well as functional considerations, is not eligible for copyright."[245] This view is reiterated in *Varsity Brands v Star Athletica*[246] as well: "The only feature of the cheerleading uniform eligible for a copyright is the two-dimensional work of art fixed in the tangible medium of the uniform fabric... Respondents may prohibit only the reproduction of the surface designs in any tangible medium."[247]

[244] *Esquire v Ringer*, 414 F.Supp. 939 (D.D.C., 1976), reversed 591 F.2d 796 (D.C. Cir., 1978).

[245] *Ibid.*

[246] *Star Athletica v Varsity Brands*, 137 S.Ct. 1002, 1009 (2017).

[247] *Ibid. A*t 1013.

The European Union has extended its protection to the overall shape of fashion design, including the cut-out style. According to the definition of design in Article 3(a) of *CDR*[248]: " 'design' refers to the appearance of the whole or part of the product."[249] Therefore, under the *European Union Design Law*, fashion design is not only protected in terms of pattern, color, and their combination, but also in terms of overall design, including style and cutting.

Obviously, the scope of protection provided by *European Union Design Law* is more suitable for fashion design protection. First of all, the unique cutting and overall modeling are worthy of copyright protection. Some designs are famous for their novel cutting and innovative modeling style, reflecting certain originality. When the originality of the design is not reflected in the pattern, color or decoration of the dress but in the overall shape, there is no reason to exclude the copyright protection of the overall shape. Secondly, rejecting protection to the overall cutting of fashion design is based on the assumption that the modeling and cutting of fashion design reflect the functionality of clothing and are inseparable from the artistry. However, the particularity of fashion design lies in its broad creative space and unlimited artistic expression, thus, fashion cutting design can go beyond its functional limitations to a certain extent, and cutting shape is not always inseparable from practicality. Therefore,

[248] Article 3 (a) of the *Community Design Regulation*: design" means 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.

[249] *Ibid*.

it is arbitrary to exclude the protection of the overall shape without exception.

Finally, the protection of the overall shape of fashion design is not to deny the practicability in the overall cutting shape, but to implement the principle of "combining the expression of ideas". That is, when there is only one or a limited number of ways of expression in cutting style, then it is difficult to distinguish the expression and thought of a work, and such design is no longer protected by copyright law. In the specific judgment, the standard of "designer freedom" in *European Union Design Law* has reference significance: the functional features are excluded from the protection scope by considering the designer's creation space.[250] That is to say, if the overall modeling performance of fashion design is unique or limited, and the functionality largely determines the shape of the design, then there is no original expression of designers, so the overall modeling and practicability cannot be separated and must be excluded from copyright protection.[251]

(ii) Substantial Similarity Principle

In view of the problem of determining copyright infringement, China has gradually formed the basic rule of "substantial similarity" in the long-term judicial practice,[252]

[250] Suthersanen, *supra* note 87, at 119.

[251] *Ibid.*

[252] Ding Liying 丁丽瑛, "Copyright Protection of Applied Art Works Tribune of Political Science and Law 实用艺术品著作权的保护," *Tribune of Political Science and Law(Journal of China University of Political Science and*

that is, only proving that the suspected infringing works and the works protected by copyright constitute substantial similarity can be judged as copyright infringement. Substantial similarity is the requirement of the degree of reproduction and it is an important boundary between legality and illegality.[253] In the process of substantive similarity judgment, it involves the subject of judgment and the way of comparison, which can be used for reference by *European Union Design Law.*

The first question is the judgment subject. The *European Union Design Law* adopts the "informed user" standard, that is, the judgment subject is not the final ordinary consumer of fashion design products, nor a fashion expert, but a standard slightly higher than the ordinary consumer but lower than the professional. That person has a certain taste of fashion and can consider each design feature from a professional perspective.[254] This standard is very important in the identification of fashion design infringement. Because ordinary consumers do not have fashion taste and related knowledge, it is easy to ignore the uniqueness of fashion design to a large extent, so that some original designs cannot be protected by copyright. On the contrary, if fashion experts are used as the judgment subject, some subtle original designs may also be emphasized its high artistic value, resulting in excessive protection of fashion design. The protection of fashion design can neither ignore the excellent design that cannot be

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law) 政法论坛(中国政法大学学报) 23, no. 3 (2005): 140.

[253] *Ibid.*

[254] *See Procter & Gamble Co. v Reckitt Benckiser (UK) Ltd.,* [2007] E.C.D.R.4.

observed by consumers without any fashion taste, nor emphasize the tiny design that can only be seen by fashion professionals. Therefore, the adoption of the "informed user" standard is reasonable.

In the way of comparison, the "overall impression" standard adopted by *European Union Design Law* is also worth adopting. The "overall impression" is a visual test specified in *CDR* capital 14[255]. Different from the judgment of "novelty" that is based on the comparison in details, the "overall impression" emphasizes to consider two designs as a whole.[256] Although there are differences in details, if the overall impression is similar, then piracy is involved. It is reasonable to use the "overall impression" to judge the infringement of fashion design, because it can not only prevent confusion with original design due to excessive reference, but also ensure a certain free creation space for designers. Under this standard, in order to avoid substantial similarity, Designers do not have to be different in every design feature, different designs can be the same in the selection of elements. Using the same design elements through different layout and expression to achieve the overall visual difference, then this creative expression should be protected by copyright. This kind of standard gives designers more freedom and creative space to use for reference and

[255] Recital 14 of *CDR*: The assessment as to whether a design has individual character should be based on whether the overall impression produced on an informed user viewing the design clearly differs from that produced on him by the existing design corpus, taking into consideration the nature of the product to which the design is applied or in which it is incorporated, and in particular the industrial sector to which it belongs and the degree of freedom of the designer in developing the design.

[256] Suthersanen, *supra* note 87, at 114.

balance the interests of individual designers, fashion circles and the public.[257]

To sum up, the copyrightability of fashion design is analyzed from the theoretical point of view to the object included in copyright protection. In order to implement the protection of fashion design, it is necessary to clarify the infringement judgment rules at the judicial level. First of all, the industrial characteristics of fashion design are not the consideration factors of denying copyright protection, and the protection from design patent does not conflict with copyright protection; secondly, the principle of separability and the standard of originality are used to determine whether fashion design can obtain copyright protection. In terms of the scope of protection, it is not recommended to exclude the overall cutting shape, but to measure it through the creative space of the designer, and the non-unique original expression can also be included in the scope of protection. Finally, when judging the infringement, informed user and overall impression standards should be adopted for the application of the substantial similarity principle of fashion design.

[257] Fei Yang 费氧, *supra* note 7, at 35.

Chapter Five Improvements of Protection System for Fashion Design in China

Based on the above discussion on the copyright protection of fashion design, this section will put forward suggestions to improve the protection system of fashion design in China from two aspects: the modification of copyright law and the connection between copyright law and patent law.

I. Amend the Copyright Law to Define Independent Legal Status for Fashion Design

It is suggested that the copyright law of China should be amended to clarify the connotation of fashion design and the protection system of the copyright law of China. For civil law countries, legislation is the basis of judicial practice. To protect fashion design and solve the confusion in judicial practice, we should first make up for the lack of legislation.

Based on the above analysis, since fashion design is regulated in the category of applied works of art, it is necessary to clarify the independent status of applied works of art under the copyright law, and then analyze fashion design within the framework of applied works of art. In the third revision of the copyright law in China, the applied

works of art have been separated from fine art works and is listed with the music works, architectural works, photography works, graphic works, fine arts works, and other sixteen works as the protection objects of the copyright law.[258] On this basis, the *Copyright Law of P.R.C. (Draft for Review)* further stipulates that: "applied art works are plane or three-dimensional plastic art works with practical functions and aesthetic significance."[259] Although the definition makes clear that the protection of practical art works is different from that of fine art works, the concept of applied art works is still vague, and the relationship between artistic part and practical part in applied art works is not clear, so the definition of applied art works needs to be further improved.

In this regard, the definition of applied works of art is suggested as follows: applied works of art are works of art produced by practical function and aesthetic significance as a whole.[260] Compared with the *Draft for Review*, the advancement of the proposed definition includes: first of all, it emphasizes the overall production of practicality and artistry. Overall production refers to the unity of practicality and artistry in the form of objects, rather than the existing fine art works as the artistic components of applied art works. If the fine art works are used for the production of daily objects, it is actually the reproduction use of the fine art works, or this way is only to transfer the fine art

[258] *See* the *Copyright Law of P.R.C. (Draft for Review)* Article 5.

[259] *Ibid.*

[260] Feng Xiaoqing and Fu Jicun 冯晓青，付继存, *supra* note 231, at 152. The definition of applied art works given by the author is a little different by excluding the plane works, stating the existence of practical art works in the form of flat works confuses the relationship between the work and the carrier. In my view there is possible for plane works to be regarded as applied art works like carpet. And the relationship between practical art works and plane works is lack of discussion in academia.

works from one existence carrier to another, without generating new applied art works. Secondly, it emphasizes that the "practical function" of applied works of art is "produced as a whole", which contains the proper handling of practicality and artistry. The overall production of applied art works refers to the creation based on the overall conception, so that the art part and the practical part cannot be separated physically but can be separated conceptually. The whole creation is the fundamental premise of physical indivisibility, and the embodiment of artistry is the equal replacement of the concept separation of artistic elements. More importantly, this kind of expression can help to distinguish the work carrier and the work itself, clarify the boundary of the work protection, and enhance the judicial operability.

Then, based on the definition of applied art works, the object of fashion design is added, which is listed in the category of applied art works together with toys, furniture, accessories, etc. Fashion design is one of the applied works of art, which has been analyzed in detail above. Although the fashion design can be defined as applied works of art through legal interpretation in the absence of explicit provisions, it can reduce the burden of argumentation and reduce the instability in judicial practice by explicitly listing "fashion design" in the article, which is the most direct way to protect fashion design.

II. Coordinate Copyright Law and Patent Law in Fashion Design Protection

The protection mode for fashion design has been discussed in fashion design protection standard of Chapter Four. From the perspective of international treaties and the practice of intellectual property legislation in the Europe Union and the United States, fashion design can be regarded as "applied works of art" protected by copyright law, and it can also be regarded as "appearance design" and protected by patent law.[261] Obviously, for the same object, copyright law and patent law overlap in the scope of protection. The suggestion is that the protection mode of applied art works and design patent should be unified, and the multiple protection and selection principles of applied art works should be clarified.

First of all, multiple protection has its legitimacy: fashion design is protected by both copyright law and design patent. This kind of overlapping right constitutes cross protection for the object of intellectual property, which is conducive to safeguard the legitimate rights and interests of the obligee.[262] The design patent and copyright of fashion design are parallel rights, and there is no possibility of substitution between them, but a complementary relationship. After the completion of a fashion design, the designer can apply for a design patent and obtain authorization. However, when the design meets the requirements of the copyright law for the applied art works, it should

[261] Zhang Xian 张宪, "A Comparative Study on the Copyright Protection of Practical Works of Art Between China and the United States 中美实用艺术品著作权保护比较研究," *Legal Review* 法学评论, no. 2 (2020): 175.

[262] Wang Zhenhua 汪振华, "Clothing Style Design Copyright Research 服装设计版权保护研究," master's thesis of Law School of Central South University (2014), at 22.

also be protected by copyright. However, the law prohibits the right holder from claiming both the copyright and the patent right of the design on the same object. Under the requirement of selection principle, when the right is infringed, the right holder can choose the most favorable legal claim right according to the case. Secondly, from the perspective of the overall protection of applied works of art, rather than the rule system of copyright law and patent law respectively, the overlap of copyright law and patent law on the protection of applied art works is actually caused by the provisions of the law itself, and it is not that the applied art works naturally have the characteristics of overlapping protection.[263] Therefore, it is better to protect the interests of creators by adjusting the law to avoid the division of works protection in the real society. Because there are different conditions, protection scope and ways between the protection of applied art works in the form of copyright and the protection of patent in the form of applying for design patent, it is acceptable in terms of both theoretical and practical effects to recognize multiple protection.[264] Besides the multiple protection brought by overlapping protection can be avoided by promoting the obligee to obtain only one form of protection through the selection principle.

[263] Feng Xiaoqing and Fu Jicun, 冯晓青, 付继存 *supra* note 231, at 153.

[264] *Ibid.*

Chapter Six Conclusion

Fashion design is a result of intellectual labor, but the current intellectual property system in China lacks sufficient protection for fashion design, which leads to serious piracy in the fashion industry. With the improvement of people's living standards, fashion design plays an increasingly important role in people's daily life. Therefore, the protection of fashion design is of great significance to encourage the innovation of fashion industry, which is in line with the purpose of copyright legislation.

Fashion design is formed under the background of artistic penetration into life. It has both aesthetic significance and practicability to meet people's daily life. It is necessary to protect fashion design through copyright in the reality that the protection of design patent and trademark law and anti-unfair competition law is insufficient. Although the *Copyright Law of P.R.C.* lacks clear regulations on fashion design, fashion design meets the requirements of the object under the two basic principles of “the dichotomy of thought and expression” and “originality” in the copyright law, thus meets the conditions of copyright protection. According to the copyright law, cutting design drawings, effect design drawings and clothing produced in the process of fashion design conform to the definitions of graphic works, fine art works and applied art works respectively. In terms of the right content with reproduction right as the core, the copy of fashion design includes the reproduction between two-dimensional works

and the reproduction from two-dimensional to three-dimensional works. It must be emphasized that if the final ready-to-wear clothes contain aesthetic elements, the act of making ready-to-wear clothes based on graphic works is also a kind of reproduction and within the copyright protection scope.

As for the infringement rules, first of all, it is necessary to make clear the standard that fashion design is protected by copyright law. That is, industrial characteristics should not be taken into account; the “originality” standard should not be too high and conform to the protection purpose of fashion design and be positively correlated with practical factors; the principle of “separability” which emphasizes physical indivisibility but conceptual separability should be used in judging copyright protection standards. Secondly, it is clear that the protection scope of fashion design should be extended to the overall shape, and the “designer freedom” standard is adopted to exclude the expression that limited by practical functions from copyright protection. Finally, the principle of “informed user” and the principle of “substantial similarity” should be established in the specific infringement rules.

China is revising the third copyright law, which is a good time to emphasize the protection of fashion design. It is suggested to confirm the independent legal status of fashion design in copyright law, coordinate the protection of design patent and copyright, and clarify the multiple protection and selection principles of applied art

works.

BIBLIOGRAPHY

LEGISLATION

1. People's Republic of China

Anti-Unfair Competition Law of the People's Republic of China (2019)

Copyright Law of the People's Republic of China (Draft for Review)

Copyright law of the People's Republic of China (2010)

Guidelines for Patent Examination of the State Intellectual Property Office of the People's Republic of China 2010 (Revised 2019)

Implementation of the Patent Law of the People's Republic of China (2010)

Patent Law of the People's Republic of China (2008)

Regulations for the Implementation of the Copyright Law of the People's Republic of China (2013)

Regulation for the Implementation of the Trademark Law of the People's Republic of China (2014)

The Implementation of the provisions of International Copyright Treaty (1992)

Trademark Law of the People's Republic of China (2013)

2. The Unite States

Code of Federal Regulation (C.F.R.) (1949)

Copyright Act of 1909

Copyright Act, 17 USC c16 (1976).

US Copyright Act of July 8, 1870

US, Bill HR 2511, Innovative Design Protection and Piracy Prevention Act, 112th Cong, (2011-2012).

3. The Europe Union

Design Directive 98/71/EC of the European Parliament and Council [1998]

Regulation 1891/2006 on Community designs [2006]

4. International

Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886, Paris (1971)

Locarno Agreement on Establishing an International Classification for Industrial Design (1979)

CASES

Alfred Bell & Co. v. Catelda Fine Arts, Inc., 191 F.2d 99 at 103-105 (2ed Cir., 1951)

Durham Industries, Inc. v. Tomy Corp., 208 USPQ 10 (2nd).

Esquire v. Ringer, 414 F. Supp. 939 (D.D.C., 1976).

Feist Publications Inc. v. Rural Tel. Serv. Co., 499 U.S. 340 at 345 (1991).

Hu Sansan v. Qiu Haisuo and the National Art Museum of China, [1999] Beijing's Second Intermediate People's Court 145.

Hu Sansan v. Qiu Haisuo and the National Art Museum of China, [2001] Beijing Higher People's Court 18.

Huang Jiale v. Guangdong World Book Publishing Co., [2004] Guangzhou Intermediate People's Court 253.

Huasi Industrial Group Suning Huasi Tannery Products Co., Ltd. v. Wuxi Mengyan Garment Co., Ltd., [2007] Hebei Higher People's Court 16.

Huasi Industrial Group Suning Huasi Tannery Products Co., Ltd. v. Wuxi Mengyan Garment Co., Ltd., [2006] Shijiazhuang Intermediate People's Court 99.

Karen Millen Fashions Ltd. v. Dunnes Stores, Dunnes Stores (Limerick) Ltd., Case C-345/13 (CJEU, June 19, 2014).

Maze v. Stein, 347 U.S. 201 (S. Ct., 1954)

Nanjing Times Sculpture Art Co., Ltd., v. Nanjing Modern Sculpture Center, [2003]

Nanjing Intermediate People's Court 30.

Ningbo Juyang Daily Products Co., Ltd. v. Ninghai Jinchang Stationery Factory, [2013] Ningbo Intermediate People's Court 142.

Procter & Gamble v. Reckitt Benckiser (UK) Ltd [2006] EWHC 3154 (Ch) High Ct (UK).

Qing Linhai v. Hong Fuyuan, [2009] Beijing No. 2 Intermediate People's Court 9953.

Shanghai Jinhe Protective Products Co., Ltd., and Shanghai Jinzecheng Industrial Protective Products Co., Ltd. v. Gu Jing, Shanghai Zhengyi Garment Co., Ltd. And Shanghai Jida Garment Factory, [2005] Shanghai Pudong New Area People's Court 53.

Shanghai NewFox Auto Parts Co., Ltd. v. Shanghai Sorea Automotive Products Co., Ltd., [2006] Shanghai Higher People's Court 25.

Shanghai Shangaoshui Clothing Co., Ltd. v. Yan Dalun and Feng Dawei, [2009] Shanghai Higher People's Court 94.

Star Athletica v. Varsity Brands, 137 S.Ct. 1002, 1009 (2017).

Zuo Shangmingshe Home Ware (Shanghai) Co., Ltd. v. Beijing Zhongrong Hengsheng Wood Co., Ltd. and Nanjing Mengyang Furniture Sales Center, [2016] Jiangsu High People's Court 291.

BOOKS

Masouyé, Claude. *Guide to the Berne Convention for the Protection of Literary and*

Artistic Works (Paris Act, 1971) (World Intellectual Property Organization, 1978).

Mihály, Ficsor. *Guide to the Copyright and Related Rights Treaties Administrated by WIPO and Glossary of Copyright and Related Rights Term* (World Intellectual Property Organization, 2004).

Burk, Dan L. and Mark A. Lemley. *The Patent Crisis and How the Courts Can Solve It* (Chicago : University of Chicago Press, 2009).

Guo, Yan 郭燕. *Analysis on cases of Clothing Intellectual Property Protection and Infringement* 服装知识产权保护及侵权案例分析, Beijing: Intellectual Property Press 知识产权出版社, 2012.

He, Huaiwen 何怀文. *China's Copyright Law: Case Review and Normative Interpretation* 中国著作权法:判例综述与规范解释 (Beijing: Peking University Press 北京大学出版社, 2016).

Huang, Hui 黄晖. *Trademark Law* 商标法 (Law Press 法律出版社, 2004).

Huang, Qinnan 黄勤南, *Intellectual Property Law* 知识产权法 (Law Press 法律出版社, 2000), 301-303.

Loschek, Ingrid. *When Clothes Becomes Fashion: Design and Innovative Systems* (Oxford: Berg, 2009).

Jarnow, Jeannette A., Miiriam Guerreiro and Beatrice Judelle. *Inside the Fashion Business: Text and Readings* (New York: John Wiley, 1987), 150.

Jones, Sue. *Fashion Design Course*. Chinese Edition (Beijing: Intellectual Property Press: China Water Resources and Hydropower Press, 2006).

Kong, Xiangjun 孔详俊. *New Theory of Anti-Unfair Competition Law* 反不正当竞争法新论 (People's Court Press 人民法院出版社, 2001), 310.

Li, Mingde 李明德. *Intellectual Property Law* 知识产权法, (China: Law Press 法律出版社, 2008).

Lu, Haijun 卢海君. *Copyright Object Theory* 版权客体论 (Beijing: Intellectual Property Publishing House 知识产权出版社, 2011)

Berg, Nanda van den and Wei, Xiaoqiang 韦晓强. *The Power of Fashion: about design and meaning* 时尚设计的力量: 经典设计与文化含义. Chinese ed (Taiwan: Building Block Culture 积木文化, 2010).

Ricketson, Ginsburg. *International Copyright and Neighbouring Right*, 2nd edn, (Oxford University Press, 2005).

Liu, Ruipu and Liu, Weihe 刘瑞璞, 刘维和. *Clothing Structure Design Principles and Techniques* 服装结构设计原理与技巧, (Beijing: China Textile Press 中国纺织出版社, 1993).

Suthersanen, Uma. *Design Law: European Union and United States of America*. The Second Edition (England: Thomson Reuters (Legal) Limited Press, 2010).

Yang, Lihua and Feng, Xiaoqing 杨利华, 冯晓青. *Research and Legislative Practice of Chinese Copyright Law* 中国著作权法研究与立法实践 (China University of Political Science and Law Press 中国政法大学出版社, 2014).

Zhang, Guangliang 张广良. *Judicial Protection of Industrial Designs* 外观设计的司法保护 (China: law Press 法律出版社, 2008).

Zheng, Chengsi 郑成思. *Copyright Law* 著作权法. (Beijing: China Renmin University Press 中国人民大学出版社, 1990).

Zhi, Guo and Ling, Xiao 支果，凌潇. *Topics and Interpretations of Intellectual Property Law* 知识产权法专题与判解 (Beijing: Intellectual Property Publishing House 知识产权出版社, 2013).

Zhou Lin 周林. "*The Patent, Copyright, and Unfair Competition Dispute Case between Intel Corporation, Lego Overseas Company and Dongguan Fun Toy Industry Co., Ltd.* 英特莱公司，乐高海外公司与东莞市乐趣玩具实业公司专利权，著作权，不正当竞争纠纷案." Published on References on Intellectual Property Handling 载中国社会科学院知识产权中心 6, (China Founder Press 中国方正出版社, 2003), 118.

THESES

Doagoo, B. Courtney. "The Use of Intellectual Property Laws and Social Norms by Independent Fashion Designers in Montreal and Toronto: An Empirical Study." PhD Thesis of University of Ottawa, Faculty of Law (2017).

Chen, Xi 陈熙. "The Study on the rational reference and plagiarism in the creation of clothing works 论服装作品创作中的合理借鉴与抄袭." Master's thesis of the Gui Zhou University (2017).

Chen, Yeyu. "Intellectual property protection in the fashion industry: current trends and insights for China." Master's thesis of the University of Macau (2014).

Fei, Yang 费氧. "The Research on Copyright Protection Issue of Apparel Design 服装设计中的著作权保护问题研究." Master's thesis of China University of Political Science and Law (2016).

Jiang, Qin 蒋琴. “Copyright Protection of Fashion Design 论时装设计的版权保护.” Master’s thesis of the Southwest University of Political Science and Law (2013).

Li, Xiaoxuan 李晓璇. “Research on the Protection of Intellectual Property Rights of Clothing Design in China 我国服装设计知识产权保护研究.” Master’s thesis of Graduate School of Chinese Academy of Social Sciences 2018.

Ma, Binbin 马宾宾. “Comparative Study Intellectual Property of Fashion Industry 服装产业知识产权比较研究.” Master’s thesis of Shandong University,2013.

Ren, Fei 任斐. “Research on the Protection of Costume Works 服装作品保护问题研究.” Master’s thesis of Soochow University (2017).

Wan, Kouw 万蔻. “Study of Intellectual Property Protection Mode of Jewelry Design 珠宝首饰设计的知识产权保护模式研究.” Master’s thesis of Huazhong University of Science & Technology (2016).

Wang, Zhenhua 汪振华. “Clothing Style Design Copyright Research 服装设计版权保护研究.” Master’s thesis of Law School of Central South University (2014).

Wu, Qiongjie 吴琼洁. “Fashion Design Protection and Knockoff Prevention-in Light of Controversy in Fashion Design Protection in US 服装设计山寨的法律问题.” Master's thesis of Beijing foreign Studies University (2015).

Xue, Jiao. “Design piracy: a critical analysis of the present protection of fashion design by intellectual property laws.” Master’s thesis of the University of Macau (2014).

Zhang, Fanzhong 张凡忠. “Research on the Problem of Patent Law Protection of Sportswear Design 运动服装外观设计专利法保护的难点.” Master thesis of Xiamen University (2018).

ARTICLES

Afori, Orit Fischman. “Reconceptualizing Property in Designs.” *Cardozo Arts and Entertainment Law Journal* 25, no. 3 (2008).

Cai, linxiao and Hu, Binbin 蔡凌霄, 胡滨斌. “The Definition of Fashion Design’s Plagiarizing in the View of Copy Right Law 版权法视角下的服装设计抄袭认定.” *Case Study* 个案点击, 8 (2012): 83.

Chen, Yizhuoning 陈依卓宁. “Research and Analysis on the Copyright Protection of Clothing 服装设计作品的著作权司法保护探析.” *Electronic Intellectual Property* 电子知识产权, 1-2 (2017).

Ding, Liying 丁丽瑛. “Copyright Protection of Applied Art Works 实用艺术品著作权的保护.” *Tribune of Political Science and Law(Journal of China University of Political Science and law)* 政法论坛(中国政法大学学报) 23, no. 3 (2005): 140.

Rosenblatt, Elizabeth L. “A Theory of IP’s Negative Space.” *COLUM. J.L. & ARTs* 34, no. 3 (2011).

Fan, Ran 范然. “Enlightenment of IDPPPA Act on China's Garment Industry IDPPPA 法案对我国服装产业的启.” *Shang* 商, 19 (2011): 146-148.

Fanelli, Laura. “A Fashion Forward Approach to Design Protection.” *St. John’s Law Review* 85: no. 1 (2011).

Feng, Xiaoqin and Fu, Jicun 冯晓青, 付继存. “Research on Reproduction Right in Copyright Law 著作权法中的复制权研究.” *JURIST* 法学家, no. 3 (2011).

Feng, Xiaoqing and Fu, Jicun 冯晓青, 付继存. “The independence of applied art works in copyright law 实用艺术作品在著作权法上之独立性.” *Legal Studies* 法学研究, no. 2 (2018): at 152.

Feng, Yilan 冯一兰. “Intellectual Property Protection of Fashion Design 服装设计的知识产权保护.” *Law and Society* 法制与社会, 2 (2019).

Garcia, Denisse F.. “Fashion 2.0: It's Time for the Fashion Industry to Get Better-Suited, Custom-Tailored Legal Protection.” *Drexel Law Review* 11, no. 1 (2018).

Giambarrese, Nicole. “The Look for Less: A Survey of Intellectual Property Protections in the Fashion Industry.” *Touro Law Review* 26, no. 1, 2012.

Guan, Yuying 管育鹰. “An Analysis of Legal Protection Path for Applied Art Products----also on Amendments to the Copyright Law 实用艺术品法律保护路径探析——兼论《著作权法》的修改.” *Intellectual Property* 知识产权, 7 (2012).

Guo, Beiwei 郭蓓薇. “On the Protection of Intellectual Property Rights in Fashion Design 浅谈服装设计的知识产权保护.” *Intellectual Property* 知识产权, 6 (1998).

Guo, Yan and Wang, Xiuli 郭燕, 王秀丽. “Analysis of Current Situation and Problems of the Patent Protection of the Clothing Design Products in China 我国服装类产品外观设计专利保护现状及问题分析.” *Intellectual Property* 知识产权, 1 (2005): 30-33.

Hagin, Leslie J.. “A Comparative Analysis of Copyright Laws Applied to Fashion

Works: Renewing the Proposal for Folding Fashion Works Into the United States Copyright Regime." *TEX . INT'L L.J.* 26, no. 2 (1991): 341-345.

He, Min 赫敏. "Research on the Mode of Intellectual Property Protection Related to Fashion Design 服装设计相关的知识产权保护模式探析." *Intellectual Property* 知识产权, 9 (2019).

He, Mu 和睦. "The Protection of Intellectual Property in China from the Disillusionment of Xiushui Street Market 从秀水街市场的幻灭看中国知识产权保护." *Journal of Xinjiang Normal University: Natural Science Edition* 新疆师范大学学报:自然科学版, 3 (2006): 440-444.

Hemphill, Scott C. and Jeannie Suk. "Schumer's Project Runway." *WALL ST . J.*, Aug. 24, 2010, 13.

Huang, Ruiyao, Shen, Julan and Huang, Xiufen 黄瑞耀, 沈菊兰, 黄秀芬. "Research on the Protection of Clothing Intellectual Property in Zhejiang Province 浙江省服装知识产权保护研究." *Zhejiang Statistics* 浙江统计, 10 (2006): 26-38.

Huang, Xuchun 黄旭春. "Clothing Products Difficult to be Protected by Copyright Law 难为著作权保护的服装产品." *Electronic Intellectual Property* 电子知识产权, 9 (2008).

Katelyn, Brandes. "Design Protection in the United States and European Union: Piracy's Detrimental Effects in the Digital World." *Brook. J. Int'lL* 37, no. 3 (2012).

Li, Bai 李柏. "Patent Protection of Clothing Industry 服装行业专利保护." *Global Market Information Report* 环球市场信息报道, 17 (2016): 16-17.

Li, Xiujuan 李秀娟. “Discussion on Intellectual Property Protection of Fashion Design Innovation 时尚设计创新的知识产权保护探讨.” *Electronic Intellectual Property* 电子知识产权, 11 (2015): 75-76.

Liu, Kechen 刘珂辰. “Research on the Protection Mode of Intellectual Property Law of Clothing Design in China 我国服装设计保护模式的研究.” *Economic and Law Research* 经济法学研究, 3 (2017).

Liu, Shijie 刘世杰. “How to Define the Copyright in the Embroidery Industry Chain -- the Infringement of Embroidery Derived from the Oil Painting ‘Drunken Concubine’ 刺绣产业链上的著作权如何界定———油画‘贵妃醉酒’衍生刺绣遭侵权.” *Beijing Business Daily* 北京商报, September 14, 2009.

Liu, Shijie 刘世杰. “Intellectual Property Protection Practice of Clothing and Clothing Design 服装及服装设计的知识产权保护实务.” *2009 Annual Meeting of Intellectual Property Committee of all China Lawyers Association and Papers Collection of China Lawyers Intellectual Property Forum* 2009 中华全国律师协会知识产权专业委员会年会暨中国律师知识产权高层论坛, October 1, 2009.

Liu, Yuhui and Zheng, Youde 刘宇晖, 郑友德. “Copyright Protection of Fashion Design 服装设计的著作权保护.” *China Copyright* 中国版权, 5 (2002).

Lou, Jiarong 楼佳蓉. “A Preliminary Study on the Law of Intellectual Property Protection of Clothing Design 服装设计的知识产权保护之法律初探.” *Intellectual Property* 知识产权, 4 (2002).

Lu Haijun 卢海君, “The Connotation of Originality from the Development of

Original Case Law 从原创性判例法的发展看原创性的内涵." *Journal of SWUPL* 西南政法大学学报 11, no. 1 (2009): 65.

Lu, Yang 陆杨. "Discussion on the Theoretical Basis of Intellectual Property Protection of Garment Enterprises 服装企业知识产权保护的理论依据探讨." *Contemporary Academic Forum* 当代学术论坛, 5 (2009): 23-25.

Lv, Bingbin 吕炳斌. "The Theoretical Logic of the Copyrightability of Practical Art Works 实用艺术作品可版权性的理论逻辑." *Comparative Study* 比较法研究, no. 3 (2014).

Martinez, Dianna Michelle. "Fashionably Late: Why the United States Should Copy France and Italy to Reduce Counterfeiting." *Boston University International Law Journal* 32, no. 2 (2014).

Monseau, Susanna. "European Design Rights: A Model for the Protection of All Designers from Piracy." *American Business Law Journal* 8, no. 1 (2011).

Nurghai, Safia A.. "Style Piracy Revisited." *J.L.&Pol'y* 10, no.2 (2002).

Neuwirth, Rostam J. "Counterfeiting and piracy in international trade: the good, the bad and the oxymoron of 'real fakes'." *Queen Mary Journal of Intellectual Property Vol. 7*, No.4 (2017).

Purcell, Lauren. "A Fashion Flop: The Innovative Design Protection and Piracy Prevention Act." *Journal of Law and Commerce* 31, (2013): 203-220.

Raustiala, Kal and Christopher Sprigman. "The Piracy Paradox Revisited." *Stan. L. Rev.* 61, no.5 (2009).

Raustiala, Kal and Christopher Sprigman. "The Piracy Paradox: Innovation and Intellectual Property in Fashion Design." *Va. L. Rev* 92, no. 8 (2006).

Song, Yizhen 宋贻珍. "On the legal protection of intellectual property rights in

fashion design in China 论我国服装设计的知识产权法律保护." *Journal of Shaoguan University: Social Science Edition* 韶关学院学报: 社会科学版, 2 (2001): 60-64.

Tan, Irene. "Knock it Off, Forever 21! The Fashion Industry's Battle Against Design Piracy." *J.L. & Pol'y* 18, no. 2 (2010).

Tse, F. Tiffany. "Coco Way before Chanel: Protecting Independent Fashion Designers' Intellectual Property against Fast-Fashion Retailers." *Cath. U. J. L. & Tech* 24, no. 2 (2016).

Wang, Limin 王莉敏. "The Current Protection Situation and Improvement of Intellectual Property Law for Clothing Design in China 我国服装知识产权保护现状及完善." *Law and Society* 法制与社会, 11 (2017).

Wang, Taipin 王太平. "Legal Protection Mode of Industrial Design 工业设计的法律保护模式." *Science & Technology* 科技与法律, no. 3 (2002).

Wang, Xiuli and Guo, Yan 王秀丽, 郭燕. "Investigation and Analysis of Intellectual Property Protection of Clothing Enterprises and Solutions 服装企业知识产权保护状况调查分析及解决对策." *Journal of Beijing Institute of Clothing* 北京服装学院学报, 2 (2006): 60-65.

Wang, Zehong 王泽红. "On the Intellectual Property Protection of Clothing 论服装的知识产权保护." *Journal of Suzhou University: Engineering Edition* 苏州大学学报: 工科版, 3 (2002): 100-103.

Wang, Zhanglin 汪张林. "Problems and Countermeasures in Intellectual Property Rights of Textile and Garment Enterprises in China 我国纺织服装企业知识产

权方面存在的问题与对策." *Science and Technology and Economy* 科技与经济, 2 (2007): 40.

West, Brittany. "A New Look for the Fashion Industry: Redesigning Copyright Law with the Innovative Design Protection and Piracy Prevention Act." *Business Entrepreneuship & the Law* 5, no. 1 (2011).

Wu, Xuanrun 吴宣润. "On the 'Counterfeit Design' of Clothing 论服装的'仿冒设计." *Fashion Designer* 服装设计师, 7 (2002): 18-21.

Yang, Yongmei and Wang, Xiao 杨咏梅, 王晓. "Connotation Comparison and Scope Division of Protective Objects of Applied Artworks and Design Patents: Discussing the Trial Ideas of the Applied Artworks Litigation, Journal of Law Application 实用艺术品与外观设计专利在保护对象上的内涵比较与范围划分:兼论实用艺术品侵权诉讼审理思路." *Journal of Law Application* 法官说法, no. 13 (2018): 78.

Zhang, Xian 张宪. "A Comparative Study on the Copyright Protection of Practical Works of Art Between China and the United States 中美实用艺术品著作权保护比较研究." *Legal Review* 法学评论, no. 2 (2020).

Zhou, Xiang 周翔. "Analyse on Legal Protection of Applied Artworks: Also on the Relationship between the Copyrights of Applied Artworks and Design Patent Rights 论实用艺术品的法律保护: 兼论实用艺术品著作权与外观设计专利权的关系." *Legal System And Society* 法制与社会, 9 (2009).

Zhuang, Zhen 庄臻. "The Legal Protection Mode of Fashion Design 服装设计的法律保护模式." *Legal Forum* 法制论坛, 2 (2008): 200-210.

ONLINE ARTICLES

Brown, Evan. "Inspiration vs. Imitation: Where To Draw The Line?" *Designmantic*, Aug. 11, 2014, available at: https://www.designmantic.com/blog/inspiration-vs-imitation/ (last accessed 14 September 2020).

Chen, Yinyin 陈颖颖. "Can Clothing be Protected as Art Works? 成衣能否作为美术作品保护?" *China Court Network* 中国法院网, Jun. 20, 2018, available at: https://www.chinacourt.org/index.php/article/detail/2018/06/id/3361457.shtml (last accessed 14 September 2020).

Hutchens, Beth. "Don't Copy My Blue Suede Shoes: Copyright Protection for Fashion Designs." *IPWATCHDOG*, September 23, 2010, https://www.ipwatchdog.com/2010/09/23/copyright-protection-for fashion/id=12602/ (last accessed 14 September 2020).

Horyn, Cathy. "Is Copying Really Part of the Creative Process?" *N.Y. Times*, Apr. 9, 2002, available at: https://www.nytimes.com/2002/04/09/ nyregion /is-copying-really-a-part-of-the-creative-process.html (last accessed 14 September 2020).

Mansfield, Stephanie. "Status Faux: Knockoff Retailers Bag Customers with Similar Looks, Cheaper Products." *WASHINGTON TIMES*, Oct. 30, 2005, available at: https://www.questia.com/read/1G1-139266128/status-faux-knockoff-retailers-bag-customers-with (last accessed 14 September 2020).

Wilson, Eric. "Before Models Can Turn Around, Knockoffs Fly." *N.Y. TIMES*, Sept. 4, 2007, available at: https://www.nytimes.com/2007/09/04/us/04fashion.html?searchResultPosition=1 (last accessed 14 September 2020).

Yang, Zhijie 杨智捷. "Does Cheerleading Uniform Designs are Protected by

Copyright La: Varsity Brands v. Star Athletica Case 拉拉队服设计是否受著作权法保护: 2015 年 Varsity Brands v. Star Athletica 案." North American Intellectual Property 北美智权报, no. 165 (2016), available at: http://www.naipo.com/Portals/1/web_tw/Knowledge_Center/Infringement_Case/IPNC_171129_0502.htm (last accessed 14 September 2020).

Zerbo, Julie. "Did Saint Laurent Copy Forever 21?" *The Fashion Law,* Sep. 4, 2015, available at: http://www.thefashionlaw.com/home/did-saint-laurent-actually-copy-forever-21?rq=forever%2021 (last accessed 14 September 2020).

Zerbo, Julie. "Forever 21 Does it Again, Copies Feral Childe." *The Fashion Law*, Jul.11, 2017, available at: http://www.thefashionlaw. com/home/forever-21-does-it-again?rq=forever%2021 (last accessed 14 September 2020).

Zerbo, Julie. "Forever 21 Sues Other Brands for Copying." online: *The Fashion Law*, Feb. 12 2018, available at: http://www.thefashionlaw.com /home/forever-21-sues-brands-for-copying?rq=forever%2021 (last accessed 14 September 2020).

Zerbo, Julie. "Vetements vs. Forever 21: Beware of Dogg." *The Fashion Law*, Mar. 17 2018, available at: http://www.thefashionlaw.com/home/vetements-vs-forever-21-beware-of-dogg?rq=forever%2021 (last accessed 14 September 2020).

Zhong, Ming 钟鸣. "Fashion Design, Extra-Legal Space and Intellectual Property Models 时装设计, 法外空间与知识产权模式." *Zhichanli* 知产力, Dec. 25, 2015, available at: http://www.zhichanli.com/article/21935 (last accessed 14 September 2020).

WEBSITES

"Brief Statistics of Industrial Designs in 2018", published by State Intellectual

Property Office, available at: http://www.cnipa.gov.cn/docs/20190528164118631 19.pdf (last accessed 14 September 2020).

“Garment design plagiarism is really a land of extraterrestrial?”. Tencent News, available at: https://new.qq.com/omn/20190527/20190527A09DTQ.html (last accessed 14 September 2020).

“Patent Payment Guide of State Intellectual Property Office of the PRC”, State Intellectual Property Office, available at: http://www.sipo.gov.cn/ (last accessed 14 September 2020).

“Qipu Road Sells Fake Burberry and Prada”, XINMIN.CN, available at: http://shanghai.xinmin.cn / xm sq /2013/04/25/19947054.html (last accessed 14 September 2020).

The website of Nation Intellectual Property Office, available at: http://www.sipo.gov.cn/ (last accessed 14 September 2020).

“The Domestic Clothing Giant Has Been Accused of Piracy, Which Annoys the Chinese Original.” PhoenixNet, Sep, 12, 2018, available at http://fashion.ifeng.com/c/7ma5zcnJNR3 (last accessed 14 September 2020).