Part I – Presentation of the Thesis ................................................................. 5
  1. Introduction .......................................................................................... 5
    1.1. Problem definition ...................................................................... 5
    1.2. The Purpose ................................................................................ 5
    1.3. Delimitation ................................................................................ 5
Part II – Background of Fashion ................................................................. 6
  1. The Fashion Industry ........................................................................ 6
    1.1. Basics .......................................................................................... 6
    1.2. Inspiration from other designs in fashion .................................... 7
  2. The importance of the design and why it should be protected .......... 8
    2.1. Fashion is an Art form of Craftsmanship ..................................... 9
    2.2. A billion dollar industry ............................................................... 9
Part III – Intellectual Property Protection of Fashion ............................. 10
  1. The Legal Balance ............................................................................ 11
  2. The US .............................................................................................. 11
    2.1. Copyright Law ........................................................................... 11
      2.1.1. Legal Framework ................................................................. 11
      2.1.2. Protection ........................................................................... 12
      2.1.3. Fashion protection under the 17 U.S.C. ............................... 12
        Physical separability .................................................................. 12
        Conceptual separability ............................................................ 13
      2.1.4. Summary ............................................................................ 14
    2.2. Patent Law ................................................................................ 15
      2.2.1. Legal framework ................................................................. 15
      2.2.2. Protection ........................................................................... 15
      2.2.3. Summary ............................................................................ 16
    2.3. Trade Dress ................................................................................ 17
    2.4. Conclusion .................................................................................. 17
  3. The EU .............................................................................................. 18
    3.1. Copyright .................................................................................. 19
      3.1.1. Legal Framework ................................................................. 19
      3.1.2. Principles of Copyright ....................................................... 19
      3.1.3. Duration of Protection ....................................................... 23
Part I – Presentation of the Thesis

1. Introduction
Only a few articles have been written on intellectual property rights in the fashion industry. This is striking, since fashion is international. The main part of the Western World directs its focus towards the same catwalks, the same fashion houses and the same lifestyle magazines. The season’s clothing of the fashion houses is presented first in New York, then in London, Milan, and finally in Paris. Then the new lines are critiqued in Vogue, In Style and Elle. Just as the inspiration to the design, so are new garment designs floating free of territorial (and legislative) boundaries – mostly through the internet and its social media. The faster the news about a new design is getting out to its potential buyers, the earlier will the demand of each piece be clarified. All of it is in the interests of both parties.

But there is a downside. As fast as the pictures from different catwalks are floating on online fashion blogs and web pages, just as fast can the items be copied. This is not limited to the country, where the design is presented and/or protected. If one or more continents have the access to pictures of these pieces, the copying can begin in several countries at the exact same time. And copying is “big business”. Several international discount fashion houses have created their names around this concept. Numerous lawsuits do not scare these enormous companies from testing the legal borders of infringement because even with a lost case, there is still profit to gain.

1.1. Problem definition
This thesis will investigate how a fashion design can obtain design and copyright protection, how the law defines the line between inspiration and copying and finally the efficiency of Western protection of fashion designs, mainly clothes. In the study there will be emphasis on case law and literature from the Nordic countries, the EU and the US.

1.2. The Purpose
Making the joy of creativity flourish without the pain of seeing others steal a work, has given and still gives headache to several people within the fashion industry. The purpose is to create an instrument for people with knowledge of design law to understand how this balance is practised in courts. With this thesis I hope to make the pain smaller and the joy greater.

1.3. Delimitation
Trademark law is not included in this thesis. Major brands like Louis Vitton and Chanel incorporating their logo in materials, to secure their designs through trademark law, see e.g. their bags. This logo procedure has rarely anything to do with the creative development of a design and is why this is not mentioned
further. The aim for this thesis is to investigate the legislatures’ desired core protection of designs: copyright and design law. Marketing law will be included as well.

The grey area in between trends and line-by-line copying will be the subject of the thesis. With an industry that changes so fast and with trendsetters that usually determine the direction for next season, there will be similarities in the clothes. Light will also be shed on the effect of this.

Part II – Background of Fashion

1. The Fashion Industry
The fashion industry is a fast developing and highly creative market. When going through Nørgaard, Fashion Dictionary; Seeling, Fashion: The Century of the Designer and Wolfe, Ready or Not, history has shown that fashion reflects society. To create a success, a designer must capture the soul of the time in an attractive design. Major dramatic changes in society feed major dramatic changes in people’s wardrobe. Whether it be introduction to new cultures, world wars, liberation of women, liberation of sex, new technology, former times greatness, financial crisis, the everyday person on the street – everything is a source of inspiration. Since history is supposed to repeat itself, the inspiration has from time to time been the same in different decades. This has resulted in similar interpretations in fashion designs, which will be later discussed.

1.1. Basics
Many cultural innovating industries, such as film, music, and even publishing, are increasingly concentrated. A small number of companies produce a large amount of the total industry output. In contrast, the degree of concentration in the fashion industry is relatively low. There is a large number of companies of varying size producing and marketing original designs. No single firm, or small set of firms, represent a significant share of total industry output. Since the trends shift so fast, unknown designers may become world famous for one fashion line, and then dropped the next season.

The products of the fashion industry are typically segmented into broader categories called “a fashion pyramid”, see Doeringer et.al., Can Fast Fashion Save the U.S. Apparel Industry? Basically at the top are haute couture, ready-to-wear and bridge collections. Next level is “better” fashion, and in the bottom is the basic or commodity category, see Raustiala et.al., Piracy Paradox, p. 1693. The higher the category is in this pyramid, the more increases the price. But the borders are, if not indistinct, then blurry. What might be considered as the less expensive line of one company, might be at the same level as the premium of another. In addition, particular forms of garments, such as jeans, appear in several categories.
The term “design content” refers to the amount of design innovation, generally speaking. The higher design content, the faster the design turnover. Generally, apparel in the “better” and basic categories contain less design content and experience slower design change than major fashion houses. As an example, new collections from Topshop are often more similar to the former one, than Prada’s spring 2005 and spring 2006, see Raustiala et al., Piracy Paradox p. 1694.

1.2. Inspiration from other designs in fashion
This section is dedicated to distinguish between following a trend and making a direct copy of a piece of clothes.

“Trend” is said to be invented by Kenzo Takada, see Wolfe, Ready or Not. Several people have tried to define this term. The Oxford Dictionary defines a trend as “a general direction in which something is developing or changing.” An attempt of a legal definition was “newly popular concept[s], idea[s], or principle[s]” that create an “immediate amplified demand for articles” that embody those styles, see the bill H.R. 2196, 111th Congres § 2(e)(2) (2009). During the H.R. 5055 hearings it was stated that fashion trends are more difficult to define. David Wolfe, creative director of Doneger Group, said: “The whole fashion concept is so ephemeral that trying to nail down specifics becomes impossible,” see supra note 8. at 2–3. As hard as it is for professionals and experts to define a fashion trend, basically it is a direction of designs which becomes popular among the mass: A shape, a colour, a fabric or a pattern that are used again and again with the purpose to increase the sales of clothes.

Trend imitation is called the “trickle-down effect”. It goes from the haute couture to the more affordable prêt-a-porter stores. This includes the “hot” colour of the season, the hem length of skirts, and the general cut of designs.

This form of imitation is not considered as an infringement. Trends can also be reused. See Seeling, Fashion, The Century of the Designer p. 6, 139, 359 and 446 for several examples of reviews of trends.

It is important to stress that a trend is a “direction of inspiration.” It illustrates a distinction between those who simply replicate the work of others and those who contribute with their own creativity, see Hemphill et al, The Law, Culture and Economics of Fashion, p. 113 f.

Where a trend is the direction or the theme of fashion, the “piece” is the individual design. A copy of a piece is also called a “knockoff”. A knockoff was defined in People v. Rosenthal. It is when a “merchandise [...] copies the design and style of a product,” see first paragraph. This phenomenon is known as “imitation” or, in the case of exact copies, “slavish imitation”. Usually, these are made of materials of lower quality, see later under Part III Intellectual Property Protection of Fashion. These line-for-line knockoffs are typically targeted at “people who appreciate high style but can’t afford high prices.”, see Surowiecki, The Piracy Paradox. This area is constantly testing the extent of fashion design protection; the aim for the designer is
to replicate a product without crossing the line and infringing the original. Knock offs are the articles within the main focus of this thesis.

2. The importance of the design and why it should be protected
The existing society has a clear interest in aesthetics values are developed and promoted. Design is one of the strongest expressions of culture. Through design the changes of the society are being reflected. Clothes and fashion contribute to the cultural aspect on a level that has been compared to fine art, see later under 2.1. Fashion is an art form of craftsmanship. A product must not only fulfill its function, but also be appealing and fashionable, see Levin, IPR, p. 346. And the intellectual property is meant to encourage companies to dare invest in this. A secondary significant impact is a good and efficient product development also contributes to the development of new materials and manufacturing processes as well as competitive products. Laser cut and the efficient distribution network of Zara are examples of bi-products of the fashion world. Therefore, appearance protection appears to be safe grounds of increased product development and investment will, see Levin, Formskydd, p. 56-57, 64-71 and Borcher, Produkt Efterligninger, p. 56 cf. In addition, when a buyer consider purchasing a garment, the demand of image and quality is (at least as) equal to its function, see e.g. the Swedish NIR 1995.311 (Tunic). Some things are bought for their intrinsic usefulness, like a screwdriver or a dishwasher. Positional goods, such as clothes from trendy designers, are bought because of what they say about the person who buys them. Fashion design is a form of communication. It is a way for the designer to express himself, but also a way for the consumers to project their personality, opinions and values, see Valentin’s comment, DR2 Dagen. As an example, the French women during WWII wore blue, white and red, to state their political opinion and resistance, see Seeling, Fashion: The Century of the Designer p. 197 f. Another signal is to show status by wearing a design only few people know about, or are able to afford, see Raustiala et.al., Piracy Paradox p. 1718 f. with references. If the product does not have an appearance that appeals to the buy circle, it is unsalable, see Borcher, Produkt Efterligninger, p. 51.

All of this creates status value. It is defined as “the goodwill that has been created around the product as a result of product features and marketing,” see Borcher, Produkt Efterligninger, p. 54. The manufacturer of knockoffs free ride on the goodwill that is attached to the original product. Significant costs and effort are saved on development, introduction and future marketing, just as the royalty payment to the designer is avoided. Copying a fashion design is usually made through the purchase of the original garment or the use of pictures and technology. Rarely is a “line-by-line” or “slavish” copy produced, but the aim is towards a commercially viable imitation (a look-a-like). With this product, the aim is to gain the knowledge and the goodwill associated with the original, without risking a lawsuit, see the Danish U 1999.1061 (Ølarmatur)
where there was ruled a “formal distance” to the original product. See also Borcher, Produkt Efterligninger, p. 18 f. The goodwill risks to be diluted, if there is a knockoff on the market, see Koktvedgaard, Lærebog i immaterialret, p. 420 f. and Borcher, Produkt Efterligninger, p. 54.

2.1. Fashion is an Art form of Craftsmanship

As the name haute couture – “high sewing” – indicates, this discipline demands skills and effort. Fashion designers often spend years learning their craft, both through education and internships. Like any art, fashion designers must possess a natural talent to accompany the skills they have developed through study. Designers need “an eye for color and detail, a sense of balance and proportion, and an appreciation for beauty.” This talent must be combined with the ability to put it all together with sewing skills and translate ideas into functional designs, see Ellis, Copyrighting Couture, p. 187 with references. Just as 100 years ago, the big fashion creations are only made by hand, taking hundreds of hours. As an example, Karl Lagerfeld’s robe "Atys" (1997) made seamstresses work for 1,280 hours. Likewise Lesage, where a single article may require up to 100,000 stitches, and a collection of up to 25,000 working hours, see Seeling, Fashion: The Century of the Designer, p. 308. To call itself “haute couture”, a fashion house must also have at least 20 permanent employees in its atelier. Twice a year it must show a collection of 50 hand-made models in their own salon. In 1992, a two years “transitional period” was introduced. In this, the fashion house only needs 10 permanent employees in the atelier, and show 25 creations each season, see Seeling, Fashion: The Century of the Designer p. 562. The time, the certification and the skills are easy to forget, when haute couture dresses are sold for hundreds of thousands of pounds.

Though a fashion design is often considered as “applied art”, the development, visual impact, and skill required to create fashion designs are just as significant as traditionally protected arts. In some countries, fashion has reached that status. The Victoria & Albert Museum’s exhibition, The Golden Age of Couture: Paris and London 1947–1957, has been presented in London, Australia, Canada, Hong Kong, and even Nashville, Tennessee. In 2007 this exhibition broke the museum’s attendance records, see The Golden Age of Couture. The fashion exhibitions at museums have increased the attendance worldwide in recent years, see Ellis, Copyrighting Couture, p. 187 with references. When the art world acknowledge fashion designs as fine art, it could be argued that fashion is worthy of equal protection.

2.2. A billion dollar industry

Fashion is a global marketplace worth hundreds of billions of dollars. The exact number is difficult to tell, but the United States market alone accounts for US $ 196 billion, where approximately US $ 12 billion is from the sale of knockoffs, see Ellis, Copyrighting Couture p. 164 f. with references and p. 185 with references. Estimated by the EU Commission, counterfeiting and piracy accounts for between 5-7% of the
world trade, see the Green Paper, COM 98/569, p. 2. Put aside the designers, the industry also counts fabric manufacturers, retailers, models, seamstresses, sales persons, publicists, tailors, and various support staff like truck drivers and storage workers. If design piracy continues, these jobs could risk being shut down.

Company turnovers aside, creating a new fashion line is extremely expensive. Besides tens of thousands of dollars to develop original prints, designs, and samples, a fashion show costs between US $ 50,000 and US $ 1,000,000 to produce. And the shows are necessary to inform the press and the public that the designs even exist. All of these events and costs occur before the season’s first orders are even placed, See H.R. 5055 Hearing, supra note 8, at 11–12 (statement of Jeffrey Banks).

Part III – Intellectual Property Protection of Fashion
The first example of fashion protection within Europe was the fabric patterns of silk weavers in Lyon, France in the early 1700s. But protection of actual designs started recently. Until Christian Dior invented licences, anybody was allowed to produce a design, if they bought the garment: People had to go to fashion shows, pay a caution to see the clothes and buy the patterns or clothes and then they could copy that. That was a system that worked, see Wolfe, Ready or Not. In the 1950, buyers from the US came to fashion shows in Europe. Here a buyer could either acquire a final model or a pattern with precise instructions for use of the fabric. Afterwards one could produce so called “original copies”, which were quite expensive, since there were few of them. Usually a model would be copied in thousands, lowering the price of US $ 950 for an original to US $ 80 for a copy, see Seeling, Fashion: The Century of the Designer, p. 245. As the industry was copied anyway, most fashion designers preferred to enter the lucrative trade in licences. No one can determine how well this system was, but it worked. And its benefits and disadvantages are fundamental to the fashion market of today, see Wolfe, Ready or Not.

In the US, there has never been a specific protection for fashion. Therefore in the 1930’s manufactures of expensive women’s clothes founded the “Fashion Originators’ Guild of America”. Through controlling who sold their products and boycotting the ones who sold (in their opinion) illegal copies, the organisation protected US fashion designs – not foreign. In short, the guilds were a fairly effective substitute for formal IP rights in fashion design, see Merges, Contracting into Liability Rules, p. 1363. In 1941 the US Supreme Court rejected the Guild’s argument that its practices “were reasonable and necessary to protect the manufacturer, laborer, retailer and consumer against the devastating evils growing from the pirating of original designs and had in fact benefited all four,” see Fashion Originators’ Guild of America v. FTC at 467. The Court ruled that this behaviour was against competition law, see at 468. See also Rosenmeier et al., IPR, p. 440 f. Since then, fashion designs have remained unprotected under US law.
For more, see also Scafidi, *Intellectual Property and Fashion Design*, p. 115 f., who also put forward that although the French intellectual property laws did not completely stopped piracy, their protection led to the strength of the fashion industry in Paris and has helped it continue to thrive today. While the fashion industry in France is still considered in the elite, "the United States instead became a haven for design pirates who strenuously resisted efforts to introduce laws protecting fashion," see *H.R.5055, (statement of Scafidi)*.

On this background, the direction of current fashion protection in both the US and the EU will be clarified.

1. The Legal Balance

Scientific and technological innovations, as well as literary and artistic works, are often difficult to create, but easy to copy. The purpose of intellectual property protection is to promote innovation and creativity in society. By granting the creator a monopoly to his work, he can prevent others from exploiting the work free of charge. This way, the intellectual property protection works as an instrument to motivate artists to create new works, see Rosenmeier et.al., *IPR*, p. 23.

On the other hand, product development is typically based on past trends in the industry. The varieties of earlier designs, which appear as processing of the ideas and principles behind the original product, have their natural and legal place in the market, see Borcher, *Produkt Efterligninger*, p. 16. The legal literature has emphasized that a broad grant of copyright protection of applied art will involve very significant competitive restrictions that is not socially acceptable. See Koktvedgaard, *Lærebog i immaterialret*, p. 50-52; Koktedgaard, *Immaterialretspositioner* p. 254-257; Levin, *Formskydd*, p. 282-313. Madsen, *Markedsret*, p. 36-39 f.; Rosenmeier et.al., *IPR*, p. 41; Schønning, *Ophavsretsloven*, p. 108 f. and Schovsbo, *IPR*, p. 154 f.

2. The US

2.1. Copyright Law

2.1.1. Legal Framework

Nationally, the US Constitution states that “[t]he Congress shall have power: To promote the progress of [...] useful arts, by securing, for limited times, to authors [...], the exclusive right to their respective writings[...]”. The Copyright Act is to be found in the United States Code (U.S.C.), “Title 17 – Copyrights.” The international copyright obligations of the US can be found in: The Berne Convention (1886); the WIPO Copyright Treaty (2002); the Wipo Performance and Phonograms Treaty (1996); the TRIPS Agreement (1995); Universal Copyright Convention (1971).

As a human right, copyright is mentioned in the Universal Declaration of Human Rights 1948 and The International Covenant on Economic, Social and Cultural Rights (1966). The later has been signed but not ratified, why the US is not bound fully by this.
2.1.2. Protection
Copyright protection applies to “original works of authorship fixed in any tangible medium of expression,” see 17 U.S.C. § 102(a). According to 17 U.S.C. § 1301(b)(1) a design is original, if it “provides a distinguishable variation over prior work pertaining to similar articles which is more than merely trivial and has not been copied from another source.” In other words, new works can be inspired by an earlier work, but they have to be more than “basic” works, and must not be copies of an existing work. The “original”-test was established during *Feist Publ’ns, Inc. v. Rural Tel.* and is not stringent. Basically, it requires only “a minimal degree of creativity” and an independent expression, see at 16. Copyright protection attaches at the moment of the work’s creation. However, in order to be eligible for certain infringement remedies and to file suit, the author must register the work with the Copyright Office, see 17 U.S.C. §§ 102(a) and 412.

The Copyright Act grants the author the exclusive right to reproduce, distribute, perform, or display the protected work, and to create derivative works from the protected work, see 17 U.S.C. § 106. These rights last the authors life + 70 years, see § 302. Derivative works, whether created by the original author or by others, also qualify for protection, but this protection “does not extend to any part of the work in which such material has been used unlawfully.” Any such protection for a derivative work extends only to the original work created by the later author, see § 103(a) and (b).

§ 501(a) states that infringement occurs any time one of the author’s exclusive rights is violated. Under the current 17 U.S.C. Chapter 13, it is only an infringing act to knowingly make, sell, or distribute a protected design, see 17 U.S.C. § 1309(c). A private person may make a copy, as long this is not “of commercial use”, see § 107. The two pieces must be “substantially similar” to establish infringement, see § 1309(e).

2.1.3. Fashion protection under the 17 U.S.C.
Traditionally, fashion designs have been considered as useful articles, see *Black’s Law Dictionary, page 507.* The main rule is that protection is not available for a “pictorial, graphic, [or] sculptural” work—including fashion designs—when the original aesthetic features cannot “be identified separately from, and are [not] capable of existing independently of, the utilitarian aspects of the article,” see 17 U.S.C. § 101.

For other works than vessel hulls, the key to determining protection for useful articles is separability. Protection is given, when the design elements can be separated from the functional elements either physically or conceptually, see 17 U.S.C. § 101 and *Ellis, Copyrighting Couture, p. 171 with references.*

Physical separability
Physical separability requires an article’s artistic features to be independent of its functional aspects, see 17 U.S.C. § 1302(4) reverse. In 1954, the Supreme Court addressed the physical separability doctrine in *Mazer v. Stein.* The case involved “statuettes of male and female dancing figures made of semi vitreous [...] china” used as a base of a lamp. The Court found that, because the statuettes were works of art that were
physically separable from the lamp, they were entitled to copyright protection even though the creator intended to reproduce the work as part of a utilitarian object. The general use of other statuettes as lamp bases was not protected, see at 218. This is in accordance with the principle of protecting the work, not the ideas and principles behind it, see Borcher, Produkt Efterligninger, p. 16.

In general, clothes fail this test, see Galiano v. Harrah’s Operating Co. The casino uniforms were found to be unprotected, because the expressive element was not marketable separately from the uniforms’ utilitarian function. See also Poe v. Missing Persons, where the functional aspects of a swimsuit were not independent of the suit, see at 23. However, the district court granted copyright protection on the grounds that the piece in question was “a work of art” that “looks like a swimsuit,” see at 33. This ruling might have been based on partly the fact that the bikini was made of unusual materials and partly that it was displayed in an art show sponsored by the Los Angeles Institute for Contemporary Art, see the ruling at 9.

Where clothes cannot be physically separated from its function, the design of footwear might, making it possible to obtain copyright, see Animal Fair, Inc. v. AMFESCO Industries, Inc. Here the District Court of Minnesota upheld the copyright of a novelty slipper in the shape of a bear paw. The slipper was “stuffed with foam and fiber,” had a “tan sueded sole,” and was “covered with a brown fur-like material.” The court found that “[v]irtually all of the design aspects of plaintiff’s slipper ‘can be identified separately from, and […] exist […] independently of, the utilitarian aspects of the [slipper].’”, see at 187.

More uncertain are costumes. In Whimsicality, Inc. v. Rubie’s Costume Co., the Second Circuit found that the costumes in question were “soft sculptures”. The court distinguished this case from Animal Fair on two grounds. The one being that the application for copyright was misleading. The main reason for this rejection of protection was based on the costumes status as soft sculptures and not costumes. Unfortunately the court did not analyze any utilitarian aspects of the costumes. The other ground was being that slippers, unlike costumes, have “firm forms,” which can be identified for copyright purposes of a sculpture, see at 456-457.

**Conceptual separability**

Conceptual separability is defined as “design elements [that] can be identified as reflecting the designer’s artistic judgment exercised independently of functional influences,” see Brandir Int’l, Inc. v. Cascade Pac. Lumber Co. An example that defines conceptual separability in fashion design, is Kieselstein-Cord v. Accessories by Pearl, Inc. The issue before the Second Circuit was whether two belt buckles were entitled to copyright protection. The buckles, called the “Winchester” and the “Vaquero”, were both designed by Barry Kieselstein-Cord. These buckles were in gold and silver “with rounded corners, a sculpted surface” and
“several surface levels.” Kieselstein-Cord registered the belts as sculptures. The Winchester buckle sold 4,000 copies between 1976 and 1980 for between $295 and $6,000 each. Accessories by Pearl began selling line-by-line copies of the buckles. These were made from “common metals”. Moreover were they referred to as “‘Barry K Copy,’ ‘BK copy,’ and even ‘Barry Kieselstein Knock-off.’” Accessories by Pearl argued that the buckles could only qualify for protection if their sculptural aspects “[could] be identified separately from, and [were] capable of existing independently of, [their] utilitarian aspects.” Since some buyers had worn the buckles in areas other than the belt, and that the buckles “[had risen] to the level of creative art,” the court found that the buckles’ sculptural elements were “conceptually separable” from their function.

The court ruled in favor of Kieselstein-Cord. In contrast see Carol Barnhart Inc. v. Economy Cover Corp. Human torsos were found to be “utilitarian articles not containing separable works of art” and therefore, not subject to protection. The judgment is complete in line of what to be understood as “more than merely trivial” in 17 U.S.C. § 1301(b)(1).

Finally fabric prints are copyrightable. Both “design[s] printed upon dress fabric” and silk-screen painting applied to ladies’ blouses have been found to qualify for copyright protection, even when the “designs involve commonplace subject matters,” see Peter Pan Fabrics, Inc. v. Brenda Fabrics, Inc.; Segrets, Inc. v. Gillman Knitware Co. and Scarves by Vera, Inc. v. United Merchs. & Mfrs.

2.1.4. Summary
The US requirement for “original” is not stringent. Why fabric designs are protected by copyright but garment designs have to be extraordinary, might be illustrated in Poe v. Missing Persons. This case shows that, in the mind of the law, the distinction between art and fashion still exists. The context in which the item is presented – whether, for example, the item can be worn as a practical matter, is being sold as a garment, is displayed in art museums, or is marketable as art – is vital. For non-art the US copyright law about useful articles deny copyright protections to garments containing original designs unless the expressive content is separable from the garment’s useful function. Zac Posen’s umbrella-sleeve blouse and Hussein Chalayan’s bubble dress have shown that clothes are not limited by the human form. They have made room for fashion designs to pass both the physical and conceptual separability tests, see H.R. 5055 Hearing, (statement of Scafidi). Hereby clothes, buckles, bags and shoes can all in theory pass both separation-tests, but this is rare in practice.

Copying from (a photography of) a garment, which is legal, is not the equivalent of copying from the underlying sketch under U.S. law. Thus copying from a three-dimensional model typically escapes copyright liability. A relatively direct path to expanded protection for fashion designs would be change U.S. law to allow ruling infringement based on the underlying copyright in the design sketch. Although one might argue
that the three-dimensional fashion product would be protected under 17 U.S.C. (the design being the original work of authorship, and fixation being the three-dimensional rendering in a garment) just as the sketches, this is plainly not the case. Copyright protection of fashion clothes, is almost entirely useless under U.S. law. As a result, the vast majority of the fashion industry’s products exist in a copyright-free zone. This is true both for slavish copies and the copies that simply “refer to” an existing item.

But this might change. At the moment, the bills, the Design Piracy Prohibition Act (DPPA) and the Innovative Design Protection and Piracy Prevention Act (IDPPPA), are pending. The bills would amend §1301(a)(3) of the Copyright Act to include fashion as a protected category under the “sui generis” design protection located in Chapter 13 of the Copyright Act. If the bills are accepted, the protection of designs in the US will be very much alike the protection under design law in the EU. In determining whether a design could obtain protection, each fashion design would be considered as a whole and would only include the original elements and their placement “in the overall appearance of the article of apparel,” see H.R. 5055 Hearing, supra note 8, at 197 (statement of the United States Copyright Office). Moreover the IDPPPA has no registration requirements and provide a protection for three years.

If these bills pass, they might limit the creativity, and change the liberal inspiration world that the US market is. On the other hand, fashion is just a big an industry in Europe, where the regulations are already incorporated in fashion. The uniform protection can turn out to give designers a more clear view of their rights. But since DPPA and IDPPPA represent the ninety-second and ninety-third attempt to obtain legislative protection for fashion designs since 1914, this scenario can be far into the future, see Estrin et al., In Vogue: IP protection for Fashion Design.

2.2. Patent Law

2.2.1. Legal framework
The U.S.C does not have an actual “design act”. This area is to be covered by “Title 35 – Patent”. The US is also obligated by the Patent Cooperation Treaty (1970) and TRIPS.

2.2.2. Protection
The 35 U.S.C. §§ 101–103 and 112 lay down the requirements for an item to be eligible for patent protection: 1) it must be a patentable subject matter, 2) useful, 3) new, 4) nonobvious, and 5) properly disclosed to the Patent Office. For a design to obtain patent protection, it must also be a “new, original and ornamental design for an article of manufacture,” see § 171. This article covers the decorative aspect of a product instead of its utility, see also Merges, et al. IP In The New Technology Age by, p. 371. If a design is only shaped by its function, the product is not eligible for a design patent, see Ellis, Copyrighting Couture, p.

Side 15 af 70
178 with references. A design patent grants the designer the right to prevent others from using it for 14 years, see § 173.

In theory, novel fashion designs can enjoy protection under the US patent laws, see § 171. However, the design patent provision fails to shelter fashion design. The first reason is doctrinal. The “novelty” standard that applies in patent is substantially higher than the “originality” requirement that obtains in copyright, see Raustiala et al., Piracy Paradox, p. 1746. Where copyright originality only requires “a minimal degree of creativity”, see Feist Publ’ns, Inc. v. Rural Tel, design patents are only available for designs that are truly “new”. The “novelty” does not extend to designs that are merely reworkings of previously existing designs, see 35 U.S.C. § 102. Since a lot of garment designs are reworkings, they are not considered as “new” in the sense that the patent law requires. Most garments will therefore not qualify for design patent protection.

Second, is the non-obviousness requirement usually a main hurdle for fashion designers. This requirement in 35 U.S.C. § 103 demands more than a trivial advance over what has been done before from the perspective of someone skilled in the relevant art. A court would consider all relevant known and existing designs, alone or in combination to determine what is obvious, see Merges et al. Patent Law and Policy, p. 96 and 663. In Graham v. John Deere Co. it was determined that a combination of earlier designs which required no more “ingenuity and skill” than that possessed by a designer within that genre, could not receive protection. Once again most fashion designs cannot meet this requirement.

Finally is the process of patent registration. In an industry where the demands change every 6 month, an average of 25 months to receive a design patent is too long, see Ellis, Copyrighting Couture, p. 179 with references. That is more than two years where the designer cannot claim his right. By the time the designs have received protection, the demand of the clientele will already have moved on to new designs. In addition, the costs of filing and receiving a design patent are too high. In case a designer has multiple pieces in each season’s collection, the US $ 740 per application plus attorney fees becomes quite expensive, see 35 U.S.C § 41(a)(3) and Tsai, Fashioning Protection. This huge economical burden can be impossible to lift – especially for new designers who earn less than US $ 30.000 a year, see Fashion Designer Salary. And if the designer can afford it, the prospects of protection is uncertain. The United States Patent and Trademark Office rejects roughly half of all applications for design patents, see Raustiala et al., Piracy Paradox, p. 1705.

2.2.3. Summary
Like copyright, patent law does not offer sufficient protection for fashion designs. The high novelty and non-obviousness standards are too difficult to fulfill for the fashion industry. In addition, the process of patent registration is way too long, too expensive and too uncertain to protect fashion designs: The
registration costs exceed the price of most garments; the industry shifts faster than the Patent and Trademark Office can work and the rejection rate is too high. The aim of the law seems to be for inventions or bigger assets, like furniture, medicine and cars, that are not replaced every 6th month. The Patent Law is without any practical use for fashion.

2.3. Trade Dress
The US has a special protection for design, called the trade dress doctrine. This was introduced in Coach Leatherware Co. v. Ann Taylor, Inc. Here trade dress is defined as “the total image of a good as defined by its overall composition and design, including size, shape, colour, texture, and graphics,” see at 21. Likewise in John H. Harland Co. v. Clarke Checks at 49. The trade dress doctrine also covers the design of a product, see Wal-Mart Stores v. Samara Bros. The US literature has split trade dress into two types; 1) a product’s packaging and labeling, and 2) its overall appearance and configuration, see Kane on Trademark Law note 116, § 3:1. As expressed in Knitwaves, Inc. v. Lollytogs, trade dress “includes the design and appearance of the product [...] and all elements making up the total visual image by which the product is presented to customers,” see at 41. Only if a product is non-functional and either is inherently distinctive or has secondary meaning, can it receive protection under the trade dress doctrine, see Kane on Trademark Law note 116, § 3:2. Beside this, a designer must “establish the non-functionality of the design feature,”. Since several rulings have stated that clothes are “useful articles” having an “utilitarian function”, see earlier 2.1.3. Fashion protection under the 17 U.S.C., this makes obtaining trade dress protection for fashion designs nearly impossible. There is no relevant protection of fashion designs to be found in the trade dress doctrine. See also Ellis, Copyrighting Couture, p. 176 cf. for a more fulfilling analysis.

2.4. Conclusion
Except for fabric designs, the current US intellectual property protection of fashion garments is almost non-existing. The garment can only obtain copyright protection, either if it is considered as art, or if the expressive content is separable from the garment’s useful function. In theory this is plausible, but it is rare in practice. The US law still consider fashion as too utilitarian to qualify for copyright protection.

The patent law appears to be aimed at inventions or bigger assets, without any practical use for the fashion world.

Finally, fashion is too utilitarian for obtaining protection under the trade dress doctrine. As a result, the vast majority of the fashion industry’s products exist in a copyright-free zone. This is true both for slavish copies and the copies that simply “refer to” an existing item.
This state of law is accepted in one of the biggest fashion markets in the world. The question is, will it remain? A relatively direct path to expanded protection for fashion designs would be change U.S. law to allow ruling infringement based on the underlying copyright in the design sketch. This way copying based on pictures or models will be illegal, and limit design piracy.

At the moment, the DPPA and the IDPPPA’s suggestion of including fashion design under “sui generis” is pending. The several attempts to get a better protection of fashion designs, are all symbols of demand from the industry. With DPPA and the IDPPPA, the next step towards better copyright protection of fashion designs in the US is close, but it has still not been taken.

3. The EU
The starting point of how the EU protection of fashion clothes is in harmony with national legislation, will be the three Scandinavian countries: Denmark, Norway and Sweden. The Nordic Legislative Co-operation that was made back in the late 1960s, has become the foundation of both design law and copyright law in Denmark (DK), Norway (N) and Sweden (S), see e.g. the Swedish SOU 1956:25. Other important elements are the European Economic Area (EEA) and EU. The EEA is the EU countries (including Denmark and Sweden) and Norway, Iceland, Switzerland and Liechtenstein. The EEA Agreement covers the four freedoms, i.e. the free movement of goods, capital, services and persons, as well as competition and state aid rules and horizontal areas related to the four freedoms. That is e.g. trade in goods, investment, banking and insurance, buying and selling of services and the right to work, study (without waiver of tuition fees) and live in other countries in the area. The Scandinavian countries have hereby the same rights and obligations as other EEA countries and their citizens. In order to ensure homogeneity, EEA-relevant EU acts are continuously incorporated into the EEA Agreement. The consequence is that EU directives concerning the mentioned areas, will have the same effect in Norway, see the EEA agreement Art. 7(a) and (b). Where there is a conflict between national legislation and the EEA Agreement, the later will have priority, see the Norwegian EEA Act (EØS-loven) § 2. In addition, EEA countries must interpret in accordance with the EU principles.

In general, the legal texts within design and copyright law in Scandinavia are uniform. Their case law can then be used to complement and develop each other’s jurisdiction, see e.g. Swedish and Danish copyright in Borcher, Produkt Efterligninger p. 122 f. Therefore, the Nordic law in this thesis should also be examined and compared. Cases from other European countries will be added as well.
3.1. Copyright

3.1.1. Legal Framework

The Danish copyright is regulated by “Ophavsretsloven” (DK Copyright Act). In Norway it is “Åndsverkloven” (N Copyright Act) and in Sweden, “Upphavsrätt lagen” (S Copyright Act). Together they will be referred to as “The Scandinavian Copyright Acts”. As mentioned, all three current copyright acts are built upon the Nordic Legislative Co-operation. In addition through Norways EEA membership and Denmark and Sweden’s EU Membership, they are all also founded on EU directives, such as the Software Directive (2009/24); the Rental Directive (2006/115); the Satellite and Cable Directive (93/83); the Term of Protection Directive (2006/116) with amendments of directive (2011/77); the Database Directive (96/9); the Infosoc. Directive (2001/29); the Resale Right Directive (2001/84) and the Enforcement Directive (2004/48), see e.g. Rosenmeier at. al., IPR, p. 69.

Internationally Denmark, Norway and Sweden have all signed the Berne Convention (1886); the Rome Convention (1961); The TRIPS Agreement (1995) and the Universal Copyright Convention (1971). Only Denmark and Sweden are also obligated by the WIPO Copyright Treaty (2002) and WIPO Performance and Phonograms Treaty (1996).


Leaving aside the minor linguistic differences, the key provisions for the protection of handicrafts, §§ 1 and 2 are essentially the same. For historical development, see Rosenmeier, Værkslæren, p. 235 f. and Levin, Formskydd, p. 287 f. However the similarity, the overlap between copyright and design law is lesser in Norway than in the two other Scandinavian countries, see Lassen and Stenvik, Designrett, p. 18.

3.1.2. Principles of Copyright

A work which by its nature can be described as artistic or literary, and which simultaneously satisfies the requirement of originality, enjoys as a main rule copyright protection, see the Scandinavian Copyright Acts § 1(1).

To determine the “artistic” and “originality”, experts’ opinion can be and are usually involved in lawsuits, see the Danish Administration of Justice Act chapter 19. See e.g. the Swedish NIR 1994.143 (Strawberry) (“With its balance of color intensity, size and surfaces interrelationships and the delimitation of the image sparkles details have been given the work an overall impression that is original, artistic individually and independently.”); the Danish U 2012.1185 H (Hermès purses), SHD V-68-06 (trousers) and SHD V-129-04 (T-shirt) (lack of expert opinion was considered as no prove of originality). Danish courts regularly hold vital importance to expert opinion, and ignore it
typically only in copyright cases, if it is surely that there has been a misunderstanding or similar. See e.g. the Danish U 1968.785 H (furniture fabric) where the Supreme Court denied copyright protection in contrast to the experts. Similar U 2012.129 H (Nørgaard t-shirt). See also Svensk Forms Opinionsnämnd (formerly Slöjdforeningen). It is a private expert body that has a significant influence on the development of the legal protection of applied art in Sweden. This body has largely supplemented and/or redundant lawsuits in this area. In many cases, the courts have obtained expert opinions from Svensk Forms Opinionsnämnd, see e.g. NIR 1998.344 (Kriss Jackets). But just as in Denmark, their statements are not always followed by the court, see e.g. NIR 1994.143 (Strawberry), where the experts found infringement, but the court did not. For more on this body and its opinions since 1960, see Bernitz et.al., Immaterialrätt, p. 45; Koktvedgaard and Levin, IPR, p. 76 f.; Levin, Formskydd, p. 305 f.; Levin, Designskydd, p. 40; Levin, Law Society, p. 315 f. and Rosenmeier, Værkslæren, p. 236 f. (with numerous references to the opinions of the body).

According to the preparations of the Danish 1961-law, applied art can be copyright protected, if there is “an artistic creation that meets the general conditions to be a work in the legal sense” and the protection is obtained “without regard for practical purposes, although for reasons of functionally correct design has played a crucial role in shaping the use object.” See FT 1960-61 appendix B, Second selection, p. 628 f. This thought is supported by case law.

Earlier, the originality requirement to clothes was quite high, see e.g. the Norwegian NIR 1957.225 (Genser). The knitted sweater (genser) in question was considered to be in the same area as fashion dresses, which was not viewed as a copyrighted work. Similar NIR 1961.196 (Jupiter Fabric) and the Danish U 1958.1211 SH (Blouses). Today fashion garments are being protected as applied art: the Danish U 1979.844 SH (foot-shaped shoes); the Swedish Supreme Court, NIR 1995.311 (Tunica) and from the Court of Appeal for Western Sweden (Hovrätten för Västra Sverige) NIR 1998.344 (Kriss Jackets). Similar in the rest of Europe, see the French case 06/06324 (Phenix) and the Dutch LJN: B6Y6496, Rechtbank Arnhem, 235404. The protection of a pair of trousers was not sufficiently documented in the Danish SHD V-68-06. Similar the Danish U 2012/229 H (Nørgaard T-shirt), which in Schønnings opinion means that fashion garment cannot enjoy protection under the DK Copyright Act, see NIR 2012.541. Compared to history and the acknowledgement from several European courts (see later), this must be view as a very unconsidered statement. Unlike Rosenmeier et.al., IPR, p. 99 f. which in line with current case law would grant fashion garment copyright protection.

The original requirement is not expressed in the Scandinavian Copyright Acts, but is developed through praxis and literature. Traditionally, the originality requirement means that the work has to be created by the personal and creative acts of the creator. This is also referred to as the work must have “individuality”, see Rosenmeier et.al., IPR, p. 74. See e.g. the Swedish NIR 1998.334 (Kriss Jackets) (“individuality and distinctiveness.”) See also the French case 11/01010 (Charlotte bag) (the design revealed a combination of a real effort in creating the design and the personal imprint of the designer) and case 06/06324 (Phenix) (Three garments had the imprint of the personality of the author) and the Dutch KG ZA 07-1168 (G-star...
RAW) (The pocket of the “Skort” t-shirt consisted of so many details that is distinguished itself from other pockets).

Cases where copyright protection has been denied because of lack of personal and creative acts: the Danish U 2012.129 H (Nørgaard shirt)(well-known design and form elements), the Supreme Court on SHD V-81-02 SH (New Balance)(recycling of a design from 1949), SHD V-123-08 (Wallet) (The design consisted of “ordinary and banal and freely available “design elements and was not put together in a way that gave the purse "essential individual character”). Similar in Europe, the French case 05/22610 (Felicia) (The clothes was a part of the common background of this type of clothing, why they could not be characterized as any creative endeavor bearing the imprint of the personality of their designer); the Dutch LJN: AZ5613, Rechtbank Amsterdam 1264/06 SKG (not be regarded as a work that is original and have the “personal stamp – persoonlijk stempel” of the designer), likewise LJN: BY 6496, Rechtbank Arnhem, 235404.

Also a structure or combination of elements can state originality. See e.g. U 2012.1185 H (Hermès purses) (“a special connection between the individual details and very fine features.”) See also the French N°RG : 09/11846 – (LV handbag). The originality of the bag was the combination of the component elements, namely the shape of the handles, emphasizing the lateral folds of the bag, the curves, the adjustable lateral link comprising a leather loop, the connecting wire rings to the handles, and the transverse leather flap clasp by a golden tuck. The court considered that the combination of all the claimed elements were original. The defendant’s bag reproduced all these features in the same combination, and is why copyright infringement was established.

An original structure or combination of non-protected elements can also fulfill the requirement, see the Danish U 1961.1027 H (Cutlery), where the originality of a cutlery was in the composition of a unprotected groove design and the other parts. From the fashion world, see the Swedish NIR 1995.311 (Tunic) contains unprotected elements, but was found as original due to “balance of different knitting techniques” and the combination between the top and the flared skirt-like bottom part. See also the Dutch LJN: BQ 2113, Gerechtshof’s-Gravenhage, 200.048.312/01 (“This combination of elements gives the Elwood a characteristic appearance.”) Similar the Swedish NIR 1994.143 (Strawberry), where natural elements as strawberries and leaves were composed in a way that made it original. See also Rosenmeier et.al., IPR, p. 188 and Rosenmeier, Værkslæren, p. 161. In the case of products where the design is determined by fashion and taste, the need for the competitive freedom dictates a greater demands on originality. Clothing and textiles are examples of areas where case law has shown reluctance copyright recognition. See e.g. U 1968.785 H (Furniture fabrics), where both the High Court and the Supreme Court was concerned to find that some of Verner Panton developed furnishing fabric enjoyed copyright protection.
For more on the originality requirement, see also Borcher, Produkt Efterligninger, p. 78 f.; Koktvedgaard, Lærebog i immaterialret, p. 57-52; Madsen, Markedsret, p. 31-39; Rosenmeier, Værkslæren, p. 227-231, 256-263; Rosenmeier et al., IPR, p. 74-83; Schovsbo, IPR, p. 144-145 and Schønning, Ophavsretsloven, p. 108-115. About the use of the terminology "plant height" (Værkshøjde), see Koktvedgaard, Lærebog i immaterialret, p. 51, stressing that the terminology is borrowed from patent law, and questions whether the concept will be maintained in light of the ongoing efforts of the EU harmonization of copyright. Similarly, Schovsbo, IPR, p. 146; Levin, Formskydd, p. 291, note 37, which refers to Ljungman, NIR 1970.21 Något om verkshöjd, as the person who introduced the concept in Swedish law. See also Nordell, NIR 1990.560 Verkshöjd och brukskonst, Nordell, NIR 2001-73, The Notion of Originality, Tómasson, NIR 2001.522, Værk og værkshøjde.

The originality assessment contains officially no quality requirement, see the Swedish NIR 1994.143 (Strawberry) ("Someone further assessment of what constitutes "good" or "bad" art is from the legislators' point of view, not relevant to the issue of copyright protection.") See Rosenmeier et al. IPR, p. 82 for a discussion of this in practice.

In determining whether a work has originality, the “double creation criteria” (dobbelskabelseskriterium) can be used. Basically, the more unlikely it is for a work to be created by more than one independent author, the more the work is considered as original and vice versa.

See e.g. the Swedish NIR 1994.143 (Strawberry): (“There is no risk that another artist could create one with "Strawberries" identical pattern... It would be unbelievable that two people independently of each other would create the same pattern as the one in this case.”); NIR 1998.344 (KRISS-Jackor) (“The risk of double creation, with regard to the findings of the case, is small.”); NIR 1995.311 (Tunica) (“As to the risk of double creation, [the expert] has stated that this is probably minimal.”) Similar the Swedish T 8982-05 (Fjällräven). See also Schønning, Ophavsretsloven, the comment of § 1; Rosenmeier, Værkslæren, p. 132 and Rosenmeier et al., IPR, p. 81. About the role of the double creation criterion in the evaluation of originality, see Borcher, Produkt Efterligninger, p. 119 f.; Bernitz et al., Immaterialrätt, p. 44 f.; Koktvedgaard and Levin, IPR, p. 76; Levin, Formskydd, p. 296 f. with references and Rosenmeier, Værkslæren, p. 132 f. and 238.

The current assessment of originality might have been changed, due to EU harmonization. The European Court of Justice (ECJ) has stated that “copyright is liable to apply only in relation to a subject-matter [...] , which is original in the sense that it is its author’s own intellectual creation,” see C-145/10 2011 (Painer) at 87. This assessment is expressed in Art. 1(3) of the Software Directive (2009/24) and recital 8; Art 3(1) in the Database Directive (96/9) and Art. 6 of recital 16 of the Term of Protection Directive (2006/116). With a number of recent rulings, the ECJ has stated that this originality assessment also applies on other works. The consequence is that applied art must likely will have to meet the same originality requirements as any other (art) works. For a more in depth analysis, see Rosenmeier et al. IPR, p. 76.
Art. 17 in the Design Directive 93/98 states that designs meeting the requirements of copyright shall enjoy copyright protection. The Member States determine “the extent to which, and the conditions under which, such a protection is conferred, including the level of originality required.” The interpretation was tested and changed in C-168/09 2011 (Flos). Here the ECJ stated that designs that meet the requirements of copyright of the before mentioned EU directives shall enjoy copyright protection, see at 34-37. In addition, this protection shall last for 70 years after the author’s death, see at 40 cf. Art. 1(1) of the Design Directive 93/98. Following the ECJ decision, Art. 17 was overruled and made redundant. The result is an EU harmonisation of the copyright requirements. With the ECJ’s aim of integrate EU law as much as possible in national law, see Koktvedgaard, Lærebog i immaterialret, p. 51, it can be expected that the harmonisation soon also will cover applied art. The consequences may be a longer and broader protection for fashion designs. See Rosenmeier et.al. IPR, p. 77-80.

3.1.3. Duration of Protection
The protection of the work starts when there is a manifestation of the work. This principle can be traced back to the Berne Convention. The protection lasts the creators life + 70 years, see the DK Copyright Act § 63; the N Copyright Act § 40 and the S Copyright Act, § 43. The EU protection has the same regulation, which was first introduced by the EU Term of Protection Directive 93/98, now amended by the directive 2006/166.

In accordance with, among other, the Berne Convention and the Universal Copyright Convention, non-EU works enjoy the same protection period as Community national works, see the DK Copyright Act §§ 85, 88 and the decree nr. 218 of 9.3.2010 (udlandsbekendtgørelsen); the N Copyright Act §§ 57-58 and the S Copyright Act § 60. If the protection in the country of origin is shorter, the protection will end with the origin-protection, see the EU Term of Protection Directive 93/98, now amended by the directive 2006/166.

A good discussion of whether or not the long copyright protection has played its part, see Skogström, Fashion Industry’s Need.

3.1.4. Content of Copyright
Copyright gives a monopoly of the work to the creator. The Scandinavian Copyright Acts gives the creator two sets of rights. The economic rights in § 2 and the moral rights in § 3. The economic rights prevent others from reproducing the work and make the work accessible to the public by spreading, displaying and public performance. An actual publication right is deemed to be included, see Schønning, Ophavsretsloven, p. 137. The moral rights can also be found in the Berne Convention Art. 6 bis. These contain two elements; the paternity right in § 3(1) (the creators’ right to get his name mentioned) and the respect right in § 3(2)
(the creator can forbid changes in the work and spreading, displaying and public performance, which will damage his reputation or individuality).

3.1.5. Protection Sphere
Traditionally, it is a basic principle that a work’s scope of protection depends on the original of the work, see NIR 1994.143 (Strawberry) (“The scope of the "Wild Strawberries" is to be determined having regard to the work’s originality.”) See also Rosenmeier et.al., IPR, p. 192. Earlier, works which as a whole had a striking similarity with the protected work, were infringing the copyright, see this stated in the Swedish NIR 1994.143 (Strawberry) and the Danish U 1979.844 S (foot-shaped shoes). Today, the courts are more willing to grant copyright protection, but only to a very narrow extend. See the Swedish NIR 1998.344 (Kriss Jacket)(“[...] protection, which as regards clothing must be very limited and largely apply only slavish imitations.”); NIR 1994.143 (Strawberry)(scope of protection was considered as being "relatively limited") and NIR 1995.311 (Tunic) (“the scope of copyright to clothing is small.”).

When assessing the grant of copyright, the public interest in an effective competition must to be included, see e.g. the Danish U 2012.229 (Nørgaard Shirt). In rejecting copyright protection, the court had “taking into account the market movement, including to prevent monopolization, considerable demands made according to Danish legal tradition in terms of originality and artistic effort to copyright protection may be considered for fashion articles. In addition the court said that the jersey consisted of familiar elements and was characterized by immense simplicity etc. That is why it used to be said that a monopoly never can be broader than the creative performance causes compared to what already exists, see Levin, NIR 1994.237 Hvilket brukskonstskydd kan vi leva med?. This is exemplified in the Swedish NIR 1994.143 (Strawberry). But with the recent ECJ rulings, this might have been changed, see later under 3.1.6.1. Fair use, last paragraph.

3.1.6. Infringement
When ruling on copyright infringements, the judge basically makes two different assessments: First, he must relate to whether the applicant's work is protected. If it is disputed, the judge must determine whether the work has originality, plant height etc. Second, he must make an independent violation assessment, i.e. determine whether the applicant's work violated the defendant's work.

The core of infringement is within the economic and moral rights. Exact replica products are not protected, since the copyist has not “created” the product, see Rosenmeier et.al., IPR, p. 74 with reference to NIR 1969.281 SH (Charms). In the case, charms that were copied by casting, were not copyright protected. But also in amended form does the work enjoy protection, see the Scandinavian Copyright Acts § 2(1).
According to case law, applied art is normally only protected by very impertinent imitations, see e.g. the Danish U 1958.1211 SH (Blouses). The court denied copyright protection, since the blouse was mass produced and the interwoven ocelot pattern was not enough artistic.

See also the Norwegian NIR 1961.196 (Jupiter Fabric). Here was “a distinct character, with high aesthetic effect”, "good and safe taste" combined with real manufacturing technique "not sufficient reason to determent that there was a work (åndsverk)”. Since the shirt did not hold a "individual creative intellectual activity", it did not enjoy protection under the N Copyright Act.

Earlier, the court would make an overall assessment. See the Danish U 1979.844 S (foot-shaped shoes) (“The defendant's shoes are not identical, nor nearly identical, with the applicant's shoes. Even after an overall assessment of the defendant's shoes there are to be the basis for the defendant's shoes will be seen as nothing more than a shoe of the same type as the applicant's.”) Now, the trend is that the court apparently does not pay full attention to the overall impression. Instead the competing product has to be almost a “slavish” imitation. See the French case 06/06324 (Phenix) (Because of the “slavishly – servilement” reproduction or almost slavishly clothing designs, the court ruled a violation of copyright.); the French case 05/05155 (Samuel X), the design was “slavishly copied – été servilement copié”; the Danish U 2012.1185 H (Hermès purses), where the Supreme Court stated that applied art is only copyright protected “against very close imitations.” The dismiss of plagiarism was regard to certain detailed differences between the purses. See also the Danish SHD V-129-04 S (T-shirts) (“t-shirts are slavish copies”).

3.1.6.1 Fair Use
On the other hand, an artist is allowed to be inspired and influenced by former great or contemporary art. This is called “fair use” and is found in the Scandinavian Copyright Acts § 4(2). It should not be confused with the US fair use, see the following. If the work is new and distinguished, it will obtain copyright protection independent of other works. This is even if the new work contains elements of style, ideas or artistic effects that can be traced back to older works, see DA MOT II, p. 20 ad § 4. The law processing do not draw a clear line to when there is an illegal imitation, but they give a direction: "The author has protection also against his craft reproduction [...] in amended form, when the [author’s] [...] artistic effort makes itself known in the restored work [...]", see DA MOT I, p. 102. The process of necessary self-development of the design has to be so intense that the original work is not recognizable anymore. In that case there is a “fair use” of the older designs, and a new work that enjoys copyright protection.

For more, see Borcher, Produkt Efterligninger, p. 79; Koktvedgaard, Lærrebog i immaterialret, p. 47 f.; Madsen, Markedsret, p. 31-35; Schousbo, IPR, p. 144; Schønning, Ophavsretsloven, p. 108 f. and Rosenmeier, Værkslæreren, p. 89 f., 227 f., 244 f. The “free use”-principle applies also to new products, even if they do not qualify for copyright
protection, see Borcher, Produkt Efterligninger p. 97 f. A work that is considered as “fair use” contains no violation of any work. About this, see Rosenmeier et. al., IPR, p 185 f. and Rosenmeier, NIR 2005.503 f. Protection of applied art against “close-by copies”.

For work B to infringe work A, four conditions must be met. For an in depth analyze of these conditions, see Rosenmeier et. al., IPR, p. 186-195. These are:

1) When comparing the two works, the judge must have an “identity experience”, see Koktvedgaard, Lærebog i immaterialret Positions, p. 118 f. The identity assessment has to be factually, fair and objective. Usually expert opinions are used in cases involving applied art. See the Danish SHD V-68-06 (Trousers) and SHD V-129-04 (T-shirt). If the identity experience is so strong that the judge believes the parties' works are "the same" regardless of any differences, there is a violation.

2) Work B must be an imitation of work A. If creator B can prove that he made his work without knowing about work A, there is no infringement.

Proving “awareness” of another person seems impossible. This is modified by the Latin phrase “Res ipsa loquitur” (the thing speaks for itself). This means that a work that is closely similar to the original, is not likely produced without the knowledge of the original. See e.g. the Danish 1963.782 H (“it is contrary to all practical experience [that] [...] the (defendant's) chair ... should have been made without the knowledge of [the applicant's] chair”). See also NIR 1994.143 (Strawberry): “One prominent similarity with the protected work, however, can in itself constitute a strong support for the later arrivals article is just an imitation. The alleged infringer of the other’s copyright must make it probable that his articles were made independently for no imitation to be declared.” NIR 1994.143 (Strawberry) are compared by Borcher with the Danish judgment U 1961.1027 H (Cutlery), see Produkt Efterligninger, p 125. Both decisions are central to the balancing act between, on the one hand making lenient requirements to originality and, on the other hand, limiting the competitive hurdles a monopoly entails. Borcher concludes that “where the product is located in the lower part of the copyright protection area requires actual identity or quasi-identity for a violation to exists.” For further reading, see Bernitz, NIR 1994.356, Design Protection, Strawberry; Halen, NIR 1995.90, More Strawberry; Karmell, NIR 1994.85, Supreme court mixing strawberry; Knutsson, NIR 1994.235; Levin, NIR 1994.237, Hvilket brukskonstskydd kan vi leva med? and Uggla, NIR 1994.361, Plagiarism Technology.

Often the defendant admits having developed the product with knowledge of the original, see e.g. Sweden; NIR 1994.143 (Strawberry): “[The defendant] further stated that the fall of 1988 he knew about the [...] pattern “Strawberries”.” In general, professionals are assumed to be familiar with competing products within their business, see the Danish SHD V-129-04 (“Niels Rasmussen, who as a professional buyer bought t-shirts for Natex, ought to have known that it was a copy of Best Sellers T-Shirts. The Court also finds that Kim Mogensen, who was employed as a buyer of men's clothing for COOP and selected the two T-shirts among more than 100 different T-shirts at Natex should have been aware that they were copies.”) Case law has stated that participation in messes,
and reading professional journals and material is a part of normal course of business, and will be considered to be known to the business circles, see T-153/08, Shenzhen. Even though the case was within the “EU conference sector”, this is stated as a general opinion, see Rosenmeier et.al. IPR, p. 450. See also the German Supreme Court of 29.1.2004, II-C 2005/260, where the market of Taiwan was considered as being known in Germany. The extent of this rule is quite uncertain, and is probably difficult to manage in specific cases. However, it is important to keep in mind that there is an exception that should be maintained accordingly, see Borcher, Produkt Efterligninger, p. 139 f., Koktvedgaard, Lærebo i immaterialret, p. 282, Schovsbo, IPR, p. 252, Svendsen et.al., Designret, p. 94-98.

3) It is a common, international rule that that copyright violation per definition requires that the part the defendant has taken over from the applicant’s work, itself is protected by copyright.

This principle was first stated in Denmark in U 1961.1027 H (Cutlery). The originality of a cutlery was the composition of unprotected elements. The defendant had used one of the unprotected elements, why there was no violation. Similar, NIR 1994.143 (Strawberry). The principle is now explicitly recognized by the ECJ, see C-5/08 (Infopaq I). at. 38 f. and at. 47 f., and Joined Cases C-403/08 and C-429/08 2011 (Premier League) at 159.

4) The part that work B has taken from work A must be concretized. Copyright only protects works in their manifested form – not the ideas.

To rule infringement of a work, it is never enough to show two works that reflects the same ideas and principles. See e.g. the WIPO Copyright Treaty (WCT) art. 2: “Copyright protection extends to expressions and not to ideas, procedures, methods of operations or mathematical concepts as such.” In the Dutch 161275 KG ZA 06-283, the court stated; “The specific combination and elaboration of these elements...is not to be regarded as original, but rather as a build on a fashion trend. This fashion trend cannot be considered exclusively as Mexx Shoes,” see at 4.4; The Dutch LJN: BX4870, Rechtbank Amsterdam, 515843/KG ZA 12-579 P/MB (Because others had similar belts in their assortment does not make the belt unoriginal, as there was no one like the belt in question. see 4.10); The French case 11/01010 (Charlotte bag) (The fact that the bag “Charlotte” was designed in the “spirit of today – l’air du temps” and had a “bag look – aspect besace”, was not enough to deny this model its original character.

The principle that the extent of protection depends on the level of originality of the work, has been a regular constituent of all sorts of copyright for many years. With the recent case C-145/10 2011 (Painer), this might have changed. According to the ECJ, the copyright protection “must be given a broad interpretation” and that “nothing in [the Infosoc. Directive] or in any other directive applicable in this field supports the view that the extent of such protection should depend on possible differences in the degree of creative freedom in the production of various categories of works,” see at 96-97. This might mean that
the extent of a works protection is liberated from the level of originality. See also Rosenmeier et al., IPR, p. 204 f.

3.1.7. Exceptions to Copyright
Because of practical and social reasons, the monopoly has its limits. These can be found in the Scandinavian Copyright Acts Chapter 2. The limits have to be interpret in such a way that they serve their purpose, but nothing further, see DA MOT II. In theory, this is considered to suggest a restrictive interpretation.

The most relevant limitation for the fashion industry is the “private use” rule. It is found in the Scandinavian Copyright Acts § 12. Copying for private use means that a person can copy a dress to themselves, or to someone close connected to them, such as family, friends, close colleagues and close fellow students, see Rosenmeier et al., IPR, p. 219.

The international sources of law have a “three-step-test”. Exceptions to the monopoly can only happen in; (step 1) a special case, (step 2) of use that does not affect the normal use of the work in a damaging way, (step 3) and which does not infringe the legitimate interests of the creator in an unreasonable manner. This was original initiated by the Berne Convention Art. 9(2). This three-step-test can also be found in the Infosoc. Directive (2001/29) Art. 5(5); TRIPS Art. 13 and WCT Art. 10(1). It is relevant for the legislature when they are introducing new exceptions. Using this test makes sure that the new laws are in accordance with EU law.

3.1.8. Summary
It is clear that the courts go far to protect fashion clothes. Usually they set the bar for obtaining copyright protection relatively low. Often they rule in favour of the right holders of the original products, but only to grant a very narrow protection, such as the slavish or very close imitations. In addition, it is easy to conclude that the ruling on protection often is made on subjective sensations of the law – either by experts or the judges.

The legal protection of applied art, like clothes and fashion garments, is significant long in EU. The first and later dresses of an upcoming designer will have different protection, with regard to time. This emphasize that the copyright protection of applied art is not fully adapted to this industry. Nonetheless, the fast shifting fashion industry terminates a look long before the rights expire, why this issue likely is of no practical interest. When the protection has expired, a third party may freely acquire the design and copy it.

The tradition of letting the level of originality determine the extent of protection, resulting in the national courts have only granted protection against very close imitations, might be changed with the recent ECJ rulings. The copyright protection of all applied arts is torn up by the roots. If applied art must be given a broad interpretation, the practice of most courts in Europe is contrary to the EU law. Time will tell, how much legal case law is compatible with the recent EU law.
3.2. Design Law

3.2.1. Legal Framework
The first Danish Design Law is from 1905. The former “mønsterloven” was replaced by Designloven (DK Design Act) on the 1st of October 2001. Norwegian design law started in 1910. The later “mønsterloven” was replaced by the current Designloven (N Design Act) the 14th of March 2003. The Swedish design law, mönsterskyddslag (1970:485) (S Design Act), came into force in 1971. With the Design Regulation (6/2002/EC) and the Design Directive (98/71/EC), the design law is completely harmonized through the whole of EU. Through the EEA Agreement it has been possible for Norway, like its sister countries, to incorporate the EU Design Directive and the EU Design Regulation, see the EEA Agreement art. 7(a) and (b). This means that the current Norwegian design law adopts the EU Design Directive, see the EEA Agreement annex XVII, section 9b. How the EU design law has been harmonized, including the cumulation of copyright and design law, will be illustrated under 3.2.8. Cumulation.

International obligations concerning designs for the three countries can be found in the Berne Convention (1886); the Paris Convention; the TRIPS Agreement; the 1968 Locarno-Agreement and the International Bureau of the World Intellectual Property Organization (WIPO). The later makes international design registration possible on the basis of the Geneva Act (1999). The Hague-arrangement of international registration of design is not joined by Denmark, but by the EU. With the accession of EU in 2007, there became a connection between the Haag-arrangement and Design Regulation. In Denmark this resulted in Part 10 of the Designs Act about “International Design”, see BEK 1079/17.11.2008 and Rosenmeier et.al., IPR, p. 443 f.

3.2.2. The vesting
There are three closely related protection forms for design in EU:

1. Design registered according to national Design Acts
2. Registered Community design
3. Unregistered Community design

Finally there is also the Hague System for the International Registration of Industrial Designs. The Hague system provides a mechanism for registering a design in countries and/or intergovernmental organizations that are members of the Hague Agreement. This makes it possible to obtain international design protection, including the whole of EU.

The Paris Convention contains the regulation about national treatment. Article 5^{quinquies} states that “industrial designs shall be protected in all the countries of the Union.” The Berne Convention sets the minimum standards,
obligating the contracting states to protect applied art for at least 25 years, see Art. 2(1) cf. 2(4) and 7(4). Art. 2(7) states that if a member of the union does not have a separate design law, applied art will be given full copyright protection of that member state. This means that a design which is protected for 25 years in its country of origin, can have a longer protection in another member state, if it does not have a specific design law. The design protection of TRIPS is to be found in its Art. 25 f.

Except for the unregistered Community design, the registration (with the time of notification) is the point where the design rights are created. It should be noted that both the unregistered and the registered Community design shall have a “unitary character”, meaning equal effect throughout the Community, see the Design Regulation (6/2002), Art. 1.

3.2.2.1. National Design Registration
The application of design registration is filed to the national body: In Denmark, Patent- og Varemærkestyrelsen; in Norway, Patentstyret (NIPO) and in Sweden, Patent- och registeringsverket, see the DK Design Act § 13 f.; N Design Act § 13 and the S Design Act §§ 1a and 13 f.


3.2.2.2. Registered Community Design
The regulations are to be found in the Design Regulation, section IV (Art. 35 cf.). An application can be filled to OHIM (the Office of Harmonization for the Internal Market) or through the national organ, which will then forward the application to OHIM within two weeks, see Art. 35. When the application reaches OHIM, they examine whether it complies with the requirements laid down in Art. 36(1), see Art. 45.

The application must be in one of the official EU languages and another of OHIMs languages (French, Italian, Spanish, German and English). The latter will be the language of proceedings for opposition, revocation or invalidity proceedings, see the Community Trade Mark Regulation (207/2009) Art. 119(2) and (3) cf. EU Design Regulation Art. 98.

3.2.2.3. Unregistered Community Design
An unregistered Community design protection occurs immediately and lasts three years “from the date on which the design was first made available to the public within the [EU] Community,” see the Design Regulation, Art. 11(1) cf. Art. 1 and Art. 11(2). This applies regardless of whether the product is marketed in only a single member state or a part of the EU.

According to the preamble of the Design Regulation 6/2002, the main aim of unregistered EU design is to give a uniform protection to “those sectors of industry producing large numbers of possibly short-lived designs over short
periods of time of which only some may be eventually commercialized,” see the preamble nr. 25. An obvious industry would be fashion, see Borcher, Produkt Efterligninger, p. 150.

3.2.3. Object of Protection

The aim of the design law is to protect an object’s visual appearance either in two-dimensional (decoration, ornaments etc.) or three-dimensional (forming etc.). The design may relate directly to visual parts of the product, but also to parts that are not readily available, such as the lining in a jacket, the inside of a shoe, etc. See Rechtbank’s-Gravenhage, 18 maart 2009, HA ZA 08-1522 (Crocs), where the inside of the sole of a shoe was a part of the protection. The resulting technique from a design is in principle available for third party use, as long as industrial design rights are respected.

See the DK Design Act § 8(1), No. 1; N Design Act § 8; S Design Act § 4(a) No. 1; section 14 in the preamble of the Design Directive; the Design Directive Art. 7(1) no. 1; the preamble section 10 in the Design Regulation and the Design Regulation Art. 8(1) no. 1. As an example of resulting technique from a design, see Rechtbank ’s-Gravenhage, 18 maart 2009, HA ZA 08-1522 (Crocs), where the holes in the shoes were considered as “fans”. They were not design protected, since they had a technical function. See also the Danish bill L 15 ad § 8; Borcher, Produkt Efterligninger, p. 136; Koktvedgaard, Immaterialretspositioner, p. 411; Koktvedgaard, Lærebag i immaterialret, p. 280; Levin, IPR, p. 357; Madsen, Markedsret, p. 111 f.; Rosenmeier et al., IPR p 453 f.; Schovsbo, IPR, p. 243 and 258; Svendsen et al., Designret, p. 24 f. and 105 f.

The definitions within the design area are clear and specific. The actual design definition is neutral in the sense that all appearance can be protected, as long as it is (1) new and (2) has individual character, see the DK Designs Act §3; N Design Act § 3; S Design Act § 2; the Design Directive Art. 3-5 and Design Regulation Art. 4-6.

These requirements are not difficult to fulfill. In fact, the German court has stated, that it does not require any great originality to qualify for design protection, see the German case, 9 O 1097/07 (187) – (Tangas), where a pair of thongs with a skull was copied. The skull motive was not new, but the court found that the individual design and an ironic petition meant distinctiveness.

3.2.3.1. Novelty

A design is considered as “new”, when there is no identical design that has been made available to the public before the registration application is filled, see the DK Design Act § 3(2), N Design Act § 3(2), S Design Act § 2(2), the Design Directive art. 4 and the Design Regulation art. 5(1). See the Danish Supreme Court on SHD V-81-07 (New Balance) (the design was not new, but a redesign/form of recycling of a design from 1949 with roots going back to 1930).

See the French case 10/18925 (Poulet), where the court stated that since there has been no identical design prior to the registration, the design is considered as new. Similar the German case, 9 O 1097/07 (187) – (Tangas); the German case, 9 O 1056/06 (174) – (Handytaschen in Form von Sportbekleidung) and the Dutch 298874/KG ZA 07-
If the special features of two designs differ only in immaterial details, they are considered as identical, see DK Design Act § 3(2), second phrase, N Design Act § 3(2), S Design Act § 2(2), the Design Directive art. 4 and the Design Regulation art. 5(2). See e.g. the Dutch 298874/KG ZA 07-1378 (Leggings), where leggings with three or four jagged edges was considered identical and the British J. Choo (Jersey) Ltd. V. Towerstone Ltd. & Others (Despite “the two designs there are some differences” but had a “large number of identical features,” why there was stated infringement.) Similar the Dutch KG ZA 07-1168 (G-star RAW)(for the design “Sniper blazer.”) All three cases involved unregistered Community design. Here by it can be concluded that small differences usually lead to the fulfillment of the novelty requirement, see Rosenmeier et.al., IPR, p. 449, do not apply on garment.

The definition of “made available to the public” for national registered and registered Community designs is found in the DK Design Act § 5, the N Design Act § 5, the S Design Act § 3, the Design Directive Art. 6 and the Design Regulation Art. 7. This is when the design “has been published following registration or otherwise, or if it has been exhibited, used in trade or otherwise disclosed.” This is limited territorially within the EU/EEA, see DK Design Act § 5(2) no. 1. “within the European Union”. Similar N Design Act § 5 no. 1., S Design Act § 3(2) no. 1. See also the Design Directive Art. 6 and the Design Regulation Art. 7. The design is “made available to the public”, if it has become known in the normal course of business to the circles, see reversed DK Design Act § 5(2)(i). See similar N Design Act § 5 no. 1, S Design Act § 3(2) no. 1, the Design Directive Art. 6 and the Design Regulation Art. 7(1).

“Available to the public” for unregistered Community designs is defined by the Design Regulation Art. 11(2). This is when the design has “been published, exhibited, used in trade or otherwise disclosed in such a way that, in the normal course of business, these events could reasonably have become known to the circles specialising in the sector concerned, operating within the Community.”

There is no requirement of disclosing to the whole of the EU. Therefore the business circle of a single country or a part of which is within the EU, is enough to fulfill the requirement. Disclosing the design outside the EU does not establish EU design rights, see the German Supreme Court 9.10.2010, EIPR 2010/181-183. More on this, see Koftvedgaard U 2002B/101 European Design. But case law has stated that normal business course includes participation in messes, and reading professional journals and material. If a product appears in one of them, it will be considered to be known to the business circles, see T-153/08, Shenzhen. Even though the case was within the “EU conference sector”, this is stated as a general opinion, see Rosenmeier et.al., IPR, p. 450. See also the German Supreme Court of 29.1.2004, IIC 2005/260, where the market of Taiwan was considered as being known in
Germany. However, there is a limit. In the Swedish T 10454-08 (H&M Skull Boots) it was stated that sale of small quantities in two stores in China was not made available to business circles.

For a design to obtain a national or an EU registration, it must be submitted no later than the 12 months “grace period” after it has been “made available to the public,” see the DK Design Act § 6(i), the N Design Act § 6, no. 1, the S Design Act § 3 a, no. 1 see the Design Directive, Art. 6 and Design Regulation Art. 7(2)b. This right can also be invoked in case of abuse. Within the grace period, the design is protected as an unregistered Community design. It gives the right holder a chance to consider whether or not a design is worth register. If the grace period expires without any application of design registration, the protection remains as unregistered Community design. It last three years, see the Design Regulation Art. 11(1). See also Borcher, Produkt Efterligninger, p. 141, Koktvedgaard, Lærebo i immaterialret, p. 282, Levin, IPR, p. 361, Schovsbo, IPR, p. 253 and Rosenmeier et. al., IPR, p. 450.

3.2.3.2. Individual Character
The requirement of individual character can be found in the DK Designs Act § 3(3), the N Designs Act § 3(3), the S Design Act § 2(3), the Design Directive Art. 5(1) and the Design Regulation Art. 6:

“A design shall be considered to have individual character if 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 available to the public[...]”

The criteria in the preamble of the Design Directive (98/71 EC) section 13 and the preamble of the Design Regulation section 14 must be involved in the assessment. It states that “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[...]” This principle is in the DK Design Act § 9(2) and the S Design Act § 5(2). See also the Board of Appeal rulings in AN 2003 00056 of 27.1.2005 and AN 2005 00052 of 12.9.2006. See also Borcher, Produkt Efterligninger, p. 142 f. and Rosenmeier et. al., IPR, p. 451 f. The “overall impression” must disregard details, see the English High Court Procter & Gamble v. Reckitt Benkiser (“...what sticks in the mind after it has been carefully viewed.”)

As an example; Rechtbank’s-Gravenhage, 18 maart 2009, HA ZA 08-1522 (Crocs) (The pattern in the soles of the shoes, the heel-strap and shape of the holes stated individual character). Examples of case law, where the overall impression has been used: the Italian R.G.C. al n. 12959\2008 (Borsa “Lindy”) (“Same overall impression: as a result, when the informed consumer sees the Laurence bag derives from them a general impression of similarity with the Hermès bag and not a different overall impression.”); The Dutch 298874/KG ZA 07-1378 (Leggings) (The court said that leggings with three or four jagged edges projected the same overall impression, see at. 4.12. The court stressed that it was the not jagged edges that was protected, since that is a common styling element, see 4.13.); The British J. Choo (Jersey)
The court stated that even though the two designs had some differences, “[…] the overall impression on an informed user is, in my judgment, exactly the same. It does not seem to me to be arguable that the differences relied on by the defendant could have the effect for which it contends,” at 18.) See also the Irish case *Karen Millen Ltd. V. Dunnes Stores & Anor* and the Danish SHD V-62-04 (Rema 1000 Jackets). In the Danish SHD V-123-08 (Wallet) the design consisted of “ordinary and banal and freely available design elements and was not put together in a way that gave the purse "essential individual character".”

The overall impression must be made from a perspective of “an informed user”, see the preamble of the Design Directive section 13 and the preamble to the Design Regulation, section 14. This is a person that is reasonably informed and who has knowledge of the area as an amateur user.

Within fashion, the Italian R.G.C. al n. 12959\2008 (Borsa “Lindy”) shed light on a definition of an informed user:

“The informed user - ie the attentive and dedicated consumer which follows the developments in the field of fashion purses and is able also to grasp the subtle differences.”

When using “an informed user” as evidence, the user has to be identified, see the French N°RG : 09/11846 (LV purse). In this case, comments of unidentified consumers were the only evidence the defendant had to challenge individual character of the bag. The court found that the evidence was not valid enough to be used.

When assessing the individual character, the degree of freedom of the designer in developing the design must be taken into consideration, see the DK Designs Act § 3(3), the N Designs Act § 3(3), the S Design Act § 2(3), the Design Directive Art. 5(1) and the Design Regulation Art. 6. Are the variation possibilities modest because of the physical technical requirements for the design, like clothes, the requirement for individuality is reducing correspondingly. See e.g. the Danish U 1990.334 S (T-shaped diaper), where similar patterns were not considered as enough to rule the two diapers as given the same overall impression.

### 3.2.4. Subject of Protection

The exclusive right to a design is either the one who has created the design (the designer), or his successor in title, see the DK Design Act § 1, the N Design Ac § 1, the S Design Act § 1a, the Design Directive Art. 12(1) and the Design Regulation Art. 14(1). This is also known as the “design right”.

### 3.2.5. Content of the protection

The content of the designers monopoly is to be found in the DK Design Act §§ 9-12, the N Design Act §§ 9-12, the S Design Act §§ 5-7b and the Design Regulation Art. 19-21. The main rule is “that nobody may
exploit the design without the consent of the holder of the right,” see DK Design Act § 9(1), likewise N Design Act § 9(1), S Design Act § 5(1) and the Design Regulation Art. 19(1).

The consent can be both express and implied, see Borcher, Produkt Efterligninger, p. 146 and Levin, IPR, p. 370. As an example, if a violation is tolerated over time, the passivity is considered as implied.

3.2.5.1. Exceptions
The exceptions to the monopoly are mentioned in the DK Design Act, §§ 10-12, the N Design Act §§ 10-12, the S Design Act 7-7b §§ and the Design Regulation Art. 19(2)-21. From a fashion garment point of view, one exception is interesting, see the DK Design Act § 10(1), N Design Act § 10(1), S Design Act § 7 no.1 and the Design regulation Art. 20(1)(a). This gives the right to recreate the design for private and non-commercial purposes.

3.2.6. The Infringement Issue
A registered Community design has the same legal impact as the national legislation, see the Design Regulation Art. 27(1). For the material conditions, see the Design Regulation Art. 3-9. For the scope of protection, see Art. 10 and 19. This form of design enjoys protection against other designs “which does not produced on the informed user a different overall impression.” In the assessment “the degree of freedom of the designer in developing his design shall be taken into consideration,” see the DK Design Act § 9(2), N Design Act § 3(3), S Design Act, 5 § (2), the Design Directive Art. 5 and the Design Regulation Art. 10.

Examples of case law, where the overall impression of an informed user has been used: the Italian R.G.C. al n. 12959(2008) Borsa “Lindy”) (“Same overall impression”) and Rechtbank ’s-Gravenhage, 18 maart 2009, HA ZA 08-1522 (Crocs) (“different overall impression – andere algemene indruk” because of different pattern in the soles of the shoes, different kind of heel-strap and shape of the holes).

Procedurally, unregistered Community designs must be treated in the same way as a registered design. But there are special regulations for an unregistered Community design, see the Design Regulation art. 19. The structure is similar to the one that can be found in copyright. Only “if the contested use results from copying the protected design” happens, will there be a violation, see art. 19(2).

See e.g. the Irish case Karen Millen Ltd. V. Dunnes Stores & Anor, where it was undisputed that the designs were identical. However, in case law, the overall impression is still considered as a key element in this assessment. See e.g. the British J. Choo (Jersey) Ltd. V. Towerstone Ltd. & Others. The court stated: “The overall impression on an informed user is... exactly the same.” see at 18. Similar in the Danish SHD V-62-04 (Rema 1000 Jackets) (“the overall impression is the same.”)

Like in copyright law, a design that is created on the same ideas as another is not enough to rule a violation, see the principle stated in the Danish SHD V-142-03 (Candy in hourglass). The traditional rule of thumb is
the higher the degree of freedom and the more individual a design, the more broad the extent of the protection, see OHIM, ICD 000003630 “Wunderbaum” and the Austrian judgment Febreze, IIC 2009/114. But with the cumulation of copyright and recent ECJ practice, this might change the material protection, see 3.2.8. Cumulation of Design and Copyright protection below.

3.2.7. Duration
A design registration is made for five years at the time and no longer than 25 years after the date of filing, see the DK Design Act § 23(1), the N Design Act § 23, the S Design Act § 24 (1) and the Design Regulation Art. 12. For each renewal, a payment of a fee must be laid. Unregistered Community designs enjoy a protection period of three years, starting from the day the design was first made available to the public within EU, see Design Regulation Art. 11(1).

3.2.8. Cumulation of Design and Copyright protection
Copyright and design law have a significant shared area, where applied art is located. Protection under the design law does not exclude copyright protection, see e.g. the DK Design Act § 50/DK Copyright Act § 10(1); N Design Act § 1(2)/N Copyright Act § 10(1); S Copyright Act § 10(1); the Infosoc. Directive Art. 9; the Design Regulation Art. 96(2) and the Design Directive Art. 17. The two forms of protection cumulate. This means, if the requirements in both laws are fulfilled, the same applied art can enjoy a “double protection”.

See e.g. the Swedish T 10454-08 (H & M boots) (H & M claimed firstly applied art protection and secondly unregistered Community design) Similar the Danish V-62-04 (Rema 1000 Jackets) and SHD V-129-04 (T-shirt). See also the Dutch LIN: AZ5613, Gerechtshof Amsterdam 1264/06 SKG. In the Dutch KG ZA 07-1168 [G-star RAW](for the designs “Sniper blazer”, “T-shirt Skort”, “Midnight Art Jacket”, “Core custom jeans”) the mentioned designs were granted both copyright protection and unregistered Community design protection. See also Borcher, Produkt Efterligninger, p. 135, Rosenmeier, et.al., IPR, p. 441 and Schovsbo, IPR, p. 234.

There is even an example of an assessment in design law to be the very much similar to copyright law. In the Danish SHD, V-62-04 (Rema 1000 Jackets), a jacket was a “impertinent imitation”; both jackets “appear very uniform,” and the newer jacket “appears with such similarity [with the design] that it is difficult to imagine that the jacket has been created with no knowledge of this ...”(double creation). Similar the British J. Choo (Jersey) Ltd. V. Towerstone Ltd. & Others, where the “double creation” assessment was used: “The likelihood that these two designs could have been arrived at independently, given the large number of identical features in a design field as free as the present one, seems to me to be truly fanciful,” see at 23.

The requirements of obtaining copyright were until recently allowed to differ from country to country, see the Design Directive Art. 17: “The extent to which, and the conditions under which, such a [copyright] protection is conferred, including the level of originality required, shall be determined by each Member
State”. But with the recent case, C-168/09 (Flos), there is now an obligation for the Member States to recognize and grant this cumulation: if a registered design meets the original requirements of copyright, the Member State must grant copyright protection, see at. 36-38.

3.2.9. Summary
Whereas the registered Community design, the national design and the design registered according to the Hague system need registration, the unregistered Community design occurs immediately.

The aim for all of them is to protect visual appearance of a product. In order to do so, a design must be new and have individual character. “New” is considered as no identical design has prior been available to the public. If a design has been shown on messes, or in professional journals and/or material, it is considered as “been available to the public”. “Individual character” means that the overall impression produced on an informed user clearly differs from other designs. In praxis the overall impression on an informed user is used both in unregistered and registered Community design, and the assessment of individual character is practically the same.

Comparing the unregistered Community design to the registered designs, this criteria is traditionally quite limited. In theory, there has to be a copy of the design. But within fashion clothes, case law states that even smaller differences are not enough to statue “individual character”, why also similar designs may infringe the unregistered Community design.

As for both protection, a review of case law shows that the infringing product commonly is referred to as an “imitation”. The degree is increased by terms such as “slavish copy”.

3.3. Good Marketing Practice

3.3.1. Legal Framework
In Scandinavia the marketing laws are called; in Denmark, LBK nr. 839 31th of August 2009 “Markedsføringsloven” (DK Marketing Act); in Norway, LOV 2009-01-09 nr. 02 “Markedsføringsloven” (N Marketing Act) and in Sweden, lag (1995:450) “Marknadspöringslag” (S Marketing Act). “The general clause” states the main purpose of the law: To secure good marketing practice with reference to consumers, traders and public interests. This is to be found in the DK Marketing Act § 1, the N Marketing Act § 1 and the S Marketing Act § 4. When referring to these rules as one, the term is “the marketing general clause”.

Consumers are the aim for the current Community marketing law. The main directive is the Directive 2005/29 EC. For a good description of this, see Engelbrekt et.al., EU and Marketing Practices Law in the Nordic Countries. Regulation of Community marketing law is also mentioned other places. In the preamble at 31. of the Design Regulation, it is stated that the Design Regulation does not preclude laws about “unfair
competition.” The Design Regulation shall not be exercised in the respect of act for the purpose of “fair trade practice”, see Art. 20(1)(c). Finally, Art. 96(1) says that the Design Regulation is without prejudice to any provisions of Community law or national law concerned “unfair competition.” Similar the Design Directive, preamble at 7, Art. 13(1)(c) and Art. 16. In short, when ruling in cases involving marketing law, the national marketing laws apply and can be given priority over the Design Regulation and Design Directive.

3.3.2. Product Imitations
In practice, the marketing law protection concerning product imitation has evolved to become the most significant addition to the copyright and design law protection. In general, this protection accounts for the largest number of cases in the imitation area, see Borcher, Produkt Efterligninger, p. 153. Although the three sets of rules are independent, the practical reality is that the marketing legal protection "takes over", where the claim of intellectual property protection cannot be met. It is the consequence of this tight connection between copyright, design law and marketing law that the marketing general clause almost with no exceptions is claimed as alternative in design imitation lawsuits. See e.g. the Danish U 1979.844 SH(foot-shaped shoes) (copyright), U 2007.1112 H (copyright, unregistered Community design), U 2012.129 H (Nørgaard T-shirts) (copyright), SHD V-62-04 (Rema 1000 Jackets) (unregistered Community design)

3.3.2.1. Protection interest
As mentioned, the main aim is to make sure that the behavior in business is exercised with good marketing practice with reference to consumers, traders and public interests. The unquestionable starting point here is that a company has the right to inflict another business competition and is allowed to produce products that have both the design and functionally that meet the same needs of the consumers as the competitor's products is legal. See Borcher, Produkt Efterligninger, p. 153 f.; Borcher and Bøggild, Markedsføringsloven, p. 66; Koktvedgaard, Immatrialretspositioner, p. 356; Levin, Formskydd, p. 362; Madsen, Markedsret, p. 240 f. and Schovsbo, IPR, p. 157.

As a main rule product imitations must only be considered as illegal if:

1) The original product has an appropriate degree of individual character,
2) the imitation utilizes the efforts that are put into the original product (typically because of a likelihood of confusion), and
3) The imitation displace the product from the market in a way that is beyond the scope of fair and healthy competition, or otherwise, without the existence of any real likelihood of confusion, unfair free ride upon reputation and goodwill of the original product.
The principle of free competition and a dynamic product dictates that the original product appearance must be worthy of protection. There can only be taken actions against relatively clear cases of parasitism and market displacement. In praxis, there has to be quite a high correlation between the original product and the imitation. The demand seems to be either slavish or almost slavish, see the Danish SHD V-73-96 (T-shirts) (“slavish imitation”), U 2007.1112H (“slavish copies”), U. 1987.240 S (Kofte/Boilersuit). But in U 1988.775 S (Knitted Sweater) the Maritime and Commercial court used an overall assessment, “[…]the differences in materials, cuts, colors and diced size are irrelevant in the direct vision of the jerseys.”

The requirement of the original product’s individual character and market position is relatively small, see later 3.3.2.3. Individual Character.

3.3.2.2. Relationship to Copyright Law and Design Law
As mentioned, the marketing legal protection against imitation has evolved to become the most significant addition to copyright protection, where the requirement of originality cannot be met. The same applies to design the law. See e.g. the Danish SHD V-68-06 (Trousers), where there was ruled unregistered Community design, and “[t]here is therefore no need to consider whether the pants would have been protected against imitation by the Marketing Act § 1”. See also SHD V-62-04 (Rema 1000 Jackets), the Supreme Courts case 113.2010 on SHD V-81-07 (New Balance) and the Norwegian NIR 1961.196 (Jupiter Fabric).

3.3.2.3. Individual Character
When the core area is a safeguard against improper acquisition of another man’s action/market position, certain requirements must be met. The product’s appearance is a development effort, and the product has a market position that makes it possible for the public to distinguish it from other products. The product must therefore possess an appropriate level of individual character or originality. As far as garments goes, the protection under the marketing general clause is broad. See e.g. the Danish SHD H-212-90 (Sweatshirt), where the sweatshirt in question was very ordinary in appearance and color. The Maritime and Commercial Court stated: “The applicant marketed sweatshirt […] is found to have one, though modest, character […] that it enjoys protection under the Marketing Act § 1.”

Similar U 1987.240 S (Kofte/Boilersuit – use of experts); SHD H-237-92 (Cardigan); NIR 1993.428 (Sweatshirt Mario); SHD V-73-96 (T-shirts): “The applicant’s products has in itself no significant character, but it does not entitle the defendant to make a slavish imitation.”; U 2001.2387 S (Textile Design); SHD V-127-03 (Work gloves); U 2004.737 H (Trousers); U 2004.1302 H (Skirt) and U 2006.2128 V (Ebbe Sand football shirts). See also the Supreme Courts case on SHD V-81-07 (New Balance), where “the individual character was a combination of a narrow elegant shape with well-defined proportions[...] Such character and expression of independent effort were entitled to the protection against imitation of Marketing Act § 1.”
In the assessment, the overall impression can be used, see U 1988.775 S (Knitted Sweater); SHD H-212-90 SHD (Sweatshirt); V-54-01 (Jackets). See also the Dutch Rechtbank 's-Gravenhage, 18 maart 2009, HA ZA 08-1522 (Crocs)

Products without individual character or which are belonging to the common shape area shall be denied the marketing legal protection. But as case law shows, the level of individual character or originality is relatively low.

In case the courts find that there is no level of individual character or originality, poor character may be remedied by targeted and comprehensive marketing. In the Danish U 2012.129 H (Nørgaard T-shirt) one dissent Supreme Court judge would give the Nørgaard T-shirt an extended protection under the Marketing Act due to the time of launch design and innovation that T-shirt represented. The judge added as well that the T-shirt had achieved a strong market identity and incorporated market position. See also U 2004.737 H (Trousers) and U 2004.1302 H (Skirt). In the Danish U 1979.844 S (Foot-shaped shoes) both producers had invested significant in marketing their shoes. Based on this, the defendants marketing was not interfering with the good-will of the applicant’s design.

3.3.2.4. Novelty
The marketing legal protection is not conditional upon an absolute novelty requirement, as known from design law. When the term “new” is used, it is only a paraphrase of the requirement of individual character/commercial distinctiveness. A “ghost” or processing of previously marketed products can thus be protected. See e.g. U 1987.240 S (Kofte/Boilersuit), where the Maritime and Commercial Court granted marketing protection to a “kofte” and a boiler suit, despite the fact that they both were a processing of known themes. Similar SHD V-103-97 (Jeans); SHD V-54-01 (Jackets); U 2001.2387 S (Textile Design); U2004.737 H (Trousers) and U 2004.1302 H (Skirt).

3.3.2.4. Colours
An essential element of the appearance of an applied art is its color or combination of colors. In general, it is believed that exclusive use of a particular color cannot be achieved, see e.g. the Danish U 1961.46 H (Lego 1) and U 1965.830 S (Wall pegs).

But where a distinctive combination of colors is an essential element of the product identity, it can be decisive when it comes to deciding whether a marketing infringement occurs. See e.g. S HD H-25-1986 (Down Jackets), where the court stated: "[...] the characteristic of the applicant's jacket is the composition of the four colors." In accordance with the “slavish/very close imitation”, it must be expected also in the fashion industry that a different shade of the colour is not infringing. See e.g. U 1980.609 S (Packaging for
3.3.3. Content of Protection

3.3.3.1. Relation to Competition

It is required that the imitative product established a currently or potentially compete with the original product. It is not required that the target client circles of the two products are the same, see e.g. U 1988.775 S (Knitted Sweater), where the court did not consider different client circles as an element in their ruling.

For a marketing protection to exist there must be an actual marketing of the original product. There can be no requirement for volume and intensity, as long as the marketing is genuine. Products sold seasonally or acting in a collection with intervals are protected as well, see e.g. SHD V-54-01 (Jacket). For the well-established product, there can under certain circumstances be operated with a run-off period to avoid dilution in the market and parasitism on the product image to see U 2001.2387 S (Textile Design).

3.3.3.2. Subjective conditions

If a company unknowingly of the original product develops a competing product with the same appearance, the act is not contrary to marketing law. The same goes for products developed in line with current trends, but has its own individual character. See the Dutch 295824/KG ZA 07-1168, where there was stated inspiration from another design, but never risk of confusion. In general, in order to rule illegal product imitation after the Marketing Act, it requires existence of intent impersonation. That is partly knowledge of the original product, and partly that the other designer has not only used this as a basis for inspiration, but directly sought after making an imitation. See e.g. SHD H-245-89 (Men underwear) ("not ... striven confusion.") Similar U 1988.775 S (Knitted sweater) ("Knowing about the original, and aiming to produce the design, the defendant has acted against honest marketing practices.") and the French case 10/18796 (Saint Tropez) (Selling cheap replicas of models, incorporating the same colours and the same print constituted intent impersonation).

Both manufacturer and dealer/retailer have self-responsibility to make sure that the products they place on the market is lawful under the marketing general clause. If a dealer brings a product, which he knows, or after a reasonable market research should know, that is infringing another products’ marketing protection that constitutes a violation of the marketing general clause. See e.g. SHD H-237-92 (Cardigan), where the court emphasized "that the defendant neither investigated who the designer was or the circumstances of its genesis in general." Similar SHD H-105-90 (Shirt), where the defendant, which is “solely engaged in
parallel import [...] should have ensured that there were original items.” See similar the Supreme Court case 113/2010 on SHD V-81-07 (New Balance).

3.3.3.3. Requirement of overlap
A key element in the marketing law appearance protection is determining the requirement of overlap between the original product and the imitation. The illegal area is in general the slavish or impertinent imitation where there is likelihood of confusion. The reasons in case law are somewhat varying, but concentrates on:

- **Slavish copy / similar appearance**
  U 1987.240 S (Kofte/Boilersuit); SHD V-40-97 (Gowns); U 2001.2387 S (Textile design); U 2004.1302 H (Skirt); U 2004.737 H (Trousers); U 2012.129 H (Nørgaard T-shirt); the Supreme Court case 113/2010 on SHD V-81-07 (New Balance); U 1958.1211 SH (Blouses) and the French case 10/18796 (Saint Tropez)

  - **Sought similarity**
    U 1988.775 S (Knitted Sweater) and SHD H-245-89 (Men underwear)

If an imitation does not meet the above criteria but is merely substantially similar to the original product, or the coincidence is more remote, case law has proven that the claim of illegal imitation typically falls out to be unfounded. See e.g. U 2004.737 H (Trousers), where the dismissal of the trousers was due to a too remote overlap. Similar U 2012.129 H (Nørgaard T-shirt), where “in spite of the significant overall similarity, the other t-shirt differed on a number of points.” Unlike U 1988.775 S (Knitted Sweater), where a more broad overall assessment was used.

3.3.4. Summery
When fashion designs are not protected by intellectual property rights, the designers can still take legal action through the marketing law. In cases where a design is granted copyright and/or design protection and this protection expires, the design may still be protected under the marketing law, if it is commercial active.

When assessing whether or not a given design can be protected, some elements from intellectual property law are used from time to time. A lower individual character requirement with the “overall-impression-test”, the use of expert opinion and novelty is used. In addition the “existence of intent impersonation” is to a great extend assessed in the same way as the “double creation criteria” in copyright. The more alike two designs are, the more likely is this requirement fulfilled.
Since the marketing general clause lasts as long as the design is active on the market, and that the level of the requirements is relatively low, the protection is also narrow. To rule a violation, there has to be a design that is either identical or a slavish copy. Only in few cases has sought similarity been mentioned as a possible reason for violation, see U 1988.775 S (Knitted Sweater) and SHD H-245-89 (Men underwear), and once has a broader overall assessment been used.

3.4 Conclusion on EU

There are several options to protect fashion designs in the EU. A protection that starts already when the design has manifested itself in a garment is the copyright protection. The courts go far to protect fashion clothes by setting the bar for obtaining copyright protection relatively low. Although they often rule in favour of the right holder of the original product, the courts only grant a very narrow protection. Only in case of “slavish imitations”, “slavishly reproduction” or “almost slavishly reproduction” are the courts willing to rule infringement of fashion designs.

The development of the three year unregistered Community design has turned out to be a good supplement to the traditional design registration on national and Community level. Making the protection start immediately when the design has been presented to the public, makes it a better fit for fashion.

In praxis the overall impression on an informed user is used both in unregistered and registered Community design. Formally, the protection under the unregistered Community design is to be more limited than the registered designs, see “only if the contested use results from copying” in Art. 19(2) in the Design Regulation. But the fact is that the assessment of a design’s individual character becomes practically the same. Based on the wording used by the courts and the extend of protection they grant, it appears that the registered protection of fashion designs has narrowed a bit down and the unregistered has expanded a little.

If fashion designs are not protected by intellectual property rights, the marketing law may step in. Garments that are commercially active when the copyright/design protection ends may still be protected. The assessment of fashion garments contains some elements from intellectual property law. A lower individual character requirement with the “overall-impression-test”, the use of expert opinion and novelty is used. In addition the “existence of intent impersonation” is to a great extend assessed in the same way as the “double creation criteria” in copyright.

Mutual for all four kinds of protection is, when ruling on protection of a design, it is often made on subjective sensations of the law – either by experts or the judges. A review of case law shows that the
infringing product commonly is referred to as an “imitation”. The degree is increased by terms such as “copy”, “very close imitations” or “slavish copy”.

Judging from the wording of the rulings, both the unregistered and the registered Community designs have a slightly more broad protection. Copyright demand a larger correspondence of the two designs. Finally, the marketing law protection is the narrowest. Using some of the same elements as intellectual property law, but with lower requirements, demands in the majority of cases a greater overlap of designs. This is also stressed by the fact, that if a design enjoys intellectual property protection, the marketing law protection is rarely considered by the courts.

**Part IV – Compare Low and High IP**
The levels of legal protection in the US and the EU are clearly different. In spite of this, the fashion industry is similar. An analysis of how two different IP-regimes affect the fashion industry will be made in the following.

1. **Low IP**

1.1. **Advantages**

As mentioned, fashion has always been in a low IP-regime in the US. Viewed culturally, copying benefits society to some extent. Thanks to fast fashion, there have never been more styles to choose from than now. “There are 60’s styles à la Nancy Sinatra; 70’s styles à la Stevie Nicks; 80’s styles à la Gloria Estefan; and 90’s styles à la Shirley Manson. It is a puzzling sight for fashion seers used to declaring that one style of boot—Midcalf! Thigh High!—is The One For Fall,” see *Colman, Choices, Up to Your Knees*. “People use fashion, whether you like it or not, to project who they are to the world,” see *Valentin’s comment, DR2 Dagen*. The industry seems to accept and need this. In the words of Tom Ford, former creative director for Gucci, “[a]ppropriation and sampling in every [fashion] field has been rampant,” see *DiMassa, Designers Pull New Styles Out of the Past*. This is confirmed by David Wolfe, former creative director at I.M. International: “Fashion is a long tradition of crafts-people working with the same materials, tools, and concepts, which is what makes it difficult for someone to design something that has not been done in a similar or same way before. Current fashion is the product of generations of designers refining and redeveloping the same items and ideas over and over,” see *U.S. House Subcommittee on Courts, (2006),(Statement of David Wolfe)*. When a fashion show has ended, for some designers the designs are already history, and free to copy. Elsa Schiaparelli, famous for translating surrealism into fashion art, stated: “The moment people stop copying you, you have ceased to be news,” see *Seeling, Fashion: The Century of the Designer, p. 161*. 


Some high-end designers follow this thought. They are not ashamed by copying earlier designs. In the TED talk, Lessons from fashion's free culture, Johanna Blakley refers to an example of Miuccia Prada, the Italian designer. In a vintage store in Paris, Ms. Prada finds a jacket by Balenciaga and says: "I'll buy it, but I'm also going to replicate it." To academics this sounds like plagiarism. But to a fashionista, this is a sign of Prada's genius: To go through the history of fashion and pick the one jacket that does not need to be changed at all, and still be fashionable at that specific time. What would have been considered as an infringement in any other businesses, is morally acceptable in fashion, because a design may be relevant again. The art is to know when.

The way the industry keeps staying alive is through the fashion cycle. It is described as: “There comes a season that creates a trend which is then is copied and eventually the idea is exhausted and it all starts back from scratch,” see Valentines' comment, DR2 Dagen. The very concept of a trend requires multiple actors converging on a particular theme. This is referred to as anchoring. It helps fashion conscious consumers understand (1) when the fashion has shifted, (2) what defines the new style, and (3) what to buy to remain within it, see Raustiala et.al., Piracy Paradox, p. 1728.

Due to fast fashion, global trends get established much more quickly than they used to, see Blakley: Lessons from fashion's free culture. If copying was illegal, the fashion cycle would occur very slowly. The result would be less turnover each season. Instead, the absence of protection for creative designs and the regime of free design appropriation speeds up this process. New trends will be set, and the fashion industry can move product. This is referred to as obsolescence of fashion designs. As Miucci Prada has put it recently: “We let others copy us. And when they do, we drop it.”, see The Look of Prada, p. 213.

The fashion cycle is driven faster through the widespread of design copying. Designers are frequently referring to each other’s work and help to create (and then exhaust) the dominant themes of trends. These themes together constitute a mode that consumers refer to, to guide their assessments of what is “in fashion.” Copying helps this, as it erodes the positional qualities of fashion goods. As Johanna Blakley stresses, fashionistas want to stay ahead of the curve, where only few are wearing that style. In turn, designers respond to this obsolescence with new designs, which keeps the innovation on a high level. This keeps the wheels turning, which is very good for the bottom line. See also Valentin’s comment, DR2 Dagen.

In short, piracy paradoxically benefits designers by inducing more rapid turnover and additional sales, as long as they keep designing. The twin phenomena of anchoring and obsolescence explains why the fashion industry’s low-IP regime in the US has been politically stable. It is claimed that “these twin phenomena at a minimum reduce the economic harm from design copying, harm that is predicted by the standard account
of IP rights. At a maximum, these processes actually benefit designers and the industry as a whole,” see Raustiala et.al., Piracy Paradox, p. 1733.

An argument for more intellectual protection is that this fashion cycle turns too fast. The concern is that the high speed of the market might generate new ideas too fast to fully develop. Some designers might want to invest time and money in developing something unique, but the expenses are too high and the time is too short. After all, a season lasts only for six months. Despite these concerns, expensive, innovative experiments are still made, with haute couture in the lead. The aim of this old art is marketing. "No matter how successful you are, you can't make a profit from couture," says Jean-Jacques Picart, a veteran fashion PR man, and co-founder of the now-bankrupt Lacroix house, see Langley, Haute Couture. Couture is where ideas are more important than direct profit. Instead, fashion houses such as Chanel, Dior, Givenchy and Gaultier use it as a marketing device for their far more profitable ready-to-wear, fragrance and accessory lines.

And the effect is clear in practice. "Haute couture is what gives our business its essential essence of luxury," says Bernard Arnault, the head of LVMH, which owns both Dior and Givenchy. "The cash it soaks up is largely irrelevant. Set against the money we lose has to be the value of the image couture gives us. Look at the attention the collections attract. It is where you get noticed. You have to be there. It’s where we set our ideas in motion," see Langley, Haute Couture. This is known as “name association”. Couture outfits may be unaffordable, even unwearable, but the whiff of glamour and exclusivity attracts consumers of all classes. The time-starved modern woman, who does not make enough in a year to afford a single piece of couture, can still buy a share of the dream for the price of a Chanel lipstick or a Givenchy scarf. Haute couture is trade in fantasy, and currently more people want to fantasise. Using couture as marketing is a good business and good for innovation. "We've received so many orders we may not be able to deliver them all," says Sidney Toledano, head of Dior, see Langley, Haute Couture. It might seem unfair that economy is a limiting factor for the full exploration of a talent. But these are the economic conditions, just as in other areas, such as Formula 1, horse racing and the Danish Pilot education. All these industries require large investments no matter the talent, and it is accepted as well.

An argument to eliminate piracy is that high-end goods or goods associated with a particular designer, may be harmed by knockoffs. In the US ruling, Hermes Int’l v.Lederer de Paris Fifth Ave., Inc., the court stated that “the purchaser of an original [design] is harmed by the widespread existence of knockoffs because the high value of originals, which derives in part from their scarcity, is lessened,” see paragraph 11. When a copy costs US $ 200, why will someone pay thousands of dollars for the original? Based on the just-mentioned success of haute couture, this fear of consumers being discouraged from buying products in the
future seems groundless. How the haute couture fashion world survives when there are knock offs, is quite simple: “And we found after much research that - actually not much research, quite simple research - that the counterfeit customer was not our customer,” see Gucci designer Tom Ford in Blakley: Lessons from fashion’s free culture. High-end costumers focus on quality. A knockoff is never the same as an original high-end design, at least in terms of the materials: They are always made of cheaper materials, which will not work on all designs. Recently Stuart Weitzman came up with the Bowden-wedge heel. It has to be made out of steel or titanium, since a sort of cheaper material will actually crack in two, see Blakley, Lessons from fashion’s free culture.

Instead of ruining the career of a designer, knockoffs might actually boost it. When a design becomes popular, there will soon be many sequels often with similar or same appearance. The spread of pieces have made costume illustrators and designers world famous, with financial benefits and creative positions in bigger fashion houses.

As examples: Helen Rose designed Elizabeth Taylors dress in Cat on a Hot Tin Roof (1958). This dress became a copy-success and turned a costume illustrator into a fashion designer, see Seeling, Fashion: The Century of the Designer, p. 189. See also Joan Crawford’s dress in Letty Lynton (1932), designed by Gilbert Adrian. The dress struck Joan Crawford’s name as iconic star, and Adrian became a famous designer, see Seeling, Fashion: The Century of the Designer, p. 189. See also Edith Heads dress which Grace Kelly made famous in “To Catch a Thief” (1955).

Even today, designers might profit from the knockoffs. Silas Adler, Danish upcoming designer, had one of his own creations, the Adler Fedora Hat, copied by Topshop. Although he could not afford to sue them, he stresses that it is difficult to tell whether or not it has been bad for his business. Through the knockoff by Topshop, Adlers company, Soulland, got some publicity, see Adlers comment, DR2 Dagen. As long as the designer is credited for his design, knockoffs can kick start a career.

1.2. Disadvantages
The twin phenomena of anchoring and obsolescence explain why the fashion industry’s low-IP regime has been politically stable. It is claimed that “these twin phenomena at a minimum reduce the economic harm from design copying, harm that is predicted by the standard account of IP rights. At a maximum, these processes actually benefit designers and the industry as a whole,” see Raustiala et.al., Piracy Paradox, p. 1733. The argument is that speeding up the fashion cycle, leads status-seekers to renew the hunt for the next new thing. But the speed might do harm in the long run. First is the amount of pressure. Christian Dior, the founder of Dior, was known as the first couturier to make his creations unfashionable for each season. He was the first to make the fashion cycle run fast, see Seeling, Fashion: The Century of the Designer p. 235 and 253. But this was at the same time his curse. He was also known as being stressed and nervous for not
delivering the amount of dresses and quality for the next season. He died of a heart attack in the age of 52. A more recent example is Adam Kimmel. This young designer was adored by the press, and everyone predicted him to go all the way to the top. Suddenly he retired in 2012. In such a tough business it is very unusual that a designer, who has everything put in front of him, stops. The Kimmel case illustrates how much pressure there is in the fashion world, see Adlers comment, DR2 Dagen.

Second is the threat against innovative ideas. It seems like Raustiala and Springman are of the opinion that the faster the fashion cycle runs, the better it is for the industry: It speeds up the turnover and pushes the innovation. The copy industry is so effective that the look of a catwalk can be found knocked off only weeks later in the stores. Before the fast technology, designers of original pieces had a “first mover advantages”. The designer could sell many units before the copies were available, and have the biggest part of the revenues from the designs, see Raustiala et.al., Piracy Paradox, p. 1759. Now, when haute couture fashion houses are showing their trends six months before they produce it, the knockoffs are available long before. The new trend created by expensive brands is watered down, often before it actually hits the market. Innovative ideas are risked to be left out due to this speed. It pulls some of the creativity out of the creative, resulting in ideas failing to fully develop. As a consequence catwalks in Milan and Paris show that all are going more mainstream. There are not many fashion houses that stick out anymore, see Adlers and Andersens comments, DR 2 Dagen. It could be argued that it is the critical financial times that cause the lack of innovation. But since it never has had an effect on fashion in history before, it seems unlikely it has now.

Usually opponents of design protection argue that most customers are not exposed to any real deception. Since the look has been out on the runway, the customers know that there is an original product. They accept products imitating a design or quality inferior product at a lower price. It is a coherent aesthetic, see Blakley: Lessons from fashion’s free culture. In fact, this has become an accepted lifestyle. The English fashion consultant, Gok Wan, hosted a British TV show called; “Gok Wan’s Clothes Roadshow.” Basically, Gok Wan shows how people can get the high-end fashion look with less expensive clothes. In addition, blogs like “The Budget Babe” show the expensive look of models and celebrities, and provide links directly to discount online shops. But in cases where it is difficult to distinguish between originals and copy products, the problem of post-sale confusion can occur. Post-sale confusion is when the public associates an infringing article with the original source, see Rosenmeier et.al., IPR, p. 683 f. Consumers are fearful of purchasing a product that is not original, and therefore rather refuse to buy at all, resulting in the designers goodwill eroding, see Borcher, Produkt Efterligninger, p. 59 and Levin, Formskydd, p. 57.

A serious problem appears when a buyer thinks the piece is original. Willow Smith, daughter of actor Will Smith, wore a ruffed sleeved canary-yellow harness at the 2010 American Music Awards. Initially, the piece
received positive reviews. Unfortunately it was a knockoff of a design by Mildred Von Hildegard, the designer behind the label Mother of London. When asked about her work being on the red carpet, she said: “I’m disappointed and saddened that this will negatively impact my business. My original design is now recognized in the mass media as someone else’s work, and it’s very hurtful on both a personal and professional level,” see Mother Of London Knocked Off. The theory that the demand for the design increases with the spread, requires that the designer gets recognition and PR for his or her work. When this is left out, it becomes a problem, see Adlers comment in DR 2 Dagen. Without this, the economic incentive has vanished, the recognition is stolen and so is the profit of a brilliant idea.

Supporters of the low IP regime use examples of industries that survive with almost no intellectual protection at all. Among these are the comedy and the fragrance industry, see e.g. Blakley: Lessons from fashion’s free culture and Schovsbo’s remark to Eising, Comedians Fight for Their Jokes. In Blakleys presentation she argues that since there is almost no protection, there is a much bigger turnover in the industries. When these industries can survive, so can fashion, seems to be her point.

I will like to stress that the point misses two things. First, if a comedian copies another comedian’s routine (order of jokes), then this will quickly be noticed. Medias like YouTube will display his copying of material and stop the copy-comedian’s progress to the top, unless he brings his own material. None of them will benefit in the long run. In addition, comedy is too different from the fashion industry: Partly because jokes are not presented to the public six months in advance, and partly because they do not project the personality of the consumer as much as clothes. Second, fragrance is rarely sold without connection to a famous design brand. Buying the fragrance is often connected to the life style that a fashion house sells, why almost all of them have several perfumes and deodorants. People buy not only the fragrance itself, but also the sensation of luxury the brand contains, see Langley, Haute Couture. With its close connection to fashion, fragrance is actually more a branch of it. Based on this, it is true that the two industries can survive without intellectual property protection. But where comedy is too far away to be compared to fashion, fragrance is too close. Blakleys comparison could have used these elements, but on the other hand that might have made her point weak.

Other industries are compared in Raustiala et.al., Piracy Paradox. 1765-1774. They are: Food; furniture; tattoos; computer databases; open source software; microprocessors; hairstyles; magic tricks and firework displays. Although there has been much effort expended into comparing these industries with fashion, the analogies seem very poor: Whereas garments are goods, food is more an experience. Furniture is, although a fashion industry, not replaced as often as clothes, nor copied six months before the original is on the market. Every tattoo and hairstyle is unique since it is placed on a human body, and cannot be sold second
handed. Computer databases, open source software and microprocessors are all more functional than aesthetical, unlike clothes that are used to project the owner’s personality. Magic tricks and firework displays are better to compared with choreography, based on the need of professional skills for the correct execution.

The damaging effect of design piracy has hit both world-famous and independent designers. Stealing the design, the very essence of enterprise in the fashion world, has ruined many careers. Besides showing how knockoffs decrease the income of designers and display how low-quality or low-priced knockoffs do effect the profits of higher-priced designers, these examples also show how creative people give up on their talent. As the first example of small designers, Nicole Dreyfuss, a New York handbag designer, created a US $ 130 handmade cable-knit clutch. One day an admirer did not want to buy Dreyfuss’s bag, because Abercrombie & Fitch was selling “the same bag” for only US $ 30. To compete with such a large company, Dreyfuss had to sell her bag for US $ 15, which would not even cover the supplies, see Kover, That Looks Familiar. When Abercrombie & Fitch received the cease-and-desist letter, they complied and agreed to remove the bags from their shelves. Scarf designer Elle Sakellis discovered that her original “evil eye” scarves had been knocked off when one of her retailers did not renew its order. The retailer told that a cheaper version was the reason why the popular original was replaced. The scarves were identical in style and colour. Only the material and price were different. Sakellis’ scarves were made of silk chiffon and cost US $ 190, while the US $ 10 knockoffs were made of polyester. "Everyone always says that imitation is the best form of flattery. But it happened too soon," she says. "I'm not Louis Vuitton," see Binkley, The Problem with being a Trendsetter.

From Denmark, there is an example of decoration of applied art. Although it is not within the scope of design protection, the situation itself illustrates the harm knockoff can course. At a personal interview, I met with Sophie the 25th of March 2013. Sophie wishes to be anonymous. Partly, because the Danish national wide chain, who stole her decoration design, is still one of her largest clients, and partly, because of fear of a defamation lawsuit. Being a sole proprietorship importing products for babies, Sophie tried to make her own decoration design of baby bedding for her own son. On request from her client through the last three years, here called Child Store, Sophie produced an exclusive line of the bedding. Although Child Store reported that the decoration design was one of the most popular on the market, they did not ordered any more products from Sophie. Talking to one of the shops, Sophie realized that Child Store had made their own line, which was mainly the same as hers. Because of financial reasons Sophie was forced to make a settlement. She ended up with a stolen decoration design, a lost success and a huge bill from her law firm. Asked if Sophie will create her own products again, her response is: “Never. Now I only stick to
supplying products from others. This is one thing that I will never go through again and neither should others.”

In the US there is not yet any specific law prohibiting knockoffs, see earlier in Part III – Intellectual Property Protection of Fashion, 2. The US. This is a huge problem for small designers, see Binkley, The Problem with being a Trendsetter: “Small designers face a particularly large burden; often, they lack deep pockets to chase down versions they find similar,” and Kover, That Looks Familiar: “Stating that it was unusual for an emerging designer to receive a response or satisfaction from a copying complaint.” But even with such a law as in Denmark, small designers are still not protected well enough. Currently, small designers often cannot defend their designs from copyists because they lack the finances for the uphill legal battle they would face.

Turning to large designers, it is said that famous designers of haute couture gowns are replicated by notorious knockoff artists just hours after they appear on the red carpet.

*See Oscar Dresses From The Red Carpet And Cheap Chic Celebrity Inspired Looks Products.* Another famous example of knock off designers is Allen Schwartz of ABS. Just days after Chelsea Clinton’s wedding, he announced that he would create a replica of the Vera Wang gown that Clinton wore down the aisle, see Wilson, No Wonder Chelsea Clinton Wanted Secrecy.

The designers experience customers turning to cheaper designs, either looking for a deal, or because of brand dilution through post-sale confusion, see above on page 48. A bride-to-be returned over US $ 1,200 worth of bridesmaids dresses to Foley+Corinna. The reason: The originals of silk cost US $ 300, where as the polyester copies were sold in Forever 21 for US $ 40. Anna Corinna, co-founder of Foley +Corinna, stated “[w]hen one of our designs gets knocked off, the dress is cheapened—customers won't touch it,” see Overfelt, When Piracy is Legal. Turning back to the above mentioned example, Vera Wang licensed two versions of Chelsea Clinton’s US $ 20.000 wedding dress to David’s Bridal for the retail prices of US $ 599 and US $ 1,050. But with the knock off the customers diverted away from the officially licensed version, see Ellis, Copyrighting Couture, p. 189 with references.

*Remarkable statement of influential US fashion designer, Jeffrey Banks: “I would like to respond to those questions with an emphatic 'yes it does hurt the designer and the industry!' And no, far from helping the designer, design piracy can wipe out young careers in a single season,” see H.R. 5055 Hearing, supra note 1, at 11 (testimony of Jeffrey Banks.)*

Even iconic designers find copying repulsive. World famous legend designer Kenzo Takada became like Christian Dior and Gabrielle “Coco” Chanel benchmark for almost the entire world. Both his design and shows were copied all over the world. He was without doubt the most copied designer of our time. With
animals and famous people as models, he turned the trade fashion industry events into media entertainment. But in the end, he got so irritated by people copying him that he stopped his shows, see Wolfe, Ready or Not.

2. High IP
From a legal point of view, the problem of no IP is that others can steal your idea. That is socially unacceptable, see e.g. Rosenmeier et.al., IPR, p. 31 f. This has also been expressed by some of the top leading designers. Even though there was no real protection of fashion designs in the beginning of the 19th century, former designers were quite creative in protecting their works. Madeleine Vionnet (1876-1975) was one of the first designers to protect her work. Aware of her special technique, she tried to protect her designs against copying. In the beginning she made three sketches – from the front, the side and the back – and putted them in her “copyright album”. This album was used to prove her as the original designer. Later she had her models photographed in front of a three-parted mirror, see Seeling, Fashion: The Century of the Designer p. 75 cf.

It is now stated that some areas of the fashion industry benefit from the lack of intellectual property protection. Turning to the other great market within fashion, Europe, is also turning to a market with more protection of designs. Light will also be shed on the effect of a higher IP regime.

2.1. Advantages
Intellectual property protection is thought to be the economic incentive to reward a person for an idea that will benefit society. Even though the inspiration is free, the ideas are not easy to come by, but copying is. The creator might not have another (groundbreaking) one in his entire life, and he should enjoy the fruit of his work. The protection also forces others to create new ideas, which might be generated from the new work. In some cases that can be groundbreaking. An example of design protection making designers more creative is the famous Hervé Léger. He was accused of copying designs made by Azzedine Alaïs. This offended Léger, and to make sure that it never happened again, he changed his style in a whole new direction. This decision made Hervé Léger world famous, and he is now recognized for his new, wonderful creations, see Seeling, Fashion: The Century of the Designer p. 565.

One of the concerns about protection of fashion designs is that it will stifle innovation. This is understandable in the case of a protection that lasts too long. With the three year protection that the Unregistered EU Community design grants, it is hard to see that happening. When trends shift every six months, it must be assumed that the protection of three years lasts until a trend is exhausted. Later, the fashion cycle can return to the same ideas and inspiration, just as history has shown before.
Some opponents of design protection argue that design protection would increase the price of fashion, resulting in products to be too expensive for the average person to buy. However, designers often licence their runway lines to stores, see H.R. 5055 Hearing, supra note 8, at 221 (statement of the American Free Trade Association) and at 81 (statement of Susan Scafidi). One way is for fashion designers to make deals with the fast fashion giants and they come up with a way to sell their product to a whole new demographic, which Versace did with H&M, see Arthurs, Daily Mail, 24-hour queue... sold out in 30 minutes. This way, the designers keep their goodwill and limit the knockoff competition.

With copyright and the harmonized design law, there are good possibilities to protect a design. The signal value of lawsuits should not be underestimated. If a company consciously and consistently prosecutes violations based on previous winning imitation cases, this can be used as a targeted marketing – just as haute couture. This will then create a clear protective sphere around the original product. The designer will appear as a resolute defender of his designs. History has shown that design companies which defends their rights are known and typically respected by their competitor, see e.g. Cartier (jewellery and watches) and Vitra (furniture) as mentioned in Borcher, Produkt Efterligninger, p. 21.

2.2. Disadvantages
It is said that since clothing is not detached from its function, there is a risk of market monopolization, see Borcher, Produkt Efterligninger, p. 86 f. reversed. With this in mind, there is a concern of granting intellectual property protection to fashion garments. If the protection lasts too long, it will stifle the innovation and limit the society, see Rosenmeier et.al., IPR, p 41. A long-term protection as copyright creates uncertainty. A licensee may appear and stop a new collection from another designer, resulting in stifling the innovation. It would be unfair to restrict competition on a market for such a long time, when there is a demand from the consumers to be met, see Skogström, Fashion industry's Need, p. 377.

Another problem is the courts and trials. Using the court to fight design piracy is a difficult and important consideration to make. Lawsuits are expensive, time-consuming and psychologically costly. The economic aspect is illustrated by Silads Adler. He experienced that TopShop copied his design, the “Adler Fedora” Hat. His company was too small at the time and did not have the capacity to enter into litigation. According to him, major companies attack small designers who cannot afford to protect their designs. Despite the intellectual property protection, fashion is partly a lawless industry, see DR 2 Dagen. Lawsuits often take too long and when a ruling has been made, it is not relevant – the demand has changed. Another example is the above-mentioned “Sophie” situation on p. 50. Because of financial reasons Sophie was forced to make a settlement. She ended up with a stolen decoration design, a lost profit and a huge bill from her law firm. Even major companies think it is too costly: “[…] but in reality [Bestseller, Danish fashion company] do
not have many cases. In fact, we have just as many cases where other companies have violated our rights. We could start many cases within the EU, if we wanted to spend the money and time on it,” see *Thiemann, Bestseller Copy*.

In addition case law proves that the outcome is more or less uncertain. In the event of a lost case, the company of the original design faces a worse position than before the lawsuit. The sphere of the protection is determined, which can encourage more to copy the design, now they know exactly where the line is, see *Borcher, Produkt Efterligninger, p. 20*. An example of the uncertainty of courts decisions is *Societe Yves Saint Laurent Couture S.A. v. Societe Louis Dreyfus Retail Mgmt. S.A*, as explained by Wolfe in *Ready or Not*. This case illustrates that the law does not always understand fashion. Originally tuxedos were invented in Tuxedo Park, New Jersey. With great success, Yvés Saint Laurent took the look, and made it into “le smoking” in 1966. Discovering Ralf Lauren had made a tuxedo dress design, Saint Laurent sued Ralph Lauren for the concept of the tuxedo dress. Saint Laurent won the lawsuit. The problem was that Ralph Laurens dress was the exact same dress as the one Christian Dior created in 1949, but the Dior company did not sue Yvés Saint Laurent nor Ralph Lauren. The protection existed, but it was actually granted to the wrong designer.

Part V – Closure

1. Discussion

1.1. The Necessity of Intellectual Property Protection

As California Representative Howard Berman noted during the *H.R. 5055 Hearing*: “Is a high level of protection necessary to promote innovation? Or does the lack of a high level of protection for fashion designs actually spur increased creativity in the fashion industry?” Fashion flourish under both regimes, and the answer is not clear at all. Even top designers cannot agree. Some say that ideas are being strangled by intellectual protection. Others stress that creativity is watered down without it.

The benefit of the copy industry is that it takes over the impulses that come from the creative brands and makes them huge global businesses, see *Seeling, Fashion: The Century of the Designer p. 607*. There will be a season that creates a trend which is then copied and eventually becomes exhausted and then it all start from scratch again, see *Valentin’s comment, DR2 Dagen*. Copying is good to a certain extent. It pushes the wheels forward in relation to consumption. If no one ever made something that looked like the original, the trend would never get any volume. And it is acceptable, partly since having elements and inspiration of a former master in ones collection is a sign of respect, and partly as long as the knockoffs do not interfere.
with the original designers clientele. It is in the nature of fashion to be copied, see Valentin’s comment, DR2 Dagen.

Looking at well established companies, piracy is beneficial for the fashion industry, or at least piracy is not very harmful. In case a fashion house sets the trend one year, the next the very same house might be the one that copy. Maybe that is why it is acceptable to copy one another. In addition to this, anchoring and obsolescence explain why the political situation is stable. These phenomena have allowed the industry to remain successful and creative despite a regime of free appropriation in the US, see above “Part IV – Compare Low and High IP, 1.1. Advantages”. The traditional theory of intellectual property rights states that copying will destroy the incentive for new innovation. Yet, fashion companies continue to innovate, precisely the opposite behavior of that predicted by the standard theory, see Raustiala et.al., Piracy Paradox p. 1690.

Long protection, as copyright, is no guarantee that smaller companies develop extraordinary designs. As Skogström concludes in Fashion industry's need for adequate design protection, copyright might have fulfilled it duty to fashion, see p. 377. Only few garments become classics, and can survive more than the six months a season last. The window rarely becomes bigger just because the design is better.

The conclusion of the Piracy Paradox is that low IP does not harm the industry. That is true. There are no boundaries that stifle the industry. And the industry can survive without any intellectual property rights. But does it actually benefit fashion? Trends are set and with the copying industry, they are exhausted faster and faster. This results in a demand for a new trend with new products to a fashion hungry clientele. In addition, there is no small, upcoming designers who actually welcoming the copy industry. All the benefits can only be used by designers with financial and/or physical capacity to move on it. Small designers can hardly profit from their designs, since they do not have a specific market yet. They have to fight hard to enter the market with their designs – maybe too hard. Zac Posen, an US fashion designer, says that this design piracy can ruin careers. Larger US designers, like smaller start-up designers, struggle to compete with European companies that produce line-for-line knockoffs using cheaper labor, see Ellis, Copyrighting Couture, p. 186 with references. This is noted by the Swedish Supreme Court. It concluded that even from a social point of view, there are strong reasons to counteract a wide ranging imitation company and instead encourage competent and reputable designers’ efforts, see Skogström, Fashion Industry's Need, p. 372.

Making an argument that too much intellectual protection would stifle the industry is valid. But some level of protection is needed. If it was harmful for the industry, how come the fashion world still exists in Europe? A better legal frame is desirable and will perhaps foster more designers and more ideas.
1.2. Suggested steps to improve protection of fashion designs
When the legislation is in accordance, the next hurdle is the time and expenses before a designer can exercise his rights. At the moment, even with fashion aimed protection as the unregistered Community design, small designers are still not protected well enough. Often small designers cannot defend their designs from copyists because of the lack of finances for the uphill legal battle they would be facing.

Fashion is a special area and should treated as one. An idea to offer better and more efficient protection, is to create its own (legal) authority. This could handle fashion issues faster and better. The sports world has examples of it, such as Fédération Internationale de Football Association (FIFA) and the International Olympic Committee (IOC). With a body of experts within the area, the legal rulings might be more in accordance with the fashion industry. See e.g. the Swedish “Svensk Forms Opinionsnämd” (formerly Slöjdforeningen) that has a significant influence on the development of the legal protection of applied art in Sweden. This body has largely supplemented and/or redundant lawsuits in this area. And courts need it. As David Wolfe expressed it: “It would be nearly impossible for a court or Government agency [to determine originality]. If a court cannot determine the originality, then how could it fairly determine whether one design infringes upon another, or whether a design is substantially similar or whether a design is sufficiently original to qualify for copyright protection?”, see *U.S. House Subcommittee on Courts, (2006), (testimony of David Wolfe)*. Maybe therefore has the Australian Governments Fashion Council prepared a legal guide for the protection of fashion products, whose purpose is to act as an aid to the fashion industry, see *Fashion Rules*.

If a body similar to FIFA and IOC is created, the quality and the number of decision will increase. As mentioned some legal systems are already heading in that direction. When fashion is so international, the legal authority must be that as well. Therefore, I find the best solution to improve the rights of fashion designers is to let the industry create its own (legal) authority. This way there can be a uniform protection of the garments and guidelines that can help the courts to give more fulfilling rulings.

2. Conclusion
In the US, the protection for fashion clothes is almost non-existing. The courts have stated over and over again that fashion is too utilitarian to qualify for protection under copyright and the trade dress doctrine. Only in the rare cases where it is considered as art, is copyright protection possible. As for patent law, it is without any practical use. The majority of fashion designs are not protected against slavish copies nor the copies that are very much similar. But with the DPPA and the IDPPPA pending, this might change.
In the EU, designs can be protected through copyright; as a registered design according to the Hague system; registered national design; as a registered Community design; as an unregistered Community design and through marketing law.

Designer clothes are considered as applied art under copyright. To enjoy protection, fashion garments must meet the originality requirement, meaning the work has to be created by the personal and creative acts of the designer. That be either unique elements, the combination of these, or a structure of non-protected elements. There is no quality requirement. In determine the originality, the double creation criteria are used to consider how big a risk there is for another designer to create the same design. This assessment might be harmonized for applied art, due to recent ECJ praxis. The courts in the Member States sets the bar for obtaining copyright protection low, but the extend is in general narrow. In general the imitation must be either “slavish” or a “very close imitation”.

As a fashion aimed protection, the unregistered Community design is a better fit than the registered Community/national designs. The protection occurs immediately, and lasts for three years, which is longer than most fashion designs. This form of protection might have given back the “first mover advantages” that the fast technology has erased.

The aim for all four design protections is to protect the visual appearance. In order to enjoy protection, the design must be new and have individual character. Although there is a formal difference between registered Community/national designs and unregistered Community designs, they are very much alike in praxis. The assessment of a design’s individual character are practically the same. Based on the wording used by the courts and the extend of protection they grant, it appears that the registered protection for fashion designs has narrowed down to almost the same level as the unregistered.

A design can enjoy both copyright protection and design protection at the same time. The two mentioned forms of protection can cumulate. According to recent ECJ praxis, if a design fulfill the requirements in both the copyright and the design law, the Member State is obligated to grant both protections. In addition the ECJ might have changed the traditional principle that the level of originality in applied art is determent for the extent of protection. This makes the practice of most rulings in Europe contrary to the EU law.

Finally, if fashion designs are not protected by intellectual property rights, either because the protection has expired or never existed, the marketing law may step in. The main requirement is that the garments are commercially active. The assessment of fashion garments contains some elements from intellectual property law. A lower individual character requirement with the “overall-impression-test”, the use of
expert opinion and novelty is used. In addition the “existence of intent impersonation” is to a great extend assessed in the same way as the “double creation criteria” in copyright.

Mutual for all mentioned protections is that private use is acceptable.

Comparing the size of the industry to the amount of cases, praxis is relatively modest on fashion protection. The reason might be that the system is not efficient enough. Designers argue that the lawsuits are too expensive and that the lawsuits are too slow. To make the protection flourish to its fullest, the legal system needs to be improved. A suggestion could be an international legal authority created by and for the industry itself.
**English Summary**

This thesis provides an analysis and an evaluation of the current situation of fashion protection in the US and the EU. Through reliable journalism and other literature, the economic and cultural importance of the fashion industry is clarified. In addition, there has also been shed light on the designers view on protecting designs through legislation.

The opinions are very split. Some leading designers find that legislation will at a minimum be useless and at a maximum strangle creativity. They find that the copy business actually benefits their design through widespread. Others cry for protection. Either because they think the fashion cycle runs too fast to fully develop ideas and trends, or because they find that the design piracy can ruin careers – both small and leading designers. One thing is for certain. There are no examples of upcoming designers welcoming others to copy their designs.

The US and the EU ways of protecting fashion garments differ much from each other. Whereas there is almost no protection in the US, the European designers can use four different ways of protection: copyright, registered Community design, unregistered Community design and market law. In fact, the unregistered Community design purpose is industries like fashion.

But even with such a broad choice of protection, there are few cases, compared to the size of the industry. The legal system is too slow and too expensive. It is not only small designer who thinks that. Even a major Danish fashion company does not bother suing. A way to ease the process from discovering an infringing design, to exercising the protection rights is to create a special (legal) authority on international level. With expert bodies as the one in Sweden, and with a legal guide from the Australian Governments Fashion Council, the idea might not be that far away.
Bibliography

Judgments

Austria

- Austrian judgment Febreze, IIC 2009/114

Denmark

- NIR 1993.428 (Sweatshirt Mario)
- SHD H-25-1986 (Down Jackets) – 9th of June 1987
- SHD H-245-89 (Men underwear) – 9th of October 1990
- SHD H-105-90 (Shirt) – 29th of June 1993
- SHD H-212-90 (Sweatshirt) – 11th of September 1991
- SHD H-237-92 (Cardigan) – 9th of July 1993
- SHD V-73-96 (T-shirts) – 7th of July 1998
- SHD V-40-97 (Gowns)
- SHD V-103-97 (Jeans)
- SHD V-54-01 (Jacket) – 21st of August 2002
- SHD V-127-03 (Work gloves) – 23rd of March 2005
- SHD V-142-03 (Candy in hourglass)
- SHD V-62-04 (Rema 1000 Jackets) – 1st of July 2005
- SHD V-129-04 (T-shirt) – 25th of January 2006
- SHD V-68-06 (Trousers) – 25th of January 2008
- SHD V-81-07 SH (New Balance) – 15th of April 2010
- SHD V-123-08 (Wallet) – 14th of December 2009
- U 1958.1211 SH (Blouses)
- U 1961.46 H (Lego 1)
- U 1961.1027 H (Cutlery)
- U 1963.782 H (Chair)
- U 1965.830 S (Wall pegs)
- U 1968.785 H (furniture fabric)
- U 1979.844 SH (Undisputed Protected Shoes)
- U 1980.609 S (Packaging for drill)
- U 1987.240 S (Kofte / Boilersuit),
- U 1988.775 S (Knitted Sweater),
- U 1990.334 S (T-shaped diaper)
- U 1999.1061 (Ølarmatur)
- U 2001.2387 S (Textile Design)
- U 2004.737 H (Trousers)
- U 2004.1302 H (Skirt)
- U 2006.2128 V (Ebbe Sand football shirts)
- U 2007.1112 H
- U 2012/229 H (Nørgaard T-shirt)
• U 2012.1185 H (Hermès purses)

**EU**
- C-145/10 2011 (Painer)
- C-168/09 2011 (Flos)
- C-5/08 (Infopaq I)
- Joined Cases C-403/08 and C-429/08 2011 (Premier League)
- Board of Appeal rulings in AN 2003 00056 of 27.1.2005
- OHIM, ICD 000003630 “Wunderbaum”
- T-153/08, Shenzhen – Case T-153/08; Shenzhen Taiden Industrial Co. Ltd vs. Office for

**France**
- French case 06/06324 (Phenix)
- Case 11/01010 (Charlotte bag)
- Case 05/22610 (Felicia)
- N*RG : 09/11846 (LV handbag)
- Case 05/05155 (Samuel X)
- Case 10/18925 (Poulet)
- Case 10/18796 (Saint Tropez)

**Germany**
- Case, 9 O 1097/07 (187) – (Tangas)
- Case, 9 O 1056/06 (174) – (Handytaschen in Form von Sportbekleidung)
- German Supreme Court 9.10.2010, EIPR 2010/181-183
- German Supreme Court of 29.1.2004, IIC 2005/260

**Ireland**
- Karen Millen Ltd. V Dunnes Stores & Anor

**Italy**
- R.G.C. al n. 12959\2008 (Borsa “Lindy”)

**The Netherlands**
- Dutch LJN: BY6496, Rechtbank Arnhem, 235404
- Dutch KG ZA 07-1168 (G-star RAW)
- Dutch 298874/KG ZA 07-1378 (Leggings)
- Dutch LJN: AZ5613, Rechtbank Amsterdam 1264/06 SKG
- Dutch LJN: BQ 2113, Gerechtshof’s-Gravenhage, 200.048.312/01
- Dutch 161275 KG ZA 06-283
- Dutch LJN: BX4870, Rechtbank Amsterdam, 515843/KG ZA 12-579 P/MB
• Rechtbank 's-Gravenhage, 18 maart 2009, HA ZA 08-1522 (Crocs)
• Dutch 295824/KG ZA 07-1168

Norway
• NIR 1957.225 (Genser)
• NIR 1961.196 (Jupiter Fabric)

UK
• J. Choo (Jersey) Ltd. V. Towerstone Ltd. & Others – J Choo (Jersey) Ltd. v Towerstone Ltd. & Ors [2008] EWHC 346 (Ch) (16 January 2008)

US
• Carol Barnhart Inc. v. Economy Cover Corp – Carol Barnhart Inc. v. Economy Cover Corp 73 F.2d 411 (2d. Cir. 1985)
• Galiano v. Harrah’s Operating Co. – Galiano v. Harrah’s Operating Co., 416 F.3d 411, 422 (5th Cir. 2005)
• Graham v. John Deere Co. – Graham v. John Deere Co. of Kansas City, 383 U.S. 1, 8 (1966) (Supreme Court).
• Mazer v. Stein - Mazer v. Stein, 347 U.S. 201 (1954) (Supreme Court)
• People v Rosenthal – People v Rosenthal 2003 NY Slip Op 51738(U) Decided on March 4, 2003 Criminal Court
• Poe v. Missing Persons – Poe v. Missing Persons, 745 F.2d 1238, 1240, 1242 (9th Cir. 1984)
• Whimsicality, Inc. v. Rubie’s Costume Co. – Whimsicality, Inc. v. Rubie's Costume Co., 891 F.2d 452, 454, 457 (2d Cir. 1989).

Sweden
• NIR 1994.143 (Strawberry)
• NIR 1995.311 (Tunica)
• NIR 1998.344 (Kriss Jackets)
• T 8982-05 (Fjällräven)
• T 10454-08 (H&M Skull Boots)

Laws and Bills

Denmark
• BEK 1079/17.11.2008
• Bill L 19 – Folketidende 2002-03, bill L 19
• DA MOT I – Udkast til Lov om Ophavsretten til Litterære og Kunstneriske værker med tilhørende anmærkninger og Bernerkonventionen af 1948 udarbejdet af den af Undervisningsministeriet i 1939 nedsatte kommission i samarbejde med tilsvarende finske, norske, og svenske kommissioner, København 1951
• DK Copyright Act = Ophavsretsloven – LBK nr. 202 of 27/02/2010 –Ophavsretsloven. Name in English; The Consolidated Act on Copyright.DK Marketing Act = Markedsføringsloven – LBK nr. 839 of 31/08/2009 with later amendments
• DK Design Act = Designloven – LBK 89/28.1.2010 with later amendments – Name in English; The Consolidate Designs Act.
• The Danish Registration Decree (1059/20.11.2008)
• FT 1960-61 appendix B, Second selection

EU


• **The Green Paper, COM 98/569** – the “Green Paper of 15 October 1998 (COM 98/569) on combating counterfeiting and piracy in the single market”


**International treaties**

• **The Berne Convention (1886)** – The Berne Convention (Convention De Paris Pour La Protection Des Oeuvres Littéraire Et Artistique (1886))


• **The Universal Copyright Convention (1971)** – The Universal Copyright Convention (Number 97 of 13/12/1980,Universal Copyright Convention as revised at Paris on 24 July 1971)

• **The Universal Declaration of Human Rights 1948** – United Nations General Assembly in Paris on 10 December 1948 General Assembly resolution 217 A (III)
• **The WIPO Copyright Treaty (2002)** – The WIPO Copyright Treaty (adopted in Geneva on December 20, 1996)


**Norway**

• EØS-loven – Lov om gjennomføring i norsk rett av hoveddelen i avtale om Det europeiske økonomiske samarbeidsområde (EØS) m.v. (EØS-loven).

• N Copyright Act = Åndsverkloven – LOV 1961-05-12 nr 02: Lov om opphavsrett til åndsverk m.v. (åndsverkloven). Name in English; *Norwegian Copyright Act*.

• N Design Act = Designloven – Design loven af 14 Marts 2003, nr. 15. Name in English; *Act relating to design protection of 14 March 2003, No. 15 (Designs Act)*

• N Marketing Act = Markedsføringsloven – LOV 2009-01-09 nr. 02

**Sweden**

• S Copyright Act = Upphavsrätt lagen – Lag (1960:729) om upphavsret till litterära och konstnärliga verk. Name in English *Act on Copyright in Literary and Artistic Works (1960:729)*.

• S Design Act = Mönsterlagen 1970:485

• S Marketing Act = Marknadsföringslag – Lag (1995:450)

• SOU 1956:25 - Statens Offentliga Utredningar 1956:25, Upphovsmannarätt till konstnärliga och litterära verk


**US**

• The bill H.R. 2196, 111th Congress § 2(e)(2) (2009)


• The United States Constitution


**Books**

• Bernitz et.al., Immaterialrätt – Bernitz, Ulf; Karnell, Gunnar; Persson, Lars; Sandgren, Claes Immaterialrätt, 6. Recast., 1998


• **Koktvedgaard, Lærebog i immaterialret** – Mogens Koktvedgaard, Lærebog i immaterialret: ophavsret, patentrej, brugsmodelret, designret, varemærkeret, 6. recast., 2002

• **Koktvedgaard, Immaterialretspositioner** – Mogens Koktvedgaard, Konkurrenceprægede immaterialretspositioner: bidrag til læren om de lovbestemte enerettigheder og deres forhold til den almene konkurrenceret, 2. recast. 1990

• **Koktvedgaard and Levin, IPR** – Mogens Koktvedgaard and Marianne Levin, Lærobok i immaterialrätt, 6. recast, 2000

• **Lassen and Stenvik, Designrett** – Birger Stuevold Lassen and Are Stenvik, Designrett – en innføring, Cappelen Akademisk Forlag, 2006.

• **Levin, Formskydd** – Marianne Levin, Formskydd: en rättsventenskaplig studie av skyddet för estetiskt syftan de industriell formgivning, 1984

• **Levin, Designslyd** – Marianne Levin, Designslydd, 1987

• **Levin, IPR** – Marianne Levin, Lärobok i immaterialrätt; Upphovsrätt, Patenträtt; Mönsterrätt, Känneteckensrätt – i sverige, EU och Internationellt. Tionde upplagan, 2011, Norstedts Juridik AB

• **Lund, Copyright** – Torben Lund, Ophavsret: kommenteret udgave af lovene af 31. maj 1961 om ophavsretten til litterære og kunstneriske værker og retten til fotograﬁske billeder, 1961


• **Madsen, Markedsret** – Palle Bo Madsen, Markedsret, 4. recast, 2002


• **Schovsbo, IPR** – Jens Hemmingsen Schovsbo, IPR, ophavsret og industrielle rettigheder, 2001

• **Svendsen et.al, Designret** – Jens Schovsbo og Niels Holm Svendsen, Designret

• **Schønning, Ophavsretsloven** – Peter Schønning, Ophavsretsloven med kommentarer, 2. edition, 1998


**Articles**

• **Arthurs, Daily Mail, 24-hour queue... sold out in 30 minutes** – Deborah Arthurs, Daily Mail, 24-hour queue... sold out in 30 minutes: shoppers go wild for Versace's collection at H&M (but website crashes under the strain), 18th of November 2011, see [http://www.dailymail.co.uk/femail/article-2062599/Versace-H-M-collection-Donatella-greets-desperate-shoppers-website-crashes.html](http://www.dailymail.co.uk/femail/article-2062599/Versace-H-M-collection-Donatella-greets-desperate-shoppers-website-crashes.html)
The Budget Babe – The Budget Babe, the look for less
http://www.thebudgetbabe.com/categories/10-Designer-Looks-for-Less#.UWWh35NTBhc

Eising, Comedians Fight for Their Jokes - Kendte komikere kæmper for deres jokes, by Jesper
Eising, Berlingske KULTUR, the 12th of January 2007 (last visited June 2013).
http://www.b.dk/kultur/kendte-komikere-kaemper-deres-jokes

Binkley, The Problem with being a Trendsetter – Christina Binkley, The Problem with Being a
Trendsetter, WALL ST. J., Apr. 29, 2010, at D8, available at
http://online.wsj.com/article/NA_WSJ_PUB:SB10001424052748704423504575212201552288996.html


Colman, Choices, Up to Your Knees – David Colman, Choices, Up to Your Knees, N.Y. Times, Aug. 25,
2005, at G1

DiMassa, Designers Pull New Styles Out of the Past – Cara Mia DiMassa, Designers Pull New Styles
Out of the Past, L.A. Times, Jan. 30, 2005, at B3, see
http://articles.latimes.com/2005/jan/30/local/me-fashion30

Doeringer et.al., Can Fast Fashion Save the U.S. Apparel Industry? – Peter Doeringer & Sarah Crean,

DR2 Dagen – DR2 Dagen, with Illeborg and Ingemann - Insiderne with Frederik Andersen, Fashion
Editor at Euroman Denmark; Silas Adler, Designer at Soulland and Maria Mackinney Valentin, Ph.D.
Scholar, at Danmarks Designskole (Denmarks Design School). Aired the 12th of March 2013 on DR2.

Ellis, Copyrighting Couture – Copyrighting Couture: An Examination Of Fashion Design Protection
And Why DPPA And IDPPPA Are A Step Towards The Solution To Counterfeit Chic by Sara R. Ellis
Candidate for Doctor of Jurisprudence, May 2011, University of Tennessee, College of Law

Engelbrekt et. al., EU and Marketing Practices Law in the Nordic Countries – Antonina Bakardjieva
Engelbrekt “EU and Marketing Practices Law in the Nordic Countries – Consequences of a Directive
on Unfair Business-toConsumer Commercial Practices. Report for the Nordic Council of Ministers
Committee on Consumer Affairs.”

Estrin et al., In Vogue: IP protection for Fashion Design – Lauren Estrin, Lisa Pearson, Ling Zhong, In
http://www.kilpatrickstockton.com/~media/files/articles/invogueipprotectionforfashiondesign.as
hx (last visited June 2013)

(last visited February 2013).


Feile 1999 – Charlotte and Peter Feil, Design of the 20th Century, Cologne 1999

http://fristcenter.org/calendar-exhibitions/detail/the-golden-age-of-couture
• Gok Wan’s Clothes Roadshow on Channel 4, see http://www.channel4.com/programmes/goks-clothes-roadshow


• Thiemann, Bestseller Copy – Per Thiemann, Politiken, “Bestseller har solgt kopi af dyre smykker” 15th of July 2010 http://politiken.dk/erhverv/EC1017360/bestseller-har-solgt-kopi-af-dyre-smykker/ (last visited June 2013)


Side 68 af 70


White, Versace to design a range for H&M – Belinda White, “Versace to design a range for H&M” the Telegraph, 21st of June 2011, http://fashion.telegraph.co.uk/article/TMG8588618/Versace-to-design-a-range-for-HandM.html


Nordic Law Articles


Halen, NIR 1995.90, More Strawberry – Torsten Halen, NIR 95.90 Mera Smultron här

Karnell, NIR 1994.85, Supreme court mixing strawberry – ass Gunnar Karnell NIR 94.85 f., Högsta domstolen bland smultron och jordgubbar, mellan två stolar?

Knutsson, NIR 1994.235 – Anders Knutsson; NIR 94.235


Levin, Law Society – Marianne Levin, Festskrift til Sveriges advokatsamfund.

Levin, NIR 94.237, Hvilket brukskonstskydd kan vi leva med? – Marianne Levin, NIR 94.237 – Hvilket brukskonstskydd kan vi leva med?

Ljungman, NIR 70.21, Något om verkshöjd – Seve Ljungman, NIR 70.21, Något om verkshöjd

Nordell, NIR 95.630, Dubbelskapande – Per Jonas Nordell, NIR 95.630, Dubbelskapande I teori och praktik.

Nordell, NIR 90.560, Verkshöjd och brukskonst. – Per Jonas Nordell, NIR 90.560, Verkshöjd och brukskonst.

Nordell, NIR 01-73, The Notion of Originality – Per Jonas Nordell, NIR 2001.73, The Notion of Originality – Redundant or not?


Skogström, Fashion Industry’s Needs – Jimmy Skogström, NIR 2010.4, Modebranschens behov av adekvat designskydd

Tómasson, NIR 01.522, Værk og værkshøjde – Eikur Tómasson, NIR 2001.522, Værk og værkshøjde


Schovsbo NIR 2005.420
Videos

- **Blakley, Lessons from fashion’s free culture** – TED Talks Johanna Blakley: Lessons from fashion’s free culture, see http://www.ted.com/talks/lang/en/johanna_blakley_lessons_from_fashion_s_free_culture.html


- **Wolfe, Ready or Not** - David Wolfe Ready to Share: Ready to Share, Ready to Wear, Ready or Not! . The Norman Lear Center's landmark conference on creativity and ownership in the fashion industry, http://www.youtube.com/watch?v=zd-AcG7hom4