
Lucille M. Ponte*

ABSTRACT

Traditional sumptuary laws, especially those government efforts aimed at regulating public attire, are often considered to be largely dusty relics of pre-industrial societies. Yet cultural legal theorists have long argued that sumptuary codes are still relevant and inextricably linked to the development of our contemporary sociolegal hierarchy. A better understanding of the primary objectives embodied in earlier sumptuary codes can shed important historical light and guidance on issues being discussed in current policy-making arenas, such as the proposed Design Piracy Prohibition Act (DPPA). The proposed law has yielded lively debates amongst legal commentators and industry professionals regarding whether or not fashion designs should be protected under copyright law. Although strong arguments exist on both sides of the issue, what is typically missing from the discussion is an adequate consideration of historical context concerning earlier government efforts to regulate dress.

Examining the congressional testimony and stated objectives of the DPPA, one can tease out some of the core principles of pre-

---

* Associate Professor of Law, Florida Coastal School of Law, Jacksonville, FL. J.D. cum laude, New England School of Law, 1983; B.A., Political Science, summa cum laude, University of Massachusetts, 1980. The author acknowledges and thanks the following individuals: Prof. Robert Brauneis, Associate Professor of Law & Co-Director of the Intellectual Property Program, The George Washington University Law School, for his insightful comments on an earlier draft of this work; Prof. Peter Yu, Kern Family Chair in Intellectual Property Law & Director, Intellectual Property Law Center, Drake University Law School, and the participants in the 2009 Intellectual Property Scholars Roundtable at Drake for their feedback on my presentation of this paper, especially Profs. Deven Desai, J. Shahar Dillbary, Michael J. Madison, and Rebecca Tushnet; and, Laura Stevens and Kellie Mears, 2009 J.D. graduates, Florida Coastal School of Law, for their fine research efforts on this project.
industrial sumptuary codes; government control over social identity, the reinforcement of public morality, and the implementation of economic protectionism. Part I of this article provides a brief overview of pre-industrial sumptuary laws and addresses the main stated objectives and evolution of these restrictive codes. Part II illustrates linkages between the primary foundational tenets of traditional sumptuary laws and the proposed objectives of the DPPA. Part III cautions that earlier sumptuary laws often suffered from infrequent and half-hearted enforcement, increased demand for and piracy of the forbidden items, and insufficient public support for and compliance with the proposed laws. The article concludes that absent a better understanding and recognition of the threads of our sumptuary past in our current legal order, the proposed Act may likely endure a similar fate, if enacted.

TABLE OF CONTENTS

I. A BRIEF HISTORICAL OVERVIEW OF SUMPTUARY LAWS .......... 51
   A. Discourses on Social Order and the Visual Hierarchy in Pre-Industrial Times ................................................. 51
   B. English Sumptuary Codes and the Evolving Role of Economic Protectionism ...................................................... 57
   C. Sinfulness, Social Station, and Income in Colonial America .................................................................................... 61
   D. Social Norms and Changing Fashion Diffusion Models .. 64

II. ECHOES OF THE SUMPTUARY IMPULSE IN THE DPPA .............. 71
   A. Overview of Proposed DPPA .............................................. 71
   B. New Efforts to Police Social Boundaries ................................ 74
   C. Addressing Societal Anxieties in Uncertain Economic Times ..................................................................................... 79
   D. Public Morality and the Language of Theft ......................... 83

III. KEY LESSONS FROM PAST SUMPTUARY PROJECTS .................. 86

IV. CONCLUSION ........................................................................... 89

Amusing news stories occasionally appear on television and on the Internet about government efforts to control modern dress,¹ such

---

as laws demanding that citizens pull up their low-riding pants\textsuperscript{2} or prohibiting beachgoers from wearing skimpier swimwear.\textsuperscript{3} The general public often scoffs at these regulations as examples of silly legislative conduct or outdated parochial moralizing.\textsuperscript{4} In the United States, the notion of modern government prescribing exacting standards of individual dress provokes not only public resentment and ridicule,\textsuperscript{5} but also legal action aimed at stopping this governmental intrusion.\textsuperscript{6}

Yet, for centuries, sumptuary laws prescribing detailed regulations about who could wear certain attire and when they could wear it were a fact of life in societies around the globe.\textsuperscript{7}

---

\textsuperscript{2} Traditionally, sumptuary laws were detailed government regulations regulating how individuals could spend their financial resources, particularly with respect to boastful public displays of fine clothing and/or excessive consumption of food or drink. 2 JOHN BOUVIER, A LAW DICTIONARY, ADAPTED TO THE CONSTITUTION AND LAWS OF THE UNITED STATES OF AMERICA, AND
Modern legal commentaries typically dismiss traditional sumptuary laws on dress as dusty historical relics of pre-industrial societies. However, to assume that sumptuary dress codes are a thing of the past underestimates the robustness of this enduring legal construct. In fact, many cultural legal theorists argue that sumptuary laws concerning dress are still relevant and are inextricably linked to the development of our contemporary socio-legal hierarchy. Noted cultural legal theorist Alan Hunt contends that “sumptuary laws did not so much ‘die’ as undergo a process of transfiguration or metamorphosis such that the original is barely recognizable in the resultant, just as the butterfly can barely be imagined from the chrysalis.” As Hunt indicated with his metaphorical butterfly, a host of modern laws are built upon the foundation of earlier sumptuary laws, with objectives easily traced back to long-established sumptuary pronouncements. An examination of the main assumptions underlying the sumptuary codes of the past will shed important
historical light and provide guidance on issues that are still discussed in policy-making arenas today.

A recent example of the resilience of sumptuary law is the 2009 re-introduction of the proposed Design Piracy Prohibition Act (DPPA), which is aimed at preventing retailers and manufacturers from selling or producing clothing that intentionally copies registered fashion designs.\textsuperscript{12} This legislation has spurred a lively debate among legal scholars and industry professionals as to whether copyright law should protect fashion designs. Advocates of the DPPA emphasize the importance of fair treatment of fashion designs as creative works,\textsuperscript{13} the need to avoid the commercial revenue and tax losses that result from global design copyists,\textsuperscript{14} and the benefits of harmonizing U.S. law with other international intellectual property regimes.\textsuperscript{15} Opponents of copyright protection counter that such protection is both unnecessary and harmful to an industry that thrives on copying fashion trends and that promotes renewed creativity through the rapid development of new fashions.\textsuperscript{16} Additionally, these critics posit that, since copyright...
safeguards for fashion designs in less litigious countries have been largely unenforced,\(^\text{17}\) adopting these safeguards could potentially lead to expensive and time-consuming lawsuits in the United States’ litigious society.\(^\text{18}\) Furthermore, opponents are concerned that more extensive copyright protection for fashion designs will result in an increase in clothing costs and a reduction in fashion choices that will hurt consumers.\(^\text{19}\)

Although strong arguments have been presented on both sides of the issue, the debate surrounding copyright protection of fashion designs often lacks a sense of historical context about past government efforts to regulate dress. On the surface, the DPPA is aimed at protecting the creative efforts of fashion designers from manufacturers who copy and sell replicas of designers’ creations to retailers. Sumptuary laws mainly focus on the dress of citizens who purchased and wore the goods.\(^\text{20}\) However, the DPPA and sumptuary laws have much more in common than the attempted regulation of clothing. Appearing largely unbeknownst to the DPPA’s Congressional sponsors,\(^\text{21}\) the underlying roots of the DPPA hearken back to some of the core principles of sumptuary codes in ancient and medieval European and Asian societies and colonial American society. These principles include: promoting government control over social

\begin{footnotes}


18. Wolfe Testimony, supra note 16, 3-4; Raustiala & Sprigman, supra note 15, at 1743-44; Hedrick, supra note 14, at 253-54; Schmitt, supra note 12, at SF1.


20. See discussion infra Part I.

21. See discussion infra Part II.

\end{footnotes}
identity, reinforcing notions of public morality, and implementing increased economic protectionism during periods of societal change and uncertainty. Drawing on Hunt's allegorical butterfly, the DPPA can be viewed as a modern incarnation of sumptuary laws, dressed up in new statutory garb.

Part I of this Article provides a brief overview of historical sumptuary laws and addresses the main objectives and evolution of these restrictive codes. Part II illustrates the links between the primary foundational tenets of these traditional sumptuary laws and the objectives of the DPPA. Part III cautions that traditional sumptuary laws often suffered from a lack of public support and compliance, as well as infrequent and half-hearted enforcement, while simultaneously increasing demand for and piracy of the forbidden items. In Part IV, the Article concludes that, absent a better understanding of the threads of our sumptuary past in our current legal order, the DPPA, if enacted, would likely endure a similar fate to earlier sumptuary laws; likely to be perceived as outdated and ineffective government meddling that will become largely unenforceable in our individualistic, market-driven society.

I. A BRIEF HISTORICAL OVERVIEW OF SUMPTUARY LAWS

A. Discourses on Social Order and the Visual Hierarchy in Pre-Industrial Times

In ancient societies, sumptuary laws detailed how individuals could spend their resources, particularly with respect to excessive displays of clothing and to food consumption. These laws typically reflected paternalistic efforts by the government to stop citizens from squandering their own limited resources, to prevent social competition that might bankrupt people of modest means, and to ensure that sufficient resources existed to pay tribute or taxes to the ruling

22. See infra notes 44-71 and accompanying text.
23. See infra notes 32, 72-101, 111 and accompanying text.
24. See infra notes 73-75 and accompanying text. Professor Hunt asserted that, since the fourteenth century, “sumptuary regulation had existed in a close symbiotic relationship with protectionism.” HUNT, supra note 1, at 324.
25. See infra notes 56, 68 & 75 and accompanying text.
26. See infra notes 30-173 and accompanying text.
27. See infra notes 174-273 and accompanying text.
28. See infra notes 274-95 and accompanying text.
29. See discussion infra Part IV.
30. BOUVIER, supra note 7, at 684; see supra note 7 and accompanying text.
government authority. These laws were often intertwined with
government moralizing about the displeasure of divine beings with
luxury and excess, and the dangers of spiritual corruption through
such inappropriate displays.

The earliest sumptuary laws focused primarily on funeral rites,
with restrictions on food consumption and mourning attire in ancient
Greek, Roman, and Confucian societies. For example, ancient
Greek and Roman sumptuary laws imposed limitations on the value
and amount of food consumed at a funeral. Greek laws allowed
female mourners a maximum of “three mourning shawls,” while
Roman laws required those in mourning to wear black or dark-colored
fabrics. Similarly, Confucian sumptuary laws regulated the type
and quantity of food that people could consume at a funeral and
spelled out the precise color and fabric of appropriate clothing for
funeral rituals. These Confucian regulations were intended to avoid
“turning these occasions into lavish and ostentatious extravaganzas.”
Subsequently, pre-modern Confucian societies extended sumptuary laws to regulate other family social rituals, such

31. Bouvier, supra note 7, at 684; Hunt, supra note 1, at 299; Chaihark Hahn, Law,
32. Gildrie, supra note 7, at 22-23; Hoffer, supra note 7, at 46; Goodrich, supra note 4,
at 711-12; Hahn, supra note 31, at 282-83. For example, sumptuary laws grounded in the
religious ideals of modesty, thrift, and social conformity can be found in both Confucian, Hahn,
supra note 28, at 283, and New England Puritanical societies. Gildrie, supra note 7, at 23-24,
194.
33. Hunt, supra note 1, at 18-19. Earliest Greek sumptuary laws have been dated to the
sixth century BC. Id. at 18. In Athenian society, these regulations also sought to tamp down on
social disorder among competing clans that might flow from such public displays of clan wealth
and feverish mourning. Id. Extended public mourning rituals often involved women “wailing
and lacerating their faces and doing so in public.” Id. These fervent emotional and physical
outbursts demonstrated the uncomfortably “close connection between the social power of
lamentations and the emotional tension needed to sustain the feuds and vendettas characteristic
of clan systems.” Id. at 19.
34. Hunt, supra note 1, at 19-21; Charlene Elliott, Purple Pasts: Color Codification in
sumptuary laws have been traced back to 450 BC. Id. at 19.
35. See Hahn, supra note 31, at 282-83 (discussing the role of sumptuary codes in
Confucian funeral rituals in Korea). Prof. Hahn notes that some of the most enduring Confucian
family rituals in Korean society date back to the Song Dynasty and the teachings of Master, Zhu
Xi (1130-1200). Not until 1998 did the Korean Constitutional Courts find portions of these
ancient sumptuary laws limiting food and drinks at certain family events an unconstitutional
violation of the “general freedom of action.” Id. at 283. The Court overturned the entire law with
all of its prescriptions, but societal norms still keep many of the earlier law’s traditions alive in
modern Korea. Id. at 286-287.
36. Hunt, supra note 1, at 18-20.
37. Hunt, supra note 1, at 18.
38. Elliott, supra note 34, at 181.
40. Id. at 282-83.
as weddings, and delineated the number, fabric, and color of garments that were permitted to be worn for these occasions which endured until the 1980s.

In addition, sumptuary laws pertaining to dress have played an active role in identifying and codifying one’s position in the social hierarchy, since the social elites believed that attire should reflect an individual’s occupation, class, gender, race, and ethnicity. For example, in Greek, Roman, and Confucian societies, wealthy and politically powerful people subsequently broadened the scope of sumptuary laws controlling expenditures at social rites to regulate the daily dress of the lower classes. They did so in an effort to display each citizen’s place in the social hierarchy and to suppress any perceived upward pressures for shared power and equality originating in the lower classes.

Ancient Roman society exemplifies the early recognition of the power of clothing to convey a host of secondary social meanings about an individual. For over four hundred years, sumptuary laws governed the fabric and color of togas, which instantly signified an individual’s occupation, class, gender, race, and ethnicity. They did so in an effort to display each citizen’s place in the social hierarchy and to suppress any perceived upward pressures for shared power and equality originating in the lower classes.

As we noted, in Greek, Roman, and Confucian societies, wealthy and politically powerful people subsequently broadened the scope of sumptuary laws controlling expenditures at social rites to regulate the daily dress of the lower classes. They did so in an effort to display each citizen’s place in the social hierarchy and to suppress any perceived upward pressures for shared power and equality originating in the lower classes.

Ancient Roman society exemplifies the early recognition of the power of clothing to convey a host of secondary social meanings about an individual. For over four hundred years, sumptuary laws governed the fabric and color of togas, which instantly signified an individual’s occupation, class, gender, race, and ethnicity. They did so in an effort to display each citizen’s place in the social hierarchy and to suppress any perceived upward pressures for shared power and equality originating in the lower classes.

Average citizens were expected
to wear plain, natural wool togas, while only senators were permitted to wear white woolen togas with purple hems and red sleeves. Candidates for office similarly wore white woolen togas without colored sleeves or hems. Mourners wore black or dark tinged togas. Togas also conveyed military rank—generals wore purple and gold woolen togas, other officers donned plain purple cloaks, while ordinary soldiers wore red cloaks. In addition, only the Roman emperor was permitted to wear purple silk with gold embroidery, and violators of this rule were punished by death. Therefore, under Roman sumptuary laws, “[c]olor and cloth distinguish[ed] citizen from candidate, mourner from general . . . [a]t a glance or a distance.”

Actually, the passage and enforcement of sumptuary laws were often at their zenith in periods of social, political, or economic upheaval or flux. In such times, ruling classes fervently sought to protect their privileged positions in society, either by privileging

49. Elliot, supra note 34, at 181; see Lahav, supra note 48, at 433-34.
50. Elliot, supra note 34, at 181.
51. Id.
52. Id.
53. Id. at 181, 184. In ancient Rome, to own or wear royal purple textiles or simulation of that hue that was reserved to the emperor “was tantamount to . . . plotting against the state” and “involvement in a crime similar to that of high treason.” Id. at 183-84. Later in the 1600s, English sumptuary law also restricted the wearing of the color purple or gold-colored cloth to the royal families. Paul Raffield, Contract, Classicism, and the Common-Weal: Coke’s Report and the Foundations of the Modern English Constitution, 17 CARDOZO L. & LIT. 69, 87 (2005).
54. Elliot, supra note 34, at 181. Quoting Pulitzer Prize-winning author Alison Lurie, Professor Capers concurs that clothing silently communicates a variety of meanings, even from a distance.

Capers, supra note 6, at 6 (quoting ALISON LURIE, THE LANGUAGE OF CLOTHES 3 (1981)).
55. Hunt, supra note 1, at 21-22.
57. According to Professor Hunt, style wars are class wars; they are made up of battles over dress, fashion and appearance. A striking feature of a great bulk of sumptuary law is that it was directed at conceptions and images of the social order. It was concerned with attempts to protect hierarchical conceptions of social relations, to resist some of the most directly
higher-status groups to wear particular clothing or by prohibiting lower classes from donning certain attire.\textsuperscript{58} Therefore, sumptuary laws, “when enforced, bolstered the \textit{visual} hierarchy,”\textsuperscript{59} permitting an individual’s place in society to be immediately recognized.\textsuperscript{60} This approach to sumptuary laws was later adopted in European, Japanese, and colonial American societies.\textsuperscript{61}

Sumptuary laws evolved with the times and continued to impose social control and identification through dress in medieval and renaissance Europe,\textsuperscript{62} as well as in various parts of Asia in the
1800s. Sumptuary codes became less about prohibiting excessive consumption and more about protecting the privileges of ruling classes and guarding social boundaries through strict dress codes. The city-state of Venice is particularly well-known for some of the most elaborate and long-lived sumptuary codes, which were enacted in the late thirteenth century and continued through the eighteenth century. Like the ancient Greek, Roman, and Confucian codes, Venetian sumptuary laws were originally grounded in consumption limits for funerals and weddings. As Venetian society weathered a number of economic and political crises, its Senate began to enact detailed laws about “dress materials, the size and design of sleeves, fringes and ornaments, belts and headaddresses, shoes and slippers, home furnishings and bed-linen” based on one’s station in society. Jews were also forced to display yellow chest cords to identify themselves. The moral objective of modesty in displays of apparel

63. Roy, supra note 44, at 90 n. 129. Professor Roy interestingly notes that in the 1800s Turkish law required people of different ethnic and religious backgrounds to wear a particular type of hat to identify their background. “Greeks wore dark caps; Armenians, balloon-shaped headdresses; Jews wore brimless caps; and Turks, a red fez.” Id. Japan was also known for its detailed and exacting sumptuary laws based on one’s social position. Id.

64. Capers, supra note 6, at 7. Professor Capers notes that

[C]ities, towns, and nation states routinely promulgated laws that regulated who wore what, and on what occasion. These sumptuary laws - the term sumptuary relating to consumption - were not limited to minimizing consumption or even conspicuous consumption. Rather, they “manifested an aspiration to construct an ‘order of appearance’ that allowed the relevant social facts, in particular about social and economic status, gender and occupation to be ‘read’ from the visible signs disclosed by the clothes on the wearer.” More importantly, many of these laws served to inscribe and police social boundaries. Consumption was monitored, but so was assumption. It was not only that those of a lower status should not adorn themselves with the clothes or accoutrements of their betters; it was also that, by so clothing themselves, those of the lower classes would not assume the status of their betters.

65. Hunt, supra note 1, at 36.
66. See supra notes 33-43.
67. Id.
68. Id. at 36-37. Over time, even the decoration and upholstering of gondolas did not escape the attention of these sumptuary laws. Id. at 37. In addition, Venetian sumptuary law banned “dark-blue or green raiment to encourage general happiness” after the plague of 1347-48. Id. at 36.
69. Capers, supra note 6, at 8; see Roy, supra note 44, at 90. Professor Roy examined how law can be employed to make hidden traits readily observable through symbols worn over clothing.

Historically, members of a majority have occasionally tried to make unobservable traits evident in order to accord reduced status to people with those traits. For example, in Nazi Germany prisoners were marked with colored triangles corresponding to the reasons for their incarceration. A green triangle marked its wearer as a regular criminal, and a red triangle denoted a political prisoner. Jewish prisoners were marked with two overlapping yellow triangles forming a star of David,
and parts of the body exposed along with the protection of citizens from wasteful spending and the payment of taxes became the primary rallying cries to promote the passage and enforcement of Venetian sumptuary laws. The codes expressed clear anxiety over increasing “class fluidity” and supported the desire to control social status through legislation.

B. English Sumptuary Codes and the Evolving Role of Economic Protectionism

A more direct predecessor to U.S. sumptuary laws, English sumptuary codes on dress emphasized a visual hierarchy, as well as the immorality of conspicuous consumption and spending beyond one’s means. However, English sumptuary laws also included nationalistic considerations that were not found in earlier sumptuary history. In 1337, the first English sumptuary law linked moralizing about the vice of excessive consumption with economic protectionism and the protection of the national interest. Not surprisingly, this act was passed during a time of political upheaval, when England was about to plunge into the tumultuous Hundred Years’ War with France. Like the sumptuary codes of earlier societies, the 1337 law sought to prevent the property-owning classes from squandering their resources and the lower classes from impoverishing themselves in their attempts to imitate the upper classes. To this end, the law banned anyone below the rank of knight or lady from wearing fur and prohibited knights from wearing ermine, a specific type of fur that could be donned only by the highest ranks of nobility. The law also

and homosexuals were marked with a pink triangle. Homosexuals bearing a pink triangle were assigned to the most difficult labor. Similarly, while wealth is not inherently observable, in the past, law and/or social custom dictated the clothing and behavior of different classes of society, making them readily identifiable.

Id. at 90 (footnotes omitted).

70. HUNT, supra note 1, at 36-37. A review of Venetian treasury documents shows that they are replete with records of fines for breaches of sumptuary codes. Id. at 36. However, verbal rebukes from the court were the most common form of punishment. Id. at 350. It is interesting to note that a study of Florentine documents during this same time period indicates that women were more often prosecuted and fined for violating sumptuary dress codes. Id. at 344.

71. Id. at 173. Professor Hunt opines that these laws sought to address “these deep-seated, multi-dimensional problems of the shifting class relations on the borders of modernity.” Id.

72. Id. at 299, 301-02, 367; see Goodrich, supra note 4, at 709; Pollack, supra note 43, at 1422-23.

73. HUNT, supra note 1.

74. Id. at 299, 301.

75. Id.

76. Id. at 299.

77. Id. at 304.
had protectionist aims, prohibiting anyone but the royal family from wearing any clothing not made in the England, Ireland, Wales, or Scotland. Finally, it included provisions that forbade the importation of foreign wool, a further attempt to bolster the British economy and royal coffers at the expense of foreign nations, particularly France.

In 1363, the English government passed “A Statute Concerning Diet and Apparel,” the one of the most comprehensive, hierarchical set of sumptuary laws in English history, with dress categories based on one’s societal rank and the economic value of his or her estate. This set of laws was enacted in response to complaints from social elites about the “outrageous and excessive apparel of divers [sic] people against their estate and degree,” in that “labourers use[d] the apparel of craftsmen, and craftsmen the apparel of valets, and valets the apparel of squires, and squires the apparel of knight.” For the first time, English sumptuary law began to reflect a recognition that the traditional notion of social rank based on bloodline was under pressure from social power based upon economic wealth. To stave off that change, the 1363 law sought to hold down the rising economic power of the merchant class by mandating that merchants’ estates must be valued at five times more than that of knights in order for merchants to wear noble garb.

The next major sumptuary law in England was not passed until 1463, but it once more pressed the twin concerns of immorality and economic protectionism in its hierarchical regulation of dress. The law detailed the colors and types of fabrics that individuals could wear based on their rank in society. No one below the rank of knight was allowed to wear velvet, satin, silk (or imitations of silk), or

78. Id. at 301. This import ban was aimed at merchants who might bring in foreign wool and held the extreme punishment of either loss of life or limb for violating the law. Id.
79. Id.
80. Id. at 303
81. Id. (old English spellings in original).
82. Id. at 163. Professor Hunt states that “[i]n both New England and much earlier in Europe, there was a progressive move away from the definition of social position by blood towards the ‘new’ economic criterion of ‘income.”’ Id.
83. Id. at 304-05.
84. Id. at 306. The preamble states that

[the commons of the said realm, as well Men as Women, have worn and daily do wear excessive and inordinate Array and Apparel to the great Displeasure of God, and impoverishing of this realm of England and to the enriching of other strange Realms and Countries to the final Destruction of Husbandry of this said Realm.

Id.; see Goodrich, supra note 4, at 709.
85. HUNT, supra note 1, at 307.
ermine, and only those with the rank of Lord or higher were permitted to wear gold cloth, sables, and purple silk.\textsuperscript{86}

In the 1500s and early 1600s, English sumptuary laws followed the patterns spelled out by these earlier statutes. In some instances, they added more complex restrictions related to specific social gradations and the nature of the fabrics and colors that could be worn.\textsuperscript{87} In other instances, the new provisions were aimed at supporting the domestic textile industry.\textsuperscript{88}

The tumultuous Elizabethan era, during which the monarchy and the House of Commons battled internally over legislative power,\textsuperscript{89} was marked by “a veritable frenzy of regulatory lawmaking,”\textsuperscript{90} including regulation of wages, prices, clothing, occupations, religious observances, and familial, social, and commercial relationships.\textsuperscript{91} During this period, the greatest numbers of royal proclamations about dress were handed down, aimed primarily at reaffirming the existing social order.\textsuperscript{92} However, despite centuries of sumptuary dress codes, legal records show little evidence of any consistent prosecution of

\begin{itemize}
  \item \textsuperscript{86} \textit{Id.}
  \item \textsuperscript{87} \textit{Id.} at 309-16.
  \item \textsuperscript{88} \textit{Id.} For example the “Proclamation Against Excess in Apparel” indicated that no one shall wear cloth of gold, silver, or tinsel; satin, silk, or cloth mixed with gold or silver, nor any sables; except earls and all of superior degrees, and viscounts and barons in their doublets and sleeveless coats; woolen cloth made out of the realm; velvet, crimson, scarlet or blue; furs, black genets, lucerns; except dukes, marquises, earls or their children, barons, and knights of the order; velvet in gowns, coats, or outermost garments; furs of leopards; embroidery, pricking or printing with gold, silver or silk; except baron’s sons, knights, or men that may dispense £200 by year; taffeta, satin, damask, or silk camlet in his outermost garments; velvet, otherwise than in jackets, doublets, etc., fur whereof the growth not within the Queen’s dominions, except grey genets, bodge; except a man may dispense by £100 year. \textit{Id.} at 314-15.
  \item \textsuperscript{89} \textit{Id.} at 312. During the Elizabethan period (1558-1603), royal rule and secular government authority vied for political pre-eminence. \textit{Id.; see infra} notes 91-100 and accompanying text.
  \item \textsuperscript{90} \textit{Hoffer, supra} note 7, at 46.
  \item \textsuperscript{91} \textit{Id.} Professor Hoffer states that \nearly every session of Parliament enacted new statutes to control domestic conduct and economic activity. Prices were regulated, as was the gold thread in one’s clothing, the language of one’s prayers, the occupation one could follow, and the profits one could make. Statutes of Artificers fixed wages, and Poor Laws set up workhouses for the indigent. The relations between master and apprentice, servant and employer, husband and wife were regulated as well. \textit{Id.}
  \item \textsuperscript{92} \textit{Capers, supra} note 6, at 7; see \textit{Hunt, supra} note 1, at 315-21 (providing further detail on the sumptuary proclamations of the Elizabethan period). It is interesting to note that a 1562 proclamation included language mandating that tailors and hosiers limit the amount of cloth used in men’s hosiery or else suffer a fine, \textit{Id.} at 316, perhaps an early example of secondary liability if placed in the copyright context. The Elizabethan era also saw the reinstatement of gender-specific dress codes for men and women. \textit{Id.} at 320-21; \textit{Capers, supra} note 6, at 8; see \textit{supra} note 57 and accompanying text; see also \textit{Finkin, supra} note 44, at 593 n.92 (citing Bavarian ordinance that in 1537 that mandated citizens wear clothing suitable to their station in order “to be recognized for whom [sic] he or she is”).
\end{itemize}
these laws in the English judicial system. During the Elizabethan period, sumptuary laws as to dress were often ineffective because their stated objectives often yielded the exact opposite reaction in the public. Limiting a certain fashion item to the upper classes instantly made it more desirable for the lower classes; conversely, requiring the general public to don a certain item resulted in it becoming immediately unfashionable for the lower classes. For example, the 1337 law banning imported wool actually caused a rise in the public demand for imported wool and increased wool smuggling. Yet wool caps became completely undesirable to the public after a 1571 law mandated that anyone over the age of six wear one on Sundays and holidays. It is this “fundamental contradiction” that seems to doom sumptuary regulations, particularly regulations as to dress. As Professor Hunt has stated,

[a] fundamental contradiction lies at the core of the project of sumptuary regulation . . . . To designate some item of dress or some dish of food as being reserved for others is unlikely to reduce the desire to consume such items on the part of the rest of the population, or at least of those sections of the population within whose economic reach or imagination such items lie. . . . If some economic or cultural asset is restricted to some groups or classes it becomes a potential object of aspiration for others. Such an aspiration is reinforced where that asset is associated with a claim to social superiority.

Still, in spite of their ineffectiveness, it was not until the first Parliament of 1604 that English sumptuary laws on dress began to be repealed, not as the direct target of Parliament for a specific reason, but as a byproduct of a general overhaul of existing statutory codes.  

93. HUNT, supra note 1, at 342-43. Professor Hunt concludes that the enforcement of sumptuary laws “was episodic, irregular and probably unpredictable.” Id. at 343.
94. Id. at 102-05.
95. Id. Professor Hunt indicates that he was not the first to recognize this issue, quoting French essayist Michel de Montaigne who wrote in 1572 that “[t]o say that none but princes shall eat turbot; or shall be allowed to wear velvet and gold braid, and to forbid them to the people, what else is this but to give prestige to these things and to increase everyone’s desire to enjoy them?” Id. at 102.
96. Id. at 299-301.
97. Id. at 104-05.
98. Id. at 102; see supra note 90 and accompanying text.
99. HUNT, supra note 1, at 102.
100. Id. at 321. A number of sumptuary laws regarding dress were proposed throughout the early 1600s but most did not survive the legislative process. Id. at 322-23. Oddly enough, in 1666, one dress law did pass with an explicitly protectionist goal for English wool, mandating that all deceased persons must be buried in wool shrouds and not from imported fabrics such as “flax, hemp, silk, hair gold or silver thread, or lining coffins with these materials.” Id. at 323. This act brought English law back full circle with ancient Greek, Roman and Confucian sumptuary codes and their initial emphases on funereal restrictions. See id. at 323; supra notes 31-35 and accompanying text. The law also sought to limit the importation of French textiles, HUNT, supra note 1, at 323, another example of the recurring theme of economic protectionism.
C. Sinfulness, Social Station, and Income in Colonial America

As English sumptuary dress codes waned, colonial America, lacking an entrenched ruling royal class, sought to establish its own visual hierarchy through dress.101 Colonial sumptuary laws were modeled after their English predecessors and focused more heavily on “a moral agenda [of] social conformity, religious obedience, and hard work”102 in line with Puritan values connecting the “evils of luxury, fashion, and dressing above one’s rank”103 with the sins of idleness and pride.104 In New England, Puritan ministers regularly railed against covetousness and corruption of society through materialism and the sin of “spiritual pride” in pursuit of fashion.105

Beginning in 1619, the Massachusetts Bay Colony gradually adopted a comprehensive set of sumptuary laws of all of the colonies.106 These efforts to regulate dress later included a 1651 ban on the ownership of gold and silver lace or buttons, silk hoods or scarves, and “great boots”107 for those with less than £200 in annual income.108 Like earlier English sumptuary laws, the 1651 law included an income component to determine a person’s rank, a controlling factor to determine one’s right to don particular items; this largely replaced the notion of social status through bloodlines, which

101. BROWN, supra note 7, at 89-90; HUNT, supra note 1, at 38.
102. HOFFER, supra note 7, at 46.
103. HUNT, supra note 1, at 39; see Pollack, supra note 43, at 1424.
104. GILDRIE, supra note 7, at 35; see Finkin, supra note 44, at n. 92.
105. GILDRIE, supra note 7, at 23, 35. In the 1600s, leading Puritan ministers actively lobbied the Massachusetts legislature for the passage of sumptuary laws, linking consumption with illicit sensuality. Id. at 24-25, 35-37. Minister William Hubbard denounced “commodities to make fuel for lust” and warning that materialism is “calling young people not to the mountain of the Lords House, but our own private recesses to offer sacrifice to Bacchus and Venus.” Id. at 194; see Goodrich, supra note 4, at 713-15 (discussing efforts to suppress erotic images through sumptuary regulations).
106. See HOFFER, supra note 7, at 47; HUNT, supra note 1, at 38; see also BROWN, supra note 7, at 89-90 (discussing role of sumptuary codes of dress in colonial Virginia in seeking to sustain hierarchical social order).
107. HUNT, supra note 1, at 39, 103-04. In a decision, one Massachusetts magistrate wrote:

We declare our utter detestation and dislike that men and women of mean condition, educations, and callings should take upon themselves the garb of gentlemen, by the wearing of gold and silver lace, or buttons, or points at their knees, to walk in great boots; or women of the same rank to wear tiffany [transparent silk or muslim] hoods or scarves, which though allowable to persons of greater estates, or more liberal education, yet we cannot but judge it intolerable in persons of such like condition.

Id. at 103 (addition in original); see supra note 93 and accompanying text; infra notes 109, 111, 281 and accompanying text.
108. HUNT, supra note 1, at 39, 163-64; Capers, supra note 6, at 7. To help enforce dress regulations, local authorities were permitted to tax persons who dared to wear clothing above their station as if their incomes exceeded £200 in annual income. HUNT, supra note 1, at 39.
was not easily transferred from European to American society. Other colonies also adopted their own sumptuary laws on dress, often with heavy moral overtones about the dangers of immodesty or idleness.

As in England, enforcement of these laws was inconsistent, occurring in sporadic bursts whenever a new sumptuary law was passed or a particularly zealous government official took office. As was likely the case in ancient societies, women tended to be more regularly prosecuted than men for violating these colonial laws, with excesses in female apparel seen as a dangerous sign of “suspicious female independence.” Consistent with Hunt’s notion of the “fundamental contradiction” of sumptuary regulation, colonial American sumptuary laws regulating dress often provoked the opposite of their intended response from the public. For example, a Massachusetts law banning women whose annual household incomes were under £200 from wearing silk hoods yielded a tremendous demand for these items as well as a flurry of prosecutions for violations of the law, some in groups of thirty or more women at a

---

109. Brown, supra note 7, at 89-90; Hunt, supra note 1, at 104, 163. With regard to colonial Virginia, Professor Brown writes:

Lacking the visible trappings of ancient status and power, as expressed in manor houses, imported clothing, and horses, the wealthy planters of the Company and early colony found it difficult to communicate to lesser men the authority to which they aspired . . . . Manual laborers who dressed above their station, creating an appearance of gentility when in fact they herded cattle or mined coal, were a social threat with some precedent in England . . . . The response of the wealthy planters to violations of dress distinctions was to do as their elite peers in England had done: to pass laws prohibiting excesses in clothing . . . . Even more than in England, where stately houses, carriages, trappings of government office, and traditions of local rule expressed aristocratic and gentry rights to rule over yeomen and laborers, clothing became a crucial signpost of status in early Virginia.

110. Brown, supra note 7, at 89-90; Hunt, supra note 1, at 39.

111. Hunt, supra note 1, at 345, 347. Professor Hunt notes that, in colonial America, in most instances these laws, if enforced, were “almost always against the lower classes.” Id. at 347.

112. See id. at 345-46, 353. The wearing of silk hoods seemed to be a consistent offense of women brought before the Massachusetts courts for sumptuary code violations. Id. at 346, 353. Fines were the traditional method for punishing such violations. Id. at 349; see supra note 70 and accompanying text.

113. Gildrie, supra note 7, at 99. Professor Brown notes that, in colonial Virginia, “[a] woman’s clothing also revealed her occupation, status, and gentility or servility.” Brown, supra note 7, at 292. She adds that for free women with financial means “clothing provided a unique opportunity to communicate one’s identity and one’s worth independently of one’s husband or father. Fashion was also the most important idiom in which elite colonial women expressed their relationship to imperial culture. A woman’s wardrobe reflected not only her financial position but her taste.” Id. at 293.

114. See supra notes 98-99 and accompanying text.

115. See Hunt, supra note 1, at 345-47, 353.
Ultimately, enforcement of sumptuary laws was most effective in colonial America when the citizens of the colony generally, and not just a specific group, benefited from the rules, as in the case of price limits on food, or grade and weight regulations on tobacco that promoted fairness to both merchants and consumers.117

In addition to laws restricting the dress of ordinary citizens, slave codes in certain colonies mandated that slaves be limited to certain fabrics, both to ensure immediate identification of the individual as a slave118 and to avoid stoking “theire foolish pride as induse them to steal fine Linninge and other ornaments.”119 The colonial Virginia law required masters to dress their slaves in coarse canvas linen in hues of blue.120 The South Carolina slave codes detailed a variety of cheap, rough fabrics “not exceeding ten shillings per yard” for masters to clothe their slaves.121 Professor I. Bennett Capers notes that, under these slave dress codes, “[i]t was not enough that their skin marked them subordinate in the eyes of whites; their clothing had to mark them as subordinate as well.”122 The visual hierarchy was thus doubly protected through clothing and skin color with the goal of supporting the existing social order.123

Due to changing social values and improved class mobility, traditional sumptuary laws regulating dress, with the exception of slave codes, began to be repealed or were no longer actively enforced by the middle of the eighteenth century.124 During the nineteenth century, sumptuary laws transformed into an increased demand for uniforms in the work place to help identify members of the working class and to further retain the visual hierarchy that was no longer mandated by law.125 The use of uniforms flourished and helped to identify three distinct groups: public employees (such as police officers

116. See id. In the case of Hannah Lyman, she was fined and censured for wearing a silk hood in public and for showing contempt for the law by wearing that same hood in the courtroom, when she appeared along with thirty-five other women being prosecuted. Id. at 353.
117. See HOFFER, supra note 7, at 47.
118. BROWN, supra note 7, at 154; see CRANE, supra note 1, at 69.
119. BROWN, supra note 7, at 154 (old English spellings in original); Capers, supra note 6, at 8.
120. BROWN, supra note 7, at 154.
121. Capers, supra note 6, at 8.
122. Id.
123. BROWN, supra note 7, at 154; Capers, supra note 6, at 8.
124. HUNT, supra note 1, at 39.
125. CRANE, supra note 1, at 87-88, 94. Professor Crane notes that “[f]ashionable clothing, which could be used to enhance the individual’s social capital, was mainly accessible to the middle and upper class during the nineteenth century, while uniforms that represented instruments of social control were imposed primarily on employees drawn from the working class.” Id. at 94.
and firefighters), domestic servants, and factory and shop workers.126 In the aftermath of slave dress codes, workplace dress codes now played a key role in maintaining the visual hierarchy for working adults.127

D. Social Norms and Changing Fashion Diffusion Models

As sumptuary laws faded in the United States in the eighteenth century, discourse on morality and dress gave way to the development of class norms that created distinct social rules about appropriate dress.128 In the late nineteenth and early twentieth centuries, wealth provided the upper class with access to the latest fashions, and designers created fashions primarily so their elite customers could express their social positions.129 During this period, social status and economic ability to purchase fashionable dress supplanted the prohibitions and privileges of sumptuary laws.130 As clothing became more readily available to the public, strict social norms about who could wear particular items and when they could wear them took the place of laws. The penalty of social ostracization for nonconformity now helped to police class and gender boundaries.131

126. Id. at 87. Furthermore, the highly ornamental and restrictive fashions of this time period, such as tight corsets and long trains, were aimed at limiting wealthy women’s physical activities, resulting in “fashionable clothing [that] was unsuitable for the daily activities of most working-women.” Id. at 29. The assumptions underlying these restraining fashions were notions that physical labor was bad for a lady’s health and that such menial tasks were to be performed by one’s servants. Id. “Aristocratic idleness was seen as the suitable way of life for middle- and upper-class women.” Id.

127. Although our society today largely views itself free from government (and/or religious) edicts on dress, Professor Klare states that employers now have taken over the societal authority to institute dress codes for adults. Klare, supra note 6, at 1431-32. He notes that “[t]he genius of appearance law as discipline lies in indirection and decentralization” that creates the illusion, but not the reality, of free choice in dress. Id. In addition, schools may have the authority to broadly regulate student dress provided that their actions do not transgress free speech rights. See, e.g., Tinker v. Des Moines Indep. Cnty Sch. Dist., 393 U.S. 503 (1969) (determining that school’s suspension of students from school for wearing black armbands to protest governmental policy in Vietnam violated the First Amendment); Newsom ex rel. Newsom v. Albemarle County Sch. Bd., 354 F.3d 249 (4th Cir. 2003) (holding school dress code policy too broad and a violation of student’s free speech right to wear N.R.A. sports shooting camp t-shirt); Canady v. Bossier Parish Sch. Bd., 240 F.3d 437 (5th Cir. 2001) (determining that school dress code requiring uniforms sought to improve test scores and reduce disciplinary problems and did not violate free speech rights); Bivens v. Albuquerque Pub. Sch., 899 F. Supp. 556 (D.N.M. 1995), aff’d, 131 F.3d 151 (10th Cir. 1997) (unpublished table decision) (upholding student suspension for saggy pants violation of school dress code as not violating free expression rights).

128. See CRANE, supra note 1, at 6, 134; Diana Crane, Diffusion Models and Fashion: A Reassessment, 566 ANNALS AM. ACAD. POL. & SOC. SCI. 13, 17 (1999).

129. CRANE, supra note 1, at 28-29, 94.

130. See id.

131. Id. at 4, 67, 134; Crane, supra note 128, at 17. For example, Vogue’s Book of Etiquette in 1948 originated the social norm of a lady only wearing white between Memorial Day
Starting in the late nineteenth century, “class” fashion dictated by these social norms ruled with a centralized system of fashion design and manufacturing, largely operating out of Paris, dictating acceptable fashion to an unquestioning public. Under historically recognized fashion diffusion models, fashion trends traditionally emanated from the wealthy upper classes and then subsequently trickled down to status-seeking members of the middle and lower classes. Under the traditional trickle down or top-down model, Professor Diana Crane, a fashion industry expert, has stated that lower-status groups sought to acquire status by adopting the clothing of higher-status groups and set in motion a process of social contagion whereby styles are adopted successively by groups at successively inferior status levels. By the time a particular fashion reached the working class, the upper class had adopted newer styles, since the previous style had lost its appeal in the process of popularization. The higher-status groups sought once again to differentiate themselves from their inferiors by adopting new fashions.

In the late nineteenth and early twentieth centuries, the availability of less expensive industrial imitation fabrics and the increased production and distribution of patterns and sewing machines allowed middle and lower classes to imitate the fashions of upper class groups, leading to a greater democratization of fashion.
However, to retain the visual hierarchy between themselves and their perceived inferiors, higher-status groups moved on to other styles once a particular fashion became too popular, creating a cycle of fashion imitation.136 This trickle-down, or top-down, model relied upon a highly centralized industry of fashion designers and manufacturers.137 From the nineteenth century until the 1960s, Parisian designers primarily dictated fashion trends for women, while London designers set the trends for men.138

In the post-World War I period, as the retail clothing market (or ready-to-wear market) exploded, the United States lacked a strong fashion design industry. Thus, many American designers hurried to the Parisian fashion shows and copied the works of Parisian and English designers.139 American copyists first manufactured copies of European designs in small, expensive amounts, and then at cheaper prices in mass quantities.140 In the 1930s and 1940s, a split grew between clothing manufacturers in the United States over issues of “design piracy,” especially as to dresses and millinery.141 Some U.S. manufacturers considered themselves to be “original creators” who did not copy Paris designs, but only received inspiration from Paris fashion shows to create small quantities of their own original designs.142 Other manufacturers, called “copyists,” imitated exactly or
substantially the designs of other manufacturers for mass production.\textsuperscript{143}

Various designer guilds were developed that permitted members to register their designs, after which the guild would sell the designs only to retailers who bought exclusively registered designs from manufacturers.\textsuperscript{144} The penalty for manufacturers who failed to comply with the guild rules was denial of their designers’ products, so non-participating manufacturers lost out on a potentially valuable opportunity to mass produce guild members’ creations.\textsuperscript{145} In addition, members of the design guilds could be fined if they continued to provide products to merchants who purchased copies of unregistered designs.\textsuperscript{146} In this way, both manufacturers and retailers were under pressure to produce and buy only registered guild designs, respectively, leading to claims of antitrust.\textsuperscript{147}

In antitrust actions brought by retailers, lower courts decried the immorality of design piracy, but they were divided on whether antitrust laws were violated.\textsuperscript{148} In \textit{Millinery Creators’ Guild, Inc. v. FTC}, the government brought an antitrust action against a hat guild that sought to press retailers into boycotting manufacturers that produced knock-offs of fine hats and in turn boycotting any retailers who continued to purchase from design pirates.\textsuperscript{149} The court recognized that fashion designers were not just concerned about

\begin{itemize}
  \item [143.] \textit{Fashion Originators}, 312 U.S. at 461; \textit{Millinery}, 109 F.2d at 176; \textit{Filene's}, 90 F.2d at 557-58. With a style life of only about three months, the Fashion Originators Guild became concerned about the increasing ability of copyists to quickly and often surreptitiously obtain designs for rapid copying. \textit{Filene's}, 90 F.2d at 558. The \textit{Filene's} court stated
  
  [a] manufacturer who is a copyist does not send stylists or designers to Paris for inspiration. Instead he copies original designs of other manufacturers, which is accomplished in different ways. Sometimes a copyist buys dresses from retailers who have purchased them from original creators. Sometimes employees of copyists visit the showrooms of original creators and memorize or take notes of the details of the original design there displayed. Sometimes copyists obtain sketches or photographs of successful designs of original creators from agencies which make a business of supplying such sketches and photographs. Sometimes copyists bribe employees of original creators to furnish samples of their employers' original designs or to let them see samples from which they make sketches, and occasionally the original designs are stolen from the original creators.

  \textit{Id.}

  \item [144.] \textit{Fashion Originators}, 312 U.S. at 461-63; \textit{Millinery}, 109 F.2d at 176; \textit{Filene's}, 91 F.2d at 558-59.
  \item [145.] \textit{See supra} note 144.
  \item [146.] \textit{See supra} note 144.
  \item [147.] \textit{See infra} notes 148-52 and accompanying text.
  \item [148.] \textit{Millinery}, 109 F.2d at 177-78 (determining that the hat guild which had controlling position in industry had violated antitrust laws as to price-fixing and creating anticompetitive monopoly for legally unprotected designs); \textit{Filene's}, 91 F.2d at 561-62 (applying rule of reason, court finds nothing illegal or unreasonable in guild's effort to protect against design piracy since retailers had other adequate markets from which to purchase dresses).
  \item [149.] \textit{Millinery}, 109 F.2d at 176.
preventing the unethical business practice of piracy, but also possessed more self-serving motives such as protecting their markets and prices from lower-priced imitations.\footnote{150} Ultimately, despite the arguably unethical nature of copying, the Supreme Court determined that designs were not legally protected under patent or copyright, and guild efforts to protect designs were coordinated actions that weakened competition and narrowed channels of distribution in contravention of antitrust laws.\footnote{151} As a result of the \textit{Millinery} decision, the cycle of copying from Parisian designers within the U.S. garment industry continued unabated until the 1960s.\footnote{152}

In the 1960s, the dominant top-down model—in which the elite members of society influenced the way the rest of society dressed— began to face competition from the new bottom-up model, in which fashions diffused from the lower classes up to higher-status groups. In the bottom-up model, youth and urban subcultures developed their own fashion trends that emphasized self-expression and declined to follow the fashion dictates of higher-status groups.\footnote{153} Beginning in the 1960s and 1970s, the desire to express one’s own personal identity through clothing led to tremendous fashion diversity.\footnote{154} Designers now competed with each other to meet the individualized tastes of a

\begin{enumerate}
\item[150.] \textit{Id.} at 177-78. The court stated that [i]t is true that concerted activity may be proper to eliminate evils, even though those evils are not violations of positive law, and the fact that the pirate is immune from legal restraint is not of itself sufficient cause to forbid the Guild from devising other means to control him. But here the courts have refrained from enjoining the pirate because they will not support a monopoly in an unpatentable idea. It would be strange to say that the Guild may establish this same monopoly by extrajudicial methods. Style piracy has been lethal in its effect on hat prices, and one of its results has been to make the latest fashions readily available to the lowest purchasing classes. The market of the high-grade originators has been sharply curtailed, and their prices have suffered correspondingly. It is safe to say that the members of the Guild instituted their antipiracy campaign to protect their markets and price levels, as well as to improve business morals within the industry.
\item[151.] \textit{Id.}.
\item[152.] \textit{Fashion Originators}, 312 U.S. at 463-68. \textit{See Millinery}, 109 F. 2d at 177-78.
\item[153.] \textit{Crane, supra} note 1, at 27-28; \textit{Crane, supra} note 128, at 14-15. In the literary world, Professor Randall indicates that copying becomes plagiarism when one mechanically copies from another with a “presumption of covertness” trying to confuse the public about the authentic author of the work. \textit{Randall, supra} note 134, at 30-31. The element of covertness is generally not found in fashion copying where the public is typically aware that knock-offs are not produced by the original designer. \textit{Id.}
\item[154.] \textit{Crane, supra} note 1, at 134-35.
\end{enumerate}
consumer-driven marketplace. Fashion designers no longer focused on “imposing a style on the public,” but now had “to perceive and to anticipate hidden demand” in their customer base. Numerous American designers were quick to capitalize on this shift toward individual fashion identities and created fashion lines oriented toward the lifestyle of a particular market segment or consumer group.

As consumer-driven fashion began to displace class fashion in the 1960s, the fashion industry became much more fragmented and fashion centers proliferated across the globe. While many luxury fashions still emanated from Paris, designers worldwide began to seek out the next major fashion trend by roving the streets, college campuses, and urban music clubs for their next creative inspiration. Some design firms even hired “cool hunters” to seek out the next big trends from urban subcultures in an effort to capture styles that the public would broadly embrace. Athletes, musicians, and Hollywood celebrities, rather than members of traditional class-based high society, became the muses for designer fashions. In this changed climate, U.S. designers became more competitive with their European counterparts and eventually developed into the $350 billion dollar industry that it is today.

---

155. Id. Professor Crane notes that “class fashion” gave way to “consumer fashion.” Id. at 134. She adds that “[c]onsumers are no longer perceived as ‘cultural dopes’ or ‘fashion victims’ who imitate fashion leaders but as people selecting styles on the basis of their perceptions of their own identities and lifestyles. Fashion is presented as a choice rather than a mandate.” Id. at 15.

156. Id. at 21.

157. BOLLIER & RACINE, supra note 16, at 12; CRANE, supra note 1, at 10-11, 148-49. Professor Crane indicates that Ralph Lauren and Espirit initiated the now heavily-imitated idea of designing and distributing fashion lifestyles that went beyond clothing to a vast array of other designer products. CRANE, supra note 1, at 21.

158. CRANE, supra note 1, at 15, 134-35; CRANE, supra note 128, at 18.

159. CRANE, supra note 1, at 134-35, 146.

160. BOLLIER & RACINE, supra note 16, at 18-19; CRANE, supra note 1, at 135, 189-85, 192; CRANE, supra note 1, at 18-19, 21-22. Some fashion forecasters employ “cool hunters,” staff who are trained to “observe and interview adolescents in suburbs and poor urban neighborhoods” in an effort to predict up-and-coming fashion trends. CRANE, supra note 1, at 192; CRANE, supra note 128, at 22.

161. BOLLIER & RACINE, supra note 16, at 18-20. For example, hip-hop artists turned such mundane items as track suits, oversized jeans, and underwear now exposed outside one’s pants into major fashion trends. Id. at 18-19.

162. Id. at 18-19; CRANE, supra note 1, at 15, 135; CRANE, supra note 128, at 16. Hip-hop artists have been particularly successful in establishing fashion trends and outselling traditional haute couture designers. BOLLIER & RACINE, supra note 16, at 18-19. For example, “Sean John sells way more than a Donatella Versace.” Id. at 119.

163. CRANE, supra note 1, at 146-49.

Despite this modern fragmentation, clothing has retained the power to identify class. With respect to prestigious designers like Lilly Pulitzer, “[t]he very fact that you knew about [them] meant you were part of an exclusive circle. You were a debutante. You attended an Ivy League school. You had a trust fund. You were a member of a restricted social club. You wintered in Palm Beach and summered on Nantucket.” Despite greater democratization of fashion, high-end fashion designers still harbor fears that the brand exclusivity will be diminished if the style is “worn by people who pull the brand down. . . . The snob appeal gets quickly diluted.”

In today’s world, practices have come full circle: a number of successful American designers have found other global competitors copying their designs, just as American designers previously copied their Parisian counterparts. The traditional copying and distribution process has greatly accelerated through the technological growth of textile production systems and the global reach of the Internet. The U.S. fashion industry has suffered an estimated $12 billion in revenue losses from counterfeit goods, and billions more in lost tax revenues. Ultimately, these losses led segments of the

---


166. Id. (quoting Suzanne C. Ryan, Back on the Rack Preppy is in Again, and Lily Pulitzer’s Bright Fun Clothes Are Riding the Wave of retro Fashion to New Popularity, THE BOSTON GLOBE, Jan. 7, 2001, at D1).

167. Id. (quoting Erin White, Protecting the Real Plaid from a Sea of Fakes, WALL ST. J., May 7, 2003, at B1); see also infra notes 192-209 and accompanying text.


169. Banks Testimony, supra note 164; Raustalia & Sprigman, supra note 15, at 1696-97; see also supra note 139 and accompanying text.

170. Scafidi Testimony, supra note 135; see also supra note 121 and accompanying text.

171. Scafidi Testimony, supra note 135; see also supra note 121 and accompanying text.

fashion industry to lobby Congress for copyright protections under the proposed DPPA in an effort to abate copying.\textsuperscript{173}

II. ECHOES OF THE SUMPTUARY IMPULSE IN THE DPPA

A. Overview of Proposed DPPA

Introduced in Congress in 2006, 2007, and most recently 2009,\textsuperscript{174} the DPPA seeks to extend copyright protection to clothing design.\textsuperscript{175} Currently, fashion designs receive only limited intellectual property protection\textsuperscript{176} under copyright,\textsuperscript{177} patent,\textsuperscript{178} and trademark\textsuperscript{179}


\textsuperscript{174} See supra note 12 and accompanying text; see generally Stop Fashion Piracy, supra note 173.

\textsuperscript{175} See supra note 12 and accompanying text; see generally Stop Fashion Piracy, supra note 173.

\textsuperscript{176} See Orit Fischman Afori, Reconceptualizing Property in Designs, 25 CARDOZO ARTS & ENT. L.J. 1105, 1158-62 (2008) (calling for sui generis statute scheme to safeguard industrial design based upon copyright laws but with shorter time periods for protection). Professor Afori notes that “industrial design is situated at the cross roads of art, technology, and an entire industry dedicated to attracting the consumer’s attention. Thus legally speaking, design suffers from a hybrid nature since it has much in common with the three major intellectual property paradigms,—copyright, patent and trademark laws—yet it does not exactly fit any one of them.” Id. at 1107-08; see also infra notes 181-184 and accompanying text. See generally CHRISTINE COX & JENNIFER JENKINS, NORMAN LEAR CENTER, BETWEEN THE SEAMS, A FERTILE COMMONS: AN OVERVIEW OF THE RELATIONSHIP BETWEEN FASHION AND INTELLECTUAL PROPERTY 7-16 (2005) (discussing various forms of current intellectual property protection for fashion designs).\textsuperscript{177}

\textsuperscript{177} See, e.g., Knitwaves, Inc. v. Lollytogs, Ltd., 71 F.3d 996, 1004-05 (2d Cir. 1995) (finding deliberate infringement of leaf and squirrel design on copyright holder’s sweaters); Folio Impressions, Inc. v. Byer Cal., 937 F.2d 759, 764-65 (2d Cir. 1991) (determining that arrangement of Folio Roses on fabric pattern was protected under copyright); Poe v. Missing Persons, 745 F.2d 1238, 1241-42 (9th Cir. 1984) (finding that vinyl, rock-filled swimsuit as soft sculpture were protected under copyright); Eve of Milady v. Impressions Bridal, Inc., 957 F. Supp. 484, 489-90 (S.D.N.Y. 1997) (ruling that lace designs on wedding dresses were copyrightable as writings and that defendants were liable for copyright infringement); Scarves by Vera, Inc. v. United Merchs. and Mfrs., Inc., 173 F. Supp. 625 (S.D.N.Y. 1959) (finding that designs printed upon scarves were subject to copyright); Peter Pan Fabrics, Inc. v. Brenda Fabrics, Inc., 169 F. Supp. 142, 143 (S.D.N.Y. 1959) (finding willful copyright infringement in copying of design printed on fabric as writing); Jack Adelman, Inc. v. Sonners & Gordon, 112 F. Supp. 187, 188-89 (S.D.N.Y. 1934) (finding that fashion design drawing was copyrightable art, but not the manufacture of dress in drawing); see also COX & JENKINS supra note 176, at 7-10; Day, supra note 13, at 245-46; Raustalia & Sprigman, supra note 15, at 1699-1700; Hedrick, supra note 14, at 228-31. But cf. Russell v. Trimfit, Inc., 428 F. Supp. 91 (E.D. Pa. 1977) (determining that the idea for designs of “toe socks” was not copyrightable); SCOA Indus., Inc. v. Famolare, Inc., 192 U.S.P.Q. 216 (S.D.N.Y. 1976) (finding that wavy lines on shoe soles were not copyrightable). However, in recent years, fashion has been recognized for its artistic purposes and has often become the subject of art exhibitions at well-respected museums. Marshall, supra note 12, at 323-24.

\textsuperscript{178} 35 U.S.C. §101 (2008) (defining design patents); see also COX & JENKINS, supra note 176, at 21-22; Day, supra note 13, at 250-51; Ashley Hofmeister, Louis Vuitton v. Dooney &
and trade dress. Copyright law does not offer its expansive protections to clothing because it is typically categorized as a useful article and not a creative work. Copyright protection is only


179. 15 U.S.C. §§1125, 1127 (2008) (defining trademark and trademark infringement and dilution); see, e.g., Coach Leatherware Co., Inc. v. Ann Taylor, Inc., 933 F.2d 162, 170 (2d Cir. 1991) (finding a trademark infringement in confusingly similar hang tags on knock-off handbags); see also COX & JENKINS, supra note 176, at 22-23; Day, supra note 13, at 249-49; Hofmeister, supra note 178, at 194-98; Raustalia & Sprigman, supra note 15, at 1700-02; Hedrick, supra note 14, at 224-27. But cf. Louis Vuitton Malletier v. Dooney & Bourke, 340 F. Supp. 2d 415, 452-53 (S.D.N.Y. 2004) (rejecting trademark infringement and dilution claims in repeated linking of distinct company monograms “DB” not “LV” on handbags). Outside of the fashion industry, some courts have also enjoined the production and sale of clothing that bears the ornamental logos of sports teams and leagues under an exclusive right to market one’s trademark while others have refused to extend trademark protection to monopolize these trademark symbols. Veronica J. Cherniak, Ornamental Use of Trademarks: The Judicial Development and Economic Implications of an Exclusive Merchandising Right, 69 Tul. L. REV. 1311, 1314 (1995); see, e.g., Boston Prof’l Hockey Ass’n v. Dallas Cap & Emblem Mfg., 510 F.2d 1004, 1012 (5th Cir. 1975) (enjoining unauthorized, intentional duplication of a professional hockey team’s symbol on embroidered emblem); Nat’l Football League Props., Inc. v. Wichita Falls Sportswear, Inc., 532 F. Supp 651, 664-65 (W.D. Wash. 1982) (enjoining production of NFL team jersey replicas or jerseys with dominant colors of professional teams, but not barring production of non-professional team replicas); Nat’l Football League Props., Inc. v. Consumer Enters., 26 Ill. App. 3d 814, 819-20 (Ill. App. Ct. 1975) (issuing preliminary injunction restraining defendant from manufacturing or selling NFL patches with emblems of NFL clubs without authorization because of likelihood of source confusion). Ms. Cherniak argues that the ornamental use of trademarks should be protected just as “originality and fancifulness” are protected under copyright. Cherniak, supra, at 1346.

180. See COX & JENKINS, supra note 176, at 14-16; Day, supra note 13, at 249-51; Hofmeister, supra note 178, at 193-94; Raustalia & Sprigman, supra note 15, at 1702-03; Hedrick, supra note 14, at 227; cf. Wal-Mart Stores, Inc. v. Samara Bros., Inc., 529 U.S. 205 (2000) (suggesting that knock-offs of children’s clothing were not protected under trade dress); Knitwaves, 71 F.3d at 1009 (finding that aesthetics of designs were not intended as source identifiers and therefore were not afforded trade dress protection); Coach, 933 F.2d at 171 (finding that configurations of ornamental features of handbags were not covered under trade dress protection).

181. 17 U.S.C. §101 (2008) (“A ‘useful article’ is an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information. An article that is normally a part of a useful article is considered a ‘useful article.’”); see also Day, supra note 13, at 191-92; Hofmeister, supra note 178, at 191-92; Raustalia & Sprigman, supra note 15, at 1699-1700; Hedrick, supra note 14, at 228.

182. 17 U.S.C. §102(a) (“Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”). Works of authorship include the following categories: (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works. Id.; see also Malla Pollack, Towards a Feminist Theory of the Public Domain, or Rejecting the Gendered Scope of United States Copyrightable and Patentable Subject Matter, 12 WM. & MARY J. OF WOMEN & L. 603, 607-08 (2006) (contending
afforded to designs if they are “original”\textsuperscript{183} and expressive aspects of the design are separable from the utilitarian functions of the clothing.\textsuperscript{184} Non-utilitarian lace and embroidery and whimsical decorations on accessories would therefore be protected as expressive aspects of design.\textsuperscript{185}

Under the DPPA, however, all fashion designs would receive three years of copyright protection, recognizing the fast pace of fashion

\begin{itemize}
    \item That lack of copyright protection for making clothes is “gendered and anti-feminine” based upon notions of “traditional women’s work”; supra notes 142-43 and accompanying text.
    \item 183. 17 U.S.C. §§ 1301(a)(1), (b)(1). The code states that “[a] design is ‘original’ if it is the result of the designer’s creative endeavor that 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.” Id. at (b)(1). Fashion designs are not protected if they are (1) not original; (2) staple or commonplace, such as a standard geometric figure, a familiar symbol, an emblem, or a motif, or another shape, pattern, or configuration which has become standard, common, prevalent, or ordinary; (3) different from a design excluded under (2) only in insignificant details or in elements which are variants commonly used in the relevant trades; (4) dictated solely by a utilitarian function of the article that embodies it; or (5) embodied in a useful article that was made public by the designer or owner in the United States or a foreign country more than 2 years before the date of the application for registration under this chapter. Id. §1302; see also Day, supra note 13, at 246-47; Hofmeister, supra note 179, at 192.
    \item 184. 17 U.S.C. § 101. The copyright code defines pictorial, graphic, and sculptural works as including two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans. Such works include works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned; the design of a useful article, as defined in this section, shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.
    \item Id; see, e.g., Kieselstein-Cord v. Accessories by Pearl, Inc., 632 F. 2d 989, 993-94 (2d Cir. 1980) (reversing grant of summary judgment, stating that artistic elements of belt buckle, separated from its utility, were protectable under copyright); Brighton Collectibles, Inc. v. Coldwater Creek, Inc., No. 06-CV-1848 H(POR), 2008 WL 2120500, at *3-4 (S.D. Cal. May 28, 2008) (denying summary judgment where plaintiff had met burden of showing potential copyright infringement of decorative “Carolina heart” on handbags); Magical Mile, Inc. v. Benowitz, 510 F. Supp. 2d 1085, 1088 (S.D. Fla. 2007) (denying defendant’s motion to dismiss, finding that plaintiff has adequately plead copyright infringement claim of allegedly copied hand-painted embellishments on women’s apparel); Express v. Fetish Group, Inc., 424 F. Supp. 2d 1211, 1224-25 (C.D. Cal. 2006) (determining that non-utilitarian lace and embroidery, but not camisole itself, was protected under copyright); Nat’l Theme Prods. v. Jerry B. Beck, Inc., 696 F. Supp. 1348, 1353-54 (S.D. Cal. 1988) (finding that artistic three-dimensional costumes with minimal functional components were protected under copyright as applied art); Animal Fair, Inc. v. Amfesco Indus., 620 F. Supp. 175, 186-88 (D. Minn. 1985) (holding that sculptural features of bear claw slippers are separable from utilitarian aspects and, therefore, copyrightable); cf. Galiano v. Harrah’s Operating Co., 416 F.3d 411, 422 (5th Cir. 2005) (determining that design for casino uniforms was not separable from its utilitarian purposes and therefore was not protected under copyright). See also Day, supra note 13, at 246-47; Hofmeister, supra note 178, at 191-92; Hedrick, supra note 14, at 228-29.
    \item 185. See supra notes 163-64 and accompanying text.
\end{itemize}
trends while still allowing for a robust “public domain” of clothing.\textsuperscript{186} To receive protection, designers would be required to apply for registration within six months of the date the design was first publicly displayed.\textsuperscript{187} Infringement would occur when a design or an image of a design is actually copied and the copyist knows or has reason to know that the fashion design is claimed for protection.\textsuperscript{188} Secondary liability for wholesalers and retailers who purchase and distribute pirated designs and its attendant remedies are also retained from the Copyright Act under the proposed DPPA.\textsuperscript{189} Damages of $5 per copy, but not exceeding $250,000 total, could be awarded for infringement.\textsuperscript{190}

Although on its face the DPPA is based on fashion design protection and intellectual property rights, the social and economic objectives underlying earlier sumptuary laws on dress are strong undercurrents of the proposed law. As with other sumptuary laws, the DPPA was introduced in a time period of great transition and flux in U.S. society.\textsuperscript{191} The Act echoes the sumptuary impulses of earlier ages as they relate to the familiar themes of sustaining the visual hierarchy and the privileged dress of higher-status groups, protecting the national economy in a time of increasing global competition, and promoting discourse on public morality as to appropriate dress.

\textbf{B. New Efforts to Police Social Boundaries}

Past efforts to protect fashion designs were unsuccessful, partly because the protection of elite designers seemed antithetical to the democratization of fashion.\textsuperscript{192} It did not help that they smacked of the sumptuary laws of the past that sought to police social boundaries through dress and to privilege access to fashion to higher-status groups only.\textsuperscript{193} In 1914, when the top-down model of diffusion still dominated the fashion industry, the National Design Registration League, a fashion industry association, lobbied for the enactment of design protection laws, arguing that

\begin{footnotes}
\item[186] H.R. 2196 §2 (d)(n)(2). See supra note 12 and accompanying text; see generally Marshall, supra note 12, at 309-10; Williams, supra note 12, at 311-14 (articles provide overview of proposed DPPA).
\item[187] H.R. 2196 §2 (b)(3)(B). See supra note 12 and accompanying text.
\item[188] H.R. 2196 §2 (e)(1)-(3). See supra note 12 and accompanying text.
\item[189] H.R. 2196 §2 (h). See supra note 12 and accompanying text; see also supra note 92 and accompanying text (analogizing Elizabethan fines against tailors and hosiers as early form of secondary liability).
\item[190] H.R. 2196 §2 (g). See supra notes 12, 92 and accompanying text.
\item[191] See infra notes 222-54 and accompanying text.
\item[192] See supra notes 19, 135 and accompanying text.
\item[193] See supra notes 56-71 and accompanying text.
\end{footnotes}
[pirates] take that popular design of high-priced goods and reproduce it in cheap material and put it on the market, the result being that the ladies going into their laundries see the clothing of their colored cooks and wash girls trimmed with the same pattern of lace they use on their expensive garments . . . . [S]he will not wear the same style of lace and embroidery that is used by the servants in her household.194

The elitist language of the League’s testimony and the notion of offering legal protections for expensive designer clothing raised discomfort among legislators.195 In questioning the League’s representative, House Representative Oscar Callaway of Texas expressed his unwillingness to provide legal protection to fashion designs which would have the effect of helping the wealthy differentiate themselves from the general public through fashion.196 In objecting to design protection, he sarcastically remarked that

[t]he trouble with this bill is that it is for the benefit of two parties; that is, the enormously rich who want to display their splendid apparel that they can wear in this country that the ordinary riff-raff ought not to be allowed to wear, and those rich concerns who have these extra and selected designers to design these special patterns for those elite. I think, too, the public ought to be cut out. I think those rich elite ought to be segregated in this country and have the immensely rich off in one place and the ordinary riffraff ought not to be allowed to come and eat with them. Is not that the whole sum and substance of [this bill]?197

This same “trouble” plagues the DPPA. By protecting elite designs outside the reach of most consumers, the proposed Act conflicts with the democratization of fashion through cheaper knock-offs.198 Courts have come to similar conclusions. In the Kieselstein-

194. Briggs, supra note 9, at 204-05.
195. Id.; see also COX & JENKINS, supra note 176, at 18 & n. 6.
196. Briggs, supra note 9, at 204-05; see also COX & JENKINS, supra note 176, at 18 & n. 6.
197. Briggs, supra note 9, at 204-05; see also COX & JENKINS, supra note 176, at 18 & n. 6.
198. See BOLLIER & RACINE, supra note 16, at 36 (noting that the modern fashion industry “is about negotiating this tension between the popular and the exclusive” and that fashion designers ultimately “pursue a paradox: to create designs that connote social exclusivity . . . and then reinterpret them for their customers. The very act of selling tends to vitiate the exclusivity being sold.”). Courts have also tried to negotiate this tension in trademark infringement and dilution cases concerning well-known exclusive designs. For example, in Rolex Watch U.S.A., Inc. v. Canner, 645 F. Supp. 484, 495 (S.D. Fla. 1986), the court determined that part of the harm to Rolex in defendants’ sales of counterfeit Rolex watches to Rolex investigators was the loss of prestige ownership of an exclusive brand for high-end consumers. Aside from fakes hurting the company’s reputation for quality Rolex timepieces, the court also indicated that

[o]thers who see the watches bearing the Rolex trademarks on so many wrists might find themselves discouraged from acquiring a genuine because the items have become too common place and no longer possess the prestige once associated with them. The fact that such bogus watches can be obtained at cheap prices only aggravates the problem.

Id.; see also Ferrari v. Roberts, 944 F.2d 1235,1243-45 (6th Cir. 1991) (citing and quoting Rolex to support the protection of trademark, in part, based upon exclusive nature of trademarked product in infringement case over defendant’s sale of replicas of plaintiff’s sports cars); Mastercrafters Clock & Radio Co. v. Vacheron & Constantin-Le Coultre Watches, Inc., 221 F.2d 464, 466 (2d Cir. 1955) (determining that parties who sought to purchase prestige from
Cord v. Accessories by Pearl, Inc., the dissent argued against the majority’s approval of copyright protection for the sculptural elements of a designer belt buckle,\(^{199}\) stating that such protection is inconsistent with the language and policies underlying existing copyright law.\(^{200}\) In his dissent, Judge Weinstein recognized the tension between exclusivity and popularization of fashion, stating that

[i]mportant policies are obviously at stake. Should we encourage the artist and increase the compensation to the creative? Or should we allow cheap reproductions which will permit our less affluent to afford beautiful artifacts? Appellant sold the original for $600.00 and up. Defendant’s version went for one-fiftieth of that sum. Thus far Congress and the Supreme Court have answered in favor of commerce and the masses rather than the artists, designers and the well-to-do.\(^{201}\)

In the Wal-Mart Stores, Inc. v. Samara Bros., Inc., a trade dress case,\(^{202}\) William Coston, Wal-Mart’s attorney, tapped into this same concern about protecting higher-status designers and their customers in his opening oral argument to the Supreme Court.\(^{203}\) With respect to the copying and sale of inexpensive knock-offs of pricier children’s clothing designs, he stated that

this case raises the legal question of when a product design is inherently distinctive under the Lanham Act, but it also raises the more practical question of how high will we raise a trademark barrier to competition. The affluent consumer, the middle class consumer, and the low[-]income consumer all want to wear clothes that are popular and stylish. Here, the $25 seersucker dress sold under the Samara label was also sold with a noticeably different quality by Wal-Mart for $3.88 under different labels, Cuties by Judy and Small Steps. The effect of the [lower] court’s injunction here is to deny consumers the opportunity to buy any seersucker dress with appliques which may or may not be found in the collar.\(^{204}\)

Similarly, in a 2008 congressional hearing on the DPPA, Steve Maiman, co-owner of a mid-size fashion manufacturing firm and an opponent of the act, testified that the law would deprive middle- and working-class families of affordable, up-to-date fashions.\(^{205}\) He asserted that the DPPA would create two distinct classes—those well-

displaying defendant’s imitations of luxury design Atmos clock resulted in actual consumer confusion in visitors to homes actionable under trademark).

199. Kieselstein-Cord v. Accessories by Pearl, Inc., 632 F.2d 989, 993-94 (2d Cir. 1980); see also supra notes 182-84 and accompanying text.


201. Id. at 999 (Weinstein, J., dissenting).


204. Id. After the unanimous victory for his client, Mr. Coston stated that the court’s decision “sends a message that the focus of the law should be on the consumer welfare, not the welfare of trademark owners. It ensures that lower- and middle-class shoppers can purchase contemporary fashions at reasonable prices.” David G. Savage, ‘Knock-Offs’ Don’t Violate Trademarks, Justices Rule, L. A. TIMES, Mar. 23, 2000, at A-1.

heeled customers with the financial resources to purchase expensive copyrighted designs, and the rest of the public that cannot hope to afford such protected designs. Maiman, who did not expressly approve or disapprove of knock-offs, noted that luxury designers do not reduce their prices to compete with copyists and that the high-end design industry is not found trawling the aisles of Target or Sears for high fashion inspiration.

Sensitive to this perception of elitism, proponents of the law have made a point of arguing that the DPPA would actually protect many small design firms and relatively new fashion designers, not just established luxury designers. Supporters have pointed out that some well-known fashion designers, such as Isaac Mizrahi (formerly for Target), Mark Eisen (for Wal-Mart), and Nicole Miller (for J.C. Penney), offer lower-priced versions of their designs to mass-market retailers to help bring high-end fashions to the average consumer. However, DPPA proponents testifying before Congress have often fallen into the same trap as the National Design Registration League did in 1914 by championing the protection of exclusive designs for high-end customers as opposed to popularized imitations for the general public.

To make their case, proponents testifying on behalf of the bill have often cited the mass copying of haute couture designs found on the Hollywood red carpet or other high-end fashions created for elite

---

206. Id. at 31-32.
207. Id. It is well-recognized that there is a booming industry in the U.S. in producing knock-offs of high fashion items as well as selling magazines through informing consumers about how to find these cut-rate styles. BOLLIER & RACINE, supra note 16, at 23-25.
208. Maiman Testimony, supra note 16, at 31-32; see also Wolfe Testimony, supra note 16, at 3-4.
209. See Maiman Testimony, supra note 16, at 30-31. Mr. Maiman stated that luxury designers make up less than five percent of the annual American volume spent on clothing. “Everybody else does get—most of the styles do trickle down. They don’t trickle up. The higher-end designers are not going to go to Target stores, Macy’s, Dillard’s, Kohl’s and Sears and Penney’s to get their inspiration. It all works from the top down.” Id. Mr. Maiman also argued that the proposed DPPA was more likely to protect high-end established designers who, unlike relative unknowns or small firms, have the necessary legal and financial resources to register and defend their designs in court. Id. See also Sprigman Testimony, supra note 16, at 3-4; Wolfe Testimony, supra note 16, at 3-4 (both Sprigman and Wolfe warn of expensive litigation delays harming fashion industry).
210. Banks Testimony, supra note 164 (asserting that young designers and thousands of small fashion firms are harmed due to legality of copying); Scafidi Testimony, supra note 135 (recounting home-based handbag designer, Jennifer Baum Lagdameo, who lost major wholesale order due to availability of cheaper knock-offs); see also Day, supra note 13, at 242-43.
211. BOLLIER & RACINE, supra note 16, at 23-24; Rodriguez Testimony, supra note 164, at 23, 26; Scafidi Testimony, supra note 135.
212. See infra notes 213-19 and accompanying text.
clients to make popular and less expensive imitations. In the 2006 debate on the DPPA, the congressional committee heard testimony about copies of a Marc Bouwer coral dress worn by *Desperate Housewives* actress Marcia Cross to the 2007 Golden Globes and a black Zac Posen gown worn by Felicity Huffman at the 2006 Academy Awards, both of which appeared in retail stores nationwide within a few days of the respective awards programs. In 2008, designer Narciso Rodriguez testified about his concerns over knock-offs of signature shoes that he created for Sarah Jessica Parker that were worn on *Sex and the City*. He also recounted the wedding dress he created specifically for his friend, Carolyn Bessette, for her marriage to John F. Kennedy, Jr. Rodriguez claimed that approximately seven to eight million knock-offs flooded the market that year, which he asserted prevented him from recouping his investment by limiting sales to only about forty dresses. Rodriguez said that the low sales of the dress were the result of his discriminating clientele being unwilling to purchase a dress that “was already too widely distributed” to the masses, which invokes Representative Callaway’s 1914 concerns about using the law to protect the “snob appeal” of upper-class fashion designs.

Ultimately, the Act’s proponents have trouble defending against the concerns of protecting luxury designers at the expense of ordinary people since the law would likely provide substantial benefits to luxury designers who could limit access to designs to their high-end customers. This policing of both consumption and assumption echoes the privileged access to fine dress found in earlier sumptuary laws, helping to reinforce social boundaries through a visual hierarchy of dress. Therefore, it is unlikely that legislators will find much constituent support for the protection of fashion designers without an appeal to broader societal concerns.

213. *See infra* notes 213-19 and accompanying text.
214. Banks Testimony, *supra* note 164; *see also* Scruggs, *supra* note 13, at *135.
217. *Id.* at 25.
218. *Id.* Many who purchase knock-offs would probably not be able to afford a Narciso Rodriguez original. *See* Maiman Testimony, *supra* note 16, at 54 (testified that copies of high-end dresses serve “a different market segment than the people who can afford to pay for the original design”). Yet the popularity of knock-offs may actually help to enhance the value and prestige associated with owning an actual original. *See* BOLLIER & RACINE, *supra* note 16, at 25 (arguing that knock-offs actually help to affirm and enhance elite status and superiority of originals).
220. *See supra* note 64 and accompanying text.
221. *See supra* notes 44-46, 72-79, 89-109, 116-120, 128-33 and accompanying text.
C. Addressing Societal Anxieties in Uncertain Economic Times

Professor Hunt has noted that throughout history “[w]hat remains unchanged is the capacity for controversies over the regulation of consumption to be the bearer, often symbolically, of contemporary social anxieties.” Like earlier sumptuary laws, the most recent call for passage of the DPPA has occurred in a period of great political, social, and economic flux, when the United States is under pressure to maintain its perceived global economic and political power and status. Therefore, concerns about the fashion industry are indicative of broader national anxieties about rapid technological developments in a digital age, protection of the U.S. economy from the strain of economic globalization, and national security fears with respect to global terrorism. Proponents of the DPPA have rolled together these uncertainties with the intellectual property desires of fashion designers in an effort to create more broad-based support for the passage of the DPPA.

Currently, rapid technological progress and the global reach of the Internet are causing major changes in social, political, and economic relationships worldwide. Recently, the movie and music industries lobbied Congress for greater legal protections when peer-to-peer file sharing over the Internet endangered their revenues. The fashion industry lagged behind these industries and did not originally seek any copyright protection from piracy. Yet, fast-paced technological advancements in production and distribution, coupled with growing electronic dissemination of fashion information in online news, blogs, and discussion boards, imperils traditional fashion design and production cycles. Such advancements have ultimately led

---

222. HUNT, supra note 1, at 391.
223. See infra notes 227-53 and accompanying text.
224. See infra notes 228-39 and accompanying text.
225. See infra notes 240-49 and accompanying text.
226. See infra notes 250-53 and accompanying text.
227. See infra notes 227-53 and accompanying text.
228. See generally Lucille M. Ponte, The Warez Scene: Digital Piracy in the Online World, in CRIMES OF THE INTERNET, CH. 19, 384-407 (Schmalleger & M. Pittaro eds. 2008) (questioning increasing emphasis on criminal liability for peer-to-peer file sharing of music and movies). However, fashion experts argue that there are significant differences “between the viral diffusion of content and the viral diffusion of fashion. Apparel is a physical product, and requires fabric and manufacturing for production, and still further expense to distribute. Digital content can be distributed for virtually nothing over the Internet.” BOLLIER & RACINE, supra note 16, at 31; see also Sprigman Testimony, supra note 16, at 1-2 (arguing that fashion industry does not need copyright protections of music and movie industries in order to flourish).
230. Banks Testimony, supra note 164; Delahunt Testimony, supra note 169, at 20; Scafidi Testimony, supra note 135.
many in the industry to realize the need for and demand stronger copyright protection.\textsuperscript{231} Technological change has alarmed many members of the fashion industry and their congressional supporters.\textsuperscript{232} Much of the testimony in favor of the DPPA recognizes that copying has always been a substantial component of the fashion industry.\textsuperscript{233} Yet, the way copying occurs has changed substantially. In the past few decades, the copying and distribution phase took three or four months, permitting high-end designers to recoup some of their investments before copyists flooded the market with cheaper knock-offs.\textsuperscript{234} However, technological advancements have rapidly accelerated the copying and distribution phase, shrinking the process to just a few days or weeks.\textsuperscript{235} Digital photography now permits high-quality, 360-degree photographs of creations seen on the catwalk to be sent instantly to copyists over the Internet.\textsuperscript{236} New software programs can quickly develop exact patterns from these photos that allow automated machines to perfectly cut and stitch the copied designs in a few days.\textsuperscript{237} Similarly, the Internet provides easy access to detailed descriptions of innovative designs.\textsuperscript{238} Designers claim that such copying deprives them of the sales they need to support future innovation.\textsuperscript{239} And this technology will only continue to evolve. The DPPA is an effort to stabilize established fashion cycles and stem the tide of copies in an era of rapid technological change.

Interlaced with technological concerns are anxieties about globalization and its negative impact on the U.S. fashion industry, as well as more general concerns about the health of the U.S. economy in a changing global economy. Past sumptuary laws were often aimed at protecting the national economy during times of economic distress,

\textsuperscript{231} Banks Testimony, supra note 164; Delahunt Testimony, supra note 169, at 20; Scafidi Testimony, supra note 135.

\textsuperscript{232} Banks Testimony, supra note 164; Delahunt Testimony, supra note 169, at 20; Scafidi Testimony, supra note 135.

\textsuperscript{233} Banks Testimony, supra note 164; Scafidi Testimony, supra note 135; see also Rauatalia & Sprigman, supra note 15, at 1695-97.

\textsuperscript{234} Banks Testimony, supra note 164; Rodriguez Testimony, supra note 164, at 27; Scafidi Testimony, supra note 135.

\textsuperscript{235} Banks Testimony, supra note 164; Rodriguez Testimony, supra note 164, at 27; Scafidi Testimony, supra note 135; Scruggs, supra note 13, at *135.

\textsuperscript{236} Delahunt Testimony, supra note 169, at 20; Banks Testimony, supra note 164; Scafidi Testimony, supra note 135; Scruggs, supra note 13, at *135.

\textsuperscript{237} Delahunt Testimony, supra note 169, at 20; Banks Testimony, supra note 164; Scafidi Testimony, supra note 135.

\textsuperscript{238} Delahunt Testimony, supra note 169, at 20; Banks Testimony, supra note 164; Rodriguez Testimony, supra note 164, at 26; Scafidi Testimony, supra note 135.

\textsuperscript{239} Delahunt Testimony, supra note 169, at 20; Banks Testimony, supra note 164; Rodriguez Testimony, supra note 164, at 26; Scafidi Testimony, supra note 135.
and the DPPA is no different.\textsuperscript{240} In the past, when U.S. designers copied from their French counterparts, there was little concern about providing copyright protection to American fashion design, since fashion was not yet a major part of the US economy. Now, however, concerns about the loss of hundreds of thousands of U.S. jobs and $12 billion in annual revenues to China, India, and other emerging manufacturing countries appear throughout the legal commentary\textsuperscript{241} and congressional testimony in support of the DPPA.\textsuperscript{242} In particular, China has been harshly criticized in congressional testimony about the DPPA.\textsuperscript{243} Infringement of U.S. copyrights in China has been perceived as a threat to the U.S. economy before, as evidenced by the complaints that the U.S. filed with the World Trade Organization (WTO) for intellectual property violations in the music and movie industries.\textsuperscript{244} In addition, the U.S. deficit and the nation's

\textsuperscript{240} See supra notes 65-69 and accompanying text. In his testimony, Representative Delahunt indicated that the enactment of the 2008 economic stimulus package under President Bush showed that the national economy was “in trouble” and that Congress needed to act to preserve and promote U.S. global competitiveness through the protection of fashion designers. Delahunt Testimony, supra note 169, at 21. Professor Hunt recognized that earlier sumptuary laws on dress had been transformed from a regulation of items to regulatory schemes that promote economic protectionism. He wrote that

\textsuperscript{241} See supra note 1, at 361; see also supra notes 10-11 and accompanying text.

\textsuperscript{242} Delahunt Testimony, supra note 169, at 19-21; Banks Testimony, supra note 164, at 6-11; Rodriguez Testimony, supra note 164, at 27; Scafidi Testimony, supra note 135, at 11-14. One may question whether U.S. jobs or revenues were truly being lost to China since U.S. retailers are some of the biggest importers of Chinese textiles for resale at low price levels to U.S. consumers. Randall Frost, China: Dressed for Success, Jan. 2, 2007, available at http://www.brandchannel.com/features_effect.asp?pf_id=549. It was estimated that more than 50% of apparel not subject to import quotas sold in the U.S. came from China in 2006, with expectations of continued growth into 2008. Id.

\textsuperscript{243} Rep. Delahunt’s testimony criticized China, stating in one portion of his testimony that

FBI, Justice and Commerce Departments report that China is growing an industry based on copying and exporting American fashion designs . . . . I read in the Wall Street Journal that in China, one city is devoted to making socks, another - kids clothes, etc. We need to make sure we don’t wake-up [sic] to find a Garment Knock-Off City! They can create infrastructure in minutes.

Delahunt Testimony, supra note 169, at 20.

\textsuperscript{244} In April 2007, the U.S. filed complaints against China with the World Trade Organization (WTO) for failing to stop widespread piracy of copyrighted goods, including the
indebtedness to China exacerbate concerns about the declining economic power of the United States in the global economy.\textsuperscript{245} Even though the United States often calls for free market competition, passage of the DPPA would signal a clear desire to resort to economic protectionism to shield the U.S. fashion industry and, in turn, the economy in general during a period of intense global competition, particularly from China.

The proposed DPPA is also seen as necessary to help the United States compete economically with other nations that offer copyright protection to their textile and fashion design industries.\textsuperscript{246} Legal experts and congressional witnesses contend that copyright protection of fashion design is needed to keep the United States in step with Europe, India, and Japan, all of whom offer copyright protection for their designers.\textsuperscript{247} In particular, the European Directive dealing with fashion design\textsuperscript{248} is viewed as the model that the United States should emulate because it provides for the registration of fashion designs putting others on notice of the designs protected status.\textsuperscript{249}


\textsuperscript{246} See infra notes 257-58 and accompanying text.

\textsuperscript{247} Delahunt Testimony, supra note 169, at 20; Rodriguez Testimony, supra note 164, at 27; Scafidi Testimony, supra note 135; see also Marshall, supra note 12, at 328-30.


\textsuperscript{249} See infra note 264 and accompanying text. However, critics of the DPPA have often responded that there is an overall lack of use of the European design registration process. Raustalia & Sprigman, supra note 15, at 1737, 1740-42, 1744; Hedrick, supra note 14, at 253-56; Schmitt, supra note 12, at SF1. Of all EU design registrations, fashion design registrations only...
Lastly, proponents of the DPPA have tried to link the sale of fashion knock-offs with support for terrorist groups, tapping into national security fears. Congressman William Delahunt has supported the idea that the sale of counterfeit goods such as handbags—already illegal under trademark law—funds resources to organized crime groups and terrorist organizations, such as Hezbollah, the Revolutionary Armed Forces of Colombia, and paramilitary groups in Ireland. Others have strongly disputed the link between counterfeit goods and organized crime and terrorist groups, and have questioned the use of these claims to justify increased intellectual property protection. Nonetheless, some proponents of the DPPA have used this alleged link to draw upon wide-ranging national fears about global terrorism in attempt to generate broader support for the DPPA.

D. Public Morality and the Language of Theft

Just as early sumptuary laws moralized about excess, idleness, and immodesty, issues of public morality also underlie the efforts to enact the DPPA, emphasizing that buying copied fashions is in addition to being criminal, an immoral act. In his testimony, Representative Delahunt chastised average consumers for thinking that their conduct is a victimless crime when, in fact, there are two victims: the designer and


251. Delahunt Testimony, supra note 169, at 21 (quoting Dana Thomas, Op-Ed, Terror's Purse Strings, N.Y. TIMES, Aug. 30, 2007, available at http://query.nytimes.com/gst/fullpage.html?res=9D04E2DB13CF933A0575B0C0A9619C8B63&sec=&spon=&pagewanted=all). It is important to distinguish between counterfeit goods and fashion knock-offs in this discussion. Counterfeit items violate trademark rights and are often sold on the street by criminal elements, while fashion knock-offs are legally distributed in legitimate retail stores.


253. See supra notes 255-56 and accompanying text.

254. See infra notes 261-62 and accompanying text.
the U.S. economy. He equates their purchases with support for the deadly acts of terrorist groups.

In addition, references to theft appear throughout testimony supporting the passage of the DPPA, a similar tactic to the prevalent use of the shoplifting analogy to discourage movie and music peer-to-peer file sharing. The theft analogy is arguably justified when discussing the illicit copying of music and movies, which violates existing copyright law. On the other hand, most copying of fashion designs is currently legal under copyright statutes. Despite its legality, supporters of the DPPA refer to those individuals or businesses that copy fashion designs as “pirates,” and characterize the pirates’ conduct using words such as, “theft,” “steal,” and “cheat.”

For example, Representative Bob Goodlatte of Virginia, a DPPA supporter, liberally sprinkles theft language into his testimony, stating that

if a thief steals a creator’s design, reproduces and sells that article of clothing, and attaches a fake label to the garment to market it, he would be violating federal law. However under current law it is perfectly legal for that same thief to steal that same design, reproduce and sell the article of clothing if he does not attach a fake label to it. This loophole allows pirates to cash in on others’ efforts and prevents designers in our country from reaping a fair return on their creative investments. Under current law this theft is legal unless the thief also reproduces a label or trademark.

It is important to note that this sort of theft language was not used in the U.S. when U.S. firms were regularly copying the details of

---

256. Id. at 20.
257. See infra notes 261-62 and accompanying text.
260. See Delahunt Testimony, supra note 169, at 20; Banks Testimony, supra note 164, at 7, 9; Rodriguez Testimony, supra note 164, at 26; Scafidi Testimony, supra note 135.
261. See e.g., Delahunt Testimony, supra note 169, at 20; Hearing on Design Law – Are Special Provisions Needed to Protect Unique Industries Before the H. Subcomm. on Courts, the Internet and Intell. Prop. of the H. Comm. on the Judiciary, 110th Cong. 8 (2008) (statement of Professor William T. Fryer III, Univ. of Baltimore School of Law); Hearing on Design Law – Are Special Provisions Needed to Protect Unique Industries Before the H. Subcomm. on Courts, the Internet and Intell. Prop. of the H. Comm. on the Judiciary, 110th Cong. 51-52 (2008) (statement of Rep. Bob Goodlatte, Member, Subcomm. on Courts, the Internet, and Intellectual Property) [hereinafter Goodlatte Testimony]; Banks Testimony, supra note 164, at 8-10; Rodriguez Testimony, supra note 164, at 25-28; Scafidi Testimony, supra note 135.
262. Goodlatte Testimony, supra note 261, at 51-52.
Parisian fashion designs\textsuperscript{263} and the United States was viewed as a pirate nation for all kinds of creative works.\textsuperscript{264} In her congressional testimony, Professor Susan Scafidi, a law professor and supporter of the DPPA, recognized the nation’s pirate past as part of a normal cycle for emerging economies, which start out copying creative works of more developed nations.\textsuperscript{265} This in turn provides the foundation for the accumulation of financial resources and domestic expertise in each specific creative industry.\textsuperscript{266} Once the funding and creative skills have been established, the pirate nation’s own creative sector ultimately demands intellectual property protection for its own domestic creative works.\textsuperscript{267} For example, the United States initially was a major importer of intellectual property and a notorious safe harbor for piracy of a wide range of creative works,\textsuperscript{268} steadfastly rejecting opportunities to participate in international copyright conventions,\textsuperscript{269} such as the Berne Convention.\textsuperscript{270} Over the past hundred years, the United States has developed the capital and expertise needed to maintain its own successful creative industries and has become a primary exporter of intellectual property.\textsuperscript{271} Eventually, in 1988, the United States signed on to the Berne Convention\textsuperscript{272} and became a major player in crafting international conventions safeguarding intellectual property.\textsuperscript{273}

\begin{thebibliography}{1}
\bibitem{263} Raustalia & Sprigman, supra note 15, at 1696-97; see also Scafidi Testimony, supra note 135, at 14.
\bibitem{265} Scafidi Testimony, supra note 135, at 13.
\bibitem{266} Id.
\bibitem{267} Id.; see also RANDALL, supra note 134, at 196.
\bibitem{268} RANDALL, supra note 134, at 196; see also supra note 275 and accompanying text.
\bibitem{271} Antezana, supra note 264, at 426, 434; Sherman, supra note 264, at 398-99.
\bibitem{273} Sherman, supra note 264, at 400-01; Patrick G. Zabatta, \textit{Moral Rights and Musical Works: Are Composers Getting Berned?}, 43 SYRACUSE L. REV. 1095, 1106 (1992). By joining the Berne Convention, the United States garnered substantial legal protection of its intellectual property exports and became “a Berne ‘insider.’ In this new position, the United States would be
\end{thebibliography}
Despite the nation’s nearly one hundred-year cycle from pirate nation to international protector of intellectual property, the United States has shown little patience for replication of this cycle in emerging economies in China, India, and other developing countries. In heavily criticizing other pirate nations for their lack of ethics, the United States’ moralizing fails to recognize its own pirate past and that the claimed “theft” of fashion designs and other creative works may simply be part of a normal cycle of economic and creative development, not a sign of international immorality.

III. KEY LESSONS FROM PAST SUMPTUARY PROJECTS

Issues of social control, economic protectionism, and public morality can be teased out of the stated goals and the congressional testimony in support of the DPPA. After analyzing earlier sumptuary laws, it is not surprising that this sumptuary project has been undertaken during a time of economic, political, and technological flux, as individuals and nations seek to maintain the status quo in the face of a confluence of pressures.274 While it is important to recognize the echoes of earlier sumptuary laws in the proposed DPPA, it may be even more essential to learn the lessons of earlier sumptuary regulation to inform the policies of the DPPA, should it pass. In the past, sumptuary codes were ineffective because of sporadic enforcement,275 the failure of stated governmental objectives,276 and changing societal views of morality.277 Considering the similar assumptions underlying earlier sumptuary laws and the proposed DPPA, these same challenges may also doom the effectiveness of the suggested law.

One of the main problems with sumptuary laws on dress was the lack of consistent enforcement.278 Enforcement tended to occur in occasional bursts arising from the passage of some new law or the enthusiastic enforcement of certain local officials.279 Ineffective enforcement of these laws typically stemmed from the failure of government policy-makers to secure substantial public support for the
sumptuary codes. While, on its face, the DPPA seeks to provide additional legal protection for fashion designs, it could also result in a more subtle legal reinforcement of a visual hierarchy between high-end consumers and everyone else. In the past, sumptuary laws tended to be most effective in societies in which there was an acceptance of the natural social hierarchy. For example, in ancient Roman and Greek societies, there was a shared belief in the prescribed hierarchical social order that enabled sumptuary laws on dress to endure for centuries. However, in the contemporary United States, society is grounded in the notions of individual choice and social fluidity. Thus, it is unlikely that members of the general public, many of whom are avid consumers of fashion copies or imitations, would accept the notion of a natural social order that protects the fashion designs of high-end designers and their upper-class clientele.

Also affecting the United States’ ability to enforce the DPPA is the fact that the United States fashion industry has moved away from the traditional notion of fashion being disseminated in a top-down manner. Today, as in the 1960s and 1970s, many elite designers are influenced by the fashion sense of urban subcultures and they seek to reinterpret that style for their wealthier customers, attempting to reflect the existing fashion tastes of a distinct consumer segment in a bottom-up manner. This market fragmentation no longer assumes that lower-status groups will automatically imitate the dress of higher-status ones. In addition, the emergence of the bottom-up model and other diffusion models makes it more difficult for parties to clearly establish the originality of their registered designs. The numerous sources for new fashion designs would certainly complicate the determination and enforcement of copyright protections under the DPPA.

Furthermore, the “fundamental contradiction” effect of earlier sumptuary codes is likely to persist if the DPPA is enacted. For

280. See supra notes 94-99, 114-17 and accompanying text.
281. HUNT, supra note 1, at 53-54.
282. See discussion supra Part I.A.
283. See discussion supra Part I.D.
284. See discussion supra Part II.D.
285. See discussion supra Part I.D.
286. See discussion supra Part I.D.
287. See discussion supra Part I.D.
288. See discussion supra Part I.D.
289. See discussion supra Part I.D. New York Times fashion reporter, Guy Trebay indicated that even determining originality in an industry that has thrived on copying would boil down “to a single truism: one is as original as the obscurity of one’s source.” BOLLIER & RACINE, supra note 16, at 14.
290. See supra notes 94-99, 114-17 and accompanying text.
example, the ban on silk hoods in colonial Massachusetts only led to a surge in demand for these items of clothing among the public.\(^{291}\) Efforts to ban imported woolen products in England only led to increased efforts to smuggle in wool from other countries.\(^{292}\) Similarly, in seeking to limit the copying and dissemination of certain registered fashion designs, the DPPA is likely to increase the demand for these items. This demand, in turn, would promote more illicit copying of these fashions to satisfy consumer demand for the protected designs. Instead of achieving its stated goals, the DPPA, like the ban on silk hoods or imported wool, is more likely achieve the opposite results.

Finally, while some societies may have been able to sustain sumptuary codes due to shared societal religious beliefs and senses of morality, such reliance on shared morality is unlikely to succeed today. For example, Confucian and early Puritan societies had some success enforcing sumptuary dress codes as an extension of their spiritual duties of economic thrift, social conformity, and modesty in dress.\(^{293}\) In contrast, Representative Delahunt’s efforts to reconnect sumptuary law, represented by the DPPA, with notions of public morality are unlikely to resonate with the American public.\(^{294}\) Surveys have shown that few Americans consider file sharing of movies and music to be theft or stealing.\(^{295}\) Therefore, it is even less likely that the public will be willing to give up their desires for knock-off fashions, even though they still pay for them in the marketplace instead of taking them for free. Furthermore, unlike music and movies, which are arguably affordable for everyone, high-end fashion

\(^{291}\) See supra note 116 and accompanying text.

\(^{292}\) See supra note 96 and accompanying text.

\(^{293}\) See discussion supra Part I.A.

\(^{294}\) See discussion supra Part II.D.

\(^{295}\) Surveys consistently show that most Americans, especially teenagers, think illegal file-sharing is acceptable, and not stealing, so long as there is no profit motive involved John B. Clark, Copyright law and the Digital Millenium Copyright Act: Do the penalties fit the crime? 32 N. E. J. ON CRIM. & CIV. CONFINEMENT 373, 391 (2006). In an October 2003 Harris poll, some 78 percent of people who downloaded music reported that they did not think it was theft, while Internet users in general agreed by a margin of 53 percent. Justin D. Fitzdam, Private Enforcement of the Digital Millennium Copyright Act: Effective without Government Intervention, 90 CORNELL L. REV. 1085, 1115 (2005). In an earlier 2003 Pew Research Project, their survey found that about two-thirds of those who shared files online indicated that “they don’t care whether the files are copyrighted or not.” MARY MADDEN & AMANDA LIENHART, PEW INTERNET & AMERICAN LIFE PROJECT: PEW INTERNET PROJECT DATA MEMO 1 (2003), available at http://www.pewinternet.org/Reports/2003/Music-Downloading-Filesharing-and-Copyright.aspx. This lack of concern about copyright law was particularly strong amongst young Americans, ages 18 to 29, with 72 percent claiming not to care if the files they downloaded were copyrighted. Id. at 5-6. Four out of five full-time students expressed no concern about the copyright status of the files they downloaded. Id. at 6. Furthermore, adults aged 30 to 49 were in general agreement with these two groups, since 61 percent of these adults also had a lack of concern about downloading copyrighted work. Id. at 5-6.
is out of the reach of most consumers’ budgets. As a result, the general public is unlikely to rally around the morality of copyright protection of fashion designs if it means higher prices and decreased choices in fashion. In turn, Congress will be unwilling to limit consumer choice and access to fashionable items, especially in difficult economic times. In addition, few consumers are likely to believe or be swayed by the notion that, if they stop buying knock-offs of clothing and accessories, the funding for terrorism will dry up and the threat of global terrorist attacks will be greatly reduced. Overall, efforts to moralize about the protection of fashion designs will probably be unsuccessful in promoting the passage or the enforcement of the DPPA.

IV. CONCLUSION

Sumptuary laws have lingered in different forms throughout history, and the proposed DPPA echoes the main themes underlying these codes. The challenges of weak enforcement, increased piracy, and differing public notions of morality create formidable obstacles to the successful enactment and implementation of the DPPA. To achieve the stated goals, proponents of the DPPA will first need to reach an agreement within the fashion industry that the law will truly benefit the economic and creative needs of the entire industry, as well as the U.S. economy as a whole, and not just the needs of high-end fashion designers and their elite customers. More importantly, however, the advocates for the DPPA must garner public endorsement of the Act from individuals outside of the fashion industry. This support could be achieved by showing that, if the DPPA is enacted, jobs will be saved or possibly increased in the fashion industry, especially in challenging economic times. Proponents could also attempt to convince the public that clothing prices will not climb higher and fashion options will not be dramatically reduced as a result of the new law. Without clearly defined and measurable objectives that would benefit the public at large, the law will likely suffer the same the fate as earlier sumptuary laws on dress. We should seriously consider whether the claimed benefits of the DPPA are outweighed by a continuation of the more negative aspects of earlier sumptuary codes—privileging social elites, bolstering economic protectionism, and encouraging insular moralizing—that are perhaps best left behind as relics of our sumptuary past.