

A CRIME OF FASHION: POPFLEX, A CASE STUDY OF A BRAND VICTIMIZED BY INTELLECTUAL PROPERTY THEFT

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Abstract

Technological innovations such as artificial intelligence have changed how fashion brands develop and market their products and designs. Cassey Ho (also known as Blogilates), social media star and creator of fashion and activewear brand POPFLEX®, has found success as a designer who primarily advertises her brand through her social media platforms. However, this comes with a significant risk, thanks to fast fashion brands like Shein that systematically utilize artificial intelligence in order to “borrow” designs from smaller brands such as POPFLEX. This Article analyzes the case study of Ho’s ongoing battle to protect her original designs, the cultural and legal framework that form her battleground, and ultimately the interaction of law, economics, and society that intellectual property theft operates within.

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I. INTRODUCTION

The advents of social media and artificial intelligence (AI) have changed the ways that companies engage in marketing, product development, and other similar business practices.¹ This is particularly true for the fashion industry, which has a global audience and has historically reflected our changing culture and society.² Technological tools including artificial intelligence (AI) and social media have contributed to the increased globalization of the fashion industry, in addition to providing a forum for increased competition.³ AI has been a particularly useful tool in market research, consumer behavior predictions, and trend-spotting.⁴ Furthermore, the average consumer's daily engagement with the digital world has shaped how they choose fashion retailers, as targeted ads and personalized content influence their

¹ Yogesh K. Dwivedi et al., *Setting the Future of Digital and Social Media Marketing Research: Perspectives and Research Propositions*, 59 INT'L J. INFO. MGMT. 1, 20, 27 (2021) (discussing how AI and social media enable businesses to predict customer behavior, personalize marketing efforts, and optimize operations, thereby transforming marketing and product development practices).

² See generally Helen Kopnina, *The World According to "Vogue": The Role of Culture(s) in International Fashion Magazines*, 31 DIALECTICAL ANTHROPOLOGY 363, 364 (2007) (describing fashion as "a social system in which the 'gurus' and 'celebrities' of fashion need to be considered together with the production and value systems" and noting how "the research done by anthropologists and consumer behavior or marketing researchers can well compliment each other and add to joint knowledge").

³ Chandadevi Giri et al., *A Detailed Review of Artificial Intelligence Applied in the Fashion and Apparel Industry*, 7 IEEE ACCESS 95376, 95377 (2019); see also Yuli Liang et al., *Implementation of Artificial Intelligence in Fashion: Are Consumers Ready?* 38 CLOTHING & TEXTILES RSCH. J. 3, 4 (2020).

⁴ See Liang et al., *supra* note 3, at 2–3; see also *infra* Section I.C (explaining how Shein uses AI to analyze user data and search history to identify fashion preferences and trends, helping to drive its fast fashion success).

opinions and preferences.⁵

These rapid technological developments have also led to increased concerns regarding the efficacy of laws intended to safeguard intellectual property (IP).⁶ The IP law framework was not developed with the abilities of AI in mind, and in many ways the laws that most significantly impact the fashion industry have failed to keep up with modern era.⁷ This has resulted in immense difficulties for less prominent fashion brands as they struggle to protect their original designs against much larger global players who often have significantly greater resources at their disposal.⁸

This Article first contextualizes IP law by discussing it within the parameters of the global economy.⁹ To that end, this Article explains the business structures utilized by large players in the fast fashion world.¹⁰ Next, this Article delves into the modern consumerist culture that largely propels fast fashion practices.¹¹ Shein, a fast fashion giant, is used as a case study to illustrate the ethical and legal issues that often accompany the staggering volume of unique styles and items that this business model relies on.¹² This Article then investigates the legal landscape of fashion, particularly the different types of IP protections available to designers, including legal standards and the benefits of registering a design with different federal offices.¹³ This discussion also includes explanations of basic IP law principles, such as copyrights, trademarks, and design patents.¹⁴

Finally, this Article shifts from a macro, global level to a micro-

⁵ Dwivedi et al., *supra* note 1, at 2–3 (“Consumer attitudes towards social media can in turn influence attitude towards the brand. . . . [A]ttitudes are influenced by consumer perception of content usefulness, entertainment, credibility, and lack of irritation from the . . . advertisement itself.”).

⁶ *See infra* Part II.

⁷ *See infra* Section II.A.

⁸ *See infra* Section I.

⁹ *See infra* Sections I.A–D.

¹⁰ *See infra* Section I.A (describing the business models of major fast fashion companies like Zara and H&M, which control multiple stages of production and sales to quickly respond to consumer demand).

¹¹ *See infra* Section I.B.

¹² *See infra* Section I.C (explaining Shein’s use of AI to replicate designs, leading to intellectual property lawsuits and raising ethical issues over data collection practices and impacts on independent artists and labor conditions).

¹³ *See infra* Part II (discussing IP protections for fashion, including limited copyrights for designs separable from function, trademarks for source identification under the Lanham Act, and design patents for ornamental features).

¹⁴ *See infra* Part II.

level approach by investigating the impact of these forces on a blogger-turned-YouTuber-turned-activewear designer Cassey Ho, best known by the screen name “Blogilates” (a remnant of her time as a popular blogger/vlogger).¹⁵ As an unfortunate side effect of her brand’s popularity, Ho’s company, POPFLEX®, has been the victim of multiple alleged design infringements by fast fashion companies like Shein.¹⁶ Ho’s efforts to protect her designs are analyzed through a legal lens in an attempt to determine the most effective way for brands to protect their IP when they do not occupy a majority market share.¹⁷

A. *The Fast Fashion Model*

Since the late twentieth century, major fashion suppliers and retailers have followed a specific business model, known as “lean retailing,” in order to minimize capital requirements and maximize consumer demand.¹⁸ The lean retailing business model coincides with increasing globalization, which is “the economic and social process whereby global markets and cultures increasingly dominate local markets and cultures.”¹⁹ Lean retailing involves locating production facilities in areas with the lowest possible cost of labor, often in countries with emerging economies.²⁰ This dramatically decreases the cost of production compared to domestic fabrication, as wages in an established economy tend to be higher.²¹ Moreover, the garment production process is generally

¹⁵ See *infra* Part III (exploring Cassey Ho’s challenges as a relatively small designer facing design theft by fast fashion companies).

¹⁶ See *infra* Section III.A.

¹⁷ See *infra* Part III.

¹⁸ See Ian Malcolm Taplin, *Global Commodity Chains and Fast Fashion: How the Apparel Industry Continues to Re-Invent Itself*, 18 COMPETITION & CHANGE 246, 247–48 (2014) (explaining how lean retailing “enable[s] retailers to respond more accurately to consumer purchasing behavior,” minimizes capital requirements for suppliers through efficient stocking and lower inventory costs, and maximizes consumer demand by producing smaller quantities of varied goods and shipping them more frequently).

¹⁹ Victoria Ledezma, *Globalization and Fashion: Too Fast, Too Furious*, 4 LAURIER UNDERGRADUATE J. ARTS 71, 71 (2017); see also David Held et al., *Globalization*, 5 GLOB. GOVERNANCE 483, 483 (1999) (defining globalization as a process “that embodies a transformation in the spatial organization of social relations and transactions, generating transcontinental or interregional flows and networks of activity, interaction, and power”).

²⁰ See Taplin, *supra* note 18, at 247–49 (explaining the cost challenges of domestic production in high-wage economies and difficulties in meeting lean retailing’s demands, and tracing how those challenges led manufacturers to relocate production to emerging economies with cheaper labor).

²¹ See Ledezma, *supra* note 19, at 76–77; see also David Lagakos et al., *Life*

based on an assembly line model, thereby reducing the necessity for skilled labor and therefore the rate of pay for workers.²²

In addition, retailers using the lean retailing model prioritize product variety and order goods in smaller quantities to reduce “product life cycles.”²³ Products have shorter life cycles when they either wear out quickly or go out of style rapidly, resulting in consumers buying more goods, more often, than they would with long-lasting standardized goods.²⁴ From the consumer standpoint, the retailer’s strategy of purchasing smaller quantities across a wide range of products increases the variety of available options.²⁵

The last major component of lean retailing is the use of sales data in order to coordinate the retailer’s “supply chain to enable a closer matching of supply with uncertain demand.”²⁶ In other words, retailers look at sales data in order to predict the market demand.²⁷ This has the benefit of ensuring that retailers do not over-purchase stock that might then need to be sold at a reduced price, potentially resulting in lost profits.²⁸ Consequently, these retailers are able to minimize risk while maximizing their opportunities to collect valuable sales data.²⁹

Furthermore, the most successful fast fashion companies took

Cycle Wage Growth Across Countries, 126 J. POL. ECON. 797, 798–99 (2018) (explaining the wage disparity between advanced and developing countries).

²² See Ledezma, *supra* note 19, at 74, 76, 78; see also Taplin, *supra* note 18, at 250.

²³ See Taplin, *supra* note 18, at 247. This has the incidental effect that, instead of suppliers driving the market, product retailers control the rate and specifics of what is produced. See Klaus Brockhoff, *A Test for the Product Life Cycle*, 35 ECONOMETRICA 472, 472 (1967) (explaining that the product life cycle “usually gives the functional relationship between the sales of a product, the dependent variable, and time, the independent variable”).

²⁴ See Ledezma, *supra* note 19, at 77–78 (highlighting how clothing made by fast fashion retailers is often poorly made and is designed for short-term use, which leads to consumers buying more clothes more frequently).

²⁵ *Id.* at 73–74; see also Nebahat Tokatli, *Global Sourcing: Insights from the Global Clothing Industry—the Case of Zara, a Fast Fashion Retailer*, 8 J. ECON. GEOGRAPHY 21, 23 (2008) (explaining how the fast fashion model’s success is predicated on producing limited quantities of a variety of short-lived products).

²⁶ See Taplin, *supra* note 18, at 247 (quoting Gérard P. Cachon & Robert Swinney, *The Value of Fast Fashion: Quick Response, Enhanced Design, and Strategic Consumer Behavior*, 57 MGMT. SCI. 778 (2011)).

²⁷ See *id.* at 247.

²⁸ See *id.* at 247–48.

²⁹ See *id.* at 247–48 (explaining that this component of lean retailing helps retailers minimize risks by lowering inventory costs and reducing the need for discounts caused by over-purchasing products, while also enhancing their ability to gather valuable customer sales insights to better align supply with often unpredictable market demands).

early advantage of increased globalization and utilized the concept of vertical integration to further develop their respective companies.³⁰ Zara, which is owned by Inditex, describes itself as “one of the biggest international fashion companies” and asserts that its customer base “is at the heart of [their] unique business model, which includes design, production, distribution, and sales through [their] extensive retail network.”³¹ In other words, Zara uses vertical integration in order to reach the largest customer base possible.³² H&M is another textbook example of vertical integration in the fashion world, enabling the company to “excel[] in good years, and survive[] the bad ones with an agile and vertical supply chain.”³³

B. Culture, Consumer Data, and Fast Fashion

Fast fashion giants, including Zara, H&M, and Forever 21, continue to refine the lean retailing model, pioneering new strategies to increase profits while reducing overhead costs.³⁴ Part of their success in refining the lean retailing model stems from their extreme awareness of market trends and their consumer profiles.³⁵ In order to appeal to their major customer bases, fast fashion retailers heavily saturate their market with a diverse range of products, so that there are always new products and apparel for consumers to peruse, especially online.³⁶ However,

³⁰ See Tokatli, *supra* note 25, at 28; see also Christoph Goebel et al., *Vertical Integration and Information Sharing – An Empirical Investigation in the German Apparel Industry*, 2009 WIRTSCHAFTSINFORMATIK PROS. 399, 400–01 (describing vertical integration as a business strategy in which an organization takes ownership and control over multiple stages of its supply chain, from manufacturing to distribution, and explaining that this control provides an advantage that contributes to fast fashion retailers’ success).

³¹ *Company Information*, ZARA, <https://www.zara.com/us/en/z-company-corp1391.html?v1=11112> (last visited Nov. 6, 2024).

³² See *id.*; see also Goebel et al., *supra* note 30, at 400–01 (identifying Zara’s vertical integration model and distribution process as its key to success); Tokatli *supra* note 25, at 28 (describing how Zara and other Spanish businesses were “forced early on into vertical integration . . . because the existing channels to Spanish consumers were insufficient and a recession had left many wholesalers bankrupt”).

³³ Jasper Zeelenberg, *How Vertical Integration Helps Fashion Leaders Grow*, RETAILISATION: BLOG, <https://www.retailisation.com/insights/how-vertical-integration-helps-fashion-leaders-grow> (last visited Apr. 13, 2025); see also Goebel et al., *supra* note 30, at 400.

³⁴ See Taplin *supra* note 18, at 248.

³⁵ See *id.*; see also Tokatli *supra* note 25, at 29.

³⁶ See Taplin, *supra* note 18, at 248 (describing how retailers’ efforts are focused toward “young consumers in a global marketplace”); Tokatli *supra* note

these are not randomized products chosen merely to increase the retailer's active listings.³⁷ Instead, retailers such as Zara, for example, conduct extensive market research in order to stay abreast of current trends so that they can tailor their inventory to appeal to their specific customer base.³⁸ Similar companies' business models also depend on accumulating a "shocking amount of data from [their] customers."³⁹ That data is then "reverse-engineer[ed] into fashion trends," so that these companies are able to best attract their target consumers.⁴⁰

Particularly in Western cultures, "consumers shop for pleasure, for entertainment, and for their need to consume."⁴¹ By having an ever-changing inventory of trendy pieces, fast fashion retailers encourage their customers to continuously purchase new products.⁴² Zara, for instance, produces "over 450 million items and launches around 12,000 new designs annually,"⁴³ with net sales of €23 million in 2022.⁴⁴ Fast fashion retailers combine their understanding of their customer base with their practically

25, at 29.

³⁷ See Tokatli, *supra* note 25, at 29 ("Styles, colors, fabrics—we don't guess any of these things. We are a business catering to demand, and we've never made any secret of that. But we need to know what the trends are, so we follow them through magazines, fashion shows, movies and city streets. We use trend-trackers and forecasting companies. We keep our eyes open[.]") (citation omitted).

³⁸ See *id.* at 29–30.

³⁹ See Complaint at ¶ 1, *Perry v. Shein Dist. Corp.*, No. 23-cv-05551, 2024 U.S. Dist. LEXIS 204279 (C.D. Cal. Nov. 8, 2024) (contending that companies like TikTok and Shein have business models that depend on collecting and utilizing data from customers).

⁴⁰ See *id.*; see also *Kewanee v. Bicron*, 416 U.S. 470, 476 (1974) (describing reverse engineering as a process that "start[s] with the known product and work[s] backward to divine the process which aided in its development or manufacture").

⁴¹ Ledezma, *supra* note 19, at 74.

⁴² See Taplin, *supra* note 18, at 248; Adam Hayes, *Fast Fashion: How It Impacts Retail Manufacturing*, INVESTOPEDIA (June 29, 2024), <https://www.investopedia.com/terms/f/fast-fashion.asp>; e.g., Elizabeth Paton et al., *What Do Gen Z Shoppers Want? A Cute, Cheap Outfit that Looks Great on Instagram*, N.Y. TIMES (Dec. 26, 2019), <https://www.nytimes.com/2019/12/17/style/fast-fashion-gen-z.html> (indicating that Gen Z consumers are encouraged through both retailers and pressures of social media to continually purchase new outfits for fear of falling behind on trends or being seen publicly in the same outfit twice).

⁴³ Martin Roll, *The Secret of Zara's Success: A Culture of Customer Co-Creation*, MARTINROLL (Nov. 2021), <https://martinroll.com/resources/articles/strategy/the-secret-of-zaras-success-a-culture-of-customer-co-creation/>.

⁴⁴ *Net Sales of the Inditex Group Worldwide from 2013 to 2022*, by Brand, STATISTICA (Sept. 24, 2024), <https://www.statista.com/statistics/456505/sales-inditex-group-worldwide-by-format/>.

negligible cost of product design to satisfy consumers' desire to have access to the latest trends at low costs.⁴⁵ In this way, the lean retail model does not simply reduce retailers' associated costs;⁴⁶ it also increases customer demand and willingness to buy as a result of the vast array of trendy products, each with limited stock.⁴⁷

Significantly, one major reason that these retailers are able to stay on top of current trends and release a large number of distinct items, all while keeping their design and development costs at a minimum, is by appropriating other companies' designs.⁴⁸ One of the main venues for fast fashion design copying is *haute couture* fashion shows, which have historically driven fashion trends.⁴⁹ The modern technological age has made it increasingly easy for anyone around the world to access pictures and videos of the catwalk with near immediacy, thereby enabling fast fashion companies to replicate the designs featured in these shows.⁵⁰ Moreover, with social media marketing becoming an increasingly valuable tool for brands of all sizes,⁵¹ fast fashion retailers now

⁴⁵ See Ledezma, *supra* note 19, at 78 (“[G]lobalization allows fashion retailers to reduce their production costs and be more competitive in a global economy while providing clothes for people of all classes.”).

⁴⁶ See *supra* notes 18–33 and accompanying text.

⁴⁷ See Ledezma, *supra* note 19, at 72–73 (“Globalization has thus opened a new clothing market with a massive demand for fashionable and trendy clothes, a demand that traditional fashion collections and stores were unable to keep up with.”).

⁴⁸ Felipe Caro & Jérémie Gallien, *Inventory Management of a Fast-Fashion Retail Network*, 58 OPERATIONS RSCH. 257, 259 (2010) (“We observe that the operational strategy of fast-fashion retailers consists of offering through the selling season a large number of different articles, each having a relatively short life cycle of only a few weeks.”); Keyon Lo, *Stop Glorifying Fashion Piracy: It Is Time to Enact the Innovative Design Protection Act*, 21 CHI.-KENT J. INTELL. PROP. 159, 164 (2022) (“Fast-fashion products are often more affordable because creating by copying can significantly reduce the costs of design and ultimately costs of production. The fast-fashion business model minimizes the need for creative input, such that companies can reduce the design lead-time and facilitate the process of frequent inventory adjustment to lower the production costs and provide customers with so-called ‘affordable items.’”).

⁴⁹ See Tokatli, *supra* note 25, at 29 n.7 (“The French organization representing *haute couture* and ready to wear designers has for sometime been calling for a crackdown to stop the designers’ fall and spring collections being imitated by fast fashion retailers and presented in shops within days of fashion shows.”) (citation omitted).

⁵⁰ See *id.* at 29 (“Spotting trends and copying ‘the whim of the day’ are now easier thanks to digital photography and websites . . . that post photos of new *couture* minutes after being shown on the catwalk to be downloaded by subscribed members.”) (citation omitted).

⁵¹ See Adam Hayes, *Social Media Marketing (SMM): What It Is, How It Works, Pros and Cons*, INVESTOPEDIA, <https://www.investopedia.com/terms/s/social->

have easier access to independent creators' designs, sometimes leading to the replication of an independent creator's work without proper credit or compensation.⁵² Fast fashion retailers are notorious for copying designs, notably through the use of technology, in order to remain on top of current market trends.⁵³

C. The Shein Case Study

Shein, a Chinese fast fashion company backed by investors like General Atlantic and Sequoia Capital China,⁵⁴ quickly attained behemoth status in the apparel and fashion industry following its 2008 founding.⁵⁵ Shein's founder, Chinese national Chris Xu, seems to have leveraged his understanding of and background in search engine optimization in order to develop Shein's groundbreaking business model, which relies heavily on user data.⁵⁶ The company collects as much information as possible, building on "customer data and search history with the assistance of artificial intelligence (AI) algorithms to discern emerging fashion preferences and patterns."⁵⁷ Once the necessary data has

media-marketing-smm.asp (Apr. 2, 2025) ("Engaging with customers through social media channels can help build stronger relationships and foster customer loyalty. It's often a less expensive option than traditional advertising methods, making it more appealing for smaller or start-up businesses."); *see also* Peter Roesler, *How Social Media Influences Consumer Buying Decisions*, BUS. JS. (May 29, 2015), <https://www.bizjournals.com/bizjournals/how-to/marketing/2015/05/how-social-media-influences-consumer-buying.html>.

⁵² *See* Kristin Sutor, Comment, *In Fast-Fashion, One Day You're In, and the Next Day You're Out: A Solution to the Fashion Industry's Intellectual Property Issues Outside of Intellectual Property Law*, 2020 MICH. ST. L. REV. 853, 873–74 ("Marketplace globalization and technology advances make it easier, quicker, and cheaper to copy designs and get them reproduced.").

⁵³ *See id.* at 859–62 ("Fast-fashion companies will often attempt to further cut their investments by shortening the design phase and recreating garments or looks produced by other designers. . . . Fast-fashion companies are aware of the lack of intellectual property protection for fashion, and they exploit it in their business strategies.").

⁵⁴ *See* Dan Strumpf, *China's Fast-Fashion Giant Shein Faces Dozens of Lawsuits Alleging Design Theft*, WALL ST. J. (Jul. 3, 2022, 5:30 AM), <https://www.wsj.com/articles/chinas-fast-fashion-giant-shein-faces-dozens-of-lawsuits-alleging-design-theft-11656840601>.

⁵⁵ *See* U.S.-CHINA ECON. & SEC. REV. COMM'N, SHEIN, TEMU, AND CHINESE E-COMMERCE: DATA RISKS, SOURCING VIOLATIONS, AND TRADE LOOPHOLES 1 (2023) ("Founded in 2008, Shein has emerged as a leading player for 'fast fashion' consumers. . . . Using data analysis of its users' search history and a consolidated and high-speed supply chain, Shein has outpaced competitors . . . to take a dominant position in the U.S. market. . . .") (footnotes omitted).

⁵⁶ *See id.* at 2.

⁵⁷ *Id.* (footnote omitted).

been collected, Shein is able to manufacture and market products at blazing speed, thanks to its integrated supply chain.⁵⁸ Shein's business model is incredibly effective; the company's market share in the United States' fast fashion industry rose from 18% at the beginning of 2020 to an unbelievable 50% by November 2022.⁵⁹

Valued at a "staggering \$100 billion," critics of the company contend that Shein poses a nearly unstoppable force as it commits "large-scale and systematic intellectual property theft from U.S. designers large and small."⁶⁰ From 2019 to 2022, Shein was involved in a minimum of fifty IP-based lawsuits in the United States.⁶¹ This is nearly ten times as many lawsuits as H&M, Shein's competitor and fellow fast fashion giant, was a party to during the same time period.⁶² Shein often settles with plaintiffs, which is not surprising given the brand's available capital.⁶³

D. Impact on Smaller Brands

Fast fashion companies' design thefts are not victimless crimes. While larger companies like Oakley and Ralph Lauren may have access to greater resources with which to fight IP infringement, smaller brands may find it difficult to expend the necessary capital to bring suits against fast fashion behemoths like Shein.⁶⁴

⁵⁸ *See id.* ("The company's integrated supply chain enables it to bring clothes to market in about five to seven days, when its competitors may take three weeks or longer.")

⁵⁹ *Id.* ("Shein's market share of fast fashion sales in the United States rose from 18 percent in March 2020 to 40 percent in March 2022. By November 2022, Shein accounted for 50 percent of all fast fashion sales in the United States. . . .")

⁶⁰ *See* Complaint at ¶ 1, *Perry v. Shein Dist. Corp.*, No. 23-cv-05551, 2024 U.S. Dist. LEXIS 204279 (C.D. Cal. Nov. 8, 2024); *see, e.g.*, Solcyré Burga, *Shein Faces Lawsuit over Copyright Infringement. Here's What to Know*, TIME (July 16, 2023, 2:59 PM), <https://time.com/6295035/shein-lawsuit-copyright-infringement/>; Sarah Speight, *Shein Used Algorithms in 'Systematic' IP Theft, Artists Claim*, WORLD IP REV. (July 14, 2023), <https://www.worldipreview.com/trademark/shein-used-algorithms-in-systematic-ip-theft-artists-claim-24083>.

⁶¹ Strumpf, *supra* note 54 ("Shein or its Hong Kong-based parent company, Zoetop Business Co., has been named in the past three years as a defendant in at least 50 federal lawsuits in the U.S. alleging trademark or copyright infringement, according to public records.")

⁶² *Id.* ("Since 2019, [Shein] has been named as a defendant in almost 10 times as many copyright or trademark-infringement cases as fast-fashion rival H&M. . . .")

⁶³ *Id.*

⁶⁴ *See id.*; Cassey Ho, *Imitation Is a Form of Robbery*, BLOGILATES (Apr. 27, 2023), <https://www.blogilates.com/blog/imitation-is-a-form-of-robbery>. It should be noted, however, that there is still some degree of economic waste even when large companies with significant financial resources bring IP infringement

Cassey Ho, better known as “Blogilates,” is one such victim of IP theft.⁶⁵ She is the owner and primary designer of a fashion and activewear company called POPFLEX, a viral brand that is often the subject of fast fashion copying.⁶⁶ One prime example is POPFLEX’s Pirouette Skort, a ballerina-esque activewear skirt with attached shorts.⁶⁷ According to Ho, the Pirouette Skort took around ten months to develop prior to its first release, due in part to the difficulty in finding a fabric that would be sufficiently light yet still have the “tutu feel” characteristic of a ballerina’s costume.⁶⁸ This attention to detail and the unique take on activewear is what Ho’s brand is centered around.⁶⁹

In order to market the Pirouette Skort, Ho created a short-form video describing her development process and the skort’s design elements.⁷⁰ Thanks to Ho’s Internet following, the product went viral, with the YouTube video attaining over twenty-six million views.⁷¹ The original Pirouette Skort was released in August 2022, and then was re-released (with minor design tweaks) in January 2023.⁷² Some three weeks later, on January 28th, Shein released a nearly identical copy of the skort.⁷³ Not only were certain design

claims, as the direct expenditure of these plaintiffs does not necessarily translate into increased sales. *See* ORG. FOR ECON. COOP. & DEV., THE ECONOMIC IMPACT OF COUNTERFEITING AND PIRACY: EXECUTIVE SUMMARY 18 (2007) (Holders of IP rights “incur a variety of costs when combating counterfeiting and piracy. It should be noted that, because these costs are remedial in nature, these do not translate into higher quality products, product innovation, or other enhancements and can therefore be considered pure social loss.”).

⁶⁵ *Imitation Is a Form of Robbery*, *supra* note 64 (Ho claiming the following IP thefts on her blog: (1) a design stolen by Shein; (2) other brands stealing her videos to advertise their own products; and (3) fitness brands taking her transformation materials to sell their programs).

⁶⁶ *See id.*

⁶⁷ Cassey Ho, *Shein Stole My Design so I’m Spilling All the Tea and It’s PIPING HOT*, BLOGILATES (Jan. 29, 2023), <https://www.blogilates.com/blog/shein-stole-my-design/> [hereinafter *Shein Stole My Design*] (discussing Ho’s design of POPFLEX’s best-selling Pirouette Skort).

⁶⁸ *Id.*

⁶⁹ *See* Cassey Ho, *About Us*, POPFLEX, <https://www.popflexactive.com/pages/about-us> (last visited Apr. 13, 2025) (“My goal with POPFLEX is to have the highest degree of quality at a price point that will not barricade women from enjoying top notch, high-tech fabrics and artistic design.”).

⁷⁰ *Shein Stole My Design*, *supra* note 67 (discussing the video created to describe Ho’s development process and the design elements of the skort); Blogilates, *I Designed the Most ROMANTIC Workout Skort. What do you Think?*, YOUTUBE (Aug. 15, 2022), <https://www.youtube.com/shorts/tHfy5gGVUg4>.

⁷¹ *Shein Stole My Design*, *supra* note 67.

⁷² *Id.*

⁷³ *Id.*; *see infra* Appendix A (a side-by-side comparison of a marketing image of

elements similar, but Shein's marketing images were also notably similar to the images on POPFLEX's website.⁷⁴

When a fast fashion retailer takes an item that is the end result of significant thought, planning, and product design, they are able to reap enormous benefits while incurring practically none of the costs associated with product development.⁷⁵ For example, in order to create and market her Pirouette Skort, Ho accurately predicted the market trend and funded the item in pre-production, taking on the associated risks.⁷⁶ She created short-form content to market her design, which, as previously discussed, represents valuable social media marketing that companies may pay top dollar for.⁷⁷ Moreover, Ho supplied the capital necessary to employ technical designers, patternmakers, sample-makers, fitting models, and a design development team in order to create the POPFLEX item.⁷⁸

In contrast, Shein could take POPFLEX's finalized design and almost immediately begin production without incurring the same pre-production costs as Ho had.⁷⁹ When fashion titans like Shein produce replicated designs, those replicated designs then compete with the original product in the market and are usually sold at a reduced price thanks to the fast fashion company's lean retailing model.⁸⁰ As a result, designers like Ho "stand to lose substantial

POPFLEX's skort and Shein's nearly identical marketing image).

⁷⁴ See *Shein Stole My Design*, *supra* note 67; see *infra* Appendix A; see also Cassey Ho, *SHEIN Has Fully Gone Shameless Thief Mode. Ugh.*, BLOGILATES (July 15, 2024), <https://www.blogilates.com/blog/shein-stealing-popf-flex-designs/> [hereinafter *SHEIN Has Fully Gone Shameless Thief Mode*] ("[Shein is] not only stealing the designs, but the entire vision for each [product, f]rom how the design is styled to how the model is posed.").

⁷⁵ See *infra* Sections II.B–C.

⁷⁶ See *Shein Stole My Design*, *supra* note 67 ("[Shein] stole my design, so they didn't have to pay me for the trend prediction, the idea, or the viral videos I made. They didn't have to take any risk."). Ho also notes that Shein did not have to incur preproduction costs such as technical designers, patternmakers, a samplemaker, fitting models, and the product development/design team. *Id.*

⁷⁷ See *id.*; see also *Social Media Marketing (SMM)*, *supra* note 51 (explaining the value of social media marketing and how companies seek individuals who can market themselves in this way).

⁷⁸ See *Shein Stole My Design*, *supra* note 67.

⁷⁹ See *id.*; see *infra* Sections II.B–C.

⁸⁰ See Kevin V. Tu, *Counterfeit Fashion: The Interplay Between Copyright and Trademark Law in Original Fashion Designs and Designer Knockoffs*, 18 TEX. INTELL. PROP. L.J. 419, 448–49 (2010) ("In the past, the amount of time required for a competitor to copy and offer a counterfeit or knockoff effectively secured sufficient commercial benefits for the original designer as the sole provider of the garment until competing items could be designed and manufactured. . . . [D]esigns can now be purloined and placed in competition with the original almost instantaneously."); Cassandra Elrod, Note, *The Domino Effect: How*

amounts of revenue after expending capital to create the item.”⁸¹

II. THE LEGAL LANDSCAPE

The United States’ IP laws provide little protection from such blatant theft of intellectual property, creating a bleak backdrop for original creators seeking to bring legal claims in defense of their products.

A. Copyright Law

The first copyright laws in the United States were developed during the advent of the printing press, but have since been modified and extended in order to include more modern methods of reproduction.⁸² However, copyright law has not truly been able to keep up with rapid advancements in technology.⁸³ These advancements have “empower[ed] anyone with a computer and an Internet connection to flawlessly, inexpensively, and instantaneously reproduce and distribute works of authorship.”⁸⁴ As a result, copyright law has struggled to keep pace with new technological advancements ushered in by rapid and unpredictable innovation.⁸⁵

The Copyright Act of 1976 forms the modern framework for

Inadequate Intellectual Property Rights in the Fashion Industry Affect Global Sustainability, 24 *IND. J. GLOB. LEGAL STUD.* 575, 575–76 (2017) (“[D]esigner fashions are repeatedly copied and sold to consumers at discounted prices—a process known as ‘fast fashion.’”) (citation omitted).

⁸¹ Tu, *supra* note 80, at 422.

⁸² See Peter S. Menell, *Envisioning Copyright Law’s Digital Future*, 46 *N.Y.L. SCH. L. REV.* 63, 63 (2003) (“Copyright initially developed in response to the printing press and gradually evolved to encompass other methods of mechanically storing and reproducing works of authorship. . . .”). See generally, *Copyright Timeline: A History of Copyright in the United States*, ASS’N RSCH. LIBRS., <https://www.arl.org/copyright-timeline/> (last visited Apr. 13, 2025).

⁸³ See David Friedman, *Does Technology Require New Law?*, 25 *HARV. J.L. & PUB. POL’Y* 71, 72 (2001) (“In some cases . . . technological advances have made pre-existing law unenforceable. We have moved . . . from technologies that made it possible to protect writings even without copyright law to technologies that make it impractical to protect programs even with copyright law.”); Menell, *supra* note 82, at 199 (“By reducing the costs of reproduction and distribution to levels enabling substantially anyone to reproduce and distribute works of authorship . . . digital technology has eclipsed the effective limits of traditional copyright law. Notwithstanding recent amendments to copyright aimed at keeping pace with the new technological landscape, more recent innovations have quickly outstripped these advanced protections.”).

⁸⁴ Menell, *supra* note 82, at 64.

⁸⁵ Ben Depoorter, *Technology and Uncertainty: The Shaping Effect on Copyright Law*, 157 *U. PA. L. REV.* 1831, 1840 (2009).

federal copyright protection.⁸⁶ Generally, in order for any object to be copyrightable, it must meet two requirements: fixation and originality.⁸⁷ Fixation refers to the idea that, in order for a work to be copyrightable, it must be tangible in some sense, such that it “is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.”⁸⁸ In order to satisfy the requirement of originality, a work need not be particularly groundbreaking or novel—a mere “modicum of creativity” is generally sufficient to satisfy the originality requirement.⁸⁹ As soon as a sufficiently original work is fixed into a satisfactory state of fixation, it automatically becomes protected by federal copyright law; there is no need to register a copyright claim with the US Copyright Office.⁹⁰ There are, however, several advantages to registering such a copyright, so certain creators may choose to do so.⁹¹

The Copyright Act sets categories of intellectual property that are eligible and ineligible for copyright protection.⁹² For example, compare copyright law, where single colors are generally not protected, to trademark law, which allows for the protection of colors in specific circumstances.⁹³ A generic pattern or design is

⁸⁶ See U.S. COPYRIGHT OFF., CIRCULAR 92, COPYRIGHT LAW OF THE UNITED STATES AND RELATED LAWS CONTAINED IN TITLE 17 OF THE UNITED STATES CODE (2024) (“The Copyright Act of 1976, which provides the basic framework for the current copyright law, was enacted on October 19, 1976. . .”).

⁸⁷ See *Copyright Law Explained: Requirements for Copyright Protection*, COPYRIGHT ALL., <https://copyrightalliance.org/education/copyright-law-explained/copyright-basics/requirements-for-copyright-protection/> (last visited Apr. 13, 2025); Copyright Act of 1976, 17 U.S.C. §§ 101–1511.

⁸⁸ 17 U.S.C. § 101.

⁸⁹ *Feist Publ'ns Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 362 (1991) (holding that Rural Telephone Service Company’s compilation of phone number listings could not be protected under copyright law because it “lack[ed] the modicum of creativity necessary” to render it “copyrightable expression”); see 17 U.S.C. § 101.

⁹⁰ 17 U.S.C. § 408(a) (“[T]he owner of copyright . . . may obtain registration of the copyright claim. . . . [But such] registration is not a condition of copyright protection.”); Lawrence H. Meier, *A Reference Guide to Copyright Law for the General Practitioner*, 22 VT. B.J. 35, 35 (1996) (“Even though registration is not required for copyright protection, certain advantages flow from registering a copyright with the Copyright Office.”).

⁹¹ Meier, *supra* note 90, at 35; see *Benefits of Copyright Registration*, COPYRIGHT ALL., <https://copyrightalliance.org/education/copyright-law-explained/copyright-registration/benefits-of-copyright-registration/> (last visited Nov. 9, 2024); see *infra* notes 112–20 and accompanying text.

⁹² See 17 U.S.C. § 102.

⁹³ *Can You Copyright Fashion Designs?*, COPYRIGHT ALL., <https://copyrightalliance.org/faqs/copyright-fashion-designs/> (last visited Apr. 24, 2024); see 37 C.F.R. § 202.1(a) (2024) (exempting “lettering or coloring” from

also not eligible for copyright protection.⁹⁴ Most notably, purely useful items may not be copyrighted.⁹⁵ Nonetheless, the Copyright Act provides for the protection of specific works created by a “designer or other owner of an original design of a useful article which makes the article attractive or distinctive in appearance to the purchasing or using public.”⁹⁶ A design is considered original when “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.”⁹⁷ Consequently, designs copied from another creator’s original source may not be copyrighted.⁹⁸

The Copyright Act provides protection for useful articles “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.”⁹⁹ In other words, a useful article may be protected so long as there is an original design which can be imagined separately from the utilitarian aspect of the item.¹⁰⁰

The fact that the Copyright Act denies protection to “useful articles” absent additional design elements has long posed difficulties in fashion-related IP law, as apparel is inherently useful. The exact distinction between an article of clothing that is

copyright protection); Dayoung Chung, *Law, Brands, and Innovation: How Trademark Law Helps to Create Fashion Innovation*, 17 J. MARSHALL REV. INTEL. PROP. L. 493, 554–55 (2018) (discussing the trademark protection extended to previously unprotected, single-color works in the Second Circuit through the *Christian Louboutin* decision).

⁹⁴ See 27 C.F.R. § 202.1(a) (2024) (listing “familiar symbols or designs” as works not subject to copyright protection).

⁹⁵ 17 U.S.C. § 1302. The Copyright Act defines a “useful article” as “an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information.” 17 U.S.C. § 101; *e.g.*, *Bonazoli v. R.S.V.P Int’l, Inc.*, 353 F. Supp. 2d 218, 225–26 (D. R.I. 2005) (holding that plaintiff’s artistic measuring spoon design could not be copyrighted because its utilitarian aspects could not be separated from its artistic ones).

⁹⁶ 17 U.S.C. § 1301(a)(1).

⁹⁷ 17 U.S.C. § 1301(b)(1).

⁹⁸ See 17 U.S.C. § 1301(b)(1).

⁹⁹ 17 U.S.C. § 101 (further defining “useful article” as “an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information”); *see also* 17 U.S.C. § 102(a)(5). This is sometimes referred to as the “separate identification” and “independent-existence” requirements. *See, e.g.*, *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 580 U.S. 405, 414 (2017) (positing that the “independent-existence requirement is ordinarily more difficult to satisfy” than the separate identification requirement).

¹⁰⁰ *Star Athletica*, 580 U.S. at 409, 417; *see* 17 U.S.C. § 101.

ineligible for copyright protection and one that meets the murky bar for copyright status has been the subject of much dispute.¹⁰¹ The United States Supreme Court granted certiorari in the seminal case *Star Athletica L.L.C. v. Varsity Brands, Inc.* in order “to resolve widespread disagreement over the proper test for implementing [Section] 101’s separate identification and independent-existence requirements.”¹⁰² Varsity Brands, a sports apparel company that primarily sells cheerleading uniforms, brought suit against fellow cheer apparel brand Star Athletica, claiming copyright infringements on five of Varsity Brands’ copyrighted designs.¹⁰³ Varsity Brands’ copyright registrations were for “two-dimensional designs appearing on the surface of their uniforms and other garments.”¹⁰⁴ These two-dimensional designs were comprised primarily of different combinations of chevrons and other stylized shapes and colors.¹⁰⁵

In *Star Athletica*, the Court established the test for determining whether a useful article is eligible for copyright, known as the test for separability.¹⁰⁶ The Supreme Court articulated the two-pronged test in its opinion, stating:

[A] feature incorporated into the design of a useful article is eligible for copyright protection only if the feature (1) can be perceived as a two- or three-dimensional work of art separate from the useful article and (2) would qualify as a protectable pictorial, graphic, or sculptural work—either on its own or fixed in some other tangible medium of expression—if it were imagined separately from the useful

¹⁰¹ See *Varsity Brands, Inc. v. Star Athletica, LLC*, 799 F.3d 468, 496–97 (6th Cir. 2015) (McKeague, J., dissenting) (“It is apparent that either Congress or the Supreme Court (or both) must clarify copyright law with respect to garment design. The law in this area is a mess – and it has been for a long time. . . . [U]ntil we get much-needed clarification, courts will continue to struggle and the business world will continue to be handicapped by the uncertainty of the law.”), *aff’d*, 580 U.S. 405 (2017) (citations omitted); Azita Mirzaian, *The Utility of Prettiness: Copyright Protection for Mardi Gras Indian Suits in the Era of the Useful Article Analysis*, 59 J. COPYRIGHT SOC’Y 747, 756–59 (2012) (outlining the confusing and problematic history of clothing copyright protection before and after the Copyright Act); Jacqueline Lefebvre, Note, *The Need for “Supreme” Clarity: Clothing, Copyright, and Conceptual Separability*, 27 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 143, 146 (2016).

¹⁰² *Star Athletica*, 580 U.S. at 409.

¹⁰³ *Id.* at 409–10.

¹⁰⁴ *Id.* at 409.

¹⁰⁵ *Id.* at 409–10.

¹⁰⁶ *Id.* at 409; Thomas S. Key, *Trudging Through the Thicket: Copyright Protection for Designs of Useful Articles in the Wake of Star Athletica*, 49 AIPLA Q.J. 55, 67 (2021) (discussing the new test in the context of copyright law history).

article into which it is incorporated.¹⁰⁷

Under this test, then, a utilitarian or useful item will only be protected under copyright law if (1) the design element can be imagined separately from the utilitarian article, and (2) if the separated design element would, on its own, qualify for a valid copyright.¹⁰⁸

Even with this test, however, there is still no bright-line rule for whether an item, particularly a fashionable garment, may be eligible for copyright protection.¹⁰⁹ The Court in *Star Athletica* did clearly state, however, that the existence of a valid copyright does not allow the copyright owner to forestall other parties from imitating the shape, cut, or general design of an article, absent the two-dimensional copyrighted portion:

To be clear, the only feature of the cheerleading uniform eligible for a copyright in this case is the two-dimensional work of art fixed in the tangible medium of the uniform fabric. Even if respondents ultimately succeed in establishing a valid copyright in the surface decorations at issue here, respondents have no right to prohibit any person from manufacturing a cheerleading uniform of identical shape, cut, and dimensions to the ones on which the decorations in this case appear. They may prohibit only the reproduction of the surface designs in any tangible medium of expression—a uniform or otherwise.¹¹⁰

In this way, the protection afforded to designs in fashion by copyrights is somewhat limited.

Nonetheless, there are several significant reasons a creator may choose to register their copyright with the US Copyright Office. One of the major advantages is the right to bring a copyright infringement claim in US federal court.¹¹¹ Although foreign plaintiffs may bring a claim without such registration, registration with the US Copyright Office is a prerequisite for a US-based plaintiff.¹¹² Furthermore, a copyright registration with the US

¹⁰⁷ *Star Athletica*, 580 U.S. at 409.

¹⁰⁸ *Id.*

¹⁰⁹ Key, *supra* note 106, at 66 (suggesting that while *Star Athletica* was indeed positively received, it also created more questions).

¹¹⁰ *Id.* at 419.

¹¹¹ See 17 U.S.C. § 411(a); 28 U.S.C. § 1338(a) (“The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to . . . copyrights and trademarks.”).

¹¹² See 17 U.S.C. § 411(a) (“[N]o civil action for infringement of the copyright

Copyright Office constitutes prima facie evidence supporting the validity of a plaintiff's copyright, which would obviously be a significant advantage should the copyright owner want to bring an infringement claim.¹¹³

Similarly, having a valid copyright registration grants a plaintiff access to statutory damages.¹¹⁴ Under the Copyright Act, a plaintiff may choose to recover either (1) actual damages plus the infringer's profits or (2) statutory damages.¹¹⁵ Each infringed work can result in damages between \$750 and \$30,000, as decided by the court.¹¹⁶ In cases where it is found that the "infringement was committed willfully," statutory damages can be increased to a maximum of \$150,000 per work.¹¹⁷ These immense benefits to copyright registration come at a fairly affordable price, with the US Copyright Office only charging between \$35 and \$500, depending on the type of work to be copyrighted.¹¹⁸ Moreover, the statutory remedy includes reasonable attorneys' fees, meaning that a prevailing plaintiff's legal fees could be borne by the opposing party.¹¹⁹ Needless to say, a statutory remedy that includes attorneys' fees may enable more copyright owners to

in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title."); *Fourth Est. Pub. Benefit Corp. v. Wall-Street.com, LLC*, 586 U.S. 296, 306 (2019) (explaining that registration is not a prerequisite for foreign plaintiffs because "[i]n 1988, Congress removed foreign works from [section] 411(a)'s dominion . . . [but] maintained the requirement for domestic works").

¹¹³ See 17 U.S.C. § 410(c) ("In any judicial proceeding[] the certificate of a registration made before or within five years after first publication of the work shall constitute prima facie evidence of the validity of the copyright and of the facts stated in the certificate.")

¹¹⁴ See 17 U.S.C. § 504(c)(1) ("[T]he copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action. . . .").

¹¹⁵ See 17 U.S.C. § 504(a).

¹¹⁶ See 17 U.S.C. § 504(c)(1).

¹¹⁷ 17 U.S.C. § 504(c)(2); *Benefits of Copyright Registration*, *supra* note 91. However, if the court finds that the infringer was unaware that they were violating copyright law, the statutory damages may be reduced to a minimum of \$200 per work, rather than a minimum of \$750. § 504(c)(2). Obviously, in these cases, it may be more beneficial to claim actual damages plus any profits made by the infringer. However, there is often some difficulty in determining the amount of actual damages, which is why statutory damages may be preferable in certain situations.

¹¹⁸ *Fees*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/about/fees.html> [<https://perma.cc/GR76-TL27>] (last visited Nov. 11, 2024). Most registration fees are under \$100; the more expensive fees are attached to updates to registrations or registrations for databases or photographs. *Id.*

¹¹⁹ See 17 U.S.C. § 505.

pursue legal action to defend their copyright, as they would be reimbursed for the costs of retaining their IP attorney(s), if successful.¹²⁰

B. Trademark Law

The Lanham Act is the principal source of trademark law in the United States.¹²¹ Unlike copyrights, which essentially function under the theory that a unique or novel idea should be protected, trademarks primarily communicate the source of the goods in order to “secure to the owner of the mark the goodwill of [their] business and to protect the ability of consumers to distinguish among competing producers.”¹²² In other words, trademark law is designed to protect a product or manufacturer’s reputation for producing reliable, quality goods, and to protect consumers from deceptive advertising of counterfeit products. While there are several types of marks that fall under this broad category, the two most relevant ones to fashion protection are trademarks and trade dress.¹²³ A trademark is “any word, name, symbol, or device” that is used or intended to be used in commerce “to identify and distinguish [one’s] goods . . . from those manufactured or sold by

¹²⁰ See *Why Register When Protection Is Automatic*, COPYRIGHT ALL., <https://copyrightalliance.org/faqs/why-register-copyright/> (last visited Nov. 11, 2024).

¹²¹ Lanham Act, 15 U.S.C. §§ 1051–1141n; see Christopher T. Zirpoli, *An Introduction to Trademark Law in the United States*, CONGRESS.GOV (July 24, 2023), <https://www.congress.gov/crs-product/IF12456>; *Lanham Act*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/Lanham_Act https://www.law.cornell.edu/wex/Lanham_Act (last visited Nov. 11, 2024); Martin Schulz, *Part Two: Marks, Their Protectability and Registrability: Why Different “Marks” in the Lanham Act?*, *Trademarks*, 12 J. CONTEMP. LEGAL ISSUES 39, 39 (2001) (citing 15 U.S.C. § 1127) (“The Lanham Act provides a registration system for ‘marks,’ which the Act defines to include ‘any trademark, service mark, collective mark, or certification mark.’”).

¹²² *Two Pesos v. Taco Cabana, Inc.*, 505 U.S. 763, 774 (1992) (internal quotations omitted) (citing *Park ‘n Fly v. Dollar Park & Fly*, 469 U.S. 189, 198 (1985)); see also *What Is Copyright?*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/what-is-copyright/> (last visited Nov. 11, 2024).

¹²³ See Hala Abdel-Jaber, Note, *The Devil Wears Zara: Why the Lanham Act Must Be Amended in the Era of Fast Fashion*, 15 OHIO ST. BUS. L.J. 234, 242–47 (2021) (discussing the differences between trademark and trade dress and explaining how both may be used by fashion companies); Karina K. Terakura, Comment, *Insufficiency of Trade Dress Protection: Lack of Guidance for Trade Dress Infringement Litigation in the Fashion Design Industry*, 22 HAW. L. REV. 569, 573–81 (2000) (analyzing the development and application of trade dress in fashion litigation).

others and to indicate the source of the goods, even if that source is unknown.”¹²⁴ Trade dress has been defined as the “overall image used to present [a product] to purchasers” and includes, among other features, “the product’s size, shape, color, graphics, packaging, and label.”¹²⁵

In order to establish a valid trademark under the Lanham Act, the mark must either be inherently distinctive or it must have acquired a secondary meaning through use.¹²⁶ A trademark is inherently distinctive when it is arbitrary (such that it bears no relation to the product), fanciful (includes words invented with meaning only in relation to the goods or services), or suggestive (such that it hints at the quality or type of product, but is not merely descriptive).¹²⁷ If a mark is not distinctive but is instead descriptive, meaning the mark describes some aspect of the good, then secondary meaning is required.¹²⁸ Secondary meaning refers to the idea that the trademark, when placed on an item, identifies the item as belonging to a particular brand.¹²⁹ As explained by the Second Circuit in the seminal case *Christian Louboutin S.A. v. Yves Saint Laurent American Holding, Inc.*, “[a] mark has ‘secondary meaning’ when, ‘in the minds of the public, the primary significance of a product feature . . . is to identify the source of the product rather than the product itself.’”¹³⁰

In order for a trademark to be registered with the United States Patent and Trademark Office (USPTO), the registrant must identify the types of goods or services that the trademark will be

¹²⁴ See 15 U.S.C. § 1127.

¹²⁵ *Vaughan Mfg. Co. v. Brikam Int’l, Inc.*, 814 F.2d 346, 348 n.2 (7th Cir. 1987) (first citing *Blau Plumbing, Inc. v. S.O.S. Fix-It, Inc.*, 781 F.2d 604, 608 (7th Cir. 1986), then citing *LeSportsac, Inc. v. K Mart Corp.*, 754 F.2d 71, 75 (2d Cir. 1985)); see Judith Beth Prowda, *The Trouble with Trade Dress Protection of Product Design*, 61 ALB. L. REV. 1309, 1315–18 (1998).

¹²⁶ See, e.g., *Wal-Mart Stores v. Samara Bros.*, 529 U.S. 205, 210–11 (2000) (explaining that, under the Lanham Act, a mark must be either inherently distinctive or have acquired distinctiveness through the development of secondary meaning).

¹²⁷ *Strong Trademarks*, U.S. PAT. & TRADEMARK OFF., <https://www.uspto.gov/trademarks/basics/strong-trademarks> (last visited Apr. 19, 2025).

¹²⁸ See, e.g., *Wal-Mart Stores*, 529 U.S. at 210–12 (citing *Qualitex Co. v. Jacobson Products Co.*, 514 U.S. 159, 162–63 (1995)) (“Because a . . . ‘descriptive’ word mark[] could eventually ‘come to indicate a product’s origin,’ . . . it [can] be protected upon a showing of secondary meaning.”).

¹²⁹ *Christian Louboutin S.A. v. Yves Saint Laurent Am. Holding, Inc.*, 696 F.3d 206, 216 (2d Cir. 2012) (quoting *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 851 n.11 (1982)).

¹³⁰ *Id.* (quoting *Inwood Labs.*, 456 U.S. 851 n.11).

used with.¹³¹ The registered trademark is then reserved for use by the registrant with respect to that specific type of good or service.¹³² Some of the main benefits to registering a trademark include a legal presumption that the trademark belongs to the registrant, the legal right to bring a lawsuit in federal court for infringement of the registered trademark, and the right to use the trademark signal in conjunction with the trademarked phrase or item.¹³³

C. Design Patents

Patents are issued to applicants by the USPTO and provide patent owners with exclusive rights to their inventions for a limited period of time.¹³⁴ There are three different types of patents, the most prominent of which are utility and design patents.¹³⁵ Utility patents are by far the most common type, and, as the name suggests, they cover inventions that are useful in some way.¹³⁶ A design patent covers “new, original and ornamental design[s] for [] article[s] of manufacture.”¹³⁷ An item or invention is ineligible for a design patent if the claimed design is dictated by the function of the item, as opposed to simply being ornamental.¹³⁸ Design patents are generally issued for a period of fifteen years.¹³⁹

While several considerations are relevant in determining whether it is appropriate to issue a design patent, two of the main requirements are that the design is (1) non-obvious and (2) not

¹³¹ *Trademark Scope of Protection*, U.S. PAT. & TRADEMARK OFF., <https://www.uspto.gov/trademarks/basics/scope-protection> (last visited Feb. 11, 2025).

¹³² *See id.*

¹³³ *Why Register Your Trademark?*, U.S. PAT. & TRADEMARK OFF., <https://www.uspto.gov/trademarks/basics/why-register-your-trademark> (last visited Feb. 11, 2025).

¹³⁴ *Patent Essentials*, U.S. PAT. & TRADEMARK OFF., <https://www.uspto.gov/patents/basics/essentials> (last visited Feb. 11, 2025).

¹³⁵ *Id.* (listing three types of patents: utility patents, design patents, and plant patents).

¹³⁶ 35 U.S.C. § 101; *see Patent Process Overview*, U.S. PAT. & TRADEMARK OFF., <https://www.uspto.gov/patents/basics/patent-process-overview#step1> (last visited Feb. 11, 2025) (A utility patent “may be granted to anyone who invents or discovers any new and useful process, machine, article of manufacture, or composition of matter, or a new and useful improvement of any of these.”).

¹³⁷ 35 U.S.C. § 171.

¹³⁸ *Columbia Sportswear N. Am., Inc. v. Seirus Innovative Accessories, Inc.*, 80 F.4th 1363, 1380 (Fed. Cir. 2023) (citing *Ethicon Endo-Surgery, Inc. v. Covidien, Inc.*, 796 F.3d 1312, 1328 (2015)).

¹³⁹ *See Patent Essentials*, *supra* note 134.

anticipated by prior art.¹⁴⁰ For design patents, the “ultimate inquiry for obviousness is whether the claimed design would have been obvious to a designer of ordinary skill who designs articles of the type involved.”¹⁴¹ A design patent is anticipated by prior art when there is a prior design that constitutes a “primary reference,” or a “single reference that creates basically the same visual impression” as the design in question.¹⁴² The “design” in the term “design patent” refers “not to the design of an article, but to the design *for* an article, and is inclusive of ornamental designs of *all* kinds including surface ornamentation as well as configuration of goods.”¹⁴³

III. IP LAW IN MOTION: HO’S BATTLE AGAINST INFRINGEMENT

Likely because of the popularity of her designs,¹⁴⁴ Cassey Ho’s brand, POPFLEX, has been the subject of fast fashion copying on multiple occasions.¹⁴⁵ In a heated blog post, Ho spoke out regarding the amount of time, energy, and money she had expended in her attempts to protect her IP from companies like Shein:

For the record, I have spent countless hours reading fashion law, talking to several lawyers to get different perspectives, while also strategizing with my legal team to see what can be done in my current situation and what can be done to prevent Shein and other shady business from stealing POPFLEX designs in the future. Lawyers aren’t cheap and this situation has set me back tens of thousands of dollars in getting copyrights, cease and desist letters, and just wrapping my head around the whole situation.¹⁴⁶

¹⁴⁰ Spigen Korea Co. v. Ultraproof, Inc. 955 F.3d 1379, 1383 (Fed. Cir. 2020).

¹⁴¹ *Id.* (internal quotations omitted) (quoting Titan Tire Corp. v. Case New Holland, Inc., 566 F.3d 1372, 1380–81 (Fed. Cir. 2009)).

¹⁴² *Id.* (internal quotations omitted) (quoting High Point Design LLC v. Buyers Direct, Inc., 730 F.3d 1301, 1312 (Fed. Cir. 2013)).

¹⁴³ *In re Zahn*, 617 F.2d 261, 268 (C.C.P.A. 1980) (emphasis added).

¹⁴⁴ See *supra* notes 66–74 and accompanying text; *Cassey Ho ‘09 Redefines Entrepreneurship*, WHITTIER COLL. OFF. ADMISSIONS: BLOG (Oct. 14, 2024), <https://www.whittier.edu/admission/blog/cassey-ho-09-redefines-entrepreneurship> (explaining how Ho’s design work and social media influencing have led to her success and the creation of her international brand, POPFLEX).

¹⁴⁵ See *Imitation Is a Form of Robbery*, *supra* note 64; *Shein Stole My Design*, *supra* note 67; Cassey Ho, *Shein Stole My Design AGAIN. And I Have More Tea*, BLOGILATES (Jul. 17, 2023), <https://www.blogilates.com/blog/shein-stole-my-design-again-and-i-have-more-tea/> [hereinafter *Shein Stole My Design AGAIN*]; *SHEIN Has Fully Gone Shameless Thief Mode*, *supra* note 74.

¹⁴⁶ *Shein Stole My Design AGAIN*, *supra* note 145.

While she has enjoyed some level of popularity as an influencer, designer, and brand owner, Ho says that she heads a small team of only about twenty people.¹⁴⁷ Needless to say, money is a finite resource and can be a significant obstacle in obtaining appropriate representation.¹⁴⁸ The expense of counsel as a barrier to litigation is a universal issue in commerce, but the problem is particularly applicable to smaller businesses like POPFLEX who lack the capital held by larger companies like Shein.¹⁴⁹

A. *Shein's Alleged Infringement of the Pirouette Skort*

In January 2023, Shein listed a skort on its website that was essentially identical to Cassey Ho's Pirouette Skort, with Shein's advertisements even featuring models who closely resembled those used by Ho.¹⁵⁰ Shein's skort listing resulted in public uproar, thanks to Ho's social media following.¹⁵¹ The company then reached out to Ho and attempted to set up a meeting between her and Shein's US president, George Chiao.¹⁵² Finally, after some persuasion, Ho agreed to a virtual meeting with Chiao in February 2023.¹⁵³ As reported by Ho, during the call, Chiao repeatedly asked Ho to consider partnering with Shein.¹⁵⁴ Understandably, Ho declined to do so, as she believed Shein was actively stealing her designs.¹⁵⁵

Nonetheless, Chiao was able to come to an amicable resolution with Ho, after he agreed to take the skort down from Shein's website.¹⁵⁶ According to Ho, Chiao asserted that Shein is merely a marketplace for sellers and that he was unaware that the skort

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *See id.*; see generally Gregory J. Meyers, *Legal Costs in Minnesota: When the Small Business Litigant Cannot Afford to Lose (Or Win): Litigation Consequences For Small Businesses, Strategies for Managing Costs, and Recommendations for Courts and Policymakers*, 39 WM. MITCHELL L. REV. 140, 141–42 (2012) (“The hard costs of litigation weigh heavily against limited business revenues. . . . [A]lmost any litigation scenario will put almost every small business in long-term hardship or worse.”).

¹⁵⁰ *Shein Stole My Design AGAIN*, *supra* note 145; *Shein Stole My Design*, *supra* note 67.

¹⁵¹ *Imitation Is a Form of Robbery*, *supra* note 64 (Ho attributing Shein's decision to remove the “POPFLEX copycat Pirouette skort” to her social media post and the many fans who supported her in fighting Shein).

¹⁵² *Shein Stole My Design AGAIN*, *supra* note 145.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

was a stolen design.¹⁵⁷ When Ho inquired as to how Chiao would prevent Shein from selling unauthorized reproductions of her designs again, Chiao made the unbelievable suggestion that she submit her designs to Shein prior to launching them on POPFLEX, so that his buyers would know what *not* to purchase for retail.¹⁵⁸ Needless to say, Ho found the proposed “solution” inadequate, as presenting blueprints of new items to a company that has already proven its willingness to utilize her designs with little or no alterations would pose a significant risk to Ho’s future product launches by enabling Shein to easily produce its own version.¹⁵⁹ This conclusion can hardly be considered mere conjecture, as even now, as of the date of this Article, Shein still has a nearly identical skirt listed on their website.¹⁶⁰

B. POPFLEX’s Trademarks

POPFLEX is owned by Cassey Ho’s incorporated business, oGorgeous.¹⁶¹ To that end, the term POPFLEX itself is actually trademarked by oGorgeous, in addition to multiple other word marks and picture marks.¹⁶² As discussed previously, specifying the types of goods that the trademark will be used in unison with is a requirement of trademark registration.¹⁶³ Accordingly, each trademark correlates to a type of good, such as the logo for POPFLEX, which is described as “stylized wording . . . featuring connecting letters whereby a lightning bolt is superimposed on the

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ See *supra* Section I.C. See generally Emily Palladinetti, Note, *When Imitation Isn’t the Sincerest Form of Flattery: Combating Fast Fashion Design Piracy Through Enhanced Copyright Protection*, 15 DREXEL L. REV. 453, 463–64 (2023) (discussing how Shein replicates designs to cut costs); *From Dr Martens to Ralph Lauren, Lawsuits Are Starting to Build for \$15 Billion Ultra-Fast Fashion Brand Shein*, FASHION L. (June 15, 2021), <https://www.thefashionlaw.com/from-dr-martens-to-ralph-lauren-lawsuits-are-starting-to-build-up-against-15-billion-ultra-fast-fashion-brand-shein/>.

¹⁶⁰ See *Women Solid Color Waist Tie Splicing Mesh Pocket Eveyday Fitness Sports Skorttennis Skirt Athletic Skirt*, SHEIN, https://web.archive.org/web/20250424205220/https://us.shein.com/ark/3715?type=immersive&goods_id=43679481&test= (last visited Apr. 19, 2025); see also *infra* Appendix E.

¹⁶¹ U.S. Trademark Registration Serial No. 5074395 (registered Nov. 01, 2016); see *oGorgeous Inc.*, USPTO.REPORT, <https://uspto.report/company/OGorgeous-Inc> (last visited Feb. 11, 2025) (an independent, third-party compilation of the trademarks registered by oGorgeous).

¹⁶² See U.S. Trademark Application Serial No. 97811712 (filed Feb. 25, 2023); *oGorgeous Inc.*, *supra* note 161.

¹⁶³ See *supra* Section II.B.

letter ‘O’ and the second letter ‘P’ is backwards,” and is registered in the categories of handbags, backpacks, and athletic bags.¹⁶⁴ A visual of this trademark can be found at Appendix C.

However, these trademarks do not necessarily protect Ho’s designs from being copied by others. A trademark, in combination with a product, mainly serves to identify the source of the good.¹⁶⁵ Having the trademark registered prevents others from registering the trademark, in addition to preventing others from using the same or a similar trademark in conjunction with the same type of product listed in the registration.¹⁶⁶ A trademark registration, then, does not necessarily prevent others from copying the same item; rather, it forbids using the same trademark in connection with the listed categories of items.¹⁶⁷ Accordingly, while the existence and registration of multiple trademarks related to POPFLEX may be beneficial to Ho’s brand image, it will not necessarily prevent other companies like Shein from copying her designs generally.

C. POPFLEX’s Copyright

After an attorney informed Ho that her Pirouette Skort may be eligible for IP law protections, the designer successfully registered her design with the US Copyright Office.¹⁶⁸ In a blog post that also addressed other companies’ infringement of her signature product, Ho excitedly announced:

[A lawyer] reached out to me to explain how my skort may actually be copyrightable because of the way I designed it. I honestly didn’t think it was possible. But guess what?

On February 28th, 2023[,] the United States Copyright Office granted me an official copyright registration for the design of my Pirouette Skort!!!¹⁶⁹

¹⁶⁴ U.S. Trademark Application Serial No. 97811712 (filed Feb. 25, 2023).

¹⁶⁵ See *supra* notes 122–25 and accompanying text; *Trademark, Patent, or Copyright*, U.S. PAT. & TRADEMARK OFF., <https://www.uspto.gov/trademarks/basics/trademark-patent-copyright> (last visited Feb. 11, 2025).

¹⁶⁶ *Trademark, Patent, or Copyright*, *supra* note 165.

¹⁶⁷ *Id.*

¹⁶⁸ See *Imitation Is a Form of Robbery*, *supra* note 64; see also *oGorgeous, Inc.*, U.S. COPYRIGHT OFF. <https://cocatalog.loc.gov/cgi-bin/Pwebrecon.cgi?SC=Author&SA=oGorgeous%20Inc%2E&PID=-OxmRzY1x9FfGF5m-OoXEHqhncIb&BROWSE=1&HC=4&SID=11> (last visited Feb. 11, 2025).

¹⁶⁹ *Imitation Is a Form of Robbery*, *supra* note 64.

A copy of the copyrighted design card can be found in Appendix D.

It is unclear from her words whether Ho believes the copyright extends to POPFLEX's tangible clothing items, and thereby prevents any other company from replicating her design.¹⁷⁰ *Star Athletica's* test for separability would seem to suggest otherwise, as it provides that a utilitarian or useful item will only be protected under copyright law if (1) the design element can be imagined separately from the useful article, and (2) if the separated design element would, on its own, qualify for a valid copyright.¹⁷¹ In *Star Athletica*, as discussed previously, the separate design element was a chevron pattern, which could easily be separated from the utility of the cheerleading uniform and imagined independently from the clothing item.¹⁷²

In the case of Cassey Ho's Pirouette Skort, there is not necessarily a single design element that can be separated from the function of the item and imagined independently from the skort as a whole.¹⁷³ This would appear to lead to the conclusion that the copyright does not actually protect any tangible or fabricable portion of the design, but rather the design card only.¹⁷⁴ This inference is supported by the text attached to the copyright registration: "Regarding basis for registration: Registration does not extend to any useful article depicted. Registration extends to deposited artwork, photographs, and text only."¹⁷⁵ Based on the excited tone of her blog post, it is possible that Ho overestimated the level of protection that this copyright registration provides her designs.

¹⁷⁰ See *id.* See generally Cassandra Baloga, *Copyright & Fashion: The Shoe That Does Not Fit*, 64 N.Y.L. SCH. L. REV. 265, 271–73 (2019–20).

¹⁷¹ *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 580 U.S. 405, 409 (2017); see *supra* notes 100–10 and accompanying text.

¹⁷² *Star Athletica*, 580 U.S. at 409–10.

¹⁷³ See *infra* Appendix D (failing to indicate that there is any pattern on the material or other distinctive decorations that can be separated from the item as a whole).

¹⁷⁴ See *Star Athletica*, 580 U.S. at 412–13 ("The United States makes a related but distinct argument against applying separability analysis in this case, which respondents do not and have not advanced.").

¹⁷⁵ PIRQUETTE TIERED SKORT WITH POCKETS, Registration No. VA0002337052 (registered Feb. 24, 2023); see also *infra* Appendix D (showing official sketch and design card for Pirouette Tiered Skort with Pockets).

D. POPFLEX's Design Patent

While the copyright registration was likely not the final solution that she may have hoped for, Cassey Ho also successfully obtained a design patent for the same Pirouette Skort on January 16, 2024.¹⁷⁶ As discussed previously, design patents may be issued for ornamental designs, including the configuration of the goods.¹⁷⁷ Although the patent application is available on the USPTO website, it does not comprehensively detail what specific components of the skort render it worthy of a design patent.¹⁷⁸ Based on the issued patent, it would appear that the patent claim, which states simply that it is for the “ornamental design for a skort, as shown and described,” was granted due to the unique and ornamental features that comprise the overall design.¹⁷⁹ Similarly, Ho successfully obtained a patent on May 14, 2024, for the design of her Pirouette Dress.¹⁸⁰

Of all the legal mechanisms to protect IP, patents arguably provide the most protection.¹⁸¹ While they are sometimes regarded as a more expensive and time-consuming legal avenue, the skort patent obtained by Ho was granted around five months after she applied, and only \$296 in fees were charged by the USPTO.¹⁸² Similarly, the dress patent was granted by the USPTO about six months after the application was filed, and only \$296 in fees were charged.¹⁸³ With that being said, Ho did hire Nixon Peabody, LLP

¹⁷⁶ U.S. Patent No. D1,010,983 S (filed Aug. 8, 2023) (issued Jan. 16, 2024).

¹⁷⁷ See *supra* Section II.C; see also *In re Zahn*, 617 F.2d 261, 268 (C.C.P.A. 1980).

¹⁷⁸ 29/909,634 | 095438-00103USPD: Skort: Documents & Transactions History, USPTO: PAT. CTR., <https://patentcenter.uspto.gov/applications/29909634/ifw/docs?application=> (last visited Apr. 19, 2025) (displaying all document and transaction history with document codes from patent claims to the eGrant).

¹⁷⁹ '983 Patent.

¹⁸⁰ U.S. Patent No. D1,026,410 S (filed Nov. 16, 2023) (issued May 14, 2024); see *infra* Appendix E.

¹⁸¹ See *Why Register Your Trademark?*, *supra* note 133 (emphasizing that a registered trademark brings the legal presumption that you own the trademark and have the right to use it); *Differences Between Copyright, Trademarks, Patents, and Trade Secrets?*, COPYRIGHT ALL., <https://copyrightalliance.org/faqs/difference-copyright-patent-trademark/> (last visited Apr. 19, 2025).

¹⁸² U.S. Patent No. D1,010,983 S (filed Aug. 8, 2023) (issued Jan. 16, 2024); 29/909,634 | 095438-00103USPD: Skort: Documents & Transactions History, at [N417.PYMT, dated Nov. 16, 2023], USPTO: PAT. CTR., <https://patentcenter.uspto.gov/applications/29909634/ifw/docs?application=> (last visited Apr. 19, 2025).

¹⁸³ U.S. Patent No. D1,026,410 S (filed Nov. 16, 2023) (issued May 14, 2024);

as POPFLEX’s attorneys in order to pursue both patents,¹⁸⁴ which likely added some degree of cost to the venture.¹⁸⁵ Regardless, the benefits of obtaining a design patent may be substantial; if a patent-holder can prove infringement, they may choose to recover the infringer’s profits.¹⁸⁶ Needless to say, this may give Ho a significant advantage if she eventually decides to bring suit against Shein or another potential infringer. Additionally, Ho may be entitled to receive equitable relief in the form of an injunction.¹⁸⁷

IV. CONCLUSION

Increased globalization has played a major role in the way that fashion retail companies operate, leading them to adopt a model that relies heavily on volume and variety of products.¹⁸⁸ However, in their efforts to keep up with market demand, fast fashion giants including Shein, Zara, and H&M have crossed ethical and legal lines by blatantly copying designs created by other artists.¹⁸⁹ While there are existing protections for fashion brands’ IP, the legal

29/916,979 | 095438-000107USPD: Dress: Documents & Transactions History, at [N417.PYMT, dated Mar. 27, 2024], USPTO: PAT. CTR., <https://patentcenter.uspto.gov/applications/29916970/ifw/docs?application=> (last visited Apr. 19, 2025).

¹⁸⁴ See *Cassey Ho Protects and Serves Her Pirouette Skort*, NIXON PEABODY (June 10, 2024), <https://www.nixonpeabody.com/insights/articles/2024/06/10/cassey-ho-protects-and-serves-her-pirouette-skort> (“With assistance from Nixon Peabody’s Intellectual Property team, Cassey applied for a patent for the skort design in 2023. . . . Cassey persevered and received the patent on January 16, 2024. . . .”); Cassey Ho, LINKEDIN, https://www.linkedin.com/posts/cassey-ho-23350792_just-received-my-second-patent-time-to-go-activity-7197720336698597376-ITW0/ (last visited Apr. 19, 2025) (identifying Bradley Taub, a Nixon Peabody partner, as her attorney in a post announcing the issuance of her second patent).

¹⁸⁵ See Sam Skolnik, *Nixon Peabody Program Trains, Elevates More Counsel to Partner*, BL (Jan. 12, 2024), <https://news.bloomberglaw.com/business-and-practice/nixon-peabody-program-trains-elevates-more-counsel-to-partner> (“Nixon Peabody ranked 83rd in the most recent U.S. law firm rankings by the American Lawyer. . . .”).

¹⁸⁶ 35 U.S.C. § 289; see *Samsung Elecs. Co. v. Apple Inc.*, 580 U.S. 53, 58 (2016) (“Section 289 [of the Patent Act] allows a patent holder to recover the total profit an infringer makes from the infringement.”); see also *Managing a Patent*, U.S. PAT. & TRADEMARK OFF. <https://www.uspto.gov/patents/basics/manage> (last visited Feb. 11, 2025).

¹⁸⁷ See James M. Fischer, *The Right to Injunctive Relief for Patent Infringement*, 24 SANTA CLARA HIGH TECH. L.J. 1, 8–9 (2007) (discussing the equitable relief of an injunction that patent owners have for patent infringement).

¹⁸⁸ See Taplin, *supra* note 18, at 247–48.

¹⁸⁹ See *supra* Sections II.A–B.

framework in the United States has struggled to keep up with technological innovations such as AI.¹⁹⁰

The field of IP law is legally and economically complex, which can lead to less established fashion brands at a loss for how to best protect their original designs. While legal protections for intellectual property, including trademarks, copyrights, and design patents, are useful tools in defending designers' rights, there are often a variety of obstacles to invoking those protections.¹⁹¹ Predominant among those obstacles is, of course, finding the necessary capital to obtain competent legal assistance in order to utilize IP infringement mechanisms.¹⁹² Despite this, investment into legal protections for IP has the potential to yield great dividends for brands, as Cassey Ho exemplifies.

Ultimately, Ho's greatest chance of success, as far as protecting against infringement of her designs, is likely to stem from the combination of each distinct area of IP law. For example, although the design patent has a limited term of fifteen years, those fifteen years of protection can be leveraged to build brand recognition for POPFLEX and therefore make the acquisition of descriptive trademarks through the existence of secondary meaning more achievable.¹⁹³ Unlike design patents, trademarks do not have a temporal limitation on their protection, assuming they are continuously used and maintained.¹⁹⁴ Using a design patent to build brand recognition, thereby making the acquisition of descriptive trademarks easier, is one of many ways that a combination of multiple types of IP protections can work together in order to make the total protection exponentially stronger.¹⁹⁵ Moreover, while Shein has not exactly shown itself to be risk-

¹⁹⁰ See *supra* notes 1–8 and accompanying text.

¹⁹¹ See *supra* Part III.

¹⁹² See Meyers, *supra* note 149, at 140–42, 144–47; see also *Imitation Is a Form of Robbery*, *supra* note 64.

¹⁹³ See *supra* notes 126–30 and accompanying text (discussing secondary meaning as a basis for acquiring trademark status); see also *supra* Section II.C (explaining the benefits of design patent protection).

¹⁹⁴ See *Keeping Your Registration Alive*, U.S. PAT. & TRADEMARK OFF., <https://www.uspto.gov/trademarks/maintain/keeping-your-registration-alive> (last visited Apr. 19, 2025).

¹⁹⁵ See generally *Building a Robust Intellectual Property Strategy for the Modern Era*, DIPLEX, <https://profwurzer.com/the-power-of-layered-ip> (last visited Apr. 19, 2025); Manon L Burns & Lisa Holubar, *Is It Functional or Is It Functional? Trade Dress vs. Design Patent “Functionality.”* A.B.A. (Feb. 8, 2021), https://www.americanbar.org/groups/intellectual_property_law/resources/landslide/archive/trade-dress-vs-design-patent-functionality/.

averse when it comes to “borrowing” designs,¹⁹⁶ the knowledge that an otherwise desirable design has multiple layers and types of federal IP protections may deter at least some of those who would otherwise infringe.¹⁹⁷ By using trademarks, copyrights, *and* design patents in unison in order to protect a single original item, Ho has gleaned unique benefits from each possible avenue.¹⁹⁸ Although brands like Shein may still attempt to steal her IP, POPFLEX is now armed with an array of weapons to defend against such an attack.

POPFLEX is just one brand among many that have been victimized by fast fashion companies.¹⁹⁹ Cassey Ho’s struggles with this issue can be viewed as a case study, informing the way that these companies operate and demonstrating the available defensive measures brands are able to take to protect their intellectual property. One thing remains clear: IP law has a long way to go before it catches up with the modern age and the unique challenges it brings.²⁰⁰

¹⁹⁶ See *supra* notes 63–67 and accompanying text. See, e.g., Sasha Rogelberg, *Fashion Giant Shein Has Been Slapped with Yet Another Lawsuit Alleging Copyright Infringement, Data Scraping, and AI to Steal Art: It’s Somewhat Shocking That They’ve Been Able to Get Away With It*, FORTUNE (Apr. 16, 2024), <https://fortune.com/2024/04/16/shein-class-action-lawsuit-copyright-infringement-data-scraping-ai-art-alan-giana-china/> (“[Shein] has been hit with dozens of lawsuits alleging theft.”).

¹⁹⁷ See *Intellectual Property: Protection and Enforcement*, WTO, https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm (last visited Apr. 20, 2025) (“[G]overnments have to ensure that intellectual property rights can be enforced to prevent or deter violations.”); *How Intellectual Property Rights Protect and Support Innovators*, U.S. CHAMBER COM. (March 20, 2023), <https://www.uschamber.com/on-demand/intellectual-property/intellectual-property-rights-protecting-ideas-for-innovation-and-economic-growth>.

¹⁹⁸ See *supra* Part III.

¹⁹⁹ See Rogelberg, *supra* note 196.

²⁰⁰ See *supra* note 85 and accompanying text.

APPENDIX



Appendix A: POPFLEX's Pirouette Skort (left) next to Shein's copycat (right).²⁰¹

²⁰¹ *Shein Stole My Design*, supra note 67.



(12) **United States Design Patent** (10) Patent No.: **US D1,010,983 S**
Ho (45) Date of Patent: **** Jan. 16, 2024**

(54) **SKORT**

FOREIGN PATENT DOCUMENTS

(71) Applicant: **oGorgeous Inc.**, Encino, CA (US)
 (72) Inventor: **Cassey Vinh Ho**, Encino, CA (US)
 (73) Assignee: **oGorgeous Inc.**, Encino, CA (US)

CN 302774648 S 4/2014
 CN 303023440 S 12/2014
 (Continued)

OTHER PUBLICATIONS

(*) Notice: Patent file contains an affidavit/declaration under 37 CFR 1.130(b).
 (**) Term: **15 Years**

BMJL Womens Mini Skirt High Waisted Tennis Skirt Golf Athletic Skorts, posted to amazon.com. Available Date: Feb. 24, 2023 [site visited Sep. 18, 2023] Available: <https://www.amazon.com/BMJL-Womens-Waisted-Athletic-Workout/dp/B0BVRJHSTHZ/>(Year: 2023)*
 (Continued)

(21) Appl. No.: **29/909,634**

Primary Examiner — Kevin K Rudzinski
 (74) Attorney, Agent, or Firm — Nixon Peabody LLP

(22) Filed: **Aug. 8, 2023**

(57) **CLAIM**

(51) **LOC (14) CL** **02-02**
 (52) **U.S. CL** **D2/851**
 USPC **D2/851**
 (58) **Field of Classification Search**
 USPC D2/851, 735, 731, 858
 CPC A41D 1/14
 See application file for complete search history.

The ornamental design for a skort, as shown and described.

DESCRIPTION

(56) **References Cited**

U.S. PATENT DOCUMENTS

D174,752 S * 5/1955 Immerman D2/722
 D315,051 S * 3/1991 Schanink D2/811
 5,052,058 A 10/1991 Muehler
 D388,938 S * 1/1998 De Scandiflo A41D 1/14
 D2/731
 D434,545 S * 12/2000 Maastricht D2/851
 D503,513 S * 4/2005 McCarthy D2/735
 D600,889 S * 9/2009 Schlueter Langdon D2/851
 D735,972 S * 8/2015 Webster D2/851
 D743,144 S * 11/2015 Swan D2/851
 D794,914 S 8/2017 Lee D2/851
 D802,888 S * 11/2017 Ardalan D2/851
 D893,833 S * 8/2020 Franklin D2/858
 D894,541 S * 9/2020 Franklin D2/858

FIG. 1 is a front elevation view of the skort, shown in a first position of use;
 FIG. 2 is a rear elevation view thereof;
 FIG. 3 is a right side view thereof;
 FIG. 4 is a left side view thereof;
 FIG. 5 is a top plan view thereof;
 FIG. 6 is a bottom plan view thereof;
 FIG. 7 is a front elevation view of the skort of FIG. 1, shown in a second position of use;
 FIG. 8 is a rear elevation view thereof;
 FIG. 9 is a right side view thereof;
 FIG. 10 is a left side view thereof;
 FIG. 11 is a top plan view thereof; and,
 FIG. 12 is a bottom plan view thereof.
 The evenly broken lines (dash-dash lines) shown in the Figures are only for illustrative purposes to show visible environmental structure and form no part of the claimed invention.

1 Claim, 12 Drawing Sheets



Appendix B: POPFLEX's approved design patent for the Pirouette Skort.²⁰²



Appendix C POPFLEX's trademarked logo for the POPFLEX brand.²⁰³

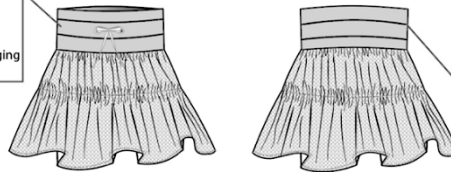
TIERED SKIRT 6064- DESIGN CARD



October 14, 2021

Use approved specs from Cottage Core for Small and 1X Twirl Skort samples

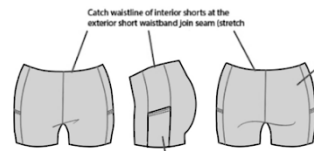
Skirt details:
 1) Use mesh for skirt (2 versions- dotted and regular... both need to have stretch)
 2) Add a gathered style line mid-way down the skirt
 3) Waistband will use the same pattern used for the Cargo legging w/ drawstring detail



Use buttersoft fabric for shorts and waistband



Dotted Mesh Version



Catch waistline of interior shorts at the exterior short waistband join seam (stretch)

Add pocket at both sides of interior short. Finish top edge with a single turn back hem and stitch using DINGS

Appendix D: POPFLEX's copyrighted design card for the Pirouette Skort.²⁰⁴

²⁰³ U.S. Trademark Application Serial No. 97811712 (filed Feb. 25, 2023).

²⁰⁴ *Shein Stole My Design*, supra note 67.



Appendix E: A picture of a listing from Shein, which bears a striking similarity to POPFLEX's Pirouette Skort.²⁰⁵

²⁰⁵ *Id.*



(12) **United States Design Patent** (10) **Patent No.: US D1,026,410 S**
Ho (45) **Date of Patent: ** May 14, 2024**

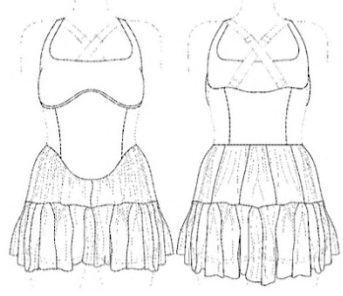
(54) **DRESS**
 (71) Applicant: **oGorgeous Inc.**, Encino, CA (US)
 (72) Inventor: **Cassey Vinh Ho**, Encino, CA (US)
 (73) Assignee: **oGorgeous Inc.**, Encino, CA (US)
 (*) Notice: Patent file contains an affidavit/declaration under 37 CFR 1.130(b).

Primary Examiner — Kevin K Rudzinski
(74) Attorney, Agent, or Firm — Nixon Peabody LLP
 (57) **CLAIM**
 The ornamental design for a dress, as shown and described.

(**) Term: **15 Years**
 (21) Appl. No.: **29/916,970**
 (22) Filed: **Nov. 16, 2023**
 (51) **LOC (14) CL.** **02-02**
 (52) **U.S. CL.**
 USPC **D2/756**
 (58) **Field of Classification Search**
 USPC D2/793, 851, 720, 756, 745
 (Continued)

DESCRIPTION
 FIG. 1 is a front elevation view of a first embodiment of a dress, shown in a first configuration;
 FIG. 2 is a rear elevation view thereof;
 FIG. 3 is a left side view thereof;
 FIG. 4 is a right side view thereof;
 FIG. 5 is a top plan view thereof;
 FIG. 6 is a bottom plan view thereof;
 FIG. 7 is a front elevation view of the dress of FIG. 1, shown in a second configuration;
 FIG. 8 is a rear elevation view thereof;
 FIG. 9 is a left side view thereof;
 FIG. 10 is a right side view thereof;
 FIG. 11 is a front elevation view of a second embodiment of a dress, shown in a first configuration;
 FIG. 12 is a rear elevation view thereof;
 FIG. 13 is a left side view thereof;
 FIG. 14 is a right side view thereof;
 FIG. 15 is a top plan view thereof;
 FIG. 16 is a bottom plan view thereof;
 FIG. 17 is a front elevation view of the dress of FIG. 11, shown in a second configuration;
 FIG. 18 is a rear elevation view;
 FIG. 19 is a left side view thereof; and,
 FIG. 20 is a right side view thereof.
 The evenly broken lines (dash-dash lines) shown in the Figures are only for illustrative purposes to show visible environmental structure and form no part of the claimed invention.
 The boundary lines (as opposed to the evenly broken lines) shown in various ones of the Figures in dash-dot-dash form do not exist in reality in the respective article embodying the design and are only for illustrative purposes to show bounds of the claimed design. It is understood that the claimed (Continued)

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 (Continued)



Appendix F: POPFLEX's approved design patent for the Pirouette Dress.²⁰⁶

²⁰⁶ U.S. Patent No. D1,026,410 S (filed Nov. 16, 2023) (issued May 14, 2024).