

THE POSITIVE IMPACT OF TECHNOLOGY ON COPYRIGHT’S NEGATIVE SPACE IN THE FASHION INDUSTRY

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Copyright’s “negative space” is an area in which creation and innovation can thrive without significant protection from copyright law, and the fashion industry is one such paradigmatic example. The rapid development of technology – especially with the accelerating use of generative artificial intelligence in the creation of artistic works – is resulting in the increasing expansion of this negative space. Copying appears to be *de rigueur* in the fashion industry, and manifests itself on a spectrum that spans permissible referencing to tolerated fast fashion knockoffs to illegal counterfeiting. This article explores how the fashion industry nonetheless will continue to thrive in the next decade, and how designers may harness the myriad technological tools available to them to positively enhance their creations in this negative space.

I. INTRODUCTION

Almost two decades ago, Kal Raustiala and Christopher Sprigman described intellectual property’s “negative space” as areas in which creation and innovation thrive without significant protection from intellectual property (“IP”) law.¹ In a later article, Elizabeth Rosenblatt explains that this taxonomy of negative space comprises three categories:

(1) doctrinal no man’s land, where creations fall through the cracks of IP protection; (2) areas of IP forbearance, in which creators could receive protection, but elect either not to seek protection or not to pursue infringers; and (3) use-based carve-outs, in which lawmakers have exempted certain types of intellectual property use from liability.²

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¹ Kal Raustiala & Christopher Sprigman, “The Piracy Paradox: Innovation and Intellectual Property in Fashion Design” (2006) 92 Va L Rev 1687 [Raustiala and Sprigman, “The Piracy Paradox”] at 1764. See also Kal Raustiala & Christopher Sprigman, *The Knockoff Economy: How Imitation Sparks Innovation* (Oxford: Oxford University Press, 2012).

² Elizabeth L Rosenblatt, “A Theory of IP’s Negative Space” (2011) 34(3) Colum J L & Arts 317 [Rosenblatt, “A Theory of IP’s Negative Space”] at 322.

In IP law's negative space, authors/creators are not exclusively motivated or incentivised by the prospect of IP protection. In the fashion industry today, not only do creators in this negative space operate without the assurance of robust copyright protection, but they also view themselves as benefitting to an extent from the weakness of the legal regime. Rosenblatt notes that IP's negative space in the fashion industry is "a *low*-IP zone rather than a *no*-IP zone".³ Indeed, trademark laws do provide significant legal protection to insignias that designate the source of goods, utility patents offer a valuable monopoly over novel and useful processes, manufacture or fabric, and design patents (also known as registered designs in Commonwealth common law jurisdictions) grant protection for new, non-obvious, ornamental and non-functional designs.

However, copyright law offers the weakest protection of them all, and this article focuses on an evaluation of copyright's negative space in the fashion industry. In particular, the idea-expression dichotomy and useful articles/utilitarian function limitation, in tandem, render many aspects of fashion creations unprotectable.⁴ More recently, even with the surge in the use of generative artificial intelligence ("generative AI") as an assistive tool in the creation of artistic works, these works have been held not to satisfy the requirements of copyrightability especially by the United States Copyright Office (USCO), and also by a number of Chinese courts.⁵ Generative AI can be harnessed to create images that form the foundation of any fashion product including pattern and print generation. For instance, the CycleGAN algorithm is capable of generating infinite designs in the style of different artists and artistic genres. Such administrative and judicial determinations are important signals that the prints and designs created with the aid of generative AI in the fashion industry may not be protected by copyright and are consequently free for others to copy.

Raustiala and Sprigman, with whom I agree, have argued that the fashion industry benefits from copying through the joint operation of "anchoring" and "induced obsolescence". According to them, fashion copying is instrumental in creating trends (anchoring) and saturating a market with similar goods until they become unstylish (induced obsolescence), thereby driving the consumers' desire for new, emerging styles which will, in turn, be copied and become unstylish in a never-ending cycle.⁶ Many luxury fashion brands do compete to set a trend – for instance, to be the first to launch the "It-Bag" of the season or a particular print on a garment (eg, the iconic black and gold Barocco print and the green jungle print by Versace). Dan Burk and Mark Lemley have suggested that first mover advantages and network effects explain how originators continue to thrive in the absence of strong

³ *Ibid* at 324.

⁴ Miranda Nolan, "Prada Bag or Fraud-A Bag: The Impact of Knockoffs and Counterfeits on the Fashion Industry" (2023) 68(1) Saint Louis ULJ 215 [Nolan, "Prada Bag or Fraud-A Bag"] at 219–225. See also Christopher Buccafusco & Jeanne C Fromer, "Fashion's Function in Intellectual Property Law" (2017) 93(1) Notre Dame L Rev 51 at 53–60.

⁵ Eg, US Copyright Office, *Copyright and Artificial Intelligence – Part 2: Copyrightability* (2025) [US Copyright Office, *Copyrightability*]; *Feng v Dongshan Cultural Communication Co Ltd* [2025] Suzhou Intermediate People's Court, Civil Appeal Judgment 4840 (PRC), on appeal from [2024] Zhangjiagang Primary People's Court, Civil Trial Judgment 9015 (PRC).

⁶ Raustiala & Sprigman, "The Piracy Paradox", *supra* note 1 at 1718–1734.

intellectual property rules or effective enforcement mechanisms. A first mover advantage exists when a creator or innovator can create enough revenue from the introduction of its product that it is not effectively harmed by later copyists.⁷ As Rosenblatt contends, “first mover advantages likely come into play for many positional goods, where there is value to being the ‘genuine’ article”.⁸ Indeed, the fashion cycle itself embodies a powerful set of first mover advantages for style originators.

This article critically assesses the level of protection that copyright law offers in the fashion industry, and postulates that the comparatively weak copyright protection, *ie*, the negative space, does not stymie the growth of the industry. The rapid development of technology, especially with the ability of generative AI to produce a staggering panoply of prints and designs, may instead enhance revenue growth and encourage the entry of more players into the fashion industry thereby improving consumer choice. Part II provides an overview of the current state of play in the global fashion industry and the key trends in 2026 and beyond. Part III discusses the nature of copyright's negative space in the fashion industry and how key technological trends are likely to affect the scope of protection. While there are a number of technological developments that will have an impact on copyright's negative space in fashion, Part IV will only focus on an analysis of the potential effects of the proliferation of generative AI applications. Part V concludes that the diminishing influence of copyright in the fashion world is not necessarily a bad thing but may instead serve the public benefit.

II. THE CURRENT STATE OF PLAY IN THE FASHION INDUSTRY

Fashion is a multi-billion-dollar global business. Not all of us need a car but we will always need to wear clothes and shoes. The fashion system thrives on ephemerality, novelty, seduction and hedonism.⁹ In 2019, McKinsey reported that research showed that the average person today buys 60% more items of clothing than they did 15 years ago. In a survey conducted in Britain, one in seven consider it a fashion *faux pas* to be photographed in an outfit twice.¹⁰

Most of fashion borrows from the past. Some would say “copy”. This was aptly captured in the movie *The Devil Wears Prada* where Miranda Priestly, the editor of the fictitious *Runway* fashion magazine (a reference to *Vogue*), lectures her intern on how fashion trends evolve through a process of copying, referencing and reworking:

You go to your closet and you select out, oh I don't know, that lumpy blue sweater, for instance, because you are trying to tell the world that you take yourself too seriously to care about what you put on your back. But what you don't

⁷ Dan L Burk & Mark A Lemley, “Policy Levers in Patent Law” (2003) 89(7) Va L Rev 1575 at 1584–1586.

⁸ Rosenblatt, “A Theory of IP's Negative Space”, *supra* note 2 at 347.

⁹ David Tan, Jeanne C Fromer & Dev S Gangjee, “Editors' Preface” in David Tan, Jeanne C Fromer & Dev S Gangjee, eds. *Fashion and Intellectual Property* (Cambridge: Cambridge University Press, 2025) xxi at xxii.

¹⁰ The Business of Fashion & McKinsey & Company, *The State of Fashion 2019* (2018) at 39.

know is that that sweater is not just blue, it's not turquoise, it's not lapis, it's actually cerulean. You're also blithely unaware of the fact that in 2002, Oscar de la Renta did a collection of cerulean gowns. And then I think it was Yves St Laurent, wasn't it, who showed cerulean military jackets? And then cerulean quickly showed up in the collections of eight different designers. Then it filtered down through the department stores and then trickled on down into some tragic "casual corner" where you, no doubt, fished it out of some clearance bin. However, that blue represents millions of dollars and countless jobs, and so it's sort of comical how you think that you've made a choice that exempts you from the fashion industry when, in fact, you're wearing the sweater that was selected for you by the people in this room.¹¹

More recently, IP scholars have also commented that the "acceptance of some degree of 'copying' among designs is largely normalized as a cultural norm within the fashion industry".¹² Fast fashion – exemplified by online and brick-and-mortar retailers such as Shein, Zara, H&M, Fashion Nova and Boohoo – is defined as cheap, trendy clothing that samples ideas from the fashion runway shows of the top fashion capitals (Paris, Milan, New York and London) or celebrity culture, and turns them into garments sold in everyday stores at breakneck speed to meet consumer demand.¹³ Fast fashion usually offers "knockoffs" as opposed to "counterfeits". A knockoff is an imitation of the original with subtle differences copying the protected aspects of the original; it does not replicate the logo of the original and it usually does not fall afoul of IP laws. A counterfeit is virtually indistinguishable from the original and intentionally passes off as the original; the logo is identical to the original and it would clearly infringe IP laws as well as attract criminal sanctions.¹⁴

For the next few years, it appears that the non-luxury sector will be driving the increase in economic profit. In *The State of Fashion 2025* report, fashion executives shared that they will be shifting their focus to "finding ways to differentiate, whether through new designs, customer experiences or finding new customer niches".¹⁵ It is not just fast fashion that represents the new norm in fashion. In *The State of Fashion 2026* report published by McKinsey and *The Business of Fashion*, fashion leaders seem to have accepted that:

¹¹ Molly Elizabeth Agnew, "The Importance of that Miranda Priestly Monologue", *Eternal Goddess* <<https://www.eternalgoddess.co.uk/posts/the-importance-of-that-miranda-priestly-monologue>> (7 February 2022). Agnew notes that "[t]he cerulean sweater monologue manages to encapsulate several things: how fashion trends are set, whom by and the economic impact that has on millions of individuals".

¹² Mark Jetsaphon Niyompatama & Ioanna Lapatoura, "Generative AI in Fashion Design Creation: A Copyright Analysis of AI-Assisted Designs" (2025) 20(10) *J Intell Prop L & Prac* 654 at 655.

¹³ Nolan, "Prada Bag or Fraud-A Bag", *supra* note 4 at 218.

¹⁴ Jyh-An Lee & Jingwen Liu, "Shanzhai Fashion and Intellectual Property in China" in David Tan, Jeanne C Fromer & Dev S Gangjee, eds. *Fashion and Intellectual Property* (Cambridge: Cambridge University Press, 2025) 252 [Lee & Liu, "Shanzhai Fashion"].

¹⁵ The Business of Fashion & McKinsey & Company, *The State of Fashion 2025* (2024) [BOF & McKinsey, *The State of Fashion 2025*] at 13.

[C]onstant change is simply the new normal. 'Challenging' has overtaken 'uncertainty' as the word executives polled in the annual BoF-McKinsey State of Fashion Executive Survey used most frequently to describe the industry in 2026 ... To retain – and attract – customers, brands will need to give them what they want, and increasingly that means offering value. While luxury players raised prices without corresponding improvements in product quality or creativity, design-led brands in the mid-market elevated their products and store experiences. Now, the mid-market is the fastest-growing segment, replacing luxury as fashion's main value creator.¹⁶

It is precisely this mid-market in which fast fashion thrives that generative AI can contribute significantly to the creation of new lookalike designs that will be sold to the consumers before the authentic collections from the luxury brands reach the store.

Typically, the luxury fashion brands stage their Fall-Winter menswear runway shows in Milan and Paris in January, and the womenswear shows in March. In addition to live streaming, images of these runway looks can be seen on social media and various websites within an hour of the end of each show. However, the clothes, bags and other accessories will only be available in the stores in August at the earliest. For the Spring-Summer collection, the menswear runway shows in Milan and Paris are in June, and the womenswear shows in September, with store deliveries around March. This lag between show presentation and stock delivery allows the fast fashion mid-market to capitalise on the hottest trends from the pinnacle brands and produce the knockoffs within weeks. For instance, the images and critical review of Jonathan Anderson's Fall-Winter 2026 menswear runway show for Dior were uploaded on *Vogue.com* on 21 January 2026 within 24 hours of the event.¹⁷ Celebrities and influencers upload photos and videos of the runway show almost in real-time on social media platforms such as Instagram and X. Even Dior itself streams the show live on its official website. The loosely fitted sequined tanktops and the short-cropped fringe-edged houndstooth jackets were adjudged by fashion critics to be the indisputable hits of the collection. By March, these looks would be copied and can be purchased for a fraction of the prices that Dior would charge at many fast fashion stores. The original runway creations would only be delivered to the Dior boutiques around the world in July 2026 at the earliest. Nonetheless, luxury fashion brands, particularly those that boast of creative directors who are noteworthy influencers themselves – such as Pharrell Williams for Louis Vuitton, Victoria Beckham for her eponymous brand and Donatella Versace – often rely on social media to draw attention to their fashion endeavours, and frequently with the assistance of their celebrity friends like Gigi Hadid, Lady Gaga and Rihanna who are in attendance at the runway shows.

¹⁶ The Business of Fashion & McKinsey & Company, *The State of Fashion 2026* (2025) [BOF & McKinsey, *The State of Fashion 2026*] at 6–7.

¹⁷ Luke Leitch, "Dior Men Fall 2026 Menswear by Jonathan Anderson", *Vogue.com* <<https://www.vogue.com/fashion-shows/fall-2026-menswear/dior-homme>> (21 January 2026).

For 2026 and beyond, fashion companies will increasingly integrate the use of AI into their business.¹⁸ McKinsey has estimated that generative AI could boost profits in the fashion, apparel and luxury sectors by up to US\$275bn by 2028.¹⁹ AI may be deployed in diverse areas that include organisational redesign, image generation, marketing, product design and personalisation.²⁰ It was reported in *The State of Fashion 2026* that at Zalando, a leading European online fashion and lifestyle retail platform, generative AI has reduced image production costs by 90%.²¹ And herein lies the conundrum of the AI double-edged sword.

Traditionally, a fashion brand may be relying on trend reports and market analysis to inform designs for next season's collection. With generative AI, both luxury brands' creative directors and mass-market fast fashion retailers can quickly and effectively analyse in real time various types of unstructured data. For example, generative AI can aggregate and perform sentiment analysis from posts and videos on social media or model trends from multiple sources of consumer data.²² One can use generative AI to analyse commercially successful designs and patterns from previous seasons and create new variations that maintain a similar aesthetic appeal. Creative directors and their design teams could specify parameters and input sketches and desired details – such as fabrics, colour palettes, and patterns – into a platform powered by generative AI that automatically creates a kaleidoscope of designs, thus furnishing designers with an enormous variety of styles and looks. A team might then refine these outputs, adding a fashion house's signature touch on each of the looks to arrive at the final product. If a creative director today wants to deliver a collection that references or pays homage to a renowned deceased designer's distinctive oeuvre such as Paul Poiret, Madame Grès or Claude Montana, generative AI would be able to effortlessly present countless variations, including in three-dimensional renditions, obviating the need to produce expensive physical prototypes or samples and accelerating the design process. With apps such as DALL-E and ComfyUI, one can upload a particular print and generative AI will be able to produce infinite iterations of the same image.

¹⁸ See, eg, Eleanor Rockett, Mark Fenwick & Paulius Jurcys, "Fashion 4.0 and Emerging Designers: Leveraging Data and AI to Drive Creativity, Innovation and Compliance in Global Supply Chain Regulation" (2025) 20(2) J Intell Prop L & Prac 111 [Rockett, Fenwick & Jurcys, "Fashion 4.0 and Emerging Designers"].

¹⁹ Holger Harreis, Theodora Koullias, Roger Roberts & Kimberly Te, "Generative AI: Unlocking the Future of Fashion", *McKinsey & Company* <<https://www.mckinsey.com/industries/retail/our-insights/generative-ai-unlocking-the-future-of-fashion>> (8 March 2023) [Harreis *et al*, "Generative AI"].

²⁰ BOF & McKinsey, *The State of Fashion 2026*, *supra* note 16 at 32. Bain & Company has also observed that agentic AI will become a core feature of e-commerce and significantly reshape US retail businesses by 2030: Aaron Cheris, Mikey Vu, Stephanie Koszyk & Katherine Hall, "2030 Forecast: How Agentic AI Will Reshape US Retail", *Bain & Company* <<https://www.bain.com/insights/2030-forecast-how-agentic-ai-will-reshape-us-retail-snap-chart/>> (17 December 2025). See also Mikey Vu, Maureen Burns & Aaron Cheris, "What Should Retailers Do About AI Shoppers", *Harvard Business Review* <<https://hbr.org/2025/10/what-should-retailers-do-about-ai-shoppers>> (27 October 2025).

²¹ *Ibid* at 32 and 35.

²² Harreis *et al*, "Generative AI", *supra* note 19.

As McKinsey has observed, “AI is shifting from a competitive edge to a business necessity” in the fashion industry.²³ While generative AI has the seductive capabilities of assisting the pinnacle or alpha brands in the creative process and also in reducing the production costs, it can also be harnessed by the fast fashion market to churn out many lookalikes that do not infringe on IP rights. The next section will examine the role that copyright law plays in this new technological landscape that fashion brands are operating in.

III. THE COPYRIGHT NEGATIVE SPACE IN THE FASHION INDUSTRY

Fashion creations do not benefit from strong copyright protection due to a number of doctrinal limitations inherent in copyright law, which include the bar against functionality, the idea-expression dichotomy and fair use. In certain situations involving mundane and common designs, sufficient creativity may be a hurdle, even though courts have indicated that only a modicum of creativity is necessary.²⁴ With the use of generative AI, a further issue of human authorship – the *sine qua non* for copyright subsistence – arises.²⁵

Generally, a utilitarian theory of copyright law – to which the United States and the Commonwealth common law jurisdictions (including Singapore) subscribe – is based on the premise that “the benefit to society of creators crafting valuable works offsets the costs to society of the incentives the law offers to creators”.²⁶ Pamela Samuelson summarises it perfectly when she wrote:

Copyright law promotes the public good by protecting authors and other rights holders from uses of their works that unfairly appropriate the commercial value of their work. But copyright also promotes the public good when subsequent authors are able to draw upon existing works in making and preparing to make new works, when members of the public are able to use copyrighted materials in a way that allows them to make a range of reasonable uses that pose no meaningful likelihood of harm to the markets for protected works, and when developers of new technologies provide new opportunities for the public to make such reasonable uses.²⁷

The US Supreme Court, as well as the Circuit Courts of Appeals, has consistently emphasised that “copyright law is intended to benefit the public, not authors”.²⁸

²³ BOF & McKinsey, *The State of Fashion 2026*, *supra* note 16 at 6. See also Cem Dilmegani, “Generative AI in Fashion”, *AIMultiple* <<https://research.aimultiple.com/generative-ai-fashion/>> (updated 9 March 2026) [Dilmegani, “Generative AI in Fashion”].

²⁴ *Feist Publications Inc v Rural Telephone Services Co*, 499 U.S. 340, 358–359 (1990).

²⁵ *Eg*, US Copyright Office, *Copyrightability*, *supra* note 5.

²⁶ Mala Chatterjee and Jeanne C Fromer, “Minds, Machines, and the Law: The Case of Volition in Copyright Law” (2019) 119 Colum L Rev 1887 at 1894.

²⁷ Pamela Samuelson, “Unbundling Fair Use” (2009) 77 Fordham L Rev 2537 at 2617.

²⁸ *Eg*, *Thaler v Perlmutter*, 130 F.4th 1039, 1049 (DC Cir, 2025) [*Thaler v Perlmutter*]. See also *United States v Loew's Inc*, 371 U.S. 38, 46–47 (1962); *Fox Film Co v Doyal*, 286 U.S. 123, 127 (1932).

Copyright, trademark, and design patent (or registered design) laws each limit protection for functional aspects of fashion designs.²⁹ In the US, the Copyright Act contains a general rule against copyright protection for “useful article[s]”, subject to a narrow exception for expressive features of a useful article that are separable from its functional aspects.³⁰ Specifically, the Copyright Act provides that “[p]ictorial, graphic, and sculptural works” include “works of artistic craftsmanship insofar as their form *but not their mechanical or utilitarian aspects are concerned*” [emphasis added].³¹ In fashion, the design of a work that constitutes a “useful article” is protectable “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”.³² According to Christopher Buccafusco and Jeanne Fromer, “[i]t is clear that fashion designs are both ‘pictorial, graphic, [or] sculptural works’ and ‘useful articles’, so copyright law’s separability criteria apply to them”.³³ Thus copyright protection is limited to only the *expressive* features of any fashion product such as a garment, bag or jewelry. Courts applying the test articulated by the US Supreme Court in *Star Athletica LLC v Varsity Brands Inc*³⁴ have separated utilitarian or functional features from a fashion creation when determining copyrightability. For example, in a case involving a banana costume, the Third Circuit Court of Appeals carved out from copyright protection the dimensions and locations of cutout holes for arms, legs, and hands because the cutouts were “intrinsically useful (perhaps even necessary) to make the costume wearable”.³⁵ As technological developments including the increasing use of AI do not significantly shift the needle on the functionality bar, this article will not discuss this issue any further.

Next, the idea-expression dichotomy imposes a further limitation on the copyright protection for the expressive features in that ideas are not protected but only the expression of the idea attracts copyright protection.³⁶ For instance, Versace’s iconic gold Barocco print has been widely copied (not identically) in fast fashion knockoffs as the common *idea* of a “gold Baroque floral design” is not protected

²⁹ Eg, Christopher Buccafusco & Jeanne C Fromer, “Fashion’s Function in Intellectual Property Law” in David Tan, Jeanne C Fromer & Dev S Gangjee, eds. *Fashion and Intellectual Property* (Cambridge: Cambridge University Press, 2025) 69 [Buccafusco & Fromer, “Fashion’s Function”].

³⁰ Copyright Act 1976, 17 USC (US) § 101.

³¹ *Ibid.*

³² *Ibid.* See also *Star Athletica, LLC v Varsity Brands, Inc*, 580 US 405 (2017) [*Star Athletica v Varsity Brands*]. In Europe, a similar approach is adopted with the German Federal Court of Justice in 2025 declaring that the Birkenstock “Madrid” and “Arizona” designs are not eligible for copyright protection: Spyros Sipetas, “The German Federal Court of Justice’s *Birkenstock* Judgment: Rethinking Copyright Protection of Designs?” (2025) 56 IIC 1392.

³³ Buccafusco & Fromer, “Fashion’s Function”, *supra* note 29 at 84.

³⁴ *Star Athletica v Varsity Brands*, *supra* note 32. According to the Supreme Court, a feature incorporated into the design of a useful article can be copyrightable only if that 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 article into which it is incorporated.”: *Star Athletica v Varsity Brands* at 405.

³⁵ *Silvertop Associates Inc v Kangaroo Manufacturing Inc*, 931 F.3d 215, 221 (3rd Cir, 2019).

³⁶ This is codified in 17 USC (US) § 102(b). It is also a universal doctrine of copyright law in all jurisdictions. See also Mala Chatterjee and Jeanne C Fromer, “Minds, Machines, and the Law: The Case of Volition in Copyright Law” (2019) 119 Colum L Rev 1887 at 1893.

by copyright, but only the *specific expression* by the fashion house of Versace is protected as a pictorial work. Silhouettes and shapes such as an A-line skirt, the hourglass dress, bell bottom pants and a sweetheart neckline also fall within the ambit of the idea-expression dichotomy. This significant negative space in the fashion industry has allowed fast fashion and small businesses to thrive.³⁷ Because of this rapid shortening of fashion cycles, knockoffs can benefit fashion designers by inducing faster turnover, additional sales and a constant demand for new fashion products. A good illustration of the idea-expression dichotomy may be seen in the US Copyright Review Board's decision in respect of the application for copyright registration by Harry Winston for its jewellery designs.³⁸ The Board held that "[s]ome combinations of common or standard design elements may contain sufficient creativity with respect to how they are juxtaposed or arranged to support a copyright claim".³⁹ Generally, a determination of copyrightability in the combination of standard design elements in fashion – which includes jewellery as works of artistic craftsmanship – depends on whether the selection, coordination, or arrangement is done in such a way as to result in copyrightable authorship.⁴⁰ A mere simplistic selection and arrangement of non-protectable elements would not demonstrate the level of creativity necessary to warrant protection. Out of the eight Harry Winston designs, only three were accepted for registration. As stated by the Ninth Circuit Court of Appeals, "a combination of unprotectable elements is eligible for copyright protection only if those elements are numerous enough and their selection and arrangement original enough that their combination constitutes an original work of authorship".⁴¹ For the jewellery designs that were rejected, they were considered to have failed to meet even the very low threshold of exhibiting a modicum of creativity. For those that were accepted, the idea-expression dichotomy applied to exclude the protection of familiar symbols and geometric shapes.⁴²

For fashion garments, accessories and footwear, the USCO has refused to register copyright for a two-dimensional, black-and-white line drawing depicting a front, back, and side view of a pair of cargo pants with pockets ("Stryke Pant"),⁴³

³⁷ Eg, Mitisha Mavani, "Copy, Paste, and Trend: The Cycle of Reinterpretation & Endless Déjà Vu", *Fashion & Law Journal* <<https://fashionlawjournal.com/copy-paste-and-trend-the-cycle-of-reinterpretation-endless-deja-vu/>> (10 April 2025).

³⁸ Letter from US Copyright Office Review Board to Timothy D Pecsénye, Esq entitled "Second Requests for Reconsideration for Refusal to Register Bracelet, Bracelet, Bracelet, Earring, Necklace, EASPFCLGF, NKSPCABFDBU, NKSPCUDRPSRI (SR # 1-7240328586, 1-7240328540, 1-7240328484, 1- 7237998918, 1-7237998891, 1-7483384688, 1-7483426204, 1-7483384661; Correspondence IDs: 1-3VG5TAF, 1-3X4FB11, 1-3X4L57J" (4 August 2023) [US Copyright Office Review Board, "Bracelet, Bracelet, Bracelet, Earring, Necklace"].

³⁹ *Ibid* at 6.

⁴⁰ *Feist Publications Inc v Rural Telephone Services Co*, 499 US 340, 358 (1990); *Yurman Design, Inc v PAJ, Inc*, 262 F.3d 101, 110 (2nd Cir, 2001); *Atari Games Corp v Oman*, 888 F.2d 878, 883 (DC Cir, 1989); *Coach, Inc v Peters*, 386 F. Supp. 2d 495, 498–499 (SDNY, 2005).

⁴¹ *Satava v Lowry*, 323 F.3d 805, 811 (9th Cir, 2003).

⁴² US Copyright Office Review Board, "Bracelet, Bracelet, Bracelet, Earring, Necklace", *supra* note 38 at 7–10. See also *DBC of NY, Inc v Merit Diamond Corp*, 768 F. Supp. 414, 416 (SDNY, 1991); *Cosmos Jewelry Ltd v Po Sun Hon, Co*, 470 F. Supp. 2d 1072, 1082 (CD Cal, 2006).

⁴³ Letter from US Copyright Office Review Board to Sean D Flaherty, Esq entitled "Second Request for Reconsideration for Refusal to Register 74367 Stryke Pant (SR #1-8744120551; Correspondence ID: 1-4P8HSN4)" (18 August 2023) [US Copyright Office Review Board, "Stryke Pant"].

a bird costume made up of semi-circular pieces of red, blue and green fabric (“Bird Costume”),⁴⁴ a shoe sole design by Cole Haan comprising white square blocks with a tooth-like appearance on the outsole (“Cole Haan Outsole”)⁴⁵ and a round black bag by Telfar with irregularly shaped ovals on its surface and three-dimensional embossed letters (“Telfar Bag”).⁴⁶ For the Stryke Pant, the key features were the placement of the pockets, but the USCO Copyright Review Board found that neither the individual elements of the work consisting of standard placements of common shapes and designs albeit with minor angling and curving nor the work as a whole demonstrated sufficient creativity.⁴⁷ For the Bird Costume, the applicant argued that it was a three-dimensional whimsical representation of bird wings, but the Board was of the view that although the costume was both a work of artistic craftsmanship and a sculptural work, and it did not contain sufficient sculptural authorship to sustain a claim to copyright.⁴⁸ Importantly, the threshold for copyright protection is a high one as despite the work containing no fewer than seven colours, “[a]rranging repeating, evenly spaced geometric shapes in semi-circular arcs is a garden-variety arrangement that copyright does not protect”.⁴⁹ For the Cole Haan outsole, the Board focused its analysis on the copyrightability of the separable aspects of the white block-shaped design when imagined separately from the useful article into which it is incorporated, which are square and rectangular shapes, and curved and straight line indentations, and concluded that these constituent elements were not copyrightable.⁵⁰ The Board emphasised that “[m]ere variations on a standard geometric shape or familiar symbol do not possess a sufficient amount of creativity to transform the uncopyrightable shape into a copyrightable work”.⁵¹ Finally, for the Telfar Bag, the Board concluded that the work, though a useful article with separable elements, the features lacked, individually or in combination, the requisite minimum degree of creativity required for copyright protection. Furthermore, copyright law does not protect “typeface or mere variations of typographic ornamentation or lettering”, and even if the design was “viewed as depicting a semi-circle and cross radii, such elements are mere variations of common geometric shapes that are not protectable”.⁵²

In summary, copyright law does not provide significant protection for fashion creations to the extent that fashion brands can rely on it in the way that trademarks

⁴⁴ Letter from US Copyright Office Review Board to James B Haddow, Esq entitled “Second Request for Reconsideration for Refusal to Register Bird Costume (SR #1-11144670851; Correspondence ID: 1-5AIP6PM)” (3 May 2024) [US Copyright Office Review Board, “Bird Costume”].

⁴⁵ Letter from US Copyright Office Review Board to Matthew A Braunel, Esq entitled “Second Request for Reconsideration for Refusal to Register Outsole (SR #1-8409988481; Correspondence ID: 1-47JEY17)” (29 August 2022) [US Copyright Office Review Board, “Outsole”].

⁴⁶ Letter from US Copyright Office Review Board to Janet B Linn, Esq entitled “Second Request for Reconsideration for Refusal to Register Telfar Round Sculpture Bag (SR #1-10111404961; Correspondence ID: 1-4YM52QO)” (7 March 2025) [US Copyright Office Review Board, “Telfar Round Sculpture Bag”].

⁴⁷ US Copyright Office Review Board, “Stryke Pant”, *supra* note 43 at 3 & 5.

⁴⁸ US Copyright Office Review Board, “Bird Costume”, *supra* note 44 at 2.

⁴⁹ *Ibid* at 5.

⁵⁰ US Copyright Office Review Board, “Outsole”, *supra* note 45 at 3.

⁵¹ *Ibid* at 4.

⁵² US Copyright Office Review Board, “Telfar Round Sculpture Bag”, *supra* note 46 at 3–4.

are leveraged to drive businesses. The notion of copyright's negative space in fashion was aptly captured by Rosenblatt:

If I want to buy a novel by Neil Gaiman, a substitute by Neal Stephenson (while also likely to entertain) will not do the trick. In contrast, if I want Manolo Blahnik shoes, I might – in a pinch – be able to make do with a similar style of shoe from Jimmy Choo. Although shoes and novels are both plentiful, the benefit to Manolo Blahnik of being able to sue one of the many makers of pumps is not as great as the benefit to Random House of being able to sue an unlicensed republisher of Neil Gaiman's books, because shoes are more similar to each other, and thus more fungible, than novels. As a result, shoes reside in negative space, and popular fiction does not.⁵³

With the accelerating pace of technological developments, this negative space will only enlarge, but it may just be a win-win situation for both the trendsetters and copycats.

Last but not least, the present luxury slowdown has impelled the alpha brands to reevaluate their brand narratives and product offerings. Well-known brands like Louis Vuitton, Apple and Nike are *alpha brands* that carry significant semiotic freight,⁵⁴ and like the most influential celebrities, they possess particular configurations of meanings and can “offer peculiarly powerful affirmations of belonging, recognition, and meaning in the midst of the lives of their [consumers]”.⁵⁵ A well-known brand can have a significant “power of attraction”⁵⁶ with its “brand image [being] created in a variety of ways: personal experience; word of mouth; how the brand is presented in stories in the media; packaging; point of sale display; retail staff; and, of course, advertising”.⁵⁷ Ultimately, as the court so astutely observed in *O2 Holdings Ltd v Hutchinson 3G Ltd*, “[a] brand is what customers choose to buy. Many decisions about brands are made by customers emotionally or intuitively rather than rationally”.⁵⁸ In fashion, these alpha brands sit atop the pinnacle of the pyramid, with designers or creative directors (eg, Pharrell Williams, Jonathan Anderson, Matthieu Blazy, Donatella Versace) who are often celebrities in their own right, setting the trends for the mass market each season. As McKinsey has intimated, in order to retain their status and to grow revenues, the alpha brands need to keep in step with the younger generation of consumers “who are gravitating towards longer-form content with more narrative depth and shifting their focus to brands that reflect their identities and give them a sense of belonging”.⁵⁹

⁵³ Rosenblatt, “A Theory of IP's Negative Space”, *supra* note 2 at 355–356.

⁵⁴ David Tan, “The Semiotics of Alpha Brands: Encoding/Decoding/Recoding/Transcoding of Louis Vuitton and Implications for Trademark Laws” (2013) 32(1) *Cardozo Arts & Ent LJ* 225 at 228.

⁵⁵ *Ibid* at 228. See also David Tan, “Beyond Trademark Law: What the Right of Publicity Can Learn from Cultural Studies” (2008) 25(3) *Cardozo Arts & Ent LJ* 913 at 946–948.

⁵⁶ *Intel Corporation Inc v CPM United Kingdom Ltd* [2007] EWCA Civ 431 at [18] (quoting *Adidas-Salomon, formerly Adidas AG & Adidas Benelux BV v Fitnessworld Trading Ltd*, Case C-408/01, [2003] ECR I-12537).

⁵⁷ *O2 Holdings Ltd and another v Hutchinson 3G Ltd* [2006] EWHC 534 (Ch) at [5].

⁵⁸ *Ibid* at [4].

⁵⁹ BOF & McKinsey, *The State of Fashion 2026*, *supra* note 16 at 76.

IV. TECHNOLOGICAL DEVELOPMENTS ENLARGE THE NEGATIVE SPACE POSITIVELY

Due to the space constraints of this article, this section will only focus on how the widespread availability of generative artificial intelligence applications (“GAIAs”) impacts copyright’s negative space in the fashion industry. However, it is first worth noting how the proliferation of social media platforms and the ubiquity of the Internet are also contributing to the expansion of the negative space.

Social media platforms can be the boon and bane of luxury fashion brands. Images and videos of new fashion designs unveiled at the seasonal runway shows in Paris and Milan which usually set the trends will be widely circulated on social media minutes (or even streamed simultaneously) after each show, and often by celebrity influencers who have front row seats at these events. In particular, these posts on Instagram and X increase the reach of the brand to consumers and fans, and can significantly boost sales. According to the Social Media Trends Report from consumer research company GWI, 38% of brand discovery today is through social media.⁶⁰ It was also reported that Gen Z shoppers who are “driving this shift to inspiration driven search on social media ... are increasingly using platforms like Pinterest to inform their purchase decisions, with almost two in five (39%) Pinner users using the app for style inspiration”.⁶¹ It is generally assumed that the unauthorised posting of copyright-protected photographs to Pinterest constitutes an infringing activity, but there had been no reported litigation by copyright owners against this platform, presumably because of the perceived benefits to the fashion brands from such increased exposure. However, these posts on social media networks, including posts by luxury fashion brands and influencers invited to the fashion shows, also allows fast fashion copyists to have immediate access to the designs, start production and make them available for purchase within weeks of the fashion shows, while the actual authentic collection will only be launched six to eight months after the runway show. While the social media posts could be infringing copyright in the expressive features of the fashion designs in addition to copyright in the photographs, the reposting on social media is usually tolerated (in many situations, even necessary for the luxury fashion brands). If there is a lawsuit at all, it would be the paparazzi photographers who will sue the celebrities and fashion brands – *eg*, Gigi Hadid, Ariana Grande, Emily Ratajowski and Versace – for reposting their photographs.⁶²

The Internet has also facilitated the rise of the counterfeit market, combining the appeal of cheap imitation luxury goods with the convenience of online shopping, especially with platforms like eBay and Amazon. More than a decade ago, high-profile litigation by luxury brands such as Tiffany & Co, Dior, Hermès and Louis Vuitton in the US and Europe against eBay have already illustrated the potential

⁶⁰ Duncan MacRae, “Brand discovery via social media overtakes search engines and TV ads”, *MarketingTech*. <<https://www.marketingtechnews.net/news/brand-discovery-via-social-media-overtakes-search-engines-and-tv-ads/>> (24 May 2024).

⁶¹ *Ibid*.

⁶² *Eg*, *O’Neil v Ratajowski*, 563 F.Supp.3d 112 (SDNY, 2021); *Robert Barbera v Ariana Grande and Grandari, Inc*, Case 1:19-cv-04349 (SDNY, filed 13 May 2019); *Robert Barbera v Versace USA, Inc*, Case 1:19-cv-03563-LAK (SDNY, filed 22 April 2019); *XClusive-Lee Inc. v Jelena Noura “Gigi” Hadid*, Case No 1:19-cv-00520 (EDNY, filed 28 January 2019).

scope of damage to the brand's goodwill and to the entire fashion industry as a whole.⁶³ More recently, Chanel's victory against What Goes Around Comes Around shows that IP laws – especially trademark and passing off laws – are still sufficiently robust to prevent counterfeiting.⁶⁴ From a positive viewpoint, the Internet enables fashion brands to better promote their goods. The ability to purchase keywords on Google Search can direct the consumer first to Sponsored Ads that allow the consumer to click through to the relevant website. For instance, when I typed in “gold baroque floral dress” on Google Search on 1 March 2026, the first three sponsored listings were: (1) an authentic Versace dress that is available for purchase on farfetch.com; (2) an authentic Versace dress on ssense.com; and (3) a Versace knockoff on shein.com. Copyright law may have a more limited role to play here compared to trademark and unfair competition laws, although luxury brands like Versace would not hesitate to sue fast fashion retailers for copyright infringement if the copying was highly substantially similar to the original creations.⁶⁵

The rest of this section will focus on an analysis of GAIAs. The central thesis is this. More works mean more options for consumers of fashion. The decrease in copyright protection as a result of using GAIAs does not equate to a net loss as significant gains can be made with the deployment of AI by fashion companies, which can result in an improvement in operational efficiency, an increase in innovative design options, an enhancement of digital interactions with customers and a proliferation of brand building and e-commerce opportunities.⁶⁶ The use of agentic AI will also be a competitive advantage for fashion brands in the years ahead.⁶⁷

The rapid adoption of generative AI has introduced unprecedented challenges to copyright law, particularly as AI-generated works become increasingly prevalent in creative industries. As intellectual property scholar Mark Lemley has observed, generative AI will fundamentally transform our understanding of creativity and copyright law.⁶⁸ By blurring the lines between human creation and machine creation, generative AI exposes the limitations of copyright regimes designed in a pre-generative AI era. Nonetheless, human authorship remains a foundational concept

⁶³ Kurt M Saunders & Gerlinde Berger-Walliser, “The Liability of Online Markets for Counterfeit Goods: A Comparative Analysis of Secondary Trademark Infringement in the United States and Europe” (2011) 32 *Nw J Intl L & Bus* 37. See also *Tiffany (NJ) Inc v eBay Inc*, 600 F.3d 93 (2nd Cir, 2010).

⁶⁴ *Chanel Inc v WGACA LLC*, 2022 WL 902931 (SDNY, 28 March 2022); *Chanel Inc v WGACA LLC*, Case 1:18-cv-02253-LLS (SDNY, 26 June 2025). See also *Chanel Inc v The RealReal Inc*, 449 F.Supp.3d 422 (SDNY, 2020). See also recent US\$8m damages awarded to Nike for a trade dress infringement of its Dunk sneakers: *Nike, Inc v Nicholas C Tuinenburg*, 2:23-cv-10495-AB-AS (CD Cal, 19 March 2026).

⁶⁵ *Gianni Versace SRL v Fashion Nova Inc*, Case No. 2:19-cv-10074 (CD Cal, filed 25 November 2019). See also Lisette Voytko-Best, “Versace Sues Fashion Nova for Knocking Off Famous Jennifer Lopez ‘Jungle’ Dress”, *Forbes* <<https://www.forbes.com/sites/lisettevoytko/2019/11/27/versace-sues-fashion-nova-for-knocking-off-famous-jennifer-lopez-jungle-dress/>> (27 November 2019); Blake Brittain, “Versace, Fashion Nova sew up dress copying dispute shortly before trial”, *Reuters* <<https://www.reuters.com/legal/transactional/versace-fashion-nova-sew-up-dress-copying-dispute-shortly-before-trial-2021-07-16/>> (17 July 2021).

⁶⁶ *Eg*, BOF & McKinsey, *The State of Fashion 2026*, *supra* note 16 at 15–17, 32–36. See also Dilmegani, “Generative AI in Fashion”, *supra* note 23.

⁶⁷ *Ibid* at 39–45.

⁶⁸ Mark A Lemley, “How Generative AI Turns Copyright Upside Down” (2024) 25(2) *Colum Sci & Tech L Rev* 21. See also Tianxiang He, “AI Originality Revisited: Can We Prompt Copyright over AI-Generated Pictures?” (2024) 73(4) *GRUR International* 299.

in copyright law, and its application to AI-generated works raises some of the most important legal questions of the digital age. Judicial and legislative developments across major jurisdictions continue to reinforce a human-centric paradigm of creative authorship. For example, the USCO Gen AI Copyrightability Report reaffirms the longstanding principle that copyright does not extend to outputs generated solely by AI, or to works lacking sufficient human control over expressive elements.⁶⁹ In *Thaler v Perlmutter*, the District of Columbia Circuit Court of Appeals affirmed the USCO's refusal to register an AI-generated image, reasoning that the absence of human authorship precluded protection under existing law; the US Supreme Court refused to hear the appeal thus implicitly affirming the decision that adopted an anthropocentric view of authorship.⁷⁰

The origin of the term “artificial intelligence” may be attributed to computer scientist John McCarthy, who is widely regarded as one of the founders of the field. At the Dartmouth Conference, a historic event often considered the birthplace of AI as an academic discipline, which McCarthy convened, researchers explored the possibility that machines could simulate every aspect of human learning and intelligence. McCarthy defined AI in his influential 2004 essay *What is Artificial Intelligence?* as “the science and engineering of making intelligent machines, especially intelligent computer programs”.⁷¹ Broadly, AI is understood to be a branch of computer science concerned with creating systems capable of performing tasks that traditionally require human intelligence. The World Intellectual Property Organization (WIPO) defines AI as “a discipline of computer science that is aimed at developing machines and systems that can carry out tasks considered to require human intelligence, with limited or no human intervention”.⁷² Generative AI refers to AI systems capable of producing new content, such as text, images, audio, videos, code, and other outputs, in response to user prompts or inputs. These models operate by identifying and encoding patterns and relationships within vast datasets, enabling them to interpret natural language inputs and generate contextually relevant outputs.⁷³ One can immediately see how generative AI output is relevant to the fashion industry, from the creation of a garment or handbag to the prints on the products to the production

⁶⁹ US Copyright Office, *Copyrightability*, *supra* note 5 at 11–27. The National Policy Framework for Artificial Intelligence released by The White House this year is silent on this issue save for the paragraph which states that “Congress should continue to carefully monitor the development of copyright precedents and enforcement in the courts and evaluate whether, due to novel AI considerations, additional action beyond that proposed here is needed to fill potential gaps or provide additional protections for content creators”: The White House (US), *A National Policy Framework for Artificial Intelligence – Legislative Recommendations* (2026).

⁷⁰ *Thaler v Perlmutter*, *supra* note 28; *Thaler v Perlmutter*, No 25-449, *cert denied* (US Supreme Court, 2 March 2026). See also Shyamkrishna Balganes, “Vicarious Artificial Authorship” [Sep 2026 Online] Sing JLS at 8.

⁷¹ John McCarthy, “What Is Artificial Intelligence?”, *Formal Reasoning Group, Stanford University* <<https://www-formal.stanford.edu/jmc/whatisai.pdf>> (12 November 2007). McCarthy defines artificial intelligence as “the science and engineering of making intelligent machines, especially intelligent computer programs. It is related to the similar task of using computers to understand human intelligence, but AI does not have to confine itself to methods that are biologically observable”.

⁷² World Intellectual Property Organisation Secretariat, *Revised Issues Paper on Intellectual Property Policy and Artificial Intelligence* (WIPO/IP/AI/2/GE/20/1 Rev, 2020).

⁷³ Peng Huijuan & David Tan, “Copyright in the Generative AI Era: Reimagining Creativity and Fairness” (2025) 37 Sing Ac LJ 749 [Peng & Tan, “Copyright in the Generative AI Era”] at 754.

of advertising and marketing content. For instance, DALL-E, a famous generative AI tool commonly used in the fashion industry, can create a wide range of images that include photorealistic images, abstract patterns and stylised illustrations.⁷⁴

One must be careful not to equate “value” with “creativity” in copyright law. It has been pointed out by Mark Runco and Garrett Jaeger that “originality is vital for creativity but it is not sufficient”.⁷⁵ Effectiveness, in the sense of the work or product being successful in the market, may take the form of value, but one cannot logically associate the notion of creativity with the effectiveness of its economic result. The requirement of human authorship has long been a cornerstone of copyright law globally, shaping both doctrinal development and policy implementation. The economic utilitarian justification for copyright does not explicitly mandate human authorship. However, it does suggest that the delicate balance of various goals would be upset if copyright were conferred on works independently and autonomously generated by AI. It is widely accepted that the primary purpose of copyright as a limited monopoly is to promote the public good by protecting authors and other rights holders from uses of their works that unfairly appropriate the commercial value of their work, and to incentivise the production of more works for the public benefit.⁷⁶ Granting copyright protection to only AI-assisted works incentivises to the extent necessary to encourage creativity, without disproportionately preventing reasonable access to works by the public.⁷⁷ As a result of this time-honoured paradigm, the scope of copyright protection in the fashion industry decreases as the use of GAIA increases.

The scrutiny by the US Copyright Office (USCO) and the Chinese courts of AI-generated content is instructive for the fashion industry where the widespread use of printed images on fabric is quintessential to the attractiveness of clothing, especially in distinguishing one simple nondescript round-neck cotton t-shirt from another.

Presently, these AI-generated outputs are widely seen to be ineligible for copyright protection. While some may view the pronouncements by the USCO in denying copyright registration for works such as *Théâtre D'opéra Spatial* and *SURVAST* and the Beijing Internet Court granting copyright protection for *Spring Breeze Brings Tenderness* as being divergent, I have previously argued that they in fact cohere over a consensus that significant human contribution and control directed to the AI-assisted creation process is required for copyright subsistence.⁷⁸ The decision of the Zhangjiagang Primary People's Court in March 2025 in *Feng v Dongshan*

⁷⁴ Dilmegani, “Generative AI in Fashion”, *supra* note 23.

⁷⁵ Mark A Runco & Garrett J Jaeger, “The Standard Definition of Creativity” (2012) 24 *Creativity Research J* 92 at 92.

⁷⁶ *Eg, Sony Corp of Am v Universal City Studios, Inc*, 464 US 417, 429 (1984); Pamela Samuelson, “Unbundling Fair Use” (2009) 77 *Fordham L Rev* 2537 at 2617; *Global Yellow Pages Ltd v Promedia Directories Pte Ltd and another matter* [2017] 2 SLR 185 (CA) at [74].

⁷⁷ *Eg, Singapore Parliamentary Debates, Official Report* (16 November 2004) vol 78 at col 1070 (Professor S. Jayakumar, Deputy Prime Minister and Minister for Law). Incentivising only to the extent necessary is consistent with legislative intention for Singapore's copyright regime to preserve “the unimpeded exchange of information and ideas to create an environment which is conducive to the development of creative works”.

⁷⁸ Peng & Tan, “Copyright in the Generative AI Era”, *supra* note 73 at 767.

Company is aligned with the approach adopted by the USCO and as outlined in its report, *Copyright and Artificial Intelligence – Part 2: Copyrightability* (USCO Gen AI Copyrightability Report),⁷⁹ where the plaintiff’s AI-generated pictures on Midjourney were found to lack sufficient original authorship to be copyrightable as she could not provide adequate documentation to prove that she had made aesthetic choices and personal judgment during the generative process. The high threshold for copyrightability enlarges copyright’s negative space in fashion but it is not necessarily a bad thing.

It was also pointed out by the present author that the fundamental issue today is when, and to what extent, an AI-generated output may be attributed to a human author, such that copyright subsistence inheres in a particular work; in this regard, the GAIA is used as an assistive tool to aid the human individual in the creation of works and the evaluation of factors such as the scope, quality, and timing of human input on a case-by-case basis is necessary to determine copyrightability.⁸⁰ As highlighted in the USCO Gen AI Copyrightability Report,⁸¹ the human text commands – or prompts – will be quintessential to such a determination. It all hinges on “prompt engineering”, the catchy term given to the practice of crafting prompts that are optimised to elicit a desired outcome from a generative AI application. The report correctly states that “inputting simple prompts is insufficient to make a user the author of the AI-generated output” and that prompts can be no more than “unprotectible ideas or instructions”.⁸² Even if the human individual who provides the prompts is deemed the “author” of the resulting AI-assisted output, the idea-expression dichotomy will nonetheless operate to render ideas and styles unprotectable under copyright law. If one wants to use a GAIA to create “gold baroque floral prints”, each of the outputs is either unlikely to attract copyrightability or if it does, it would be entitled only to thin copyright protection akin to that granted by the USCO to “A Single Piece of American Cheese” as if it was a compilation work.⁸³

In Europe, where the leading fashion capitals of Paris and Milan set the fashion trends each season with their influential runway shows, the Court of Justice of the European Union (CJEU) in *Cofemel-Sociedade de Vestuário SA v G-Star Raw CV* emphatically held that “the fact remains that the circumstance that a design may generate an aesthetic effect does not, in itself, make it possible to determine whether that design constitutes an intellectual creation reflecting the freedom of choice and personality of its author”.⁸⁴ Specifically, “it is both necessary and sufficient that the subject matter reflects the personality of its author, as an expression of his free and creative choice”.⁸⁵ Fashion garments are generally perceived as works of artistic craftsmanship or works of applied art, but the threshold of originality must be met,

⁷⁹ US Copyright Office, *Copyrightability*, *supra* note 5.

⁸⁰ Peng & Tan, “Copyright in the Generative AI Era”, *supra* note 73 at 783–786.

⁸¹ US Copyright Office, *Copyrightability*, *supra* note 5 at 5–7, 12–22.

⁸² *Ibid* at 13.

⁸³ See Alec Winshel, “U.S. Copyright Office Grants Registration to AI-Generated Work”, *Harvard Journal of Sports & Entertainment Law* (24 March 2025).

⁸⁴ *Cofemel-Sociedade de Vestuário SA v G-Star Raw CV*, Case C-683/17, EU:C:2019:721 at [54] (“*Cofemel*”).

⁸⁵ *Ibid* at [30]. See also *Eva-Maria Painer v Standard Verlags GmbH*, Case C-145/10, [2011] ECR I-12533 at [87]–[89], [94]; *Levola Hengelo BV v Smilde Foods BV*, Case C-310/17, EU:C:2018:899 at [33]–[37].

ie, they must be a human author's own intellectual creation. This requirement of human creativity in authorship is inextricably intertwined with originality. Jyh-An Lee notes that originality "reflects the author's creativity in the copyright work".⁸⁶

When considering Jason Allen's *Théâtre D'opéra Spatial*, the USCO concluded that the Midjourney Image, which remains in substantial form in the final work, was not the product of human authorship.⁸⁷ Such an image could easily be appearing as a print on dresses, jackets and coats in the same way that Olivier Rousteing showcased Renaissance-inspired prints in his Spring-Summer 2023 runway collection for luxury fashion brand Balmain. The Copyright Review Board rejected Allen's submission that he provided "creative input" when he "entered a series of prompts, adjusted the scene, selected portions to focus on, and dictated the tone of the image". The Board found that although Allen describes "input[ing] numerous revisions and text prompts at least 624 times" before producing the Midjourney Image, the steps in that process were ultimately dependent on how the Midjourney system processed Allen's prompts. As Midjourney does not treat text prompts as direct instructions, users may need to attempt hundreds of iterations before landing upon an image they find satisfactory; ultimately, the "'traditional elements of authorship' are determined and executed by the technology—not the human user".⁸⁸ However, according to the USCO Report, there may be circumstances that a human may "modify material originally generated by AI technology to such a degree that the modifications meet the standard for copyright protection".⁸⁹

In another USCO determination regarding an application to register the artwork *Suryast*, the image was generated by "RAGHAV Artificial Intelligence Painting App" ("RAGHAV"), which had been trained on Vincent van Gogh's *The Starry Night* – with an instruction to apply the style of *The Starry Night* to the uploaded photograph. The Copyright Review Board found that the resulting image did not "contain sufficient human authorship necessary to sustain a claim to copyright" because the applicant "exerted insufficient creative control over RAGHAV's" generation of the output.⁹⁰ In contrast, the USCO registered *Rose Enigma*, an AI-generated work by Stable Diffusion, where the author applicant Kris Kashtanova had first created a hand-drawn illustration and used it as an input, which was submitted together with an extensive chart detailing the entire creation process; the Examining Division was satisfied that the applicant sufficiently controlled the production of the image.⁹¹

Generally, where a human inputs his or her own copyrightable work and that work is perceptible in the output, the individual will be the author of at least that

⁸⁶ Jyh-An Lee, "Computer-Generated Works under the CDPA 1988" in Jyh-An Lee, Reto Hilty and Kung-Chung Liu, eds. *Artificial Intelligence & Intellectual Property* (Oxford: Oxford University Press, 2021) 177 at 184.

⁸⁷ Letter from US Copyright Office Review Board to Tamara Pester, Esq. entitled "Second Request for Reconsideration for Refusal to Register *Théâtre D'opéra Spatial* (SR # 1-11743923581; Correspondence ID: 1-5T5320R)" (5 September 2023).

⁸⁸ *Ibid.*

⁸⁹ US Copyright Office, *Copyrightability*, *supra* note 5 at 24.

⁹⁰ Letter from US Copyright Office Review Board to Alex P. Garens, Esq. entitled "Second Request for Reconsideration for Refusal to Register *SURYAST* (SR # 1-11016599571; Correspondence ID: 1-5PR2XKJ)" (11 December 2023).

⁹¹ US Copyright Office, "Rose Enigma", Copyright Registration No VAU 1-522-922 (21 March 2023). See also Jane C. Ginsburg, "Humanist Copyright" (2025) 6 J Free Speech L 91 at 145.

portion of the output. This could be of some comfort to the fashion brands that originate the design process with a purely human-created artistic work such as a painting, drawing or photograph. If this source material is then used as input for a GAIA to generate variations, then the output *may* acquire limited copyright protection subject to certain conditions. In January 2025, USCO registered a visual work by Kent Keirse, *A Single Piece of American Cheese*, consisting entirely of AI-generated components created using the “*image retouching*” or “*inpainting*” technology (selectively regenerating parts of an image while preserving the rest) of Invoke AI.⁹² Importantly, Invoke provided substantial evidence of human control, including a time-lapse video of the creation of the image and an explanation of how Keirse had been involved in the creation process. Even if one succeeds in securing copyrightability over the output, the protection is nonetheless a thin one, and also subject to the idea-expression dichotomy.

In *Li v Liu* (the 2023 *Spring Breeze Brings Tenderness* case),⁹³ the Beijing Internet Court recognised copyright in an image generated using Stable Diffusion, on the basis that the plaintiff had invested original intellectual effort through prompt selection, parameter tuning, and iterative refinement. Just like what the successful registrants had done in the US for *Rose Enigma* and *A Single Piece of American Cheese*, the plaintiff here has also captured the entire creation process on video which she submitted as evidence of her authorial control over the creation of the work. Similarly, in *Lin Chen v Hangzhou Gaosi Membrane Tech* (the *Half Heart* case),⁹⁴ the Changshu Primary People’s Court affirmed copyright protection for an image generated via Midjourney, emphasising the plaintiff’s creative contribution through prompt design and post-editing. In contrast, in *Feng v Dongshan Company* (the *Butterfly Chairs* case), the Zhangjiagang Primary People’s Court denied protection, citing the plaintiff’s failure to provide sufficient evidence of creative input. Importantly, the plaintiff admitted herself that it was impossible for her to direct Midjourney to produce the exact same AI-generated pictures that she was claiming authorship over, with the same prompts, due to the inherent randomness in Midjourney’s generative process. In the absence of legislative reform, Chinese courts have developed a functional judicial approach that distinguishes between the mere instrumental use of AI and genuine human authorship. Under this approach, copyright protection is recognised only when the user’s creative input exceeds a minimal threshold and contributes materially to the final expressive output.⁹⁵

As demonstrated above, one of the most significant challenges of the use of generative AI for the fashion industry is the ambiguities around the copyright of AI-generated content. In addition to more immediate issues relating to subsistence and infringement, there is also a divergence of fair use and fair dealing approaches

⁹² US Copyright Office, “A Single Piece of American Cheese”, Copyright Registration No VAU 1-543-942 (5 August 2024).

⁹³ *Li v Liu* [2023] Beijing Internet Court, Civil Trial Judgment 11279 (PRC).

⁹⁴ *Lin Chen v Hangzhou Gaosi Membrane Technology Co Ltd* [2024] Changshu Primary People’s Court, Civil Trial Judgment 6697 (PRC).

⁹⁵ See Yong Wan & Hongxuyang Lu, “Copyright Protection for AI-Generated Outputs: The Experience from China” (2021) 42 Computer L & Sec Rev 105581.

across jurisdictions around the world. In the midst of the flurry of academic articles on these issues, Tianxiang He offers a calm pragmatic perspective:

Accordingly, even if we follow the pro-copyrightability approaches, without voluntary evidence submitted by the parties, it would be almost impossible for the authorities to verify whether a piece is purely human-authored or machine-assisted at the current stage, unless we require the courts to check that in each and every case ... why should AI-related copyrightability disputes warrant fundamentally different treatment?⁹⁶

While the use of generative AI may raise issues of copyrightability of the output, the more traditional concerns of imitating the *style* of particular fashion designs have not changed. He correctly points out that “it is not copyright infringement, as substantial similarity cannot be established based solely on stylistic overlap, even if it raises moral questions of style appropriation”.⁹⁷ Other scholars have suggested that copyright law is a “poor fit” for AI-generated content⁹⁸ and perhaps *sui generis* legislation based on a different set of policy objectives would be more appropriate in addressing these challenges.⁹⁹

V. CONCLUSION – EVEN FASTER FASHION LIES AHEAD

In 2024, Singapore-headquartered Chinese fast fashion juggernaut Shein was reported to have generated revenues of US\$38bn. Through its new initiative Shein Xcelerator, thousands of small independent designers can access Shein’s fulfilment, sampling and production capabilities and earn a commission when their product sells. This scaling strategy not only generates tangible benefits for small businesses, but also results in lower prices for consumers.¹⁰⁰ AI is fast becoming an invaluable tool in the creative process for the fashion industry. It was reported that at the Paris Fashion Week in March 2025, several designers “attempted AI-powered designs, where artificial intelligence supported the creation of garments by studying patterns, textures, and silhouettes to generate designs that are both aesthetically pleasing and highly functional”.¹⁰¹

⁹⁶ Tianxiang He, “Three Obstacles to AI-Generated Content Copyrightability” [2026] Sing JLS 77 at 77–78.

⁹⁷ *Ibid* at 94.

⁹⁸ Mark A Lemley, “How Generative AI Turns Copyright Upside Down” (2024) 25(2) Colum Sci & Tech L Rev 21 at 43.

⁹⁹ Eg, Micaela Mantegna, “ARTificial: Why Copyright Is Not the Right Policy Tool to Deal with Generative AI” (2024) 133 *Yale Law Journal Forum* 1126; Tianxiang He, “AI Originality Revisited: Can We Prompt Copyright over AI-Generated Pictures?” (2024) 73(4) GRUR International 299.

¹⁰⁰ William Langley, Adrienne Klasa & Barbara Moens, “The problems piling up at fast-fashion giant Shein”, *The Straits Times* <<https://www.straitstimes.com/opinion/the-problems-piling-up-at-fast-fashion-giant-shein>> (23 February 2026).

¹⁰¹ Tatler T-Labs Team, “Paris Fashion Week: 5 ways fashion brands are embracing AI and cutting-edge tech on the runway”, *TatlerAsia* <<https://www.tatlerasia.com/power-purpose/innovation/paris-fashion-week-brands-embracing-ai>> (13 March 2025).

The most pronounced characteristic of the fashion industry today is choice. The fashion industry is saturated with a legion of most non-infringing substitutes. According to McKinsey, Gen Z has popularised “dupes” with the #dupe hashtag on TikTok attracting 6 billion views; one third of US adults have said that they intentionally bought a knockoff of a premium or luxury product.¹⁰² These products are not counterfeits in the traditional sense, as they rarely reproduce protected trademarks; but they do mirror the aesthetic codes of their more expensive counterparts closely enough to satisfy the average consumer’s penchant for luxury fashion goods.¹⁰³ There is a discernible shift to prioritising quick aesthetic access over brand provenance. Whoever comes out on top depends on one’s ability to originate a trend, engender desire, and build customer loyalty. It is therefore unsurprising that in the upper echelons of luxury fashion brands, we have been witnessing a chain reaction of “creative resets” as the euphoria of post-Covid spending waned.¹⁰⁴ Stronger copyright protection does not translate to better sales. Fashion brands need to redesign product pyramids, introduce premium halo products and leverage collaborations to maintain excitement amongst the new generation of consumers.¹⁰⁵ The key to success for fashion brands in the years to come is “differentiation” – brands will have to convince shoppers that they are worth the price.¹⁰⁶

As technology develops at a breathtaking pace and more generative AI systems become freely accessible, the traditional mode of producing, disseminating and licensing literary, dramatic, musical and artistic works will also have to evolve. It has been observed that with the use of generative AI, “designers can push the boundaries of creativity, producing innovative, trend-responsive designs that speak directly to evolving consumer demands. AI tools can create personalized experiences, adapting to user preferences and behaviors based on data analysis”.¹⁰⁷

The seduction of the imitative inauthentic is only a temporary consolation in the quest for the aspirational authentic. The semiotic connotations of the alpha brands as Veblen goods at the apex of the fashion pyramid will continue to set trends and stimulate flocking.¹⁰⁸ Take for instance, the iconic Versace jungle print that was first

¹⁰² BOF & McKinsey, *The State of Fashion 2025*, *supra* note 15 at 67.

¹⁰³ See also Julie Zerbo, “The Luxury Reckoning: How Dupes Became the Logical Outcome”, *The Fashion Law* <<https://www.thefashionlaw.com/the-luxury-reckoning-how-dupes-became-the-logical-outcome/>> (5 March 2026).

¹⁰⁴ Lucy Maguire, “Will the Creative Reset Ever End?”, *Vogue* <<https://www.vogue.com/article/will-the-creative-reset-ever-end>> (20 January 2026).

¹⁰⁵ *Ibid* (“Since fashion’s drastic democratization over recent years, public discourse carries a lot of weight, meaning even critically acclaimed designers can face sales challenges or prompt pressure from executives, if they don’t please the thousands, if not millions of netizens who now see fashion as a spectator sport”); BOF & McKinsey, *The State of Fashion 2026*, *supra* note 16 at 109.

¹⁰⁶ BOF & McKinsey, *The State of Fashion 2025*, *supra* note 15 at 68.

¹⁰⁷ Rockett, Fenwick & Jurcys, “Fashion 4.0 and Emerging Designers”, *supra* note 18 at 119.

¹⁰⁸ The term “flocking” has been used to describe the phenomenon of fashion brands – whether luxury brands or fast fashion retailers – adopting common design elements such as prints and shapes each fashion season as they flock towards the same trends. See C Scott Hemphill and Jeannie Suk, “The Law, Culture, and Economics of Fashion” (2009) 61(5) *Stan L Rev* 1147 at 1164–1165 (“It can be a manifestation of a desire to partake of the collective moment, to be in step with society, or to be in touch with the present. It may be pleasurable for people to move in a collective direction, joined by others in expressive endeavor. There may be pleasure in a convergence, in participation in similar themes and ideas that reflect the times that all are experiencing.”).

created by Donatella Versace in the year 2000 and became of one of the most iconic dresses in history with a Wikipedia page titled “Green Versace Dress of Jennifer Lopez”.¹⁰⁹ Perhaps paradoxically, references to this print whether by another luxury brand such as Dolce & Gabbana or a fast fashion retailer will never replace the authentic. Imitative – but not identical – copies of the jungle print may have the effect of increasing sales for the copyist either because consumers recognise the reference to the iconic or consumers simply appreciate the visual appeal *per se*. A similar comparison may be made with *shanzhai* products that evoke the alpha brands.¹¹⁰ While certain consumers may gravitate toward these referential products, they know that these are not the original and many will still aspire to own the original. A momentary satiation does not mean that the imitative would substitute for the original. Sales of the original are also unlikely to be impacted by the non-counterfeit imitative.

What we are witnessing today is the democratisation of fashion – the result of more individuals being able to utilise technology to build on existing works to create new creations and innovations at a faster pace. This could be viewed as a welcomed renaissance in which AI has enabled anyone to be a fashion designer. In his interviews with artists between 2017–2020, unlike the current backlash, Ahmed Elgammal discovered that many artists who worked with AI found “A.I. useful in two ways: *creative inspiration* and *creative volume*” and that it gave them “sparks of new ideas, new directions, new ways to create their art”.¹¹¹ With flocking, comes differentiation. With differentiation, we beget new non-infringing expressions and transformative adaptations. Look for the silver lining in copyright’s enlarged negative space in the fashion industry – there are many positives to be gleaned.

¹⁰⁹ Wikipedia, “Green Versace Dress of Jennifer Lopez” <https://en.wikipedia.org/wiki/Green_Versace_dress_of_Jennifer_Lopez>.

¹¹⁰ Eg, Lee & Liu, “*Shanzhai* Fashion”, *supra* note 14; David Tan, “Fashion, Post-Postmodernism and Intellectual Property” in David Tan, Jeanne C Fromer & Dev S Gangjee, eds. *Fashion and Intellectual Property* (Cambridge: Cambridge University Press, 2025) 3. Originally a term used to describe a fortress in a mountainous region, *shanzhai* has gained a metaphorical meaning in the fashion industry, denoting the Chinese factories’ low-cost imitation or copying of a well-known product from an international brand often with deliberate misspelling of the English brand names such as “BANE BERRY” instead of “BURBERRY”.

¹¹¹ Ahmed Elgammal, “Text-to-Image Generators Have Altered the Digital Art Landscape – But Killed Creativity. Here’s Why an Era of A.I. Art Is Over”, *Artnet* <<https://news.artnet.com/art-world/ahmed-elgammal-op-ed-ai-art-is-over-2304028>> (20 June 2023).