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The House of AI: Intellectual Property Law as it relates to Generative AI and Fashion

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Over the past decade, artificial intelligence has permeated nearly every aspect of society, yet American legislation in this field remains largely archaic. The absence of specific legislation governing generative AI in the United States has led to numerous intellectual property (IP) and copyright disputes, infringing on both creator's rights and discouraging innovation. Given the rapid evolution of generative AI in society, comprehensive legislative action is necessary to establish clear guidelines balancing intellectual property rights with the need for innovation through technological advancement. While this issue spans multiple industries, this article focuses on fashion, examining how AI regulation can foster innovation while safeguarding designers' rights. By analyzing existing and proposed EU statutes, we can gain insight into legislating AI training processes, copyrighting AI-generated designs, and ensuring transparency.

I. Introduction

Over the past decade, artificial intelligence has permeated nearly every aspect of society, yet American legislation in this field remains largely outdated. The absence of specific legislation governing generative AI in the United States has led to numerous intellectual property (IP) disputes, both infringing on creators' rights and discouraging innovation. Given the rapid evolution of generative AI in society, comprehensive legislative action is necessary to establish clear guidelines balancing intellectual property rights with the need for innovation through technological advancement. While this issue spans multiple industries, this article focuses on the fashion industry, examining how AI regulation can foster innovation while safeguarding designers' rights. Analyzing existing and proposed EU statutes can give insight into legislating AI training processes, copyrighting AI-generated designs, and ensuring transparency.

A. U.S. Copyright Law

To understand the legal landscape of copyright and artificial intelligence, it is important to understand the purpose and principles of American copyright law. U.S. copyright law was created initially to encourage innovation and technological advancement. The first copyright law was published in 1790, "for the encouragement of learning, by securing copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned." This aligns with the powers granted to Congress by the U.S. Constitution, which seek "[t]o promote the Progress of Science and useful Arts, by securing for limited times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries[i]" [i] "This provision establishes that

human authorship is a bedrock requirement to register a copyright"[ii]1, ensuring that only works involving significant human creativity and original expression are eligible for protection

17 U.S. Code § 102 establishes the subject matter of copyright eligible for protection. "Works of authorship include the following categories: literary works, musical works (including any accompanying words); dramatic works (including any accompanying music); pantomimes and choreographic works,; pictorial, graphic, and sculptural works; motion pictures and other audiovisual works; sound recordings, and architectural works."[iii]

If a work of authorship is given copyright protection due to it falling in to one of the above categories, copyright owners have six exclusive rights: "(1) the right to reproduce the copyrighted work in copies or phonorecords; (2) the rights to prepare derivative works based upon the copyrighted work; (3) the rights to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; (4) the rights in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; (5) the rights in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and (6) the rights in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission."[iv]

B. EU Copyright Law

The European Union's copyright law is built on a framework of thirteen directives and two regulations designed to harmonize essential rights, encourage creativity, and stimulate investment.

The difference between a directive and a regulation is the following: Directives tell members of the European Union that they are required to adopt particular items in their legislation, while allowing them to dictate the specific details of said legislation, while regulations are a directly binding source of law in each member. Nevertheless, they both are important sources of legislation as it relates to copyright law. According to *Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society* " EU Member States must provide for the exclusive right to authorize or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part: for authors, of the original and copies of their works, for performers, of fixations of their performances; for phonogram producers, of their phonograms; for the producers of the first fixation of films, with respect to the original and copies of their films; for broadcasting organizations, of fixations of their broadcasts, whether those broadcasts are transmitted by wire or over the air (wireless), including by cable or satellite[v]." Once granted these rights last the entirety of the author's life plus seventy years and provide both economic (control over reproduction, distribution, and adaptation) and moral (ensuring proper attribution of the work and protecting its integrity).

Copyright and Fashion

According to *§ 101 of the U.S. Copyright Act,* copyrighted protections are only awarded to a garment "if, and only to the extent that, such design incorporates pictorial, graphical, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article."[vi] This definition specifically excludes strictly utilitarian designs from copyright protection and historically made it nearly impossible to copyright fashion designs because garments are largely dictated by the shape of the human body. In recent years, however,

this has been weakened by the Supreme Courts decision in Star Athletica, LLC v. Varsity Brands, Inc, which dictated that "graphics that were used by a company that manufactured cheerleading uniforms were copyrightable under 17 U.S.C.S. § 101 because they could be identified separately and were capable of existing independently of uniforms the company manufacture" and "Features incorporated into the design of a useful article were eligible under § 101 for copyright protection if they could be perceived as two- or three-dimensional works of art separate from the useful article and qualified as a protectable pictorial, graphic, or sculptural work—either on their own or fixed in some other tangible medium of expression—if they were imagined separately from the useful article into which they were incorporated".[vii] The decision in Star Athletica opened the door for fashion companies to submit their designs for copyright protection. In summary, to be eligible for copyright protection here in the United States, a garment must have an element that is separate from its utilitarian purpose. The European Union has a sui generis design protection law, in the form of the Community Design System, which provides copyright protection for designs that fulfill both the novelty and individual character requirements. A design is considered novel if "no identical design has been disclosed before it" and fulfills the individual character requirement if the "overall impression conveyed to the informed user differs from that conveyed by any other previous designs".[viii] While the Community Design System was initially created for industrial designs, it applies to fashion designs as well and gives designers the "exclusive right to use a design, which includes making, offering, putting on the market, importing, exporting or using the product in which [the] design is incorporated or to which it is applied."[ix]

Artificial Intelligence in Fashion

Since its inception, artificial intelligence has been utilized across various industries, including fashion. Since the AI boom in 2019, there have been various capsules, collections, and pieces all

using artificial intelligence in different ways. Designs utilizing artificial intelligence typically fall into two different categories: AI-assisted (hybrid) designs and text-to-image designs. AI-assisted designs are ones in which artists streamline the design process by inputting previously created designs. Designers then refine these designs by using AI as a vehicle in which they can visualize textures, colors, etc. This is the process that is typically favored by most high-fashion designers and houses, as they see it as a happy medium between protecting the human emotion, which is essential to the design process, and creating a more innovative and efficient design process. The second type of design is the text-to-image design. Designs such as this one are created after a human inputs a textual prompt, which the machine uses to generate an image. Software for both hybrid and text-to-image designs is created by an extensive training process, which involves identifying patterns in already existing designs that are input into these machines. Regardless of the process used, artificial intelligence is said to add over $200 billion of revenue to the fashion industry.

The State of regulation regarding artificial intelligence in the U.S. and EU

Regulation of artificial intelligence in the United States, like many other policy areas, has been a slow-moving process with little progress. Currently, there is no comprehensive federal legislation regulating the use or development of artificial intelligence. While there have been several attempts at legislation, none of them have come to fruition. This means that the majority of copyright disputes regarding artificial intelligence are to be decided by the courts using existing copyright law. The closest the U.S. has to a federal AI framework is the Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence, which aims to enhance safety standards and implement watermarking provisions for AI-generated content.[x] As it pertains to the fashion industry, this means that designs which were created using artificial intelligence would

have to be marked as such. However, this order may be subject to revocation under future administrations. The European Union, however, has taken a far more aggressive approach in regulating artificial intelligence. The EU AI Act was the world's first comprehensive legislation regarding the use of artificial intelligence. The EU AI Act seeks to create AI systems that are safe, transparent, traceable, nondiscriminatory, and environmentally friendly. A second, more comprehensive set of legislation, the GPAI Act, focuses on the training process of artificial intelligence, went into effect in August 2025.

Summary of Conclusions

Given the rapid evolution of generative AI in fashion, comprehensive legislative action is necessary to establish clear guidelines balancing intellectual property rights with technological advancement. The regulatory frameworks in the European Union should be used as models for legislation in the U.S to make sure that we ensure innovation while safeguarding the rights of designers.

II. The AI Training Process

The role of artificial intelligence in the fashion industry is primarily centered around the creation of fashion designs using generative AI. The major root of dispute in both the fashion and creative world, as it pertains to artificial intelligence, rests in the training process of these generative AI models. Most generative AI models, such as Midjourney, undergo a training process before they are fit for consumer use. This training process centers around data mining, where these models are fed millions of already existing copyrighted designs. The models then identify patterns and calculate the probabilities of various elements existing for a singular prompt. Despite a growing number of licensing deals, the majority of original creators of the designs used in these training processes receive no compensation for the use of their work in this process. These models

have been used by designers to both edit already-created designs and create entire collections. The training process that surrounds Generative AI raises several ethical questions about the infringement of the intellectual property rights of designers and artists.

Proponents of generative AI claim that the training process is not an infringement of copyright since it is no different than the ordinary designer taking inspiration from works that they come across in their daily lives. They argue that these generative AI models are not copying existing designs but rather computing the probabilities associated with various elements that are said to be associated with a certain topic, so that they can create an independent image that consists of the elements identified by these patterns. This process can be equated to a human designer taking inspiration from various designs that they come across in their daily life. In addition, proponents claim that direct copying is impossible because copies of the designs used in the training process are never stored. Any alleged infringements committed during the training process are a small price to pay, according to these proponents, for the billions of dollars in additional revenue due to increased efficiency.

On the other hand, opponents of these training processes, claim that models such as Midjourney undermine the work of designers by directly copying their work without compensation. They claim that it is possible to create exact replicas of an artist's work because generative AI can memorize copies of designs. They also argue that technology like this will lead to a lack of incentive for traditional designers to create, since their work can easily be stolen without compensation. Notably, the same training process is used in models where artificial intelligence is merely an assistant in the design process and text-to-image models. This is because even in cases where artificial intelligence is merely an editor, the models somehow have to learn how to make the required edits

It is this conflict of interest that has led to numerous court cases within the U.S. regarding the use of copyrighted images in the generative AI training process. The majority of these cases have a singular root cause. Currently, no legislation specifically governs the use or publishing of training data, which means the majority of corporate governance in this area comes from decisions made by individual companies regarding their specific use of such models. While there have been numerous attempts at legislation, such as the Generative AI Copyright Disclosure Act of 2024, 118 H.R. 7913,[xi,] which sought to require the publishing of generative AI training data, none of these attempts have ever made it past the initial stages. The U.S. has instead taken a judicial approach to regulating generative AI. The only guidance given to designers in the judicial process is a congressional service report that states that a copyright owner may be able to prove a copyright infringement if the models in question "both had access to their works and created 'substantially similar' outputs." [xii] However, this report is not legal precedent and merely a suggestion of circumstances where the plaintiff may be victorious.

The primary defense regarding the use of copyrighted materials in the training process of artificial intelligence lies in the fair use doctrine . The purpose of this doctrine is to "avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster".[xiii] To determine whether a particular infringement is fair, the courts typically consider four factors: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work. Regarding the creative world, one of the biggest indicators of whether a work would be protected under the fair use doctrine is if the work in question is a transformative

work rather than a derivative work. A derivative work takes an existing copyrighted work and edits it in some way. In contrast, Transformative works create a completely new work after taking inspiration from the copyrighted one.

However, there was a considerable amount of overlap between the two definitions since the line between inspiration and alteration is not always clear. For example, as it relates to the fashion industry, if a designer used a copyrighted symbol that appeared on a brand's jacket as inspiration to create his own symbolled jacket, we cannot always tell to what extent the symbol has to be altered for it to be considered "transformative". Furthermore, while a design that was based on but substantially different from the original symbol could be transformative, it also, by definition, falls into the derivative category since it was technically made by making edits to the original work.

This was the tension that was at the forefront of the case of *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*,[xiv] The Andy Warhol Foundation of Visual Arts licensed to appear on the cover of the magazine an image "Orange Prince" which was derived from a copyrighted photograph taken by Lynn Goldsmith. The Warhol Foundation argued that the use of this image fell within the provisions of the fair use doctrine because it was substantially different enough; however, both the Supreme Court and the Court of Appeals disagreed. The court ruled that "if an original work and secondary use share the same or highly similar purposes, and the secondary use is commercial, the first fair use factor is likely to weigh against fair use, absent some other justification for copying"[xiv] Additionally, the work in question must "alter the first [work] with new expression, meaning, or message."[xiii] . Essentially, the transformative nature of the work must completely outweigh the derivative nature of the work, and the two works must exist in different markets.

Returning to our example about jackets, this would mean that the symbol in question would have to have an entirely different meaning and exist in a different market than the first. For example, if the first symbol was a bear that appeared on a brand's women's leather jacket. The second symbol would have to be a cartoon bear, which appeared on children's clothing. While the cartoon could be made after taking inspiration from the first bear, the new bear motif is selling to a different market and is a complete transformation of the first.

Artificial intelligence companies argue here that if the principles of the Warhol decision were applied to cases involving training data, the courts would rule in favor of their companies. These companies claim that the images generated by these machines are transformative and not derivative. Analyzing this claim requires understanding the AI training process. According to artificial intelligence companies, these models seek to simply analyze textures, structures, and identify patterns from inputted copyright material. These patterns are then used to create transformative works. The proof of this is allegedly seen in the fact that the copyrighted material is not saved or distributed by these companies. In addition, because the images in question are often scraped from the internet, the process is no different than a human creator taking inspiration from something they see on the internet. This allegedly results in a transformative work because of the difference between the original inputs and the generated output.

The counter-argument to this defense can be seen in the case of *Andersen v. Stability AI Ltd*[xv] Plaintiff Sarah Anderson and various other artists sued the company Stability AI for unauthorized use of their copyrighted works in the training of the stable diffusion models created by Stability AI. In her direct infringement claim, Anderson provided various sources of academic evidence that showed that these systems can often generate images that are copies of an artist's copyrighted work. These alleged outputs would be considered derivative, meaning that the fair use doctrine could not

be applied here. Whether or not the fair use doctrine can be applied in these instances rests on whether these models have the potential to generate outputs that are direct copies of the imputed copyrighted materials.

A secondary application of fair use in cases of the training process and generative AIis scientific research. Courts have typically allowed fair use in cases of scientific research, claiming that it falls within the doctrine. In cases like this the defendant must prove that the "distinct purpose is justified because it furthers the goal of copyright, namely, to promote the progress of science and the arts, without diminishing the incentive to create" [xv] The majority of generative AI companies claim that the training of artificial intelligence models constitutes scientific research as they seek to innovate or create new technology by using these copyrighted materials. However, to prove this factor, companies must prove that the patterns that are identified by using copyrighted data lead to new, previously unseen insights. In the fashion industry, this essentially means that the technology in question must be used in a way that creates designs that are novel to the industry.

The issue with relying on both the fair use doctrine and precedent set by the Supreme Court to determine the future of U.S. copyright law lies in the purpose of copyright directives themselves. To prevent the "stifling of creativity," the U.S. Copyright Office claims that the fair use and intent directives "set forth general principles, the application of which requires judicial balancing, depending upon relevant circumstances". [xvi] While this theory may seem positive in principle, having decisions like this made on a circumstantial basis could lead to legal uncertainty and inconsistent rulings. Allowing judges to make decisions like this one makes it difficult for both AI companies and creators to know what is permissible and what is impermissible. The circumstances in the majority of these cases vary significantly, meaning that completely different rulings can be applied in each one. Further, no laws require that companies

publish the training data used in these models, which means that independent designers are not equipped with the tools necessary to decide if infringement occurred. In addition, litigation in this country is incredibly expensive and not something that can be afforded by everyone. A designer who is employed by a massive brand will have no issues in affording this process, but a smaller independent designer may not be able to. Allowing the courts to make decisions like this one could lead to "designers who lack the power held by bigger luxury brands [to] be disincentivized to keep creating when their designs will just be used to feed an AI device" [xvii]without their consent. Therefore, the best solution regarding this issue is coming up with concrete legislation that both encourages innovation and protects copyright holders.

When it comes to creating such legislation there is no reason for the U.S. to reinvent the wheel, as it can easily look to the European Union as a model for what to do regarding issues such as this one. In late 2019, the European Union published Directive (EU) 2019/790 [xviii]on copyright and related rights in the Digital Single Market. This directive, among other things, allowed for the use of lawfully accessible copyrighted data in text and data mining situations. The DSM exception states that the copyright act must provide exceptions for "reproductions and extractions made by research organizations and cultural heritage institutions to carry out, for the purposes of scientific research, text and data mining of works or other subject matter to which they have lawful access" Text and data mining is a research method that uses large sums of data to find patterns and trends. However, to protect the rights of the individual copyright owners, copyright owners were given the legal right to opt out of this process. If a copyright owner expressed that it did not want its copyrighted materials used in this process, then that wish had to be respected.

This directive was at the forefront of the case of *Kneschke vs. LAION*[xix], in Germany. The circumstances of this case are similar to many U.S. copyright cases where a creator was suing an

artificial intelligence firm for the unauthorized use of copyrighted material in the model-training process. The trial courts in the LAION case ruled that the training process of artificial intelligence fell inside of the DSM exception issued by the European Union. This was because, according to the trial court in Germany, the creation of these data sets constituted scientific research because it was a significant step in the acquisition of future knowledge. The courts ruled that because "the company makes training datasets publicly available free of charge, [it] does not pursue commercial purposes. In this regard, it does not matter that LAION may actually benefit from creating such datasets for developing its commercial offerings. Moreover, it does not matter whether commercial actors then use such databases to train their models or not" [xix]

This case is important to American copyright law for various reasons. To begin with, the scientific research exception, which is present in the European Union, is implicitly present in the U.S. fair use doctrine as well. Additionally, because LAION, the company in question in this suit, is the same company that provides training data to various U.S. GPAI companies, the second factor that led to this decision exists in the U.S. as well. This is particularly important because, under the fair use doctrine, non-profit purposes are typically favored over profitable purposes. The decision in this case would later be clarified through GPAI Act, which went into effect in late 2025. It is this Act that should provide the blueprint for regulating training data in the United States.

The GPAI Act expands upon the previous CDSM directive, stating that the Union intended for the TDM exception to include generative AI models. This means that the use of lawfully accessible copyrighted materials (material that is accessible on the internet) in training generative AI is allowed. However, the same opt-out provision that was present in the CDSM directives is applicable in this instance. A fashion designer who creates a work which is eligible for copyright, will now have the opportunity to opt out of this process. If such an opt-out is issued,

then the use of copyrighted data would constitute infringement and would be punishable by fines of up to 3% of the company's worldwide revenue. Furthermore, generative AI models that do not comply with this opt-out provision are not allowed to be used in the European Union. The GPAI Act encourages transparency of the training process by requiring the publishing of training data through a template provided by the European Union. To respect the trade secrets and confidential information of a business, these corporations only have to provide the data that was collected, in our case, the fashion designs that were used to train these models rather than the individual outputs that could be generated. This provision compels designers to exercise their rights once they are aware that their work was used for training purposes. Artificial intelligence companies that fail to publish this summary of training data will be fined up to 3% of their worldwide revenue. Finally, the GPAI Act provides a 24-month grace period for AI companies to comply with this regulation to help ensure a smooth and timely transition.[xx]

The impacts of the GPAI acts on the fashion industry would be as follows. First, fashion designers will be provided with valuable information regarding the use of their copyrighted designs in the AI training process. Once they are armed with this information, they can decide whether they would like their material to be used to train generative AI modules. If they make the decision to opt out, they have the assurance that their designs will not be used, preserving their copyright. On the other hand, fashion houses that use artificial intelligence in the design process will no longer have to be in legal limbo. This allows them to continue innovating in an area that has the potential to bring billions of dollars of revenue into the fashion industry.

The primary argument for enacting legislation similar to the GPAI Act here in the United States is the balance it provides between respecting designers' rights and encouraging innovation. Generative AI, whether we like it or not, is the technology of the future. It has the potential to

increase both efficiency and revenue. Failing to allow such technology will only cause the United States to be less competitive in global markets. Furthermore, the purpose of the Copyright Acts, as written by the founding fathers into the Constitution itself, was to encourage innovation in the fields of useful arts and sciences, and enacting such legislation does just that. In addition to this, it respects the work and rights of designers by letting them have a seat at the table in the decision- making process. This gives them the ability to see how exactly their copyrighted works are being used. This part of the GPAI Act was the primary motivating factor behind the Copyright Disclosure Act of 2024, 118 H.R. 7913[xxi], which is one of the only proposed statutes to come before Congress when it comes to legislating generative AI models. The Copyright Disclosure Act of 2024 states that anyone who creates or alters a database using AI training data must file notice with the copyright office and provide information about any copyrighted work used in the creation of this database.

The proposed allowances in the GPAI act all fall under the provisions that are allowed in the fair-use doctrine, which is the most common defense used in successful copyright infringement cases. While the United States does not have an explicit TDM exception, text and data mining is typically classified here as scientific research, one of the factors that allows for the potential use of copyrighted material. Furthermore, the published training data will help designers prove intent in cases where companies create models that are solely to copy existing designs. This information is valuable for two purposes. Second, many copyright cases involving artificial intelligence, which are in their early stages here in the U.S., have had judicial orders requiring the plaintiff to provide greater evidence of how exactly their copyrights were infringed upon. The publishing of such training data will help expedite this process as well. Finally, the opt-out process complies with the sections of the fair use doctrine, which typically favor works that are substantially different from

the original and non-competitive works. This is because if a rights owner feels as though their work is being used in a process that results in a substantially similar output, which is a direct competitor in the market, they can opt out of such a process.

In addition to being consistent with the provisions of the fair use doctrine, the GPAI Act helps further the initial purpose of the copyright clause, which was to encourage and foster innovation. Artificial intelligence has the potential to add over $275 billion of revenue to the fashion industry. The bulk of this revenue comes from new innovative design practices that seek to increase efficiency and create new innovative designs that will help expand existing markets. The innovation that takes place here is precisely the one that was intended by the founding fathers when the copyright clause was initially written.

Due to its benefits in the fashion industry and beyond, legislation similar to the GPAI Act should be enacted in the United States as well.

III. The Copyright of AI-generated Designs

Generative models in the creative sector date back to the 1960s with the creation of AARON. AARON was created by artist Harold Cohen as the first machine that could draw and paint with little to no human intervention. Since then, the growth of such generative technology has led to the creation of artificial intelligence models such as Mid-Journey, which can now create detailed images based on textual inputs. In the fashion industry specifically, these models can now create designs by inputting a series of requirements or assist the human designer by showcasing ways that textures, colors, etc, can be implemented into a specific design. This leads to the question: Are these designs eligible for copyright protection in the United States?

To better understand this question, we need to go back to the Copyright Clause and Act. The Copyright Clause in the U.S. Constitution gives Congress the power "to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries" [xxii] This purpose is embodied in the U.S. Copyright Act, which seeks to protect "original works of authorship fixed in any tangible means of expression".[xxvi] It is the language of "author" and "original", in Copyright Act statutes which have led to the majority of copyright protection disputes pertaining to artificial intelligence.

We will first focus on the word "author". In the fashion industry, the "author" is typically the designer who created the sketch for the garment in question. It is important to note that when these statutes were initially enacted in the late 1700s, it was difficult to envision an "author" who was not a human. The courts responded to this technological evolution in the case of *Burrow-Giles Lithographic Co. v. Sarony*[i] [xxiii]. *Sarony* asked a question regarding whether a photograph would be eligible for copyright protection since it was merely created by a machine. The Courts ruled in *Sarony* that a work is available for copyright protection if "the ideas in the mind of the author are given visible expression" [xxiii]. We can look towards *Sarony* to tell us that the courts typically look to the goals of the Copyright Act and typically employ a less stringent definition of the word author. This case is particularly important to note in cases where human "authors" use machines to assist them in their creativity.

We can next look towards the case of *Naruto v Slater*[xxiv], which involves an entirely non-human "author". Slater and Wildlife Personalities, Ltd published a series of selfies that were taken by Naruto, a monkey living in the Indonesian wildlife. In 2015, People for the Ethical Treatment of Animals ("PETA") and Dr. Antje Engelhardt filed a complaint for copyright infringement against Slater, Wildlife, and Blurb, as Next Friends on behalf of Naruto. The court concluded that

"monkeys—and all animals, since they are not human—lack statutory standing under the Copyright Act." The case establishes an important precedent in cases regarding artificial intelligence and copyright because it concludes that copyrights will not be awarded in cases where there is no human "author".

This human authorship requirement was at the forefront of The Compendium of Copyright Office Practices, issued by the U.S. Copyright Office. The Compendium states that "works produced by a machine or mere mechanical process that operates randomly or automatically without any creative input or intervention from a human author are not registrable". [xxv] This rule strongly suggests that "content created [solely] by AI is not copyrightable because the traditional elements of authorship are determined and executed by the technology—not the human user". [xxvi] Essentially, to be provided copyright in the United States, a designer must prove that the element of human involvement was greater than de-minimis.

It is this requirement that was at the forefront of the case of *Thaler v. Perlmutter, 687 F. Supp. 3d 140*[xxxvii] The plaintiff Steven Thaler sued the U.S. Copyright Office after it denied copyright protections for his work "A Recent Entrance to Paradise", which was created by a generative AI machine that Thaler created, known as the "creativity machine". The courts ruled that "A Recent Entrance to Paradise" was not eligible for copyright protection, citing an absence of human authorship. Despite Thaler's argument that the Sarony case proves that the copyright act has expanded to include new technological advances, the courts ruled that: "Human involvement in, and ultimate creative control over, the work at issue was key to the conclusion that the new type of work fell within the bounds of copyright. Copyright has never stretched so far, however, as to protect works generated by new forms of technology operating absent any guiding human hand, as the plaintiff urges here. Human authorship is a bedrock requirement of copyright."

The decision in *Thaler* was further clarified by The Compendium of Copyright Office Practices regarding Copyright protections and artificial intelligence. "The Office concludes that, given current generally available technology, prompts alone do not provide sufficient human control to make users of an AI system the authors of the output".[xxv] The rationale behind this decision was rooted in the principles of the United States Constitution. According to the report, "the United States is bound by our own Constitution and copyright principles. We should not abandon or distort those principles simply because other countries may not share them. Rather, we should make a persuasive case that a human-centered approach is good policy and inherent to copyright." [xxv]

However, aside from designs that are created completely from artificial intelligence, there is a second type of design that uses artificial intelligence as an assistant in the creative process. This is one of the more common uses of AI in the fashion industry today. For example, various designers use artificial intelligence to visualize and then incorporate different patterns and textures. Designers often argue that these designs fulfill the requirement of "original expression" because these designs represent a sort of hybrid where the designer and technology work together to create an original work. The case law here, however, remains unclear. This is because the threshold of what constitutes AI-generated vs hybrid outputs is rather blurry. Even in cases of text-to-image prompts, which would normally be classified as AI-generated outputs, the human author has to spend considerable amounts of time experimenting with different prompts till they get their desired output. Beyond this, once the design has been created by the technology, the human designer has to spend time editing the proportions of the design and applying it to the context of the market today. Yet in these situations, these works are often not awarded copyright. Because the line between what constitutes a hybrid work is so blurry, it is difficult to determine what exactly determines a hybrid work.

We can see the copyrightability of such hybrid works in the graphic novel, Zarya of the Dawn. The graphic design was written by author Kristina Kashtanova, who used artificial intelligence to generate images from prompts. She later arranged these images and added text creating her graphic novel Zarya of the Dawn. This process can be compared to a fashion designer who generates portions of a design (such as textures or colors) using artificial intelligence and then later arranges or edits them to his or her liking. The copyright office initially awarded Zarya a copyright for her novel, but later cancelled her original copyright and awarded her with a more limited copyright, which consisted of just the text and the arrangement of the images. This is because the copyright awarded to the images in question did not fulfill the de minimis requirement which is the minimum amount of creativity required for a work to be copyrightable.

The decision in Zarya sheds further light on the de minimis requirement. The copyright office in Zarya observed that "[a]s a constitutional matter, copyright protects only those constituent elements of a work that possess more than a de minimis quantum of creativity." As it relates to the human involvement in such a process, the copyright office ruled that there can be no copyright in a work in which "the creative spark [employed by the author] is utterly lacking or so trivial as to be virtually nonexistent."[xxviii]The arrangement of the images and the text qualified under this doctrine because they both required a quantum of creativity that was entirely at the author's own volition. The images in question did not fit this requirement. According to the office, "Users of Midjourney do not have comparable control over the initial image generated, or any final image", which means that it is not their creativity that results in the work in question. Kashtanova argued that the generation of images took significant effort on her part because she spent close to a year carefully rewording and "training" mid-journey to produce her desired output. The court, however, disagreed, stating that "[they] will not consider the amount of time,

effort, or expense required to create the work" because they "have no bearing on whether a work possesses the minimum creative spark required by the Copyright Act and the Constitution"[xxxvii]

From the Zarya case, we can infer that in order to provide the quantum of creativity that is required, the author must have complete control over the outputs that are produced and must exert significant influence over the process. The technology in question cannot produce any images that have any elements that were not clearly spelled out by the user. However, in practice this is incredibly difficult due to the fact that the majority of creative artificial intelligence models do not allow users to have this level of control over the output. Applied to the fashion industry, we can conclude that only technology that provides total control to the designer as it pertains to the output in question can produce designs that are eligible for copyright.

An argument that is made in relation to allowing copyright for AI-assisted and generated designs stems from the Work Made for Hire doctrine. This doctrine was acknowledged by the court in the case of Zarya as a potential avenue for allowing a copyright for Kashtanova's book. Under the WMFH doctrine "employers generally own works made by employees within the scope of their employment" [xxix] To qualify as work made for hire, one of two conditions must be met: (1) the work must be created by an employee within the scope of their employment, or (2) it must be created by an independent contractor under a written agreement that explicitly states the work is made for hire and falls into certain categories which are defined by the statue. Using this doctrine, the employee is the generative AI model and the employer is the designer. The legal basis of this argument can be seen in the case of *Community for Creative Nonviolence v. Reid, 490 U.S. 730*[xxx] where the Supreme court failed to define the exact meaning of employee or employer, stating only that the Common Law master-servant relationship should be applied here.

Under Common Law the master-servant relationship is defined as one where the "hiring party [has the] right to control the manner and means by which the product is accomplished".[xxx] To be considered an employer, the party in question must have significant control over how the work was created and what the work itself consists of. The purpose of the doctrine is to acknowledge that, in several employment scenarios, the copyrightable work, while created by the employee, would not exist without the creative direction and ideas of the employer. When applied to generative AI, we can acknowledge that artificial intelligence itself cannot independently create any creative medium. It was the creative direction of the designer that led to the design in the first place. This argument seeks to circumvent the human authorship requirement set by the copyright office.

The counterargument that is often made and cited by the Copyright Office and some designers is that allowing designs which are created by artificial intelligence to gain copyright protection undermines the efforts and motivation of human designers. This is because it is often considerably more efficient to utilize artificial intelligence in creative endeavors, which means that more companies will come to favor it over human designers. According to the Copyright Office, "If authors cannot make a living from their craft, they are likely to produce fewer works. And in our view, society would be poorer if the sparks of human creativity became fewer or dimmer."[xxv]. The fear here is that artificial intelligence will eventually come to replace human artists and designers. However, this argument is flawed for several reasons. Creativity and Art are created primarily through portraying human emotion. This is particularly evident in the high fashion industry, where the primary goal is to portray or invoke a certain human emotion. Generative AI cannot currently portray such emotion. This sentiment is echoed by several high-fashion houses in particular, who state that not using artificial intelligence is a way to differentiate themselves from their

competitors. There will always be a market that exists, particularly in creative spaces, for human creativity/emotion, which will never be emulated by artificial intelligence. Designs that are created by artificial intelligence exist in a completely separate market from this one. Furthermore, the use of new technology has never in the past made artistry obsolete. After all, painters did not stop painting after the invention of the camera. The market for paintings only slightly shifted focus and an entirely new market sprang up for photographs.

The United States is hardly the only country to grapple with the idea of copyright protections for Generative AI. Internationally, legislation regarding the copyrightability of generative AI continues to be debated. However, several countries, including China, New Zealand and the United Kingdom, allow copyright protection for works which were created by generative AI. Under current United Kingdom Laws, the author of a copyrightable work "generated by computer in circumstances such that there is no human author of the work [is the] person by whom the arrangements necessary for the creation of the work are undertaken." Such a scenario is concerning for innovation in the United States. Restrictions such as this one allow foreign designers to have an advantage over those in the U.S. Innovators and fashion companies are much more likely to create in a country under the convention, such as China or the United Kingdom, which allows copyright in such an instance and sell in the U.S. This gives foreign designers and companies a distinct advantage over American ones. Policies such as this one unintentionally favor foreign businesses over American companies, reducing innovation in our country.

As it pertains to the purpose of copyright in the United States, it has always been to "promote the progress of Science and useful Arts, by securing for limited times to Authors and Inventors the exclusive right to their respective Writings and Discoveries". Since its inception, copyright in the United States was not created to protect human interests but to promote progress in the U.S.

There is no better way to do such a thing than to allow for the copyright of AI-generated materials here in the United States. This will allow for greater innovation in an ever-growing industry and help ensure that the U.S continues to stay competitive in global markets. It was impossible for the founding fathers to predict and account for the technology that would exist today. This idea was at the forefront of allowing copyrights for photographs in *Burrow-Giles Lithographic Co. v. Sarony.* While the lower courts were initially against the awarding of a copyright for something that was simply created by a machine, the Supreme Court understood that providing such a copyright was necessary for furthering the purpose of the Copyright Clause. It is this logic that should be applied in providing copyright protections for AI-generated designs.

Similar to legislating the training process of generative AI, we can once again look towards a proposed statute in France to provide us with a blueprint in drafting comprehensive legislation here in the U.S. Current legislation in the European Union regarding AI-generated works as a whole is arguably quite similar to legislation here in the United States. In both the U.S. and EU copyright protections are not typically awarded to works that are generated completely by artificial intelligence. To be eligible for copyright within the European Union, the work in question must be original, meaning "it reflects the personality of its author, as an expression of the author's free and creative choices[,]" and…..must be "identifiable with sufficient precision and objectivity" [xxxi] This is in direct contrast with the United Kingdom, which under its CDSM directive names "the machine's owner [as the] default owner of any intellectual property it produces and any benefits that would otherwise subsist in a natural person owner"[xxvii] This essentially means that AI- generated works in the UK are eligible for copyright and the owner of these copyrights is the designer who made the work possible.

The UK's rationale for allowing copyrights in such instances is to "drive growth and prosperity by making responsible innovation easier and reducing regulatory uncertainty." [xlvii] The British government recognized that the principles of the CDSM directive (UK copyright laws) were to encourage and foster innovation within the country. They recognized that artificial intelligence and related technology were the way forward, and not embracing such technology would only be detrimental to innovation in the country. It was this same realization that led to French lawmakers drawing up Proposition de loi, n° 1630[xxxii]. The eight French MPs who drafted the proposition felt as though they must protect creation and innovation according to a humanist principle while falling within the provisions of the intellectual property code.

The purpose of *Proposition de loi, n° 1630*, is to reform the existing copyright norms within the country as they relate to artificial intelligence. Article two in particular deals with the copyrightability of AI-generated works. The article states that "When the work is created by artificial intelligence without direct human intervention, the only rights holders are the authors or assignees of the works that made it possible to conceive the said artificial work."[xxxii] This proposition, which is currently tabled in the French Assembly, seeks to mimic copyright law within the UK in order to allow for protection for AI-generated works with little to no human involvement.

Similar provisions should be enacted within the United States for several reasons. First, it is important to understand that the purpose of copyright in the United States was never to protect human artists, but innovation itself. Such a provision will only seek to further encourage innovation by providing the necessary incentives, which is exactly what the founders intended. As artificial intelligence continues to develop, it will only integrate more sectors within our society. For us to innovate within these sectors, it is important for us to embrace the technology that makes competitive advances possible. This is particularly important if we consider the

implications of the Berne Convention, which will force the United States to recognize such protections even if they are not enacted within the country. This puts American artists at a disadvantage when compared to their foreign competitors and counterparts.

The impact of such a proposition on the fashion industry would be as follows. First, it will allow designers who use artificial intelligence in the design process to be awarded copyright protections for their works. This would be beneficial in two different ways. Many new designers rely on artificial intelligence as a way to break into a rather exclusive and niche industry. This would help further growth within the fashion sector as these designers could bring forth new innovative methods of design using artificial intelligence. In addition, artificial intelligence has the potential to help increase efficiency within the industry, leading to billions of dollars in new revenue. For existing fashion companies, particularly those that specialize in haute couture and high fashion, protection of artificial intelligence will serve as a way for them to differentiate themselves from their competitors by focusing on human artistry. These industries that serve a different customer base could easily signal that they are not using artificial intelligence to keep this customer base. Overall, increased copyright provisions will help strengthen existing sectors while also encouraging the growth of new ones.

Due to its benefits in the fashion industry and beyond, legislation similar to Proposition de loi, n° 1630, which allows fashion designs created by artificial intelligence to be copyrighted should be enacted in the United States as well.

IV. Increasing transparency regarding the use of Artificial Intelligence in the Fashion Industry

Perhaps the biggest concern as the use of artificial intelligence continues to grow in various industries is the lack of transparency provided by corporations. While generative AI and artificial

intelligence certainly have several positives, it is important for customers to have the opportunities to make informed decisions regarding the products that they purchase. This is particularly notable in the field of Haute Couture in the fashion industry. Haute Couture refers to the creation of exclusive high fashion products that rest upon the highest levels of human creativity and emotion. Customers in this field often spend thousands of dollars on a singular product with the expectation that the product they will be receiving is created by a designer with the highest level of expertise. One of the biggest concerns with this set of clientele is that they will not receive the level of human emotion and creativity that they paid for due to the use of generative AI. This concern is not limited to the fashion industry. With the rise of AI has come the rise of deep fakes, false information, and copyright infringements spanning across various industries. Customers and users across the country have the right to be informed regarding both the product they are receiving and the content that they are consuming. In this way, requiring that AI-generated designs be marked as such is no different from the requirement that material percentages be marked on clothing.

During the Biden administration, there seemed to be some progress as it relates to greater transparency in the field of artificial intelligence. Much of this progress was contained within an executive order known as Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence. The purpose of this executive order, which was signed by former President Joe Biden, is "to make it easier to detect deep fake content andset an example for the private sector and governments around the world and make it easy for Americans to know that the communications they receive from their government are authentic" [xxxiii] . This was part of the previous administration's commitment to developing technology that aids in the development of watermarking provisions for content created by generative AI. However, this progress was short-lived with the Trump administration revoking this order after a few days in office.

Therefore, currently at the federal level, the only requirements regarding AI transparency rest with the U.S Copyright Office. U.S. Copyright Office currently requires designers to disclose the portions of their works that are created by generative AI. This requirement is to ensure that only portions of a work that have been created using human creativity and emotion are eligible for copyright protection. However, the caveat to this is that there is no requirement for the same disclosures to be made when a work is published online. As it relates to the fashion world in particular, this means that a designer who wants to apply for a copyright regarding one of their designs will have to tell the Copyright Office and not their clientele that generative AI was used in the design process.

California, however, has decided to enact specific statewide legislation in order to address this issue. The California AI Transparency Act, which took effect in January 2026, was created to enhance transparency in the use of generative AI, specifically focusing on training data and the identification of AI-generated content. The Act requires a "disclosure [that] would identify that the output is AI-generated content, be permanent (or 'extraordinarily difficult to remove'), and be 'clear, conspicuous, appropriate for the medium of the content, and understandable to a reasonable person". Furthermore, providers of generative AI models are required to "make available an AI detection tool to identify content created by their system 'at no cost to the user'"[xxxiv] Finally, this act requires that the training data which is used to train generative AI models be published and readily available for users.

While the California AI Transparency Act is the only specific piece of enacted legislation in the country targeting watermarking provisions for generative AI, similar legislation already exists in Europe. Under the GPAI Act, "Providers of AI systems would have to disclose that the content they provide is AI-generated so that users can make informed decisions on further use".

In addition to this, "GPAI/foundation models will have to comply with specific transparency obligations before being placed on the market. They will have to implement measures that respect EU copyright law, applying state-of-the-art technologies, and publish a detailed summary of the copyright-protected content used to train their AI algorithms"[xxxv] The California AI Transparency Act is essentially the American version of an already implemented piece of legislation in Europe.

The application of such an act on the fashion industry would be as follows. First, designs that are created or generated by artificial intelligence would be clearly marked. This would minimize the deception or smoke screen behind purchasing decisions. Consumers who are paying high prices for human creativity and emotion can be confident in the prices that they pay. Furthermore, fashion companies that do not use generative AI can easily differentiate themselves from those who do, which will help create market advantages in both sectors. As it pertains to training data, both designers and artists will have the ability to understand exactly how their copyrighted materials are being used in the generative AI training process, which will allow them to make informed decisions and minimize copyright violations by companies. Due to its benefits in the fashion industry and beyond, legislation similar to the California AI Transparency Act or the EU AI Act should be enacted in the United States as well.

V. Limitations and Future Direction

It is important to acknowledge that the majority of the ongoing cases regarding artificial intelligence are still in the very early stages of litigation, which means much of the legal landscape regarding AI governance remains unknown. Therefore, this paper and others like it can only draw inferences through similarities with already existing cases/case law in both the U.S. and EU. Furthermore, we are unaware of the extent to which governments will be able to legislate artificial intelligence and copyright restrictions, and can only imagine what would be a "best-case scenario".

As these cases continue to be decided, we can get a more comprehensive picture of the extent to which the legislation which was described in this paper can be implemented within the U.S.

Furthermore, the technical landscape which is surrounding generative AI is rapidly changing, which complicates the situation as well. As AI evolves, the legislation surrounding it must evolve as well. This leads to a situation where regulating artificial intelligence becomes playing a game of catch-up.

VI. Conclusion

Artificial intelligence is no doubt the technology of the future. As generative AI continues to evolve and advance, there is no doubt that it will continue to integrate into other industries, fashion, and beyond. Therefore, it is important that we look to protect both consumers and designers by implementing comprehensive legislation regarding Generative AI within the United States.

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