The Fashion Designer as Author: The Case of a Danish T-shirt

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Introduction

Where does design belong in the hierarchy of the arts? Is a designer capable of creating works of artistic expression that match the works of fine artists? And *fashion* designers, in particular: What is their status as measured against, say, the designers of applied arts? Within the framework of copyright law, we can find a straight answer to these questions. Since copyright law was introduced in the eighteenth century in a number of European countries, as well as in the United States, it has served to recognize the "skill, labor, and judgment" or "spark of creativity" that authors and artists invest in their works.[1] Thus, under U.S. copyright law (and a large number of other copyright laws in the world) visual artists hold exclusive rights to reproduce, distribute, and display in public their works for the lifetime of the artist plus 70 years.[2] Since the mid-twentieth century, in the United States, designers of applied art have received a similar protection for any (aesthetic) elements of their designs that exist "independently of the utilitarian aspects."[3] Fashion designers, however, are granted no protection under U.S. copyright law. Courts have consistently found that in fashion designs, the aesthetic element is inseparable from the utilitarian element. In other words, they see no creative "remainder" that is worthy of copyright protection.[4]

Some national laws of copyright—notably those of the French—contradict the described hierarchy of the arts. Since the early twentieth century, the doctrine of *"l'unité de l'art"*—the unity of art—has prescribed that a French law judge is to evaluate neither the merit nor the purpose of a creative work. Original expression manifested in any genre or form—be it a sculpture or a dress—must be protected as a copyright work in France.[5]

Nonetheless, the traditional approach for national laws of copyright has been to discriminate between works of "pure" art (i.e., fine art) and works of art that are also "useful articles"—as in U.S. copyright law—and to offer protection only to the former. As it is, this circumstance has led to interesting legal practices in countries where design plays an important cultural role. A striking

1 For the former, see *University of London Press Ltd. v. University Tutorial Press Ltd.,* [1916] 2 Ch. 610. The latter was formulated by the U.S. Supreme Court in *Feist Publications, Inc., v. Rural Telephone Service Co.,* 499 U.S. 340 (1991).

2 The Berne Convention, which has 165 nations as contracting parties, obliges member states to protect "literary and artistic works" for, as a minimum, the lifetime of the author and 50 years after his or her death. See *Berne Convention for the Protection of Literary and Artistic Works* (Paris Act of July 24, 1971, as amended on September 28, 1979).

3 U.S. copyright law as contained in Title 17 of the U.S. Code defines in sec. 101 works of "artistic craftsmanship" as objects of copyright law "in so far as their form but not their mechanical or utilitarian aspects are concerned; the design of a useful article, as defined in this section, shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article." The same section defines a "useful article" as "an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information. An article that is normally a part of a useful article is considered a 'useful article.'" Today, this definition is not taken to mean that a "useful article" must be physically separable; rather, U.S. courts have interpreted the issue to be whether there is conceptual separability between the utilitarian and the aesthetic aspects of a work. As can be imagined, this separation has not always been easy. The seminal case is *Mazer v. Stein* 347 U.S. 201 (1954).

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example arises in Denmark. Heirs to a renowned tradition, Danish designers have long been considered contributors to the arts. To be sure, this recognition has along the way manifested itself in Danish copyright law. Yet, the length of time over which the intrinsic "utilitarian element" of design kept designers from being granted copyright protection of their works is worth noting.

In Denmark, fine art has qualified for copyright protection since 1837. By the turn of the twentieth century, the Danish parliament was prepared to recognize designers of applied arts as subjects of copyright law, too. The *Act on Authorial and Artistic Rights of 1902* was formulated in such a way as to enable the inclusion of applied art within its realm of protection. However, in 1907 the Supreme Court—in a ruling that concerned a Royal Porcelain coffee pot designed by Arnold Krog—declared that "industrial goods" had no place within the framework of copyright law. This ruling caused the Danish parliament to amend the law the following year, adding a provision to specify that:

> …original artistic works intended to be prototypes for industrial art and handicrafts, as well as the objects created on the basis of such works, are to be considered works of art whether or not these are produced individually or in a larger quantity.[6]

By this amendment to Danish copyright law, the applied arts were formally allowed a legal status that had previously been reserved for the fine arts.[7] Yet Danish courts were not altogether convinced. Rulings from the first half of the twentieth century reveal a degree of hostility toward offering copyright protection to works of applied art: Such rulings resulted from the works' "practical purpose."[8]

Eventually, the Danish *Copyright Act of 1961* specifically mentioned applied art as an object of protection.[9] Since then, a variety of tea and coffee sets, knives and forks, chairs, tables, lamps, bottle openers, dishwashing brushes, and more have been granted copyright protection insofar as they are found to be the result of an author's "personal," "creative," and "independent" effort.[10] Hence, a wide range of different useful articles have been found copyrightable—with one conspicuous exception: fashion apparel. Although formally in Danish copyright law nothing prevents such a finding, fashion design simply has never attained the status of a copyright work in Denmark. In no case yet have courts found a fashion design to possess the "degree of originality" required to qualify for copyright protection under Danish law. Given the scale of creativity that is evident in the works of contemporary Danish fashion designers, including Henrik Vibskov, Stine Goya, Anne Sofie Madsen, Asger Juul Larsen, Astrid Andersen, and many others, this situation may seem unjustly chauvinist and

4 A recent series of U.S. bills proposing that fashion (e.g., clothing, handbags, purses, wallets, tote bags, belts, and eyeglass frames) be included as an object of copyright law have all failed. Such bills include *H.R. 5055: To Amend Title 17, United States Code, to Provide Protection for Fashion Design* (2005), *H.R. 2033 Design Piracy Prohibition Act* (2007), and *S. 3728 Innovative Design Protection and Piracy Prevention Act* (2010).

5 According to L112-1 of the French *Code de la propriété intellectuelle*: "les dispositions du présent code protègent les droits des auteurs sur toutes les œuvres de l'esprit, quels qu'en soient le genre, la forme d'expression, le mérite ou la destination." ("The provisions of this Code shall protect the rights of authors in all works of the mind, whatever their kind, form of expression, merit or purpose.")

6 *Law of 28 February 1908 to amend Section 24 of the Act on Authorial and Artistic Rights of 29 March, 1904.*

7 This step was part of a general movement in European copyright law. Copyright protection of applied art had been introduced in France with the *Law of 11 March 1902* and in Germany with the *Law of 9 January 1907*. The *British Copyright Act 1911* included "works of artistic craftsmanship" as objects of copyright protection. In Sweden copyright protection of applied art was introduced in 1926, and in Norway in 1930.

8 For more on these rulings see Stina Teilmann-Lock, "What's Worth Copying Is Worth Protecting: Applied Art and the Evolution of Danish Copyright Law," in *Scandinavian Design: Alternative Histories*, ed. Kjetil Fallan (Oxford: Berg Publishers, 2012), 35-47.

9 *Act on Copyright in Literary and Artistic Works of 31 May 1961,* Sec 1. The Danish term for applied art is "brugskunst," which derives from the German: "Gebrauchskunst."

10 See Morten Rosenmeier, *Værkslæren i ophavsretten* ["The Concept of the Work in Copyright Law"] (Copenhagen: DJØF Publishing, 2001).

Figure 1
Nørgaard T-shirt No. 101. Photo by the author.

old-*fashioned* on the part of the Danish legal establishment. Notwithstanding, as mentioned, this line toward fashion is common in most national laws of copyright.[11]

Designers as Authors?

To understand the direction copyright law has taken historically in relation to design, and fashion design in particular, an essential first step is to look at the concept of the "author." As it is, copyright protection is only offered to works that are said to have been created by an "author." Our modern understanding of an author as an inspired individual creator was given its most significant early characterization by the English Romantic poet, Edward Young, in *Conjectures on Original Composition* (1759). In this text, Young gave expression to a notion of authorship, familiar to us today, in which an "author" is perceived of as an "original writer" whose work "rises spontaneously from the vital root of Genius."[12]

Young, to be sure, was referring to the originators of literary works when speaking of authors; he was not thinking of the creators of cotton T-shirts. However, in 2009, the Danish fashion designer, Jørgen Nørgaard, was able to congratulate himself on having been found, by one of the three judges of the Danish Maritime and Commercial Court, to be, in a legal sense, the "author" of an "original work:" the so-called "Nørgaard T-shirt No. 101" (see Figure 1).[13] The Nørgaard T-shirt is at the same time a minimalistic and an extraordinary piece of design. It has been on the market since 1967, and it has been popular among Copenhagen women of fashion almost without interruption until today. It is cherished for its lasting quality and simple design in pure cotton. Only the assortment of colors has changed over the years. In the copyright infringement case, *J. Nørgaard A/S* v. *Rebecca Mode Aps*

11 The Berne Convention leaves it to national legislation to determine how and whether "works of applied art" and "industrial designs" and "models" are to be protected by copyright law.

12 Edward Young, *Conjectures on Original Composition in a Letter to the Author of Sir Charles Grandison* (Leeds: The Scolar Press Limited, 1966 [1759]), 11.

13 *J. Nørgaard A/S v. Rebecca Mode Aps* (Danish Maritime and Commercial Court, March 27, 2009).

(heard by the Danish Maritime and Commercial Court in 2009 and subsequently on appeal by the Danish Supreme Court in 2011), the copyright-ability of the Nørgaard T-shirt was tested.

Despite the opinion of one judge, the majority of the judges in the first court—along with all the judges of the Supreme Court—held that the T-shirt was *not* protectable by copyright. Jørgen Nørgaard was not to be regarded as the "author" of an "original work" as defined by copyright law. Hence, for the time being, Nørgaard remains a businessman trading in T-shirts; he is not an author creating artistic works in cotton. Accordingly, protection against imitators of his T-shirts is to be sought through the legal remedy of unfair competition.[14]

Being recognized as an "author" entails not merely an esteemed social status. Emphatically, it is a position with a claim to legal rights. If you are the "author" of an "original literary or artistic work," as defined by the Danish Copyright Act, you own the copyright in the work. This ownership implies "the exclusive right to control the work by reproducing it and by making it available to the public, whether in the original or in an amended form, in translation, adaptation into another literary or artistic form or into another technique."[15] The exclusive right lasts for the whole of your lifetime and (to the benefit of your heirs) for 70 years *post mortem autoris*. Moreover, authors have "moral rights" in their work. The "right of paternity" gives an author the right to "be identified by name as the author in accordance with the requirements of proper usage, on copies of the work as well as if the work is made available to the public."[16] By the same token, the "right of integrity" stipulates that a copyright work "must not be altered nor made available to the public in a manner or in a context which is prejudicial to the author's literary or artistic reputation or individuality."[17] In other words, authors have a far-reaching control over the dissemination and treatment of their works. As long as the Nørgaard T-shirt remains an "ordinary" consumer product, no one will be prevented from making their own copies of it or from using it for a number of purposes that the originator of the shirt does not agree to. The law against unfair competition, which protects T-shirts and many other consumer products, prohibits bad marketing practice only: What is outlawed is to market a *copycat* T-shirt in a way in which it might be confused with the *real* shirt.

Since the eighteenth century, which saw the introduction of copyright acts in Europe and the United States, the range of subject matter included under copyright law has expanded vastly. The world's first law on copyright, the Statute of Anne 1710, offered protection against the unauthorized copying of books only. Today, works that may be eligible for copyright protection include sculptures, paintings, websites, music, films, photographs, buildings, furniture, jewelry, software, and much more.[18] In other

14 Apart from the copyright infringement claim, the plaintiff, Jørgen Nørgaard, had also sued for unfair competition—for infringement of Sec. 1 of the Danish *Marketing Practices Consolidation Act,* which stipulates that "traders subject to this Act shall exercise good marketing practice with reference to consumers, other traders and public interests." By marketing a T-shirt which bore a close resemblance to the Nørgaard T-shirt, the defendant, so it was claimed, had failed to act according to "good marketing practice."

15 *Consolidated Act on Copyright* (Act No. 202 of February, 27, 2010), Sec. 2(1).

16 Ibid., Sec. 3(1).

17 Ibid., Sec. 3(2).

18 See e.g. ibid., Sec. 1. Similarly in other Berne Convention countries.

words, sculptors, painters, photographers, architects, cabinet-makers, and software developers are all authors—"inspired individual creators" according to the law of copyright. That T-shirt designers, too, might one day be considered authors by copyright law is not unthinkable.

Such a development is not accidental. Rather, it is the result of a remarkable interplay between the concept of the modern author as promoted by Edward Young (and the Romantic Movement) and the response of copyright law to the many claimants for protection in the three centuries since 1710. Still, the concept of the author as an individual creator remains the cornerstone of copyright law; copyright exists *because* books and other works have "authors."

What Was an Author?

The importance of Young's *Conjectures* derived not least from the particular force of his expression. Young spelled out literary composition as an organic process, the product of which was original work:

> …let not great Examples, or Authorities, browbeat thy Reason into too great a diffidence of thyself: Thyself so reverence as to prefer the native growth of thy own mind to the richest import from abroad; such borrowed riches make us poor. The man who thus reverences himself, will soon find the world's reverence to follow his own. His works will stand distinguished; his the sole Property of them; which Property alone can confer the noble title of an *Author;* that is, of one who (to speak accurately) *thinks,* and *composes;* while other invaders of the Press, how voluminous, and learned soever, (with due respect be it spoken) only *read,* and *write.*[19]

By representing writers as the creators of unique works that spring from an inherent source of genius, Young redefined an "author" as an individual who deserves the sole credit for his or her work. And within this framework of thinking, a work is its author's property. Such a Romantic concept of authorship was formulated in opposition to the Renaissance author, who was considered a kind of craftsperson, trained in rhetorical arts and the classics, citing sources for readers to recognize.[20] Renaissance writers were, accordingly, unlikely to claim exclusive rights to their works. However, as Romantic ideas spread in the eighteenth century, crediting writers with originality and recognizing individual proprietorship of texts became increasingly common. In this way, the shaping of the Romantic concept of authorship and the emergence of authorial rights are inseparable.[21] The re-conceptualized figure of the individual author became an indispensable justification for copyright protection. Thus, in the debates that preceded the introduction of

19 Young, *Conjectures on Original Composition*, 53-54.

20 See e.g., Thomas Greene, *The Light in Troy: Imitation and Discovery in Renaissance Poetry* (Berkeley: University of California Press, 1982) and Ann Moss, *Printed Commonplace-Books and the Structuring of Renaissance Thought* (Oxford: Clarendon Press, 1996).

21 See Carla Hesse, "Enlightenment Epistemology and the Laws of Authorship in Revolutionary France, 1777–1793," *Representations*, no. 30 (1990): 109-37; Molly Nesbit, "What Was an Author," *Yale French Studies* 73 (1987): 229-57; Mark Rose, "The Author as Proprietor: Donaldson v. Becket and the Genealogy of Modern Authorship," *Representations*, no. 23 (1988): 51-86; and Martha Woodmansee, "The Genius and the Copyright: Economic and Legal Emergence of the 'Author,'" *Eighteenth-Century Studies* 17, no. 4 (1984): 425-48.

copyright with the Statute of Anne in 1710, the author was proclaimed the master of his or her own writings.[22] Systems of royal privileges in different European countries, including England, had provided members of book guilds with exclusive rights to book printing, but the Statute of Anne for the first time in history singled out the author as the primary rights holder:

> Whereas Printers, Booksellers, and other Persons, of late, have frequently taken the Liberty of Printing, Reprinting, and Publishing, or causing to be Printed, Reprinted, and Published Books and other Writings, without the Consent of the Authors or Proprietors of such Books and Writings, to their very great Detriment, and too often to the Ruin of them and their Families.[23]

The emphasis on the figure of the author in copyright law came to be even more important in Continental law, from which moral rights originate.[24] Today, we perceive of copyright as something that originates in the author. As things have turned out, the notion of the author as an inspired individual creator has proven itself a principal justification for the exclusive rights of copyright law.[25] The Romantic notion of authorship has also supplied copyright law with a remarkably elastic *subject* of copyright. The subject of protection by copyright law is, precisely, the "author" understood as an inspired, creative individual. And the products of such individuals may well be realized in a variety of forms—sculptures, paintings, websites, films, music, photographs, buildings, furniture, jewelry, software, and so forth. All such products can be protected by copyright because of their status as "works of authorship." That the subject of copyright has been defined in terms of an inner "creative" process has been crucial for the modern development of copyright law. As a result of this definition, a very wide range of different types of "creativity" have come under copyright protection. In addition, by no means inconceivable, as mentioned, is the possibility that fashion designs might one day come under copyright protection in Denmark. This adjustment would occur as soon as the majority of judges in a Danish court find themselves satisfied that the originator of such a fashion design is an author and the design, accordingly, is a work of authorship.

In fact, in a number of other countries, including Sweden and France, copyright protection is already extended to fashion.[26] However, in Denmark the general stance has been that copyright law should not be instrumental in preventing the participation of "fair followers," which characterize and continue to play a central role in the fashion market: Without the signals that such followers and imitations provide, something might hardly be said to be "in fashion." For the sake of balancing competition in the marketplace, Danish courts have long resisted the granting of copyright protection to fashion.[27]

22 See the discussion in Mark Rose, *Authors and Owners: The Invention of Copyright* (Cambridge, MA: Harvard University Press, 1993), Chap. 3. See also Joseph Loewenstein, *The Author's Due: Printing and the Prehistory of Copyright* (Chicago: The University of Chicago Press, 2002).

23 *An Act for the Encouragement of Learning by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies* 8 Anne c. 19 (1710) (Stature of Anne).

24 See Carla Hesse, *Publishing and Cultural Politics in Revolutionary Paris, 1789-1810* (Berkeley: University of California Press, 1991); Martha Woodmansee, *Author, Art, and the Market: Rereading the History of Aesthetics* (New York: Columbia University Press, 1996); Stina Teilmann, "Justifications for Copyright: The Evolution of *le droit moral*," in *New Directions in Copyright Law* vol. 1, ed. Fiona Macmillan (Cheltenham: Edward Elgar Publishing, 2005), 73-87; and Eckhard Höffner, *Geschichte und Wesen des Urheberrechts* ["The History and Nature of Copyright"] (Darmstadt: Verlag Europäische Wirtschaft, 2010).

25 In general, three dominant types of justifications of copyright exist today: the argument of natural right, the cultural argument, and the economic argument. According to the principle of natural justice, authors deserve the fruits of their labor: They should justly be masters of their own intellectual creations. The cultural argument promotes the idea that writers and artists serve the interest of the state and the public: Royalties are rewards and encouragements to create. The urge to protect investments and to prevent unfair competition, combined with the analytical tool of a cost/benefit analysis, constitute the main components of the economic argument. Copyright is seen as a legislative means of protecting and inciting economic investments in works of, for example, literature, architecture, art, and music. For more on this, see Stina Teilmann-Lock, *British and French Copyright: A Historical Study of Aesthetic Implications* (Copenhagen: DJØF Publishing, 2009).

26 In Sweden, where the legal criteria for copyright protection are the same as in Denmark, a number of rulings have

Figure 2
Heart Beat T-shirt. Photo by the author.

The Nørgaard T-Shirt in Court

For a long time Danish courts also resisted the granting of copyright to designers other than fashion designers. During the first half of the twentieth century, the furniture designers who came to represent and even personify the "Danish Modern" movement repeatedly had their works assessed in Danish courts with the intention that their copyright ability would be confirmed. Yet time after time, the designs were denied protection on the grounds that they were the results of the "skilled efforts of a craftsman" rather than "works of art."[28] However, in 1960 a new development began: Copyright protection was granted to "The Chair" by Hans Wegner. Thus went the decision of the High Court of Eastern Denmark in *Snedkermester Johannes Hansen* v. *Firmaet I. Thorballs Eftf ved Viggo Johansen*.[29] At the trial, numerous declarations paying tribute to the artistic expressiveness of the chair were cited by the plaintiff and producer of Wegner's chair, master cabinetmaker Johannes Hansen. Mogens Koch in his capacity as a court-appointed expert described "The Chair" as a "marked example of what is covered by the law's [category of] 'original work of art.'"[30] The plaintiff was thus able to establish as a generally recognized fact that Hans Wegner had created a "classic work of art" remarkable for its "aesthetic qualities," and Wegner himself was pronounced "an artist."[31] The High Court's ruling confirmed this view. And this ruling helped to effect a change in Danish copyright law, by which a piece of applied art for the first time was expressly recognized in the text of the law as an object of copyright protection.[32]

The line of argument employed by the plaintiff in the *Nørgaard* case was remarkably similar to that of the successful counsel representing Hans Wegner and his chair. The *Nørgaard case—J. Nørgaard A/S v. Rebecca Mode Aps*—was initially heard by the Maritime and Commercial Court in 2009. However, the dispute had

confirmed that fashion may be a work of authorship: the Högsta Domstolen decision of March, 28, 1995, the Hovrätten för Vestra Sverige decision of November 1, 1996, and the Svea Hovrätt decision of December 21, 2006. For French statutes see L112-2 (14) of the French Code *de la propriété intellectuelle*.

27 See Jens Schovsbo and Morten Rosenmeier, *Lærebog i Immaterialret* ["Textbook on Intellectual Property Law"] (Copenhagen: DJØF-Publishing, 2011), 157ff.

28 U.1954.170Ø, 170ff.

29 U.1960.483Ø.

30 Ibid, 488.

31 Ibid, 486ff.

32 *Act on Copyright in Literary and Artistic Works of 31 May 1961,* Sec. 1.

actually begun in 2001 when, in a letter directed to Rebecca Mode Aps, Jørgen Nørgaard had complained that Rebecca Mode was producing and marketing a T-shirt—labeled "Heart Beat Style Drop Needle" (see Figure 2)—that was very similar to Nørgaard's classic T-shirt No. 101. Inasmuch as Rebecca Mode continued to produce and market the T-shirt, Jørgen Nørgaard, on June 30, 2003, requested a preliminary injunction to stop it. The preliminary injunction was granted by the Bailiff's Court on July 15, 2003; it was considered probable that the marketing of Rebecca Mode's T-shirt was an act of unfair competition. Soon afterward, 81 boxes containing 2,545 Heart Beat T-shirts were seized from Rebecca Mode's warehouse.

In June 2004, however, the High Court lifted the injunction on the grounds of the unwarrantably long delay between Jørgen Nørgaard's first address to Rebecca Mode and his taking the legal step of requesting the injunction. In other words, the director of Rebecca Mode could have his 81 boxes back and was free to market the Heart Beat T-shirt again. By then, quite clearly being samples of "last-year's fashion," the T-shirts were sold off cheaply at a street market in Copenhagen.

However, the story did not end there. Jørgen Nørgaard decided to pursue the matter further, and the result was the case *J. Nørgaard A/S* v. *Rebecca Mode Aps*. As plaintiff in the case, Jørgen Nørgaard claimed that his T-shirt No. 101 was a copyright work and that Rebecca Mode's Heart Beat Style Drop Needle-shirt was an infringing copy. Nørgaard further maintained that the marketing of the latter constituted a breach of competition law. The defendant, the director of Rebecca Mode, pleaded not guilty on all counts and made the counterclaim that Nørgaard should be obliged to pay DKR 1, 269,000 (approximately USD 230,000) in compensation for lost revenue resulting from the injunction.

A remarkable amount of written evidence and testimonials was presented by the plaintiff at court—all of which served the aim of reconceptualizing the "Nørgaard T-shirt" as a work of authorship. Thus, as we learn from the evidence, the T-shirt is a celebrated cultural artifact. The Danish Museum of Art & Design has three copies of the T-shirt in its permanent collection. In the Museum catalogue, the details of the design—almost unchanged since the T-shirt came into production in 1967—are described meticulously. Such qualities as its being made in "cotton with a welt pattern," its having a "tight fit," and its "bias bindings" are particular characteristics of the T-shirt.[33] In 2004, the Nørgaard T-shirt was part of a special exhibition at the Danish Museum, titled "The Industrial Icons." The catalog of the exhibition included an article dedicated to the cultural significance of the T-shirt. And here the T-shirt was described as an icon of Danish fashion history, a "primary form" in Danish fashion. American Post-World War II street-style

33 *J. Nørgaard A/S* v. *Rebecca Mode Aps* (the Danish Maritime and Commercial Court, March, 27, 2009), transcript of the records of Danish Maritime and Commercial Court, 9.

aesthetics inspired Jørgen Nørgaard to create a new type of shirt: He "transformed" the "masculine expression" of the classic American T-shirt and "adapted" it to the "natural shape of women." The result was a shirt that is simultaneously "general and unique, archetype and original."[34] We learn in the article that Nørgaard combines his ability for business with a "burning interest in experimental art and philosophy," and that on numerous occasions he has collaborated with visual artists.

The plaintiff also referred to several academic texts on Danish design: *Dansk Design* (2006) by Thomas Dickson, *Dansk Design 1945-1975* (2006) by Lars Dybdahl, and *Dansk Mode: Historie, Design, Identitet* (2006) by Thomas Schødt Rasmussen (ed.) are cited as authorities for the view that Jørgen Nørgaard's design was "pioneering" and "original." The works are, furthermore, cited as authority for the claim that the shirt design is a carrier of significations that go beyond that of being merely something to wear: The T-shirt is a symbol of "teenage culture," "anti-capitalism," "feminism," and more.[35]

Journalistic sources are quoted, bearing evidence of the special status of the Nørgaard T-shirt over several decades. It is a "classic:" No other T-shirts have been as popular for so long; it continues to be bought and worn by women of all ages; it has been copied many times by other Danish fashion brands, although no other T-shirt has ever replaced it, nor achieved a comparable status.[36] The plaintiff also points out that in 2007 Jørgen Nørgaard was the first *fashion* designer ever to be awarded the prestigious annual prize of the Danish Design Council.

An expert appointed by the court presented a report on the technical details, the production, and the marketing of the Nørgaard T-shirt, including a comparative analysis of the two T-shirts in dispute. And the expert's conclusions with respect to its quality and status were fully in accord with the views already presented by others. She was able to testify that a number of details of the Nørgaard T-shirt distinguished it from (and made it superior to) the Heart Beat T-shirt (as with other T-shirts of the same type). In her opinion, the Heart Beat shirt was an inferior copy of the Nørgaard shirt. As such, we are told that it might potentially deceive customers into thinking that they are faced with the *real* Nørgaard shirt; and according to the expert, that the shirt marketed by Rebecca Mode—made without familiarity with the Nørgaard T-shirt—would be unimaginable.

A number of witnesses also confirmed the singular status of the Nørgaard T-shirt: that its design was "unique" and "innovative" when introduced in 1967, that it is the result of an "individual creative process," and that Jørgen Nørgaard is a highly "talented and original designer."[37]

34 Ibid., 9f.

35 Ibid.

36 Ibid., 13ff.

37 Ibid., 44ff.

Figure 3 (left)
Nørgaard T-shirt detail. Photo by the author.

Figure 4 (right)
Heart Beat T-shirt detail. Photo by the author.

On the basis of the presented evidence, the plaintiff claimed that the Nørgaard T-shirt No. 101 was an original work of art, and that it was the result of the independent and original artistic effort of Jørgen Nørgaard. Hence, the T-shirt should be protectable according to the Danish *Consolidated Act on Copyright,* Section 1(1). Moreover, the plaintiff maintained, the Heart Beat model produced by Rebecca Mode was an infringing copy of the Nørgaard T-shirt. The one was a slavish copy of the other; despite a few minor differences in detail, the overall appearance of the two shirts was remarkably alike (See figures 3 and 4).[38]

Just a T-Shirt?

The defendant denied all claims made by the plaintiff. In particular, he rejected the claim that Nørgaard's T-shirt was an original work according to Danish copyright law: This originality, alleged the defendant, had not been proven by the plaintiff. The quality, shape, material, and look of the T-shirt did not, in themselves, amount to the level of originality that is required for something to qualify as a work of authorship. As the defendant also pointed out, all material in support of the Nørgaard T-shirt that had been presented in court by the plaintiff was dated after litigation had begun. Furthermore, the fact that museums and the press celebrate the T-shirt and its designer for their originality does not necessarily imply that the T-shirt is an "original work" in the legal sense.[39]

The defendant also disputed that the Heart Beat shirt might in any respect be considered an infringing copy of the Nørgaard T-shirt. That the Heart Beat shirt had in fact been modelled on the other had not been proven; and in his view, the shirts differ in a substantial number of details. In response to the claim by Nørgaard that a breach of Section 1 of the *Marketing Practices Consolidation Act* had occurred, the defendant argued that the director of Rebecca Mode had not acted in bad faith when he marketed his T-shirt; he did not mean to deceive his customers into thinking that his was the *real* Nørgaard T-shirt; and the intent to deceive is a prerequisite for infringement of the Act. The market for T-shirts is flooded with

38 Ibid., 51ff.

39 Ibid., 58ff.

similar-looking styles, and the Nørgaard T-shirt and the Heart Beat T-shirt were never intended, the defendant alleged, for the same segment of the market. The regulation of marketing practices was, admittedly, a much more appropriate legal framework for this case than the law of copyright; the defendant nevertheless denied infringement in this realm as well.[40]

In their comments, two members of the court found that it was irrelevant to the question of copyright-ability that the Nørgaard T-shirt had been on sale for many years. They also deemed irrelevant that the T-shirt was highly esteemed in a "cultural context." Considering that Danish copyright law (to prevent a "monopolistic market") requires a high level of originality and artistic effort for fashion articles and that the design of the Nørgaard T-shirt consisted of combining just a few components well-known in 1967, the two judges decided that the Nørgaard T-shirt did not qualify as a work of authorship. However, the third judge—the only woman among them—found that the T-shirt was a manifestation of "artistic skill." Being the result of Jørgen Nørgaard's "independent and artistic effort," the T-shirt in the opinion of this judge was protectable by copyright law. With two votes against one, the ruling went against Nørgaard on the copyright issue. He was no "author"' according to the judges. However, on the claim relating to bad marketing practice, the judges agreed unequivocally that Rebecca Mode had unlawfully exploited Nørgaard's market position, thereby damaging the brand and goodwill of the Nørgaard T-shirt. Accordingly, Rebecca Mode was ordered to stop producing and marketing the Heart Beat shirt or any other shirt bearing close resemblance to the Nørgaard T-shirt and to pay damages of DKR 100,000 (approximately USD 18,000) for market disruption.[41]

The Supreme Court Decision

The plaintiff appealed the decision, and the case was taken up by the Danish Supreme Court. In its decision of October 6, 2011, the Supreme Court confirmed the first court as regards to the question of whether Jørgen Nørgaard was the "author" of a copyright work.[42] The judges decided that he was not. The Supreme Court judgment was also in accordance with the Commercial and Maritime Court in finding that the Nørgaard T-shirt was sufficiently distinctive to be protected under the *Marketing Practices Consolidation Act*. However, as far as the Supreme Court was concerned, there had been no infringement in this realm. The decision of the lower court was thus overturned on this point. The Supreme Court ruling pronounced that the Nørgaard T-shirt was a "simple creation which consists of well-known design and 'form elements' only."[43] As a result of this ruling, only a "slavish copy" of the Nørgaard T-shirt would amount to infringement; taking into consideration a number

40 Ibid.

41 Nørgaard for his part was ordered to pay damages of what amounts to approximately USD 1,760 in compensation for Rebecca Mode's lost revenue in relation to a collection of children's shirts. This aspect of the litigation has not been discussed here.

42 *Rebecca Mode Aps v. J. Nørgaard A/S,* Danish Supreme Court decision of October, 6, 2011 (Case 102-2009).

43 *Rebecca Mode Aps v. J. Nørgaard A/S* (The Danish Supreme Court, October, 6, 2011), 8.

of differences in the details of the two shirts, the Heart Beat Style Drop Needle T-shirt was found by the Supreme Court not to be a *slavish* copy. As a result, Rebecca Mode was awarded compensation for lost profits, and Jørgen Nørgaard was ordered to pay costs amounting to about DKR 1,100,000 (approximately USD 200,000).

What had the *fashion designer* done to deserve this? Jørgen Nørgaard went to court with the conviction that someone had copied his T-shirt. What he learned was that his T-shirt had been copied, but such copying was not unlawful and that he had to pay up simply for believing that it was. In the first court, the judgment against Jørgen Nørgaard on the copyright issue had been justified by reference to how, from a societal perspective, having a *balanced* law of copyright is paramount. Thus, a balance must be maintained between the interests of the many creators, providers, and consumers of creative works. Fashion designers as a group are negatively affected if one designer is able to monopolize the making of "Nørgaard-style" T-shirts. Consumers benefit from having a wide selection of products to choose from, and society as a whole has an interest in avoiding economic and cultural monopolies that impede innovation and development. As we might see from the first judgment, the message is that the type of violation that occurs when a design is plagiarized would be better regulated by the *Marketing Practices Act;* here, designers are viewed and judged according to their role as competitors in the marketplace, rather than in their capacity as "inspired individual creators." Fashion designers utterly depend on their ability to build on and be inspired by the works of others. After all, something can only be called "fashion" insofar as it is itself a copy that has been copied by others: Copying is the essence of fashion.

However, the Supreme Court, finding no infringement of the *Marketing Practices Act*, altered the message. First, fashion designers are not "authors" as defined by copyright. As concerns "simple" designs, their protection against bad marketing practice is narrowed down to a protection against *slavish* imitations only. What happens, then, to the Nørgaard T-shirt's unique status as a celebrated cultural artifact? And what about the undisputed fact that Jørgen Nørgaard has created a pioneering design that has long been admired by connoisseurs of the art world and the fashion world alike? What of the fact that the Nørgaard T-shirt—because of its popularity—has been copied over and over? The *Marketing Practices Act* allows that the T-shirt is qualified for protection, but it stipulates that this protection might not come into effect as long as competitors include a few differences in detail.

This situation reframes the question of why Jørgen Nørgaard was found not to be an "author" of a copyright work. What would it have taken to persuade the courts that the Nørgaard T-shirt was the result of an author's "personal," "creative," and "independent"

effort? Because applied art was specifically mentioned as an object of copyright, the simplest of designs of cutlery, sauce pans, flashlights, and much more have been found qualified for copyright protection. Why not fashion apparel? The only clue that the Supreme Court gives to understanding its rationale for the decision is the observation already quoted: that "[Jørgen] Nørgaard's T-shirt is a remarkably simple creation which consists of well-known design and 'form elements' only." In other words, the judges did not consider the T-shirt to be the product of the "organic process" that characterizes the creation of "original works." Insofar as the T-shirt had not sprung from an "inherent source" of creativity—it consisted of "well-known elements"—Nørgaard supposedly had nothing with which to justify the claim that it was his "authorial property," to which he was to have exclusive as well as moral rights. Perhaps to have persuaded the judges that a piece of fashion apparel was copyrightable, the focus ought to have been on the alleged "author" rather than on the T-shirt. Much effort went into establishing the exceptional reception and the reputation of the Nørgaard T-shirt; no one was left in doubt of the special status it enjoys in design history and among those of us who wear clothes! Yet to satisfy a court that the Nørgaard T-shirt is an "original work" eligible for copyright protection, the strategy should be to establish that a fashion designer is capable of being an author—in the words of Edward Young, one who prefers "the native growth of [his] own mind to the richest import from abroad." To demonstrate the organic bond between a fashion designer and his design would be to recognize that a fashion design might be the result of an author's "personal," "creative," and "independent" work and effort.

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