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WHERE IP ISN'T

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Where IP Isn't

By Kal Raustiala & Christopher Sprigman*

The Framers of the Constitution granted Congress the power to create intellectual property rights as a way to "promote the Progress of Science and the useful Arts." Today's advocates for strong IP continue to argue that such rights are necessary. The orthodox argument for IP proceeds in three steps. First, artistic and literary works and scientific and technical innovations are often difficult and expensive to create—think of the poet in pursuit of the right verse, or pizza-fueled late nights spent programming a new video game, or the piles of money a pharmaceutical company spends in an often fruitless search for a new blockbuster drug. Second, once the author or inventor produces the first version of a work, others will find it quick and cheap to copy the work. Third, unless the law equips the creator with enforceable exclusive rights, the copyist, having invested nothing in the creation of the work, will outcompete the originator and deny her a return on her investment.

Our *Virginia Law Review* article, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design* is about the challenge that the global fashion industry presents to this traditional justification for IP rights.

The practices of the fashion industry are hard to square with the traditional justification. The global fashion industry produces a huge variety of creative goods *without* strong IP protection in one of its biggest markets (the United States), and without apparent *utilization* of nominally strong IP rights in another large market (the countries of the European Union). Copying and derivative re-working of fashion designs are rampant in both the U.S. and E.U., as the traditional account would predict. Yet innovation and investment remain vibrant.

Why, when other major content industries have obtained increasingly powerful IP protections for their products, does fashion design remain mostly unprotected—and economically successful? We argue that the fashion industry counter-intuitively operates within a low-IP equilibrium in which copying does not deter innovation and may actually promote it. We call this *the piracy paradox*. Our article offers a model explaining how the fashion industry's piracy paradox works, and how copying functions as an important element of, and perhaps even a necessary predicate to, the industry's swift cycle of innovation. In so doing, we aim to shed light on the creative dynamics of the apparel industry. But we also hope to spark further exploration of a fundamental question of IP policy: to what degree are IP rights necessary to induce innovation in particular industries? Are stable low-IP equilibria imaginable outside of the fashion industry?

A brief doctrinal note: Why is fashion design mostly unprotected by IP law in the U.S.? Take a look at the paper for a full explanation, but in brief, although trademarks protect

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famous fashion industry marks (Gucci, Prada, etc.), copyright protection has been withheld in the U.S. from virtually all fashion *designs* due to the "useful articles" rule in U.S. copyright law. Copyright does not protect the aesthetic components of useful articles like apparel unless a particular garment's aesthetic appeal is somehow "separable" from its usefulness in covering the human form. On this basis, U.S. courts have rebuffed plaintiffs' claims of copyright infringement arising from fashion knock-offs. It is theoretically possible that fashion designs could be protected with design patents, but patent's novelty requirement—which limits protection to designs that are significantly different from any preexisting design, rather than the mere "scintilla of creativity" required under the copyright law—precludes protection for virtually all designs. So too with "trade dress" protection—an outgrowth of trademark law that protects elements of a product design such as size, shape, contour, color, color combinations, texture, and graphics. Trade dress protects these product characteristics only when they reliably indicate the product's *source*—in the case of fashion products, the apparel firm marketing the design. Few fashion designs meet this criterion; although consumers may find a design attractive, it is rare that they associate particular design elements (colors, shapes, contours, color combinations), with a particular fashion firm. Perhaps the design elements of Chanel's iconic women's jacket (pictured below)—square cut, collarless, 4-pocket, braided piping—are an exception.



Perhaps. Still, that hasn't stopped the St. John Knits Company, which, like Chanel, offers very costly clothing, from appropriating many elements of the Chanel trade dress. Such as here:



Or, more garishly, here:



We'll leave many of the details of our argument for a full reading of our paper, but we'll provide a quick summary of our main points. We advance an explanation for fashion's piracy paradox that rests on two features: *induced obsolescence* and *anchoring*. Both reflect the status-conferring power of fashion, and both suggest that copying, rather than impeding innovation and investment, promotes them.

First, what do we mean by *induced obsolescence*? Fashion is a status-conferring, or "positional," good—in affluent societies, apparel purchases are motivated largely by status seeking, rather than a desire to cover nakedness. And fashion goods are subject to an unusual form of "two-sided" positionality. As an attractive design begins to spread, its positional or status-conferring value grows as fashion-forward consumers consume it. But as the design diffuses beyond the fashionable to the lumpen, its positional value declines, and fashion-conscious early adopters are primed for the next new thing. Obligingly, the fashion industry has a new round of design innovations ready for them to consume. The cycle of innovation and diffusion starts again.

This is the fashion cycle, and it's familiar stuff to anyone who's thought about the industry or even paged through an issue of *Vogue*. Less well-appreciated is the fashion cycle's connection with fashion's low-IP regime. The industry's practice of copying and re-working attractive new designs—a practice made possible by the low-IP rule—speeds up the fashion cycle by diffusing designs more quickly, and then driving them toward exhaustion. Copying and derivative re-working produce a faster fashion cycle, a faster innovation cycle, and more consumption of fashion due to the quicker deterioration of apparel's status-conferring value.

We describe a second dynamic, *anchoring*, that works along with induced obsolescence in stabilizing fashion's low-IP equilibrium. The basic thrust of the anchoring dynamic is simple: The industry's goal is to quickly exhaust the status-conferring value of our clothing and induce us to chase the new thing. For that induced obsolescence project to work, the industry must somehow communicate to us *what the new thing is*. It does that by turning out a large number of copies and derivative re-workings of a limited number of designs each season: i.e., the industry "anchors" its seasonal output to a discrete set of designs that characterize what is, at least for the moment, in fashion.

We discuss some of these trends in the paper, and we also provide pictures to illustrate them. We do not attempt, however, to describe this anchoring process in any detail—that would be a great subject for a future paper. Nonetheless, one can readily see the anchoring process at work. Why, in the spring of 2004, was our world suddenly filled with hundreds of iterations of the bohemian skirt? Why, a year later, were dozens of variations of the "driving shoe" on the racks in men's shoe stores? We include pictures of both of these styles in our paper. But of course the fashion cycle moves on. So why are the spring 2006 collections replete with these platform/wedge shoes?









(Dolce & Gabbana, Donna Karan, Prada, Dries van Noten, Chloe

All of these shoes are different, and yet all are working off of similar design elements—a high wedge sole, ankle straps, solid colors. And these shoes are just a few examples of a much larger output of similar shoes for this season. Moreover, we can multiply these examples endlessly—here are some examples of a boomlet in baby-doll dresses for spring 2006:



(Burberry Prorsum, Jill Stuart, Miu Miu, Emilio Pucci, Thakoon)

Again, these dresses are all different, but they are all variations on a similar design theme. Not every example of anchoring is also a likely candidate for copyright infringement. Sometimes the similarities are at a high enough level of abstraction—e.g., the "baby doll" style—that copyright liability would be inappropriate. But sometimes not. Here is a current women's shoe style, a platform pump, by the firm said to have originated this style, Christian Louboutin:



And here are some others: Brian Atwood, Gucci, Mossimo, Michael Kors, Antebi, Boutique 58, Steve Madden, Guess?, N.Y.L.A., and Diba.





















These shoes are all subtly different, but they are also strikingly similar to one another and to the Louboutin shoe. In a high-IP world, each of these Louboutin-inspired shoes might be a copyright violator. In the low-IP rule that actually governs the fashion industry, we get a trend in platform pumps.

Another doctrinal note: These shoes are not identical to each other or to the Louboutin. But that does not mean, if fashion design were subject to the standard rules of copyright, that the variations on the Louboutin would escape liability. The copyright law uses a test not of identity, but of "substantial similarity." The appearance of the word "substantial"

might suggest to the copyright non-cognoscenti that the work said to infringe must resemble the plaintiff's work quite closely. But in fact, that is not the case.

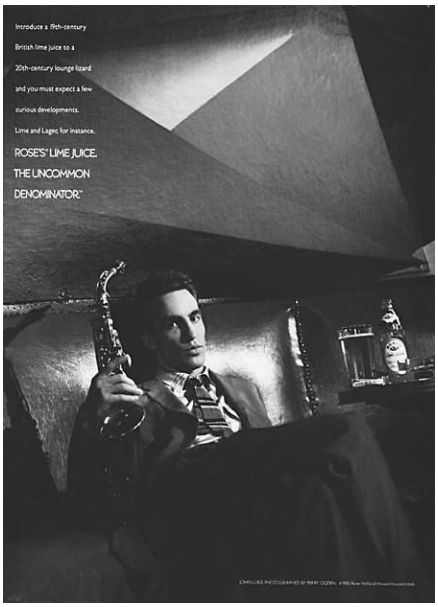
Listen to this clip of the Chiffon's "He's So Fine," and then to George Harrison's "My Sweet Lord" (RealPlayer required). Do they sound substantially similar? The federal district court in *Bright Tunes Music v. Harrisongs Music*[1] certainly thought so, holding Harrison liable for copyright infringement even though *at most* the Harrison song involved the sub-conscious usage of two chords and a few notes from the earlier Chiffons melody—and, to be absolutely clear, the alleged appropriation was not from the Chiffon's *sound recording*; rather, it was from the underlying *musical composition* of the Chiffons song. No actual sounds were copied, and the bits of melody alleged to have been appropriated actually sound quite different in the Harrison recording. On a more general level, no one would mistake the Harrison song for the Chiffons song. Nor did plaintiffs adduce any evidence that the Harrison song harmed the market success of the Chiffons song in any way (nor is such evidence required as an element of copyright liability). In short, these two songs are much more different from one another, in terms of their overall "design" (i.e., their musical composition) than any of the platform pumps pictured above. And the *Harrisongs* case is not an outlier—it is, rather, treated in the copyright casebooks as a paradigmatic substantial similarity case.

This perhaps bizarre understanding of "substantial similarity" is not limited to musical works. Take, for example, *Kisch v. Ammirati & Puris, Inc.*.[2] *Kisch* involved two photographs taken at the Village Vanguard, a famous jazz club in New York City. Here is plaintiff's photograph, accurately rendered in its original black-and-white:



And here is defendant's work—actually, this is a black-and-white rendition of what was really a *color* magazine advertisement:

[1] 420 F. Supp. 177 (S.D.N.Y. 1976).
[2] 657 F. Supp. 380 (S.D.N.Y. 1987).



Fans of Jim Jarmusch, and especially of his films *Down by Law* and *Stranger than Paradise*, will recognize the man in the second picture as New York lounge-jazz musician John Lurie. Fans of the Village Vanguard will recognize a particular corner banquette, and a particular mural above that banquette. But these are things that exist in the world—the plaintiff is hardly entitled under the copyright law to take the only picture composed at that spot in the Village Vanguard. What other similarities do we see? The people are different, and they are posed differently and dressed differently. Both pictures feature tables (or parts of tables), but they are placed differently. Both pictures feature musical instruments, but they are different instruments (exactly what that woman is doing playing an accordion at the Village Vanguard is unclear). The pictures are even lit differently—the plaintiff's picture is lit from the left side, the defendants' from the right (and perhaps less intensely). The defendant's photo includes a bottle of Rose's Lime Juice and a pint of beer. So there are many differences, and few similarities. But the district court denied defendants' motion to dismiss, stating that a rational finder of fact could conclude that "the underlying tone or mood of defendants' photograph was similar to the original conception expressed in plaintiff's work." *Underlying tone or mood*. Whatever kind of "substantial" similarity that is, it is more than enough to condemn the platform pump variations pictured above, and indeed it is a standard encompassing enough to condemn a substantial number of the many instances of design "referencing" that we observe in each season's fashion output.

The point, of course, is that if copyright law applied in its standard form to the fashion industry, it would interfere substantially with the copying and derivative re-working that drive induced obsolescence, anchoring, and the fashion cycle. The industry's practice of spurring consumption by trend-making is so familiar that it's almost invisible. But it's a vital element of the fashion industry's innovation process, and it is able to happen in part because IP doesn't stand in the way.

Let us close by noting that the fashion industry, as economically significant as it is, is only part of our project. We are also interested in fashion design as one corner of what we call IP's "negative space." By that we mean creative activities and industries to which IP rules could apply, but which for some reason entirely or mostly escape this type of regulation. Surprisingly, what falls within and what falls without the domain of copyright is little explored; the existing literature offers few good theories of why certain creative endeavors are granted IP rights and others not. In *The Piracy Paradox* we offer a clutch of examples that fall within the negative space of copyright, including food, haircuts, sports plays, and scents. But we do not have a good answer yet to the question of why this is so. In the future, we hope to study the contours of copyright's domain more closely, and we hope that other IP scholars do as well.