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ARTICLES

THE PIRACY PARADOX: INNOVATION AND INTELLECTUAL PROPERTY IN FASHION DESIGN

*Kal Raustiala and Christopher Sprigman**

INTRODUCTION 1688
I. THE FASHION INDUSTRY 1693
A. *Fashion Industry Basics* 1693
B. *Copying in the Fashion Industry* 1695
1. *Copy Control via Cartelization: The Fashion Originators' Guild* 1695
2. *Unrestrained Copying Following the Fall of the Guilds* 1698
a. *Fashion's Low-IP Equilibrium* 1698
b. *Some Examples of Fashion Design Copying* 1705
II. THE PIRACY PARADOX 1717
A. *Induced Obsolescence* 1718

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B. Anchoring 1728
C. Summary: The Paradoxical Effects of Low Protection ... 1732
D. The European Union and the United States—Different Legal Rules, Similar Industry Conduct 1735
E. Alternative Explanations for the Fashion Industry's Low-IP Equilibrium 1745
1. Copyright Doctrine as a Barrier 1745
2. Political Barriers 1755
3. First-Mover Advantage 1759
III. PARADOX OR PARADIGM? INNOVATION AND COPYRIGHT'S NEGATIVE SPACE 1762
A. Creative Cuisine 1765
B. Other Elements in Copyright's Negative Space 1769
CONCLUSION 1775

> *It is surprising that in this tremendous field [of fashion], ranking conservatively among the first five in the United States, such unregulated and primitive conditions obtain that unreserved pilfering is tolerated and openly permitted.*
>
> *The leaders of this gigantic segment of our commercial life . . . have completely ignored a situation that is eating away at the very roots of its existence. Style and creation constitute the life blood of this multi-billion dollar business. Without them, the industry would fade into obscurity. Yet, for some unknown reason, style piracy is treated more indulgently than much lesser offenses involving deprivation of one's rights and property.*
>
> Samuel Winston, Inc. v. Charles James Services, Inc., 159 N.Y.S.2d 716, 718 (N.Y. Sup. Ct. 1956).

INTRODUCTION

THE standard justification for intellectual property rights is utilitarian. Advocates for strong intellectual property ("IP") protections note that scientific and technological innovations, as well as music, books, and other literary and artistic works, are often difficult to create but easy to copy. Absent IP rights, they argue, copyists will free-ride on the efforts of creators, discouraging future investments in new inventions and creations. In short, copying stifles innovation.

This argument about the effects of copying is logically straightforward, intuitively appealing, and well reflected in American law. Yet, few seem to have noticed a significant empirical anomaly: the existence of a global industry that produces a huge variety of creative goods in markets larger than those for movies, books, music, and most scientific innovations,[1] and does so without strong IP protection. Copying is rampant, as the standard account would predict. Competition, innovation, and investment, however, remain vibrant.

That industry is fashion. Like the music, film, video game, and book publishing industries, the fashion industry profits by repeatedly originating creative content. But unlike these industries, the fashion industry's principal creative element—its apparel designs—is outside the domain of IP law. And as a brief tour through any fashion magazine or department store will demonstrate, while trademarks are well protected against piracy, design copying is ubiquitous. Nonetheless, the industry develops a tremendous variety of clothing and accessory designs at a rapid pace. This is a puzzling outcome. The standard theory of IP rights predicts that extensive copying will destroy the incentive for new innovation. Yet, fashion firms continue to innovate at a rapid clip, precisely the opposite behavior of that predicted by the standard theory.

[1] According to the 2002 Economic Census, the U.S. book publishing industry reported revenues of $27 billion. U.S. Census Bureau, 2003 Service Annual Survey, Information Sector Services, Tbl. 3.0.1 (2003), http://www.census.gov/svsd/www/sas51.html. Annual revenues for 2001 for the U.S. motion picture industry are estimated at approximately $56 billion. Id. Annual revenues for 2004 for the recording industry are estimated at approximately $12 billion. See Recording Industry Association of America, 2004 Yearend Market Report on U.S. Recorded Music Shipments (2004), http://www.riaa.com/news/newsletter/pdf/2004yearEndStats.pdf. The U.S. apparel industry reported gross revenues for 2004 exceeding $173 billion. See Press Release, NPD Fashionworld, The NPD Group Reports U.S. Retail Apparel Sales Up After Three Years of Decline (Feb. 23 2005), http://www.npd.com/dynamic/releases/press_050223.html. Globally, the fashion industry is said to produce revenues of about $784 billion. See Safia A. Nurbhai, Style Piracy Revisited, 10 J.L. & Pol'y 489, 489 (2002). It may well be, as some commentators on this Article have suggested to us, that the "IP content" of the film or music industry's products is higher than the "IP content" of fashion items. We are unsure how to measure this in any reliable way. Even if this suggestion is accurate, these numbers illustrate that by whatever metric may be used, fashion is a very large economic sector when compared to the more traditional foci of IP scholarship. Thus, even if fashion's per-item IP content is much lower, the aggregate value of this content across the industry is still quite high.

Despite this anomaly, few legal commentators have considered fashion design in the context of IP.[2] Those who have done so have almost uniformly criticized the current legal regime for failing to protect apparel designs. For example, one article argues that "[s]ociety must protect the great talent of fashion designing. Courts need to adequately safeguard innovation and creativity in the fashion business."[3] Another describes fashion designers as "scorned by

[2] Jessica Litman has noted in passing fashion's unusual disconnection with copyright. See Jessica Litman, The Exclusive Right to Read, 13 Cardozo Arts & Ent. L.J. 29, 44–45 (1994). Litman's formulation of the fashion industry's challenge to IP orthodoxy is worth considering in full:

> Imagine for a moment that some upstart revolutionary proposed that we eliminate all intellectual property protection for fashion design. No longer could a designer secure federal copyright protection for the cut of a dress or the sleeve of a blouse. Unscrupulous mass-marketers could run off thousands of knock-off copies of any designer's evening ensemble, and flood the marketplace with cheap imitations of haute couture. In the short run, perhaps, clothing prices would come down as legitimate designers tried to meet the prices of their free-riding competitors. In the long run, though, as we know all too well, the diminution in the incentives for designing new fashions would take its toll. Designers would still wish to design, at least initially, but clothing manufacturers with no exclusive rights to rely on would be reluctant to make the investment involved in manufacturing those designs and distributing them to the public. The dynamic American fashion industry would wither, and its most talented designers would forsake clothing design for some more remunerative calling like litigation. And all of us would be forced either to wear last year's garments year in and year out, or to import our clothing from abroad.

Id. Consideration of fashion and IP is rising. See Jonathan M. Barnett, Shopping for Gucci on Canal Street: Reflections on Status Consumption, Intellectual Property, and the Incentive Thesis, 91 Va. L. Rev. 1381 (2005); Kal Raustiala, Fashion Victims, The New Republic Online (Mar. 15, 2005), http://www.tnr.com/doc.mhtml?i=w050314&s=raustiala031505. Recently, Susan Scafidi has created a blog addressing issues of fashion and IP. See Counterfeit Chic, http://www.counterfeitchic.com (last visited Aug. 26, 2006).

[3] Karina K. Terakura, Comment, Insufficiency of Trade Dress Protection: Lack of Guidance for Trade Dress Infringement Litigation in the Fashion Design Industry, 22 U. Haw. L. Rev. 569, 619 (2000). For articles arguing for expanded protection for fashion designs, see, for example, Samantha L. Hetherington, Fashion Runways Are No Longer the Public Domain: Applying the Common Law Right of Publicity to Haute Couture Fashion Design, 24 Hastings Comm. & Ent. L.J. 43, 71 (2001); S. Priya Bharathi, Comment, There Is More Than One Way to Skin a Copycat: The Emergence of Trade Dress to Combat Design Piracy of Fashion Works, 27 Tex. Tech L. Rev. 1667, 1669–72 (1996); Leslie J. Hagin, Note, A Comparative Analysis of Copyright Laws Applied to Fashion Works: Renewing the Proposal for Folding Fashion Works into the United States Copyright Regime, 26 Tex. Int'l L.J. 341, 364–66 (1991); Jennifer Mencken, A Design for the Copyright of Fashion, 1997 B.C. Intell. Prop. & Tech. F. 121201, ¶14 (Dec. 12, 1997), http://www.bc.edu/iptf.

the copyright system," and subject to an "injustice" that Congress must fix.[4] A third characterizes the existing legal regime as "ridiculous" and declares that the "bizarre blindness towards the inherent artistry and creativity of high fashion can no longer be ignored."[5]

Despite these exhortations, the fashion industry itself is surprisingly quiescent about copying. Fashion firms take significant, costly steps to protect the value of their trademarked brands, but they largely appear to accept appropriation of designs as a fact of life. Design copying is occasionally complained about, but it is as often celebrated as "homage" as it is attacked as "piracy."[6] This diffidence stands in striking contrast to the heated condemnation of piracy—and associated vigorous legislative and litigation campaigns—in other creative industries.

Why is copying in the fashion industry treated so differently from copying in other creative industries? Why, when other major content industries have obtained and made use of increasingly powerful IP protections for their products, does fashion design remain mostly unprotected? That the fashion industry produces high levels of innovation, and attracts the investment necessary to continue in this vein, is a puzzle for the orthodox justification for IP rights. This Article will explore this puzzle and offer an explanation for it. We will argue that copying fails to deter innovation in the fashion industry because, counter-intuitively, copying is not very harmful to originators. Indeed, copying may actually promote innovation and benefit originators. We call this the "piracy paradox." In this Article, we will explain how copying functions as an important element of—and perhaps even a necessary predicate to—the apparel industry's swift cycle of innovation. In so doing, we aim to shed light on the creative dynamics of the industry. We also hope to spark further exploration of a fundamental question of IP policy: to what degree are IP rights necessary in particular industries to induce investment in innovation? Does the piracy paradox occur

[4] Anne Theodore Briggs, Hung Out to Dry: Clothing Design Protection Pitfalls in United States Law, 24 Hastings Comm. & Ent. L.J. 169, 194, 213 (2002).

[5] Hetherington, supra note 3, at 71.

[6] See Brian Hilton et al., The Ethics of Counterfeiting in the Fashion Industry: Quality, Credence and Profit Issues, 55 J. Bus. Ethics 345, 350–51 (2004). As we discuss below, earlier this year several fashion designers supported a bill introduced into Congress that would amend an existing design-protection statute to encompass fashion design.

only in the fashion industry, or are stable low-IP equilibria imaginable in other content industries?

This Article has three parts. Part I will provide a brief overview of the apparel industry, examine the industry's widespread practice of design copying, and distinguish design copying from "counterfeits" or "knock-offs" that involves the copying of protected trademarks. Our focus is the copying of apparel designs, not brand names.[7]

In Part II, we will offer two interrelated models—induced obsolescence and anchoring—that help account for the stability of the fashion industry's low-IP equilibrium. These arguments reflect two related features of fashion goods: first, that the value of fashion items is partly status-based, or "positional," and second, that fashion is cyclical—that is, styles fall out of fashion and are replaced, often seasonally, by new styles. These twin features help to explain why design copying can be counter-intuitively beneficial for designers, and hence help account for the remarkable persistence of the permissive legal regime governing fashion design. Later in Part II, we will consider, and largely reject, several alternative explanations for the relative absence of IP protection. These include: structural features of American copyright doctrine; collective action problems in the industry; first-mover advantage; and rival interests between fashion designers and retailers.

In Part III, we will turn to the broader implications of the fashion case. Is the apparel industry's ecology of innovation unique, or does its juxtaposition of high levels of creativity with low levels of formal legal protection suggest something about optimality in IP rules? Apparel is not the only industry in which status plays a role in consumer behavior; nor is it the only area of creative innovation that lacks IP protection. Accordingly, at the close of this Article we will offer some initial observations about the implications of our analysis of the fashion industry for other creative industries.

[7] It is also important to distinguish textile designs from apparel designs, though there is sometimes overlap. Textile patterns can be copyrighted (and sometimes trademarked, as in the case of Burberry's signature plaid) and are increasingly the subject of knock-offs. See Evelyn Iritani, Material Grievances, L.A. Times, Jan. 15, 2006, at C1 (discussing recent lawsuits initiated by L.A.-based textile designers).

I. THE FASHION INDUSTRY

A. Fashion Industry Basics

The global fashion industry sells more than $750 billion of apparel annually.[8] While the industry markets apparel worldwide, the creative loci for the global fashion industry are Europe and the United States, and, to a lesser degree, Japan. In Paris, Milan, London, New York, Tokyo, and Los Angeles there are large concentrations of designers and retailers as well as the headquarters of major fashion producers.

Major fashion design firms, such as Gucci, Prada, Armani, Ralph Lauren, and Chanel, produce new apparel designs continually, but market their design output via collections introduced seasonally in a series of runway shows. Fall shows are held during consecutive weeks in February and March, first in New York, then in London, then Milan, and finally, in Paris. Spring shows are held during consecutive weeks in September and October, in the same cities and order.

The fashion industry's products are typically segmented into broad categories forming what has been described as a fashion pyramid.[9] At the top is a designer category that includes three different types of products. First is a very small trade in haute couture, that is, custom clothing designed almost entirely for women and sold at very high prices.[10] Directly below is a much larger business in designer ready-to-wear clothing for women and men. This tier is further segmented into prestige collections and lower-priced bridge collections offered by many famous designers. Another level down is "better" fashion, an even larger category that consists of moderately priced apparel. Below that is a basic or commodity category. Figure A illustrates the fashion pyramid:

[8] See Nurbhai, supra note 1, at 489.

[9] Peter Doeringer & Sarah Crean, Can Fast Fashion Save the U.S. Apparel Industry?, 4 Socio-Economic Rev. 353 (2006).

[10] See Elizabeth Hayt, The Hands That Sew the Sequins, N.Y. Times, Jan. 19, 2006, at G1 (noting that couture customers pay "upwards of . . . $150,000 for an evening gown"); Dana Thomas, When High Fashion Meets Low, Newsweek, Dec. 20, 2004, at 38. There is now arguably another category of "semi-couture." See Rachel Dodes, A Stir Over "Semi-couture," Wall St. J., Feb. 4–5, 2006, at P6.

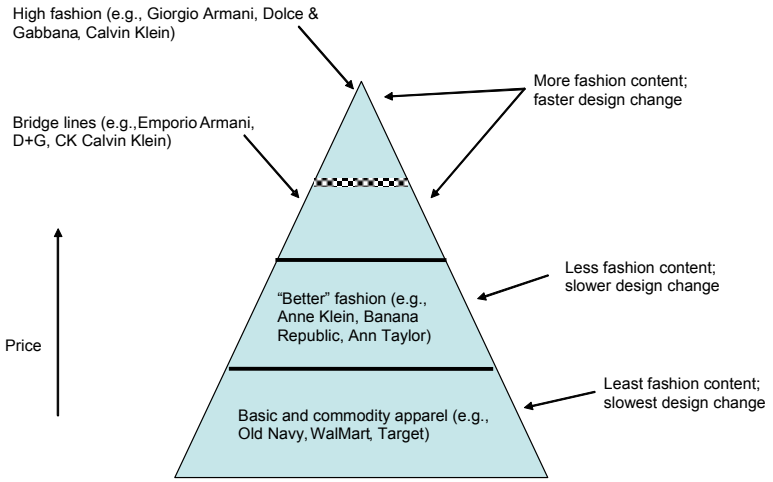

Figure A

One difference between the categories is price; it generally increases as one ascends the pyramid.[11] The more important distinction, for our purposes, is the amount of fashion content, or design work, put into a garment. Apparel in the designer categories (couture, designer ready-to-wear, and bridge) is characterized by higher design content and faster design turnover. Generally, apparel in the "better" and basic categories contain less design content and experience slower design change.[12]

Many fashion design firms operate at multiple levels of the pyramid. For example, Giorgio Armani produces couture apparel, a premium ready-to-wear collection marketed via its Giorgio Armani label, differentiated bridge lines marketed via its Armani Collezioni and Emporio Armani brands, and a "better clothing" line distributed in shopping malls via its Armani Exchange brand.

[11] The borders between product categories are indistinct. Some designers' bridge lines market apparel as expensive as that found in others' premium lines. In addition, particular forms of apparel (for example, jeans) appear in several categories.

[12] We do not offer a precise definition of "design content" but our basic point is unobjectionable: clothing available from major fashion houses, such as Prada, contains more design innovation, generally speaking, than that from commodity retailers such as Old Navy. While Old Navy does produce new collections on a regular basis, the differences between old and new are, generally, smaller than the differences between Prada's Spring 2005 and Spring 2006 collections, for example.

Many firms producing high-end apparel have bridge lines, and a growing number of firms have begun to sell their clothing (albeit not exclusively) through their own retail outlets.[13]

Many content industries, such as film, music, and even publishing, are increasingly concentrated—that is, characterized by a small number of firms that produce a large share of total industry output. In contrast, the degree of concentration in the fashion industry is relatively low, with a large number of firms of varying size producing and marketing original designs. No single firm, or small set of firms, represents a significant share of total industry output. The persistence of the low-IP legal regime is even more puzzling when set against the fashion industry's relative atomization. Economic theory suggests that firms operating in concentrated markets often need IP protection less, especially when they possess non-IP forms of market power (preferred access to distributors, for example) that enable them to prevent free-riding and capture the benefits of their innovations. And yet the highly concentrated movie, music, and commercial publishing industries have pushed for and enjoy broad IP protections for their works, whereas the deconcentrated fashion industry, which economic theory would suggest needs IP protection more, enjoys a far lower degree of protection. Public choice theory may provide an alternative explanation for fashion's low-IP regime: perhaps the low-IP regime persists because the various fashion industry players, unlike those in film or music, cannot effectively organize to press their case before Congress. This hypothesis is plausible, but as we argue in Part II below, it is not compelling.

B. Copying in the Fashion Industry

1. Copy Control via Cartelization: The Fashion Originators' Guild

While more extensive today, design copying has long been a widespread practice in the fashion industry, especially in the United States. As one observer notes, "Seventh Avenue has a long,

[13] Press Release, Berns Communications Group, Berns Communications Group Unveils 2005 Retail Strategies Noted by Leading Industry Experts (Dec. 6, 2004), www.findarticles.com/p/articles/mi_m0EIN/is_2004_Dec_6/ai_n7637018.

rich tradition of knocking off European designs."[14] Indeed, a book on fashion published in 1951 contains an entire chapter on the topic, entitled "Style Piracy—A Fashion Problem," which argues that design piracy "has long plagued the fashion field."[15] In the interwar and early postwar periods, the major French couture houses tacitly sanctioned some design copying, permitting a few American producers to attend their Paris runway shows in exchange for "caution fees" or advance orders of couture gowns.[16] Wholesalers and retailers were barred from Parisian shows unless explicitly invited and had to follow certain rules: no photos or sketches could be published until after a set date, and deliveries to customers and stores were staggered.[17] The technology of the time limited the swiftness with which copies could be made and marketed, but did not prevent copying. As one writer described the practices of copying Parisian designs in the 1950s, "The manufacturers flew in from New York, laid the (couture) clothes out on a table, and measured each seam. They went back to New York to copy the dresses and then [the Chicago-based department store Marshall] Field's bought the copies."[18] The British economist Arnold Plant described, in a work published in 1934, the already well-established and international practice of design copying:

> [T]he leading twenty firms in the haute couture of Paris take elaborate precautions twice each year to prevent piracy; but most respectable "houses" throughout the world are quick in the market with their copies (not all made from a purchased original), and "Berwick Street" follows hot on their heels with copies a stage farther removed. And yet the Paris creators can and do se-

[14] Teri Agins, Copy Shops: Fashion Knockoffs Hit Stores Before Originals As Designers Seethe, Wall St. J., Aug. 8, 1994, at A1.

[15] Jessie Stuart, The American Fashion Industry 28 (1951).

[16] Terri Agins, The End of Fashion: How Marketing Changed the Clothing Business Forever 23–24 (2000). For an analysis of the reaction of French fashion houses to domestic and foreign copying during the early growth of the industry, see Mary Lynn Stewart, Copying and Copyrighting Haute Couture: Democratizing Fashion, 1900-1930s, 28 French Hist. Stud. 103 (2005).

[17] Agins, supra note 16, at 24.

[18] Id. at 175.

> cure special prices for their authentic reproductions of the original—for their "signed artist's copies," as it were.[19]

In 1932, the nascent U.S. industry established a nationwide cartel to limit copying within the small but growing ranks of American designers.[20] (Copying the designs of Parisian houses was apparently thought just fine.) The "Fashion Originators' Guild" registered American designers and their sketches and urged major retailers to boycott known copyists.[21] "Retailers and manufacturers signed a 'declaration of cooperation' wherein they pledged to deal only in original creations."[22] Non-compliant retailers were subject to "red-carding" (i.e., boycott). Guild members who dealt with non-cooperating retailers faced Guild-imposed fines.

The Fashion Originators' Guild was effective at policing design piracy among its members. By 1936 over sixty percent of women's garments selling for more than $10.75 (approximately $145 in 2005 dollars) were sold by Guild members.[23] But eventually the Guild ran afoul of the antitrust laws. In its 1941 decision in *Fashion Originators' Guild of America v. Federal Trade Commission*,[24] the Supreme Court held the Guild's practices to be unfair competition and a violation of the Sherman and Clayton Acts. The Court rejected the Guild's argument that its practices "were reasonable and necessary to protect the manufacturer, laborer, retailer and consumer against the devastating evils growing from the pirating of original designs and had in fact benefited all four."[25]

At the same time, the Federal Trade Commission ("FTC") also terminated a similar cartel that organized the designers of women's hats.[26] The United States Court of Appeals for the Second Circuit, in upholding the FTC's prosecution, acknowledged the utility of

[19] Arnold Plant, The Economic Aspects of Copyright in Books, 1 Economica 167, 172 (1934).

[20] The American fashion industry, headquartered in New York, really took off in the 1930s. See Leslie Davis Burns & Nancy O. Bryant, The Business of Fashion 16 (Sylvia L. Weber ed., 2d ed. 2002).

[21] Robert P. Merges, Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations, 84 Cal. L. Rev 1293, 1363 (1996).

[22] Nurbhai, supra note 1, at 495–96.

[23] See Fashion Originators' Guild of Am. v. FTC, 312 U.S. 457, 462 (1941).

[24] Id. at 467–68.

[25] Id. at 467.

[26] See Millinery Creators' Guild v. FTC, 109 F.2d 175, 175 (2d Cir. 1940).

the cartel in preventing "style piracy," but concluded that the law offered no remedy:

> What passes in the trade for an original design of a hat or a dress cannot be patented or copyrighted. An "original" creation is too slight a modification of a known idea to justify the grant by the government of a monopoly to the creator; yet such are the whims and cycles of fashion that the slight modification is of great commercial value. The creator who maintains a large staff of highly paid designers can recoup his investment only by selling the hats they design. He suffers a real loss when the design is copied as soon as it appears; the imitator in turn reaps a substantial gain by appropriating for himself the style innovations produced by the creator's investment. Yet the imitator may copy with impunity, and the law grants no remedy to the creator.[27]

As Robert Merges has noted, the only important differences between the early twentieth century fashion guilds and a formal IP right covering fashion designs were: (1) the guilds were based on "an informal, inter-industry quasi-property right, rather than a formal statutory right;" (2) the guilds "required concerted action to achieve *any* appropriability"; and (3) the guilds "concentrated [their] enforcement efforts at the retail level by requiring retailers to sign contracts and by policing retailers, rather than targeting competing manufacturers."[28] In short, the guilds were a fairly effective substitute for formal IP rights in fashion design. But this substitute lasted only until the early 1940s. Since then, fashion designs have remained unprotected by American law. Retailers and manufacturers alike have freely copied designs that originated here or, more frequently in the immediate postwar era, in Europe.

2. Unrestrained Copying Following the Fall of the Guilds

a. Fashion's Low-IP Equilibrium

In the more than six decades since *Fashion Originators' Guild*, copying has continued apace. Fashion industry firms have occasionally lobbied for expanded legal protections for their designs. Yet, these efforts are notable mostly for their feebleness, and the

[27] Id. at 177.
[28] Merges, supra note 21, at 1364.

IP framework governing fashion designs is today essentially the same as that existing at the time of the Fashion Originators' Guild. Set against the trend (especially in the last quarter-century) of dramatically expanding intellectual property protections, the copying free-for-all that obtains in the fashion world looks increasingly peculiar. Today, the fashion industry operates in what we term a "low-IP equilibrium." When we use that phrase, we mean that the three core forms of IP law—copyright, trademark, and patent—provide only very limited protection for fashion designs, and yet this low level of legal protection is politically stable. While occasionally efforts have been made to alter the legal regime governing design copying, the regime has persisted unchanged for over six decades. We briefly consider each area of IP protection in turn.

• Copyright. The American guilds resorted to an extra-legal system of design protection because copyright law did not protect most clothing designs. As a doctrinal matter, this lack of protection does not arise from any specific exemption of fashion design from copyright's domain. (We discuss this issue in much greater depth below.) Rather, the lack of protection flows from a more general point of copyright doctrine: namely, the rule largely denying copyright protection to the class of "useful articles," that is, goods, such as apparel, furniture, or lighting fixtures, in which creative expression is compounded with practical utility.

This means that a two-dimensional sketch of a fashion design is protected by copyright as a pictorial work. The three-dimensional garment produced from that sketch, however, is ordinarily not separately protected, and copying that uses the garment as a model typically escapes copyright liability. Why? The doctrinal answer is that the garment is a useful article, and copyright law applies only when the article's expressive component is "separable" from its useful function.[29] For example, a jeweled appliqué stitched onto a sweater may be a separable (and thus protectable) design, because

[29] See, e.g., Galiano v. Harrah's Operating Co., 416 F.3d 411, 422 (5th Cir. 2005) (finding casino uniforms to be unprotected because the expressive element was not marketable separately from the uniforms' utilitarian function); Poe v. Missing Persons, 745 F.2d 1238, 1240, 1242 (9th Cir. 1984) (finding copyright in "three dimensional work of art in primarily flexible clear-vinyl and covered rock media" shaped like a bathing suit; evidence suggested article "was an artwork and not a useful article of clothing").

the appliqué is physically separable from the garment, and it is also conceptually separable in the sense that the appliqué does not contribute to the garment's utility. But very few fashion designs are separable in this way; the expressive elements in most garments are not "bolted on" in the manner of an appliqué, but are instilled into the form of the garment itself—in the "cut" of a sleeve, the shape of a pant leg, and the myriad design variations that give rise to the variety of fashions for both men and women. As a result, the copyright laws are inapplicable for nearly all apparel, and consequently, the vast majority of the fashion industry's products exist in a copyright-free zone. This is true both for slavish copies and for looser copies that simply "reference" an existing item or pay it homage.

• Trademark/Trade Dress. Trademarks help to maintain a prestige premium for particular brands, and can be quite valuable to apparel and accessory firms.[30] Fashion industry firms invest heavily in policing unauthorized use of their marks.[31] Many fashion goods

[30] Fashion brands are heavily licensed, and excessive licensing can tarnish the brand such that its status is lost. But many firms put significant effort into ensuring that their trademarks are neither diluted nor counterfeited. We use dilution here in a general sense to mean "watered-down" through excessive exposure and licensing, rather than in its doctrinal mode. Trademark counterfeiting is discussed, and to some degree blurred with design piracy, in Barnett, supra note 2. Trademark infringement cases are common in the fashion industry, but courts carefully distinguish trademark from design piracy claims. Barnett gives the example of *People v. Rosenthal*, No. 2002NY075570, 2003 WL 23962174 (N.Y. Crim. Ct., Mar. 4, 2003), noting that "while it is perfectly legal to sell merchandise that copies the design and style of a product often referred to as 'knockoffs,' it is against the law to sell goods that bear a counterfeit trademark." Barnett, supra note 2, at 1394 n.27. We are skeptical of Barnett's claim that copyists produce easily recognizable and "generally imperfect" imitations. Id. at 1384. As an article in the *Wall Street Journal* recently described, the quality of knock-offs often is extremely good, and distinguishing imitations from originals can be difficult. Mei Fong, Counterfeit for Christmas: Gift Givers Tap New Source As Travel to China Eases, Knockoff Quality Improves, Wall St. J., Dec. 9, 2005, at B1. In any event, it is clear, as we describe in the note below, that major labels put significant effort into trademark policing but almost none into policing design copying.

[31] The lengths to which firms will go to prevent unauthorized use of their marks is illustrated by Dolce & Gabbana's anti-counterfeiting system:

> Starting out from the 1997–1998 Autumn/Winter season Dolce & Gabbana S.p.A. decided to introduce an "anti-imitation" system made up of both visible and invisible elements. The aim of this system is to protect the articles of some of the lines which are to a greater degree the object of numerous attempts at imitations on the part of counterfeiters and, on the part of Dolce & Gabbana S.p.A., to safeguard its clientele. The by now consolidated system of anti-imitation principally consists of the use of a safety hologram (in the foreground

sold by street vendors are counterfeits that plainly infringe trademarks. Some, however, copy designs rather than trademarks. Similarly, all goods sold by retail copyists like H&M, or by copyist designers working in major fashion houses, are not counterfeits in terms of trademark. These goods are instead sold under another trademark but freely appropriate the design elements of a fashion originator.

It is this category of goods—design copies—that is our focus here. The utility of trademark law in protecting fashion designs, as distinct from fashion brands, is quite limited. Occasionally, a fashion design will visibly integrate a trademark to an extent that the mark becomes an element of the design. Burberry's distinctive plaid is trademarked, for example, and many of Burberry's garments and accessories incorporate this plaid into the design. Increasingly, clothing and accessory designs incorporate a trademarked logo on the outside of the garment. Louis Vuitton handbags covered with a repeating pattern of the brand's well-known "LV" mark are a prominent example. For these goods, the logo is part of the design, and thus trademark provides significant protection against design copying.[32] For the vast majority of apparel

> showing an "&", together with a series of micro-texts which reproduce the trademark): the graphic elements were ideated by Dolce & Gabbana whereas the hologram is produced and guaranteed by the Istituto Poligrafico e Zecca della Stato (the Italian State Printing Works and Mint). The anti-imitation elements used by the "D&G Dolce & Gabbana" line which make up the system consist of a certificate of authenticity bearing the hologram, a woven label placed inside every article with the trademark with the same hologram heat-impressed on it, a safety seal whose braiding contains an identification thread that is reactive to ultra-violet rays and a woven label with the Company's logo incorporating the same identification thread. Furthermore, Dolce & Gabbana S.p.A. has stipulated agreements with the Customs Authorities of the most important countries throughout the world with the intention of monitoring the articles bearing its trademark. Dolce & Gabbana has also provided these Authorities with anti-imitation kits which reproduce and elucidate the elements mentioned above, divided by way of each line forming part of the anti-imitation system, with the aim of individuating and blocking the transit of counterfeited goods bearing our trademark by the same customs personnel.

Dolce & Gabbana, Anti-Imitation System, http://eng.dolcegabbana.it/corporatedef.asp?xml=AntiImitation (last visited Aug. 23, 2006).

[32] Significant, but not complete protection. In *Louis Vuitton Malletier v. Dooney & Bourke*, 340 F. Supp. 2d 415, 452 (S.D.N.Y. 2004), a district court rejected Louis Vuitton's trademark infringement and dilution and unfair competition claims arising from

goods, however, the trademarks are either inside the garment or subtly displayed on small portions such as buttons. Thus for most garments, trademarks do not block design copying. Figure B clarifies the distinction between design copying and trademark counterfeiting.

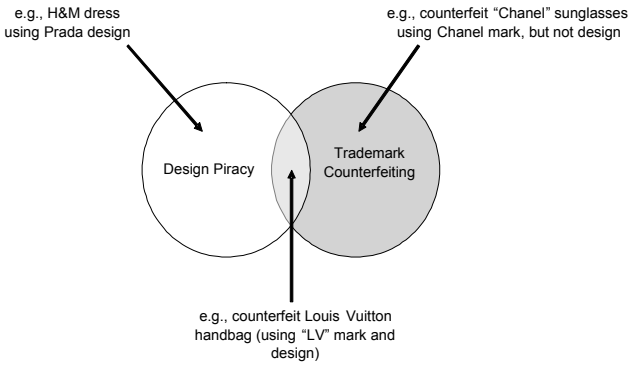

Figure B

In addition to protecting source-defining marks, trademark law also protects "trade dress," a concept originally limited to a product's packaging, but which, as the Supreme Court has noted, "has been expanded by many Courts of Appeals to encompass the design of a product."[33] Some courts have gone so far as to hold that "'[t]rade dress' involves the total image of a product . . . such as size, shape, color or color combinations, texture, graphics, or even particular sales techniques."[34]

Many of the attributes constitutive of trade dress are, of course, key to the appeal of clothing designs, and trade dress might therefore play an increasingly significant role in the propertization of designs. The doctrine has not yet emerged, however, as a substitute for copyright, in part because trade dress protection is, like copy-

rival firm Dooney & Bourke's appropriation of Louis Vuitton's repeating "LV" design, only using a repeating pattern of "DB" marks rather than Louis Vuitton's "LV."

[33] Wal-Mart Stores v. Samara Bros., 529 U.S. 205, 209 (2000).

[34] John H. Harland Co. v. Clarke Checks, 711 F.2d 966, 980 (11th Cir. 1983).

right, limited to non-functional design elements.[35] Perhaps more importantly, trade dress is limited to design elements that are "source designating," rather than merely ornamental.[36] In *Knitwaves v. Lollytogs*, a 1995 case dealing with appliqué designs on sweaters, the Second Circuit noted that few clothing design elements are protected under the "source designation" standard.[37] More recently, the Supreme Court further restricted the potential application of trade dress law in *Wal-Mart Stores, Inc. v. Samara Bros., Inc*. In a case involving Wal-Mart knock-offs of designer children's clothing, the Court held that product design (including fashion items) "almost invariably serves purposes other than source identification."[38] As a result, a plaintiff seeking trade dress protection for any product design, including a fashion design, is obliged to show that the design is one that has acquired "secondary meaning" under the trademark law.[39] To meet this requirement, a manufacturer must show that, "in the minds of the public, the *primary significance* of a product feature or term is to identify the source of the product rather than the product itself."[40]

For clothing designs, such a standard will rarely be met. The court's observation in *Knitwaves* seems correct: consumers may admire a clothing design, but they seldom appreciate that particular design elements are linked to a brand. Rarely does not, of course, mean never: fashion savvy consumers might, for example,

[35] Lanham Act, 15 U.S.C. § 1052(e)(5) (2000). The non-functionality requirement for trade dress may be somewhat lower than obtains in copyright law, because most courts have held that functional design elements may be protected as trade dress if they are part of an assemblage of trade dress elements that contains significant non-functional items. See Fuddruckers v. Doc's B.R. Others, 826 F.2d 837, 842 (9th Cir. 1987) ("[O]ur inquiry is not addressed to whether individual elements of the trade dress fall within the definition of functional, but to whether the whole collection of elements taken together are functional.").

[36] See, e.g., Knitwaves v. Lollytogs, 71 F.3d 996, 1009 (2d Cir. 1995) (finding that aesthetic features of girls' sweaters that were not source designating were not part of protectible trade dress); see also *Wal-Mart Stores*, 529 U.S. at 213 (stating that product design cannot be "inherently distinctive," and "almost invariably serves purposes other than source identification").

[37] "As Knitwaves' objective in the two sweater designs was primarily aesthetic, the designs were not primarily intended as source identification." *Knitwaves*, 71 F.3d. at 1009.

[38] *Wal-Mart Stores*, 529 U.S. at 213.

[39] Id. at 216.

[40] Inwood Labs. v. Ives Labs., 456 U.S. 844, 851 n.11 (1982) (emphasis added).

associate with Chanel a group of trade dress elements consisting of contrasting-color braided piping along the lapels of a collarless, four-pocket woman's jacket—signature elements of Chanel's iconic jackets. But few fashion design elements are likely to stimulate the degree of source recognition in the minds of the public sufficient to undergird trade dress protection. Consequently, trade dress protection is unavailable for most clothing designs.

• Patent. Protection for novel fashion designs is available, at least in theory, under the patent laws, which include a "design patent" provision offering a fourteen-year term of protection for "new, original, and ornamental design[s] for an article of manufacture."[41] The design patent provision fails to shelter fashion design for two principal reasons, however.

The first reason is doctrinal. Unlike copyright, which extends to all "original" expression, that is, all expression not copied in its entirety from others and that contains a modicum of creativity, design patents are available only for designs that are truly "new," and does not extend to designs that are merely reworkings of previously existing designs.[42] Because so many apparel designs are reworkings[43] and are not "new" in the sense that the patent law requires, most will not qualify for design patent protection.

There is, moreover, a second and more substantial limitation to the relevance of design patent as a form of protection for fashion designs. The process of preparing a patent application is expensive, the waiting period lengthy (more than eighteen months, on average, for design patents), and the prospects of protection uncertain

[41] 35 U.S.C. § 171 (2000).

[42] 35 U.S.C. § 102 (2000); see also In re Bartlett, 300 F.2d 942, 943–44 (C.C.P.A. 1962) ("The degree of difference required to establish *novelty* occurs when the average observer takes the new design for a different, and not a modified already-existing, design.").

[43] We recognize that this pattern of "remix" innovation may be endogenous; in other words, if not for the practical barriers sharply limiting the availability of design patents, it is at least theoretically possible that the fashion industry would engage less in the endless reworking of existing designs and instead turn its attention toward designs that would meet patent's novelty requirement. We have no way to test this counterfactual, but we doubt that, even if the practical barriers to design patent protection were eased, the industry's design output would change much. See infra Subsection II.E.2. As our discussion of anchoring suggests, see infra Section II.B, the industry's design output reflects consumers' deep desire not for "novelty," but for limited conformity to the current design mode.

(the United States Patent and Trademark Office rejects roughly half of all applications for design patents). Given the short shelf-life of many fashion designs, the design patent is simply too slow and uncertain to be relevant.

b. Some Examples of Fashion Design Copying[44]

Fashion design copying is ubiquitous. Designs are frequently copied by retailers, such as H&M, which offers cheap facsimiles of expensive ready-to-wear clothing in over 1000 stores, including in the United States.[45] But copying is not limited to large retailers aping elite designers. The practice of designers and design firms copying one another is equally common, as is illustrated in Figures C, D, and E. These photographs are taken from the *Marie Claire*'s regular feature titled "Splurge or Steal."

It is evident from these pairings that one designer is copying. Which designer is the originator and which the copyist is of little moment, but at least for Figure E, the identity of the copyist is no mystery. The "steal" in Figure E is a copy by Allen B. Schwartz, who, in the biography offered by his own company, states that he is "revered and applauded for the extraordinary job he does of bringing runway trends to the sales racks in record time."[46] These "runway trends," of course, are the works of other designers.

[44] The illustrations of fashion designs in this Article are reproduced in black-and-white on these pages but are best viewed in color; readers are invited to do so at this web site: http://www.virginialawreview.org/page.php?s=content&p=piracyparadox.

[45] H&M, 2004 Annual Report 8, available at http://www.hm.com/corporate/do?action=investorrelationsviewannualreports; see also Amy Kover, That Looks Familiar. Didn't I Design It?, N.Y. Times, June 19, 2005, § 3 (Magazine), at 4; Eric Wilson, McFashion? Bargains Sell, N.Y. Times, Apr. 24, 2005, § 9 (Magazine), at 14. H&M has begun using famous or semi-famous designers to design their collections as well, such as Stella McCartney. See History of Fashion Designer Stella McCartney, http://www.designerhistory.com/historyofashion/mccartney.html (last visited Aug. 21, 2005). For an interesting take on the growth of "fast-fashion" firms like H&M, and the effect of this growth on the fashion industry, see Rana Foroohar and Martin Stabe, Fabulous Fashion; Low-cost companies like Zara and TopShop are emerging as defining and dominant players, not just followers, Newsweek International, Oct. 17, 2005, at 30, available at http://www.msnbc.msn.com/id/9630978/site/newsweek/.

[46] See biography of Allen B. Schwartz, http://www.absstyle.com/allen.asp (last visited Aug. 24, 2006); see also Sarah Childress, Proms Go Hollywood, Newsweek Web Exclusive (May 18, 2005), http://www.msnbc.msn.com/id/7888491/site/newsweek/?GT1=6542 (discussing Schwartz's history of design copying).

splurge
SPLURGE:
Brocade jacket, $2390, Luisa Beccaria; leather sandals, $205, Stuart Weitzman.
STEAL:
Jacquard jacket, $398, Perry Ellis Women's; dress, $310, Theory; sandals, $49, Colin Stuart for Victoria's Secret.
190 MARIE CLAIRE * NOV 2004

Figure C

SPLURGE

STEAL
SPLURGE:
Silk trenchcoat, $1565, Behnaz Sarafpour; stretch jeans, $350, Escada; slingbacks, $205, Stuart Weitzman; bag, $950, Celine; white-gold hoops, $495, Dean Harris; watch, $795, Christian Dior.
STEAL:
Linen trenchcoat, $159, Jones New York Collection; jeans, $139, Bebe; slingbacks, $49, Colin Stuart for Victoria's Secret; hoops, $6.50, Claire's; watch, $75, DKNY Time.
JUNE 2005 • MARIE CLAIRE 169

Figure D

splurge
steal
SPLURGE:
Cardigan, $187, Shoshanna; silk dress, $1000, Jeffrey Chow; sandals, $205, Stuart Weitzman; bracelet, $185, R.J. Graziano.
STEAL:
Cardigan, $44, Gap; dress, $245, A.B.S. by Allen Schwartz; sandals, $49, Colin Stuart for Victoria's Secret. For information, see Shopping Directory. Hair: Bill Westmoreland for artandcommerce.com. Makeup: Matin for artistsbytimothypriano.com. Manicure: Tamika for artistsbytimothypriano.com. Models: Karolina & Line. Production: Ziggy Lenn/House Productions. Shot on location at the Shops at Columbus Circle, Time Warner Center, NYC; guest services: (212) 823-6300.
FOR SHOPS AT COLUMBUS CIRCLE EVENT OPPORTUNITIES, CALL (212) 823-6110
196 MARIE CLAIRE ✱ NOV 2004

Figure E

Copying typically occurs in the same season or year that the original garment appears, but the arc of the "driving shoe" illustrates that fashion design copying can sometimes occur with a lag. In 1978, the J.P. Tod firm marketed a shoe called the "Gommino," a leather moccasin with a sole made of rubber "pebbles." The Tod shoe is pictured in Figure F.

Figure F—Della Valle (J.P. Tod)

The Gommino found a niche audience in the early 1980s. That changed, however, in the mid 2000s, when dozens of shoe designers began marketing their own versions. A few examples of the derivative driving shoes are shown in Figure G, below.

Figure G—Spring 2005—driving shoe variations for menswear

Bacco Bucci

Minnetonka

Ecco

E.T. Wright

Ralph Lauren

The driving shoe's trajectory is unusual. Most fashion designs do not endure; some barely survive a season. Given the evanescence of many trends, fashion copying causes the greatest protests when copies are produced and distributed quickly. Increasingly, they are. Digital photography, digital design platforms, the Internet, global

outsourcing of manufacture, more flexible manufacturing technologies, and lower textile tariffs have significantly accelerated the pace of copying. Copies are now produced and in stores as soon as it becomes clear a design has become hot, if not before.

The result is the remarkably pervasive appropriation of designs, with firms at every level of the apparel marketplace producing copies and derivatives. From the perspective of the music or motion picture industries, this is called "piracy." Piracy, of course, is a principal concern of content owners, as is clear to anyone who has followed the recording industry's battle against online file-trading over peer-to-peer networks like Grokster,[47] or who views the websites of the industries' trade associations, the Recording Industry Association of America ("RIAA") and the Motion Picture Association of America ("MPAA"), both of which prominently feature links on their homepages to anti-piracy initiatives.[48]

Unlike the music and motion picture industries, the fashion industry has not embarked on any substantial anti-piracy initiative. Recently, the principal trade association for American fashion designers, the Council of Fashion Designers of America ("CFDA"),[49] has participated in the crafting of a bill, H.R. 5055, that would extend some content protection to fashion designs.[50] As of this writing, the bill has not been voted out of committee. Even if legislation protecting fashion design is enacted in the next few years, sixty years will have passed since the fall of the fashion guilds, which is a

[47] See, e.g., Metro-Goldwyn-Mayer v. Grokster, 545 U.S. 913 (2005); Bary Alyssa Johnson, New RIAA Lawsuits Target Campus Users, PC Mag., Oct. 4, 2005, available at http://www.pcmag.com/article2/0,1895,1866777,00.asp; Jesse Hiestand, MPAA Launches Legal Offensive Against Online Pirates, The Hollywood Rep., Nov. 5, 2004, http://www.hollywoodreporter.com/thr/article_display.jsp?vnu_content_id=10007066.

[48] See RIAA homepage, http://www.riaa.com/default.asp (last visited Oct. 10, 2005); MPAA homepage, http://www.mpaa.org/home.htm (last visited Oct. 10, 2005).

[49] See The Design Piracy Prohibition Act: Hearing on H.R. 5055 Before the H. Comm. on the Judiciary, 109th Cong. 2 (2006) (statement of Jeffrey Banks, Fashion Designer, on behalf of Council of Fashion Designers of America), available at http://judiciary.house.gov/HearingTestimony.aspx?ID=450 (last visited Aug. 22, 2006).

[50] See H.R. 5055, 109th Cong. (2d Sess. 2006). For a Congressional Research Service summary of H.R. 5055, see http://thomas.loc.gov/cgibin/bdquery/z?d109:HR05055:@@@D&summ2=m& (last visited Aug. 22, 2006). After this Article appeared in draft form on the SSRN database, we were approached by the staff of the House Subcommittee on Courts, the Internet and Intellectual Property and asked to testify on the merits of the bill. On July 27, 2006, Christopher Sprigman testified in opposition.

striking amount of time for the industry to have lived without IP law protections—especially given the many opportunities to alter the law. This sixty-year period encompassed major changes within copyright law, including changes that significantly extended the reach and power of IP protection. Against this backdrop, the relative absence of concern about IP among fashion industry firms and the stability of the legal framework is remarkable.

The industry's diffidence about copying reinforces what the foregoing illustrations of design copying suggest and what many within the industry have observed: that the freedom to copy is largely taken for granted at all levels of the fashion world.[51] In the words of Tom Ford, former creative director for Gucci, "[a]ppropriation and sampling in every [fashion] field has been rampant."[52] This is not to deny that fashion designers sometimes complain about specific instances of design copying. On rare occasions, they even sue one another. In 1994, Yves Saint Laurent ("YSL") famously sued Ralph Lauren in a French commercial court for the "point by point" copying of an YSL dress design.[53] YSL's successful suit took place in Europe, where IP laws are more protective of fashion designs, a topic to which we return below.[54] The YSL-Lauren lawsuit is in many ways the exception that proves the rule that fashion designs are "free as the air to common use."[55]

[51] Cathy Horyn, Is Copying Really Part of the Creative Process?, N.Y. Times, Apr. 9, 2002, at B10.

[52] Cara Mia DiMassa, Designers Pull New Styles Out of the Past, L.A. Times, Jan. 30, 2005, at B3.

[53] Societe Yves Saint Laurent Couture S.A. v. Societe Louis Dreyfus Retail Mgmt. S.A., [1994] E.C.C. 512, 514 (Trib. Comm. (Paris)) ("*YSL*"). Interestingly, the plaintiff's litigation position in *YSL* is illustrative of the significant measure of legitimacy copying enjoys in the fashion industry relative to other content industries. According to an associate of St. Laurent: "it is one thing to 'take inspiration' from another designer, but it is quite another to steal a model point by point, as Ralph Lauren has done." Id. at 519–20; see also Agins, supra note 14, at A1 (quoting a New York-based fashion consultant as saying that "Yves Saint Laurent has blown the whistle on the dirtiest secret in the fashion industry. None of them are above copying each other when they think they can make a fast buck"). Terry Agins elsewhere notes that YSL was himself a copyist, having been fined by a French court in 1985 for copying a jacket design. Agins, supra note 16, at 43.

[54] See infra Section II.D.

[55] See Int'l News Serv. v. Assoc. Press, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting) ("[T]he noblest of human productions—knowledge, truths ascertained, conceptions, and ideas—become, after voluntary communication to others, free as the air

This famous dispute aside, what is most striking about design copying is how remarkably little attention it gets from the industry, either in Europe or in the United States.

II. THE PIRACY PARADOX

As fashion spreads, it gradually goes to its doom.

Georg Simmel, 1904[56]

The orthodox view of IP law holds that piracy is a serious, even fatal threat to the incentive to engage in creative labor. Certainly, the film, music, software, and publishing industries have used the orthodox theory of IP rights to demand increased legal protections. In Congress, these industries have sought broader and more durable IP protections through new laws such as the Digital Millennium Copyright Act and the Sonny Bono Copyright Term Extension Act. In the courts, they have aggressively fought alleged pirates and their enablers.[57] At the international level, they have pushed the executive branch to negotiate strict new bilateral IP treaties, as well as the landmark 1994 Agreement on the Trade-Related Aspects of Intellectual Property Rights ("TRIPS"), which ties signatories' enforcement of minimum IP standards to the World Trade Organization's powerful dispute resolution mechanisms.[58]

The fashion industry, in comparison, has done none of these things. Fashion firms and designers in the United States have neither obtained expanded copyright protection applicable to apparel designs nor sui generis statutory protection. Why has the industry failed to secure U.S. copyright or quasi-copyright protection for its designs, despite what all observers agree is rampant appropriation?

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to common use," and should have "the attribute of property" only "in certain classes of cases where public policy has seemed to demand it.").

[56] Georg Simmel, Fashion, 10 Int'l Q. 130, 138–39 (1904).

[57] See supra note 47.

[58] Rochelle Cooper Dreyfuss & Andreas F. Lowenfeld, Two Achievements of the Uruguay Round: Putting TRIPS and Dispute Settlement Together, 37 Va. J. Int'l L. 275, 277 (1997). Compliance with the TRIPS agreement is mandatory for all WTO members. See generally Overview: the TRIPS Agreement, http://www.wto.org/english/tratop_e/trips_e/trips_e.htm (last visited Aug. 22, 2006). It sets a floor of "minimum standards" for IP protection in member states, and establishes procedures for enforcement of members' obligations. Id.

The answer is not doctrinal. Later, we argue that no substantial doctrinal barrier prevents copyright's extension to fashion designs.[59] If the law could expand to cover fashion design, why hasn't it? This Article seeks to explain why fashion's low-IP rule persists. We offer a theory of why the regime of free appropriation is a stable equilibrium, one that relevant actors have failed to overturn via the political process in the sixty-five years since the fall of the Fashion Originators' Guild. We advance two interrelated theories that we believe are foundational to the continuing viability of fashion's low-IP equilibrium, both of which relate to the economics of fashion. In doing so, we argue that the lack of design protection in fashion is not especially harmful to fashion innovators, and hence they are not incentivized to change it. Indeed, we claim that this low-IP system may paradoxically serve the industry's interests better than a high-IP system.

A. Induced Obsolescence

Clothing is a status-conferring good. Most forms of apparel above the commodity category, and even some apparel within that lowest-level category, function as what economists call "positional goods." These are goods whose value is closely tied to the perception that they are valued by others. *The Economist* helpfully defines positional goods as:

> Things that the Joneses buy. Some things are bought for their intrinsic usefulness, for instance, a hammer or a washing machine. Positional goods are bought because of what they say about the person who buys them. They are a way for a person to establish or signal their status relative to people who do not own them: fast cars, holidays in the most fashionable resorts, clothes from trendy designers.[60]

[59] See infra Subsection II.E.1.

[60] Economics A–Z, www.economist.com (follow "Economics A–Z" hyperlink; then follow "P" hyperlink; then follow "positional goods" hyperlink) (last visited Aug. 26, 2006). For more elaborate treatments of contemporary consumer behavior with regard to status-conferring goods, see Robert Frank, Luxury Fever: Why Money Fails to Satisfy in an Era of Excess 159–65 (1999) (portraying much consumer purchasing as an arms race, in which each new purchase spurs others to engage in similar purchasing, but with no gain in status since status is inherently relational); Juliet Schor, The

Positional goods purchases, consequently, are interdependent: what we buy is partially a function of what others buy. Put another way, the value of a positional good arises in part from social context.

The positionality of a particular good is often two-sided: its desirability may rise as some possess it, but then subsequently fall as more possess it. Take the examples used in the quote directly above. A particular fast car is most desirable when enough people possess it to signal that it is a desired object, but the value diminishes once every person in the neighborhood possesses one. Nothing about the car itself has changed, except for its ability to place its owner among the elite and to separate her from the crowd. Similarly, part of the appeal of a "fashionable" resort is that only a few people know about it, or are able to afford it. For these goods, the value of relative exclusivity may be a large part of the goods' total appeal.[61]

Not all apparel goods are positional, but many are, and that positionality is often two-sided. Particular clothing styles and brands confer prestige. A particular dress or handbag from Gucci or Prada has value, in part, because fashionable people have it and unfashionable ones do not. As those styles diffuse to a broader clientele, frequently the prestige diminishes for the early adopters. This observation is not new. Jean Cocteau tapped into this dynamic of obsolescing attractiveness when he opined that "[a]rt produces ugly things which frequently become more beautiful with time. Fashion, on the other hand, produces beautiful things which always become ugly with time."[62] Even earlier, sociologist Georg Simmel noted the same process: "As fashion spreads, it gradually goes to its doom. The distinctiveness which in the early stages of a set fashion assures for it a certain distribution is destroyed as the fashion spreads, and

Overspent American: Why We Want What We Don't Need (1999). Barnett focuses on this literature to create a three-tiered model of utility: snob utility, aspirational utility, and bandwagon utility. Barnett, supra note 2, at 1386–92.

[61] In this respect, two-sided positional goods are very different from those goods subject to positive externalities and network effects. Goods like fax machines or computer operating systems are continually more valuable as they are more widely used. The rate at which these goods increase in value may slow past a certain threshold of distribution, but there is no inflection point at which the good begins to decline in value as it is more widely spread.

[62] N.Y. World Telegram & Sun (Aug. 21, 1960).

as this element wanes, the fashion also is bound to die."[63] Perhaps Shakespeare put it most succinctly: "the fashion wears out more apparel than the man."[64]

This process of diffusion leading to dissipation of social value occurs for at least two reasons. First, the diffusion of cheap, obviously inferior copies may tarnish by association the original article, although whether originals are in fact "tarnished" by copies is an empirical question on which there is little research. Indeed, one recent commentator has argued that such low-grade copies actually signal the desirability of the original, thus enhancing its value.[65] Second (and, in our view, much more importantly), for the class of fashion early-adopters, the mere fact that a design is widely diffused is typically enough to diminish its value. It can no longer signify status if it widely adopted. To even a casual follower of fashion, the key point is obvious: what is initially chic rapidly becomes tacky as it diffuses into the broader public, and for true fashion junkies, nothing is less attractive than last year's hot item.

A recent example of the quick ascent and descent of a fashion item is the Ugg, a sheepskin boot originating in Australia. An Ugg boot is shown in Figure H.

Figure H

[63] Simmel, supra note 56, at 547.
[64] William Shakespeare, Much Ado About Nothing act 3, sc. 3.
[65] Barnett, supra note 2, at 1410–11.

Ugg boots were a must-have fashion item for women in 2003 and 2004. The style was widely copied and quickly gained wide distribution, even among men.[66] By August 2004, however, commentators were calling the Ugg boot a "human rights violation" and urging readers to give them up.[67] By early 2005, the Ugg trend was apparently over, at least among the cognoscenti:

> I read in US Weekly recently that Demi Moore had walked into a hip store wearing Uggs and was laughed at by the workers behind the counter who couldn't believe she didn't know that she was hopelessly out of date. When the people who really have their fingers on the pulse of fashion, the retail workers, think you're fashion road kill, you have to accept it. The trend is over. Hooray![68]

The product cycle of Uggs illustrates the perils of positionality: what goes up eventually comes down. As a design is copied by others and used in less-expensive derivative works, it becomes more widely purchased. Past a certain inflection point, the diffusion of the design erodes its positional value, and the fashion item becomes anathema to the fashion-conscious. This drives status-seekers to new designs in an effort to distinguish their apparel choices from those of the masses. The early adopters move to a new mode; those new designs become fashionable, are copied, and diffused outside the early-adopter group. Then, the process begins again.

[66] See Lorrie Grant, UGG Boots a Fashion Kick, USA Today, Dec. 10, 2003, at 3B.

[67] Ugg Poncho, The New Ugg Evil, Defamer, Aug. 9, 2004, http://www.defamer.com/hollywood/culture/ugg-poncho-the-new-ugg-evil019192.php.

[68] The Budget Fashionista, Alyssa Wodtke Gives Us Her Thoughts on the Demise of the Ugg (Jan. 26, 2005), http://www.thebudgetfashionista.com/archives/000540.php; see also Tad Friend, Letter from California: The Pursuit of Happiness, The New Yorker, Jan. 23 & 30, 2006, at 64, 66 (discussing a police search for actress Lindsay Lohan following a car crash in which the actress was involved: "Dunn panned down Robertson toward the Ivy . . . . 'Problem is, every girl on the street kind of fits the profile. How's this?' He zoomed in on a Lohanish figure in dark glasses. 'She's wearing Uggs,' [the station manager says]. 'Those are so last year, couldn't be her'").

The fashion cycle has long been familiar.[69] What is less commonly appreciated is the role of IP law in fostering the cycle. We argue that fashion's low-IP regime is paradoxically advantageous for the industry. IP rules providing for free appropriation of fashion designs accelerate the diffusion of designs and styles. We call this process "induced obsolescence." If copying were illegal, the fashion cycle would occur very slowly. Instead, the absence of protection for creative designs and the regime of free design appropriation speeds diffusion and induces more rapid obsolescence of fashion designs. As Miucci Prada put it recently, "We let others copy us. And when they do, we drop it."[70] The fashion cycle is driven faster, in other words, by widespread design copying, because copying erodes the positional qualities of fashion goods. Designers in turn respond to this obsolescence with new designs. In short, piracy paradoxically benefits designers by inducing more rapid turnover and additional sales.

Free appropriation of clothing designs contributes to more rapid obsolescence of designs in at least two broad ways. First, copying often results in the marketing of less expensive versions, thus pricing-in consumers who otherwise would not be able to consume the design. What was elite quickly becomes mass.

As in other industries, the significance of design copying turns somewhat on the closeness of the copying. If design copies were readily discernable from originals by the casual observer, the status premium conferred by the original design would, in large part, remain.[71] It is often quite difficult, however, to distinguish copies

[69] See, e.g., Paul H. Nystrom, Economics of Fashion 18–36 (1928); Wolfgang Pesendorfer, Design Innovation and Fashion Cycles, 85 Am. Econ. Rev. 771 (1995); James M. Treece, Copying Methods of Product Differentiation: Fair or Unfair Competition?, 38 Notre Dame Law. 244, 245 (1963).

[70] The Look of Prada, In Style Mag., Sept. 2006, at 213.

[71] The status premium might even be enhanced because consumption of the cheaper and visibly inferior copy would help signal to consumers able to afford the expensive original that the original design is particularly attractive. Barnett relies heavily on this assumption in his analysis of knock-offs.

> [T]he introduction of copies, provided they are visibly imperfect, may increase the snob premium that elite consumers are willing to pay for a fashion good. Second, the introduction of copies may lead non-elite consumers to adjust sufficiently upward their estimate of the status benefits to be gained by acquiring the relevant good, thereby translating into purchases of the original.

from originals, or to determine which version actually is the original. As the examples shown in Part I demonstrate, many copies are not visibly inferior compared with the originals, at least not without very close inspection.

Trademarks can help distinguish the original from the various copies, and thus distinguish elites from the masses. As noted above, trademarks only occasionally appear prominently on the outside of clothing. More often, they are not visible unless one looks inside an item of clothing. Where there is a visible mark, it blunts some of the effects of copying on the diffusion of innovative designs.[72] (This may help explain what some believe is an increase in visible trademarks on apparel.) For the majority of items, however, the trademark is not visible to others, rendering the original and the copy strikingly similar.

In arguing that trademark law alone does not inhibit copying of designs, we do not wish to suggest that trademarks are unimportant. Even in a competitive environment that includes substantial freedom to copy, particular firms are known as design innovators. The Chanel firm and its head designer, Karl Lagerfeld, for example, have originated many influential styles of women's clothing. Because of the firm's reputation, and the resultant strength of its mark, Chanel is able to charge very high prices for apparel, even for apparel, such as its signature women's jacket, that is widely cop-

Barnett, supra note 2, at 1422. We are unsure about the enhancement effect on additional purchases of the original good, but it is an empirical question. Not only do we not employ this assumption, we stress a fundamentally different aspect of fashion—the desire for the *new*. Our primary claim is that copies, by diffusing the original design to the mass of consumers, leads early adopters to seek out new designs in order to stay ahead, or on top, of the fashion cycle. Hence, copies in our model need not be visibly inferior: in fact, the better they are, the more they propel the cycle forward. As a matter of observation, the visible difference between copies and originals is not always large and arguably declining. As the *Wall Street Journal* recently reported, driving the trend toward purchases of knock-offs "is the improving quality of many fake goods. As more genuine luxury goods are produced in China, more counterfeits are being manufactured nearby—often using the same technology." Fong, supra note 30, at B1. We focus not on the effects of these improved copies on the copied good but on purchases of *new* goods.

[72] Some designers have ambivalence about copying that may be manifested in a desire to affix visible external trademarks. But the rise of visible trademarks, to the degree there is such a rise, can also be attributed to more general efforts at brand management and may simply reflect the increased value of well-known brands in a global marketplace.

ied by other firms. What Chanel is not able to do, however, is establish itself as an exclusive purveyor of its own designs—an option it would have if U.S. copyright law protected Chanel's designs as well as its trademarks.

Additionally, many "copies" are not point-by-point reproductions at all, but instead new garments that appropriate design elements from the original and recast them in a derivative work. This observation brings us to the second way in which copying drives induced obsolescence. A regime of free appropriation contributes to the rapid production of substantially new designs that were creatively inspired by the original design. Importantly, this regime is precisely the opposite of the default rule under the copyright laws, which allocate to the originator the exclusive right to make or authorize derivative works. The many variations made possible by unrestricted exploitation of derivatives contributes to product differentiation that induces consumption by those who prefer a particular variation to the original. To the extent that derivatives remain visibly linked to the original design, they help diffuse the original design. This, in turn, further accelerates the process by which the design (and its derivatives) become less attractive to early adopters.

This account suggests an obvious response: if copying and derivative reworking have this effect, originating design houses would have an incentive to reproduce their original designs and variations of those designs in garments at different price levels—thus pursuing a single-firm price discrimination strategy. In other words, if this argument is correct, we should expect the originator to reproduce its own designs at lower price points, and to elaborate derivatives, rather than let competitors do it. In a recent article, Jonathan Barnett notes this puzzle and suggests further that one might even expect innovating firms to give away cheaper, visibly inferior versions of the product. Barnett argues that brand protection, the desire to maintain the exclusivity of a brand such as Gucci, stops this from occurring in the real world. Yet, the question remains why the same design could not be introduced by the same firm, but under a different brand.

The answer is that firms sometimes do pursue a single-firm strategy via bridge lines. While some fashion insiders stress the danger of bridge lines blurring a brand's identity and tarnishing a mark,

many well-known design houses have a second line that is lower-priced, such as Armani's "Emporio Armani" or Dolce & Gabbana's "D & G." One way to understand the phenomenon of bridge lines is precisely as a strategy to achieve some measure of vertical integration—in essence, knocking off one's own signature designs to price discriminate among consumers. Themes developed in the premier lines are echoed in the bridge lines, but with cheaper materials, lower prices, and design variations pitched to the particular tastes of that bridge line's constituency.[73] The most prominent user of this strategy is Armani, which has up to five distinct lines, depending on how one counts. Most fashion firms, however, do not follow the Armani model. Why the Armani model—or a model in which a single firm self-copies designs at multiple price points under different brand names—is not more prevalent is an interesting question for future research. Given the absence of IP protection and the reality faced by originating firms that other firms often will appropriate their designs at lower price levels,[74] the economic incentives to self-appropriate via bridge lines would seem strong. Moreover, the objections to damaging the value of the brand can be overcome by using different labels and segmenting sales at different outlets. It is clear that at least some degree of self-appropriation occurs through the common practice of an (often single) bridge line. It is also clear, however, that fashion firms

[73] The nascent practice of "semi-couture" can be viewed in a similar fashion. See Dodes, supra note 10, at P6 (noting "the sudden rise of the semi-couture category"). Unlike couture, "which must be handsewn to earn the designation, semi-couture pieces are mostly machine-made. . . . The designers are trying to entice shoppers to move up from ready-to-wear lines that appeal to a broader audience." Id.

[74] Under the current low-protection IP regime, the fashion industry is an example of *decentralized* management of innovation. In the fashion field, while the initial development of a design may be undertaken within a single firm, many other firms engage in the development of that design via copies and derivatives. By contrast, in a system of *centralized* innovation, a fashion design would be owned and controlled by one firm or a small number of firms by virtue of enforceable intellectual property rights, and the development of that design and related designs would be controlled by the rights-holding firm or firms. We do not offer a view on whether the decentralized approach is optimal for the fashion industry. Instead, we limit ourselves here to pointing out that the industry has long followed the decentralized model, and we offer potential explanations for the model's seeming stability. For an excellent discussion of both centralized and decentralized innovation models, see Mark A. Lemley, Ex Ante Versus Ex Post Justifications for Intellectual Property, 71 U. Chi. L. Rev. 129 (2004).

often do not price-discriminate via bridge lines even when they know others will do so.

While we observe some self-copying, we do not see any sustained attempt by fashion firms to prevent appropriation of their original designs by other firms. If self-appropriation through bridge lines were an optimal strategy for a large number of fashion firms, we suspect that the current low-IP equilibrium might not long endure, for a logical corollary to a more fully elaborated single-firm strategy based on bridge lines is a strategy of blocking others from appropriating one's designs. In any event, for the moment, the industry's longstanding tolerance of appropriation contributes to the rapid diffusion of original designs. Rapid diffusion leads early-adopter consumers to seek out new designs on a regular basis, which in turn leads to more copying, which fuels yet another design shift. The fashion cycle, in sum, is propelled by piracy.

We do not claim to be the first to note the cyclical nature of fashion design. But what has not been previously understood is the role of law in fostering this cycle. Until the early twentieth century, most of Western society treated clothing as a durable good to be replaced only when it wore out.[75] Only the wealthiest consumers could afford to purchase new clothing well before the old became nonfunctional. Nevertheless, for clothing produced for the elite, the cyclical nature of the good was already apparent. Thorstein Veblen, in his 1899 classic *The Theory of the Leisure Class*, noted the process of seasonal change of "conspicuously expensive," that is, elite fashion:

> Dress must not only be conspicuously expensive and inconvenient, it must at the same time be up to date. No explanation at all satisfactory has hitherto been offered of the phenomenon of changing fashions. The imperative requirement of dressing in the latest accredited manner, as well as the fact that this accredited fashion constantly changes from season to season, is sufficiently

[75] Most clothing before the early twentieth century was home-made or custom-made. Ready to wear as a category first developed for men in the mid-nineteenth century and for women a few decades later. Only by the 1920s was mass-produced clothing available to most consumers in the United States. Burns & Bryant, supra note 20, at 10–14.

> familiar to every one, but the theory of this flux and change has not been worked out.[76]

This passage highlights a dynamic that spread, during the twentieth century, to the middle classes and beyond. Veblen's explanation for shifting fashion proceeded from his "norm of conspicuous waste," which, he claimed, "is incompatible with the requirement that dress should be beautiful or becoming."[77] Accordingly, each innovation in fashion is "intrinsically ugly," and therefore consumers are forced periodically to "take refuge in a new style," which is itself, of course, but another species of ugliness, thus creating a "aesthetic nausea" that drives the design cycle.[78] While some runway fashion can indeed induce nausea, we think it is the positional nature of fashion as a status-conferring good rather than any abstract aesthetic principle that drives the fashion cycle, leading status-seekers regularly to acquire new clothing even when the old remains fully serviceable.

Our core claim is that piracy is paradoxically beneficial for the fashion industry, or at least piracy is not very harmful. We do not deny, however, that copying may cause harm to particular originators. Even originators that suffer harm, however, may not be strongly incentivized to break free of the low-IP equilibrium because, often, they are also copyists. The house that sets the trend one season may be following it the next, and whether a particular firm will lead or follow in any given season is likely difficult to predict. Thus, in the current system, designers viewing their incentives ex ante are at least partially shrouded within a Rawlsian veil of ignorance.[79] If copying is as likely a future state as being copied, it is not clear that property rights in fashion designs are advantageous for a designer, viewed ex ante. And there is good reason to think that, in a world with more than two designers, one is more likely, over time, to be a copyist than to be copied. Original ideas are few, and the existence of fashion trends typically means that many actors copy or rework the ideas of some originator (or copy a copy of

[76] Thorstein Veblen, The Theory of the Leisure Class 122 (Transaction Publishers 1992) (1899). Not coincidently, American Vogue began publication in 1892. See Burns & Bryant, supra note 20, at 32.

[77] Veblen, supra note 76, at 124.

[78] Id. at 124–25.

[79] John Rawls, A Theory of Justice 136–42 (5th prtg. 1973).

the originator's design). Some may originate more than others, but all engage in some copying at some point—or, as the industry prefers to call it, "referencing." Moreover, the industry's quick design cycle and unusual degree of positionality means that firms are involved in a rapidly repeating game, in which a firm's position as originator or copyist is never fixed for long. The result is a stable regime of free appropriation.

B. Anchoring

Our second, and related, argument proceeds from the observation that if the fashion industry is to successfully maintain a cycle of induced obsolescence by introducing one or more new styles each season, it must somehow ensure that consumers understand when the styles have changed. In short, to exist, trends have to be communicated as well as created. A low-IP regime helps the industry establish trends via a process we refer to as "anchoring."

Our model of anchoring rests on the existence of definable trends. While the industry produces a wide variety of designs at any one time, readily discernible trends nonetheless emerge and come to define a particular season's style. These trends evolve through an undirected process of copying, referencing, receiving input from consultants,[80] testing design themes via observation of rivals' designs at runway shows, communication with buyers for key retailers, and coverage and commentary in the press. Designers and critics note these trends all the time, and they often talk of the convergence of designs as a reflection of the *zeitgeist*. Like a school of fish moving first this way and then that, fashion designers follow the lead of other designers in a process that, while bewildering at times, results in the emergence of particular themes.

For anchoring to occur, the trendy need to be able to identify the trends. In practice, there is always a discernable set of major trends and a myriad of minor ones. Copying contributes substantially to this process. Widespread copying allows each season's output of

[80] Creative consultants such as the Doneger Group provide advice on design trends to the fashion industry. See Doneger Group, http://www.doneger.com/web/231.htm (last visited Aug. 22, 2006). Similarly, the Color Association of the United States provides input on color trends in apparel and accessories. See The Color Association of the United States, http://www.colorassociation.com/site/colorforecasts1.html (last visited Aug. 22, 2006).

designer apparel to gain some degree of design coherence. In doing so, copying helps create and accelerate trends. The very concept of a trend requires multiple actors converging on a particular theme. Copying helps to anchor the new season to a limited number of design themes, which are freely workable by all firms in the industry within the low-IP equilibrium. A regime of free appropriation helps emergent themes become full-blown trends; trendy consumers follow suit. Anchoring thus encourages consumption by conveying to consumers important information about the season's dominant styles: suits are slim, or roomy; skirts are tweedy, or bohemian; the hot handbag is small, rectangular, and made of white-stitched black leather, and so forth. Thus anchoring helps fashion-conscious consumers understand (1) when the mode has shifted, (2) what defines the new mode, and (3) what to buy to remain within it.

The process by which the industry converges on a particular theme(s) is worthy of its own study, but is beyond the scope of this Article. We can see the process at work, however, in the illustrations of driving shoes in Figure G. That particular style had an efflorescence in Spring and Summer 2005. At the same time, the *New York Times* reported on a project by a former fashion critic for the *New Yorker* magazine honoring the twenty-fifth anniversary of the original Della Valle (Tod's) driving shoe.[81] In the recent Fall 2005 season, the hot fabric was said to be astrakhan, a sort of fur made from lambs (and even fetal sheep) from Central Asia;[82] a hot shoe style was the snub-nosed high heel pump.[83] There is no functional explanation for the sudden relevance of these themes; that is, no explanation related to the utility of a particular design. Rather, the process by which design themes emerge and characterize a season's output is a combination of creative intuition, testing among constituencies, and informal communication within the industry. Via this process, the fashion community converges on seasonal themes, which fashion firms exploit by copying from one another, spinning out derivatives and variations, diffusing the themes widely, and fi-

[81] See Armand Limnander, Back to Collage: Michael Roberts Snips and Tells, N.Y. Times, Aug. 28, 2005, § 6 (Magazine), at 92.

[82] Alexandra Zissu, Rack of Lamb, N.Y. Times, Aug. 28, 2005, § 6 (Magazine), at 86.

[83] Ellen Tien, Pumped and Plumped, N.Y. Times, Sept. 11, 2005, § 9 (Magazine), at 3.

nally, driving them toward exhaustion. The resulting anchoring of a season's innovation around a set of discrete designs helps drive consumption by defining what is, and what is not, in style that season.

We also see this process at work within the fashion media, operating as a large adjunct to the fashion industry. Magazines such as *Glamour*, *Marie Claire*, and *Vogue*, and television shows such as *What Not to Wear* all provide fashion advice to consumers. Their proclamations do not always take root, but they are a constant. For example, a recent *New York Times* story describes, in the vaporous prose that characterizes fashion writing, the appearance during the Fall 2005 season of a large number of women's boot designs. The article highlights the unusual existence of multiple boot designs in the season:

> There are 60's styles à la Nancy Sinatra; 70's styles à la Stevie Nicks; 80's styles à la Gloria Estefan; and 90's styles à la Shirley Manson. It is a puzzling sight for fashion seers used to declaring that one style of boot—Midcalf! Thigh High!—is The One For Fall.[84]

The writer's expectation, which the style promiscuity of the 2005 season violated, is that the industry will anchor narrowly. And there are many examples of narrow anchoring that appear in the fashion press and on the fashion racks. One example from Spring/Summer 2005 is the "bohemian" skirt, a loosely fitted skirt featuring tiers of gathered fabric, lace inserts, and (usually) an elasticized or drawstring waist. This skirt is derivative of a style not widely worn since the 1970s. Suddenly last spring, dozens if not hundreds of versions of these skirts appeared, became one of the defining themes of the season,[85] and served as an anchor for a wider

[84] David Colman, Choices, Up to Your Knees, N.Y. Times, Aug. 25, 2005, at G1.

[85] See Pauline Weston Thomas, The Gypsy Boho Summer of 2005, http://www.fashion-era.com/Trends_2006/9_fashion_trends_2006_boho_gypsy.htm (last visited Aug. 22, 2006) ("It's unlikely that you missed it, but in the past year eclectic ethnic has swept the nation with a phenomenal speed, reaching a peak in summer 2005 with the ultra feminine Gypsy Boho skirt. In 2005, women began to wear skirts for the first time in years. This revived 1970's tiered 'Hippy Skirt' has been a worldwide success and because of the easy fit with mostly elasticated waist/drawstring and lots of hip room it is ultra comfortable. In addition this makes it very easy to manufacture with one size often adjusting to fit many.").

"bohemian look."[86] Figure I shows examples of bohemian skirts from U.K. fast-fashion retailer Topshop; the photo on the right also illustrates garments that, along with the skirt, comprise the "bohemian look":

Figure I

If the usual lifespan of trends in women's fashion is a guide, the bohemian look for Spring/Summer 2005 is over. However, it did, by some accounts, influence a related "Russian" or "Babushka" look for Fall 2005.[87] Figure J shows examples of the Russian style

[86] See, e.g., Judy Gordon, If You Want to be Groovy, You Gotta Go 'Boho,' Today: Fashion & Beauty (Apr. 8, 2005), http://msnbc.msn.com/id/7425693/ ("This season, fashionistas are rhapsodic about the revival of the bohemian style."); Kidzworld.com, Spring Fashion—Get the Bohemian Look, http://www.kidzworld.com/site/p5553.htm (last visited Aug. 22, 2006) ("If you haven't already noticed, the bohemian look is the hottest trend of the moment. Inspired by gypsies, ethnic patterns and the '70s hippie scene, the boho trend is all about looking like you just threw on some clothes without thinking.").

[87] See Thomas, supra note 85 ("Yet now, with fall 2005 upon us we find the time has come to move forward. This is easily achievable with the Rich Russian Look which will take you through the transition from Boho to Babushka with ease.").

by Oscar de la Renta, Diane von Furstenberg, Behnaz Sarafpour, Anna Sui, and Matthew Williamson.[88]

Figure J

To be sure, the styles produced by designers do not always resonate with individual consumers or the major retailers that must make decisions about purchases well before the clothes hit the racks. But it is undeniable that particular designs are identified as anchoring trends, and that these trends wax and wane, only to be replaced by the next set of themes. The fashion industry's low-IP environment is constitutive of this induced obsolescence/anchoring dynamic: designers' frequent referencing of each other's work helps to create (and then exhaust) the dominant themes, and these themes together constitute a mode that consumers reference to guide their assessments of what is "in fashion."

C. Summary: The Paradoxical Effects of Low Protection

Our stylized account of the fashion industry and the surprising persistence of its low-IP regime obviously glosses over much. The so-called "democratization of fashion" that took place in the latter half of the twentieth century makes the process of modeling innovation and diffusion in the industry difficult because fashion is no

[88] Harriet Mays Powell & Amy Larocca, Fall Fashion, New York Mag., Feb. 28, 2005, http://newyorkmetro.com/nymetro/shopping/fashion/fall2005/11164/index.html.

longer a top-down design enterprise.[89] Today, many trends bubble up from the street, rather than down from major houses. But if there is one verity in fashion, it is that some things are hot and others are not, and the styles in vogue are constantly changing.

Our argument depends less on who determines what is desirable than on how a regime of low IP protection, by permitting extensive and free copying, enables emerging trends to develop and diffuse rapidly, and, as a result of the positionality of fashion, to die rapidly. Induced obsolescence and anchoring are thus intertwined in a process of quick design turnover. This turnover contributes to, though it does not by itself create, a market in which consumers purchase apparel at a level well beyond that necessary simply to clothe themselves. Together, induced obsolescence and anchoring help explain why the fashion industry's low-IP regime has been politically stable. These twin phenomena at a minimum reduce the economic harm from design copying, harm that is predicted by the standard account of IP rights. At a maximum, these processes actually benefit designers and the industry as a whole. More fashion goods are consumed in a low-IP world than would be consumed in a world of high IP protection precisely because copying rapidly reduces the status premium conveyed by new apparel and accessory designs, leading status-seekers to renew the hunt for the next new thing.

It is important to underscore that we do not claim that induced obsolescence and anchoring have caused IP protection to be low in any direct sense. Rather, our more nuanced argument is that these phenomena help explain why the political equilibrium of low IP protection is stable. The existence and cyclical effect of induced obsolescence and anchoring have allowed the industry to remain successful and creative despite a regime of free appropriation. We acknowledge that many designs do not fall within any identifiable trend, and the induced obsolescence/anchoring process does not apply to every innovation produced by the fashion industry. Our point is simply that the existence of identifiable trends is itself a product of pervasive design copying and that the creation and accelerated extinction of these trends helps to sell fashion.

[89] See Agins, supra note 16, at 276.

We also do not claim that the current regime is optimal for fashion designers or for consumers. We recognize that the fashion industry may also be able to thrive in a high-IP environment that offers substantial protections to originators against copying—protections analogous to those afforded to other creative industries. Since a formal high-IP regime has never existed in the fashion industry (at least in the United States), it is difficult to say with any certainty whether raising IP protections would raise consumer or producer welfare.[90] It is possible that the structure of the fashion cycle, and the industry's relentless remixing and reworking of older (and current) designs, is endogenous, in that industry practices derive, in part, from the existing legal regime of open appropriation of designs. To some degree this is clearly true: if fashion were treated like music or books by the law, the reworking of designs might be quite limited. It is unlikely, however, that the fashion cycle as a phenomenon would cease to exist under a high-protection legal regime. In other words, the extant legal regime likely has some causal effect on the structure of innovation in the fashion industry, but not an overwhelming effect. The positional nature of fashion long predates Veblen's observations in the nineteenth century; we doubt much could dislodge the practice of using clothing styles to signal status to others. In any event, the history of fashion shows that informal high-IP equilibria have existed. As we have described, prior to the 1940s, the American industry constructed an extra-legal high-IP regime via the Fashion Originator's Guild that permitted copying of European designs but not American ones.[91] Once the Supreme Court disrupted that regime on antitrust grounds, however, extensive copying of all designs renewed. In the six decades since, the legal regime for fashion has been remarkably stable, and the fashion industries in both America and abroad have thrived.

[90] Whether consumers would be better off with less rapid change or more rapid change is not clear to us, and our arguments above are not very relevant to this question. We think the apparel industry is probably, in the aggregate, better off with more rapid change because more rapid change generally means more sales per year. See generally, Barnett, supra note 2.

[91] See supra Subsection I.B.1.

D. The European Union and the United States—Different Legal Rules, Similar Industry Conduct

So far, our arguments about the nature of the fashion industry's low-IP regime have focused on the United States. But of course the fashion industry is global, and most of the same firms that market apparel in the United States also do so in the fashion industry's other creative center, Europe. Interestingly, the European regime affecting fashion designs is, in a formal sense, markedly different than the American regime. European law, an amalgam of national laws and European Union law, generally protects fashion designs from copying. Yet, we do not see evidence, in either the form of lawsuits or the absence of design copying, that the behavior of fashion industry firms changes much from one side of the Atlantic to the other. This observation suggests that the industry's practices with respect to design copying are not sensitive to changes in legal rules, and that the industry chooses to remain within a low-IP regime even where the nominal legal rules are the opposite.

Compared with the United States, the European Union provides much more encompassing protection for apparel designs. In 1998, the European Council adopted a European Directive on the Legal Protection of Designs ("Directive").[92] The Directive obliges Member States to harmonize their laws regarding protection of registered industrial designs, a category that includes apparel designs, and to put in place design protection laws that follow standards set out in the Directive. Those standards include the following:

- For protection to apply, a fashion design must be registered.

- The owner of a registered design gains exclusive rights to that design. These rights apply not only against copies of the protected design, but also against substantially similar designs—even those that are the product of independent creation (this is a patent-like form of protection that extends beyond copyright).

[92] Council Directive 98/71, 1998 O.J. (L 289) 28 (EC). The Member States agreed to implement the Design Directive by October 28, 2001. See Press Release, European Commission, Internal market: Commission moves against 13 Member States for failure to implement EU legislation (Jan. 6, 2003), available at http://europa.eu/rapid/pressReleasesAction.do?reference=IP/03/4&format=HTML&aged=0&language=EN&guiLanguage=n.

- Protection extends to the "lines, contours, colours, shape, texture and/or materials" of the registered design. It also applies to "ornamentation."

- A design registration in each Member State is valid for a total of 25 years.[93]

Shortly after issuing the Directive, the European Council adopted a Council Regulation for industrial designs.[94] This regulation applies the very broad design protections set out in the Directive to all Member States without the need for national implementing legislation.

In addition to protection for registered designs, the regulation also provides E.U.-wide protection for unregistered designs. The standards for the unregistered design resemble rights previously existing under U.K. law, which provided a right for unregistered designs in the Copyright, Designs and Patents Act 1988, but the E.U.-wide protection is broader in terms of the type of works to which it applies.[95] Importantly, protection for unregistered designs is conditioned on the claimant providing competent proof of copying. In this respect, the unregistered design right is less powerful than the rights attending registered designs, which are patent-like in their prohibition of use of a registered design, regardless of whether the impugned party actually copied.[96]

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[93] Council Directive 98/71, 1998 O.J. (L 289) 28 (EC).

[94] See Press Release, European Commission, Commission welcomes adoption of Regulation on Community designs (Dec. 12, 2001), available at http://europa.eu/rapid/pressReleasesAction.do?reference=IP/01/1803&format=HTML&aged=1&language=EN&guiLanguage=en. A directive of the European Council ("EC") has legal force only after each member state enacts national legislation implementing the directive. The EC cannot create a self-implementing, community-wide right through a directive. The EC can, however, adopt a Council Regulation, which has automatic legal force in all member states without the need to enact implementing legislation at the national level. See id.

[95] See G. Scanlan, The Future of Design Right: Putting s51 Copyright, Designs & Patents Act 1988 in its Place, 26 Statute L. Rev. 146, 156 (2005).

[96] France protects unregistered fashion designs as part of its copyright law, and also has a separate statute, the French Design Act, extending patent-like protection to designs. Additionally, because the E.U.-wide standards for unregistered design rights do not replace national laws relating to unregistered designs, generally an unregistered design rights holder will have a choice between invoking the national law of the member state concerned or the community-wide right to protect the unregistered de-

Despite the availability of legal protection in the European Union for both registered and unregistered designs, we see little litigation in Europe involving fashion designs.[97] Perhaps more importantly, we see widespread fashion design copying, often by the same firms offering similar clothing in both the E.U. and U.S. markets. Indeed, two of the major fashion copyists—H&M and Zara—are European firms that expanded to North America only after substantial success at home.[98] For example, Figure K shows a reproduction of a Michael Kors shoe by U.K. retailer Morgan.[99] Although there are differences, it is reasonably likely that, under the "substantial similarity" standard that applies in both the E.U. and U.S. systems, the Morgan shoe would be judged infringing. Figure L shows a dress by French design firm Chloe and a similar dress sold by U.K. retailer Tesco.[100] The Tesco dress clearly is "referencing" the Chloe dress in a manner that, under applicable E.U. law, would potentially condemn the Tesco dress as an unauthorized, and thus infringing, derivative work.

sign. See Annette Kur, The Green Paper's 'Design Approach'—What's Wrong With It, 15 Eur. Intell. Prop. Rev. 374, 375–76 (1993) (summarizing national laws).

[97] See, e.g., Shirin Guild v. Eskander Ltd., [2001] F.S.R. 38, 24(7) I.P.D. 24,047 (U.K. High Court) (finding infringement of a shirt, sweater, and cardigan); J. Bernstein Ltd. v. Sydney Murray Ltd., [1981] R.P.C. 303 (U.K. High Court 1980) (finding infringement of underlying design sketch based on copying of made-up garment). But see Lambretta Clothing Co. v. Teddy Smith Ltd., [2003] R.P.C. 41, 2003 WL 21353286 (Ch. D), [2003] EWHC 1204 [2004] EWCA Civ. 886 (refusing to find copyright infringement based on use of design sketch to create made-up garment). Agins notes that in the 1990s, as the traditional French couture houses came under increasing market pressure, they threatened all kinds of litigation at those who distributed photos of designs shown at the Paris runway shows. But, she recounts, "nothing happened." Agins, supra note 16, at 42–43.

[98] Similarly, Topshop, a large U.K. retailer that is often said to engage in design copying, has recently announced plans to open a location in New York and is considering additional U.S. outlets. See Ruth La Ferla, But Will it Play in Manhattan?, N.Y. Times, June 21, 2006, at C1 (noting availability in London Topshop outlets of "Stella McCartney and Marni look-alikes").

[99] See Mark Tungate, When Does Inspiration Become Imitation?, Telegraph (London), July 27, 2005, available at http://www.telegraph.co.uk/fashion/main.jhtml?xml=/fashion/2005/07/27/efcopy27.xml.

[100] Id.

(Michael Kors shoe)

Figure K (Morgan shoe)

(Chloe, Spring/Summer 2005)

Figure L (Tesco)

The paucity of lawsuits in Europe and ubiquity of copying is reflected by the scant utilization thus far of the E.U.-wide system for fashion design registration established by the E.U. Council Regulation. Any firm or individual marketing apparel in the territory of the European Union may register a design in this database and thereby gain protection under the regulations governing registered designs. We conducted a search of the E.U. fashion design registration database for all apparel designs registered between January 1, 2004 and November 1, 2005.[101] During the period in question, a query of the database yields 1631 registered designs. Although it is impossible to measure the total number of designs marketed in the twenty-five member states of the European Union during that period, we believe 1631 designs over a twenty-two month period represents a very small fraction of that total figure.

More to the point, the number of actual fashion designs registered is much smaller than even the figure of 1631 registrations would suggest. Hundreds of the registered "designs" are nothing more than plain t-shirts, jerseys, or sweat shirts with either affixed trademarks or pictorial works in the form of silk-screens or appliqués. The protection sought through registration is not for the apparel design, but for the associated marks and pictorial works, many of which are already protected under applicable trademark, trade dress, or copyright law. Another feature generally covered by trademark law, pocket stitching for jeans, also accounts for a large number of registrations. Thus, the function of the registration for all of these items is not to protect an original apparel design but to back-up the protection of a mark or pictorial work over which the owner already enjoys rights. Another large category of registered designs is for work and protective clothing such as surgery apparel, welders' bibs, military clothing, and uniforms for a courier service owned by the German post office. An even larger number of designs pertain to sport apparel, such as cycling shorts, skiwear, and soccer jerseys, marketed by athletic equipment firms.

Exactly how many registrations count as "fashion designs" is a matter of judgment, but even including all garments that could conceivably fall within that category (that is, including a large

[101] See Office for Harmonization in the Internal Market, Trade Marks and Designs, http://oami.eu.int/RCDOnline/RequestManager (last visited Aug. 22, 2006).

number of men's and women's trousers with little apparent design content, t-shirts with potentially copyrightable fabric designs, jeans, and a very small number of men's suits and ladies' dresses), at most approximately 800 fashion designs have been registered during the twenty-two month sample period. Even if we credit every registered design as a "fashion" design, it is nonetheless clear that the total number of registrations (1631) is extremely small compared to the industry's design output during that period. Indeed, Street One GmbH, a mid-tier German "fast-fashion" design and retailing firm, was solely responsible for 409 of those registrations.[102] Two other small E.U. companies, Creations Nelson[103] and Mascot International,[104] made 202 and 189 registrations, respectively. That three firms, none of which is a leading design originator, account for almost half of all designs recorded in the E.U. registry during the sample period suggests that a huge number of designs that could have been recorded in the E.U. registry were not. That conclusion is supported by the fact that we have not found a single major fashion design firm or individual designer identified as an owner of any design registered in the E.U. database during the sample period.

Europe thus presents a situation of pervasive but unutilized regulation. Despite a regime that permits registration of designs, few choose to register. If design protection were an important ele-

[102] Street One produces a new women's wear collection every month. See Street One, Fashion for Women Who Know What They Want, http://www.street-one.de/en/unternehmen/produkte.html (last visited Aug. 26, 2006). Street One sells their design output through shops around Europe owned by others. See Street One, Central Branch Power – Local Competence, http://www.streetone.de/en/unternehmen/distribution.html (last visited Aug. 22, 2006). Together with its sister companies, Street One claims total revenues of over 550 million Euros. See Street One, Unlimited Success, http://www.street-one.de/en/unternehmen/fakten.html (last visited Aug. 23, 2006). Street One, therefore, is a substantial firm, though by no means a leading design firm. By comparison, U.S. fashion and accessories firm Polo Ralph Lauren reported 2004 revenues of over $3.4 billion. See Forbes, Polo Ralph Lauren Corp. At A Glance, http://www.forbes.com/finance/mktguideapps/compinfo/CompanyTearsheet.jhtml?tkr=RL&cusip=731572103&repno=00038377&coname=Polo+Ralph+Lauren (last visited Aug. 23, 2006).

[103] Creations Nelson is a small French firm with twenty-two retail outlets in Paris that does business under the Comptoir des Cotonniers brand. See Comptoir des Cotonniers, http://www.comptoirdescotonniers.com (follow "stores" hyperlink) (last visited Aug. 22, 2006).

[104] Mascot International is a Danish firm that manufactures mostly durable work clothes. See Mascot Classic, http://www.mascot.dk/2006/showpage.php?pageid=605228&pid=&cid=&farve=&lang=EN (last visited Aug. 22, 2006).

ment of success for fashion firms competing in the European Union, we would expect to see a higher rate of registration under the E.U.-wide scheme, both because registration in the E.U. database provides a unitary right that applies across all twenty-five member countries, and because the law of the European Union provides patent-like protection that simply proscribes any subsequent design that is substantially similar to the registered design. As a result, if fashion firms competing in the European Union valued design protection, the current legal system would strongly incentivize registration in the E.U. database.

It nonetheless could be argued that the low registration rate might simply suggest that fashion firms are content with national design protection laws, but the industry does not appear to make much use of the national laws either. The United Kingdom has a statute, the Registered Designs Act of 1949, which establishes rights in registered industrial designs and includes protection for registered apparel designs. Our search of this U.K. database[105] yielded results similar to what we found for the E.U.-wide registry—few designs are registered.

As of June 24, 2006, our searches yielded 296 designs in the "undergarments, lingerie, corsets, brassieres, nightwear" category; 960 in "garments"; 313 in "headwear"; 2311 in "footwear, socks and stockings"; 197 in "neckties, scarves, neckerchiefs and handkerchiefs"; 111 in "gloves"; 706 in "haberdashery and clothing accessories"; and 14 in "miscellaneous." As is the case with the E.U. database, a significant number of entries in the U.K. database are unadorned t-shirts, logos, jeans pocket designs, and other potentially trademarked matter, and graphic designs that would otherwise be eligible for copyright as pictorial works. The number of designs containing significant fashion content is tiny. Only thirty-nine designs are registered in the "dresses" category, twenty-four in the "skirts" category, two in the "trouser suits" category, and none in the "skirt suits" category. Furthermore, we could find no evidence of major design firms registering clothing designs. Chanel, for example, appears to have registered a few watches, handbags, and jewelry items, but no clothing designs. Gucci also appears to have

[105] The Patent Office, Design Search, http://webdb1.patent.gov.uk/RightSite/formexec?DMW_INPUTFORM=tpo/logon.htm (last visited Aug. 22, 2006).

registered a small number of watches and handbags, but no clothing designs. We could not find any registrations for other major firms or designers such as Ralph Lauren, Chloe, Yves St. Laurent, Balenciaga (or its chief designer Nicolas Ghesquiere), Dolce & Gabbana, Michael Kors, Diane von Furstenberg, or Karl Lagerfeld.

The difference between the regimes in the United States and the European Union creates a natural experiment: one would expect to observe some difference in the industry's conduct or perhaps variances in industry outcomes on each side of the Atlantic. More pointedly, if strong IP protection were a sine qua non of investment and innovation in fashion design, we would expect to see the European industry flourish and the U.S. industry stagnate. Yet, we observe no substantial variances in conduct. Instead, we see widespread design copying in both the European Union's high-IP environment and America's low-IP environment. That fashion firms do not exhibit marked differences in behavior despite these very different legal environments is consistent with our claim that the industry operates profitably in a stable low-IP equilibrium. For E.U. fashion firms that wish to stop copyists, the law is in place. Yet in practice, designers rarely employ E.U. law to punish copyists. The one famous and much-mentioned example of design piracy litigation in Europe is the YSL-Lauren lawsuit mentioned earlier. Yet, that case is notable mostly because it has so few equivalents.

With respect to comparative industry performance, we cannot say much. Firms and retailers usually operate in both jurisdictions, making revenue and profitability comparisons across regions difficult or impossible. At the very least, we can say that we detect no obvious disinclination of fashion firms to market in the United States. The fact that firms in both the European Union and the United States engage in design copying suggests that the nominal difference in legal rules has had no substantial effect on the real rules that govern innovation in either jurisdiction.

This cross-jurisdictional comparison has important implications for the recent bill introduced in Congress to amend U.S. law to protect fashion designs for a short period. The European Union experience suggests that such a statutory change is unlikely to have a great effect on industry behavior. We would, however, expect to see more litigation over design piracy in the United States than in

Europe simply because we are a more litigious society. More significantly, it is unlikely that a statutory change to American IP law would produce more innovation in the fashion industry, and innovation is the sine qua non for IP protection in the United States.

We are doubtful that statutory change will improve the fashion industry's performance for two reasons. First, and most compellingly, it is clear that the fashion industry is already very creative and innovative. This claim does not depend on our particular account of the piracy paradox: it is an empirical observation that few who have looked at the industry have contested. It is surely possible that the fashion industry could be even more innovative than it is now, but it is hard to know what that scenario would look like. A faster fashion cycle? More varied designs each season? More differentiation among designers? The latter is the most likely effect in our view, since our account of anchoring rests on the claim that the prevalence of trends in fashion is in part driven by the regime of free appropriation. The second reason we believe that a legislative change would have minimal impact on the fashion industry is the experience of Europe. The proposal currently before Congress would mimic prevailing EU law in some important ways. As we have shown, there is little empirical evidence that this law has made any appreciable difference in the rate or amount of copying or in design innovation. Nor do we observe fashion designers availing themselves of the full possibilities presented by the law. While a full-blown normative analysis is a topic for the future, the positive analysis presented in this Article at least suggests that any change from a low-IP system to a high or mid-level of protection will not have a dramatic effect on innovation.[106] Nevertheless, it is also likely true that a move to a nominal high-IP regime in the United States is more likely to result in significant litigation compared to the same move in Europe. The introduction of substantial legal risk may induce designers to avoid the "referencing" that they engage in so freely now. And it may chill innovation by empower-

[106] One of the authors submitted testimony to the House committee considering H.R. 5055. See Christopher Sprigman, Associate Professor, University of Virginia School of Law, Testimony Before the Committee on the Judiciary, U.S. House of Representatives, Subcommittee on Courts, the Internet, and Intellectual Property 109th Cong. (July 27, 2006), http://www.law.virginia.edu/pdf/faculty/sprigman_testimony.pdf#search=%22sprigman%20testimony%22.

ing larger players to use cease and desist letters to quash competition. No one knows for sure, but this is a possibility.

E. Alternative Explanations for the Fashion Industry's Low-IP Equilibrium

We have argued that the stability of fashion's low-IP regime results from the paradoxically beneficial effects of copying. Are there other possible explanations for this political equilibrium, which has lasted since the 1940s? Below we consider three plausible alternatives: (1) that copyright law's useful articles doctrine prevents expansion of copyright to cover fashion designs; (2) that the fashion industry is unable to organize itself to pursue changes in the law; and (3) that first-mover advantages in the industry explain the industry's relative tolerance of copying.

1. Copyright Doctrine as a Barrier

Perhaps the fashion industry would prefer expanded copyright protection for its designs, but change is stymied by "useful articles" rules that are deeply embedded in the doctrinal structure of the copyright laws. In other words, do the useful articles rules pose an insurmountable obstacle to change?

We think the answer is no, for at least two reasons. First, the rules about useful articles are not part of the viscera of U.S. copyright. Rather, they are a surface feature that could easily be changed. Indeed, in architecture, a field directly analogous to fashion design, copyright law has already been changed to provide protection where none previously existed. Second, the useful articles doctrine is no barrier to sui generis protection of the type that has been provided, to industrial designs in the semiconductor and boat hull industries, at the federal level. The availability of sui generis protection would allow an IP-hungry fashion industry to elide whatever difficulties might be involved in altering copyright law's useful articles rules.

• The Malleable Useful Articles Rule. As a general matter, the Copyright Act grants exclusive rights in "original works of authorship" that are "fixed in any tangible medium."[107] Two-dimensional

[107] Copyright Act, 17 U.S.C. § 102 (2000).

renderings of fashion designs, the precursor to the three-dimensional product, are already protected if they contain a modicum of originality. Thus, a designer's sketch of a new dress design is protected by copyright. Although one might conclude that the three-dimensional fashion product would be protected as well (the design being the original work of authorship, and fixation being the three-dimensional rendering in a garment), this is plainly not the case. Copyright law's rules about useful articles deny copyright protections to garments containing original designs unless the expressive content is separable from the garment's useful function.[108]

The protection of useful articles has long straddled an indistinct boundary between copyright, which exists to protect original expression, and patent, which protects useful inventions, or, in the case of design patents, novel ornamental designs. Note that the "novelty" standard that applies in patent is substantially higher than the "originality" requirement that obtains in copyright. The former limits protection only to those useful inventions or ornamental designs that have never before been produced; that is, those that are "unanticipated" in the prior art. The latter requires only lack of copying and some glimmer of creativity.

The same useful article may, of course, have a market appeal based both on its usefulness and its appearance, that is, its original, expressive element. The Supreme Court considered copyright in such an article in *Mazer v. Stein*.[109] *Mazer*, decided in 1954, held that a statuette used as part of a lamp base could be copyrighted. In so holding, the Court adopted the Copyright Office's then-extant standard providing protection for "works of artistic crafts-

[108] As mentioned, U.S. law grants copyright (as a pictorial work) in a two-dimensional sketch of a fashion design. This protection, however, is almost entirely useless under U.S. law because almost all fashion appropriation involves copying from a sample or a photograph of an actual garment, not copying from a design sketch. Copying from a garment is not the equivalent of copying from the underlying sketch under U.S. law. A relatively direct path to expanded protection for fashion designs would change U.S. law to allow an infringement finding to be based on the underlying copyright in the design sketch. We have found one judicial decision from the U.K. High Court of Justice that takes this approach. See J. Bernstein Ltd. v. Sydney Murray Ltd., [1981] R.P.C. 303, 330–31 (U.K. High Court 1980) (finding infringement of underlying design sketch based on copying of made-up garment). Accordingly, even if the useful articles doctrine stood as a more substantial doctrinal barrier than we believe it to be, the fashion industry has an alternative path to protection.

[109] 347 U.S. 201 (1954).

manship, in so far as their form but not their mechanical or utilitarian aspects are concerned, such as artistic jewelry, enamels, glassware and tapestries . . . ."[110] Following *Mazer*, courts have held artistic jewelry,[111] designs printed upon scarves,[112] and dress fabric designs,[113] to be protected by copyright. These courts appeared to read the *Mazer* opinion as ratifying the ability to copyright the form of any useful article that is also aesthetically pleasing in appearance.

In the wake of *Mazer* and the lower court decisions taking an expansive approach to copyright in useful articles, the U.S. Copyright Office issued regulations seeking to narrow copyright law's application in this area:

> If the sole intrinsic function of an article is its utility, the fact that it is unique and attractively shaped will not qualify it as a [copy-

[110] Id. at 212–13 (citing 37 C.F.R. § 202.8 (1949)).

[111] See, e.g., Kieselstein-Cord v. Accessories by Pearl, Inc., 632 F.2d 989, 993 (2d Cir. 1980).

[112] See, e.g., Scarves by Vera, Inc. v. United Merchs. & Mfrs., 173 F. Supp. 625, 627 (S.D.N.Y. 1959).

[113] See, e.g., Segrets, Inc. v. Gillman Knitware Co., 42 F. Supp. 2d 58, 78 (D. Mass. 1998), rev'd in part on other grounds, 207 F.3d 56 (1st Cir. 2000); Peter Pan Fabrics, Inc. v. Candy Frocks, Inc., 187 F. Supp. 334, 336 (S.D.N.Y. 1960). Why fabric designs are protected by copyright but most apparel designs are not is an issue that presents interesting questions both about copyright doctrine and innovation incentives. Prior to the Supreme Court's decision in *Mazer*, most courts denied copyright protection to fabric designs. See Cheney Bros. v. Doris Silk Corp., 35 F.2d 279, 280 (2d Cir. 1929); Verney Corp. v. Rose Fabric Converters Corp., 87 F. Supp. 802, 803 (S.D.N.Y. 1949). In response to the Supreme Court's opinion in *Mazer*, the Copyright Office issued a regulation stating that registration of copyright in a "work of art" would not be affected by "the use of the work, the number of copies reproduced, or the fact that it appears on a textile material or textile product." 37 C.F.R. § 202.10(b) (1959). Concurrently, courts began post-*Mazer* to protect fabric designs as "pictorial works" or as designs for "works of art." See Peter Pan Fabrics, Inc. v. Brenda Fabrics, Inc., 169 F. Supp. 142, 143 (S.D.N.Y. 1959). This reversal in the treatment of fabric designs reflects a sensible reading of *Mazer*. But if pictorial works do not lose protection simply because they are printed onto textiles, then why should an original design (which often begins life as a pictorial work, that is, a design sketch) lose protection simply because it is instilled into a garment? In addition to this doctrinal puzzle, the existence of copyright for fabric design raises a host of questions regarding how IP protections operate in the textile industry's own particular innovation process. Fabric design operates within a formal high-IP regime. Does the formal regime drive the industry's conduct? Or is copying a substantial element of the fabric design industry's innovation process, as it appears to be in the fashion design industry? These questions await further research.

> rightable] work of art. However, if the shape of a utilitarian article incorporates features, such as artistic sculpture, carving, or pictorial representation, which can be identified separately and are capable of existing independently as a work of art, such features will be eligible for [copyright].[114]

This formulation, which the Copyright Office characterized as "implement[ing]" *Mazer*, is more accurately viewed as substantially narrowing that holding. Whereas the *Mazer* Court's decision would allow most aesthetically pleasing useful articles to gain copyright protection, the Copyright Office approach would limit protection to instances in which a useful article's expressive element is "separable" in some sense.

The present Copyright Act follows the Copyright Office's approach in sharply limiting the applicability of copyright to many useful articles and, indeed, goes further than even the Copyright Office regulation in narrowing protection. Today the Copyright Act denies copyright protection to any article having "an intrinsic utilitarian function"—a broader definition of the useful articles category than the regulation's "sole intrinsic function."[115] In addition to this definitional tinkering, the Act does something that is probably more important in litigation: it establishes a presumption that cuts against the separability of expression and utility by stating that "[a]n article that is normally a part of a useful article is considered a 'useful article.'"[116]

The debates over how to implement the useful articles rules are not particularly important for our purposes here.[117] The important point is that the decision to limit copyright protection of the expressive elements contained in useful articles is not somehow entailed in copyright doctrine, but is a policy choice. Jurisdiction over most useful articles has been allocated to the patent laws, which enforce a novelty standard that most useful articles cannot meet. This policy decision could readily have gone another way, and indeed, if the Supreme Court's *Mazer* standard had been left alone, it

[114] 37 C.F.R. § 202.10(c) (1959).

[115] Copyright Act, 17 U.S.C. § 101 (2000 & Supp. III 2004) (emphasis added).

[116] Id.

[117] For an extended discussion of the various approaches to the separability analysis, see Pivot Point Int'l v. Charlene Prods., 372 F.3d 913, 920–30 (7th Cir. 2004) (en banc).

would have. Equal emphasis could have been given to protection of the useful article's expressive elements, with responsibility allocated to the copyright laws to protect the aesthetic component of the article's market value and to the patent laws to protect the utilitarian component.

• Erasing the Useful Articles Rule: Architecture. In sum, we see that Congress could easily change the useful articles rule, thereby extending copyright protection to fashion design without disturbing the broader coherence of the copyright laws.[118] Not surprisingly,

[118] If the useful articles rules were changed, any design that appropriates elements of another design to the extent of "substantial similarity" would transgress the originator's exclusive rights. Courts have set out varying articulations of the test for substantial similarity, all of which have focused on the subjective impressions of a notional "ordinary observer." The Seventh Circuit directs fact finders to inquire "whether the accused work is so similar to the plaintiff's work that an ordinary reasonable person would conclude that the defendant unlawfully appropriated the plaintiff's protectible expression by taking material of substance and value." Atari, Inc. v. North Am. Philips Consumer Elecs. Corp., 672 F.2d 607, 614 (7th Cir. 1982). The Ninth Circuit has relied on the intuition of idealized consumers, holding that "a taking is considered *de minimus* [and thus insufficient to support infringement liability] only if it is so meager and fragmentary that the average audience would not recognize the appropriation." Fisher v. Dees, 794 F.2d 432, 434 n.2 (9th Cir. 1986); accord Newton v. Diamond, 388 F.3d 1189, 1193 (9th Cir. 2004) (en banc). The Second Circuit has articulated a similar test: "[t]wo works are substantially similar where the ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard [the] aesthetic appeal [of the two works] as the same." Castle Rock Entm't, Inc. v. Carol Publ'g Group, Inc., 150 F.3d 132, 139 (2d Cir. 1998) (internal quotations and citations omitted) (alteration in original).

In practice, the courts' implementations of the test have resulted in a low threshold for finding infringement. More important for our purposes than courts' differing articulations of the standard of liability is one overarching verity: under any of the various articulations of the substantial similarity standards that courts have applied to other media, the copying of most, if not all, of the apparel designs illustrated in the figures above would be actionable. As a result, if the useful articles rules were modified to extend copyright to apparel designs, the current substantial similarity doctrine would expose many designs to challenge under the copyright laws. This change would create substantial disruption for the industry.

Fashion firms could not resort, as software industry firms do, to designing apparel in a "clean room," that is, in an environment in which engineers design software and write code without access to the code of competitors' products. Because fashion designers are immersed in their competitors' products once they leave work, there is no such thing in fashion as a clean room.

This observation does not mean, however, that copyright doctrine is a substantial barrier to expansion of copyright law to embrace fashion design, for the substantial similarity test is as malleable as the useful articles rules. The industry could, for example, ask for changes to the copyright law that would make only point-by-point copies actionable. Some courts have already moved in that direction with respect to

Congress has illustrated the malleability of the rule by altering it to provide design protection for a type of creative work that until recently was, like fashion, kept on the periphery of copyright's domain.[119] We refer to buildings, many of which (like apparel) embody original designs and yet perform a utilitarian function. Although architectural drawings and models have long been within the ambit of copyright laws,[120] architectural designs embodied in actual buildings ("built" architecture) have traditionally been unprotected. Accordingly, until recently, although it may have been unlawful to copy a set of blueprints, it was entirely lawful, if one possessed a set of those blueprints, to erect a building based on them. Similarly, it was entirely lawful to examine an already-existing building, take measurements, and then erect a facsimile.[121]

claims of copyright on the selection and arrangement of data in databases. It is entirely possible for copyright to expand to cover fashion design, while the scope of permissible copying is maintained at some level that allows copying in the context of substantially transformative works, while disallowing very close or point-by-point copies. Such a development would replace a low-IP regime not with the usual high-IP regime that obtains in the music, film or publishing industries, but with a moderate-IP regime calibrated to the particular creative environment of the fashion industry, with its historically greater tolerance of design appropriation. This has, of course, not happened, but not because copyright doctrine is a substantial barrier to such developments.

[119] In addition, the fashion industry, heavily concentrated in New York and California, could very well have sought protection under state law. One may plausibly argue that because the federal copyright laws do not extend to most apparel designs, the states are free to regulate, either via statute or judicial development of state common law copyright. Such an argument traditionally has met the rejoinder that state common law protection is limited to unpublished works, but a recent decision of the New York Court of Appeals in *Capitol Records v. Naxos of America*, 830 N.E.2d 250, 264 (N.Y. 2005), holds that even *published* musical recordings are subject to a perpetual common law copyright under New York state law. The *Naxos* holding would possibly support an argument extending copyright or copyright-like state law protections to "published" (that is, previously distributed) fashion designs.

[120] See, e.g., Imperial Homes Corp. v. Lamont, 458 F.2d 895, 899 (5th Cir. 1972); Herman Frankel Org. v. Tegman, 367 F. Supp. 1051, 1053 (E.D. Mich. 1973).

[121] This is not to suggest that copyright had no relevance to "built" architecture. Architectural works that served purely ornamental purposes, such as grave markers, were protected because they were deemed to lack utility and were thus outside the category of useful articles. See, e.g., Jones Bros. Co. v. Underkoffler, 16 F. Supp. 729, 731 (M.D. Pa. 1936). Purely decorative elements of a building such as a gargoyle adorning a building's cornice were also protected, because these were, in effect, sculptural works that were "separable" from the building as a whole. But these were minor exceptions to the general rule that the overall appearance of a building, as opposed to the blueprints or a model of that building, was unprotected.

That changed in 1990, when Congress amended the Copyright Act to extend protection to a category of "architectural works." In the Architectural Works Copyright Protection Act ("AWCPA"),[122] Congress defined a protected "architectural work" to include "the design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings."[123] The same provision that extended copyright law to built architecture also limned the contours of that protection, providing that "[t]he work includes the overall form as well as the arrangement and composition of spaces and elements in the design, but does not include individual standard features."[124] What Congress has done in expanding copyright protection to cover building designs could easily be done again for fashion designs. In the case of architectural works, Congress has simply erased the traditional presumptions of the useful articles doctrine as it applies to a building's design. The same move applied to fashion would result in broad copyright protection for original designs.

• Eliding the Useful Articles Rule: Semiconductor "Mask Works" and Boat Hulls. In addition to erasing the useful articles rule in the case of built architecture, Congress has elided the rule by constructing sui generis forms of protection, that is, copyright-like protection outside the Copyright Act, for two classes of useful articles—semiconductor "mask works" and boat hulls. We will examine each briefly.

Semiconductors. In 1984, Congress adopted the Semiconductor Chip Protection Act ("SCPA").[125] The SCPA protects "mask works," which are the stencils used to control the process of etching onto silicon wafers the circuitry that make up a microprocessor. The production of these mask works, and the transistor and layout

[122] Title VII of the Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (effective Dec. 1, 1990).

[123] 17 U.S.C. § 101 (2000).

[124] Id. The effect of the last clause is not entirely clear, but it suggests that liability ordinarily cannot be predicated on the copying of particular elements of the design of a building when the overall design is not copied. The legislative history supports such a reading, stating that the separability test that applies to other types of useful articles does not apply to architectural works, and that it is "the aesthetically pleasing overall shape of an architectural work [that] could be protected . . . ." H.R. Rep. No. 101-735, at 21 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6935, 6952.

[125] Semiconductor Chip Protection Act of 1984, Pub. L. 98-620, § 301, 98 Stat. 3347 (1984) (codified at 17 U.S.C. §§ 901–14).

design work they graphically embody, requires significant investment, amounting often to many millions of dollars.[126] Congress stated that the "appropriation of creativity" by those copying mask works would be a "devastating disincentive to innovating research and development."[127] Under the SCPA, a mask work is protected if it is fixed in a semiconductor chip and is original.[128] Protection is limited to the works of U.S. nationals and domiciliaries,[129] or to works first commercially exploited in the United States, regardless of the nationality of ownership.[130] In addition, the SCPA requires that mask works either be registered with the Copyright Office or be commercially exploited as a condition of protection.[131]

[126] As the House Report on the Semiconductor Chip Protection Act ("SCPA") noted, "A competing firm can photograph a chip and its layers, and in several months and for a cost of less than $50,000 duplicate the mask work of the innovating firm." H.R. Rep. No. 98-781, at 2 (1984), *reprinted in* 1984 U.S.C.C.A.N. 5750, 5751.

[127] H.R. Rep. No. 98-781, at 2–3, *reprinted in* 1984 U.S.C.C.A.N. 5750, 5751–52. U.S. protection of mask works also arises from, and is subject to, treaty obligations. The 1989 Treaty on the Protection of the Layout-Designs of Integrated Circuits was the first instrument to set international standards for the protection of mask works. Extension of Existing Interim Orders Granting Protection Under the Semiconductor Chip Protection Act of 1984 for Nationals, Domiciliaries and Sovereign Authorities of Certain Countries to Which Interim Protection Has Been Extended, 57 Fed. Reg. 56327, 56328 (Nov. 27, 1992). The U.S. never adhered to the Washington Treaty. The United States is bound, however, by the provisions on mask works contained in TRIPs.

[128] In addition to the originality requirement of Section 902(b)(1), Section 902(b)(2) limits protection to those mask works that are not "staple, commonplace, or familiar in the semiconductor industry." H.R. Rep. No. 98-781, at 18, *reprinted in* 1984 U.S.C.C.A.N. 5750, 5768. This language has prompted a debate whether the SCPA imposes a patent-like standard of novelty. See Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 8A.03[B] (2d ed. 1978).

[129] 17 U.S.C. § 902(a)(1)(A)(i). It has been argued that the U.S. is obligated under the Berne Convention to protect foreign mask works, but the U.S. does not to date provide such protections. See Nimmer & Nimmer, supra note 128, at 8A.04[D][1].

[130] 17 U.S.C. § 902(a)(1)(B).

[131] Id. § 904(a). The SCPA is, therefore, a "conditional" system of protection, that is, a system that creates property rights only when the "author" of a mask work indicates (either through commercial exploitation or via registration) that protection is necessary. In this feature the SCPA resembles the U.S. copyright system as it existed from the founding Copyright Act of 1790 up to 1976, when the current Copyright Act was put in place. The law during this period of nearly two centuries was conditional, in that it required authors to take steps, such as registering their works and marking published copies with a copyright notice, in order to gain the protection of the law. See Christopher J. Sprigman, Reform(aliz)ing Copyright, 57 Stan. L. Rev. 485, 487–88 (2004). In contrast to conditional schemes like the SCPA, the current "unconditional" copyright laws provide that copyright arises automatically upon the fixation in a tan-

Once an owner complies with the SCPA's formalities, he possesses the exclusive right for a period of ten years "to reproduce the mask work by optical, electronic, or any other means."[132] As in copyright law, the exclusive right of reproduction granted is not limited to identical copies. The owner of a mask work protected by the SCPA has the right to enjoin any work that is "substantially similar" to the protected work.[133] The SCPA also gives the owner an exclusive right for the same ten-year period "to import or distribute" a chip for which the protected mask work has been used in production.[134]

Boat Hulls. Congress has also granted sui generis design protection in boat hulls. In response to the decision in *Bonito Boats v. Thunder Craft Boats*,[135] in which the Supreme Court invalidated a state law prohibiting the process by which boat manufacturers copied the designs of other manufacturer's boat hulls, Congress passed the Vessel Hull Design Protection Act ("VHDPA").[136] Enacted as a part of the Digital Millennium Copyright Act, the VHDPA restores the protection removed in *Bonito Boats*, though it leaves intact the Supreme Court's ruling that the states are preempted by federal law from providing such protection.

The VHDPA gives owners exclusive rights for a period of ten years in the "design of a vessel hull, including a plug or mold" used in the construction of that hull.[137] Protection is limited to "original" designs, which the statute defines as those that are "the result of the designer's creative endeavor that provides a distinguishable variation over prior work pertaining to similar articles which is more than merely trivial and has not been copied from another source."[138] The Act grants the owner the exclusive right to "make, have made, or import" any boat hull incorporating the protected

gible medium of an original piece of expression. The SPCA also provides that, if protection arises via commercial exploitation, registration must occur within two years or protection will be terminated. 17 U.S.C. §§ 901(a)(5), 908.

[132] Id. § 905(1).

[133] Nimmer & Nimmer, supra note 128, § 8A.06[A].

[134] 17 U.S.C. § 905(2).

[135] 489 U.S. 141, 168 (1989).

[136] Vessel Hull Design Protection Act, Pub. L. 105-304, §§ 501–02, 112 Stat. 2860 (1998) (codified at 17 U.S.C. §§ 1301–32).

[137] 17 U.S.C. § 1301(a)(2).

[138] Id. § 1301(b)(1).

design.[139] It also grants the exclusive right to sell or distribute any hull incorporating the protected design.[140] The Act protects any element of a hull design "which makes the article attractive or distinctive in appearance to the purchasing or using public . . . ."[141] In addition, protection is granted even for elements of hull design that are strictly utilitarian in function.[142]

Both the semiconductor and vessel hull acts create sui generis but "copyright-like" forms of protection; both elide copyright's useful articles rule and protect original expression that would not be protected under copyright laws because the expression is compounded into a useful article. It is also worth noting that the VHDPA was originally written as a general design protection law. The statute could be readily extended to cover not only vessel hulls but also fashion or any other form of industrial design. This point has been noted by David Nimmer, who hypothesizes that the VHDPA might have been passed as a platform that Congress could use subsequently to expand protection to all industrial designs.[143] Congress would simply have to change the non-intuitive definition of "useful article" in Section 1301(b)(2). Indeed, that is the exact approach taken in the pending design piracy bill discussed earlier, H.R. 5055, which simply inserts "fashion design" alongside "design of a vessel" in the VHDPA's definition of "design" and attaches a three-year period of protection to the newly protected design category. In sum, Congress could limit the scope of the useful articles rule, as it has for built architecture, or it can simply elide it, as it has for semiconductor mask works and boat hulls. Copyright doctrine presents no substantial barrier to protection of original fashion designs.

[139] Id. § 1308(1).

[140] Id. § 1308(2).

[141] Id. § 1301(a)(1).

[142] Id. § 1301(b)(2). Like the SCPA, the VHDPA imposes mandatory formalities. Designs must be registered with the Copyright Office within two years after a hull design is made public or protection is forfeited. Id. § 1310(a). Protected designs must be marked with a prescribed form of notice of protection. Id. § 1306(a)(1)(A). Omission of notice precludes recovery against an infringer who "began an undertaking leading to infringement . . . before receiving written notice of the design protection." Id. § 1307(b).

[143] See David Nimmer, Codifying Copyright Comprehensibly, 51 UCLA L. Rev. 1233, 1318–19 (2004).

2. Political Barriers

If fundamental copyright principles do not bar the protection of fashion design, perhaps there are political barriers that have prevented designers from acquiring protection from Congress. These barriers might come in two varieties. First, simple collective action problems may impede designers from effectively organizing to lobby Congress. As we noted earlier, the fashion industry, unlike most other content industries, is quite deconcentrated. Second, there may be a problem of "rival rent-seekers." Perhaps the fashion retail sector has markedly different preferences than does the fashion design sector, and the former is more powerful politically, such that it blocks efforts by the latter to modify federal law to be more design-protective.

The collective action problem is easy to state. Mancur Olson famously argued that small groups are often better able than large groups to organize support for or opposition to policy proposals that matter to them. Each member of a small group may have a large stake in a particular proposal, while individual members of the large group each have a small stake and are thus hard-pressed to overcome the transaction costs involved in organizing.[144] As the number of actors rises, the incentive problem becomes more severe. Hence sugar consumers, who are numerous, fail to effectively organize to ensure low sugar prices, whereas sugar producers, who are few, successfully organize to keep out cheaper imports.

Many IP-protected industries are highly concentrated, and as a result, have little problem organizing to strengthen IP protection. For example, the recording industry has a small number of major firms and a powerful trade association, the RIAA. Likewise, the motion picture industry consists of a small number of major producers and a larger number of smaller ones, most of which cooperate under the aegis of the MPAA. These trade associations protect the interests of these industries in Congress, the executive branch, the courts, state capitals, and abroad. Indeed, they have been instrumental players in many recent expansions of copyright.

If the fashion industry were unable to effectively organize itself, the puzzling lack of copyright protection might be explicable as an Olsonian problem. In other words, perhaps it is not that designers

[144] Mancur Olson, The Logic of Collective Action 53–57 (5th prtg. 1965).

benefit in any way from unfettered copying or that copyright doctrine somehow is the barrier to change, but rather that designers are simply unable politically to bargain for the protection they desire. American fashion designers, however, are organized and do have a trade association that represents their interests: the Council of Fashion Designers of America. The Council, based in New York, has 273 members, including such well-known names as Kenneth Cole, Calvin Klein, John Varvatos, and Vera Wang.[145] The Council does many things, including working "to advance the status of fashion design as a branch of American art and culture," promoting achievement in fashion design, and sponsoring charitable programs.[146] Lately, the Council has lobbied on behalf of H.R. 5055, although we have not found any evidence suggesting that it was previously active on the issue of IP protection.[147] Since 1980, there have been at least ten bills introduced in Congress that addressed design protection generally, most of which exempted apparel expressly. For example, the proposed "Industrial Design Anti-Piracy Act of 1989" specifically exempted from protection designs "composed of three-dimensional features of shape and surface with respect to men's, women's and children's apparel, including undergarments and outerwear."[148] There is no evidence in the legislative history of any of these bills that fashion designers testified in favor of change or lobbied for change. In any event, the recent efforts, however weak, to support the proposed fashion design bill illustrate that there is no insuperable barrier to lobbying Congress. At the same time, the extent of the lobbying is quite low—an observation consistent either with our argument that copying is not much of a threat to designers or with a claim that there are other political barriers in place that we have not yet recognized.

It is also possible that more subtle political barriers are at play. Perhaps the fashion retail industry prefers a low-IP regime, which permits them to copy designs and sell them at various price levels.

[145] Council of Fashion Designers of America—Members, http://www.cfda.com/flash.html (follow "Members" hyperlink) (last visited Sept. 14, 2006).

[146] Council of Fashion Designers of America—About, http://www.cfda.com/flash.html (follow "About" hyperlink) (last visited Sept. 14, 2006).

[147] Telephone Interview with Steven Kolb, Exec. Dir., Council of Fashion Designers (Oct. 3, 2006).

[148] H.R. 3017, 101st Cong. § 1002(5) (1st Sess. 1989).

Fashion designers might desire a high-IP regime, but perhaps the retailers have prevailed over the designers in this struggle.

We find little support for the hypothesis that retailer opposition is a major factor in explaining the political equilibrium of low protection, and there are several reasons to doubt that the "rival rent-seekers" story is significant. First, many large retail firms are also designers themselves, either via the work of in-house designers producing own-label apparel, or contractually, in the form of exclusive arrangements to market a designer collection. It is true that many house-label clothes, such as the Barneys house label, closely track designs pioneered by other designers, but not all own-label products are derivative. An example of the mingling of original design and retail is U.S. mass retailer Target, which has for several years offered an exclusive collection by U.S. designer Issac Mizrahi and this year is offering a "Go International" collection by designers Luella Bartley and Tara Jarmon.[149] Similarly, H&M had an exclusive arrangement to offer a collection by Chanel designer Karl Lagerfeld. Recently, worldwide retail giant Wal-Mart opened an in-house fashion design department to produce its own-label "Metro 7" fashion line; Wal-Mart is reportedly also interested in buying the Tommy Hilfiger design firm. In the case of retailers that pursue an apparel strategy based on offering own-label clothing and exclusive access to a designer's output at a particular price point, the interests of retailer and designer in preventing appropriation of the original design become more difficult to differentiate.

Viewed from the perspective of the orthodox high-IP framework, retailers who also engage in design work have at least some incentive to prevent appropriation and maintain exclusivity. But they also plainly benefit from a low-IP system, since they can use their house label to more readily copy designs pioneered elsewhere. The optimal strategy for any particular retailer is hard to predict ex ante. There is little reason, however, to conclude that retailers face markedly strong incentives to favor the current low-IP regime. Similarly, there is scant evidence, either in the debates preceding the enactment of the Copyright Act of 1976 or various other

[149] Ylan Q. Mui, Where Target is Always "Tar-zhay," Wash. Post, June 21, 2006, at D1.

legislative proposals, that designers have jointly or severally mounted a serious political campaign to obtain IP protection, only to be defeated in Congress by the power of the retailing lobby. That said, retailers apparently have voiced some concerns about the implications of H.R. 5055, and have informally sought to ensure that the standard for infringement is loose enough that designs that do not closely mimic an original will not be deemed infringing.[150] Nevertheless, we find no evidence to date that they have coalesced to oppose the bill.

Second, even if most retailers do not currently engage in significant design work, it is not clear at the theoretical level that even "pure" retailers would inevitably prefer a low-IP regime. In the current low-IP environment, major retailers like Bloomingdale's are free to follow apparel trends by purchasing and reselling original designs, and by offering, via the brands of copyist firms and under their own-label brands, reproductions and derivatives. Of course, the low-IP regime applies equally to their competitors, and freedom to appropriate original designs means that Bloomingdale's will seldom be able to keep popular designs to itself for long. As a consequence, the firm's option to pursue exclusivity will be limited to trademarks. We cannot predict without knowing more about the business strategies of individual firms whether a particular retailer would prefer a low-IP environment in which product differentiation in fashion is limited to brands or a higher-IP environment in which retailers differentiate not just via brands, but also designs. It may be that a minority of retailers would prefer a strategy of differentiation via style exclusivity. These retailers would face incentives to prefer a higher-IP regime.

Third, and perhaps most convincingly, the "rival rent-seeking" hypothesis is met by powerful countervailing evidence from Europe, where the industry operates in a very different legal environment but does not appear to conduct itself any differently with respect to copying. If the barrier to legal change in the U.S. were the power of retailers, to explain the existence of the different nominal rule in Europe we would need an argument for why Euro-

[150] E-mail from Steven Kolb, Executive Director, Council of Fashion Designers of America, to Professor Christopher Sprigman, University of Virginia School of Law (July 5, 2006, 12:00:47 EST) (regarding the status of H.R. 5055) (on file with author).

pean retailers are comparatively weaker than their American counterparts. Such an explanation would be especially unlikely given that two of the largest retail copyists—H&M and Zara—are both European companies. Further, if expanded design protection were helpful to designers in Europe, we would expect to see the existing law used and many more infringement suits brought. The few infringement suits that have been brought have plainly not deterred copyists. And the failure of fashion firms to act upon the available protections by registering their designs suggests that to the extent that retailers favor a low-IP regime, the designers are not necessarily their "rivals," but perhaps their allies.

3. First-Mover Advantage

Another potential alternative explanation for the remarkable persistence of the current legal regime looks to the possibility that fashion design originators enjoy a "first-mover advantage" substantial enough to reduce or eliminate the need for formal IP protections. First-mover arguments are occasionally used to explain how originators continue to thrive in the absence of legal rules propertizing innovation or of effective IP enforcement.[151] In the fashion context, a first-mover argument would suggest that if fashion design originators are able to sell many units before copyists produce copies, design originators can gain the lion's share of revenues from their designs and will continue to engage in innovation. Eventually copyists would flood the market, as predicted by the standard account of IP rights. But in the brief interim period, the originator can make back her investment plus profit. This brief but profitable period might be sufficient to blunt pressures to seek legislative change, and thus could help explain why fashion design remains unprotected by American IP law.

A first-mover argument in the fashion context relies for its force on the existence of an appreciable gap between fashion design originators and copyists. Yet, there is little evidence that such a gap exists. For the last quarter-century (at a minimum) the copying of fashion designs has been easy and fast. The use of ordinary photos

[151] See Dan L. Burk & Mark A. Lemley, Policy Levers in Patent Law, 89 Va. L. Rev. 1575, 1584–86 (2003) (discussing first-mover advantage and other non-IP innovation incentives).

and sketches and transcontinental air travel allows copyists to begin work on a design copy within days of photographing or sketching the original. The advent of the fax machine made the process even faster. An increasingly nimble global manufacturing and shipping capacity, which allows products to move swiftly from manufacturing site to market, coupled with the rise of the Internet and digital design platforms, may have reduced any remaining gap between originators and copyists to near zero. That said, fashion design copies have for some time been produced quickly and the difference in speed between twenty-five years ago and today does not appear large. For this reason, we are skeptical of the existence of a meaningful first-mover advantage in fashion design for any period in the past quarter-century, and we doubt that recent technological advances have reduced the already-tiny first-mover advantage very much. And even if a significant first-mover advantage could be shown to exist, design firms might still face incentives to seek IP protection as an additional barrier to entry, especially with respect to those fashion items that could potentially have a longer-term market appeal. Hence, to explain the political equilibrium in American IP law, a first-mover argument would also have to posit that the costs of obtaining legislative change are high—sufficiently high that apparel designers chose to invest in new designs rather than greater legal protection. Or, alternatively, that legal protection is unattractive because even were it instituted, the cost of obtaining it for individual designs is too high. In the patent context, the costs, in money and time, of obtaining protection make this a reasonable assumption, at least under some circumstances. But in the copyright context, where copyright obtains either immediately or (respecting apparel designs in the EU) upon completion of a simple registration process, this assumption makes little sense.

First-mover advantage might be causally significant in another way, however. Even if first-mover advantage cannot explain why the regime of free appropriation is stable, shifts in the magnitude of first-mover advantage may produce stronger or weaker incentives to seek legislative change. In other words, it is possible that the advent of nearly instantaneous copying and ever more efficient global manufacturing may eventually disturb the industry's low-IP equilibrium and foster efforts at propertization.

This argument has some surface plausibility. In our induced obsolescence model, originators' ability to recover investment depends on there being some period, albeit quite brief, before a given design saturates the market and loses its appeal to fashion-conscious buyers. And some time lag between the appearance of an original and its copies may be necessary for early-adopter consumers to identify particular designs with a particular firm (thereby helping that firm build its reputation as an innovator and consequently grow the value of its brand). In theory copying could become so rapid that it becomes more harmful and less helpful to originators. Under such a scenario we might expect to see new efforts at controlling design appropriation, either through enhanced use of trademark or through modification of copyright law to bring some elements of fashion design within the purview of IP law. Indeed, one could read the recent introduction of a bill in Congress to add sui generis copyright protection to fashion designs as evidence of such an acceleration in the speed of copying.

We remain skeptical of this argument as well, for we believe that this declining-first-mover-advantage argument faces both empirical and conceptual difficulties. The empirical difficulty is easily stated: any first-mover advantage that might have protected design originators following the fall of the fashion guilds was probably gone by the mid-1980s, by which time fax machines had become widely distributed around the world. Moreover, Congress has many times before considered, and rejected, fashion design protection, which demonstrates that the need for protection has been assessed, and dismissed, at several points in the advancement of copying technologies. And the original American design protection effort—the extra-legal fashion guilds—date back to the 1930s and 1940s, well before the internet, the fax, or the global supply chain were in existence. Hence there is also no necessary connection between technologically enhanced copying ability and efforts at legislative change.

The conceptual problem is also simple: the virtually instantaneous copying model described above assumes that copyists can successfully predict winning designs without some period of market testing. If they wait for some period before copying, copyists can see which designs resonate with consumers and which do not, and copy those that prove popular. If copyists do not wait to see what

sells in the market, they are forced to guess which, of the many new designs that appear each season, they ought to copy. This incentive to wait in order to accurately gauge market success suggests that originators will retain some first-mover advantage in many cases, even if technology allows virtually instantaneous copying.

In sum, we believe that some first-mover advantage exists in the fashion industry—indeed, one of our models depends on some gap between originators and copyists. But we see little evidence that first-mover advantages explain much of the political stasis of the last six decades. Likewise, we doubt that recent technological change is markedly erasing this advantage or incentivizing efforts at propertization today.

III. PARADOX OR PARADIGM? INNOVATION AND COPYRIGHT'S NEGATIVE SPACE

The fashion industry flourishes despite a near-total lack of protection for its core product, fashion designs. That this low-IP regime has remained stable over more than half a century, and that significant innovation and investment is undertaken within it, is a profound, if overlooked, challenge to the standard account of IP rights. We believe that the models we have advanced to explain the fashion industry's peculiar innovation ecology are valuable in themselves, in that they help explain an important anomaly in American law. The next and ultimately more important question is whether the fashion industry has anything to say about the orthodox justification for IP rights more generally.

Our arguments thus far suggest that the particular structure of the fashion industry, and the rules by which it runs, are idiosyncratic. But the same may be said of the music industry, the film industry, the software industry, the market in artistic photographs, commercial graphic designs, romance novels, lyric poetry, scholarly monographs, and so forth. Copyright law occasionally creates special rules for particular industries. U.S. law imposes, for example, a compulsory license for "mechanical rights" to perform musical compositions, thereby replacing the default property rule with a liability rule specific to the music industry.[152] This specialized rule contributes to a creative environment in which the reworking of

[152] 17 U.S.C. § 115 (2000).

popular, and even obscure, compositions is common practice. But for the most part, the exclusive rights created by U.S. copyright law are not sensitive to the characteristics of particular industries. For example, the law imposes virtually the same rules on one-hundred million dollar motion pictures that it does on the two-cent labels on shampoo bottles, even though the nature of creativity in these two settings and the level of investment required to maintain that creativity differs substantially.[153]

Copyright law largely ignores these differences; to do otherwise would add substantial complexity to an already Byzantine regulatory scheme. That strategy carries with it, however, a subtle cost: we are not often called upon to fit the scope of copyright, or its duration, to particular industries. As a result, we rarely have occasion to think about industry-specific copyright rules. Much the same is true of patent law, and as a result we are not induced to focus on any particular industry's innovation economics when constructing patent rules. We fall back, instead, on an abstract orthodox justification for IP rights, which may make perfect sense as a general matter, but which is nonetheless insensitive to important industry characteristics that make IP rules more or less relevant in particular markets.[154]

Larry Helfer has suggested to us a quick and insightful example of how our habit of IP-generalizing may lead us to ignore some questions that might otherwise be obvious. The music industry operates in a high-IP regime. Copyright in musical compositions proscribes not just point-by-point imitations, but any substantial use of pre-existing copyrighted material. While we do not know for certain, we may reasonably fear that a move from a high-IP regime in music to no IP or very low IP would lead to unrestrained copying

[153] On industry specificity in IP, see Dan Burk and Mark Lemley, Tailoring Innovation Law: Shaping Patent Policy for Specific Industries (forthcoming); Michael W. Carroll, One for All: The Problem of Uniformity Cost in Intellectual Property Law, 55 Am. U. L. Rev. 845, 856–57 (2006); Stacey L. Dogan & Joseph P. Liu, Copyright Law and Subject Matter Specificity: The Case of Computer Software, 61 N.Y.U. Ann. Surv. Am. L. 203, 204–05 (2005).

[154] That said, the orthodox justification for IP is in many respects undergoing change as IP rights are increasingly, and inaptly, conceptualized as akin to rights in real property, and therefore subject to deeper and stronger forms of protection as a way to prevent or minimize free riding. For a trenchant critique of this tendency in contemporary law, see Mark Lemley, Property, Real Property, and Free Riding, 83 Tex. L. Rev 1031 (2005).

and a marked reduction in the number of songs produced. In this situation, the utilitarian argument for copyright has its greatest force, and our imposition of some level of copyright protection seems necessary to support innovation in the music industry. But what level? A switch from high IP to low or no IP is not the only possible move in legal rules. For example, a move from high IP protection to medium IP protection, such as only giving songwriters protection for nearly verbatim copying, might conceivably result in the same number of works (or perhaps even a higher number) being produced and selling at a lower price, leading to an aggregate gain in social welfare. We do not know that this would be the case, but we cannot rule it out, and in any event, the point of this example is much broader. Were we to adopt an industry-by-industry IP analysis, we would be focusing on the optimal level of IP protection for each industry. We would then be able to see more clearly both the industry-specific justifications for a particular form and level of IP protection, and the industry-specific negative welfare effects that would arise if the imposed IP rules clashed with the innovation dynamics of a particular industry.

Perhaps a useful first step in thinking about how different industries fit with different IP rules is to consider why and when industries are left out of the IP system altogether. The fashion industry is interesting because it is part of IP's "negative space." It is a substantial area of creativity into which copyright and patent do not penetrate and for which trademark provides only very limited propertization. To date there has been little systematic exploration of what else falls within this negative space.[155] If there are any broader conclusions we can draw about the necessity (versus the current convenience) of strong IP rights in any of the industries that operate in a high-IP environment, such conclusions would rest on more solid ground if we better understood the variety of exist-

[155] One could reasonably include within copyright's negative space not only areas of innovation that are largely immune from copyright altogether, such as fashion, but also the "carve outs" within areas plainly covered by copyright, such as the doctrine of fair use as applied to published books. There is certainly substantial attention to these latter issues in the existing literature, and many odd examples. See, e.g., David Nimmer, Copyright in the Dead Sea Scrolls: Authorship and Originality, 38 Hous. L. Rev. 1, 18–42 (2001).

ing low-IP equilibria. The final part of this Article is a brief first cut at exploring these issues.

A. Creative Cuisine

Several years ago Jessica Litman noted that, like fashion, important products produced by the food industry are not covered by copyright.[156] We nonetheless continue to see substantial creativity in cuisine. Litman uses a counterfactual to make her point about the relationship between IP and food:

> [I]magine that Congress suddenly repealed federal intellectual property protection for food creations. Recipes would become common property. Downscale restaurants could freely recreate the signature chocolate desserts of their upscale sisters. Uncle Ben's® would market Minute® Risotto (microwavable!); the Ladies' Home Journal® would reprint recipes it had stolen from Gourmet® Magazine. Great chefs would be unable to find book publishers willing to buy their cookbooks. Then, expensive gourmet restaurants would reduce their prices to meet the prices of the competition; soon they would either close or fire their chefs to cut costs; promising young cooks would either move to Europe or get a day job (perhaps the law) and cook only on weekends. Ultimately, we would all be stuck eating Uncle Ben's Minute Risotto® (eleven yummy flavors!!) for every meal.[157]

Litman's playful observations are characteristically insightful: food is another huge industry that operates—and innovates—in a low-IP environment. To be precise, Litman refers to two discrete elements of a much larger total industry: (1) recipes, and (2) "built" food, that is, the recipe as "fixed" in tangible form for con-

[156] Litman, supra note 2, at 45. That has not stopped creative lawyers from seeking alternative forms of protection for culinary creations. See Katy McLaughlin, That Melon Tenderloin Looks Awfully Familiar, Wall St. J., June 24, 2006, at P1, P9 (noting that "[c]hefs copying other chefs is as time-honored a culinary tradition as snooty sommeliers" but that now "[s]ome chefs are seeking patents for an original idea or technological innovation"). This trend dovetails with the culinary trend toward more scientific approaches to cuisine, as pioneered especially by the famed Spanish chef Ferran Adria at his Costa Brava restaurant El Bulli. These include complex forms of flavor distillation, "food foams," and unusual cooking techniques. The more culinary dishes resemble science projects, the more reasonable patents become.

[157] Litman, supra note 2, at 45.

sumption. Neither form of creative expression is substantially protected by copyright.

Recipes are copyrightable only in a very limited sense. Copyright protects the "original expression" in a recipe, but does not extend to the procedures and methods that the recipe describes. In short, it fails to protect the attributes that are the core of a recipe. Accordingly, copyright protects mostly incidental expression. An example from Nigella Lawson's cookbook, *Nigella Bites*, is instructive. In a prologue to her recipe for "Double Potato and Halloumi Bake," Lawson claims that this simple dish has unappreciated virtues:

> I first made this for a piece I was writing for Vogue on the mood- enhancing properties of carbohydrates . . . It's a simple idea, and as simple to execute. What's more, there's a balance between the components: bland and sweet potatoes, almost caramelised onion and garlic, more juicy sweetness with the peppers and then the uncompromising plain saltiness of the halloumi (which you should be able to get easily in a supermarket)—that seems to add the eater's equilibrium in turn . . . .[158]

This piece of Lawson's expression is copyrightable, and her musings on the mood-altering qualities of a glorified potato casserole may conceivably comprise part of the cookbook's appeal. But for those who buy cookbooks to cook, rather than to read, it is the description of ingredients and necessary steps that make the book valuable. Yet, the "[m]ere listing[ ] of ingredients" that typifies a recipe is simply an assemblage of facts. As such, it is outside the scope of copyright.[159]

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[158] Nigella Lawson, Nigella Bites—Comfort Food, http://www.channel4.com/life/microsites/N/nigella/bites2.shtml (last visited Sept. 14, 2006) (first omission in original).

[159] See U.S. Copyright Office, Recipes, available at http://www.copyright.gov/fls/fl122.html (last visited Sept. 14, 2006); see also Malla A. Pollack, Note, Intellectual Property Protection for the Creative Chef, or How to Copyright a Cake: A Modest Proposal, 12 Cardozo L. Rev. 1477, 1481 (1991). As David Nimmer pointed out to us, instructions merged with explanation in a cookbook are typically copyrightable. Thus when Lawson writes, apropos the Halloumi bake, "[s]eason with black pepper, but no salt as the cheese will make it salty" that passage would probably qualify for copyright. Interview with David Nimmer, Professor from Practice, UCLA School of Law, in L.A., Cal. (Jan. 19, 2006).

What about the description of the steps that must be taken to prepare the dish? The U.S. Copyright Office has stated that "substantial literary expression" that accompanies a recipe "in the form of an explanation or directions" may be copyrightable.[160] It is doubtful, however, that most of the sentences in Lawson's "instructions" pass this test. Accordingly, whatever copyright protection might arise is exceedingly thin. In short, the parts of Lawson's recipe that seem the most valuable are outside the domain of copyright, and the situation is much the same for virtually all cookbooks.[161] And yet bookstore shelves (and our own) are groaning under the weight of cookbooks, many of which are expensively produced and priced accordingly.

"Built" food, recipes made tangible in a box or on a plate, is even more removed from copyright laws, at least under current arrangements. Yet, this situation could change. In most cases, built food would endure long enough to be judged a "fixation" of the recipe in a tangible medium, that is, the edible material. If so, then the built food is a derivative work of the recipe. Even if built food is considered evanescent because it persists only until consumed, and therefore, does not meet the fixation requirement that the copyright laws ordinarily impose as a predicate, this would still not cut off all possibility of protection. If recipes were protected, then the act of preparing a particular recipe could be held to amount to a "performance" of the underlying work, which is one of the rights that the copyright laws reserve to the copyright holder.[162] Performances need not be "fixed" in order to implicate the copyright holder's exclusive rights; the law grants the copyright owner exclusive authority to do or to authorize all *public* performances, regardless of whether the performance is recorded.[163] If copyright were expanded to include recipes, home preparation of a recipe would be permitted, but public preparations such as food cooked in a res-

[160] U.S. Copyright Office, Recipes, available at www.copyright.gov/fls/fl122.html (last visited Sept. 14, 2006).

[161] This is not to claim that intellectual property plays no important role in cookbooks: the selection of pictures is copyrightable, trademarks often matter, and the celebrity author/chef often has valuable rights of publicity.

[162] 17 U.S.C. § 106 (2000).

[163] Id.; see also id. § 101 (defining "publicly").

taurant would require the permission of (that is, a license from) the copyright owner.

Requiring a license does not seem like an insane rule. Many restaurants are required to pay license fees to "publicly perform" musical works when they play a CD for the entertainment of their customers. Why should they not also pay a fee when they entertain their customers with someone else's original recipe? After all, the food, rather than the music, is the restaurant's primary product. Current law allows free appropriation of both recipes and built food, and such appropriation is quite common, with chefs around the world imitating the innovative and popular creations of others.[164] But that arrangement, like the low-IP regime governing fashion, is not set in stone. A superficial application of the orthodox justification would suggest that culinary innovation would benefit from the protection of the law. Yet, there is no meaningful effort to move to a higher-IP regime for either recipes or built food.

Food is another of IP's negative spaces. While we are content to leave recipes without IP protection, history provides an interesting counter-example. The first recorded evidence we have of an IP system comes from third-century A.D. Greek author Athenaeus, who, quoting an earlier writer, reports that in the sixth century B.C., the inhabitants of Sybaris, the largest of the ancient Greek city-states, enforced short-term exclusivity in recipes:

> [I]f any caterer or cook invented a dish of his own which was especially choice, it was his privilege that no one else but the inventor himself should adopt the use of it before the lapse of a year, in order that the first man to invent a dish might possess the right of manufacture during that period, so as to encourage others to excel in eager competition with similar inventions.[165]

So our pleasure-seeking forebears chose to apply that justification to food—while we (voluptuaries in our own right) do not. We should understand why.[166]

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[164] See McLaughlin, supra note 156, at P1.

[165] 5 Athenaeus: The Deipnosophists 348–49 (Charles Burton Gulick trans., Harvard Univ. Press 1927).

[166] Work on this question has already begun. Recently, Emmanuelle Fauchart and Eric von Hippel released an insightful draft paper documenting an informal, norms-based quasi-IP system that exists among a community of elite French chefs and regu-

B. Other Elements in Copyright's Negative Space

There are many other potential low-IP equilibria to examine, each with special relevance for the broader IP regime. These include:

• *Furniture designs*, which are denied copyright protection for many of the same reasons fashion designs are—furniture falls into the category of "useful articles." And for reasons similar to those articulated in our analysis of the doctrine as applied to fashion, the useful articles rules as they apply to furniture are subject to change. Yet, we see no campaign to move to a higher-IP rule.

• *Tattoos* are nominally subject to copyright as pictorial works, but until recently there has been little copyright litigation despite an apparent norm of widespread tattoo design copying.[167] Recently,

lates their use of others' original recipes. See Emmanuelle Fauchart & Eric von Hippel, Norm-Based Intellectual Property Systems: The Case of French Chefs (MIT Sloan Research Paper No. 4576-06, Jan. 2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=881781. Fauchart and von Hippel argue that this informal property system obviates the need for law-based IP protection for recipes. Id. at 3. But see McLaughlin, supra note 156, at P1 (hinting that informal norms are not deemed sufficient by all parties). Christopher Buccafusco has also released a draft paper arguing for the existence of a norms-based informal property system for creative cuisine. See Christopher J. Buccafusco, On the Legal Consequences of Sauces: Should Thomas Keller's Recipes Be Per Se Copyrightable? (Sept. 12, 2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=923712.

Aram Sinnreich and Marissa Gluck have argued that an analogous norms-based quasi-IP system operates in the fashion industry. See Aram Sinnreich & Marissa Gluck, Music & Fashion: The Balancing Act Between Creativity and Control 6–8 (Jan. 9, 2005), available at http://learcenter.org/pdf/RTSSinnreichGluck.pdf. We see some evidence that aligns with this thesis, for example Yves St. Laurent, in his lawsuit against Ralph Lauren, simultaneously condemning point-by-point copying and accepting the less exact copying necessary to "take inspiration." See Societe Yves Saint Laurent Couture SA v. Societe Louis Dreyfus Retail Mgmt., [1994] E.C.C. 512, 519 (Trib. Comm. (Paris)). The emerging scholarship about copying norms raises some difficult questions that future scholarship should address. Do the norms drive legal rules, or is it the other way around? Do copying norms align with economic incentives, either in the short or long term? How effective are norms-based systems as proxies for formal IP rules? And how are norms about copying communicated and reinforced?

[167] See Thomas F. Cotter & Angela M. Mirabole, Written on the Body: Intellectual Property Rights in Tattoos, Makeup, and Other Body Art, 10 UCLA Ent. L. Rev. 97, 98–99 (2003); Jordan S. Hatcher, Drawing in Permanent Ink: A Look at Copyright in Tattoos in the United States (Apr. 15, 2005) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=815116.

a number of copyright lawsuits have been brought. What has changed?

• *Computer databases* are only lightly protected under U.S. law. The assembled facts themselves are unprotected, while the manner in which those facts are selected and arranged may be protected if sufficiently original and not dictated by the particular nature of the data or the function the database performs. In contrast, the European Union has, beginning with its 1996 Database Directive,[168] created a Community-wide sui generis IP right that gives compilers of databases exclusive rights over their creations, including rights over collections of facts otherwise unprotected under copyright law. In 2005, the European Commission completed a report analyzing the effect of the 1996 Database Directive on production of computer databases within the European Union.[169] The Commission's report found that the Database Directive had not yet shown any effect in inducing additional production of databases in the European Union: "[The] economic impact of the 'sui generis' right on database production is unproven. Introduced to stimulate the production of databases in Europe, the new instrument has had no proven impact on the production of databases."[170] In fact, the Commission's study showed that the production of databases within the European Union had fallen to pre-Directive levels, that the U.S. database industry, which operates in a relative low-IP environment, was growing faster than the E.U.'s, and that the measure by which the U.S. database industry outperforms the E.U.'s appeared to be growing. This outcome challenges the standard account of IP protection. The variance between E.U. and U.S. rules governing databases, and the lack of a clear connection between the E.U.'s high-IP regime and enhanced industry performance, recommends computer databases as another area for further study.

• *Open-source Software* is created within a low-IP environment that exists despite nominally strong applicable IP rules. In this sense, open-source software is similar to the conduct of the fashion

[168] Council Directive 96/9/EC, ¶ 17, 1996 OJ (L77/20).

[169] See Commission of the European Communities, DG Internal Market and Services Working Paper, First Evaluation of Directive 96/9/EC on the Legal Protection of Databases ¶ 1.4 (Dec. 12, 2005), available at http://ec.europa.eu/internal_market/copyright/docs/databases/evaluation_report_en.pdf.

[170] Id. ¶ 5.3.

industry in the European Union, although the disjunction between nominal and actual legal rules arises in open-source software for a special reason. Software source code is copyrightable, and the algorithms and programming techniques that underlie source code are patentable subject matter. Yet, participants in open-source programming projects engage in a variety of licensing and contractual arrangements that avoid the default rules of copyright[171] and patent[172] and construct a cooperative low-IP regime. In doing so, open-source projects use the default rules of IP law as a lever to require those who use and modify open-source code to maintain that code's openness—an end that open-source projects pursue for a mix of ideological and economic motivations. Commentators have studied the incentives of programmers and others working in open-source projects. It is time now to look again at the open-source movement to more fully appreciate what it has become—an industry that attracts significant investment and engages in fast-moving innovation with a far lower degree of propertization than IP law would otherwise permit.

• The *microprocessor industry* is another potential example of a "contractual" low-IP equilibrium, albeit in this case industry characteristics are very different from what we find in fashion. The microprocessor industry clearly does not desire to operate in a "no-IP" equilibrium (the size of individual firms' patent portfolios and the existence of important manufacturing and design trade secrets are testament to that). Competitors' willingness to operate within a contractually created regime that deemphasizes IP rights relative to what industry IP portfolios would otherwise permit applies only within the "charmed circle" of the industry's small number of dominant firms. These firms engage in portfolio cross-licensing, thus freeing them to pursue architectural and manufacturing innovations without concern for the large number of overlapping and conflicting patent claims that might otherwise arise.[173] Perhaps an

[171] See, e.g., John Sullivan, GNU General Public License, http://www.gnu.org/copyleft/gpl.html (last visited Aug. 23, 2006).

[172] ZDNet.com, Linux Backers Form Patent-Sharing Firm, http://news.zdnet.com/2100-3513_22-5943781.html (last visited Sept. 14, 2006).

[173] See Rosemarie Ham Ziedonis, Patent Litigation in the U.S. Semiconductor Industry *in* Patents in the Knowledge-Based Economy 180, 190 (Wesley M. Cohen & Stephen A. Merrill eds., 2003), available at http://www.nap.edu/catalog/10770.html.

added benefit, from the perspective of the large microprocessor firms, is the increased entry barriers that the portfolio cross licenses impose upon would-be upstarts that lack similarly comprehensive patent portfolios.

• *Hairstyles*, which typically originate with celebrities, are freely copied by barbers and hairstylists. As with built food, hairstyles as rendered on a person's head are probably not "fixed" in the manner demanded by the copyright law. But again, one might imagine the rule changing to extend protection to original "haircut designs." A photograph of a haircut is already subject to copyright as a pictorial work. Many barbers and hairstylists have in their shops books of such photographs. One can imagine a rule providing that using one of these photographs as the template for a customer's haircut is a public performance of a copyrighted work—the hairstyle design, as fixed in the photograph. Such a public performance may only be undertaken with the authorization of the copyright owner. Perhaps that authorization is given in exchange for the purchase of an "authorized" book of hairstyle photographs in that the price of a license is included in the price paid for the book. Or perhaps the hairstyle design industry nominates a middleman, similar to the music industry's American Society of Composers, Authors, and Publishers ("ASCAP") or Broadcast Music Incorporation ("BMI"), to collect annual fees from individual haircutting shops for blanket licenses to perform a large number of copyrighted hairstyles.

• Perhaps the most important product attribute of *perfume*,[174] its scent, is not protected by IP, though the trademark and often the trade dress, such as the design of the bottle, are legally protected against copying. Patents are granted on the novel chemical composition of certain perfumes. Indeed, the United States Patent and Trademark Office maintains a category for "Perfume Composi-

[174] We thank Neil Netanel for this suggestion. Recently, two European courts have held that scent is copyrightable. In January 2006, a French court ruled that a perfume's scent can be copyrighted. See Societe Bellure NV v. S.A. L'Oreal, http://breese.blogs.com/pi/files/CA_BELLURE.pdf. A similar ruling was handed down in June 2006 in *Lancome v. Kecofa* by the Dutch Supreme Court. See, Toby Sterling, Court Upholds Ruling on L'Oreal Copyright, Int'l Bus. Times, June 16, 2006, available at http://www.ibtimes.com/articles/20060616/l-039-oreal-netherlands-tresor perfume.htm.

tions" in its classification and search system.[175] A particular scent may, however, be produced by a variety of different chemical compositions, and therefore the patent system does not prevent the marketing of "smells like" knockoffs, such as the following (Figure M).[176]

Figure M

[175] See United States Patent and Trademark Office, Class Definitions, Class 512, http://www.uspto.gov/web/patents/classification/uspc512/defs512.htm#C512S001000 (last visited Aug. 23, 2006).

[176] For additional examples, see Imitation Perfume, http://www.imitationperfume.com (last visited Aug. 23, 2006).

Why scents are not protected by copyright when sounds are is not clear. It may be difficult for non-experts to detect similarity in scents, but it is often also difficult for the layperson to perceive the unauthorized appropriation in copyright cases involving music. In any event, strong evidence of intent to copy, often arising from the manner in which a scent is marketed (see above), would help resolve otherwise difficult cases.

The more we look, the more candidates we find. *Magic tricks* and *fireworks displays* are potentially copyrightable subject matter, but although both magicians and fireworks impresarios occasionally spat over ownership of particular tricks and explosive displays, we do not see copyright lawsuits.[177] Nor do we see lawsuits over potentially copyrightable (and also potentially patentable) sports plays, even though these, like fashion designs, are freely appropriated by rivals.[178]

With the exception of open-source software, none of the areas mentioned above has been widely studied. That is understandable. From the perspective of most people interested in IP, industries that IP does not reach, or that have contracted out of IP, do not seem very interesting. But that view mistakes the means for the end. The means is IP, whereas the end is innovation. Innovation occurring over long periods of time, in the absence of the legal rules that are conventionally said to be innovation's necessary predicate, should command our attention. The lack of protection in some of these areas may be explicable as resulting from their na-

[177] See Campbell Robertson, Dueling Magicians: Whose Trick is it Anyway?, N.Y. Times, Sept. 27, 2006, at E1 (quoting magician Teller: "If an act hasn't been prominently performed for a long time, and someone takes the trouble to bring it back from absolute death and put it into his act with fine touches, and which at least hasn't been seen by a current generation," he said, "the gentlemanly thing to do is say, 'That's his for now.'" That said, he added, "magicians are not unique in their absence of creativity"); 32Wlky.com, Battle over Thunder Broadcasting Rights Prompts Fireworks, available at http://www.wlky.com/sports/3002432/detail.html (last visited Sept. 29, 2006) (describing threatened copyright lawsuit over unauthorized broadcast of public fireworks display).

[178] See Tom Dienhart, Robbery on Campus, SportingNews, Mar. 29, 2006, available at http://www.sportingnews.com/yourturn/viewtopic.php?t=77167 (describing a meeting of college football coaches seeking to learn spread-formation offense designed by West Virginia Mountaineers Coach Rich Rodriguez); Michael Lewis, Coach Leach Goes Deep, Very Deep, N.Y. Times, Dec. 4, 2005, at § 6 (Magazine), (describing innovative football offense designed by Texas Tech coach Mike Leach).

ture as necessities: we all need clothes, haircuts, furniture, and food, and indeed the useful articles doctrine is aimed at ensuring that useful things are excised from copyright's domain.[179] Regardless, the fact that innovation continues apace in these areas that fall outside the reach of IP suggests that the connection drawn by the orthodox account between IP rules and innovation is less strong and direct than commonly believed. While a broader theory of the proper scope of intellectual property rules is beyond the ambit of this Article, delimiting and exploring IP's negative space is clearly an important project, and one that has been surprisingly neglected.

CONCLUSION

The proper scope and strength of intellectual property rights is the subject of intense debate. The orthodox view of IP demands strong legal protection of property rights on the ground, and posits that without such protections innovation will wither. Driven out by cheap copies that destroy the incentive to innovate and deter the investment that innovation demands, producers will fail to produce. This justification for IP rights has enjoyed overwhelming support in American law as well as international law, with the result that copyright, patent, and trademark have all expanded in strength and scope in recent years. In this Article we have explored a very large industry in which IP law protects some attributes, namely brands, but not others. Indeed, IP law fails to protect the core of fashion, the design. Despite this lack of protection, the fashion industry continues to create new designs on a regular basis. The lack of copyright protection for fashion designs has not deterred investment in the industry. Nor has it reduced innovation in designs, which are plentiful each season. Fashion plainly provides an interesting and important challenge to IP orthodoxy.

We have argued that the lack of IP rights for fashion design has not quashed innovation, as the orthodox account would predict, and this has in turn reduced the incentive for designers to seek legal protection for their creations. Not only has the lack of copy-

[179] We thank Mark Lemley for this suggestion. It may be that fashion, cuisine, and haircuts, in addition to being utilitarian items, are also perceived to be feminine products. The gender dimensions of IP, and their explanatory force vis-à-vis copyright's negative space, are topics worth further attention.

right protection for fashion designs not destroyed the incentive to innovate in apparel, it may have actually promoted it. This claim—that piracy is paradoxically beneficial for fashion designers—rests on attributes specific to fashion, in particular the status-conferring, or positional, nature of clothing. We do not claim that fashion designers chose this low-IP system in any conscious or deliberate way. But we do claim that the highly unusual political equilibrium in fashion is explicable once we recognize its dynamic effects: that fashion's cyclical nature is furthered and accelerated by a regime of open appropriation. It may even be, as one colleague suggested to us, that to stop copying altogether would be to kill fashion.[180]

The account we offer raises at least two larger questions about IP theory and policy. One is whether the positional nature of fashion is present in other creative industries, and if so, whether similar, if perhaps more muted, effects exist. Certainly music, for example, exhibits some degree of positionality. On one hand, artists who were once the darlings of audio cognescenti, such as Coldplay, become too popular, and hence unfashionable, for their original fan base. These early-adopter fans then move on to new bands and new styles. On the other hand, musical choices are more private than fashion choices and hence it is easier to maintain "guilty pleasures" in music than in clothing. Either way, a general theory of fads and fashions and their connection to IP is beyond the agenda of this Article. Here we seek only to signal that the status-based dynamics of the fashion industry may not be singular, and to the degree they are not singular, they are worth investigating much more closely.

The second question raised by our account of innovation in fashion concerns the contours of IP's negative space. To better understand the proper domain of IP, we must consider those cases in which IP rights are not present but innovation and creativity persist. Fashion is one such case, but not the only one. Above we noted several examples that arguably fall within this negative space, but our list is not exhaustive. Cataloging this negative space, and understanding what it contains and why, is an important task

[180] E-mail from Professor Annette Kur, Munich Intellectual Property Law Center, to Professor Christopher Sprigman, University of Virginia School of Law (Feb. 10, 2006, 11:11:19 EST) (on file with author).

for legal scholars. It may well be that the two questions we raise are linked: that IP's negative space encompasses those creative endeavors that do not require state-sanctioned monopolies, and that all such endeavors remain creative (and consequently do not require protection) precisely because they exhibit positionality sufficiently strong that it provokes a constant stream of new innovation. If so, the existing constellation of legal protection is broadly rational. But without more study, we cannot be sure. Music, books, films, scientific innovations, and the like remain the core interests of IP scholars, and with good reason. But to better understand the domain of IP, and its boundaries, scholars need to consider more intensively the variety of creative endeavors that seem to thrive in IP law's absence.