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Authors

Raustiala, Kal

Sprigman, Christopher Jon

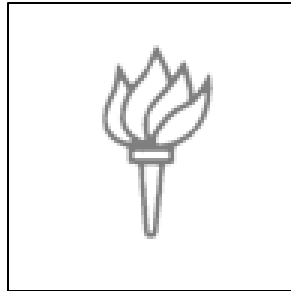
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Faster Fashion: The Piracy Paradox and its Perils

Kal Raustiala and Christopher Jon Sprigman

May 2021

FASTER FASHION: THE PIRACY PARADOX AND ITS PERILS♦

KAL RAUSTIALA AND CHRISTOPHER JON SPRIGMAN*

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INTRODUCTION

The problem is cheap clothes with a short shelf life. It’s called fast fashion. Since World War II, what we wear has grown cheaper and cheaper while coming from further and further away. We ask about the scale of the carbon footprint and social cost, and how TikTok and Instagram have further fed that buying frenzy. The world’s favourite sport is not football. It is shopping.¹

For more than a century, the American fashion industry has bemoaned the ubiquity and ease with which clothing producers copy one another’s designs. Writing in 1916, one industry observer explained the problem: Despite “the expense of thousands of dollars to create a design intended to appeal to the American customer, copies appeared within

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* The authors are, respectively, the Promise Institute Professor of Comparative and International Law at UCLA Law School, and the Murray and Kathleen Bring Professor of Law at New York University School of Law and Co-Director of the Engelberg Center on Innovation Law and Policy. We thank Alexander Fay and Haley Sanders for research assistance and Xiyin Tang for helpful comments on this article. We are grateful to Chris Buccafusco and to the editors of the *Cardozo Arts and Entertainment Law Journal* for giving us this opportunity to look back at *The Piracy Paradox* and to the authors who have contributed articles to this special issue.

¹ François Picard, Alessandro Xenos & Juliette Laurain, *The Age of Fast Fashion: How to Kick the Planet’s Shopaholic Habit?*, FR. 24: THE DEBATE (Dec. 21, 2020, 6:22 PM), <https://www.france24.com/en/tv-shows/the-debate/20201221-the-age-of-fast-fashion-how-to-kick-the-planet-s-shopaholic-habit> [https://perma.cc/5FNS-D826].

forty-eight hours. The only recourse was multiplicity and rapidity of design at such frequent intervals that competitors would lag behind.”² Copyists could not be defeated in the marketplace or in court. They could only be outraced.

Over a century later, the story is fundamentally the same. Despite numerous attempts at legislative change,³ most fashion designs remain outside the scope of American copyright law. This feature of the fashion industry has long posed a challenge to the dominant justification for intellectual property law. Copyright is based on the premise that copying must be barred lest competitors knock off originals more cheaply—thereby undercutting the incentive to create in the first place. The fashion industry, in which design copying is both legal and rampant, seems to violate this supposed legal axiom at every turn.

Seeking to explain how the fashion industry curiously survives, and even thrives, in the face of extensive copying, in 2006 we introduced the concept of the “piracy paradox.”⁴ We argued that the legal freedom to copy clothing designs actually helps, not harms, the fashion industry in its quest to sell more garments to consumers and in the process makes the industry more, not less, creative.⁵ Rather than suppressing the incentive to create new designs, the freedom to copy paradoxically enhances it.

The reason, we argued, is two-fold. First, copying ensures that styles come in and then go out of fashion quickly, leading consumers to seek out, and designers to supply, the next new thing.⁶ Second, copying allows trends to develop by anchoring consumers’ understanding of what is in and what is out of fashion at a given time.⁷ Both of these phenomena rest on important features of social behavior. Fashion is a means of personal expression but also an attempted statement of status, and, depending on their nature or their disposition at a given moment, individuals seek to flock to dominant trends or differentiate themselves from the masses.⁸ (In

² Sara B. Marcketti & Jean L. Parsons, *Design Piracy and Self-Regulation: The Fashion Originators’ Guild of America, 1932–1941*, 24 CLOTHING & TEXTILES RSCH. J. 214, 216 (2006) (internal quotations omitted) (quoting JULIUS HENRY COHEN, LAW AND ORDER IN INDUSTRY: FIVE YEARS’ EXPERIENCE 88 (1916)).

³ See Innovative Design Protection Act of 2012, S. 3523, 112th Cong. (2012); Innovative Design Protection and Piracy Prevention Act, H.R. 2511, 112th Cong. (2011); Innovative Design Protection and Piracy Prevention Act, S. 3728, 111th Cong. (2010); Design Piracy Prohibition Act, H.R. 2196, 111th Cong. (2009); Design Piracy Prohibition Act, S. 1957, 110th Cong. (2007); Design Piracy Prohibition Act, H.R. 2033, 110th Cong. (2007); To Amend Title 17, United States Code, to Provide Protection for Fashion Design, H.R. 5055, 109th Cong. (2006).

⁴ Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687 (2006) [hereinafter *Piracy Paradox*].

⁵ *Id.* at 1691.

⁶ *Id.* at 1718–28.

⁷ *Id.* at 1728–32.

⁸ C. Scott Hemphill & Jeannie Suk, *The Law, Culture, and Economics of Fashion*, 61 STAN. L. REV. 1147, 1152 (2009) (“Formalizing these cultural observations, we [Hemphill and Suk] call these two coexisting tastes ‘flocking’ and ‘differentiation.’ Fashion puts into relief people’s

practice, these are often less opposites than deliberate choices and may be made differently by the same individual over time.)

In the fifteen years since our article was published, fashion's imitation-driven trend cycle has continued to churn. Indeed, the growth of the fashion industry has only accelerated. We are grateful for the opportunity in this symposium to both revisit the original arguments we made and, more importantly, to consider several aspects of fashion and intellectual property that we did not explore in our original article. In what follows, we first expand upon our very brief description above of the basic claims in *The Piracy Paradox*. In Part I, we consider the impact of our article on the legal literature and make clear both the reach and the limits of our arguments. In Part II, we explore several current normative arguments about the harmfulness of fast fashion, consider whether, on balance, these critiques have merit or perhaps suggest a non-IP rationale for reining in the freedom to copy. As the epigraph of this Article illustrates, fast fashion is frequently denigrated for its environmental wastefulness, for its implications for labor, for its impact on the fashion industry itself, and for its social harms. We evaluate each of these varied claims in turn.

I. COPYING, THE FASHION CYCLE, AND FASHION'S *PIRACY PARADOX*

Copying in the fashion industry has been around as long as there has been a modern fashion industry; which is to say for more than a century, since ready-to-wear clothing became commonplace in the United States. As we described above, as early as the first decades of the twentieth century, industry participants have noted the speed and ease of copying.⁹ While many fashion veterans then (and now) simply view copying like the weather—something to be endured or even, at other times, enjoyed, but fundamentally unchangeable—others have on occasion sought to eliminate knockoffs altogether. In the 1930s, a fashion industry cartel, the Fashion Originators' Guild, even created a system of design registries, secret shoppers, and red cards that aimed to police and punish those who copied and sold registered dress designs.¹⁰ Struck down by the Supreme Court in 1941 as a violation of the Sherman Antitrust Act,¹¹ Guild leaders argued the sky would soon fall and the American fashion industry would wither away.¹² Neither happened.

tendency to flock while also differentiating from each other.”).

⁹ See, e.g., Marcketti & Parsons, *supra* note 2, at 216.

¹⁰ See C. Scott Hemphill & Jeannie Suk, *The Fashion Originators' Guild of America: Self-Help at the Edge of IP and Antitrust*, in *INTELLECTUAL PROPERTY AT THE EDGE: THE CONTESTED CONTOURS OF IP* 159–79 (Rochelle Cooper Dreyfuss & Jane C. Ginsburg eds., 2014); see also *Piracy Paradox*, *supra* note 4, at 1695–98.

¹¹ *Fashion Originators' Guild of Am. v. FTC*, 312 U.S. 457 (1941).

¹² Maurice Rentner, the head of the Fashion Originators' Guild, argued in the wake of the Supreme Court's decision that the ruling would “write *finis*” to the American dress industry. Kal Raustiala,

Proposals to renew and legislatively bless the Guild concept in altered form occasionally popped up throughout the postwar decades,¹³ but a curious thing happened: the American fashion industry grew and grew even as copying flourished. Home-grown designers such as Ralph Lauren, Roy Halston Frowick (better known simply as Halston), and Calvin Klein developed major national and international brands, making fortunes along the way. That fashion designers were somehow still motivated to create despite the ubiquity of knockoffs was noticed by a few legal scholars—such as Jessica Litman in 1994¹⁴—but did not attract extensive attention. In part, this was because the study of intellectual property law was fixated on creative industries that relied heavily on intellectual property rights, such as film, music, and book publishing. Such a focus made sense from the perspective of legal practice. But it was a major theoretical blinder for legal study because there are many creative fields that lack intellectual property protection—fashion obviously among them. Understanding how these fields operate and innovate can be very illuminating for understanding how, and when, intellectual property rights matter.

We dubbed this array of creative fields copyright's "negative space."¹⁵ The negative space of copyright comprises all those creative endeavors that copyright law could in theory protect but in practice does not. Over the last fifteen years, a slew of studies has been produced about these negative space fields beyond the fashion industry. Roller derby names, comedy, cuisine, sports plays, tattoos, magic tricks, even clown eggs—these and many more quirky, fascinating fields have been explored and shown to remain creative despite the lack of legal bars on copying.¹⁶

New York's "Dress Wars," OUPBLOG (Oct. 10, 2012), <https://blog.oup.com/2012/10/new-yorks-dress-wars/> [<https://perma.cc/JF6Q-63AF>]. Almost a decade ago, the Council of Fashion Designers of America, pushing for new legislation, channeled the same sentiment: "If Congress does not act, the US risks losing these jobs to Europe or to Japan, which offer more stringent intellectual property protections to shield the industry from design thieves." *Id.*

¹³ For a detailed discussion of the legislative efforts to protect fashion design throughout the twentieth and early twenty-first centuries, see Lisa J. Hedrick, *Tearing Fashion Apart at the Seams*, 65 WASH. & LEE L. REV. 215, 234–36 (2008).

¹⁴ Jessica Litman, *The Exclusive Right to Read*, 13 CARDOZO ARTS & ENT. L.J. 29, 44–46 (1994).
¹⁵ *Piracy Paradox*, *supra* note 4, at 1762.

¹⁶ YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* (2006); ROBERT SPOO, *WITHOUT COPYRIGHTS: PIRACY, PUBLISHING, AND THE PUBLIC DOMAIN* (2013); Jacob Loshin, *Secrets Revealed: Protecting Magicians' Intellectual Property Without Law*, in *LAW AND MAGIC: A COLLECTION OF ESSAYS* 123 (Christine A. Corcos ed., 2010); 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); Jonathan M. Barnett, Gilles Grolleau & Sana El Harbi, *The Fashion Lottery: Cooperative Innovation in Stochastic Markets*, 39 J. LEGAL STUD. 159 (2010); Christopher J. Buccafusco, *On the Legal Consequences of Sauces: Should Thomas Keller's Recipes Be Per Se Copyrightable?*, 24 CARDOZO ARTS & ENT. L.J. 1121 (2007); Kate Darling, *IP Without IP? A Study of the Online Adult Entertainment Industry*, 17 STAN. TECH. L. REV. 709 (2014); David Fagundes & Aaron Perzanowski, *Clown Eggs*, 94 NOTRE DAME L. REV. 1313 (2019); David Fagundes, *Talk Derby to Me:*

In the process, this line of research has challenged some of the received verities about the relationship between innovation and intellectual property and provided new perspectives on how, and why, creators create.

Our primary goal in *The Piracy Paradox*, however, was to explain the puzzling persistence of innovation in the apparel industry. We offered two core arguments about how the freedom to copy, far from reducing creativity, actually enhanced it. Both rest on a fundamental social feature of fashion: the fashion cycle. Since at least 1612, when Shakespeare wrote in *Much Ado About Nothing* that “the fashion wears out more apparel than the man,”¹⁷ it has been well known that style is cyclical. Things come in and then go out of style. What is desired today is discarded tomorrow.

The reason is that for a significant slice of society, dressing in a way that tracks a current style is an important form of self-expression and group identity. Being in fashion is good; being out of fashion is bad. And once an item or design is commonplace, it (almost always) rapidly begins its descent out of style.¹⁸ Apparel is a status-laden good whose value is largely dependent on its scarcity and novelty.¹⁹ When a design is fresh and new, it can become desirable and signal membership in a particular tribe. But as it spreads into the marketplace, if it becomes too common, the early adopters (often) no longer value it and seek out newer designs.²⁰

The legal freedom to copy did not create this basic feature of fashion. Rather, it actuates and accelerates it.²¹ The fashion cycle existed

Intellectual Property Norms Governing Roller Derby Pseudonyms, 90 TEX. L. REV. 1093 (2012); Emmanuelle Fauchart & Eric von Hippel, *Norms-Based Intellectual Property Systems: The Case of French Chefs*, 19 ORG. SCI. 187 (2008); Catherine L. Fisk, *Credit Where It's Due: The Law and Norms of Attribution*, 95 GEO. L.J. 49 (2006); Jon M. Garon, *Wiki Authorship, Social Media, and the Curatorial Audience*, 1 HARV. J. SPORTS & ENT. L. 95 (2010); Amy Kapczynski, *Order Without Intellectual Property Law: Open Science in Influenza*, 102 CORNELL L. REV. 1539 (2017); Greg Lastowka, *Minecraft as Web 2.0: Amateur Creativity & Digital Games* (Oct. 5, 2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1939241 [<https://perma.cc/R7HJ-WS9Z>]; Josh Lerner & Jean Tirole, *The Economics of Technology Sharing: Open Source and Beyond*, J. ECON. PERSPS., Spring 2005, at 99; Gerard N. Magliocca, *Patenting the Curve Ball: Business Methods and Industry Norms*, 2009 BYU L. REV. 875 (2009); Dotan Oliar & Christopher J. Sprigman, *There's No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy*, 94 VA. L. REV. 1787 (2008); Aaron Perzanowski, *Tattoos & IP Norms*, 98 MINN. L. REV. 511 (2013); Mark F. Schultz, *Fear and Norms and Rock & Roll: What Jambands Can Teach Us About Persuading People to Obey Copyright Law*, 21 BERKELEY TECH. L.J. 651 (2006); Rebecca Tushnet, *Economies of Desire: Fair Use and Marketplace Assumptions*, 51 WM. & MARY L. REV. 513 (2009).

¹⁷ WILLIAM SHAKESPEARE, *MUCH ADO ABOUT NOTHING* act 3, sc. 3, l. 139–40.

¹⁸ There are exceptions: designs or at least items that seemingly never go out of style. For those (say, jeans), another piece of IP carries an even larger degree of weight: trademark.

¹⁹ *Piracy Paradox*, *supra* note 4, at 1718–20.

²⁰ *Id.*

²¹ See Kal Raustiala & Christopher Sprigman, *The Piracy Paradox Revisited*, 61 STAN. L. REV. 1201, 1209 (2009) (“Hemphill and Suk, like us, see copying as an essential part of the creative ecology of fashion. Fashion piracy may be parasitic on original designs, but it is a parasite that does not kill its host: though it may weaken individual designers it also, paradoxically, strengthens the industry and drives its evolution.”).

before copyright law as we know it was born: Shakespeare wrote a century prior to the passage of the Statute of Anne—the first law to grant exclusive rights in literary works as a matter of public, rather than private, benefit, and generally considered the first modern copyright statute. And the fashion cycle would likely exist even if there were some form of IP protection for fashion designs—indeed, fashion designs are heavily protected by IP rights in Europe, and there is still a fashion cycle. Moreover, these designs are regularly knocked off nonetheless. That some of the biggest fast fashion firms are European only adds force to this point. Still, the absence of legal protection means that a hot design can be rapidly knocked off at many price points and spread more quickly into the market. The quicker the rise, the quicker the fall. That, in turn, means that fashion-forward consumers want something new to replace what is now yesterday's style.

The freedom to copy, in short, is like a turbocharger for the fashion industry, making designs spread faster and further, accelerating trend cycles, and forcing designers to come up with new designs on a regular basis—well before, as Shakespeare himself noted, anything is actually “worn out.” This is important in a field in which there are no real improvements. Unlike computers or cars, fashion does not get objectively “better” over time; it simply changes.²² By stimulating consumer demand for new designs, the regime of free appropriation that exists in the fashion industry actually spurs innovation in design. We called this process “induced obsolescence.”²³

The second argument we made in *The Piracy Paradox* concerned trends. Trends are a ubiquitous feature of the fashion world. At the most basic level, a trend is a series of things that look alike. For a trend to exist there must be some degree of copying.²⁴ Copying first helps to set trends and then to anchor consumers' expectations about what is in style at a given moment.²⁵ This benefits the fashion industry by solving what otherwise would be an information problem: copying makes it easier for customers to know what is and is not currently in style. As a result, it eases the decision about what to wear—which, of course, encourages more apparel purchases by lowering the risk of purchase. Assisting this process is an entire ecosystem of fashion guides and influencers (e.g., Who What Wear, Refinery29, the Sartorialist, as well as any number of Hadids and Jenners) who highlight trends and steer consumption. And as copying of

²² This is not unique to fashion; nearly all the canonical fields covered by copyright—music, literature, film—do not objectively improve but simply change over time.

²³ *Piracy Paradox*, *supra* note 4, at 1718–27.

²⁴ *Id.* at 1728–29.

²⁵ *Id.* at 1719–20, 1728–29.

a given design spreads still further, the freedom to copy helps to kill the trend that it birthed. As a design becomes very widely copied, its cachet typically falls.²⁶ Copying is, in short, the engine that drives the fashion cycle faster.

In the years since we made these arguments, a number of other scholars have attacked, amended, and applauded our work.²⁷ Outside the legal academy, further attempts have been made in Congress to revise copyright law to cover fashion designs. All these legislative efforts, however, have failed. Indeed, these efforts have been failing since 1941 and the fall of the Fashion Originators' Guild. The defeat of these legislative efforts is due to a congeries of factors.

The first—and the most important—is that the American apparel industry has done well over the past eight decades since the Supreme Court killed the Guild. There have been ups and downs, of course, but no sign of the fashion apocalypse predicted in the wake of the Court's decision—or predicted many times since. Some have claimed that the rise of the Internet would change everything by speeding up copying to the point where the industry would finally melt down.²⁸ Those claims always

²⁶ *Id.* at 1719–20.

²⁷ See Barnett et al., *supra* note 16, at 170 n.14 (noting that *The Piracy Paradox* does not elaborate on “the informal argument that, under a veil of ignorance, designers may prefer no protection against design imitation given the roughly equal probability of being a copyist or being copied in any given season”); Silvia Beltrametti, *Evaluation of the Design Piracy Prohibition Act: Is the Cure Worse than the Disease? An Analogy with Counterfeiting and a Comparison with the Protection Available in the European Community*, 8 Nw. J. TECH. & INTELL. PROP. 147, 158 (2010) (qualifying the argument of *The Piracy Paradox* by stating “that design piracy cuts into sales, tarnishes a brand's reputation and constitutes a major barrier for young designers trying to establish their identity in the marketplace”); Dayoung Chung, *Law, Brands, and Innovation: How Trademark Law Helps to Create Fashion Innovation*, 17 J. MARSHALL REV. INTELL. PROP. L. 493 (2018) (arguing opposite the ideas of *The Piracy Paradox*, that the motivator for new design creation is already built into the modern fashion industry and the focus should be on how the law aids the creation of fashion); Arielle K. Cohen, *Designer Collaborations as a Solution to the Fast-Fashion Copyright Dilemma*, 11 CHI.-KENT J. INTELL. PROP. 172, 181–82 (2012) (arguing that (1) proponents of *The Piracy Paradox* “do not take the rapidly evolving new technologies of fast-fashion into account,” (2) mid-level and independent designers are most harmed by copying, (3) proponents do not distinguish between close copying and interpretational copying, and (4) proponents do not “take downturns in the economy into account when predicting consumer behavior”); Arianne Vanessa Josephine T. Jimenez, *A Sui Generis System of Protection for Exceptionally Original Fashion Designs*, 36 LOY. L.A. ENT. L. REV. 101 (2016) (agreeing with *The Piracy Paradox*'s contention that fashion operates in a low-IP equilibrium, but suggesting that the status quo is not encouraging as much innovation as it could be); Amy L. Landers, *The Anti-Economy of Fashion: An Openwork Approach to Intellectual Property Protection*, 24 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 427, 466 (2014) (arguing *The Piracy Paradox* “fail[s] to account for the non-economic and anti-economic values that cannot fit easily into the prevailing economic conception of intellectual property law”); Jared Schroeder & Camille Kraepelin, *Give Me a ©: Refashioning the Supreme Court's Decision in Star Athletica v. Varsity into an Art-First Approach to Copyright Protection for Fashion Designers*, 26 UCLA ENT. L. REV. 19, 52–53 (2019) (arguing that heightened copyright protection is needed in the fashion industry and that a weakness of the argument in *The Piracy Paradox* is that it “fails to account for the havoc the accelerated fashion cycle brings to designers”).

²⁸ Lazaro Hernandez, Designer and Co-Founder of Proenza Schouler, argued that the increased speed of copying undercuts the designers:

seemed ahistorical and overblown—the camera and the fax machine made fashion copying rapid decades ago—and now, after more than a quarter-century online and the industry yet to be destroyed, we submit that the Internet has been exonerated, at least of this particular alleged crime. Of course, the current COVID-19 crisis has damaged the fashion industry in a different way; people locked inside their houses are not shopping for clothes in the same manner as before. And we cannot be sure at this point whether COVID-19 is just a temporary pause in the industry’s growth or whether it heralds more significant changes in how people think about and consume apparel. Setting that uncertainty aside for the moment, it seems clear that, given the broad and durable success of the American fashion industry since World War II, it is very hard to argue that intellectual property rights in fashion designs are essential, though they certainly may benefit some industry participants in some instances.

Second, as a doctrinal matter, copyright law has long classified fashion in the category of so-called “useful articles,” which are broadly denied copyright protection save for pictorial, graphic, or sculptural features that are separable from the article as a whole. Useful articles are instead the purview of patent law. The classic example of a separable design is something like an appliqued image on a sweater. The sweater itself is not protected, but the “attached” design might be. The Supreme Court’s 2017 decision in *Star Athletica, L.L.C. v. Varsity Brands, Inc.* established a relatively permissive test for separability,²⁹ but one that nonetheless

Just as the Internet has transformed industries like music, books and motion pictures, and created new opportunities for piracy, it has done the same for fashion. Today, global changes in both the speed with which that information is transferred and the location where the majority of clothing and textiles are produced have resulted in increased pressure on creative designers. Digital photographs from a runway show in New York or a red carpet in Hollywood can be uploaded to the Internet within minutes, the 360 degrees images viewed at a factory in China, and copies offered for sale online within days—months before the designer is able to deliver the original garments to stores.

Innovative Design Protection and Piracy Prevention Act: Hearing on H.R. 2511 Before the Subcomm. on Intell. Prop., Competition, and the Internet of the H. Comm. on the Judiciary, 112th Cong. 102 (2011) (statement of Lazaro Hernandez, Designer & Co-Founder, Proenza Schouler).

²⁹ *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1010 (2017). Under the rule articulated in *Star Athletica*, a feature incorporated into the design of a useful article is eligible for copyright protection

only if the feature (1) can be perceived as a two- or three-dimensional work of art separate from the useful article and (2) would qualify as a protectable pictorial, graphic, or sculptural work—either on its own or fixed in some other tangible medium of expression—if it were imagined separately from the useful article into which it is incorporated.

Id. at 1007. The Court applied this test to find separable a number of two-dimensional designs consisting of various lines, chevrons, and colorful shapes that appear on the surface of cheerleading uniforms. *Id.* at 1012. However, the Court explicitly declined to make a finding with respect to the designs’ originality, therefore reserving for determination on remand the ultimate question of the designs’ copyrightability. *Id.* at 1012 n.1.

continued to exclude from copyright the overall shape or design of a garment.³⁰ This means that any change aimed at extending protection to fashion designs would either require Congress to create some kind of *sui generis* right, perhaps along the lines of what Congress has previously created for boat hulls³¹ or silicon chip maskworks,³² or to enact a change to the scope of copyright's subject matter similar to what was done in 1990 for architectural works in the Architectural Works Copyright Protection Act.³³ That is, Congress would need to remove fashion designs from the category of "pictorial, graphic, and sculptural works"³⁴ that are subject to the useful articles limitation.

Third, when Congress has at various times considered amending the law to protect fashion designs, the industry has been somewhat divided. While the New York-based Council of Fashion Designers of America has supported several recent legislative proposals, the Los Angeles-based California Fashion Association has not. The American Apparel and Footwear Association, which represents more than one thousand apparel industry brands rather than designers specifically, has also been uneasy about protection and has supported only the narrower proposals that have been put forward. Even within the New York fashion world, some very prominent designers—including some that have won the CFDA's Designer of the Year award—have told us they saw little point to these legislative efforts, since copying, or, as it is sometimes more charitably called, "referencing" or "homage," was simply part of the process in fashion. Other prominent designers have made legislative change their personal crusade.

Last, and perhaps most interestingly, bringing fashion design within the scope of copyright protection would have an important and

³⁰ *Id.* at 1013 ("Even if respondents ultimately succeed in establishing a valid copyright in the surface decorations at issue here, respondents have no right to prohibit any person from manufacturing a cheerleading uniform of identical shape, cut, and dimensions to the ones on which the decorations in this case appear. They may prohibit only the reproduction of the surface designs in any tangible medium of expression—a uniform or otherwise.").

³¹ Vessel Hull Design Protection Act, Pub. L. No. 105-304, §§ 501–02, 112 Stat. 2905 (1998) (codified at 17 U.S.C. §§ 1301–32).

³² Semiconductor Chip Protection Act of 1984, Pub. L. No. 98-620, § 301, 98 Stat. 3347 (codified at 17 U.S.C. §§ 901–14).

³³ Architectural Works Copyright Protection Act, Pub. L. No. 101-650, 104 Stat. 5089, 5133–34 (1990).

³⁴ Section 101 of the U.S. Copyright Act of 1976 defines "pictorial, graphic, and sculptural works" and provides that

[s]uch works shall include works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned; the design of a useful article, as defined in this section, shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.

17 U.S.C. § 101 (2018).

deleterious effect on consumers. By limiting certain designs to certain producers, copyright would raise prices and thereby deprive some, especially those with limited means, of a lot of the fun of fashion.³⁵ The freedom to copy is inherently democratizing: it means that a design from Tom Ford or the Olsen twins may quickly trickle down to the masses at a price point they can afford. It is not surprising that the elite segment of the fashion industry is, on the whole, not sensitive to the question of fashion's role in a democratic society or concerned about the purchases of poor people. Indeed, there are sound economic reasons for some firms to actively oppose such purchases. Fashion's desire for exclusivity is predicated on inequality—*on the privileging of wealthy consumers who can afford luxury fashion over their less affluent compatriots*. As the stories of Halston and Burberry demonstrate, brands that spiral downmarket may struggle to recover, killing the golden goose.

As this suggests, trademarks are an important part of the legal system of fashion. To a degree, trademarks permit status signaling³⁶ that apparel designs do not (thanks to the legal open access to designs). In this sense trademarks push against the leveling quality of the freedom to copy. But trademarks can only provide so much control to producers over fashion goods that copyright's absence takes away; the public's limited appetite for huge logos means that while subtle (and not so subtle) signals of distinction abound, there are still plenty of ways to mimic a high-end look. In a sense, it is the very ability of fashion designs to be appropriated and to appear from many manufacturers that signals to the observer, at least in the case of a well-known design, that a knockoff article is imitating a design from another source. That is to say, in general, we believe few consumers are actually confused by most knockoffs.³⁷

Relatedly, the freedom to copy designs is part of what drives many fashion firms to focus so much on branding. Luxury brands police their exclusivity intensely using trademark law, both through civil lawsuits and—wrongfully, we think—by co-opting federal, state, and local government to use the criminal law to help them police who has access to the status that desirable goods convey and who does not.³⁸ Maintaining social

³⁵ See, e.g., *A Bill to Provide Protection for Fashion Design: Hearing on H.R. 5055 Before the Subcomm. on Cts., the Internet, and Intell. Prop. of the H. Comm. on the Judiciary*, 109th Cong. 221 (2006) (statement of the Am. Free Trade Ass'n) (arguing that as a result of potential legislative regulation of copying in the fashion industry, "the real losers will be the American consumers, who will be cheated out of access to the latest fashions at prices they can afford").

³⁶ See generally Jeremy N. Sheff, *Veblen Brands*, 96 MINN. L. REV. 769 (2012).

³⁷ Kal Raustiala & Christopher Jon Sprigman, *Rethinking Post-Sale Confusion*, 108 TRADEMARK REP. 881 (2018).

³⁸ See, e.g., Rosemary Feitelberg, *NYPD Nabs \$2.2M in Counterfeit Goods*, WOMEN'S WEAR DAILY (Dec. 10, 2014), <https://wwd.com/business-news/financial/nypd-nabs-22m-in-counterfeit-goods-8066448/> [<https://perma.cc/2RV3-JZWH>].

class distinctions in this way is a misuse of public law enforcement resources. It is also, however, an important strategy for those fashion firms that wish to identify their goods with wealthy consumers, one which recruits law enforcement to reify the social class distinctions that the freedom to copy threatens to (however minimally) efface.

Indeed, luxury fashion firms have built their current success on the decades-long rise in inequality. In the face of this, the legal right to copy can be understood as a democratizing counter-force, one which blunts inequality in the broader society from being too overtly reflected in a sort of modern sumptuary code based in IP rules.³⁹ This role has always existed, but it has more bite today. Thanks to the fashion industry's norm of mostly unrestricted design imitation, less affluent people can obtain at least a simulacrum of elite design.

II. THE PIRACY PARADOX IN NORMATIVE PERSPECTIVE

Our arguments in *The Piracy Paradox* were almost wholly analytical. We were interested in solving the puzzle of how the fashion industry maintained its innovation incentives in the face of ubiquitous fashion copying and unearthing the significance for theories of intellectual property. We largely took the industry's practices as a given; we did not address whether fashion copying, or the industry's response to it, were bad or good by some normative standard. We did conclude that design copying was consistent with design innovation, and indeed that, given the positional nature of fashion consumption, copying was part of what made high levels of innovation possible. But those are arguments about the economics of fashion consumption and the efficacy of the particular innovation environment created by the legal regime of free appropriation. We did not move on to consider the wider normative implications.

In the years since *The Piracy Paradox*, others have pointed out various consequences of faster fashion cycles, including the actual or asserted contributions of fast fashion to environmental destruction,⁴⁰ the exploitation of labor,⁴¹ and the wasteful status competition.⁴² These

³⁹ See generally Barton Beebe, *Intellectual Property Law and the Sumptuary Code*, 123 HARV. L. REV. 809 (2010).

⁴⁰ See ELLEN MACARTHUR FOUND., A NEW TEXTILES ECONOMY: REDESIGNING FASHION'S FUTURE (2017); NIKOLAY ANGUELOV, THE DIRTY SIDE OF THE GARMENT INDUSTRY: FAST FASHION AND ITS NEGATIVE IMPACT ON ENVIRONMENT AND SOCIETY (2016); Kirsi Niinimäki, Greg Peters, Helena Dahlbo, Patsy Perry, Timo Rissanen & Alison Gwilt, *The Environmental Price of Fast Fashion*, 1 NATURE REV. EARTH & ENV'T 189 (2020); Luz Claudio, *Waste Couture: Environmental Impact of the Clothing Industry*, 115 ENV'T. HEALTH PERSPS., at A 448 (2007).

⁴¹ See ROBERT J.S. ROSS, SLAVES TO FASHION: POVERTY AND ABUSE IN THE NEW SWEATSHOPS (2004); Liat Smestad, *The Sweatshop, Child Labor, and Exploitation Issues in the Garment Industry*, 1 FASHION PRAC. 147 (2009).

⁴² See Vertica Bhardwaj & Ann Fairhurst, *Fast Fashion: Response to Changes in the Fashion Industry*, 20 INT'L REV. RETAIL, DISTRIB. & CONSUMER RSCH. 165, 170 (2010) (stating that there is

arguments have received more attention as fashion has become even faster. Firms such as Fashion Nova introduce 600–900 new items *per week*.⁴³ None of these particular arguments about the perils of fast fashion fall within our expertise, which centers on intellectual property law and the role that the law plays in various industries' innovation cultures. Still, we believe these arguments are important and ought to play a role in any comprehensive evaluation of the merits of the existing legal regime, which fuels fast fashion. In what follows, we offer some brief and general comments about these critiques of fast fashion.

A. Fast Fashion and the Environment

Some have argued that rapid style turnover, which is both created by and feeds the fast fashion segment of the industry, is wasteful and environmentally destructive.⁴⁴ It is difficult to gainsay this observation. Faster fashion cycles—with apparel made cheaper, and both style change and consumption much more rapid—is bound to consume more energy in production and distribution and to produce more waste. The success and growth of companies that rely on the fast fashion model led, as of 2016, to brands “producing almost twice the amount of clothing . . . compared with before the year 2000.”⁴⁵ One study found that, as of 2015, greenhouse gas emissions from textiles production and the fashion industry were “more than those of all international flights and maritime shipping combined.”⁴⁶ That same study found that synthetic fabrics use over 340 million barrels of oil per year and depend heavily on other non-

a constant need to keep up with trends and this leads consumers to purchase lower quality clothing at more frequent intervals and dispose of older clothes as quickly as they purchase new); Francois Souchet, *Fashion Has a Huge Waste Problem. Here's How It Can Change*, WORLD ECON. F. (Feb. 28, 2019), <https://www.weforum.org/agenda/2019/02/how-the-circular-economy-is-redesigning-fashions-future/> [https://perma.cc/9YK9-68U3] (explaining how rapidly cycling trends have resulted in drastic growth in clothing production and decline of clothing utility).

⁴³ Aria Hughes, *How Fashion Nova Won the Internet*, WOMEN'S WEAR DAILY (Feb. 28, 2018), <https://wwd.com/fashion-news/fashion-features/inside-fashion-nova-cardi-b-1202595964/> [https://perma.cc/9TR2-CFLD] (quoting Richard Saghian, Fashion Nova's CEO, as saying that he has turned fast fashion into “ultra-fast fashion”). For a general overview of the firm, see Chantal Fernandez, *Inside the Fashion Nova Hype Machine*, BUS. OF FASHION (July 19, 2018, 5:27 AM), <https://www.businessoffashion.com/articles/news-analysis/inside-the-fashion-nova-hype-machine> (last visited Feb. 25, 2021).

⁴⁴ See, e.g., Cassandra Elrod, Note, *The Domino Effect: How Inadequate Intellectual Property Rights in the Fashion Industry Affect Global Sustainability*, 24 IND. J. GLOB. LEGAL STUD. 575 (2017); Niinimäki et al., *supra* note 40 (detailing environmental consequences of fashion production at each level of the industry); ELLEN MACARTHUR FOUND., *supra* note 40, at 3 (finding that in 2015 greenhouse gas emissions from textiles production and the fashion industry was “more than those of all international flights and maritime shipping combined”). For more on the social and environmental costs of fast fashion, see ANGUELOV, *supra* note 40; see also DANA THOMAS, FASHIONOPOLIS: THE PRICE OF FAST FASHION AND THE FUTURE OF CLOTHES (2019).

⁴⁵ Niinimäki et al., *supra* note 40, at 189.

⁴⁶ ELLEN MACARTHUR FOUND., *supra* note 40, at 3.

renewable resources.⁴⁷ The study concluded that “[t]he trajectory of the industry points to the potential for catastrophic outcomes.”⁴⁸

To make matters worse, fashion firms do not just cause environmental harm via the production of apparel; many also *destroy* production on purpose. In 2018, for example, Burberry was revealed to have destroyed nearly \$37 million worth of clothing.⁴⁹ This practice exists largely because fashion firms are fixated on maintaining brand value and do not want their products overly discounted or appearing in certain markets. That obsession with status—about which more in a moment—is critical to the unusual economics of fashion. But it adds to the overall environmental harm produced by the industry.

These are serious issues. Yet in our view, fast fashion’s wastefulness or energy-intensiveness is neither unique to fashion nor a particularly powerful normative argument against fashion copying and the rapid fashion cycle that copying makes possible. The basic problem with the argument is that it fails to identify why we should treat fashion differently from any other form of economic activity that produces environmental harms—which is a huge swath of economic activity today. In theory, any fast moving, non-digital industry may exhibit this problem (and indeed even digital industries use a large amount of electricity—with cryptocurrency mining being an especially egregious example).⁵⁰ Prior to Napster, iTunes, and Spotify, for instance, one could have argued that the music industry, by spinning out new hits all the time, was wastefully consuming vinyl, cardboard, and plastic producing records and emitting greenhouse gases through record distribution. That no one did make this argument (to our knowledge) reflects perhaps weaker environmental concern in the late twentieth century and, probably more significantly, the fact that fashion is often seen as exceptionally frivolous.⁵¹ But in reality, any non-essential good is vulnerable to this critique; while industries may vary in scale and speed, the basic claim is not fashion-specific.

For these reasons, those who would use fast fashion’s environmental impact to justify restricting fashion copying must provide a reason to treat fast fashion differently than, say, the production of other non-necessities,

⁴⁷ *Id.* at 38.

⁴⁸ *Id.* at 39.

⁴⁹ Chavie Lieber, *Why Fashion Brands Destroy Billions’ Worth of Their Own Merchandise Every Year*, VOX (Sept. 17, 2018, 8:00 AM), <https://www.vox.com/the-goods/2018/9/17/17852294/fashion-brands-burning-merchandise-burberry-nike-h-and-m> [<https://perma.cc/H5V5-PA7H>].

⁵⁰ See, e.g., Lauren Aratani, *Electricity Needed to Mine Bitcoin Is More than that Used by ‘Entire Countries’*, THE GUARDIAN (Feb. 27, 2021), <https://www.theguardian.com/technology/2021/feb/27/bitcoin-mining-electricity-use-environmental-impact> [<https://web.archive.org/web/20210510005751/https://www.theguardian.com/technology/2021/feb/27/bitcoin-mining-electricity-use-environmental-impact>].

⁵¹ There is obviously a gender dimension to this; fashion has long been culturally-coded as female.

like video game systems, or even goods, like automobiles, that many consider to be among life's necessities. Automobile production and distribution is a form of economic activity that imposes huge social costs, not just in the form of pollution but also infrastructure damage, traffic fatalities and injuries, and the degradation of the quality of life in cities.⁵² Underneath the arguments about fast fashion, we suspect, is the unarticulated premise that fast fashion production is simply not socially valuable, either because fashion is viewed as inherently frivolous or because, while "normal" fashion may be good, fast fashion is cheap and déclassé. We firmly disagree with that premise (as we will discuss in more detail later). Fashion is a vital element of human self-expression, and fashion copying is an integral element of fashion's democratization. In a society that is ever more unequal, as we noted above, the ability of consumers who are not rich to access popular designs helps slow the process by which growing income inequality harden into rigid and visible social class disparities.

None of this should be taken to suggest that there is not an argument that the pollution costs of fashion production should be addressed: they should be, in the context of wider policies designed to minimize environmental damage caused by the production and distribution of goods and services. There are many ways to do this. Some firms already are pledging to improve; in July 2019, Zara's parent company, Inditex, "pledged that it will only use sustainable, organic, or recycled material" in its clothing by 2025.⁵³ Many environmental economists argue that the most direct and efficient way to improve is to mitigate that enormous impact through a program of Pigouvian taxes—i.e., taxes calculated to offset the social cost of environmental pollution and damage.⁵⁴ The overarching goal of such taxes is to force producers to internalize the environmental costs that they are currently permitted to externalize onto society as a whole. Once those costs are internalized by producers—and, ultimately, by consumers—then decisions about both production and consumption will respond to the total costs of the activity, including environmental costs, and both production and consumption will be undertaken only if it produces value in excess of those costs. The tax will sharpen incentives to lower the environmental costs of all environmentally-damaging forms of economic

⁵² See generally Gregory H. Shill, *Should Law Subsidize Driving?*, 95 N.Y.U. L. REV. 498 (2020).

⁵³ Terry Nguyen, *Fast Fashion, Explained*, VOX (Feb. 3, 2020, 7:00 AM), <https://www.vox.com/the-goods/2020/2/3/21080364/fast-fashion-h-and-m-zara> [<https://web.archive.org/web/20210212051536/https://www.vox.com/the-goods/2020/2/3/21080364/fast-fashion-h-and-m-zara>].

⁵⁴ See generally A.C. PIGOU, *THE ECONOMICS OF WELFARE* (4th ed. 1932) (1920); see also OFF. OF POL'Y, ECONS., & INNOVATION, U.S. ENV'T PROT. AGENCY, EPA-236-R-04-001, *INTERNATIONAL EXPERIENCES FOR ECONOMIC INCENTIVES FOR PROTECTING THE ENVIRONMENT* (2004) (describing possible economic incentives and taxes for managing firms' impact on the environment).

activity, including apparel production. At the same time, the tax will also produce revenues that can be used to remediate the damage caused. Taxation is but one tool, however; our larger point is that environmental harms are most effectively tackled through environmental policies. These are very unlikely to be fast fashion-specific.

B. Fast Fashion and the Exploitation of Labor

A similar point can be made in response to another normative critique of fast fashion—that it contributes to the exploitation of low-wage labor, particularly in the developing world. The growth of fast fashion, critics say, “has engendered a race to the bottom, pushing companies to find ever-cheaper sources of labour. That cheap labour is freely available in many of the countries where textile and garment production takes place.”⁵⁵ While major companies in the United States are normally averse to the use of child labor, the supply chain is complex, and manufacturers often use sub-contractors, which reduces accountability for the brand name companies.⁵⁶ In 2018, the U.S. Department of Labor found that cotton, garments, and textiles were all officially listed as products made by child or forced labor.⁵⁷ However, forced labor is not unique to the developing world, and recent investigations have uncovered fast fashion sweatshops in Los Angeles.⁵⁸

Much like the environmental critique above, this argument raises serious concerns yet also lacks a particular connection to fast fashion, or even to the fashion industry generally. A wide variety of developed-world manufacturing industries utilize cheap labor in the developing world. And the same moral questions apply across all of these industries. Some of these questions are relatively easy to answer—child labor is and should be everywhere barred—but others resist simple arguments. On the one hand, Western firms employing labor in the developing world should adhere to minimum standards designed to afford those workers a decent wage, safe working conditions, and the choice whether to organize for collective bargaining. On the other hand, those standards should not be set at a level that prevents developing countries with less-educated,

⁵⁵ Josephine Moulds, *Child Labour in the Fashion Supply Chain*, THE GUARDIAN, <https://labs.theguardian.com/unicef-child-labour/> [<https://perma.cc/JBK9-NYW5>] (last visited Jan. 20, 2021).

⁵⁶ See Tripti Lahiri & Christina Passariello, *Why Retailers Don't Know Who Sews Their Clothing*, WALL ST. J. (July 24, 2013, 7:07 AM), <https://www.wsj.com/articles/SB10001424127887324436104578579552855683948> [<https://perma.cc/YZ34-U7KV>].

⁵⁷ U.S. DEP'T OF LAB., LIST OF GOODS PRODUCED BY CHILD LABOR OR FORCED LABOR 11–14 tbl.2 (2018).

⁵⁸ Natalie Kitroeff & Victoria Kim, *Behind a \$13 Shirt, a \$6-an-Hour Worker*, L.A. TIMES (Aug. 31, 2017), <https://www.latimes.com/projects/la-fi-forever-21-factory-workers/> [<https://perma.cc/EDN6-DNN6>].

lower-skilled, and therefore on average less productive work forces from competing in the world market for manufacturing jobs based on the comparative advantage of lower labor costs. To do so is to deny labor in the developing world the chance to compete on terms that give them any prospect of success. Threading the needle between protection and competition is not easy. But it is also not fashion-specific.

Aside from the difficult questions involved in determining where to draw the line, it is far from clear that firms producing low-cost fashion or fast fashion are, on the whole, more likely to engage in exploitative labor practices relative to firms in other segments of the fashion industry.⁵⁹ Nor is it likely that the solutions to abusive labor conditions in the developing world are to be found in Western intellectual property law, as opposed to national and international labor standards and enforcement, whether via human rights treaties, the work of the International Labor Organization, the workings of trade agreements, or internal supply-chain policies within multinational corporations. In short, much like the environmental impacts of fast fashion, the labor impacts are real. But they are not unique to fashion, and their solutions are likely to be found in generalized regulatory approaches rather than in any regulation aimed at slowing the fashion cycle.

It bears mentioning that, to the extent that consumers are sensitive to the environmental or labor costs of fashion, we might expect a share of consumption to shift toward fast fashion's antithesis—that is, toward so-called “slow fashion.” The slow fashion concept, which emerged under that title around 2007⁶⁰ (a riff on the much older “slow food” movement),⁶¹ encourages the purchase of high-quality clothing that can be worn for longer and is made of sustainable materials. It also pushes for consumers to change their consumption practices and priorities when purchasing clothing. The slow fashion movement began with a primary focus on environmental sustainability, but it has expanded to include discussion

⁵⁹ Prestigious fashion firms such as Marc Jacobs, Coach, Michael Kors, CHANEL, Dior, and Saint Laurent have been accused of labor violations in Bangladesh, China, Korea, and India. See, e.g., Tiffany Ap, *Michael Kors' China Factory Workers Strike over Alleged Abuse*, WOMEN'S WEAR DAILY (Mar. 12, 2018), <https://wwd.com/accessories-news/handbags/michael-kors-china-factory-workers-strike-over-alleged-abuse-1202626372/> [<https://perma.cc/D3WW-AG6V>]; Kai Schultz, Elizabeth Paton & Phyllida Jay, *Luxury's Hidden Indian Supply Chain*, N.Y. TIMES (Mar. 11, 2020), <https://www.nytimes.com/2020/03/11/style/dior-saint-laurent-indian-labor-exploitation.html> [<https://perma.cc/Q3MV-R4VV>]; Kevin Sobel-Read & Georgia Monaghan, *Fashion Industry Giants Keep Failing to Fix Labor Exploitation*, FASHION L. (July 28, 2020) <https://www.thefashionlaw.com/why-does-the-fashion-industry-keep-failing-to-fix-labor-exploitation-its-simple/> [<https://perma.cc/4UMT-EWLR>]; *Chanel Subject to Protest in Korea over Working Conditions, Agrees to Raise Wages*, FASHION L. (Mar. 28, 2018), <https://www.thefashionlaw.com/chanel-subject-to-widespread-protest-in-korea-over-working-conditions/> [<https://perma.cc/5HX5-ABMQ>].

⁶⁰ Kate Fletcher, *Slow Fashion*, THE ECOLOGIST, June 2007, at 61.

⁶¹ See, e.g., *About Us*, SLOW FOOD, <https://www.slowfood.com/about-us/> [<https://perma.cc/9PD8-Y3DQ>] (last visited Feb. 27, 2021) (stating that the Slow Food movement was established in 1989).

of labor and status competition concerns as well.⁶² It will be interesting to see whether slow fashion gains cultural currency. For now, it is a movement hatched and mostly adhered to by cultural critics, rather than ordinary consumers. And like other movements to raise the tastes of the masses, it smacks of elitism.

C. Fast Fashion and Zero-Sum Status Competition

Finally, some have argued that fast fashion contributes to an unhealthy and wasteful appetite for status competition.⁶³ This argument accuses fast fashion of luring more people into a fashion cycle that represents a ceaseless and expensive contest to signal status, a contest which no one wins (except, perhaps, for fashion producers). We think this argument has some merit as applied to certain luxury goods. But as a critique of fast fashion, its impact is limited.

The argument is primarily based in the work of economist Robert Frank, who has made important arguments about the social consequences of status competition. In Frank's seminal book *Choosing the Right Pond*,⁶⁴ he argues that we tend to care more about our relative status rather than our absolute status—which means that even when we are doing well, often we are unhappy if our peers do better. (A disturbing account of human nature that nonetheless often rings true.)

Our obsession with relative status drives a lot of consumption. We are endlessly obsessed, Frank argues, with the need to “keep up with the Joneses.”⁶⁵ And that endless status race, he asserts, is harmful to society as a whole, because the entire thing is a zero-sum game: if you improve your status relative to your neighbor, then your neighbor's status falls relative to you. In the end, what's lost offsets what's gained, and we've all spent money competing with one another but not actually getting anywhere, at least not collectively, and at least not in the long run.

⁶² Elizabeth Cline, *The Power of Buying Less by Buying Better*, THE ATLANTIC (Feb. 16, 2016), <https://www.theatlantic.com/business/archive/2016/02/buying-less-by-buying-better/462639>

[<https://perma.cc/6ULK-ZFN2>]; Sojin Jung & Byoungcho Jin, *A Theoretical Investigation of Slow Fashion: Sustainable Future of the Apparel Industry*, 38 INT'L J. CONSUMER STUD. 510 (2014).

⁶³ Liz Barnes & Gaynor Lea-Greenwood, *Fast Fashioning the Supply Chain: Shaping the Research Agenda*, 10 J. FASHION MKTG. & MGMT. 259, 260 (2006) (discussing that the need to keep up with celebrities and the latest catwalk trends has fueled the fast fashion industry); Nguyen, *supra* note 53 (discussing the perceived pressure Gen Z feels to wear a different outfit each time they go out or post on social media, and how this desire for novelty drives people to cheap fast fashion to fulfill this desire); Lucy Siegle, *How Instagram Influencers Fuel Our Destructive Addiction to Fast Fashion*, HUFFPOST: IMPACT (Feb. 7, 2019, 5:45 AM), https://www.huffpost.com/entry/fast-fashion-influencers-instagram-fashion-nova-waste-climate-change_n_5c5ae8ffe4b0871047598750 [<https://perma.cc/N6QB-SVLU>] (arguing that fast fashion brands are capitalizing on consumers' need to keep up with social media influencers and quell their “FOMO,” or fear of missing out, on the next trend).

⁶⁴ ROBERT H. FRANK, *CHOOSING THE RIGHT POND: HUMAN BEHAVIOR AND THE QUEST FOR STATUS* (1985).

⁶⁵ *Id.* at 5–6.

This is why, Frank suggests, increases in wealth do not generally translate into durable increases in subjective feelings of well-being. At least after our basic needs are taken care of, as we get wealthier, a lot of that extra money is dissipated in status competition—which, if it produces well-being at all, tends to increase it only fleetingly. At one extreme, Frank argues, people get caught up in unproductive “expenditure cascades.”⁶⁶ An example would be a group of people who own modest houses on a nice beach. Imagine one homeowner tears down her house and builds a beach mansion in its place. That owner may gain relative status at the expense of the other homeowners. But the neighbors may now be more likely to tear down their existing houses—with which they previously may have been entirely satisfied—and build bigger beach mansions in a bid to recover the relative status their neighbor’s action took from them. At the end of the day, we have a beach jammed with bigger, more expensive houses and a group of homeowners who are, on the whole, likely no happier than they were before the construction boom. The remedy, Frank argues, is progressive consumption taxes.⁶⁷ By reducing the disposable income of the rich, we dampen status racing and discourage expenditure cascades, without substantially reducing subjective well-being. This leaves more money for more productive investments.

So where does fast fashion fit into all this? Fashion is, of course, a classic “positional” good (what economists call status-conferring items); fashion consumption is one of the principal ways that people signal relative status. Fashion is readily seen by others—we literally wear it on our bodies—and because of the social norm of wearing different clothes each day, it provides an endless stream of opportunities to recalibrate one’s status via one’s style. To be sure, fashion is not simply about status; it is a form of self-expression for many (though of course many others pay only glancing attention to the styles of the day). Fashion is fundamentally functional as well. We wear clothes to stay warm and cover our nakedness. But it is undeniable that fashion has a status-seeking dimension, and whether we are always conscious of it or not, our decisions about what to wear send signals to others of our status.

As a result, on the surface, fashion consumption looks like it is part of the problem that Frank is describing: that of people desperate to improve or at least to maintain their relative social position spending money on expensive apparel in an unproductive, zero-sum status race. Some believe Instagram and other forms of social media may make the problem

⁶⁶ See Robert H. Frank, Adam Seth Levine & Oege Dijk, *Expenditure Cascades*, 1 REV. BEHAV. ECON. 55–73 (2014).

⁶⁷ FRANK, *supra* note 64, at 247–50.

even worse, by driving constant purchases of new outfits.⁶⁸ Over 40% of 18–25-year-olds, according to one study, feel pressure to never wear the same outfit out more than once.⁶⁹ Addressing this issue is not simple. First, with respect to fashion consumption generally, people have been signaling status through apparel choices probably since shortly after Adam and Eve discovered they were naked and “sewed fig leaves together, and made themselves aprons.”⁷⁰ It is difficult to believe that any progressive consumption tax of the type Frank suggests—at least one that is at all politically feasible—is likely to substantially suppress the human desire for adornment.

Perhaps more to the point for our purposes here, it is far from clear whether the fast fashion segment of the apparel industry should be considered a problem within Frank’s framework or part of the solution. Fast fashion is a way that ordinary consumers (and even some affluent ones) gain access on the cheap to a simulacrum of elite status. This means that fast fashion may open status competition through apparel purchases to more consumers, or allow some consumers to engage in fashion-based status competition more frequently. Fast fashion may simultaneously make status competition through apparel cheaper. That is an important point, because if the effect of fast fashion is, on net, to reduce the cost for non-affluent people to compete for status through apparel choices, then we should be wary of introducing legal rules that make fashion copying more risky and expensive—especially at a time when income and wealth class disparities have grown so wide in our society.

New entrants in the fashion ecosystem such as Rent the Runway, which allows subscribers to borrow and then return a fixed number of apparel items, might be seen as a way to achieve the same end of cheaper access to fashion designs but without the knockoffs. Perhaps the same could be true of online consignment stores like The RealReal, where consumers can buy used clothing that is generally pitched quite a bit higher than the average Goodwill store. But there are limitations to the online rental and consignment models. First, Rent the Runway is not especially cheap: subscriptions begin at over \$1,000 per year and rise rapidly from there.⁷¹ Consignment stores are not new (Tokio 7 in New York has been around for decades), and in the new online version items tend not to be

⁶⁸ Siegle, *supra* note 63.

⁶⁹ *The Truth About Outfit Repetition: “There Are Real Issues at Play Here,”* FASHION L. (Jan. 5, 2018), <https://www.thefashionlaw.com/outfit-repetition-there-are-real-issues-at-play-here/> [<https://perma.cc/5BB4-T8U2>].

⁷⁰ *Genesis* 3:7 (King James).

⁷¹ *Pick a Plan*, RENT THE RUNWAY, <https://www.renttherunway.com/plans> [<https://perma.cc/3ETT-G9D6>] (last visited Feb. 27, 2021) (the lowest-priced plan allows users to rent up to four items per month for \$89 per month).

cheap, at least by the current standards of fast fashion: a recent look on The RealReal site at used items for women by Rick Owens ranged from \$42 to \$2,200, and used items by Tom Ford for men ranged from \$37.50 to \$6,500.⁷² Second, unlike digital goods, which can be distributed at scale, online rental or consignment of tangible goods like apparel is unlikely ever to work at sufficient scale to replace any significant share of fast fashion consumption—there are just not enough original pieces to go around. As a consequence, firms like Rent the Runway or The RealReal are interesting but peripheral, and likely to remain so.

We should note, separately, that fast fashion gives more people access to the opportunity to wear a lot of styles. For some this is merely fun, but for others, fashion choices are a core means of self-expression. Every day, many more people express themselves through fashion choices than have ever written a book, composed a song, or made a motion picture. Nor is fashion expression trivial—quite the opposite, in fact. At various points in their lives, many hundreds of millions of people use fashion to speak for them: as a way of celebrating their youth, communicating their dignity, showing the world their joy, or their mourning, and even signaling their allegiance to great causes: think of the white suits that Democratic women in Congress wore to the 2020 State of the Union speech in honor of the their fore-sisters who fought for women's suffrage.⁷³ If fashion is speech, it is the *wearer* who speaks far more than the designer. And if fashion is art, it is still the *wearer*, as much as the designer, who makes it so.

CONCLUSION

When we think about whether the regime of largely unrestricted fashion copying we analyzed in *The Piracy Paradox* is likely to endure, we are mindful that offering predictions is hazardous even when the lessons of history seem clear. Since the Supreme Court struck down the Fashion Originators' Guild, copyright has played a largely peripheral role in the innovation culture of the American fashion industry. Nonetheless, the industry, including the industry's fast fashion segment, has thrived. Moreover, the quick spread of new designs makes fashion a much more democratic and vibrant element of our culture, allowing all but the

⁷² Search conducted on Feb. 27, 2021, 11:00 AM. The RealReal has a few brick-and-mortar stores in select (and wealthy) locations, such as West Hollywood, Palo Alto, and Miami. In New York City, The RealReal has a physical presence in two of the most elite shopping areas: in SoHo and on Madison Avenue.

⁷³ Cady Lang, *Why Democratic Congresswomen Wore White Again to Send a Message at the State of the Union*, TIME (Feb. 4, 2020), <https://time.com/5777514/women-wearing-white-state-of-the-union/> [<https://perma.cc/M5DD-R6R2>].

poorest to express themselves through fashion choices. In the last decade, fashion has become even faster and cheaper, accentuating this aspect.

And yet, there is an important historical counter-trend. The history of American copyright has been one of continual expansion, whether in terms of the range of subject matter that copyright law reaches or the breadth and duration of copyrights.⁷⁴ So it is entirely possible that a proposal to extend copyright to fashion design will one day succeed. We continue to believe this would be a mistake. There is little reason to believe that copyright protection would make the fashion industry more innovative or productive. It might actually do the opposite. And, importantly, introducing copyright protection might fundamentally change the industry by making it less open to small competitors and new entrants. An industry in which every new season of designs is followed by years of copyright litigation is going to be more expensive and riskier. Lawyers and lawsuits are costly. For big players with powerful brands that give them market power, that expense will be manageable. For small players, and for new entrants, one wrong move might be ruinous.

The fifteen years since the publication of *The Piracy Paradox* have also witnessed new and varied attacks on fashion, especially the fastest fashion. These environmental, labor, and social critiques have merit. Yet, fast fashion seems especially prone to drawing these critiques in a way that other creative industries do not. This may be because fashion is partly viewed as easy prey: meaningless in a way that supposedly higher arts, like music or film, are not. Some might argue that were fashion designs accorded statutory protection akin to these other creative fields it would elevate its status, a view that seems to depict copyright—a system of government-backed monopoly—as ennobling. For reasons that lie beyond the scope of this short essay, we do not agree. But either way, copyright protection is purposive in the American legal system, and its role is not to ennoble but rather to incentivize. Any sober look at the industry today illustrates that incentives to create new designs are already abundant; this was, indeed, the major theme of *The Piracy Paradox*.

In sum, while the problems engendered by fast fashion are real, the solutions are rarely fashion-specific. Moreover, the suggestion that because fast fashion is bad, slow fashion would be better, does not necessarily follow—especially if the slowing of the fashion cycle is attempted through legislation aimed at granting broader monopolies to fashion firms.

⁷⁴ See generally Neil W. Netanel, *Why Has Copyright Expanded? Analysis and Critique*, in 6 NEW DIRECTIONS IN COPYRIGHT LAW 3 (Fiona Macmillan ed. 2008).

We can end by affirming that whatever the future brings, we suspect that one central idea put forward in *The Piracy Paradox* is likely to endure. That idea is not about the fashion industry as such, but about the signal sent by the American fashion industry's decades of vigorous growth in the absence of meaningful copyright protections. Copyright has been justified as a necessary predicate to innovation. *The Piracy Paradox* proposes that matters are considerably more complicated than that simple equation suggests. As the negative space literature that has grown up in the past fifteen years has made clear, a lot of creativity is not principally dependent on intellectual property protections. This is not to deny IP's salience: sometimes creativity may indeed depend on intellectual property protections. The point is that this dependence cannot simply be presumed. It must be evidenced.⁷⁵ And on that point, there is much work yet to be done.

⁷⁵ See generally Christopher Jon Sprigman, *Copyright and Creative Incentives: What We Know (and Don't)*, 55 HOUS. L. REV. 451 (2017); Kal Raustiala & Christopher Jon Sprigman, *When Are IP Rights Necessary? Evidence from Innovation in IP's Negative Space*, in 1 RESEARCH HANDBOOK ON THE ECONOMICS OF INTELLECTUAL PROPERTY LAW: THEORY 309–29 (Ben Depoorter & Peter S. Menell eds., 2019).