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A BILL TO PROVIDE PROTECTION FOR FASHION DESIGN

HEARING

BEFORE THE

SUBCOMMITTEE ON COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED NINTH CONGRESS

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A BILL TO PROVIDE PROTECTION FOR FASHION DESIGN

THURSDAY, JULY 27, 2006

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, THE INTERNET,
AND INTELLECTUAL PROPERTY,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 9:13 a.m., in Room 2141, Rayburn House Office Building, the Honorable Lamar Smith (Chairman of the Subcommittee) presiding.

Mr. SMITH. The Subcommittee on Courts, the Internet, and Intellectual Property will come to order.

I don't know what the distraction was out to my left, but we are all going to come to order this morning. After our opening statements, then we will introduce our witnesses and proceed with our hearing.

In just a moment, I will announce we are going to be going out of order in one way, and I am going to go into greater explanation in regard to that in just a second. I recognize myself for an opening statement.

The topic of today's hearing is not the usual for our Subcommittee. That our audience is unusually well attired may well reflect the subject.

The legislation we are considering today would create a new intellectual property right for fashion designers. H.R. 5055 amends chapter 13 of the Copyright Act to extend design protection for articles of clothing, as well as watches, handbags, sunglasses and other fashion accessories.

Currently, articles of clothing are considered useful articles and are generally ineligible for copyright protection. The design of a useful article is protected under copyright, "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."

For the first time under this bill, fashion design would be protected by copyright law and copies that are found to be in "appearance in the whole of the protected design would be prohibited."

Design protection legislation has been introduced in Congress since 1914. Previous bills took one of two forms: changes to copyright law or relaxation of the restrictions placed on design patents. They were based on the limited protection available to useful articles under the patent, copyright and trademark laws.

Advocates of H.R. 5055 say that under current law, fashion designs are generally ineligible for any type of protection, so designers, especially new designers entering the field, easily become victims of those who wish to copy their designs and profit from them. Others have expressed concerns that the legislation is too broad and would prohibit the ability of designers and retailers to replicate current trends and styles, something on which the fashion industry thrives.

This Subcommittee must carefully weigh the competing interests and the consequences of establishing such a precedent. Our Subcommittee follows the mandate of the Constitution to protect the intellectual property rights of our citizens and those who fairly deserve to reap the benefits of their creativity and inventions.

At the same time, we must also make sure that intellectual property legislation does not have an adverse impact on economic growth. When we allow goods to be taken out of the marketplace and assign ownership rights to a certain creator, we should look at the fairness of doing so and also the impact it will have on the market. The economic impact of expanding designer protection for fashion designs and the potential burden to the Copyright Office of a large increase of registered designs both need to be explored.

Because the bill mandates that a court, and not the Copyright Office, settle disputes over registration of designs, the impact of the bill on the Federal court system also needs to be examined.

We will look forward to discussing these issues and ask some questions on these subjects during the hearing today.

I will now recognize the Ranking Member, Mr. Berman, for his opening statement, then we are going to move very quickly to the opening statement of the mover of this legislation, the gentleman from Virginia, Mr. Goodlatte.

Mr. BERMAN. Along with Mr. Delahunt.

Thank you, Mr. Chairman.

H.R. 5055 would extend copyright protection to fashion designs. I am open-minded about this issue and see that the Copyright Office in their written testimony has raised the core question for discussion today.

[The written testimony of the U.S. Copyright Office is published in the Appendix.]

Mr. BERMAN. Is there a need for this legislation? And what evidence is available for quantifying the nature and extent of the harm suffered by fashion designers due to the lack of legal protection for their designs?

The global fashion industry is said to have revenues of $784 billion annually. According to the NPD group, total U.S. apparel sales reached $181 billion in 2005. California alone produces over $13 billion in apparel products and employs 204,000 direct employees, 59,000 indirect workers, and put me through college and law school.

Reportedly, apparel and footwear losses due to counterfeiting have been estimated to be $12 billion annually. The fashion designers are seeking this protection in order to prevent the rampant piracy of their fashion designs, as well as to maintain the incentive for designers to continue to develop new, original fashion designs. This protection would last only 3 years, allowing original designers

sufficient time to recoup the expenses incurred in designing and developing their fashion works.

Current copyright law only provides protection to those design elements of a useful article that are separable and independent of the utilitarian function of the article. Therefore, fashion works have traditionally been denied copyright protection on the ground that they are considered to be useful articles. Fashion designers do have access to some other intellectual property rights both in trademark and patent law.

However, trademark law protects the elements of a design that indicate the source of the product, but does not provide general protection for designs. In patent law, there is the potential for design patents, but this route of protection often is not practical for designers because of the length of the time it takes before the patent issues, as we know, combined with the typical lifespan of a fashion design, which is only a single season, maybe 3 to 6 months.

Further, the design patents require a level of novelty and originality that has generally been held to be higher than that which is achieved by fashion works. The fashion industry is unique in that it epitomizes the ultimate paradox of intellectual property protection. The arguments I have heard illustrate both sides of the debate. Is a high level of protection necessary to promote innovation? Or does the lack of a high level of protection for fashion designs actually spur increased creativity in the fashion industry?

Furthermore, in part as a result of the great speed with which fashion trends come and go, new fashions are available in the high-end designer stores and in the low-end retail outlets, making these fashions available to virtually all individuals regardless of their income level. Will an increased level of protection for designers be at the detriment of the retailers and the public?

In the past, Congress has demonstrated a flexibility in expanding copyright laws. For example, providing design protection for buildings through the Architectural Works Copyright Protection Act, and providing protections specifically for semiconductor mask works and boat hulls. Should we be extending copyright protection to fashion designs or are there other areas that we should also consider extending protection to, such as for example the furniture and auto parts industries?

I look forward to understanding the extent of the problem of fashion design knockoffs and what the impact is on the high-end market. For example, is there a fear of lost sales in this market as a result of production in retail stores?

In addition, I would like for the witnesses to describe what constitutes a design that is substantially similar. Is it an exact copy? Is it a mere inspiration of a current trend? And how does one determine if it is something in between?

I yield back, Mr. Chairman.

Mr. SMITH. Thank you, Mr. Berman.

The gentleman from Virginia, Mr. Goodlatte, is recognized for an opening statement.

Mr. GOODLATTE. Mr. Chairman, thank you very much for holding this important hearing on the Design Piracy Prohibition Act, which I was pleased to introduce with my good friend and colleague, Con-

gressman Delahunt of Massachusetts, and also Congressman Coble, Congressman Wexler and Chairman Sensenbrenner.

Article I, section 8 of our Constitution lays the framework for our nation's copyright laws. It grants Congress the power to award inventors and creators for limited amounts of time exclusive rights to their inventions and works. The founding fathers realized that this type of incentive was crucial to ensure that America would become the world's leader in innovation and creativity. This incentive is still necessary to maintain America's position as the world leader in innovation.

Most industrialized nations provide legal protection for fashion designs. However, in the United States, the world's leader in innovation and creativity, fashion designs are not protected by traditional intellectual property protections. Copyrights are not granted to apparel because articles of clothing, which are both creative and functional, are considered useful articles, as opposed to works of art. Design patents are intended to protect ornamental designs, but clothing rarely meets the criteria of patentability.

Trademarks only protect brand names and logos, not the clothing itself. And the Supreme Court has refused to extend trade dress protection to apparel designs. Thus, if a thief steals a creator's design, reproduces and sells that article of clothing, and attaches a fake label to the garment to market it, he would be violating Federal law.

However, under current law, it is perfectly legal for that same thief to steal that same design, reproduce and sell the article of clothing if he does not attach a fake label to it. This loophole allows pirates to cash in on other's efforts and prevent designers in our country from reaping a fair return on their creative investments.

Furthermore, the production lifecycle for fashion designs is very short. Once a design gains popularity through a fashion show or other event, a designer usually has only a limited number of months to effectively produce and market that original design. Further complicating this short-term cycle is the fact that once a design is made public, pirates can now virtually immediately offer an identical knockoff piece on the Internet for distribution.

Again, under current law, this theft is legal unless the thief reproduces a label or trademark. Because these knockoffs are usually of such poor quality, these reproductions not only steal the designer's profits, but also damage his or her reputation. It is simply common sense that these creators' works be protected.

Chapter 13 of the Copyright Act offers protection for the designs of vessel hulls. The Design Piracy Prohibition Act protects designers by amending chapter 13 of the Copyright Act to include protections for fashion designs. Because the production lifecycle for fashion designs is very short, this legislation similarly provides a shorter period of protection that suits the industry, 3 years. This legislation further establishes damages for infringing a fashion design at the greater of $250,000 or $5 per copy.

This legislation has broad support among those in the fashion and apparel industries. While concerns have been expressed by some about the scope of the legislation, my office has been engaged in discussions with interested parties to ensure that the bill does

not prohibit designs that are simply inspired by other designs, but rather targets those that are more significantly similar.

In addition, the Copyright Office has weighed in with testimony saying that almost all of their suggestions have been incorporated into this legislation and that it provides a sound basis for balancing competing interests.

I look forward to hearing from our expert witnesses today. As America's fashion design industry continues to grow, America's designers deserve and need the type of legal protection that are already available in other countries. The Design Piracy Prohibition Act establishes these protections.

Again, thank you, Mr. Chairman, for holding this important hearing.

Mr. SMITH. Thank you, Mr. Goodlatte.

The gentleman from Massachusetts, Mr. Delahunt?

Mr. DELAHUNT. I won't take 5 minutes, Mr. Chairman.

Mr. SMITH. The gentleman is recognized for an opening statement.

Mr. DELAHUNT. I thank the Chair for inviting me.

As you well know, I have served on this Subcommittee during my first 3 terms here in Congress. I just want to underscore some of the statistics that the Ranking Member, Mr. Berman, referred to in his opening remarks: $12 billion in terms of losses because of piracy to the American economy just in this particular segment of our American economy.

We are all aware that in a significant way our competitive advantage in the new world of electronic commerce is at risk because of piracy. So what I would suggest is that in addition to fairness to the creative community, this is even in a more significant way about whether we are going to protect our economy.

I would suggest that one only has to review the trade deficits that we have experienced in a consistent way through the course of the past 10 years, that I would suggest support the passage of this particular legislation.

I would just associate myself with the remarks of Mr. Goodlatte.

Mr. SMITH. Thank you, Mr. Delahunt.

Let me ask the witnesses to stand, if you would, so you could be sworn in, and then we will begin.

[Witnesses sworn.]

Mr. SMITH. Thank you. Please be seated.

I mentioned a while ago that we were going to proceed out of order. We are actually going to do something today that has never been done, to my knowledge, at this Subcommittee or any other Committee. It is with the agreement of the Ranking Member that we do so, and that is to allow Mr. Goodlatte to actually ask questions before you all give your testimony.

That is not to say your testimony is not important. It is to say that Mr. Goodlatte has a hearing and a markup of the Committee that he chairs, the Agriculture Committee, which begins in 3 minutes. So in an effort to accommodate him because he is the author of the bill, along with Mr. Delahunt, we are going to have Mr. Goodlatte ask his questions now. That is, of course, with the witnesses' indulgence, and then we will hear your testimony and the rest of us will ask questions at that point.

So Mr. Goodlatte is recognized for his questions. But I want to add one caveat, and that is to say that we are not setting a precedent by doing this. This is going to be an exception to the general rule.

Mr. Goodlatte is recognized for his questions.

Mr. GOODLATTE. Thank you. Mr. Chairman, I am deeply indebted to you and Congressman Berman for this forbearance. It is highly unusual, and I respect that. If it were not for the fact that the other hearing and markup in my Committee is something that is of great importance to the Agriculture Committee, I would not impose in that fashion. But since you have been so kind as to hold the hearing, I welcome the opportunity to ask a few questions of the witnesses before they testify.

Mr. Wolfe, welcome. I read two interesting things in your testimony. One, you thanked and acknowledged Public Knowledge, well represented by GiGi Sohn behind you, for the contribution to your efforts to prepare your testimony; and also that you have fashion designers as clients. So I was interested in noting that, and I wonder if you think that any of your client designers have ever created anything unique or original that would be worthy of protection.

Okay. Now, let me ask you this question. You mentioned in your testimony, in fact, I would say the main focus of your testimony is protecting trends in the fashion industry. You want trends to be able to move fluidly, and we do, too. In fact, the CFDA has repeatedly told me and other policymakers that they are not interested in protecting trends. So I have been looking at language to include in the bill to make it clear that trends are not included.

Would that be an improvement from your perspective?

Mr. WOLFE. I think there is a difficulty in defining what is a "trend." Is a trend an item, or is a trend an idea, or is a trend just an attitude? That is one of the major problems about the bill, frankly. I think the whole fashion concept is so ephemeral that trying to nail down specifics becomes impossible.

Mr. GOODLATTE. Mr. Sprigman, not by way of impeachment prior to your testimony, but you have a long record of opposing measures passed by the Congress that have originated in this Committee, including the Copyright Renewal Act of 1992, the Sonny Bono Copyright Term Extension Act, the Copyright Act of 1976, the Bern Convention Implementation Act. I think I am correct in saying that you have not been supportive of any of those.

I also note your view of Congress's copyright policy expertise is that, "The copyright clause is framed as a delicate balance between creation and dissemination, intellectual property and free speech. Congress and the court have now sawn off one arm of that balance." You have also said that, "While the fair use doctrine may still exist, however, it has been crippled by the Digital Millennium Copyright Act," something that I was very much engaged in the crafting of.

Those are some rather strong views. I have heard from others as well about every intellectual property protection, including protection for music and movies. They say it will stifle innovation and that consumers will suffer because there will be fewer choices. I would appreciate it if you would explain your views further on that.

Mr. SPRIGMAN. Well, that is too broad a question for me to address, except to say that I am not old enough to have a long record of opposing those bills, because a lot of them I was a child when they were passed. I will just say that I have a record of noting some constitutional problems with some of these bills, and I am involved in some litigation that focuses on those constitutional problems.

Mr. GOODLATTE. Challenging the constitutionality of those statutes?

Mr. SPRIGMAN. Challenging the constitutionality of the Uruguay Round Agreements Act; challenging the constitutionality of the removal from the copyright scheme of formalities. That is a matter of public record. I am involved in that litigation. I am a lawyer representing clients in that litigation.

Mr. GOODLATTE. Okay.

Mr. SPRIGMAN. In terms of the general desirability of copyright laws as a system, I am also on the record as saying that copyright is a boon to the United States. It is a boon to the economy. It is Congress's responsibility to get the balance that the framers put into the Constitution right, and that balance is a balance between creating innovation incentives for authors and inventors, and allowing people access to ideas and to expression.

That is the important balance, and it doesn't behoove us to ignore where Congress strikes that balance. We should constantly be reexamining whether Congress has struck that balance correctly because I would note that technology moves along and a balance struck at one point in one technological world may be perfectly appropriate, and it may later become somewhat inappropriate when technology evolves and makes things possible that weren't possible before.

I am not the only one to notice this. Every major copyright scholar has noticed this.

Mr. GOODLATTE. Based on that comment, let me then follow up with this question, similar to the one I asked Mr. Wolfe. If we included language in the bill to make it clear that it only protects against copies that are significantly similar and not those merely inspired by other designs, would that be an improvement from your perspective?

Mr. SPRIGMAN. I think this bill is unnecessary and I think it is unwise. I think the substantial similarities standard in this bill——

Mr. GOODLATTE. You are going to get to testify in a minute.

Mr. SPRIGMAN. Right. And I am going to answer your question.

Mr. GOODLATTE. You get the last word.

Mr. SPRIGMAN. Absolutely.

Mr. GOODLATTE. But if you could answer the question?

Mr. SPRIGMAN. Yes, I think the "substantial similarity" standard that is in the bill now, as I teach my students, would reach designs that are inspired as well as those that are copied. I think it would be better if the bill were clearly limited only to those garments that are point-by-point copies of existing garments, but I don't think that is necessary either, even though it would clearly be better than what we have now.

Mr. GOODLATTE. Thank you, Mr. Sprigman, Professor.

Mr. Chairman, I have other questions, but I will submit those in writing, if I may. I thank you very much again for the forbearance.

Mr. SMITH. Thank you, Mr. Goodlatte.

That reminds me, I am going to have questions to submit to the witnesses as well. We will ask you to respond to those questions within a week, if you can.

We will now return to regular order. Let me introduce the witnesses officially.

Our first witness is Jeffrey Banks. Mr. Banks is an internationally known fashion designer. His design credits include Ralph Lauren and Calvin Klein, as well as his own successful menswear label. With 30 years of experience in the fashion industry, Mr. Banks has served as a senior boardmember of the Fashion Institute of Technology and currently sits on the executive board of directors of the Council of Fashion Designers of America. Mr. Banks is a graduate of the Parsons School of Design.

Our next witness is David Wolfe. Mr. Wolfe is creative director of Doneger Creative Services, the Doneger Group's trend and color forecasting and analysis department. His views have appeared in such publications as The Wall Street Journal, Women's Wear Daily, Vogue, Glamour and Forbes.

Mr. Wolfe has worked in the fashion industry for over 35 years and began his career in a small-town department store. He later moved to London where he established himself as a fashion artist, published in Vogue, Women's Wear Daily, and the London Times. Mr. Wolfe is a graduate of the Cleveland School of Art.

Our third witness is Susan Scafidi. Professor Scafidi is a member of the law and history faculties of Southern Methodist University, where I went, and a visiting professor at Fordham Law School. She is the author of a book entitled, "Who Owns Culture?" and numerous articles on intellectual property, as well as a Web site dedicated to I.P. and fashion design called "Counterfeitchic.com."

Professor Scafidi has taught intellectual property law for over 10 years at institutions including Yale and Georgetown. She is a graduate of the University of Chicago, Duke University and Yale Law School.

Our final witness is Chris Sprigman. Mr. Sprigman is an associate professor at the University of Virginia Law School where he teaches intellectual property. Mr. Sprigman has served as appellate counsel in the Antitrust Division of the U.S. Department of Justice, and is a former partner with the Washington, D.C. office of King and Spaulding, LLP. Mr. Sprigman graduated from the University of Chicago Law School and the University of Pennsylvania.

Welcome to you all. We have your written statements. Without objection, they will be made a part of the record. As you know, we hope that you will keep your testimony to 5 minutes.

Mr. Banks, we will begin with you.

TESTIMONY OF JEFFREY BANKS, FASHION DESIGNER, ON BEHALF OF THE COUNCIL OF FASHION DESIGNERS OF AMERICA

Mr. BANKS. Good morning, Chairman Smith and Members of the Subcommittee.

I am pleased to testify on behalf of the Council of Fashion Designers of America. I come to speak to you with over 30 years experience in the United States fashion industry, including working for Ralph Lauren and Calvin Klein, before starting my own menswear business at age 22.

Much in fashion has changed since then. Fashion generates approximately $350 billion in the United States annually and is no longer only based in New York. It is now also centered in such diverse places as L.A., Dallas, Chicago and Atlanta. The American fashion industry is made of thousands of small businesses who live on the hope of designing something that will capture the imagination of consumers.

Success in our studios grows opportunities in many sectors, from publishing to trucking to retail all across the country. As the Internet has transformed our sister creative industries like music, books and motion pictures, creating opportunities as well as problems, it has transformed fashion, and not always for the better. Runway fashions can now be sent around the world and copied in the blink of an eye.

Fashion design piracy has become a blight that affects all who depend on the fashion industry. The U.S. is conspicuous in that unlike Europe and Japan, it does not protect fashion in its laws. H.R. 5055 provides 3 years of protection for original designs registered with the Copyright Office. This is less than the life-plus-70 granted to other copyrighted works, less than the 10 years granted to vessel hull designs, and less than the protection provided in Europe and Japan.

Because of the unique seasonality of the fashion industry, this is enough time for the designer to recoup the work that went into designing and marketing his collection. We believe that the passage of design protection would be a powerful deterrent to the pirates.

I question how many lawsuits for infringement would ever be filed. Since registration of designs under H.R. 5055 is mandatory and only original non-commonplace designs can be protected, I believe that designers will register very selectively.

Retailers have told us that if fashion design piracy was illegal, they wouldn't buy copies. The law would have a powerful and much-needed deterrent effect on the market.

As a movie and music aficionado, I would never dream of buying an illegal DVD or CD. You recently passed a law to combat counterfeiting. Counterfeiting starts with design piracy. You can't make a counterfeit bag without first copying the bag's design. Both counterfeiting and piracy must be addressed, or else a small designer with no brand recognition will be left defenseless to the problem of piracy.

Copying today through technology is instantaneous. Although a designer can spend tens of thousands to mount their runway show to reveal their new lines, they frequently don't even recoup their investments. Their designs are stolen before the applause has faded; software programs develop patterns from photographs taken at the show and automated machines then cut and stitch copies of designers' work from those patterns. Within days, the pirates in China are shipping U.S. consumers tons of copies before the designer can ever even get his originals into the store.

American design and designers add a value in the world marketplace. Design innovation is the reason for this. It enables fashion houses to provide more choices for consumers, more competition and growth, and it won't occur simply by everybody distributing identical product around the world. In the long term, lack of protection will shrink American businesses and mean a loss of American jobs.

Designers want to make their designs available at a variety of prices in a variety of stores. In the past few years, we have seen a proliferation of American designer partnerships with large American retailers, even discounters like Target, Wal-Mart, J.C. Penney, Kohl's and Payless. Design innovation is an absolutely critical part of the economy. Designers can't compete if low-cost countries copy our designs. If we don't protect American fashion design creativity, we deprive consumers of the fashion choices they have enjoyed with the growth of the industry, and workers of their jobs.

The wealthy will still be able to buy the designs originating out of Europe and Japan, where protection exists. The rest of America will be left buying the cheap knockoffs from Europe. I urge you to pass this important legislation.

And I thank you very much, and I look forward to your questions.

[The prepared statement of Mr. Banks follows:]

PREPARED STATEMENT OF JEFFREY BANKS

Good morning Chairman Smith, Ranking Member Berman, Representatives Goodlatte and Delahunt and other Members of the Subcommittee. I am pleased to be here today on behalf of the Council of Fashion Designers of America. The CFDA is a not-for-profit trade association of America's fashion and accessory designers. The CFDA works to advance the status of fashion design as a branch of American art and culture and to help elevate this important American industry.

I got started in the fashion business at the age of 15, working right here in Washington, where I was born and raised, as a salesman at the menswear store Britches of Georgetown. Sadly, Britches is no longer in business, but for those of you who have been here for a time, you'll remember that it was once a Washington icon. Back then, I was probably one of the only high school students in Washington with subscriptions to *Daily News Record* AND *Womens Wear Daily* BUT EVEN AS A YOUNG TEEN, FASHION WAS MY PASSION. I LEFT DC THREE WEEKS AFTER GRADUATING HIGH SCHOOL, BEGAN WORKING AS RALPH LAUREN'S ASSISTANT, AND STARTED COLLEGE THAT FALL. I GRADUATED FROM THE PARSONS SCHOOL OF DESIGN AND AFTER WORKING WITH CALVIN KLEIN FOR ONE YEAR, I OPENED MY OWN MENSWEAR LABEL AT THE AGE OF 22. I COME TO SPEAK TO YOU TODAY WITH OVER 30 YEARS EXPERIENCE IN THE UNITED STATES FASHION INDUSTRY.

Much in fashion has changed during those 30 some years. For one, fashion has grown into a very significant and important US industry, generating approximately $350 billion in the United States each year and supporting the printing, trucking, and distribution, advertising, publicity, merchandising and retail industries as well. And of course, all the industries which support the production and dissemination of men's and women's fashion magazines. Although New York is often thought of as the U.S. fashion capital because fashion is the 2nd largest money-making business in the city, after the stock market, with the exponential growth of America's fashion and design industries other fashion centers have come into existence across the country—Los Angeles, Dallas, and Atlanta come to mind. That wasn't the case 30 years ago, when most of the fashion in the United States was copied from the European fashion centers of Paris and Milan. Back then there weren't multitudes of talented young American designers generating their own original designs as there are today. The fashion industry in the last few years in America has become a very significant influence in trends and the way the fashion industry is perceived by consumers. American style. American design. It has meaning. And it has value.

This wonderful home-grown industry is really made up of thousands of American small businesses. We're all entrepreneurs who pursue our fashion with the hope of

designing something that will catch on and capture the imagination of U.S. consumers. Success that starts in all of our individual design studios, grows opportunities all across the country . . . there are fabric manufacturers, printers, the people who produce paper for making patterns, the shippers who ship the merchandise, the truckers who truck, design teams, fabric cutters, tailors, models, seamstresses, sales people, merchandising people, advertising people, publicists, those who work for retailers. In short, this is a big employment business today.

The other most significant change in the industry in the past decade is technological. Just as the internet has transformed our sister creative industries like music, books and motion pictures, creating opportunities as well as problems, it has transformed fashion and not always for the better. In the blink of an eye, perfect 360 degree images of the latest runway fashions can be sent around the world. And of course, they can be copied. And that copying, coupled with the importance of the fashion industry to America, is the main reason that I sit before you today.

Fashion design piracy has become a blight that affects all who depend on the U.S. fashion industry. It robs American workers of their livelihood, which is why the CFDA is working in an alliance with industry partners such as *Harper's Bazaar* AND EBAY, AMONG OTHERS, TO RAISE THE PROFILE OF THIS MASSIVE PROBLEM. OTHER COUNTRIES HAVE RECOGNIZED THE PROBLEM AND PROVIDED PROTECTION FOR FASHION DESIGN TO HELP COUNTER DESIGN PIRACY. THE UNITED STATES IS THE ONLY DEVELOPED COUNTRY THAT DOES NOT PROTECT FASHION IN ITS LAWS. WE WANT TO THANK REPRESENTATIVES GOODLATTE AND DELAHUNT FOR RECOGNIZING THIS INEQUITY AND INTRODUCING H.R. 5055, THE DESIGN PIRACY PROHIBITION ACT, TO REMEDY IT. WE ALSO WANT TO THANK CHAIRMAN SENSENBRENNER AND REPRESENTATIVES COBLE AND WEXLER, AMONG OTHERS, FOR COSPONSORING THE MEASURE.

H.R. 5055 would provide three years of protection to those designers who register their ORIGINAL designs with the Copyright Office. That is far less than the life of the author plus 70 granted to other copyrighted works. However, because of the unique seasonality of the fashion industry, we agree with Congressmen Goodlatte and Delahunt that a shorter term of protection is reasonable. That allows the designer time to recoup the work that went into designing the article and develop additional lines of ready-to-wear, etc. I will note, however, that in Europe most member states protect fashion for a term of 25 years, with registration. In Japan, it is 15.

We believe that passage of design protection would be a powerful deterrent to the pirates. In fact, I question how many lawsuits for infringement would actually ever be filed. Since registration of designs is mandatory in order for design protection to be granted, and only original, noncommonplace designs can be protected, I believe that designers will register very selectively. And retailers have told us that if the practice of fashion design piracy was illegal, they wouldn't engage in it. A law would have a powerful and much-needed effect on the market.

THE ADVERSE IMPACT OF PIRACY ON AMERICAN DESIGNERS

I have heard some question whether fashion piracy actually harms the industry. A few have even suggested that it may help designers to have their works knocked off. I would like to respond to those questions with an emphatic "yes it does hurt the designer and the industry!" And no, far from helping the designer, design piracy can wipe out young careers in a single season. The young designers are the ones who are creating the new designs, which they have to have some way of protecting. Copying is stealing. As a movie and music aficionado, I would never dream of buying an illegal DVD or CD on the street. I respect the film and music industries much too much, and all of the people that work in them. Piracy is taking somebody's design, replicating it quickly, doing it so that nobody would know the difference between yours and theirs unless you are an expert at it, and sending it out as your own. That's clearly wrong and American law must address it.

The Congress has passed laws to protect against counterfeits. One in three items seized by U.S. Customs is a fashion counterfeit. Just this year, you made it illegal to traffic in the labels that are used in counterfeit goods. But a copy of a design is really a counterfeit without the label. If no design piracy existed, there would be no counterfeiting. Both must be addressed or else the small designer with no brand recognition is left defenseless to the problem of piracy, leaving only famous brands protected, and then only if the label is taken.

The fashion business is a tough business. With each new season, designers put their imagination to work, and they put their resources at risk. When I started my business, I started with a five thousand dollar loan from my family. You never would do that today. It takes tens of thousands of dollars to start a business. And every season when you go out to create, if you're creating original prints, original

patterns, original samples that you have to go through trial and error, you are talking about thousands and thousands of dollars. Then if you go to put on a show, you can spend anywhere from fifty thousand dollars to a million dollars just to put on a show to show buyers and press what you're creating for that season. So, before you have even received your first order, you've spent thousands and thousands and thousands of dollars. Whether you are an accessory designer or a star designer creating men's, women's, children's lines, you spend many thousands of dollars before you see your first order.

Some designers make their names in haute couture, where they sell a very small number of rather expensive designs. While the designs are high priced, the designer frequently doesn't even recoup investment costs for the designs because he or she sells so few garments. Designers are able to recoup their investments when they offer their own ready-to-wear lines. They can lower the prices at which their designs are sold because they sell more of them. It's all based on volume. Design piracy makes it difficult for a designer to move from haute couture into ready to wear.

The Council of Fashion Designers of America is all about mentoring. We partner with Vogue to run a mentoring program for young designers—offering on-going technical advice and business grants. A documentary, *Seamless*, WAS EVEN MADE ABOUT IT. (WE ARE REACHING OUT TO YOU AS MUCH FOR THE YOUNG DESIGNERS AS ANYONE ELSE). THE CFDA RECEIVED TONS OF E-MAILS AFTER THE BILL WAS INTRODUCED, SAYING, "THANK YOU, I'VE BEEN PIRATED."

PIRACY FUELED BY TECHNOLOGY

Copying, years ago, would take anywhere from three to four months to a year or more. But as I said, all that changed with new technology. So once a designer spends the thousands and thousands and gets to that runway show and then reveals a new and original design—it can be stolen before the applause has faded thanks to digital imagery and the internet. Today, there are even software programs that develop patterns from 360 degree photographs taken at the runway shows. From those patterns, automated machines cut and then stitch perfect copies of a designer's work. Within days of the runway shows, the pirates at the factories in China and other countries where labor is cheap are shipping into this country those perfect copies, before the designer can even get his or her line into the retail stores. Since there is no protection in America, innovation launched on the runway—or the red carpet—is stolen in plain sight.

The famous designer with an established and substantial business might be able to withstand that assault, but it can absolutely derail the career of a young designer. Let me show you a few examples of the type of copying that I've been describing—these photos are included in my testimony. At this year's Golden Globes, Desperate Housewives star Marcia Cross wore a stunning coral gown designed by young designer Marc Bouwer. Within days a famous manufacturer renowned for its copying of dresses of the stars had shipped an exact copy to stores across the nation. This dress became that particular manufacturers' most popular selling prom dress of the year.

At the Academy Awards Felicity Huffman wore a black gown created by designer Zac Posen, a 25 year old designer from Manhattan who manufactures all of his designs there in the city. This time, a different manufacturer sold exact copies of the design and was bold enough to use the fact that Huffman wore the gown in his advertising. That's completely legal in the United States. And it prevents Marc Bouwer or Zac Posen from being able to develop the affordable ready-to-wear line of their own designs. They can't gain the volume to allow them to compete against the company that pirated their creations. And it dilutes their haute couture brands because nobody will spend thousands for a gown when it is available for hundreds in a department store. Without a law that makes it clear that design piracy is illegal, these pirates base their marketing strategy on all the free advertising they receive—based on how good they are at copying! This is an example of the growth of one type of American fashion on the back of small business. That's just wrong, but it's all perfectly legal under U.S. law.

THE IMPACT OF FASHION PIRACY ON CONSUMERS

Some have argued that protecting fashion will drive up costs, accessibility and ultimately harm consumers. I am deeply offended by this argument. In fact the same could be said for the protection of music, movies, software and books. If these works weren't protected by copyright, if new technologies weren't protected by patents, wouldn't prices come down for consumers? In fact, some of the very proponents of eviscerating protection for copyrighted works and limiting the copyright laws are now arguing against protecting fashion design.

If the fashion business is going to grow and provide more choices for consumers, we must understand that design innovation is the real leverage point for American companies—both big and small. More competition and growth won't occur simply by everybody distributing the identical product around the world because copying isn't illegal. Growth won't occur because somebody can steal designer's creation and then go sell it for a third of the price. In the long term, lack of protection will shrink American businesses and mean the loss of American jobs.

Designers want to make their designs available at a variety of prices in a variety of stores. In the past few years we have seen a proliferation of partnerships between American designers and large American retailers—even discount retailers. American designers are collaborating with retailers who realize the enormous benefit of an Isaac Mizrahi at Target, a Mark Eisen at Wal-Mart, or a Nicole Miller at JC Penny. Kohls is reported to be negotiating to sign Vera Wang. These stores have all seen the value of making the works of American designers available in their stores through licensing deals so that these designers get paid for their innovation and creativity. This proves that the real growth of American fashion is in the lower to mid price range.

Other retailers have gone a different path, not licensing, not even hiring in-house designers. They are skipping the use of their own designers in order to copy the work of others and make it available more cheaply—this is done on the backs of the original designers. But design innovation—in fact brands as we know them—is an absolutely critical part of a free American economy. With extra labor expenses in the West, designers can't compete if low cost labor countries copy our designs. We have an investment in those designs—they don't. We can't compete against piracy so the creativity and innovation that has put American fashion in a leadership position will dry up. Innovation is an investment but we can't innovate without protection against copying.

If we don't protect American fashion design creativity, we're going to lose all the advantages we've gained in the last ten years by now becoming a global industry, by now working side by side with Milan and Paris. There won't be any more L.A. Style which has become so hot around the globe. No Texas style. The wealthy will still be able to buy the designs originating out of Europe and Japan where protection exists. The rest of America will be left buying the cheap knockoffs of those European designs made in China and other places in Asia where labor is cheap. That will be bad for consumers who have enjoyed the growth of fashion choices in the U.S. And it will be sad for the workers employed by U.S. fashion industry when they no longer have jobs.

I ask that you not let that situation take place. Please pass a law to protect the creativity and innovation of American fashion design just as this subcommittee has done for America's other creative industries. Europe grants designs 25 years of protection. Boat hulls in this country receive 10. We only ask for three. Please pass the Design Piracy Prohibition Act this year. I thank you for your time and look forward to your questions.

Mr. SMITH. Thank you, Mr. Banks.
Mr. Wolfe?

TESTIMONY OF DAVID WOLFE, CREATIVE DIRECTOR, THE DONEGER GROUP

Mr. WOLFE. Thank you, Chairman Smith, Ranking Member Berman and Members of the Subcommittee, for inviting me to speak to you today on the proposed copyright for fashion design. I am David Wolfe. I am creative director of Doneger Creative Services.

I analyze men's, women's and youth apparel and accessories markets, as well as big-picture developments in style, culture and society. The fashion industry is thriving in America and it has for the past century because of, and not in spite of, a lack of copyright protection for fashion designs.

The fashion industry is like a balanced ecosystem of an ocean reef. It exists because all the various symbiotic elements of design are inspired and they feed off each other. It is successful because it achieves an independent blend of originality, creativity, and yes,

copying, and like a reef, the ecosystem would collapse completely in the absence of any one of those elements.

H.R. 5055 and the creation of the three monopolies over design would disrupt this delicate balance and devastate a flourishing industry. Copyright law in this country is premised on protecting originality, but finding and defining originality in fashion is an extremely difficult, if not impossible, task.

Fashion is a craft, not a science or an art. Fashion is a long tradition of crafts-people working with the same materials, tools, and concepts, which is what makes it difficult for someone to design something that has not been done in a similar or same way before. Current fashion is the product of generations of designers refining and redeveloping the same items and ideas over and over.

Copying and appropriation in fashion isn't just about creating a $200 knockoff of $2,000 dresses. It is about incorporating influences from all around. Trends don't always work from the top down, from the exclusive studios of couture to the sales rack in the shopping mall. Often, they work from the bottom up.

Because it is so difficult to determine what is original about a particular fashion design, it would be equally difficult to enforce a copyright fairly. Defining and determining originality is difficult enough for those of us who work in and study the fashion industry.

It would be nearly impossible for a court or Government agency. If a court cannot determine the originality, then how could it fairly determine whether one design infringes upon another, or whether a design is substantially similar or whether a design is sufficiently original to qualify for copyright protection?

I have a few examples with me to illustrate how unfair a copyright would be and how difficult it would be to enforce. Okay?

Mr. SMITH. I see we have a visual assist here.

Mr. WOLFE. We have visual assistance.

This is almost an original jeans jacket. It is not from Levis or the Gap. It is from Gloria Vanderbilt.

Flip it around, please.

Okay. Does this make it an original? All of these are jeans jackets. Where does the originality strike? Who thought of putting jeweled buttons on?

Okay, thank you.

Fashion design is about creating compilations of elements.

Mr. SMITH. I think we ought to give Mr. Banks an opportunity to have a fashion show if you are going to present that. [Laughter.]

Mr. WOLFE. Copyright would stifle the fashion industry when certain design elements that were otherwise available in the public domain for all to use, like jeweled buttons, would be rendered off-limits. Not only will copyright create litigation, injunctions and licensing that will slow the pace of producing new designs, but fashion designers will have a limited array of design elements available to create new designs.

Finally, I would like to point out that fashion designers already have protection for their brands through trademark law. By opposing a copyright for fashion, I am not suggesting condoning piracy in any way. Designers already have legal remedies if a another designer or manufacturer uses their trademark and confuses the consumers as to who made the goods. But copyright for fashion design

doesn't make sense because it is a craft that is dependent on building from the past, ideas that came before. It is evolutionary.

I urge you to oppose H.R. 5055 and any legislation that would create a copyright for fashion design.

Thank you. I look forward to your questions.

[The prepared statement of Mr. Wolfe follows:]

PREPARED STATEMENT OF DAVID WOLFE

Testimony of David Wolfe, Creative Director
Doneger Creative Services

Before the
U.S. House Subcommittee on Courts, the Internet, and Intellectual Property
U.S. House of Representatives Committee on the Judiciary

Legislative Hearing On H.R. 5055:
"To amend title 17, United States Code, to provide protection for fashion design"

Washington, DC
July 27, 2006

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July 27, 2006

Chairman Smith, Ranking Member Berman, members of the subcommittee, my name is David Wolfe. I am Creative Director for Doneger Creative Services, the Doneger Group's trend and color forecasting and analysis department. In my role as Creative Director, I analyze men's, women's and youth apparel and accessories markets as well as big-picture developments in style, culture and society. I want to thank the subcommittee for inviting me to testify on the proposed copyright for fashion design.*

Over the past century, the fashion industry in America has thrived because of, and not in spite of, a lack of copyright protection for fashion designs. The fashion industry is a well balanced system which succeeds by smoothly, quickly and profitably integrating a complicated blend of original ideas, individual creativity and copying. Fashion designers draw on a wide array of influences from society, history and one another, making it virtually impossible to determine the originality of a given design. Copyright for fashion design is antithetical to this process. For these reasons, H.R. 5055, or any other legislation that provides copyright protection to fashion design, could not be enforced fairly, would create litigation that would slow the pace of the industry and would increase costs for the industry, retailers and consumers.

Attached to my testimony is a copy of the book, *Ready to Share: Fashion & the Ownership of Creativity*, which contains essays examining the relationship between creativity and intellectual property law in fashion. The book is a product of a conference sponsored by the Norman Lear Center at the University of Southern California's Annenberg School of Communication and attended by fashion designers, fashion analysts, journalists, and academics.

The Lack of Originality in Fashion Makes Copyright Protection a Poor Fit

Copyright law in this country is premised on protecting originality, but finding and defining originality in fashion is an extremely difficult if not impossible task. Fashion trends today follow our shifting society; they are not invented on a runway. The runway reflects what is happening in our world. Economics, politics, weather, media, celebrities, demographics, sex and science all influence trends. All designers feed off of this same information and inspiration, and hopefully interpret it in their own unique way.

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* I would like thank Public Knowledge intern Sarah Zenewicz for helping me with this testimony.

For example, movies are highly influential to the fashion industry. Faye Dunaway's costumes in *Bonnie and Clyde* influenced American women to wear longer "midi" skirts after the miniskirt trends of the 1960's. Kimono-inspired clothing began appearing on runways after the release of *Memoirs of a Geisha*. The *New York Times* recently published a story discussing the influence the television series *Miami Vice* had on fashion: "The extent to which the show played a part in the sartorial recasting of the American man is difficult to overestimate."

Originality in fashion design is questionable when designers are explicitly influenced by so many sources. There was little originality in the "midi" skirts that became popular in the 1970's because those designers were inspired by the costumes in *Bonnie and Clyde*, which were in turn inspired by the fashion of the 1920's. If a designer today can be influenced by *Miami Vice* and produce a pastel suit reminiscent of Don Johnson's 1980's attire, much like kimono-inspired fashion became ubiquitous on the runways after *Memoirs of a Geisha*, then it should be readily apparent that assigning originality in fashion is a great challenge.

Because it is so difficult to determine what is "original" about a particular fashion design, it would be equally difficult to enforce a copyright fairly. For example, bestowing copyright to a designer for the "little black dress," ubiquitous in the wardrobe of every woman who attends cocktail parties or concerts, would be unfair because there is no originality in a design for the little black dress. Designer Coco Chanel is credited with introducing the dress in 1926 as a symbol of urban sophistication, and every designer for the past eighty years has copied, reinterpreted, and reintroduced the dress.

The Fashion Industry Has Thrived and Continues to Thrive in the Absence of Copyright

Fashion has always operated without copyright protection in the United States. The absence of copyright in fashion frees designers to incorporate popular and reemerging styles into their own lines without restricting themselves for fear of infringement, thus facilitating the growth of new trends. The fashion industry benefits from the constant creation of new trends because new trends are what induce consumers to continually buy. The result is an industry that in 2005 had revenues of $19.5 billion.

Fashion designers influence each other and appropriate each others' designs into their own lines. Chanel created her influential Chanel Jacket that fashion designers at all levels have copied and redesigned from its release in 1916 until today. Chanel's influence for the jacket came from men's jacket designs of the time. The influence of Chanel's jacket can be seen in designs for the past 90 years from Karl Lagerfeld, Adolfo, St. John, BCBG and H&M. Designs are copied, and they morph and change over time, and so-called "original" ideas often originate in the designs of others.

Designs and ideas that become popular in fashion do not always come from the design studios of haute couture (high fashion for a wealthy clientele), but trends can also work from the bottom up. Fashion designer Diane von Furstenberg once said, "Everything in fashion begins in the street." While this is something of an overstatement, it does illustrate the point that fashion

appropriates from all levels of the design world. Designer Mary Quant is credited with being the inventor of the miniskirt, yet Quant denies being the inventor. She says she looked out her window in Chelsea, saw what was happening on the streets, and picked up on what was in the air. Copying in fashion design is about incorporating influences from all around, and it is not just about creating a $200 knock-off of a $2,000 dress.

Copying and appropriation creates trends that are beneficial to designers, retailers and consumers. A designer who introduces or reintroduces an idea benefits by inducing more consumers to buy as the trend spreads. The designers who copy, appropriate and reinterpret benefit because they can take an idea, make it their own and create competition in the fashion marketplace. Consumers benefit because they have more choices. A consumer may not like an original design, but may be inclined to purchase a reinterpretation. Fashion thrives when trends can spread from haute couture to sales racks and everything in between because consumers have more choices. Consumers with more choices are more likely to find clothing that fits their tastes or price range, and designers and retailers are more likely to profit.

H.R. 5055 Would Be Detrimental to the Fashion Industry, Retailers and Consumers

H.R. 5055 would provide fashion designers a three year monopoly over a fashion design and any design "substantially similar" to it. Copyright protection for fashion designs would harm the thriving fashion industry, retailers and consumers. Specifically, I urge you to oppose H.R. 5055 for the following reasons:

- Copyright protection would cause delays because it would create litigation, injunctions and licensing. Delays would stunt the development of trends, and ultimately the fashion industry, as disputes would outlast the attention span of the fashion market.
- Determining originality in fashion design is virtually impossible, and thus it would be virtually impossible for judges to effectively and fairly enforce the law.
- The legislation would ultimately decrease the amount of choices available to consumers, and would dramatically increase costs for the fashion industry and retailers.

Delays from litigation, injunctions and licensing would stunt the fashion industry

Copyright protection would slow the rapid pace of the fashion industry, which is what makes it profitable. As a result the industry for the first time would be subject to the risk of infringement litigation. Fashion designers would be held up with the time and expense of depositions, injunctions, trials and the negotiations. H.R. 5055 would create a morass of litigation that will hinder rather than encourage creativity in fashion design. Rather than efficiently creating new fashion designs for the market, designers will be trapped in the perpetual chaos of trying to defend the copyright on existing designs while planning and producing designs for the future. The lifespan of a legal dispute is longer than the attention span of the fashion

industry. By the time a design is determined to be or not be infringing, the marketplace will have moved on and new trends will have emerged.

This subcommittee knows well that the content and technology industries are constantly at odds on issues of infringement, secondary liability, injunctions, and negotiations of licensing terms. These issues will exponentially complicate business arrangements between designers and retailers and increase the time necessary to produce new clothing lines and develop trends. With a copyright in place, many trends that would have developed in the marketplace as it exists today will never develop, which in turn will remove the incentive for consumers to make purchases.

A fashion copyright would be virtually impossible to enforce fairly because of the lack of originality in fashion.

As I discuss on page 2, a fashion copyright that grants monopoly to a design and any design that is "substantially similar" could not be enforced fairly or efficiently because determining the originality of a design is nearly impossible. Designs that may seem "original" during a current fashion cycle may be a slight reinterpretation of a previous design. Because fashion relies on appropriation and merely modifying existing ideas, it would be impracticable for the government to confer fashion designers a copyright monopoly on a design.

Because defining and determining originality is difficult enough for those who work in and study the fashion industry; it would be just as difficult for a court. If a court cannot determine the originality of a design, then how could it fairly determine whether one design infringes upon another or whether a design is substantially similar or whether a design is sufficiently original to qualify for copyright protection? Would a court be forced to measure the width of the lapels on a tuxedo jacket, the width of spaghetti straps on a cocktail dress, the similarity of pastels of a suit? Or the originality in the length of a skirt, the cut of a men's button-down dress shirt, or in the number of straps on a pair of gladiator-style sandals?

A fashion copyright would increase costs for designers and retailers and would decrease choices for consumers.

A copyright would give designers unprecedented monopolies over fashion designs and any reinterpretations thereof, which would complicate the business of fashion even more. Negotiating licensing, the risks—and reality—of litigation and constant internal debates over infringement and originality would create a higher cost of doing business for designers. Designers would become more cautious and conservative in their designs for fear of creating a design that infringes on another. Ultimately, they would have to account for the costs of licensing and the risk of infringement litigation in their pricing, and pass these costs on to consumers. The end result for consumers will be fewer choices, higher prices or both.

It is important to note that fashion design is not entirely without intellectual property protection. Indeed, patent and trademark law offer limited protection for fashion designs. Design patents protect the ornamental features of an invention that can be separated from the functional aspects. Few fashion designs meet the qualifications for a design patent, but some areas of the fashion industry, such as athletic shoes, have been able to take advantage of the protection.

Trademarks are the symbols that identify the origins of a product, and are an important way for designers to distinguish their brands from others. Fashion designers can use trademark law to protect their brand and distinguish their goods from knock-offs and limit consumer confusion. For example, while a designer may be able to copy Gucci, Prada or Louis Vuitton hand-bags, that designer may not use the Gucci, Prada, or Louis Vuitton trademarks on his own versions.

Conclusion

Chanel once said, "Fashion should slip out of your hands. The very idea of protecting the seasonal arts is childish." While she died over thirty years ago, this is no less true today. Extending copyright protections to an industry that thrives on a rapidly changing marketplace, where originality is difficult to determine and designers are constantly influenced by each other and the world would cause more harm than good. Fashion is ephemeral and must move faster than the hindrances that would accompany copyright: time and resources necessary to negotiate licensing deals, to determine the substantial similarity of two garments or to assess the overall originality of a design. The fashion industry has thrived in the absence of copyright as a well balanced system of appropriation, copying and originality. It will continue to do so only if we maintain the current system.

Thank you. I look forward to your questions.

ATTACHMENT

READY TO SHARE:
FASHION & THE OWNERSHIP OF CREATIVITY
EDITED BY
DAVID BOLLIER AND LAURIE RACINE
"LESSER ARTISTS BORROW. GREAT ARTISTS STEAL."
—Igor Stravinsky
"GOOD ARTISTS COPY. GREAT ARTISTS STEAL."
—Pablo Picasso
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Courtesy of the Millicent Rogers Museum

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Inspired by 1950s' fashion, a white-on-black silk gazar dress by Kevan Hall brings the past into the present.

Participating organizations

THE USC ANNENBERG NORMAN LEAR CENTER

The Norman Lear Center is a multidisciplinary research and public policy center exploring implications of the convergence of entertainment, commerce and society. On campus, from its base in the USC Annenberg School for Communication, the Lear Center builds bridges between schools and disciplines whose faculty study aspects of entertainment, media and culture. Beyond campus, it bridges the gap between the entertainment industry and academia, and between them and the public. Through scholarship and research; through its fellows, conferences, public events and publications; and in its attempts to illuminate and repair the world, the Lear Center works to be at the forefront of discussion and practice in the field. For more information, visit **www.learcenter.org**.

CREATIVITY, COMMERCE & CULTURE

When art is created for commercial purposes, who owns it? Once it's in the hands of consumers, what rights do they have to change it? Headed by Lear Center senior fellows David Bollier and Laurie Racine, the Creativity, Commerce & Culture project explores the new digital environment and the impact of intellectual property rights on innovation and creativity. The project is funded in part by a generous gift from the Center for the Public Domain, a non-profit foundation that supports the growth of a healthy and robust public domain by establishing programs, grants and partnerships in the areas of academic research, medicine, law, education, media, technology and the arts.

THE FASHION INSTITUTE OF DESIGN & MERCHANDISING/FIDM

The Fashion Institute of Design & Merchandising/FIDM is an internationally recognized college that prepares students for leadership in the global industries of Fashion, Visual Arts, Interior Design and Entertainment. As an accredited institution granting Associate of Arts degrees and providing Advanced Study programs in 14 industry-specific majors, FIDM has equipped more than 30,000 students over the last 30 years to become skilled professionals. FIDM is headquartered in a state-of-the-art campus in downtown Los Angeles, with additional campuses in Orange County, San Diego and San Francisco. The FIDM Museum houses one of the nation's finest costume collections dating from the 18th century, as well as ethnic costumes and selections from top fashion designers. For more information, visit **www.fidm.edu**. ⌖

◄ Kevan Hall talks about the influence of his muse, Millicent Rogers, on his designs.

Introduction

BY DAVID BOLLIER AND LAURIE RACINE

This book is an exploration into creativity — how it originates in our society, the means by which it circulates from one person to another, and the role that intellectual property law plays in encouraging or impeding the flow of creativity. One of the most instructive arenas for studying these themes, we discovered, is the fashion industry.

Fashion has the virtue of being ubiquitous, with a creative narrative that is familiar and easy to comprehend. It is at once personal, visual, historical, evolving and completely inescapable. Fashion offers us a compelling story arc for understanding how creativity works from its inception, as an inspired idea, through the creative process and into the marketplace.

To document and explore this journey, the Norman Lear Center at the USC Annenberg School for Communication held a conference titled "Ready to Share: Fashion & the Ownership of Creativity" in January 2005. We brought together top fashion designers, industry analysts, retailers, attorneys, copyright scholars, songwriters, musicians, high-tech experts and others to talk about the complicated ecology of creativity in fashion. The hypothesis was that the tradition of open appropriation and transformation in fashion contributes significantly to that industry's creative vitality and economic success.

Fashion seems to draw its life's breath from a creative and cultural commons — a shared pool of artistic design and cultural references that is constantly changing and churning in all sorts of novel, unpredictable ways. In this sense, fashion resembles the creative genres of the Internet — or more precisely, those genres resemble fashion, which in its modern form has been around for decades.

To venture onto the World Wide Web is to enter a zone of recombinant creativity, a place where the differences between originality and imitation are often difficult to discern. There are many brilliant individuals, to be sure, each of whom adds original verve to writing, music and visual works. But what may most distinguish the online world is how the collective origins of new ideas are more readily apparent. A creative fragment from one Web site often is added to another, and mixed with a third — much as mash-up artists like Danger Mouse have combined the music of Jay-Z and The Beatles with improbable success. Bricolage is the order of the day.

In fact, the French term bricolage lies at the heart of the matter. Bricolage refers to the recombinant process in which everything gets mixed and morphed, and incongruous elements are synthesized into something new. The term seems to describe perfectly the creative processes of fashion, where most everything that ever has been designed is considered fair game for new creations. The intellectual property restrictions on bricolage in fashion are nearly nonexistent.

Unlike the online culture, however, modern fashion has been practicing its brand of bricolage for decades. The means by which vintage clothing is plundered for new ideas are fairly well-established. We can examine the diversified market ecology that popularizes haute couture at lower price points and, simultaneously, elevates open "street fashion" into high-priced designer styles. Fashion gives us a window into the tension between the open commons and the proprietary market. It helps us understand both the contradictions and the synergies between the two, and how each is indispensable to the other. Looking at creativity in fashion gives us a richer, more complex appreciation for the meaning of "originality" and the importance of imitation in all creative endeavors.

This naturally led us to wonder — how can an industry built upon open borrowing and re-use of other people's work thrive financially? Doesn't this contradict one of the core premises of the traditional narrative for intellectual property — that strict property rights are critical in order to reward creators for coming up with new works and selling them in the marketplace?

We conclude that a complex matrix of factors affects creativity and economic sustainability in fashion. Intellectual property rights, including copyright and trademark protection, are certainly important in spurring creativity. But many social, technological and historical elements also affect how creativity unfolds and circulates. One of the most important questions, as the title of our conference suggests, is whether creative design is "ready to share." The history of fashion suggests that it is. Fashion designers routinely appropriate and transform prior works, generating innovations that reflect both their individual talents and different times and contexts.

The first essay in this volume, "Between the Cracks, a Fertile Commons: An Overview of the Relationship Between Fashion and Intellectual Property," by intellectual property attorney Christine Cox and Duke Law professor Jennifer Jenkins, offers an overview of the relationship between fashion and intellectual property. Drawing upon fashion history and congressional statutes, this article is a primer in the legal treatment of creativity in fashion. The authors explain why fashion design generally is not protectable under copyright law, design patent, trademark or trade dress law.

A second essay, "Ready to Share: Creativity in Fashion & Digital Culture," by David Bollier and Laurie Racine, senior fellows at the Norman Lear Center, builds on the first piece by looking at the social and intergenerational dynamics of creativity in fashion, and how shared traditions and designs play an indispensable role in driving new creativity.

The authors wonder why the "borrowing" that is considered standard practice in fashion should be denounced as "theft" when it occurs in music or film. How is it that sampling the

1. Norman Lear and Michael Patrick King discuss the impact of intellectual property restrictions on specific creative decisions in their TV shows.

2. FIDM's Barbara Bundy highlights the energy of the conference.

How can an industry built upon open borrowing and re-use of other people's work thrive financially?

designs of someone else's garment can be lauded as genius in fashion, but condemned as piracy in other creative fields? Much of the answer seems to lie in the willingness of fashion companies to acknowledge the larger ecology of innovation — a frame of analysis that traditional copyright law omits. Intellectual property law tends to ignore the fact that creativity in real life must germinate within communities of practice and creative traditions — and that privatizing those communities and traditions only diminishes the feedstock of future creativity. Rare among creative sectors, fashion frankly acknowledges that there is little that is wholly original or unprecedented. Timing and context are at least as important as the originality that a designer contributes.

In the final essay, "Music & Fashion: The Balancing Act Between Creativity and Control," Aram Sinnreich and Marissa Gluck, two former research analysts for Jupiter Research, explore the fascinating parallels and differences between creativity in music and fashion. The culture of fashion is far more accepting of appropriation and imitation than the music industry, which relies upon strict copyright protection and fierce litigation to prevent the smallest forms of unauthorized copying.

Since we believe the topic of creativity and ownership in the fashion industry deserves greater scrutiny, this volume includes an annotated bibliography prepared by Norman Lear Center researcher Patrick Reed. The wealth of articles and books listed in this far-ranging bibliography features some of the leading works in this emerging arena. The bibliography also includes works about the relationship of fashion to the entertainment industry.

Some of the most exciting insights about fashion and creativity emerged from the "Ready to Share" conference itself, which was funded in part by a generous gift from the Center for the Public Domain and sponsored by The Fashion Institute for Design & Merchandising/FIDM. Included with this book is a stand-alone DVD. The video incorporates highlights of the conference — including comments by producer Norman Lear, designer Tom Ford, *New York Times* reporter Guy Trebay, *Sex and the City* creator Michael Patrick King and recording artist Danger Mouse — with a walking tour of New York fashion. Hosted by journalist Rick Karr with special guest, David Wolfe, Creative Director of the Doneger Group, we interweave an on-the-ground look at fashion with the "Ready to Share" conference themes.

David Wolfe, one of the industry's foremost trend forecasters, exposed fashion as a kind of "fragile ecosystem" of styles and motifs, tracing some of the significant historical shifts in fashion design and markets over the past 75 years.

Tom Ford's illuminating conversation with *New York Times* reporter Guy Trebay centered on whether fashion is derivative at its core or an original art form. Using examples from various designers, Ford and Trebay talked about the necessity of personal interpretations, and brand identity and its

"Fashion is not something that exists in dresses only. Fashion is in the sky, in the street, fashion has to do with ideas, the way we live, what is happening."

— Coco Chanel

coexistence with pervasion appropriation and sharing. A panel on the ownership of music applied the themes of "ready to share" to musical creativity and sampling. Moderated by Jonathan Taplin, the panel featured mash-up artist Danger Mouse, musician and producer T Bone Burnett, The Roots' producer Richard Nichols, singer-songwriter Sam Phillips and archivist Rani Singh. The group discussed how digital technologies have radically changed the distribution of music, giving artists the potential for much greater control over their business affairs and greater ability to reap economic gains directly.

Los Angeles designer Kevan Hall presented his Spring 2005 collection as part of a dialogue with Kevin Jones, curator of The Fashion Institute of Design & Merchandising Museum, about the direct influence of previous designers and even other arts, such as watercolors paintings and photographs, on his contemporary designs. Hall explained how his collection paid homage to the grand style and simple design sense of heiress Millicent Rogers of the 1930s and to the hand-tinted photographs of artist Cecil Beaton.

Television writer-producer Norman Lear delved into the nature of creative risk-taking with Michael Patrick King, executive producer of *Sex and the City*. Each worked in a different decade and with different networks — Lear for CBS in the 1970s, King for HBO in the 1990s — but each recounted episodes in which intellectual property restrictions threatened to derail their creative plans. King also spoke about the special challenges of writing a show in which fashion itself served as a kind of "character" in addition to the four female leads.

It is impossible to sum up a field of inquiry that is still unfolding and fraught with open questions and speculative answers. Still, several important insights emerged from the "Ready to Share" conference and the commissioned essays.

First, it is clear that creativity critically depends upon its social context and the collective legacy of prior works. Access to previous creativity is as important as control over any commercial product. What matters most is striking a careful balance between access and control, so that excessive restriction — especially through intellectual property law and technology — does not choke off future creativity.

A second insight is that thriving markets of creative products require an open commons of "raw material" — old works, unowned words and images, freely accessible characters, plots and themes — to assure fresh and robust creativity. Again, balance is key. Creators must have the means to earn money for their work, but an overdeveloped marketplace that encloses the commons is likely to undermine the quality and vigor of its creativity over time.

Finally, our explorations of creativity in fashion suggest that we may have to modify our ideas about individual originality. Many social, community and intergenerational

Which one is the real Chanel jacket? "Knocking off" a classic design is common in the fashion world.

factors play vital roles in the creative process. These must be acknowledged. Moreover, the grand narratives of law that purport to describe how creative works emerge and circulate must take account of these factors. The law must recognize that both artistic and economic success depend upon access to an open, nonproprietary universe of unowned material.

Although the tradition of "ready to share" is more evident in the fashion world, its dynamics can be seen in nearly any field whose creativity occurs in a collective, social context. The progress of science, for example, has always depended on the ability of researchers to build upon the prior work of others. Innovators in music and film always have drawn freely from the styles of prior artists and traditions. By focusing on a fact that intellectual property law largely discounts — that appropriation, sharing and transformation are critical elements in the eternal dance of creativity — the "ready to share" paradigm offers some provocative new ways to understand how creativity and markets alike can remain fresh and robust. For this reason alone, the deeper character of the "ready to share" model deserves much greater investigation and discussion in the years ahead. +

Essays

page 16 | Ready-to-Share: Fashion & the Ownership of Creativity

The original and its interpretation are revealed in "Chanel or Fauxnel," a live fashion presentation at the "Ready to Share" event.

Between the seams, a fertile commons:

an overview of the relationship between fashion and intellectual property

BY CHRISTINE COX
AND JENNIFER JENKINS

> "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 America fashion industry would wither, and its most talented designers would forsake clothing design for some more remunerative calling like litigation. 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. Of course, we don't give copyright protection to fashions ... We never have."
>
> — Jessica Litman, *Digital Copyright* [1]

INTRODUCTION

Each month, *Marie Claire* magazine presents a feature devoted to fashion knockoffs called "Splurge vs. Steal." A $195 Lilly Pulitzer halter top is compared with a $15.00 version by Newport News.[2] $175 Theory shorts are juxtaposed with a $39.50 look-alike from the Gap.[3] Though the designer version usually looks more tasteful or well-made, many shoppers are quite happy to obtain "the look" while saving several hundred dollars. Newport News and the Gap can adapt the more expensive designs, and consumers can "dress for less," because clothing designs generally are not protectable under current United States intellectual property regimes.

We often are told that intellectual property protection is necessary to stimulate creativity and innovation. It provides incentives by allowing creators to control access to their works and demand payment for them. Without these incentives — the argument goes — people will be unable to profit from their works and will stop creating. Yet, despite the lack of intellectual property protection for fashion, style houses continue to make money, and designers continue to

The classic shirtdress, revisited.

develop new looks every season. Creativity thrives in the absence of intellectual property protection.

What can we learn from this seeming paradox? This paper will examine the reasons why fashion design generally is not protectable under existing intellectual property regimes, and consider how the fashion experience might inform ongoing debates about desirable levels of intellectual property protection in other creative industries.

WHY NOT FASHION?

In recent years, the scope of U.S. intellectual property protection has expanded greatly in a variety of fields. Patents now are granted over plant varieties and common business methods, areas for which the U.S. Patent and Trademark Office previously had been hesitant to issue protection. Copyright terms have been extended to a staggering length of time — life plus 70 years — far longer than the 14-year term originally contemplated by the drafters of the Constitution. Powerful industry lobbies continue to push for ever stronger intellectual property protections.

Despite these recent expansions that have benefited, among others, the biotech, pharmaceutical, movie and recording industries, the fashion industry receives little protection under current U.S. intellectual property laws. This is not to say that certain fashion houses have not tried to obtain intellectual property protections for their designs, for valiant efforts have been made in this regard. While these efforts have succeeded in protecting limited design elements, however, fashion design as a whole receives little to no protection. Knockoff goods are a huge part of the fashion industry and are accepted as common practice. With a system that tries its best to forbid sampling and remixing at every turn, how can such an extensive and fertile commons be allowed to exist?

Fashion designs, particularly for clothing, fall between the seams of traditional intellectual property protections.

Fashion designs, particularly for clothing, fall between the seams of traditional intellectual property protections.[4] Copyrights generally are not granted to apparel because articles of clothing, which are both creative and functional, are considered "useful articles" as opposed to works of art. Design patents are intended to protect ornamental designs, but clothing rarely meets the demanding criteria of patentability, namely novelty and nonobviousness. Trademarks only protect brand names and logos, not the clothing itself, and the Supreme Court has refused to extend trade dress protection to apparel designs. Congress repeatedly has declined to enact legislation that would provide sui generis design protection.

Fashion designs are not unprotected merely because they fall into a legal limbo between intellectual property schemes, however. Both policymakers and courts have been guided by compelling policy reasons to limit design protection.[5] They have expressed concerns that, while such protection might benefit certain designers, it could create monopolies in the fashion industry that would stifle the creativity of future designers, hinder competition and drive up prices for consumer goods. Designers could demand payment for design elements that currently are free, and this cost would be borne by others in the industry and by the public. The less affluent would not be able to afford the range of fashions they currently enjoy.[6] Therefore, policy advisors have been unconvinced that "new protection will provide substantial benefits to the general public which outweigh removing such designs from free public use."[7] As one judge put it, "Congress and the Supreme Court have answered in favor of commerce and the masses rather than the artists, designers and the well-to-do."[8]

COPYRIGHT

Copyright law is used to protect artistic creations, including music, films, paintings, photographs, sculptures and books.[9] While U.S. copyright law protects "applied art," such as artistic jewelry, patterns on dinnerware or tapestries, it does not protect "useful articles," such as automobiles or television sets that, while attractively shaped, are primarily functional.[10] Apparel designers have tried to obtain copyright protection for their designs by suggesting that clothing is a type of sculptural work. However, copyright law generally has not provided protection for wearable designs because clothing is considered a useful article that (among other things) protects its wearer from the elements, provides modesty and decorates the body.

While copyright law normally does not protect useful articles, it does protect aesthetic elements of a useful article if those features amount to works of art "that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article."[11] This "separability" rule was developed in the landmark 1954 case of *Mazer v. Stein*,[12] in which the Supreme Court held that Balinese statuettes that formed the bases of lamps were copyrightable because the aesthetic work in question (a statuette) was separable from the useful article (a lamp). The statuettes could be copyrighted as independent works of art even though they also could be used as lamp bases.[13]

While lamps with statuette bases offer a relatively easy example of separability, it is much more difficult to separate aesthetic elements of most fashion designs, particularly clothing designs, from their function. An unusual neckline, flared sleeve or cinched waist — while attractive and

Design patents are an extension of patent law that protects the ornamental features of an invention.

creative — serve the utilitarian function of dressing the human form, and are not likely to be considered separable and independent works of art.

Accordingly, both Congress and the courts have said that clothing design is not subject to copyright protection. The legislative history to the Copyright Act explicitly stated that copyright protection would not be extended to "ladies' dress" unless it had some element that was physically or conceptually distinguishable from its form.[14] And courts have "long held that clothes, as useful articles, are not copyrightable."[15]

There have been a few unusual cases involving fashion designs in which courts have found aesthetic form separable from function. One such case, *Kieselstein-Cord v. Accessories by Pearl*, involved the design of high-end belt buckles.[16] Registered with the Copyright Office as "original sculpture and design," the Kieselstein-Cord belt buckles widely were recognized as innovative jewelry designs and even made their way into the Metropolitan Museum of Art's permanent collection.[17] Knockoffs of the belt buckle designs subsequently were created in common metals by Accessories by Pearl, and Kieselstein-Cord sued for copyright infringement.[18]

The district court found that the belt buckles did not meet the separability standard required for protection because the artistic features were not separable readily from the utilitarian buckle.[19] The Second Circuit reversed the decision, noting that the separability standard does not require "physical" separability but also may include "conceptual" separability.[20] The notion of conceptual separability (which was introduced in the legislative history to the current Copyright Act), allowed the *Kieselstein-Cord* court to discern between the aesthetic design of the belt buckles and their utilitarian function. The court concluded that the separable aesthetic elements should be copyrighted:

> We see in appellant's belt buckles conceptually separable sculptural elements, as apparently have the buckles' wearers who have used them as ornamentation for parts of the body other than the waist … Pieces of applied art, these buckles may be considered jewelry, the form of which is subject to copyright protection.[21]

However, the Second Circuit retreated from its expansive reading of conceptual separability a few years later in *Carol Barnhart v. Economy Cover Corp.*, in which the court held that mannequins

used to display clothing were merely useful articles and did not have aesthetic elements that were conceptually separable from their utilitarian functions.[22]

In rare cases, an apparel design may be copyrightable as a separable work of art when it hardly functions as clothing at all. For example, one court found that a clear plastic swimsuit filled with crushed rock and displayed as part of a modern art exhibit could be copyrightable as soft sculpture:

> Nothing in our legal training qualifies us to determine as a matter of law whether [the swimsuit] can be worn as an article of clothing for swimming or any other utilitarian purpose. We are also unable to determine merely by looking at [the swimsuit] whether a person wearing this object can move, walk, swim, sit, stand, or lie down without unwelcome or unintended exposure.[23]

As one commentator observed, "given that the object was filled with crushed rock, one wonders if it might have been more 'useful' as an anchor than a swimsuit."[24] Another court upheld copyrights in certain costumes that were unsuitable as clothing — these included a "Rabbit In Hat" costume that "does not readily permit the wearer to sit, recline, or maneuver easily" and a "Tigress" costume that "cannot be worn without a separate body covering underneath as it is too narrow to cover a woman's chest and contains no sides or bottom."[25] But in almost all other cases, clothing falls outside of the bounds of copyright protection.

Although clothing designs themselves are not copyrightable, designs on the surface of clothing, which are capable of being independent works of art (such as paintings or drawings), have been extended copyright protection.[26] Fabric designs, patterns for knit sweaters, designs printed on dresses and lace designs on wedding gowns have been held to constitute copyrightable subject matter.[27] When granted, copyrights for these works are often "thin," offering protection only from designs that are confusingly similar to the original.[28]

On the whole, then, copyright law affords little protection for clothing designs. Aside from protection for surface designs and a few exceptions that have been recognized by the case law, the design of clothing itself generally is considered ineligible for copyright protection because it is extremely difficult to separate the artistic from the functional elements.[29] As a result, some fashion designers have turned to other intellectual property regimes, such as design patents, to try to secure protection for their designs.

DESIGN PATENTS

Patent law provides protection for new and useful processes, machines, products and compositions of matter through utility patents.[30] Design patents are an extension of patent law that protects the ornamental features of an invention. In the most current version of the patent statute, design patents are governed by 35 U.S.C. § 171, which states: "[W]hoever invents any new, original and ornamental design for an article of manufacture may obtain a patent therefor[sic], subject to the conditions and requirements of this title."[31] The "conditions and requirements" referred to in § 171 are those of patentability. All patentable inventions and designs must be (1) novel[32] and (2) nonobvious,[33] or not readily apparent to someone skilled in the art. Inventions subject to a utility patent have an additional requirement of "utility," meaning that the invention must serve some useful purpose.[34] In contrast, design patents are intended to protect the "ornamental" portion of an item, which must be separable from its function.[35] While the scope of a utility patent is defined by the patent's claims, comprised of written text and figures, a design patent is defined only by its drawings;[36] as a result, the scope of design patent protection is limited more than that of utility patents. When granted, design patents provide 14 years of protection for the invention, compared to 20 years of protection for utility patents.[37]

Although patent law typically is associated with the realms of science and technology, members of the fashion industry have tried to use design patents to gain protection for their apparel designs. It has been extremely difficult, however, for clothing designers to obtain design patents because apparel designs — though ornamentally different from one era to another — rarely merit patent protection.

First, there are few elements of clothing design that are novel and nonobvious enough to be distinguishable from previous types of clothing. The standard, as articulated by the Second Circuit, is that "conception of the design must

"Trade dress" refers to the unique design or packaging of a product, such as the distinctive curve of a Coca-Cola bottle.

demand some exceptional talent beyond the skill of the ordinary designer."[38] For instance, bell bottoms made a resurgence in the late 1990s, incarnated as "boot cut" pants. Though more modest in girth than bell bottoms, boot cut pants clearly were not novel and were obvious in terms of the prior art. As a result, no design patents could have been issued for boot cut pants.

Second, design patent protection issues only when the design is not dictated by the function of the product and is primarily ornamental.[39] As noted in the copyright section of this paper, it is difficult to separate design from function in the clothing context. In the example discussed above, even ornamental features such as the boot cut shape serve the utilitarian purpose of protecting the wearer's legs.

While clothing manufacturers generally have not been able to take advantage of design patents due to the demanding novelty and nonobviousness requirements, athletic shoe manufacturers have been able to obtain design patents and have been responsible for much of the design patent litigation in the fashion context. Design patents on athletic shoes have been upheld even when some of the features in the design also served a useful purpose.[40] Such protection can be rather limited, however, applying only to the design as pictured in the patent application.[41] And although design patents have been granted to shoes on numerous occasions, courts have not upheld these patents consistently.[42]

Even if fashion designers were to develop a design that met the standards of novelty and nonobviousness, the process of obtaining a patent (which tends to take around two years) would in most cases be too long and expensive to make patent protection a practical alternative. By the time the designer secured the patent, it would be useless because the commercial lifespan of the design would have lapsed.

TRADEMARK

Trademarks are symbols used to identify the origin of a product in a commercial context. By identifying the source of the product, trademarks serve an important consumer protection function. In contrast to copyrights and design patents, which are used to protect the artistic and ornamental aspects of a product, trademarks protect only the link between the product and its source, not the product itself. If the makers of knockoff goods affix their own trademarks to their products, then trademarks actually can serve to distinguish knockoffs goods from originals and minimize consumer confusion.

To be a registrable trademark, a name or symbol must be able to identify and distinguish a product from other goods in commerce.[43] Marks that are arbitrary or fanciful qualify for trademark registration almost immediately, while marks that are descriptive, including surnames, must acquire "secondary meaning" before they may be registered.[44] Secondary meaning is a specific type of distinctiveness that is acquired through use of the trademark in the marketplace and requires the formation of a link in the mind of the consumer between the trademark symbol and the company for which it is serving as a signifier. So, while fanciful marks for clothing, such as "Banana Republic," are easily registrable, descriptive marks such as "Tommy Hilfiger" require a considerable amount of investment before they may become registered trademarks.

Protection against trademark infringement has been a key objective for many fashion houses. As knockoff purses bearing "Kate Spade" and "Gucci" labels are sold around the world at bargain prices, it is easy to understand fashion designers' concerns about trademark infringement. Consumers may believe that the knockoff goods, which are inevitably of lower quality, actually were produced by the company. Some designers have seen blatant attempts to adopt confusingly similar trademarks, as in Gianni Versace's case against the holder of the "A.V. by Versace" and "Alfredo Versace" marks.[45] In a more striking case of infringement, Calvin Klein sued a Hong Kong manufacturer for sale and distribution of goods that the company had rejected for quality reasons but were sold overseas with the trademark still attached.[46] But infringement suits have been filed not only against unknown knockoff companies; Coach sued Ann Taylor for, among other things, an imitation of Coach's trademarked hanging tag.[47] The *Coach* court held that Ann Taylor's hanging tag was confusingly similar to, and infringed, the one used by Coach.[48]

On occasion, certain elements of clothing design also serve as distinctive indicators of the clothing brand, and are eligible for trademark protection. For example, Levi Strauss has a registered trademark in the stitching pattern on the back pocket of its jeans, and successfully has prevented other jean manufacturers from using confusingly similar patterns.[49] But Levi Strauss' trademark protection only extends to the stitching pattern, and not to the design of its jeans in general. Thus, while trademark law may be used to prevent counterfeiting or misleading production of goods, it is not a useful tool to protect clothing designs per se.

TRADE DRESS

Trade dress protection is a relatively recent extension of trademark law. "Trade dress" refers to the unique design or packaging of a product, such as the distinctive curve of a Coca-Cola bottle. Trade dress originally referred to the design of a product's package, but the scope of trade dress has expanded dramatically so that it now "involves the total image of a product and may include features such as size, shape, color or color combinations, texture, graphics, or even particular sales techniques."[50] Although certain types of trade dress may be registered with the Trademark Office, most remain unregistered and must be protected by § 1125(a) of the Lanham Act.[51] This statutory section forbids the use of any similar trade dress that is likely to cause confusion, mistake or deception.[52]

In 2000, the Supreme Court declined to extend trade dress protection to clothing designs in *Wal-Mart Stores, Inc. v. Samara Brothers, Inc.*[53] In this case, a children's clothing manufacturer sued the retail chain over the sale of knockoff one-piece seersucker outfits for children. The Court held that the outfits were not protected by trade dress law, and confirmed that product designs are only protectable if they acquire secondary meaning as a trademark, such that "in the minds of the public, the primary significance of a [product design] is to identify the source of the product rather than the product itself."[54] Fashion designs rarely will have secondary meaning because they are not intended to identify the source of the product, but instead aim to make the product more useful or appealing.[55] In addition, most fashion designs would be too short-lived to achieve secondary meaning. The Court maintained this high threshold for trade dress protection in order to benefit both competition and consumers, stating that "[c]onsumers should not be deprived of the benefits of competition with regard to the utilitarian and esthetic purposes that product design ordinarily serves."[56]

A federal court recently applied the *Wal-Mart* holding in a case involving purses.[57] Design house Louis Vuitton

alleged that Dooney & Bourke's "It Bag" with multicolored "DB" monograms on white or black backgrounds infringed Vuitton's trade dress in its similar looking bags. The court held that, while Vuitton had trademark rights in the Vuitton marks themselves,[58] it did not have trade dress rights in the overall look of its bags. Among other things, the court was concerned that excessive trade dress protection would hinder competition:

> Louis Vuitton created a new look and now seeks to preclude others from following its lead. If Louis Vuitton succeeds, then it will have used the law to achieve an unwarranted anticompetitive result. It is well established that the objective of trademark law is not to harm competition.[59]

Indeed, trademark laws seek to safeguard competition, and as the Supreme Court has observed, "copying is not always discouraged or disfavored by the laws which preserve our competitive economy."[60]

CONCLUSION

This paper began with a quote from intellectual property scholar Jessica Litman, in which she transposes the traditional argument in favor of expansive intellectual property protection to the fashion industry. According to the traditional argument, without intellectual property protection, artists will lack incentives to create and creative industries will wither. It is a powerful argument, and one that has been extremely successful in justifying new rights — the music and film industries have used it to secure (among other developments) a 20-year extension to the copyright term and a new right to control access to digital works. When applied to the fashion industry, however — as Litman's quote brilliantly illustrates — the theory doesn't hold. Despite the lack of intellectual property protection (or perhaps because of it), designers continue to create and the industry continues to grow.

Fashion's counterexample challenges the idea often reflexively accepted by policymakers and courts that "more rights" automatically ensure "more creativity" and less rights will choke it. In the fashion industry, the absence of rights actually may feed the creative process. Fashion designers are free to borrow, imitate, revive, recombine, transform and share design elements without paying royalties or worrying about infringing intellectual property rights. Of course, fashion designers are not the only creators who draw on previous works in order to create. "Culture … grows by accretion, each new creator building on the works of those who came before."[61] If the 12-bar Blues, boy-meets-girl story, or the works of Shakespeare and Mozart were copyrighted, much of the music, films and novels we enjoy today would be illegal. In any creative sector, granting excessive rights could stifle creativity, because every right asserted takes away "raw materials" from future creators.

Fashion's counterexample also challenges the dominant business model in other creative industries that relies on zealously preventing unauthorized or unpaid uses of content. With fashion, the constant frenzy of creation and imitation may actually drive rather than destroy the market for original goods. Perhaps the ubiquity of a design makes owning the original more desirable and prestigious. Perhaps designers recoup costs by marketing to high-end consumers who want the brand name and quality of the original, while knockoff goods serve those who would not buy couture anyway.

Is fashion the exception or should it be the rule? Does fashion flourish in a less protective climate because of unique mechanics of creativity and marketing, or are we overprotecting in other creative sectors? Either way, the questions are crucial. As this paper has described, intellectual property has been expanding rapidly in recent years, driven by the argument that more protection will spur greater creativity and save creative industries from extinction. But what if this isn't true? What if these expansions might actually harm the very creativity and industries they seek to protect?

We are currently in the midst of critical debates about optimal levels of intellectual property protection. The fashion experience can inform these debates with important insights into how the creative process works and how different business models function, and merits further, careful examination. ✦

AUTHOR BIOGRAPHIES

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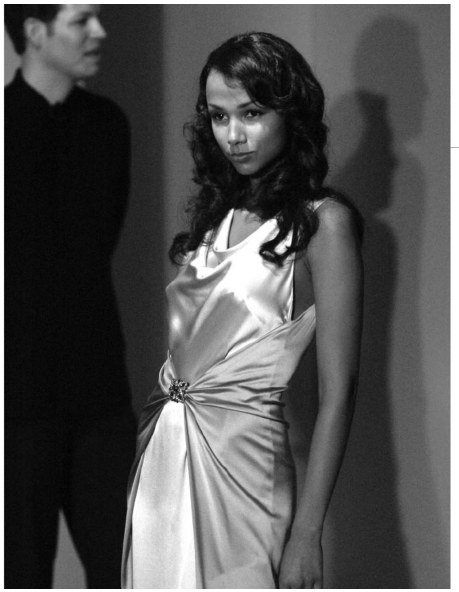
ENDNOTES

[1] Jessica Litman, *Digital Copyright: Protecting Intellectual Property on the Internet* (Amherst, New York: Prometheus Books, 2000), 105-06.
[2] "Splurge vs. Steal," *Marie Claire*, July 2005, 154.
[3] *Id.*
[4] A number of law review articles have made this observation, and argued that fashion designs should enjoy greater protection under various intellectual property schemes. See, *e.g.*, Anne Theodore Briggs, *Hung Out to Dry: Clothing Design Protection Pitfalls in United States Law*, 24 HASTINGS COMM. & ENT. L. J. 169 (2002); Safia A. Nurbhai, *Style Piracy Revisited*, 10 J.L. & POL'Y 489 (2002); Jennifer Mencken, *A Design for the Copyright of Fashion*, 1997 B.C. INTELL. PROP. & TECH. F. 121201 (1997); Peter K. Schalestock, *Forms of Redress for Design Piracy: How Victims Can Use Existing Copyright Law*, 21 SEATTLE U. L. REV. 113 (1997); Rocky Schmidt, *Designer Law: Fashioning a Remedy for Design Piracy*, 30 UCLA L. REV. 861 (1983).
[5] See, *e.g.*, H.R. REP. NO. 1476, 94th Cong., 2d Sess. 50 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5668; Fashion Originators' Guild of America, Inc. v. Federal Trade Commission, 312 U.S. 457 (1941); Cheney Bros. v. Doris Silk Corp. 35 F.2d 279 (2d Cir. 1929); Policy Decision, Registrability of Costume Designs, 56 Fed. Reg. 56530-02 (Nov. 5, 1991).
[6] Addressing proposed design protection legislation in 1914, one Congressman remarked: "The trouble with this bill is that it is for the benefit of two parties; that is, the enormously rich who want to display their splendid apparel that they can wear in this country that the ordinary riff-raff ought not to be allowed to wear, and those rich concerns who have these extra and selected designers to design these special patterns for those elite." Hearings on H.R. 11321, 63d Cong. (1914).
[7] Testimony of the Department of Justice, Hearings on H.R. 2223, 94th Cong. (1975), H.R. REP. NO. 1476 at 50.
[8] Kieselstein-Cord v. Accessories by Pearl, 632 F.2d 989, 999 (Weinstein, J., dissenting) (2d Cir. 1980).
[9] 17 U.S.C. § 102(a) (2001).
[10] 17 U.S.C. § 101 (2001); H.R. REP. NO. 94-1476 at 55. Under the current Copyright Act, a useful article is "an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information."
[11] 17 U.S.C. § 101 (2001).
[12] 347 U.S. 201 (1954).
[13] *Id.* at 218.
[14] H.R. REP. NO. 94-1476 at 55. Congress explained the reasoning behind this "separability" rule as follows:

> [T]he Committee is seeking to draw as clear a line as possible between copyrightable works of applied art and uncopyrighted works of industrial design. A two-dimensional painting, drawing, or graphic work is still capable of being identified as such when it is printed on or applied to utilitarian articles such as textile fabrics, wallpaper, containers, and the like. The same is true when a statue or carving is used to embellish an industrial product or, as in the *Mazer* case, is incorporated into a product without losing its ability to exist independently as a work of art. On the other hand, although the shape of an industrial product may be aesthetically satisfying and valuable, the Committee's intention is not to offer it copyright protection under the bill. Unless the shape of an automobile, airplane, ladies' dress, food processor, television set, or any other industrial product contains some element that, physically or conceptually, can be identified as separable from the utilitarian aspects of that article, the design would not be copyrighted under the bill.

[15] Whimsicality v. Rubie's Costume Co., 891 F.2d 452, 455 (2d Cir. 1989). The *Whimsicality* court further denied the plaintiff's claim that the costumes at issue in the case were not useful articles but could instead be classified as soft sculptures, stating that "the word sculpture implies a relatively firm form representing a particular concept. The costumes in question have no such form .... [W]e conclude therefore that these costumes do not constitute sculpture." *Id.* at 456.
[16] Kieselstein-Cord v. Accessories by Pearl, 632 F.2d 989 (2d Cir. 1980).
[17] *Id.* at 991.
[18] *Id.*
[19] *Id.*
[20] *Id.* at 993.
[21] *Id.*
[22] Carol Barnhart v. Economy Cover Corp., 773 F.2d 411, 418 (2d Cir. 1985).
[23] Poe v. Missing Persons, 745 F.2d 1238, 1242 (9th Cir. 1984).
[24] Schalestock, *supra* note 4, at 123.
[25] National Theme Prods., Inc. v. Jerry B. Beck, Inc., 696 F. Supp. 1348, 1350 (S.D. Cal. 1988).
[26] Knitwaves, Inc. v. Lollytogs Ltd., 71 F.3d 996 (2d Cir. 1995).
[27] Knitwaves, 71 F.3d at 1002; Peter Pan Fabrics Inc. v. Brenda Fabrics Inc., 369 F. Supp. 142 (S.D.N.Y. 1959); Banff Ltd. v. Express, Inc., 921 F. Supp. 1065 (S.D.N.Y. 1995); Eve of Milady v. Impression Bridal, Inc., 957 F. Supp. 484 (S.D.N.Y. 1997).
[28] See H.R. REP. NO. 94-1476 at 55.
[29] See Melville Nimmer, 1-2 NIMMER ON COPYRIGHT §2.08.
[30] 35 U.S.C. § 101 (2001).
[31] 35 U.S.C. § 171 (2001).
[32] 35 U.S.C. § 102 (2001).
[33] 35 U.S.C. § 103 (2001).
[34] 35 U.S.C. § 101 (2001).
[35] 35 U.S.C. § 171 (2001).
[36] 37 C.F.R. § 1.153(a).
[37] 35 U.S.C. § 173 (2001).
[38] Neufeld-Furst & Co. v. Jay-Day Frocks, 112 F.2d 715 (2d Cir. 1940).
[39] L.A. Gear v. Thom McAn, 988 F.2d 1117, 1123 (Fed. Cir. 1993).
[40] *Id.* Upholding a design patent on a sneaker, the court stated: "[T]he utility of each of the various elements that comprise the design is not the relevant inquiry with respect to a design patent. In determining whether a design is primarily functional or primarily ornamental the claimed design is viewed in its entirety, for the ultimate question is not the functional or decorative aspect of each separate feature, but the overall appearance of the article, in determining whether the claimed design is dictated by the utilitarian purpose of the article."
[41] Payless Shoesource v. Reebok International, 998 F.2d 985, 990 (Fed. Cir. 1993).
[42] Briggs, *supra* note 4, at 178.
[43] 15 U.S.C. § 1052 (2001).
[44] *Id.*
[45] A.V. By Versace v. Gianni Versace, 126 F. Supp. 2d 328 (S.D.N.Y. 2001).
[46] Calvin Klein Industries, Inc. v. BFK Hong Kong, Ltd., 714 F. Supp. 78 (S.D.N.Y. 1989).
[47] Coach Leatherware Company, Inc. v. Ann Taylor, Inc., 933 F.2d 162 (2d Cir. 1991).
[48] *Id.* at 170.
[49] Lois Sportswear v. Levi Strauss & Co., 799 F.2d 867 (2d Cir. 1986).
[50] Two Pesos v. Taco Cabana, 505 U.S. 763, 765 n.1 (1992).
[51] 15 U.S.C. § 1125(a) (2001).
[52] *Id.*
[53] 529 U.S. 205 (2000).
[54] *Id.* at 211 (internal citation omitted).
[55] *Id.* at 213.
[56] *Id.*
[57] Louis Vuitton Malletier v. Dooney & Bourke, Inc., 340 F. Supp. 2d 415 (S.D.N.Y. 2004).
[58] There was no infringement of Vuitton's marks because Dooney & Bourke used its own "DB" mark, making it obvious to consumers that the Dooney & Bourke bags were not Vuitton bags. *Id.* at 440.
[59] *Id.* at 420 (emphasis in original).
[60] Traffix Devices v. Marketing Displays, Inc., 532 U.S. 23, 29 (2001).
[61] White v. Samsung Electronics, 989 F.2d 1512, 1513 (9th Cir. 1993) (Kozinski, J. dissenting).



Pastel hues of famed artist Cecil Beaton shimmer anew in this contemporary evening gown.

READY TO SHARE:

CREATIVITY IN FASHION & DIGITAL CULTURE

BY DAVID BOLLIER
AND LAURIE RACINE

Anyone who ventures onto the Internet quickly discovers that the creative spirit is riotously alive. On any given day, 8 million bloggers forage the deep forests of the World Wide Web for twigs and leaves of information, which they weave into personal nests. Remix musicians sample snippets of music and ambient sounds, synthesizing them into startling new musical creations. Tens of thousands of software programmers collaborate in building soaring cathedrals of code, which run operating systems, Web sites, document archives and much more. Filmmakers and photographers pore through archives of public domain and privately owned material searching for the perfect images from which to create new visual works.

The open, participatory culture found on the Internet and other digital media is perhaps the defining crucible of creativity in our time. Guided by a sensibility that appropriates from irregular materials that exist in other contexts and forms, the Internet has redefined the way we express ourselves and relate to culture. Structuralist Claude Levi-Strauss once described this recombinant creative process as bricolage[1], a concept that refers to the constant mixing and morphing of incongruous "found" elements into a new synthesis.

But is this environment of open borrowing and transformation a liberating place for the imagination — or simply a state of lawless anarchy in which pirates prey upon the work of the truly creative and hard-working? Can a cultural milieu truly flourish without strong intellectual property rights and market control over creative work? Or, to the contrary, is a deliberately unstructured, uncontrolled environment one of the most powerful ways to nurture innovation?

We believe that the world of fashion — known for its embrace of appropriation, derivation *and* imitation, and for its ferocious attention to the bottom line — can shed light on these questions. It can help us understand the social and cultural wellsprings of creativity as well as the plasticity of the marketplace. There are, in fact, many ways that the raw social and human energy known as *creativity* can be refined and packaged as it travels from the human mind and social groups to the marketplace. This reality is on display not only in the world of fashion, but also in the growing universe of digital culture. The "ecologies of creativity" in both realms are strikingly similar.

In sharp contrast, other creative sectors like music and film remain committed to business models that value ownership and control of content above all else. To listen to music and film executives, much of what passes for "creativity" in the digital world is nothing less than theft. These business leaders argue that strict copyright controls are necessary if anyone is going to have sufficient incentive to create new works. Yet to many artists who live and create via electronic networks, creativity has never been more robust and innovative precisely because, thanks to new technologies, copyright protections are relatively lax.

The core issue in this debate between intellectual property protectionists and cultural renegades is the control of creativity. Does creativity need to be controlled strictly

through copyright law in order to thrive? Or can creativity actually flourish in a milieu of open appropriation and derivation, without destroying the potential for a healthy, competitive market? Although the fashion business usually does not engage in this sort of self-examination, this paper argues that the fashion business reveals a great deal about the "cultural hydraulics" of creativity and the novel ways in which intellectual property law can foster, and not restrict, creative freedom.

Fashion is a quicksilver mode of creativity that many people dismiss as trivial and ephemeral. It is, after all, the demimonde of celebrities, high society, supermodels and decadent flamboyance. Yet fashion is also one of the most high-profile creative sectors of our time, with earnings that vastly exceed those of the music or film industries.

It is difficult to find reliable numbers to describe the scale and scope of the fashion industry. It is a sprawling global enterprise consisting of many specialty clusters (apparel, accessories, fabric, etc.) with many interconnected and irregular players (designers, manufacturers, merchandisers, marketers, etc.). Yet one can get an idea of the industry's size when one considers that the international trade of textiles and apparel accounts for some $495 billion.[3] In the United States alone, apparel sales in 2003 supported an estimated 80,000 garment factories and generated $192 billion, according to the Chicago research firm Euromonitor International.[3] The American film and video-DVD industry, by contrast, had revenues of $60 billion in 2003, according to the U.S. Census Bureau.[4] The music industry reported revenues of $12.6 billion in that year, according to the Recording Industry Association of America.[5]

While the economic footprint and splashy styles of fashion may attract the most attention, fashion's distinctive "ecology of creativity" may be its most important attribute. Indeed, the cavalcade of beautiful clothes and accessories, and the unpredictable new styles and attitudes that burst forth every so often, are products of a very special social and economic system. With great speed and flexibility, fashion constantly expresses shifting cultural moods, social demographics and personal identities with new apparel designs and accessories. This remarkable and turbulent drama is, in turn, seamlessly integrated into a complicated market apparatus of global production, marketing and distribution.

The result, rare among creative industries, is a highly robust, churning tide of innovation. Fashion is a vital, vigorous creature living in an open, always evolving environment. It is no accident that fashion permits and even celebrates the appropriation and modification of other people's creative designs; these practices are an indispensable part of the process. Designers do not need to ask permission or pay fees in order to make their own interpretations of hip-hugging denims, leopard-skin bikinis or black evening dresses. They just do it. The ferment of new ideas and innovation is literally out of control, and beyond the ability of any single player to manipulate or dominate. Since strict market control is generally impossible, nearly everyone strives to stay ahead of the competition through the sheer power of one's design and marketing prowess.

Metaphorically, fashion is all about black and white and gray. Designers use black and white shades as basics — sometimes incorporating them as the grounding for a season's lines; other times using them as accents to highlight an expression or mood. The two absolutes serve as a kind of default to which fashion often reverts before venturing forth to explore a broader, more subtle spectrum of color.

Figuratively speaking, black-and-white also symbolizes the fixed boundaries of intellectual property law, which aims to set clear rules for what sorts of innovation are permissible and which are not. And black-and-white represents the boundaries within which the business of fashion must operate, with profitability being of paramount importance.

But black-and-white must be seen as simply the *framework* for the real work of fashion — the constantly changing permutations of gray. Gray can be considered the shade that drives creative innovation because creativity is a process, not a final destination. It is made up of pathways and linkages that are neither fixed nor immutable. There are no absolutes, like the shades of black and white. Fashion's real mission and its most memorable achievements are seen in its explorations and the *filling in* of everything that can exist between the black and the white. Fashion is all about novelty and experimentation, and about striving to be as daring and original as possible.

Paradoxically, the unfettered freedom and pace of fashion can exist only because the black-and-white frame does not interfere with the sector's open "creative space." In fashion, most design innovation is immediately available to everyone. Indeed, there is a long history in fashion of "knocking off" haute couture garments and selling them as quickly as possible at lower price points. The past is constantly being plundered for "new" ideas. Stylistic elements are routinely appropriated from the most unlikely places — Polynesian islands, urban street corners, stock-car races, bowling alleys — and transformed into new trends. In fashion, nearly every design element is available to anyone for the taking. Any fashion design, one might say, is "ready to share."

The term is, of course, a play on the fashion industry's bread-and-butter market, "ready-to-wear." But we use it here to reference fashion's rough-and-tumble approach to the ownership of creativity. This complex dynamic warrants investigation. Why is it that the "borrowing" that is a standard practice in fashion is denounced as "theft" when it occurs in music or film? Why should sampling and even exact garment replications be considered acts of genius in fashion, or at least respectful homage, while the titans of most other creative fields regard such appropriations as scurrilous acts of piracy?

Answering these conundrums requires that we probe the deeper sources of creativity itself — and the ways that different market structures can be built atop the social communities responsible for innovation. It also requires that we recognize those attributes of garment design and marketing that are unique to fashion, and that may or may not apply to other creative sectors.

A NEW GRAND NARRATIVE FOR CREATIVITY

We believe that the styles of creative bricolage exemplified by fashion and new digital environments embody a new grand narrative for creativity, born of ancient tradition. This new story of creative innovation cannot be understood by the traditional premises of copyright law, which are fixated on individual creativity. Rather, this new story sees individual genius in the context of evolving social relationships and community practice. Creativity is not just a matter of individual creativity, but a conversation between individuals and larger communities of people and creative traditions.

The traditional story laid out by copyright law sees creativity as more or less an individual product and a static product; works must be instantiated in a physical medium, for example, in order to earn protection. But the new grand narrative that we see in fashion is, like online creativity, inherently social and dynamic. Creativity not only is given wide leeway to change and evolve in whatever directions it wishes, but the marketplace also is structured to respond to consumers in more organic, flexible and rapid ways. The predictable and unpredictable churn of styles, and the fairly open and decentralized marketplace, enable talented and resourceful newcomers to enter the market and succeed. No style is ever fixed and consummated, once and forever; no market franchise lives forever. Creative design is always in flux.

In this sense, fashion has many striking resemblances to digital environments that work through the Internet. Creative ideas are available to all through an open commons. Creators enjoy access to a bottomless reservoir of possibilities. Consumers enjoy unparalleled choices. Despite limited copyright protection, companies continue to rise and fall and make money. The ecology gives rise to a centrifugal spiral of innovation and new businesses. It is an environment in which the open and the proprietary are more or less aligned, not clashing, and creative freedom can flourish without onerous legal restrictions. It is hard to imagine a more compelling, responsive, sustainable milieu for creativity.

In the bricolage world of fashion and digital culture, creativity is a fragile and ephemeral essence. The legendary designer Coco Chanel once observed: "Fashion is not something that exists in dresses only; fashion is something in the air. It's the wind that blows in the new fashion; you feel it coming, you smell it … in the sky, in the street; fashion has to do with ideas, the way we live, what is happening." It is tempting to focus on the tangible "containers," but fashion is simply the "clothing" for a deeper creative spirit.

What is so captivating about the ecology of creativity in fashion is its ability to host the protean spirit of the imagination, and to build profitable businesses around it, without becoming sterile and rigid. This same sensibility prevails

in the digital world. Although we may associate creative artifacts with their tangible forms — CDs, DVDs and countless electronic appliances — their real essence is immaterial and versatile. It is always in flux — moving, replicating and morphing — through the virtual channels of the Internet. While it is tempting to see the products of digital creativity as instances of "intellectual property" — a fictional object defined by law — in truth the creativity of digital media is far too elusive, abstract and mercurial to be confined easily. Like a virus that locates a hospitable "host" to replicate itself, human creativity uses digital technologies as cheap and easy hosting facilities for its relentless bricolage.

FASHION AND THE OWNERSHIP OF CREATIVITY

Before exploring the similarities between creativity in fashion and the culture of bricolage, we must explore how creativity originates, circulates and is transformed in the world of fashion design. It is worth probing this issue because it suggests something about how creativity and markets can interrelate in a healthy, vigorous way. Fashion shows how appropriation and sharing is necessary in any creative community and how it can also contribute to a robust, competitive marketplace.

Fashion is one of the few creative industries in which it is usually impossible to claim copyright protection for one's work. Two-dimensional fabric designs and ornamental features such as buttons are entitled to copyright protection, and newly developed man-made fabrics can be patented, but otherwise, most aspects of garment design cannot be owned. Only one's business name and logo can be protected, as trademarks. Despite perennial calls for extending copyright protection to more aspects of fashion, the lack of such protection has not hurt the overall fortunes of fashion in the least. Indeed, the industry as a whole has flourished.

The ecology of creativity in fashion features an open design commons, limited copyright protection, a focus on marketing and branding, and competitive markets that reward innovation and speed. Intellectual property rights are not unimportant in this regime, to be sure, but neither do they obstruct new sorts of creativity and competition. Businesses still enjoy proprietary advantages — their brand name and reputation — but no one is allowed to privatize and lock up design itself. Fashion recognizes that pleasing a diverse, constantly changing consumer base in a timely way is the key to a profitable bottom line, and that staying one step ahead of fickle style trends that last months, not years, is imperative to success.

The evolution of styles in fashion may seem quixotic and arbitrary, and indeed it is, at a certain level, mysterious. One only can venture theories. Yet it is clear enough that apparel design has its own rudimentary "physics" — a rough set of principles that seem to explain how new styles emerge, develop and are embraced by consumers.

One must, at the outset, distinguish the traditional hierarchy of fashion from today's more democratic ecology of fashion. For most of the 20th century, haute couture in Paris, Milan and New York was the fountainhead of new styles. A handful of prestigious fashion houses were the recognized arbiters of taste, their styles trickling down to the masses in irregular cascades. Department stores followed the lead set by Paris, for example, making their own adaptations of the season's popular styles. Traditional fashion involved designers catering to well-heeled clients, whose tastes in clothing and style were forged, if not dictated, by recognized fashion magazines.

While the vestiges of this system remain, a far more open, competitive and dynamic fashion industry has arisen over the past 40 years. Teri Agins describes this evolution in her landmark 1999 book, *The End of Fashion: How Marketing Changed the Clothing Business Forever,*[7] and in her reporting as fashion commentator for *The Wall Street Journal*. She suggests that as more women entered the workforce in the 1960s and 1970s, the cultural appeal of high fashion waned. Working women needed a different type of wardrobe, and department stores and boutiques began to offer fashionable clothes at cheaper prices.

In the open and democratic fashion environment that developed in the following decades, the aura of the catwalk was replaced by the spectacle of the red carpet. Styles were no longer driven by elite fashion shows, but by movies stars and celebrities wearing couture clothes chosen by professional stylists. Rather than a twice-a-year fete in select cities around the world, fashion became a year-round, ubiquitous passion.

Fashion is one of the few creative industries in which it is usually impossible to claim copyright protection for one's work.

The industry's evolution also was fueled by the marketing genius of Ralph Lauren, who in the late 1960s brilliantly introduced the idea of integrating fashion with lifestyle. He launched a campaign associating his clothing lines with a largely imagined lifestyle of affluent, landed-gentry WASPs living in a world of country estates, travel and equestrian sports. He splashed his lifestyle fantasy across the pages of magazines and on billboards and buses and, in the decades that followed, the branding of clothing and marketing of lifestyles became merged. As a result, designers began offering apparel and accessories that reflected and resonated influences from music, film and the street. Retailers, in turn, reinterpreted those influences and offered them back out to the larger culture from which they originally emanated.

Throughout this shift in emphasis from high fashion to today's more ecumenical fashion marketplace, however, there has been one significant constant: the appropriation and derivation of other people's creativity. If fashion is going to be culturally relevant, it must be constantly on the move, and no one can be allowed to own it.

THE DURABILITY OF HOMAGE

If Ralph Lauren was a pioneer in linking an elite lifestyle to a line of clothes, and marketing it to the masses, he was, at bottom, aping someone else's work. Lauren's creations drew upon a body of accumulated fashion design by the venerable fashion houses, which continue to hold great cachet. Such fashion houses as Chanel, Yves Saint Laurent, Givenchy and Balenciaga long have been pacesetters for "original" design.

These elite brands are not frozen in amber; they repeatedly have been built and rebuilt around an ethic of homage, the respectful referencing and imitation of other people's creativity. The great designers of today routinely incorporate and adopt aspects of their mentors' work, refining basic elements and adding new design aesthetics. Ungaro was the protégé of Balenciaga; Lagerfeld drew upon Chanel. Tom Ford incorporated the traditions of Gucci, and Alexander McQueen recognized the style of his sponsor, Givenchy.

Fashion, in this sense, always has been a form of creativity based on lineage. The individual designer may have his own distinctive talents, but he also participates in a recognized tradition. Indeed, young designers freely incorporate aspects of house tradition — an affinity for draped jersey here, an attraction to certain color palettes there — into their own personal styles. Inevitably, when protégés later go off to start their own named line, they take certain stylistic leitmotifs from their former patrons while developing their individual signature look.

The adage "what goes around comes around" is perfectly suited to fashion. In 2003, Oscar de la Renta candidly admitted that his designs derived from famous peers. Cathy Horyn of *The New York Times* reported: "In his studio last week, [de la Renta] pointed with amusement to a picture of a Balenciaga shift with a draped back and then to a dress he took from his wife, Annette's, closet, a virtually identical model made for her in the 90s by Saint Laurent. On Monday, Mr. de la Renta sent out his version, in vivid melon."[7]

As creativity migrates the continuum from originality to outright imitation, the very idea of "originality" begins to appear more problematic. Guy Trebay, a fashion reporter for *The New York Times*, wryly noted: "Adolfo builds a wildly successful business on an interpretation of a boxy suit by Coco Chanel; lucky for him Ms. Chanel, being dead, is unable to litigate. Tom Ford becomes famous copying Halston, Alexander McQueen for aping Vivienne Westwood. Half of fashion, in fact, seems to owe its professional existence to a single truism: one is as original as the obscurity of one's source."[8]

In an environment of constant emulation, it can be difficult to separate "originality" from "imitation." The two blur together so seamlessly that it often doesn't make sense to try to sort them out. Such conclusions are jarring to anyone steeped in the orthodoxy of copyright law, which presumes that it is in fact possible — and perhaps urgently necessary — to ascertain the authorship and "originality" of a work.

While there is little question that individual artists bring their own distinctive talents to bear on any creation, it is worth recalling Salvador Dali's puckish admonition: "Those who do not imitate do not create anything new." Or as fashion journalist Cathy Horyn playfully put it, "Fashion is in some ways like a worm going from one apple into the next …"[9]

One must wonder how important "originality" truly is if a "derivative" rendition can attract its own separate following. Consider the daisy chain of creative transformation that bobs and weaves from British sports and military tradition through a series of designers to culminate in Tommy Hilfiger. Cayce Pollard, the protagonist of *Pattern Recognition*, a thriller by novelist William Gibson, frankly is repulsed by the dilution of a style through imitation. She laments:

> My God, don't they know? This stuff is simulacra of simulacra of simulacra. A diluted tincture of Ralph Lauren, who had himself diluted the glory days of Brooks Brothers, who themselves had stepped on the product of Jermyn Street and Savile Row, flavoring their ready-to-wear with liberal lashings of polo knit and regimental stripes. But Tommy is surely the null point, the black hole. There must be some Tommy Hilfiger event horizon, beyond which it is impossible to be more derivative, more removed from the source, more devoid of soul. Or so she hopes, and doesn't know, but suspects in her heart that this in fact is what accounts for his long ubiquity.[10]

However derivative his clothing, Hilfiger remains a popular fashion brand. The most important point may be that one person's etiolated style is another generation's fresh feedstock. What seems like a derivative dead-end from one vantage point frequently turns out to be, decades later, the direct inspiration for a fashion revival. Today's styles become the compost for tomorrow's new growth. And so the cycle continues.

HOW FASHION BUILDS UPON THE PAST

Contemporary fashion always is engaged in a spirited dialogue with the past and culture. The homage that prevails within fashion is but a microcosm of a larger, more bracing dialogue in all creative art, between design and earlier styles, particularly artistic traditions and recognized cultural symbols. The intimate affinity between fashion and culture plays itself out as bricolage; meaning and beauty are drawn from whatever elements are at hand, which designers then transform into something "new."

A dramatic explication of this premise can be seen in the celebrated Goddess Exhibit mounted by the Costume Institute of Metropolitan Museum of Art in New York City in 2003.[11] The show presented the goddess as both an iconic artistic image and a tradition of dress design. Drawings, sculptures and paintings depicting ancient "goddess" images showed how recurrent motifs were used in apparel spanning the ages, from ancient Greece and Rome to the 19th century and modern dress. The exhibit showcased the classic "goddess" style in three distinct dress forms of Grecian and Roman eras, and tracked their development through modern-day couture interpretations. Remarkably, little has changed. Reinterpretations by Halston, Donna Karan and John Galliano, sometimes line for line, easily could be recognized as emanating from classic civilization.

The Goddess Exhibit depicted how originality and imitation actually can coexist in seamless harmony. Novelty is built atop an archetype. Separating the two may be theoretically possible — copyright law protects expression, not ideas — but in practice innovation and archetype are inextricably fused. Indeed, that is precisely why some designers gravitate toward archetype; such designs seem to resonate at a certain timeless, fundamental level, while still proving amenable to contemporary adaptation.

The fusion of fashion and art is a natural convergence, of course. Both are dedicated to seeking out that which is new, provocative and beautiful. Fashion and art also have natural commercial synergies, as most designers realize. For the last five years, Madison Avenue, world-renowned home of designer boutiques and art galleries, has mounted a week-long exhibition titled "Madison Avenue: Where Fashion Meets Art." Sales have supported such institutions as the Whitney Museum of Art, as the promotional campaign is a yearly acknowledgement of the inexorable link between fashion and fine art, aesthetic refinement and upscale prestige.

Artist and designer Elsa Schiaparelli was a pioneer in fusing fashion and art in the 1940s and 1950s. She is credited by reviewer Roberta Smith with being "the first modern fashion designer to collaborate with artists while also thinking like one .... We owe to her the idea, so prevalent today, of the fashion designer as an art-smart provocateur and promotion-minded celebrity." Schiaparelli made dresses inspired by the Surrealists, transplanting trompe l'oeil techniques from paintings to dresses. Her motifs often drew upon the playful, conceptual art of such painters as Marcel Duchamp and Paul Poiret. One of Schiaparelli's dresses — a gown worn by Zsa Zsa Gabor in the 1952 film *Moulin Rouge* — is an exact copy of a dress in a Toulouse-Lautrec lithograph.[12]

"Everything in fashion begins in the street."
—Diane von Furstenberg

Fashion designers do not only embrace classic artistic forms or historical artifacts to create new lines. Fashion routinely borrows from itself. Building a new season's collection on designs from years past is an essential component of fashion praxis. Today, evidence of fashion raiding its own closet abounds in the success of vintage clothing dealers. Cameron Silver, the owner of Decades, Inc., a vintage clothing chain in Los Angeles and London, said that 60 percent of his business comes from designers. In New York City, designers constantly trek to Gallagher Paper Collectibles, a small East Village grotto that owns a rich archive of vintage fashion magazines. Proprietor Michael Gallagher told a reporter: "We get them all, Hedi Slimane, Karl Lagerfeld, Marc Jacobs, big time, John Varvatos, Narciso Rodriguez, the Calvin assistants, the Gucci assistants, Dolce & Gabbana, Anna Sui — you name it. They all come here for inspiration. At least that's what we call it."[13]

Seth Weisser, co-owner of What Comes Around Goes Around, told a reporter: "Remember that Celine double-wrap belt with the metal on the outside? The original was from us. It's exactly as it was." Weisser admits that "when the good stuff comes in, there are about five designers who get the call."

What fashion may borrow from art and from vintage styles, it certainly returns in a coin of equal value. This is an elemental part of culture: Ideas and designs must flow constantly like water. Fashion and art both share an ethic of borrowed inspiration. If such unmetered circulation of design offends the guardians of intellectual property, creators and aesthetes have few qualms. They consider it the heart of culture. "A culture could not exist if all free riding were prohibited," writes legal scholar Wendy Gordon. "Culture *is* interdependence, and requiring each act of dependency to render an accounting would destroy the synergy upon which cultural life rests."[14]

THE STREET AS A SOURCE OF FASHION

"Everything in fashion begins in the street," the fashion designer Diane von Furstenberg once said.[15] Although an overstatement, von Furstenberg's claim points to an open secret of fashion design: "The street" is one of the richest, most fertile sources of innovation. It may take an insightful designer to identify and adapt a fugitive style seen on the street, but designers readily acknowledge that the street has a creative vitality that no one can ignore.

The street is forever dedicated to the renegade and unpredictable, and to styles that are jarring, improbable and surprising. "Has there ever been a designer's catwalk that produced better fashion than a city sidewalk?" asks Guy Trebay. "Is there a style, high or low, that has not felt the influence of Fifth Avenue, or Bushwick Avenue in Brooklyn, or the Rue Bonaparte ...?" *New York Times* fashion photographer Bill Cunningham has made a career chronicling the emerging styles that he detects on the streets of New York City. His weekly photo essays, "On the Street," announce the ubiquity of pink, fur, bare-midriff T-shirts or broaches.

While some trends can be pushed successfully by fashion-forward designers, the street is a fractious animal. It often insists upon making its own defiant statements. Some of the biggest trends of recent decades — cargo pants, lowriders, frayed jeans, do-rags — originated among the musicians, night-clubbers and bohemian vanguard of urban America.

Urban fashion pioneers, hip-hop artists have become one of the great engines of new fashion trends. Hip-hop played a major role in converting track suits, wrestling shoes (and boxing and soccer shoes), designer sneakers, outsize denims, prison-style jumpsuits and underwear worn above the trouser waistband into fashion must-haves.[17] Leading hip-hop artists took notice when established Italian fashion houses like Dolce & Gabbana and Versace appropriated urban streetwear for their new collections. Several decided it was time for them to build on their personal musical brands and launch their own clothing lines: Sean Combs began the Sean John label, Russell Simmons started Phat Farm, Eminem has his Shady Ltd. Line and Jay-Z started Rocawear.

Female rappers like Mary J. Blige, Foxy Brown and Lil' Kim, too, have capitalized on their celebrity image and music to call attention to their clothing collections — a cross-media synergy, as it were. (Lil' Kim once posed nude on the cover of *Interview* magazine with her body painted with Louis Vuitton logos.) "Hip hop artists today are the icons," said Peter Ferraro, associate publisher of *Source* magazine. "In the past, they were using supermodels."[48]

The popularity of hip-hop — the music, the video images, the lifestyle of its stars — propelled its move into fashion. "The bottom line is that urban sells way more than high fashion," Emil Wilbekin, editor of hip-hop magazine *Vibe*, told a reporter. "Sean John sells way more than a Donatella Versace."[49]

The great fashion writer Holly Brubach once wrote, "Fashion is one of the means by which we dream collectively," calling it "a feminine counterpart to architecture." If fashion is a language by which we express ourselves, then, said Brubach, "it is incumbent on every generation to remake the world in its image." The street performs this function. It is a theater in which our culture expresses itself and remakes its identity. Fashion is the medium.

"A strong street style is the healthy sign of a society that is enthusiastic about itself," said artist Ruben Toledo. "Immigration is vital to its survival. The fertilization of style is enhanced by the rare and new, by the cross-pollination of ideas. It is also a sign of a society that values freedom of interpretation — underwear becomes outerwear, overcoats become dresses, extra small on me is extra large on you."[50] The street is a key reason why fashion remains so creatively alive. Fashion could not renew itself without the uncontrolled cultural space that the street represents. As one observer put it, "Street fashion can afford to make mistakes, to change its mind overnight, because it's cheap or on sale or found on the curbside like an orphan." The street is a living proof that creativity is too large and dynamic for anyone to own.

No one really has a protected market franchise. Every market participant constantly must be on the prowl for the "new," and even classic styles must be updated periodically. To be sure, companies can and do seek to gain some proprietary control over new trends. They try to become the first to market, for example, or to cultivate a marketing identity closely associated with a lasting trend. Many fashion houses also employ "cool hunters" to forage through urban subcultures in search of the next big trend[51]; and subscribe to "trend research" newsletters like the *Tobé Report*. and other tip sheets.[52]

The makers of clothing, sneakers and accessories feel compelled to identify if and when a geeky, forgotten product — Converse sneakers, Hush Puppies casual shoes, pink menswear — are going to catch on as new fads. Designers look to the street both as a source of inspiration and as a benchmark against which they must compete. An important factor in creativity in fashion, then, is insecurity. *No one can really know in advance just what styles the street will embrace and ratify as a trend.*

"Cool" is always moving on, just out of reach. But it cannot be ignored if only because it embodies a spirit of cultural authenticity and validation that commercial fashion today *needs*. Fashion therefore constantly must draw upon the street if it is to renew itself. The street has panache and credibility precisely because its sensibility is uncontrolled and wild; the commercial machine has not yet domesticated it through mass marketing. Styles from the street are seen as expressions of "real feelings"; they elude (for now) the calculated marketing gambits of major corporations.

Designers sit astride this tension between the street and the market. They recognize the creative energy and mass appeal of "street styles," yet they also know that commercialization ineluctably will take the bloom off the rose. They pursue a paradox: to create designs that connote social exclusivity … and then reinterpret them for their customers. The very act of selling tends to vitiate the exclusivity being sold.

Much of fashion is about negotiating this tension between the popular and the exclusive. A fashion reporter profiling Marc Ecko, a street-inspired designer, concluded: "What the Eckos of the world cannot combat is the manner in which trends often emerge organically and unpredictably from the street. Here, young people are powerfully swayed by and averse to marketing at the same time."[53]

In truth, the street encompasses "all of culture." Nearly all aspects of culture are routinely used as feedstock for new fashion designs. The most unlikely backwater in the U.S. or anywhere in the world is regarded as a plausible source of new styles. The fashion houses Imitation of Christ, Preen and Jessica Ogden have built collections around thrift-store clothing.[54] Some designers have seized upon tacky souvenir T-shirts to produce their own faux down-home T-shirt designs.[55] Clothing inspired by NASCAR stock-car racing — checkered tops, splashy graphics, leather jackets with logos for Budweiser and Quaker State Motor Oil — enjoyed a brief vogue in 2001.[56] At one point in 2002, reported *The New York Times*, younger designers were "rediscovering the early renegade work of Vivienne Westwood, whose collection drew inspiration from pirates, peasants and American Indians."[57]

All this stylistic imitation and transformation is not necessarily faddish. Sometimes a design's original function specifically is utilitarian and, through circumstance, genius or trend, evolves into an iconic fashion element, actually creating a new archetype. For example, when Levi Strauss made Levi's denim trousers from tent canvas, introducing rivets to prevent the pockets from tearing, he had no idea that denim jeans would become the fashion staple of the last 50 years. Likewise, Coco Chanel's 1926 coinage of the little black dress as a symbol of urban sophistication — a uniform suitable for cocktail parties and concerts, not just funerals — truly was inspired.

The trench coat originated, quite literally in the trenches of WWI. The clothier Thomas Burberry, who already had invented the fabric called gabardine, submitted the original design to the British War office in 1901. The coat was modified and given to the troops to protect them from the muck and the mire of European winters. It later went on to become a standard raincoat design. In the last several years, the trench coat has re-emerged as a trendy staple, with Burberry once again leading the charge.

The ecology of creativity in fashion that we have sketched here points to a deep and abiding principle about creativity: It requires freedom. It can endure only so much private control before it careens into a downward spiral of sterile involution. If it is to be fresh, passionate and transformative — if it is to express a cultural moment and speak to our aspirations — fashion must have the room to breathe and grow.

So far we have focused on the "spectacular shades of gray" — the innovation, the experimentation, the sharing — that color fashion, and not on the "black-and-white" frame that contains its energies. As suggested earlier, in order to leverage the powers of the marketplace, creativity also must exist within a regime of business profitability and intellectual property law. We turn now to the intellectual property rules that enable creativity in fashion to be so seemingly boundless yet still capable of supporting a robust marketplace.

THE ETHICS OF IMITATION IN FASHION, OR THE DIFFERENCE BETWEEN COUNTERFEITS, KNOCKOFFS AND PLAGIARISM

A key reason why the ready-to-share ethic can survive in fashion is that companies are able to claim property rights, albeit through the use of two important legal tools — trademark and trade dress. These intellectual property protections enable businesses to leverage brand names, logos and certain aspects of three-dimensional design that usually are applied to handbags. The locus of piracy is thus shifted. As a result, copying a garment design is entirely legal, and even respectable, but copying a brand name or logo is considered an act of piracy and the resulting products are called counterfeits.

The legal distinction between a *counterfeit* and a *knockoff* is crucial. It is what enables the fashion world to sustain its wide-open creative ethic while maintaining its profitability. A counterfeit dress is one that falsely bears the label of another designer even though no license has been paid. A knockoff is a dress that may be almost identical to a brand-name dress, but it does not purport to be anything but what it is: a nearly identical knockoff produced by someone else.

Counterfeiting is wrong not because it imitates design elements, but because it steals from the repository of value in fashion — the trademarked name and logo. Designers have credibility, stature and profitability because their name comes to represent a look and an artistic standard.

The moment designs appearing on the runways of Paris were mimicked and mutated for the tastes and budgets of a larger audience, the knockoff culture was born. Over the last 60 years, the demand for knockoffs has increased

exponentially as women have come to embrace the idea that one can look like a million bucks without having a million in the bank. The demand for knockoffs only has grown with the rise of cheaper production technologies, faster logistics and shorter fashion cycles.

Initially, department stores primarily were responsible for harnessing and carefully reproducing the couture look. Stores felt no compunction about offering both couture label garments and store-label imitations. A pivotal moment in the history of knockoffs occurred in 1957, when Seventh Avenue garment makers copied Christian Dior skirts for Macy's before Dior's own clients had received the originals. Dior's response was brilliant and prescient. He proceeded to introduce his own label, non-couture, ready-to-wear line. The idea was to profit from both ends of the market — those who could afford couture and those who wanted to look like they could. Today, most major designers have developed multiple market price points.

The fashion world has become so acclimated to knockoffs that insiders trade countless anecdotes about the lineage of an idea or the blatant imitation of a distinctive article of clothing by someone else. The storytelling ripens into lore that serves to reinforce and validate the knockoff ethic. Legendary fashion photographer Manuela Pavesi once told a friend (who later told *New York Times* reporter Guy Trebay) that her Prada coat was a copy of an original Balenciaga coat that Miuccia Prada had found at a vintage-clothes dealer in Paris. "Miuccia loved this coat so much," Pavesi said. "So much that she took it and copied it. But I mean copied it exactly."[18]

Occasionally, the designer credited with the "original" fights back. In 1982, Giorgio Armani called off his fashion show because the press refused to delay publishing reviews and pictures of his new lines of clothes until the merchandise was in stores. He wanted to thwart imitators from making knockoffs in the interim period. And Ralph Lauren famously sued Yves Saint Laurent in 1994 for making a $1,000 sleeveless tuxedo gown that he claimed was a rip-off of his $15,000 couture version.[19] (Lauren and Saint Laurent later settled.)

Attention to design detail has become more refined in the knockoff culture of the last decades, and price points now range from high-end "bridge" collections to chain-store merchandise. There is now a flourishing, above-ground segment of the industry expressly devoted to producing replicas of dresses worn by major entertainment celebrities. ABS, started by Allen B. Schwartz, the most visible and successful of these companies, assiduously copies the designer gowns worn by stars at the Academy Awards ceremony, churns them into production within hours and has them on the department store floors within days. Other knockoff entrepreneurs such as Victor Costa and AnyKnockoff.com, a Los Angeles-based maker of "designer-inspired products," also give credence to this independent industry form. Any-Knockoff.com declares (figuratively, one assumes), "We tear out the designer label and save you money."

In our time, the knockoff ethic has become so consuming and ubiquitous that it is reinforced and validated by all manner of media. The fashion magazine *Marie Claire*, has a standing feature called "Splurge vs. Steal." *InStyle* magazine invites readers to "Steal This Look." Daytime television programs run regular segments devoted to knockoff dressing, as do the burgeoning cable fashion channels. There are also many Web sites devoted to knockoff fashion (among them: fashionknockoffs.com, knockoffs.com, edressme.com, fivestarreplicas.com and anyknockoff.com).

There is value — for companies and for innovation — in sanctioning imitation. The elite designers can charge a premium for their perceived superiority and "originality," and imitators can make money by catering to mid-market and lower-tier consumers who are not likely to buy the elite brands. While a counterfeit garment clearly steals revenue from a name-brand company, knockoffs paradoxically affirm the elite status of the original brand while having few harmful financial effects. Consider the vintage Valentino gown that Julia Roberts wore to the 2001 Oscars: Victor Costa knocked it off and sold hundreds of the gowns. Anyone who saw or owned the knockoff referenced its "original" designer, Valentino, even though none of the imitators purported to be a Valentino.

A brand name is, in essence, the commodification of socially created value. The "goodwill" of a brand represents

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"Those who do not want to imitate anything, produce nothing." — *Salvador Dalí*

a social consensus that a brand "means" certain things and ensures certain standards of quality. Knockoffs help stabilize the lexicon of meanings in fashion, albeit inelegantly, while undercutting the counterfeiting that would surely result otherwise. The little black dress by Chanel, the wrap dress by von Furstenberg, the Izod knit shirt — each retains its brand-name value, in part, because knock-offs indirectly affirm the brand franchise of the "original."

If counterfeiting is the illegal copying of someone else's brand name or logo, and knockoffs are copycat designs that are sold to different market tiers, how shall we regard the verbatim copying of designs just for the hell of it? Some critics call it genius, others call it plagiarism. While few question the legality of verbatim rip-offs, fashion mavens have mixed feelings about the ethics of such practices.

A celebrated instance of plagiarism-inspired genius is the case in which Nicolas Ghesquière, a star designer at Balenciaga, knocked off a highly idiosyncratic 1973 vest by a little-known, deceased San Francisco designer, Kaisik Wong, as part of Balenciaga's 2002 collection. The "borrowing" was disclosed by the "Chic Happens" column of the Web site Hintmag.com after the co-option of the design was discovered by an intern.[31] Ghesquière said that his design technique resembles sampling in the music business, and admitted that he had indeed copied the vest. Without embarrassment, he said, "I'm very flattered that people are looking at my sources of inspiration." The novelist Tom Wolfe, who was a friend of Kaisik Wong's, interpreted the incident rather differently; he complained that the stigma of copying should not be removed simply by calling it "referencing." On many occasions, wags have quipped that homage is merely French for stealing.

When Harold Koda, the costume curator at the Met, was asked whether it was fair for a celebrated designer to steal from an obscure innovator and pass it off as his own without credit, Koda replied, "What about all the famous designers today whose collections are designed by anonymous assistants? Is that any more unfair?"[31]

The line between ordinary creative transformation and plagiarism virtually can be nonexistent in apparel. "Right now at Karen Millen you can find gold trousers remarkably similar to those at Prada," wrote Charlie Porter of *The Guardian* (UK), "while Marks & Spencer are very proud of its animal-print kaftans which echo the ones shown at Yves Saint Laurent."[32] Indeed, a great many fashion experts believe that the best, most innovative work comes from the artful recombination of existing work. Vanessa Friedman noted in the *Financial Times*: "It's ironic then that the designers who face the plagiarism issue full-on are those who have produced the most thought-provoking and inventive work, in much the same way hip-hop artists about 20 years ago borrowed drumbeats from chart-topping tunes and created a new music genre."[33]

In fashion, at least, this debate is a matter of professional ethics, not a matter of law. The issue in the Ghesquière case was chiefly about the etiquette of crediting, or not crediting, an artistic source. In truth, the appropriation of a prior work is not just about the work itself; the *recontextualization* is at least as important in the creation of meaning. That's why contemporary revivals of decades-old styles have a very different meaning than they originally did; the context is completely altered.

This is the strategy that designer Russell Sage played upon when he made clothes decorated with trademarked logos. Sage's Fall 2000 collection included halters made from the linings of old Burberry trench coats, pleated skirts with Prada and Hilfiger ads photo printed onto them, and a Victorian evening gown with sequined Chanel and Vuitton logos. Sage's point was to step out of the discourse of traditional fashion, as exemplified by elite fashion logos, and call attention to the ways in which designer clothes are associated with certain social tribes. He called the collection "So Sue Me." Burberry did, in fact, threaten legal action and force Sage not to mention the word "Burberry" in the collection (his substitute, "reclaimed check.")[34]

A similarly playful commentary on the elite brands was made by companies issuing rubber knockoffs of the famous Hermès Birkin handbag. Should the colorful bags be considered a counterfeit of a trademarked bag design or a fully protected satire on fashion? Hermès obviously believed the former, and threatened legal action against anyone making or selling the bags. But the case caused some frisson because the creative norm in garment design is that anything is fair game. Fashion is part of an ongoing conversation, and therefore *of course* the "jelly bags" should be considered legal.[35] But since fashion accessories can be trademarked, Hermès had considerable legal leverage in banishing the send-ups.

Such collisions between trademark law and fashion's free-wheeling creative spirit lead to perennial controversies. In 2003, for example, some clever imitations of Louis Vuitton handbags started appearing. They did not use the famous Vuitton logos (which would have constituted counterfeiting), but they did feature clever, suggestive imitations of the trademarked logos.[36] The copycats clearly were trying to evoke the Vuitton handbags without stepping over the line.

So goes the homage of imitation, which necessarily cuts both ways. When Anya Hindmarch used logos of food products on satin evening bags, the trademark owners actually paid her to use their logos. They considered it great visibility for their brands. It didn't hurt that foods don't compete with clothing in the marketplace. By contrast, Burberry has no desire for other designers to use the copyrighted Burberry plaid on other designers' clothing.

It is a timeless tension: proprietary companies seeking control and subversive designers using bricolage to come up with "something new." Unlike most other creative sectors, fashion has chosen the open-ended horizon for itself. Innovation cannot be squelched simply because the first mover is fearful that his market franchise might be diminished. Fashion has thrown its fate in with George Bernard Shaw's aesthetic ethic: "In art, the highest success is to be the last of your race, not the first. Anybody, almost, can make a beginning; the difficulty is to make an end — to do what cannot be bettered."

THE FUTURE OF CREATIVITY

There is little doubt that fashion presents a distinctive milieu for creative endeavor, one that illuminates the market benefits that can flow from a "ready to share" creative environment. But do its dynamics hold lessons for other creative sectors?

We are struck by the remarkable similarities between the creative ecology of fashion and those of digital media. While the creative milieu of fashion is unique in many respects, the success of its framework for creativity suggests that it might have broader lessons for the digital age. It is striking, for example, to observe how in both fashion and many digitally based creative communities, new ideas arise

and circulate with few impediments of either market access or intellectual property law. Sharing, collaboration and modification of other people's works occur naturally, almost automatically, and at a breakneck pace.

Open-source software may be the most celebrated example of this creative dynamic. In open-source communities, hundreds and sometimes thousands of creators openly appropriate and modify a shared body of software code to build new programs that suit their purposes. Like the design archetypes of fashion, which serve as shared models for constant innovation, open-source software has any number of shared scripts of code that are the basis for customized applications. The GNU-Linux computer operating system may be the most prominent example, but there literally are thousands of sophisticated open-source programs that are functionally competitive with proprietary software, albeit with a key difference: They invite anyone to change, modify and improve the existing code.

The Internet itself fosters this sort of creativity because of its structural architecture. It relies upon open technical protocols for communicating among countless computer networks, so there is no central authority dictating how creativity may or may not occur on the Internet. All activity is radically decentralized, which means that most creative innovation emerges from "on the edge" of the system, not from the center. Anyone with a new idea can launch it and transmit it to a global community with few impediments.

In this respect, the Internet functions much like "the street" in fashion. It is a rich and important source of creative inspiration. Recall that the street is an open, bustling place filled with unpredictable new ideas. It is a constantly churning world of innovation and surprise that the proprietary world depends upon for new ideas, and against which they compete.

One can find a parallel between fashion and the street on the one hand, and Web logs (or "blogs") and the mainstream media. Blogs are a form of personal diaries and news platforms for individuals and communities of shared interest. More than a way of "broadcasting" individual views, blogs have extensive links to other bloggers who are like-minded and admired. This cross-linking — among an estimated 8 million bloggers — has created a fantastically powerful network for the viral diffusion of information.

In many respects, the mainstream media must keep pace with bloggers in much the same way that Levi's or the Gap must keep pace with the street. In both instances, the proprietary businesses look to the creative commons for potentially important new ideas. There may be a lot of dross — bad ideas, unsubstantiated facts — but the aggregated power of large numbers of people on the street, or in the blogosphere, is a creative force that cannot be ignored.

There are, in fact, many instances of this dynamic on the World Wide Web. Many Web sites are vehicles for collaborative creativity or archiving of community information. Genealogical Web sites assemble vast quantities of research data, for example. The Wikipedia project is a massive "encyclopedia" consisting of more than 500,000 entries written entirely by users. Many smaller "wiki" projects work on the same dynamic of pooling the work of thousands of voluntary contributors. There are fan communities that share their fictional stories about Star Trek characters and television stars. There are peer-to-peer file sharing communities of scientists (having nothing to do with illegal music downloading) who share documents and databases as a group.

It is difficult to generalize about the eclectic types of sharing going on over the Internet, but one rough common denominator is a bricolage model of creativity. While there are nominal boundaries for ownership of content (copyright law still applies in an official sense), in practice these communities tend to appropriate, modify and share digital materials with great abandon. In this, the creative process used by digital artists and authors resembles that of fashion: Each innovator-imitator freely draws upon the building blocks of the past and, indeed, all of culture.

The quick-and-easy excerpting of content in digital media fuels the viral diffusion of creativity in the networked environment. The similarity to fashion is obvious, as a new fashion style quickly sweeps the culture and the marketplace in a matter of weeks. Because there are few barriers to participating in the decentralized marketplace — either from high costs or intellectual property restrictions — creative innovations can proliferate with remarkable speed. Some styles turn out to be fads and die out; others prove useful, and persist and grow. No one could have predicted that Levi's jeans or the Chanel black dress would become new archetypes. Fortunately, the creative environment allowed them to emerge and find consumers. So too, on the Web, no one could have predicted that MoveOn.org would attract 2 million contributors and become a major force in the 2004 presidential election, or that blogs like Boing Boing, with a daily readership of nearly 1 million Internet users, exceeds that of many mainstream magazines. Who could have predicted that the *Grey Album*, an artist's mash-up of The Beatles' *White Album* and Jay-Z's *Black Album* — would be downloaded 1 million times, more than the sales of the best-selling album at the time, Norah Jones' *Feels Like Home*.

Finding new ways to balance intellectual property law and embedded business practices with the free-wheeling spirit of creatives is of the utmost importance.

There are significant differences, of course, between the viral diffusion of content and the viral diffusion of fashion. Apparel is a physical product, and requires fabric and manufacturing for production, and still further expense to distribute. Digital content can be distributed for virtually nothing over the Internet. But the larger point is that creativity in both "ecologies" is fairly fluid and unimpeded. While it is probably premature to adopt a theoretical model for innovation in fashion or the Internet, the similarities between the two are clear enough to suggest that it is time to develop a new narrative about creativity. Forays into both realms reveal that creativity is by its very nature a messy process that flourishes in open environments with minimal limitations. The best creativity is elusive, unpredictable and ungovernable. It loses its vitality if it is forced to remain static, and it cannot be defined easily. It thrives without borders and suffers from having to live within boundaries.

We are drawn back to the metaphor — of black, white and shades of gray. The worlds of business and the law prefer the absolutes of black and white. Investors and lawyers are in the business of minimizing risk; they prefer legal rules that are clear and business models that yield predictable results. Companies that wish to thrive in fashion, digital media or any other field therefore strive to enthrone the black-and-white framework — and to minimize the "gray zone" of creative endeavor — by rationalizing it as much as possible.

This creates a structural tension with the creative spirit, however, because authentic creativity is about following one's passions and emotions without regard for official boundaries. If the world of "ready to share" in fashion reveals anything, it is that a delicate rapprochement must be negotiated between the champions of black and white absolutes that business and lawyers embrace to compete in the marketplace, and the blended tones of gray that are the preferred domain of creators. Finding new ways to balance intellectual property law and embedded business practices with the free-wheeling spirit of creatives is of the utmost importance. We believe that the fashion industry offers many constructive lessons for how this challenge can be met. +

"Science and art belong to the whole world." — *Goethe*

AUTHOR BIOGRAPHIES

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David Bollier is a senior fellow at the Norman Lear Center and co-founder of Public Knowledge, an advocacy group dedicated to defending the commons of the Internet, science and culture. Since 1984, he has been a collaborator with television and film producer Norman Lear on a wide variety of projects. Bollier also works as an independent strategist and journalist specializing in issues of progressive public policy, digital media and democratic culture. Bollier's recent work has focused on developing a new vocabulary for reclaiming "the commons." The commons refers to the diverse array of publicly owned assets, gift-economies and natural systems that are available to everyone as a civic or human right. Bollier's critique of the commons is set forth in his 2002 book, *Silent Theft: The Private Plunder of Our Common Wealth* (Routledge), and in a number of essays and reports. He has developed the notion of the information commons as a new paradigm for understanding the public interest in the digital, networked environment. His latest book related to the subject is *Brand Name Bullies: The Quest to Own and Control Culture* (Wiley, 2004). Educated at Amherst College (B.A.) and Yale Law School (M.S.L.), Bollier lives in Amherst, Massachusetts.

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page 46 | Ready to Share: Fashion & the Ownership of Creativity

A bevy of styles from times gone by are reinvented in Kevan Hall's 2005 Spring collection, modeled at the conference.

Music & fashion:

THE BALANCING ACT BETWEEN CREATIVITY AND CONTROL

BY ARAM SINNREICH
AND MARISSA GLUCK

In June 2002, underground music phenomenon DJ Z-Trip signed a recording contract with Hollywood Records, home to teen pop sensation Hilary Duff and veteran television personality Regis Philbin. While there is nothing new or unusual about underground musicians making uneasy alliances with mainstream record companies, this was a notable event for two reasons. First, Z-Trip's music was made entirely from samples of other songs, none of which had been licensed prior to the signing of the record contract. Second, Hollywood Records is a division of the Walt Disney Company, which arguably has been the most aggressive proponent of intellectual property control in the entire media and entertainment sector.[1]

Z-Trip is one of the pioneers of the mash-up, also known as "bootleg" or "bastard pop." This new musical style, which emerged only in the last five years or so, has two basic rules: First, all the source materials must be recycled. Vocals, accompaniment, ambient noise and anything else that goes into the mix must be sampled from an already existing piece of recorded music. Often, this means the vocal track from one song is "mashed" with the instrumentation from another. However, a single mash-up can incorporate samples from hundreds of songs.[2] The other rule of mash-ups is that the samples must be combined to make something new and surprising. In the words of one bootleg artist, "A good mash up / bootleg is a culture clash ... styles that shouldnt [sic] work together but do."[3]

Predictably, things have not gone smoothly for Z-Trip's music at Hollywood Records. After years of legal acrobatics, the company was able to license only a handful of the dozens of samples on Z-Trip's album. There are many reasons why the record label may have failed to obtain the blessings of these copyright owners. Some may have had a strict "zero sampling" policy, prohibiting derivative works of any sort to be created. Others may not have understood what a mash-up was, and weren't willing or able to take the time to learn. Some copyright owners may have been difficult or even impossible to track down. Ironically, all of these hurdles can be traced to the system of rigid copyright control that the Walt Disney Company successfully has lobbied to create over the past several decades. In other words, it was hoisted by its own petard.

Hollywood Records finally did release DJ Z-Trip's major-label debut album, *Shifting Gears*, in April 2005 — after a lag of nearly three years from the artist's initial signing date. In that time, mash-ups progressed from underground art form to mainstream fare distributed by MTV, Lollapalooza, and *Wired Magazine*. These newer mash-ups differ from Z-Trip's underground work in one respect: They are composed of a small pool of sanctioned, *pre-licensed* samples, which were given to the artists with the express purpose of being mashed. Gone is the innovation, the "culture clash" that defined the form in the first place. In its stead is an often predictable, homogenous product that arguably functions more as a marketing pitch for the source materials than as a new and independent work of art. In the words of French economist and music theorist Jacques Attali, "Inducing

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people to compose using predefined instruments cannot lead to a mode of production different from that authorized by those instruments."[4] Or, as *The New York Times* recently predicted, "the mainstreaming of the mash-up ... may end up killing the genre."[5]

Z-Trip's record for Hollywood, indeed, more closely compared to these newer mash-ups, and likely lacked the samples the company was unable to license. Before its release, music journalist Bill Werde, who has reported extensively on mash-ups for *Rolling Stone* and *The New York Times*, speculated, "This album will not resemble anything Z-Trip has built his following on. Whatever does come out will be a very sanitized version."[6] In his later review of the album, Werde noted, "*Shifting Gears* doesn't have the novelty of Z-Trip's earlier work."[7]

The moral of this story is fairly straightforward. Intellectual property laws theoretically are supposed to encourage innovation, prevent theft and reward artists. However, in the case of DJ Z-Trip, they did just the opposite. An innovative musician was delayed for years from sharing his work with the market, and in order to do so, he had to change it to make it more derivative and less original. As we shall discuss in this paper, such outright dysfunction is the norm, rather than the exception, in the music industry today.

It would be difficult to find a case analogous to DJ Z-Trip's in the world of fashion. In the fashion industry, sampling, derivation and reappropriation all are accepted and common forms of creative innovation. Indeed, the creative process today is almost wholly reliant on forms of re-use and has deftly avoided the kind of fracas the music industry[8] faces over intellectual property protections. However, there still are powerful institutions that help navigate the murky waters that separate legitimate influence from theft. Without the "thick" copyright protection afforded to the music industry, fashion depends more heavily on social regulation and a primitive but highly functional watchdog — shame.

Fashion is perhaps the most cyclical of all design industries. As with music, ideas and aesthetics constantly have been recycled, particularly from the 1930s to the present. Sleeves, collars, skirt lengths, patterns, fabrics, buttons and hems all are elements with seemingly infinite permutations, but in reality there is a fairly limited aesthetic vocabulary, with the proven successes cropping up again and again. What makes fashion distinct from other culture industries, however, is its willingness — perhaps its imperative — to acknowledge sources of inspiration. Inez Brooks-Myers, curator of costume and textiles at the Oakland Museum of California, explains:

> Designers will say they were inspired by the gingham that Adrian used or inspired by the patchwork skirts that Rudi Gernreich did. They will acknowledge inspiration, copying and borrowing heavily. There is a nuance of change but they acknowledge the source of inspiration. I don't know if that happens in other industries.[9]

On rare occasions, a fashion designer will cross over the invisible line separating influence from theft. One example is particularly illuminating. In 2002, Nicolas Ghesquière, head designer of couture house Balenciaga, produced an embroidered patchwork vest for its spring collection. Not long after it hit the market and the fashion magazines, the fashion Web site Hintmag.com revealed it to be a stitch-by-stitch replica of a design created in the 1970s by a then-young, somewhat obscure Chinese American designer in San Francisco, Kaisik Wong. The vest originally was produced in 1973, and was photographed and included in the 1974 book *Native Funk and Flash*. Mr. Ghesquière claims that at the time he produced the vest he was not familiar with Kaisik Wong or his designs, and he has said in interviews he thought the original vest that influenced him was from a theatrical costume.[10] When Balenciaga produced the imitation, Mr. Wong had been dead for more than a decade, minimizing the risk of exposure or legal action against the company.

Ghesquière is one of the few designers ever to be criticized for copying, and perhaps was singled out only because he failed to state the source of the original design. "Giving credit where credit is due" is one of the unwritten maxims of the fashion world. By not crediting the source of his design, Mr. Ghesquière risked the scrutiny of the fashion community; suddenly his talent — and therefore his livelihood — was called into question. While this sole misstep has not hurt his career in the long run, the murmurs of doubt

1. Jonathan Taplin, former tour manager for Bob Dylan and The Band, moderates a session on music ownership.

2. Brian Burton aka Danger Mouse answers tough questions about his illegal mash-up, the Grey *Album*.

3. Singer-songwriter Sam Phillips brings up her conflicts over unauthorized use of music samples, but ultimately asks Danger Mouse to "please mash me."

about his credibility unquestionably served as a warning against repeat offenses — as well as a warning against theft to the fashion community as a whole. As Cameron Silver, fashion expert and owner of high-end vintage store *Decades* cautions, "The incident doesn't die. When Ghesquière passes away, his obituary will mention two things: the bag [he designed] and the Kaisik scandal."[11]

This example underscores the subtle yet effective way in which the fashion community regulates the industry through social mores, codes and conventions, in contrast to the dense copyright protection and brute legal force that characterize the music industry. This difference is not simply a matter of preference or predilection; as we will discuss later, there also are structural features specific to fashion that regulate copying. These include the pace of innovation (which generally renders legal actions moot); the fairly fixed number of garment genres and styles (which virtually requires that copying be allowed lest a genre or style be monopolized); and the philosophical refusal of copyright law to protect functional items.

But is this a meaningful comparison? Are there significant similarities between the creative communities and social forces that drive fashion and music? If so, what accounts for the drastically different industries that have emerged to enable and profit from them? Why is it that, despite its stringent approach to intellectual property, sales of music in America dropped by 6 percent in 2003, while fashion sales in the U.S. grew by 5.4 percent?[12] And, given the pace of technological change and the ever accelerating cycles of innovation and obsolescence, is there any lesson the music industry can learn from fashion's success in balancing creative demands against market forces? These are the questions we aim to address in the following pages.

MUSIC AND SOCIETY

Music is so deeply entrenched in our lives that we tend to take it for granted. It is an intrinsic part of our environment, either as the focal experience (i.e., listening to a CD, going to a concert), as background noise (i.e., waiting rooms, parties) or as an enhancement to visual information (i.e., movie soundtracks). Music is so common in these contexts that its absence can be disturbing. People in silent waiting rooms often can be heard humming to themselves or tapping their feet to compensate for the quiet. Similarly, a movie devoid of music, such as Alfred Hitchcock's classic 1963 thriller, *The Birds*, can be far more unsettling than one with a normal soundtrack.

Music's ubiquity can be traced to two defining features: its invisibility and its power. All sound is, of course, invisible by definition. It vibrates at a different range of frequencies, and acts upon different sensory organs than visible information. Its technical invisibility also gives it a social invisibility. This is especially true in our ocularcentric culture, which prizes the eyes over the ears.[13] We devote so much of our attention to what we see that we rarely think about what we hear. Thus, music becomes a kind of stealth agent, influencing our thoughts and feelings while it hides in plain "sight."

This stealth would be meaningless, however, without

the power that it helps to obscure. The power of music has been extolled, debated and exploited at least since the beginning of written history. In *The Odyssey*, Circe warns Ulysses of the dangers of the music of the Sirens:

> If any one unwarily draws in too close and hears the singing of the Sirens, his wife and children will never welcome him home again, for they sit in a green field and warble him to death with the sweetness of their song.[14]

Today, music's power is still in abundant evidence, from the tens of billions of dollars Americans spend on CDs each year to the focal role music plays in social and political change, such as the civil rights movement. This power can be traced to three spheres of human life in which music exerts a phenomenal degree of influence: cognitive, social and commercial.

Recent research has established that music is a vital factor in the cognitive development of children, and even may have played a central role in the evolution of the human mind.[15] This finding is no doubt evident to readers in their own lives. From the traditional "Alphabet Song" to the current craze for Baby Einstein products, music has been linked inextricably with the process of imparting knowledge and values to children from infancy onward.

Similarly, researchers have identified numerous ways in which music both produces and reflects social structures. Attali writes that "all music, any organization of sounds is … a tool for the creation or consolidation of a community."[16] Music serves less grandiose social purposes as well. Media research has identified scores of different "uses and gratifications" for people's interaction with music, ranging from social lubrication to political message dissemination to personal mood management.[17]

Finally, music has become a commercial entity — a development we will examine at length in this paper. For now, suffice it to say that music is both a product in itself (when distributed via CDs, radio or downloads, for instance) and an essential component of our commercial system (in the form of advertising jingles, theme songs, etc.).

FASHION AND SOCIETY

While music derives much of its power from its invisibility, fashion is one of the most visible markers we have in contemporary society to express affiliation, lifestyle choice and identity. Yet paradoxically, its utter ubiquity also affords it a status — similar to that of music — beyond questioning or criticism. We may make decisions about what clothes to buy, or what shoes to wear, or cattily dismiss someone's choice of apparel, but few of us ever stop to wonder why fashion exists, why it changes so rapidly or what those changes mean about our society.

Consequently fashion, like music, enjoys a social power that far exceeds its apparent role in our lives. A hat is never just a hat, and we rarely wear one simply to guard against the cold. Arguably fashion is *by definition* the symbolic coding of social power through apparently innocuous means such as shape, texture or color. This is evident in the breadth and scope of its social functions. It has been used as an index of social rank in Victorian England, and as a gauge of social mobility in 20th century America. It has been used to express ideological conformity and allegiance, as in the case of the Mao Suit, and social unrest or nonconformity, as in the case of the 1960s Flower Power movement. Throughout time, fashion has been used to communicate a dizzying array of social signifiers, such as class, gender, occupation, regional identity and religion.[18] The brilliance of fashion is that, for the system to work, all people have to do is wake up in the morning and get dressed.

Although fashion may seem innocuous and simple on an individual level, religions, governments and other large organizations long have seen the value of fashion as a form of social control, dictating uniforms and dress codes, and prescribing and proscribing everything from shoes to hats to underwear. In the Middle Ages in England, for example, livery — uniform clothing or the badge or cloak color of the lord's family — was heavily regulated. If a person took a nobleman's livery, he became his servant and owed him loyalty and other required services. A liveried servant also shared his nobleman's identity to a certain extent, granting him legal privileges he would not have enjoyed otherwise.

Similarly, during Elizabethan times, Sumptuary laws restricting lavish dress were passed in order to maintain the boundaries between the nobility and the rising bourgeoisie. Elizabethan lawmakers feared that "letting anyone wear just anything must lead inexorably to moral decline. If you couldn't tell a milkmaid from a countess at a glance, the very fabric of society might unravel."[19]

Fashion, like music, was redefined by the advent of modern capitalism. In contemporary society, fashion serves as a commercial entity, driven by the same forces of manufactured demand and planned obsolescence that characterizes everything from movies to breakfast cereals to presidential candidates. This commodification of fashion historically has interacted with America's social mobility and class competition, in effect producing an almost feverish obsession with fashion among many Americans, particularly women.

In the last few decades, as more traditional notions of social class have given way to increasing fragmentation based on cultural interest, consumers have had greater freedom to construct their social identities based on other parameters, such as participation in certain fashion-related lifestyles. Leather-clad dominatrix, polo-wearing Connecticut preppie and So-Cal surfer all are accessible identities to anyone with a credit card. To paraphrase *Hamlet*'s Polonius, "the clothes make the man." This change, from class identification to lifestyle articulation, suggests that fashion offers a greater level of individual agency today than in earlier eras. In contemporary culture, "consumption is conceptualized as a form of role-playing, as consumers seek to project conceptions of identity that are continually evolving."[20]

Thus, both music and fashion act as social stealth agents, regulating and reflecting cultural roles and expectations while eluding scrutiny through their ubiquity. Music's stealth is aided by its literal invisibility, while fashion functions in spite of, and because of, its hypervisibility. In contemporary society, both music and fashion generally are regarded in primarily capitalistic terms. Songs and apparel are conceived of as products, and most people relate to them as consumers. However, both music and fashion originate within creative communities, which are built on a different kind of relationship: that between an artist and a work.

MUSICAL COMMUNITY AND COMMONS

Most everyone can agree that, as Leonard B. Meyer puts it, "music has meaning and … this meaning is somehow communicated to both participants and listeners."[21] In other words, music, like all activities that come under the rubric of "art," is a fundamentally communicative and therefore social act.

As Meyer observes, music can be addressed to two kinds of audiences: "participants" and "listeners." Although this distinction may seem intuitively obvious, there is an immense gray area between these two extremes. Dancers, people clapping in time to the beat or musicians playing along with recordings all are difficult to categorize according to this dichotomy.

There are social, political and economic reasons for the existence of these two opposing roles. As Attali argues, the distinction of musicians as a separate category of individual originally served to strengthen and legitimize hierarchical social and political structure during Europe's feudal era.[22] Later, of course, the musician-listener dichotomy would come to echo and reinforce the producer-consumer relationship that drives the capitalist system. As we will argue later in the paper, we believe this distinction has ceased to be useful (if it ever was), and actively is preventing our society from allowing music to progress in the current era.

As a social phenomenon, music takes place within communities. From the collective worship of a church choir to the performance of the national anthem at a baseball game to a freestyle competition at a hip-hop club, music often serves to define and unite a group of people with one another and with other groups of people. Like fashion, it is an essential element in social identity, both a bonding ritual and a kind of aesthetic shorthand for categories ranging from age to ethnicity to sexual orientation.

But if music occurs within communities, it is also rooted within Community. Music is an ever evolving language, the lexicon and grammar of which constantly are being updated and negotiated by musicians around the world. This ongoing dialogue constitutes a community that transcends the boundaries of region, style and even period. Practicing musicians, for instance, tend to have knowledge of and expertise in a range of styles far broader than the ones they

"Every generation laughs at the old fashions, but follows religiously the new." — *Henry David Thoreau*

typically perform.[53] Thus, music can have meaning or power only in the context of other music. Put another way, music dwells in the differences between sounds, not in the sounds themselves.

If difference is the mark of music, then innovation is the engine that drives it. Difference can only exist by dint of innovation. Despite the resistance of some academics, critics and other purists to change, and attempts to confine music within known parameters,[54] it is amply clear that one of the characteristics all music shares — from the traditional songs of Tuva[55] to the most synthetic products of the American pop market — is an ever changing nature, fueled by the mechanisms of reinvention, reinterpretation and recombination. As music sociologist Hugo de Jager writes, "The sum total of available elements in a society (which is called its 'cultural base') influences the number — and perhaps the kind — of innovations a composer living in that society can make."[56]

Thus one may argue that innovation springs from collective access to the creative commons in music, as in other creative communities.[57] This means that all musicians may draw on a common set of ideas and materials, and that each new composition or performance instantly joins that commons as soon as it becomes publicly available, by whatever means.

In some cases, this is a subtle and sweeping process that sets the rules for all who follow, as when J.S. Bach redefined Western harmony, or when Charlie Parker revolutionized improvisation in American music. In other instances, the process can be more visible and less widely influential, as when one musician reinterprets or samples another's work. Either way, every musician is engaged in an ongoing dialogue with all other musicians, past, present and future. This truth has been acknowledged frequently by musicians themselves. As jazz saxophonist John Coltrane once said, "It's a big reservoir, man, that we all dip out of."[58] Similarly, musicians ranging from Hungarian classical composer Zoltán Kodály to world-famous Pakistani Qawwali singer Nusrat Fateh Ali Khan to American jazz drummer Buddy Rich all have been quoted independently as saying: "Music belongs to everybody."

FASHION COMMUNITY AND COMMONS

As with music, fashion encompasses a large gray area between the extremes of consumers and producers. This gray area, in which creative thinkers draw upon an ever growing and constantly circulating pool of common memes, is arguably the source of new ideas and trends within the fashion industry. Sociological literature on innovation describes it as an interactive process, dependent upon cumulative knowledge and the capacity for interchange between individuals, institutions and organizations. Academic research on fashion echoes this definition. As Vincent B. Leitch writes, "innovation in fashion is less a matter of creativity ex nihilo than of mutation and pastiche."[59] In fashion today, innovation continues to thrive as its central practices — foresight, flexibility and cooperation — flourish in a fairly open and unfettered creative commons.

While fashion, like music, is a global community — fragmented, multifaceted and highly stratified — it also is tied to an industry that reaps the benefits of agglomeration economies, or the types of spatial concentration that create advantageous economic conditions, resulting in sustained or increased concentration.[61] Thus, Paris has remained a central node in the global fashion economy, along with New York and Milan, and London, Tokyo and Los Angeles serve as a second tier. Designers tend to live and work in one or more of these cities, as do buyers and merchandisers, and design schools such as Parsons School of Design in New York and Central Saint Martins College in London are located in these fashion centers. Of course, the actual production of most clothing, with the exception of haute couture or signature collections, is outsourced to the third world, mainly to Asian countries.

The career of most designers is a peripatetic one, moving between companies every few years. Fashion design, like entertainment, depends more and more on blockbusters. One bad collection can sink a design team. As Richard Wheeler, an accessories designer at Ann Taylor, commented, "Teams don't stay in place for more than a few years. If there is a bad season, it's always seen as the designer's fault. You fire the designer and hire a new team."[62] This approach helps to create a community that is fairly fluid, with talent, ideas, individuals and aesthetics constantly recirculating within a relatively limited sphere.

Both music and fashion owe their existence to globalized creative communities, which thrive on the continual circulation of ideas and mining of the creative commons. Unlike technological or industrial development, in which new objects and ideas may be discovered (e.g., Neptune, penicillin) or invented (e.g., airplanes, zip codes), both music and fashion rely on innovation — the reshuffling of known elements into unique and surprising patterns — for creative advancement.

Thus, in order to innovate effectively, musicians and fashion designers *must* operate within environments that grant them access to ideas and the permission to use them in new and creative ways. Neither community exists in a vacuum. Both function within highly structured industries that have emerged over the years to enable and exploit the fruits of creative endeavor. These industries have a constraining effect on the creative communities by continually pitting the financial, legal and structural imperatives of their own continuance against the needs of the artists themselves. Often, this means restricting access to the creative commons. In order to understand how market forces came to exert such control over music and fashion, it is useful to examine the histories of these industries.

MUSIC INDUSTRY HISTORY

The history of the music industry is, arguably, one of increasing institutional control, narrowing access to the means of production and distribution, and a widening gap between music's social origins and its commercial role.

In early traditional societies that lacked the capacity to turn music into a static object, either through the printed score or through recording technologies, music was synonymous with live performance. This living music was, by and large, integrated into the fabric of life and shared among the community in a way people in our society scarcely can understand. As Attali writes of music in the Middle Ages, "The circulation of music was neither elitist nor monopolistic

of creativity … music in daily life was inseparable from lived time, in which it was active and not something to be watched."[33] Similarly, music historian Eileen Southern writes that "for every activity in the life of the individual or the community there was an appropriate music; it was an integral part of life from the hour of birth to beyond the grave" in West Africa during the slave trade years of the 17th through the 19th centuries.[34]

Despite the vital role music played for members of traditional society, there was often what amounted to a class of professional musicians — composed of individuals assuming inherited positions — whose job was to serve not only as entertainers but also as traveling cultural historians, news distributors and political propagandists. The griots of West Africa, jongleurs and troubadours of Western Europe and bards of Ireland all fit this description. These professional musicians became more and more estranged from society, however, as centralized political and religious powers arose and put a stop to their itinerancy. In Europe during the 16th century, Attali writes, "musicians became professionals bound to a single master." The feudal courts "banished the jongleurs, the voice of the people, and no longer listened to anything but scored music performed by salaried musicians."[35] This officially sanctioned professionalization was the beginning of a long process by which powerful interests gradually would remove music from the public sphere and control its distribution for religious purposes or political or financial gain.

The next major development along these lines was the creation of the printing press, and with it, the idea of copyright. This concept has been a double-edged sword for musicians and musical culture since its inception. Although it provided an opportunity for composers to achieve both cultural renown and financial compensation for their work, it also is evident that "in the beginning, the purpose of copyright was not to defend artists' rights but rather to serve as a tool of capitalism in its fight against feudalism."[36] In other words, the benefit accruing to musicians was incidental to the primary aim of establishing a financial system based on the control of creative expression. Media scholar Siva Vaidhyanathan reminds us this set-up is still very much in place since "copyright issues are now more about large corporations limiting access to and use of their products, and less about lonely songwriters snapping their pencil tips under the glare of bare bulbs."[37] As we will discuss, this function of copyright is especially problematic when it comes into conflict with the mechanism at the heart of any creative community, namely the free flow of ideas.

With the development of the printed score, music became a commodity that could be bartered for cash, akin to food or clothing. This commodification was reflected in performed music as well, with the development of concert halls and ticket sales. Music was removed from its function at the heart of everyday life and placed on a shelf, or behind a proscenium, where only those who were willing and able to pay could access it. Meanwhile, the music of the streets atrophied, as new musical traditions rooted in professional expertise and requiring the use of expensive equipment overwhelmed the old aesthetics.

With the advent of sound recording at the end of the 19th century and radio broadcasting at the beginning of the 20th century, the encapsulation of music within a capitalist framework was completed. A new class of organizations, such as record labels and radio networks, emerged to monopolize the channels of distribution between musical performers and their audiences, now two separate social categories. New and more elaborate conceptions of intellectual property emerged to protect the interests of these organizations, and new financial structures based on the economies of mass production emerged to support them.

These developments affected people's relationship to music. One effect of the emerging mass market music economy was that the cost of manufacturing products was eclipsed by the cost of manufacturing demand.[38] Today, the majority of expenditures by record labels are related to marketing and promotion, rather than production and distribution. Music sellers now spend billions of dollars each year attempting to persuade customers to purchase something they used to manufacture freely for themselves and for one another. Ironically, music becomes even more peripheral through this process, as songs essentially are sales jingles advertising the discs on which they are recorded. Similarly, live performances primarily have become showcases for recorded music, an inversion of their original relationship.[39]

This situation reflects another, larger inversion at the center of musical culture today. If the music industry originally developed as an ancillary to musical community, today the community serves as an ancillary to the industry.

FASHION INDUSTRY HISTORY

For centuries, clothing design and production were under the purview of mostly anonymous dressmakers and seamstresses, and were not yet dictated by the proclamations of famous, individual designers. In the 18th and 19th centuries in the U.S. and Europe, clothes had not only symbolic influence but also economic currency. For many working-class families, clothing comprised a significant percentage of their material worth. In France, a suit purchased at the time of a young working-class man's marriage literally was expected to last a lifetime, and worn to church, weddings and funerals. In England, clothing was somewhat limited to the working classes, and low income families formed clubs to save enough money to purchase clothes.[40]

Until the 18th century, fashion was the province of the upper class, and production was done by hand. Advances in technology and industrial manufacturing in mid-18th century Europe engendered the rise of the textile and apparel industries. The industrial revolution also meant a rising standard of living for the working and middle classes, suddenly allowing them to buy much less expensive, mass-produced versions of Parisian haute couture.

At the end of the 19th century, with the advent of mass production, clothes became even cheaper and more accessible to the working classes. As a result, clothing and fashion first became democratized, and, as Diane Crane argues, this evolution was most evident in the United States because of its fluid social structure. By the early 20th century in America, consumers were buying haute couture copies in the recently founded department stores and retail catalogs. Some were sold as approved "reproductions" of European designs but the majority consisted of unauthorized knockoffs.

Despite France's dominance in the decorative arts (e.g., furniture, porcelain and silver), it was Charles Frederick Worth, an Englishman living in Paris in the mid-19th century, who first established the concept of the fashion designer as an autonomous artist. Worth founded his *maison couture*, the House of Worth, a name that simultaneously established the centrality of the designer to fashion and conferred brand-name status on the designer himself.

Succeeding Worth at the forefront of fashion design was Paul Poiret, who not only waged war against the corset but also established what is now thought of as haute couture. In the 20th century, many of today's most famous and most expensive brands were established, including Chanel, Balenciaga and Dior. As with Worth and Poiret, these brands almost were inseparable from the designers, who often expanded beyond haute couture into other artistic disciplines and entertainment endeavors. For example, Coco Chanel often dabbled in costume design. She designed the costumes for Jean Cocteau's 1924 operette-danse, *Le Train bleu*, and again for Gloria Swanson in the 1931 film *Tonight or Never*. She also collaborated with Jean Renoir in 1938, designing the costumes for *La Marseillaise*.

Thus, like music, fashion design is an aesthetic practice taking place within artistic communities. However, unlike most music, fashion must meet the added requirement of functionality.[41]

Over the past century, fashion has undergone a transformation in everything but name. The history of the fashion industry in the U.S., in contrast to that of music, reflects a continuing resistance to oligopolistic control and strict intellectual property controls. While there is a widening gap between music's social origins and its commercial role, in fashion the two coexist in relative peace.

For many decades, haute couture dictated fashion trends as designers, on high, came down from the proverbial mountain twice a year to dictate to their upper-class customers, decreeing the height of their hemlines, the silhouette of their shoulders, and the appropriateness — or not — of pleats. Design houses usually were owned by their designers, clothes were still produced by craftspeople domestically and the fashion community was fairly small, centered in Paris. Thus, while styles changed from season to season, the fundamental structure of the business remained stable.

By the 1960s, haute couture's stranglehold on fashion was beginning to weaken. Hollywood films, television, rock music, youth culture, the woman's movement and revolutionary politics all served to destabilize the top-down fashion paradigm, with trends generated by consumers (particularly the younger ones) rather than the large couture houses. The further democratization of fashion could be seen in the establishment of numerous casual wear companies such as the Gap (1969), Ann Taylor (1954) and J. Crew (1983). Such changes in the fashion industry were precipitated by the underlying cultural, political and social shifts following World War II. American consumers, finally

liberated from the shackles of the Great Depression and infused with a sense of self-sufficiency and national pride, adopted a far more active role. They no longer were content simply to accept the dictates of Paris, Milan and New York. Consumers were usurping the autonomy of producers, and the relationship between the two has been complex and tenuous ever since.

If these changes reflected social evolution, they also were enabled by legal developments. During the 1940s in the United States, several crucial legal decisions established the validity and value of knockoffs, sampling and reappropriation in the fashion industry in the name of healthy competition. For instance, in 1940 the *Millinery Creators' Guild v. FTC* decision determined that piracy in fashion triggers a downward force on pricing, making it a socially desirable form of competition. Similarly, a year later, the judge in *Cheney Bros. v. Doris Silk Corp.* rejected a request to prohibit design piracy on the grounds that such a prohibition would grant a de facto monopoly to designers, who formally are denied patent and copyright protection. Thus, the fashion industry consistently and intentionally has been denied the legal protections afforded to other design industries, in order to maintain a healthy creative ecosystem and the continuing availability of diverse, inexpensive products to the American consumer base.

The changes in the fashion industry during the mid-to-late 20th century contributed to a creative climate in which designers influence and draw influence from one another. Fashion is a chaotic if highly stratified industry, and the directional flow of aesthetics is now top-down, bottom-up and side-to-side. Ideas flow in every direction, so any attempt to pinpoint the creative forebears of any given garment (unless it is an *exact* copy) is an exercise in frustration and futility.

The advent of the modern media system in the 20th century also had an enormous impact on dictating fashion. Cultural icons such as musicians, actors, celebrities, royalty and political figures came to influence trends. Today, newspapers, magazines and Web sites report daily on what Beyoncé, Cameron Diaz and the Bush Twins are wearing. The role of media and entertainment as mediators between designers and consumers, in the form of the myriad magazines, TV shows and even films about fashion, cannot be understated. While the aesthetic inflection points between celebrity and fashion are beyond the scope of this article, suffice it to say that the constant flood of entertainment-focused media has turned celebrities (and their stylists) into the new authorities on fashion trends.

Thus, the music and fashion industries evolved quite differently, despite their similar origins. The music industry grew to exert ever more rigid and consolidated control over musical expression, to such a degree that the creative needs of musicians and music listeners have taken a back seat to the financial needs of the marketplace. The fashion industry, however, has evolved with a healthier balance between creative and economic demands, offering consumers and aspiring designers a greater degree of control and agency than they enjoyed a century ago. These divergent paths have produced significantly different legal, economic and organizational structures, which we will now examine.

LEGAL STRUCTURES

The legal structure of both the music and fashion industries is contingent upon the notion of intellectual property, which Vaidhyanathan refers to as "the murkiest and least understood aspect of American life and commerce."[43] By this, he means that intellectual property laws are complex, difficult to police and enforce, always changing, and often out of step with the latest trends in technology and culture.

Despite their nebulous quality, one thing is clear and consistent about the collection of rights, privileges and practices commonly grouped together under the heading of intellectual property law: They all were founded on the premise that democratic society and creative cultures thrive on the free flow of ideas, and that remunerating people for sharing their ideas is the best way to keep them flowing. This notion can be found in the origins of traditional forms of intellectual property, such as copyrights, patents and trademarks, as well as newer alternative models such as GNU and creative commons licenses.

Copyrights give "authors" the exclusive power to control a "work" fixed in a tangible medium. The tangibility is important: Copyrights protect the expression of an idea, rather than the idea itself. In practice, this generally means a

Copyright changes historically have lagged

significantly behind technological innovations.

person or company possesses the rights to copy, perform or sell a book, song, software program or some other creative work. American copyright law is based on a constitutional mandate that Congress give creators an incentive to create, for the good of society. Consequently, copyrights always have had built-in limitations, such as a fixed expiration term and specified "fair use" exclusions for journalists, educators, critics and other contributors to the public sphere. However, such restrictions have been scaled down significantly over the years, as media and software companies have lobbied successfully Congress to push back expiration terms,[44] limit fair use in new legislation, and include a growing range of categories as "works" that can be protected under copyright.[45]

Copyright traditionally has been the principal form of intellectual property law applied in the American music industry. This application has broadened considerably over the years. Printed material, such as scores, was covered first in 1790. Public performances were not covered until 1889. Mechanical reproduction, a right currently applied to songs on CDs, first was introduced in 1909 to cover piano rolls. In 1972, nearly a century after the invention of recorded sound, a new kind of copyright was developed to describe the performances (rather than the compositions) captured on records. Television broadcasts and jukebox playback first were added in 1976.[46] Today, all of these copyrights and more commonly are used in the music industry, creating a dense web of overlapping and interweaving protections that constantly is tested and renegotiated through legislation, litigation and contractual bickering.

As this brief overview demonstrates, copyright changes historically have lagged significantly behind technological innovations. As the pace of technological change continues to accelerate, it is becoming more difficult to apply existing copyright laws in a meaningful way. This is a problem we will address further in the next section of the paper.

In the fashion industry, copyright typically has been denied to apparel design, due to the idea that apparel consists of solely useful articles. Useful articles, under the Copyright Act of 1976, have only limited protection — there must be elements of a "pictorial, graphic, or sculptural work that may be identified separately and can exist independently of the utilitarian aspects of the article." Little has changed since the act was passed, despite the 1977 claim by former Register of Copyrights Barbara Ringer that design protection was "one of the most significant and pressing items of unfinished business" of copyright revision.[47]

Unlike in other industries, which are increasingly oligopolistic, the denial of copyright protection in fashion effectively has prevented monopolistic or oligopolistic control. Legislators and judges consistently have concluded that the public interest would be served best by denying copyright protection to designers, in effect promoting the free exchange of fashion ideas among a broad community of participants.

Like copyrights, patents were developed at the behest of Congress in order to spur creativity by granting a degree of control and remuneration to creators. Patents, known as the "law of invention," generally apply to ideas or processes. Unlike copyrights, patents cover both an idea and its execution, and their terms are not extended to a functional infinity; currently patent terms last for 20 years. The three standards generally required to obtain a patent are usefulness, novelty and nonobviousness. As a consequence of these features, patents have found little use in the music industry outside of recording technologies and business practices.

Patents play a limited role in the fashion business, as well. Besides the three general patent standards, fashion law has added supplemental criteria. According to a historic court ruling on the subject, "the conception of the design must require some exceptional talent beyond the range of

the ordinary designer familiar with the prior art."[50] In other words, innovation isn't enough — invention ex nihilo is the bottom line.

Apparel designs consistently have failed to meet these requirements, for obvious reasons. However, there are other good reasons for the paucity of patents in fashion. It commonly is believed that even if patent law were modified to accommodate the unique needs of the fashion industry, the lengthy patent approval process would render its protection useless. Patent protection is most useful for articles and inventions that are used repeatedly and have a long shelf life. Fashion, with its abbreviated time spans and ephemeral nature, would have to rely on protection retroactively. The cycles of production and distribution, accelerated in the fashion industry, make litigation over IP infringement ineffectual and unwieldy. Thus, there has not been an aggressive push within the U.S. by apparel designers or manufacturers for more rigorous patent protection.[51]

Trademarks, which protect the commercial reputation or "goodwill" of a company or creator, play less of an immediate role in ensuring innovation and market diversity. Yet an argument can be made that it is easier for companies to market and sell a unique product with a unique brand attached to it. Trademarks, which are protected for infinitely renewable 10-year terms, generally are used within the music industry only to protect label names and unique artist names. However, they play a far more central role in the fashion industry.

According to current trademark law, marks or brands that are descriptive, such as a designer's name, must gain a "secondary meaning" in order to qualify for registration. Thus, designers who intend to trademark their name, such as Calvin Klein or Donna Karan, must prove they've established a reputation in the marketplace — one in which their name has achieved a separate, qualitative significance. Obviously, a great deal of money must be spent to establish a brand that is distinct and recognizable, so it is no surprise that companies guard their trademarks aggressively.

Trademark law, while protecting designers from the unauthorized use of their registered marks (usually their labels), does not extend to the actual design of a garment itself. Thus, it is legal for a manufacturer to make an exact reproduction of another company's apparel design "without suffering any repercussions under trademark law."[52] To combat this standard, designers have sought protection under claims of unfair competition. If a designer can demonstrate the sale of a reproduction is likely to confuse the public, she may be afforded greater protection. This point is especially salient for design houses that consistently use their trademarks in their fabric patterns, such as Chanel, Gucci and Louis Vuitton, and therefore have a better chance of proving an unfair competition claim. However, the majority of fashion companies would not benefit from such litigation, given the seasonal and ephemeral nature of fashion, which makes pursuing such claims burdensome.

As technology has advanced in recent years — producing new creative products such as computer software and variations on older creative products such as recorded music and video — patents, trademarks and copyrights no longer represent a flexible and robust enough framework for control over intellectual property. The all-or-nothing approach embodied by traditional intellectual property law, which assumes a strict dichotomy between producers and consumers, lacks the capacity to cope with the vast and expanding gray area between the two roles.

Consequently, a variety of new models have been put forward to strike a better balance between the needs of creators, the public and the industries that connect them. For example, the GNU project was launched in 1984 in order to encourage information sharing and innovation among the software community.[53] Participating software developers use a "copyleft" instead of a copyright to designate their work. In the words of GNU founder, Richard Stallman, the idea of copyleft is:

> [W]e give everyone permission to run the program, copy the program, modify the program, and distribute modified versions — but not permission to add restrictions of their own. Thus, the crucial freedoms that define "free software" are guaranteed to everyone who has a copy; they become inalienable rights.[54]

Creative Commons, launched in 2001, aims to apply the same kinds of freedoms to a broader range of creative works.[55] The organization offers creators the ability to assign four conditions to their works that offer more freedom than traditional copyright but more control than a work ceded to the public domain. An "attribution" condition allows others to copy, distribute or perform a work as long as the original creator is given credit. A "noncommercial" condition allows others to copy, distribute or perform a work for free. Under this condition, commercial users need to pay a negotiated fee. A "no derivative works" condition allows others to copy, distribute or perform a work, as long as it appears (or sounds) exactly like the original. Under this condition, derivative works like samples or collages can be produced only with the original creator's permission. A "share alike" condition allows others to distribute their own derivative works only under a license identical to the one that governs the original work. Millions of works have been released under Creative Commons licenses to date, including works by thousands of musicians, including the Beastie Boys, the Talking Heads and Gilberto Gil.

ORGANIZATIONAL AND ECONOMIC STRUCTURES

Like its legal structure, the music industry's organizational and economic structures are a somewhat hodgepodge result of historical changes in technology, power struggles and market forces. The industry can be seen as an ongoing response to a single challenge: How can music be channeled from performers to consumers in a profitable way? The financial component of this challenge traditionally has conflicted with, and generally trumped, the creative component. In other words, the music business has been most focused on maximizing revenues, rather than maximizing exposure for musicians, for example, or increasing access to music for consumers.

Despite the music industry's emphasis on profit at the expense of musical community, musicians typically do not receive much of the money spent by consumers on their music. According to entertainment law attorney and author Chris Taylor,[56] the breakdown of revenue distribution from a typical CD sold at $19.95 is as follows:

- Record label: $6.17
- Retailer: $5.95
- Manufacturing: $1.00
- Distribution: $4.39[57]
- Producer(s): $0.44
- Songwriter(s): $0.69
- Artist: $1.31

Thus, the creative progenitors of a record — the performing artists and composers — are entitled to only a combined 10 percent of the total money spent on their music by consumers.

While these numbers are an accurate average, they sadly overestimate the true revenue potential for most recording artists under the major label system. This is because a few artists sell extremely well, while most others sell extremely poorly. Of the 35,000 albums released in 2002 by the recording industry, fewer than 5,000 sold over 1,000 units.[58] According to the Recording Industry Association of America (RIAA) fewer than 10 percent of albums released ever recoup record label expenditures,[59] meaning that 90 percent of recording artists never see any royalty checks beyond their initial advances. Many recording artists are debited tens of thousands of dollars for each month their albums are completed after their contractual deadlines. Also, under certain circumstances, some major labels require their artists to repay recording costs if their projects are canceled.[60] Stacking the cards even further against musicians is the fact that many expenditures — from the producers' royalties to promotional expenses to the cost of creating a music video — are deducted routinely from the artists' royalties, rather than from the record labels' piece of the pie.[61]

How can the power balance between musicians and the music industry be so one-sided? Don't record labels need musicians at least as much as musicians need them? In a broad sense, the answer is yes. However, the balance of power is tipped by the vast number of musicians hoping to make a living through their music, and the relatively small number of firms providing opportunities for them to do so.

Every major conduit between musicians and music listeners in America currently is dominated by an oligopoly. The recording industry, radio, music television, concert venues and music retail each are controlled by a handful of

companies commanding the lion's share of audience and revenues. This trend only is accelerating with time. While six "major" record labels accounted for roughly 85 percent of American record sales a decade ago, today there are only four.[62] Radio giant Clear Channel, taking advantage of a 1996 law that exponentially multiplied the maximum number of radio stations one company could run, currently owns approximately 1,200 stations throughout the United States, including stations in 89 of the top 100 markets.[63] General merchandiser Wal-Mart, which operates over 3,000 stores in the U.S., is responsible for selling approximately one-fifth of all CDs sold in this country each year.

The massive consolidation in the music industry is compounded by a degree of vertical integration. All of the major record labels are part of larger corporate organizations that own music publishers, CD manufacturing plants, electronics manufacturers, distribution companies and other vital elements of the music supply chain. In addition to its radio-station holdings, Clear Channel owns SFX, the largest chain of live event venues in the country. Viacom, another media conglomerate, owns Infinity Radio (with 185 stations) as well as MTV, Vh1 and BET — creating a near monopoly on cable television music programming. With such entrenched economic and organizational structures commanding a firm grip on the means of production and distribution, it is easy to see why the needs of the music community come as a distant second to the needs of the industry.

The global fashion industry accounts for $495 billion in the international trade of textiles and apparel.[64] Like the music industry, it has endured some consolidation as competitive pressures have forced manufacturers and retailers to seek economies of scale. This is especially true in the case of high-end, luxury manufacturers such as LVMH, Gucci and Richemonde, all of which have experienced rapid consolidation in the past decade. The fashion retail sector also has seen a great deal of recent merger and acquisition activity as companies aim to diversify their portfolios. As a result there are some unlikely pairings, such as the 2004 acquisition of high-end retailer Barneys by mass consumer brand Jones Apparel for $400 million. Manufacturers also are starting to integrate vertically, citing better profit margins. Thus, apparel brands as diverse as Elie Tahari, Juicy Couture and Oscar de la Renta have started to experiment with retailing.[65]

However, in contrast to the music industry and despite these developments, the apparel industry still is fairly distributed and diverse, and remains horizontally structured, with the continued separate manufacture of textiles and the manufacture of clothing. There is no such thing as a "typical" fashion enterprise — the sector consists of a broad spectrum of companies in apparel, textile and accessories ranging from the high-end couture houses to mass-produced, low-priced commodity goods.[66]

The supply chain in the fashion industry also is somewhat complicated, with multiple layers and organizational inefficiencies. In the transformation from design and product development to raw material to fabric to the apparel manufacturer to wholesale distributors and finally to retailers, there are multiple points for conflict and redundancy, often causing problems for manufacturers and retailers, such as the overstocking and understocking of items. As a result, the response to market needs traditionally has been somewhat slow.

There is not a single standard supply chain for the fashion industry. Manufacturing and distribution methods vary depending on the type of product. For example, haute couture designers such as Chanel or Yves Saint Laurent choose the fabric and design of their collections, which then are produced in relatively small quantities in their own workshops. Distribution also is limited and controlled, usually through the designer's own retail outlets or small, independent fashion boutiques.

In contrast, for more common mass brands, as well as the bridge lines[67] from designers, the design and manufacture processes are more industrial and prices tend to be much lower. Distribution takes place through high-end specialty chains and some department stores. Basic commodity apparel tends to be designed, produced and marketed for a mass audience through distributors such as general retail chains like Wal-Mart, lower-end department stores like JC Penney and specialty chains like the Gap.

In an effort to be more competitive and responsive to consumer desires, vertically integrated specialty chains, such as H&M and Zara, recently have emerged. The concept

— sometimes called "fast fashion" (an allusion to both the standardized supply chain and a degree of disposability akin to fast food) — was developed in Europe to boost consumption while hedging against uncertain consumer demand. The goal is to produce short-cycle fashion products as quickly as possible in relatively small quantities. The products are often trendy and typically aimed at teenagers and young women, although this demographic may change with the recent success of Karl Lagerfeld's collection for H&M.

The critical component of fast fashion is the ability to identify and track apparel trends quickly and marry this knowledge to the supply chain, producing new products in an abbreviated time frame. Zara's headquarters in Spain house its designers, factories and distribution center all in one space. Thus the company is able to respond to consumer demand immediately, turning over its inventory in a matter of weeks rather than months. As a result, the Zara shopper drops into the store an average of 17 times a year, resulting in added sales.[68] Digital technologies, just-in-time manufacturing techniques and vertical integration of the supply chain all are vital to the success of fast fashion.

In summary, despite the fundamental similarities between the creative communities at the heart of music and fashion, the two industries have evolved very differently, producing radically divergent legal, financial and organizational structures. Music has become a highly speculative industry, depending upon a fraction of its products to generate the vast majority of its revenues and all of its profit margin. Consequently, it has had to reduce risk through massive corporate consolidation, limited product diversity and a broadening array of intellectual property controls. In contrast, fashion, with a lower cost of doing business and a shorter lag time between conception and execution than music,[69] benefits from the diversity of products engendered by a decentralized industry. Additionally, the industry largely eschews the costly and cumbersome apparatus of intellectual property litigation in favor of a reputation-based system to ensure "fair play."[70]

Yet many of the most ingrained aspects of the music and fashion industries exist as a result of the technological and economic realities that shaped them. As we have mentioned, one of the most-used copyrights in music still is referred to as a "mechanical," although the mechanical piano, for which it was named, waned in popularity nearly a century ago. With continued technological and social advancement, will these industries have an opportunity, or even a mandate, to undergo fundamental structural changes? In order to answer this question, we must examine the ways in which forces like digital technology and globalization are influencing music and fashion today.

MUSIC IN THE DIGITAL AGE

Digital technologies have had a monumental impact on music culture and the music industry. Indeed, the advances made over the last 10 years are perhaps the most revolutionary of any since the advent of recorded sound more than a century ago. The primary change is the fact that, for the first time in history, music can be produced, distributed and consumed all on the same platform — the personal computer. Within the digital universe composed of PCs, the Internet, mobile phones, MP3 players, CD burners and other related technologies, music has become almost completely free and unfettered, a species of pure information that can be audited, edited and redistributed with the click of a button. This fact challenges nearly all of the assumptions previously held about music as a creative community, a commercial product or a system of institutions.

The digital music revolution has had a profound effect on the way music as an art form is conceived and created. All musical expression is composed of a unique sequence of fundamental sound elements, much as a sentence is a unique sequence of words. Typically, the sound elements define the limits of musical expression, while the sequence is the locus of innovation. For the last 400 years, nearly all music in Western society has been based on a set of elements called the tempered chromatic scale — the notes described by the keys on a piano. Until recent decades, every song in every style — from Bach's fugues to Miles Davis' extended improvisations — relied upon new reconfigurations of this now-ancient musical lexicon.

Today, the musical lexicon has broadened far beyond the limits of the piano keyboard to encompass the universe of recorded sound. Audio samples have augmented and replaced musical notes as the new building blocks for compo-

sition and improvisation, astoundingly expanding music's aesthetic horizons. To be sure, this advancement preceded digital technology by a few decades. Academic musicians like John Cage and Alvin Lucier, as well as pioneering dub reggae and hip-hop producers such as Lee "Scratch" Perry, DJ Kool Herc and Grandmaster Flash, used analog recording technology to paint sound pictures with samples. However, until the advent of digital music, these were fairly arcane practices, requiring a degree of interest and expertise beyond the scope of more traditional instruments.

Today the tools of audio sequencing and remixing are as accessible as the keys of a piano or the strings of a guitar. With minimal effort, any PC owner can use free and intuitive software to make new music entirely from pieces of other music and sound. This fact has changed the shape and practices of the creative community. As we argued earlier, there always has been a significant gray area between the opposing roles of producer and consumer. However, the limitations of pre-digital music technology reinforced this distinction, defining producers as those with the instruments and recording studios, and consumers as those with discs in their hands and electronic devices with which to listen to them. The digital age has brought about a collision of production and consumption technologies and the liberation of music from physical products. These developments have in turn enabled a consequent collision between the roles of producer and consumer, and the liberation of the musical community from the strictures of these roles.

We don't mean to suggest that digital technologies have returned us magically to a pre-feudal communitarian state in which everyone was a musician. Clearly this is not the case. On the whole, the changes have been more subtle. For many music fans, digital technology simply means greater access to a larger library of music, and more control over how to listen to it. However, the power of digital technologies enables "creative consumption," in which consumers apply aesthetic skill and discretion to such activities as constructing the perfect playlist or recommending music to other fans.

For many musicians, digital technology paves the way to improve the sound of their traditional instruments in the recording studio and to lower the cost of the recording process. And for everyone involved in music, the bottom line is the same — digital technology allows more people to have more access to more music, and more power over it. In other words, it has created a vaster, exponentially richer music commons.

These changes also represent a challenge to the traditional ways in which the music industry has conducted business. When recorded music was attached to physical objects like CDs and cassettes, it possessed two qualities that economists refer to as rivalry (meaning only one person or group can use one resource at a time) and excludability (meaning that a person or group can be prevented from accessing a resource). According to standard economic theory, resources that are both rival and excludable fall under the category of "private goods," best treated as property and exploited through the market system. However, when music was decoupled from physical delivery mechanisms, it ceased to be either rival or excludable, recategorizing it as a "public good." Public goods notoriously are difficult to profit from via traditional market practices; rather, they tend to be managed by governmental or non-profit entities.[71]

It is easy to understand how the traditional music economy suddenly has been rendered obsolete. The best strategy the music industry can follow if it hopes to continue profiting from the distribution of music somehow is to tie its newly non-rival, non-excludable goods to other rival and excludable goods or services. This is no doubt the rationale behind the music industry's well-advised recent support for new distribution models like online music subscriptions and its increased enthusiasm for licensing popular songs to video games and other entertainment product categories.[72]

The industry's loss of physical control over the distribution and use of music has had other significant effects as well. One major development is a renewed focus on intellectual property as a blunt but powerful instrument of legal control, which has become most visible – and possibly most absurd — in the prosecution of music consumers who share files over the Internet. At the time of this writing, nearly 7,000 individuals had been targeted by the RIAA for participating in peer-to-peer communities,[73] one of the most prominent manifestations of the new digital music commons.

Audio samples have replaced musical notes as the new building blocks for composition and improvisation.

Ironically, as intellectual property has played an increasingly central role in the music industry's control apparatus, copyright law also has become increasingly difficult to apply to music. Remember that copyright only protects the expression of ideas, rather than the ideas themselves. As Vaidhyanathan argues, the digitization and networking of music undermines this central "idea/expression dichotomy,"[74] raising questions about what protections legitimately can be enforced.

There also has been an erosion of the concept of a copyrighted "work." Copyright originally was conceived as a way to protect entire compositions or scores. Even with the advent of the sound recording copyright in 1972, the law commonly was applied to complete songs or albums. With the rise of sampling as a compositional technique in recent decades, the American legal system has struggled to maintain a clear sense of where public goods end and distinctive property begins.

Two recent court decisions demonstrate the lack of resolution of these issues. In September 2004, a federal appeals court judge ruled that a song by N.W.A.,[75] which included an unlicensed two-second sample of Funkadelic's "Get Off Your Ass and Jam," violated the sound recording copyright. This ruling overturned a lower court decision that had argued the sample was so short it didn't constitute theft.[76] However, in November 2004, another federal appeals court judge addressing a different suit supported the argument that a six-second sample of a James Newton song by the Beastie Boys was "not sufficient to sustain a claim for infringement" of a composition copyright.[77]

How can it be that the two-second sample violates copyright while the six-second sample does not? Theoretically, the distinction exists because one case is based on the sound recording copyright, while the other is based on the composition copyright. But does it make any sense for a fragment of a recording to constitute infringement, while a fragment of a composition does not? This inconsistency perfectly demonstrates the difficulty (perhaps the impossibility) of applying laws based on an analog universe to the new digital reality. As scholars such as Vaidhyanathan and Lawrence Lessig have argued, this ambiguity actually may work to the benefit of the music industry and to the detriment of musical culture. The threat to traditional business practices provides a convenient rationale for corporations that thrive on intellectual property protections to push for ever tighter controls over the use of creative material — essentially shrinking the size and scope of the commons.

FASHION IN THE DIGITAL AGE

If digital technology defines the current era for music, globalization defines it for fashion. The growing web of communications networks bringing the world closer together radically has redefined the ways in which fashion designers interact, trends spread throughout the world and the fashion industry organizes itself.

The impact of digital technologies has been far less earth-shattering on the fashion industry than on the music industry, as digital advancements drastically have eroded the music's economic and organization structures. Digital technologies have made the distribution of fashion design images instantaneous, and broadened their reach. They also have helped accelerate the production and distribution cycles for lower-priced, trendy, commodity goods, as evidenced in the discussion of H&M and Zara. However, unlike music, which now is divorced from any physical product, apparel and accessories have not entered fully into the virtual realm (thankfully, we've heeded our childhood morality tales of emperors and their clothes). Certainly, some avant-garde designers and computer engineers are attempting to fuse apparel and consumer technology, but these experiments still are relegated to the margins, more at home in museums and universities than on the street.

Thus, while music has been transformed from a tangible product into a digital one, fashion remains a utilitarian, physical good. Technology may accelerate fashion's business processes, produce new ways of cutting patterns or develop a more breathable alternative to polyester, but it doesn't divorce the expression of the design from the design itself. Fashion is tactile and physical, necessarily rival and excludable, an indelible fact of its creation that separates it from music.

Technology also creates a living archive of design, ideas and styles in the microscopic chronicling of the fashion

industry by the media. It creates the opportunity for broader "sampling," as seen in the rapid production of Academy Awards dress knockoffs, but it is also a valuable tool for the social regulation of "theft," as described in the case of Nicolas Ghesquière at Balenciaga. As one journalist notes:

> Designers have always looked to the past for inspiration; most famously, Christian Dior based his landmark New Look collection on memories of his mother, but in those days the past was not so minutely archived by the media and he could pass the belle époque off as his own.[78]

The major change caused by digital technologies in fashion today is its globalization, which has drastically increased the already high tempo of the fashion world — accelerating production and consumption, and shortening the shelf life of trends. However, digital technologies also have a paradoxically inverse effect — sustaining the long-term shelf life of products and designs that may have disappeared much more quickly into fashion's fickle ether. Also thanks to new technologies and communications networks, the traditional dichotomy between consumer and producer, already fragile in America since the 1960s, has deteriorated even further. Fashion consumers, like music fans, have become much more adept at creative consumption, mixing high and low to create new street trends. Fashion consumers today think nothing of combining a Chanel jacket with Levi's jeans, Converse sneakers and a Hermès Birkin bag. Similarly, music fans increasingly are likely to combine several songs and albums into larger playlists, often played in "shuffle" mode,[79] creating a controlled chaos in which R&B, opera and Celtic jigs may rub shoulders, producing unexpected and often aesthetically gratifying results.

Clothing at one time served the exclusive purpose of shielding people from the elements — keeping us warm in colder climates, protecting us from the sun in tropical climates. With our current control over our physical environment — thanks to air-conditioning, indoor heating and commuting — our exposure to the elements is greatly reduced. As a result, traditional designs originally produced to protect their wearers, like those with socially denotative functions from other cultures, can be appropriated in new reconfigurations, detached from their original meaning or intent. Globalization, with its ever expanding circulation of images, defines this practice. Suddenly, images of apparel, both traditional and new, high end and low, are available effortlessly and instantaneously. The fashion industry and community borrow freely from this global circulation of images, remixing and reconfiguring them in a persistent and expanding commons.

CONCLUSION

Music and fashion, two creative communities that share much in common, have evolved over time to produce drastically different industries. Both communities thrive on innovation and change, spurred by the mechanisms of reconfiguration, reinterpretation and reappropriation. Both are sustained by an ever growing commons, a living archive of all that has come before. Yet music suffers from a fundamental schism separating many of the needs of the creative community and consumers from the needs of the industry that enables and exploits it. Fashion, by contrast, has succeeded in brokering a working balance between aesthetic and financial mandates.

The causes for music's malaise can be traced to the industry's economic foundations and are compounded by the changes wrought through new digital technologies. An exceedingly high cost of doing business, low success rate and disproportionate balance between the cost of producing demand and supply all have conspired to make the industry risk-averse.[80] The industry currently operates through concentrated ownership structures, vertically integrated business organizations and fiercely protective attitudes toward intellectual property rights. In an age when new technologies have lowered the costs of production and distribution while decoupling musical expression from any physical media, the industry must re-evaluate its most deeply held practices and assumptions or face almost certain dissolution.

Fashion provides a tantalizing example of what the music industry could be under different circumstances. In the absence of thick copyright protection, the dividing line between influence and theft is maintained through a social apparatus of shame and an aesthetic tradition of transparency. Meanwhile, with historically lower barriers to entry, the fashion industry has proven resistant thus far to corporate consolidation on the scale of the music industry.

In order to avert a catastrophic turn of events, the music industry would do well to heed some of the fashion industry's basic creative, organizational and legal tenets.

Given its present imperative to reassess its core principles, what, if anything, can music learn from fashion? The answers have ramifications far beyond the scope of the music industry, if, as some suggest, music represents the proverbial canary in the coalmine for similar industries ranging from film to television to computer software.[81]

During the 1990s, many hoped the efficiencies of digital distribution would provide an opportunity for new and innovative companies to pose a significant challenge to the established record labels. However, these dreams were dashed by the growing expense of marketing and promotion in the face of new communications channels and the resolute inflexibility of a music industry wary of change. In the subsequent years, the only large-scale solution the music industry has sought for its social, economic and organization problems has been the increasingly stringent interpretation and enforcement of intellectual property rights.

Clearly, this policy cannot continue without dire consequences. At some point, the aggressive controls the music industry seeks over the behaviors of both musicians and listeners will stifle aesthetic innovation (or force it entirely underground), and alienate its own consumer base. In order to avert such a catastrophic turn of events, the music industry would do well to heed some of the fashion industry's basic creative, organizational and legal tenets. Specifically, the industry could adopt thinner copyright protections, vertically disintegrate, and work with the creative community to inculcate a culture of transparency and accountability. In an environment tailored to innovation and change, rather than enforced inertia, perhaps products and services could emerge that would appeal to consumers despite the non-rival, non-excludable nature of digital music.

To be sure, the music industry already has made some intelligent moves in this direction. Labels and publishers recently have increased their efforts to license recorded music to movies, television, video games and other secondary media channels, effectively shifting a larger portion of their revenues from a business-to-consumer model to a more reliable business-to-business model. Additionally, after years of institutional resistance to new consumer-oriented business models, the major labels recently have exhibited enthusiasm for digital music services, following the unexpected consumer success of Apple's iTunes Music Store. While it is a move in the right direction, this was a reactive, rather than a proactive change. A major structural reorganization and consumer education marketing campaign would have to be undertaken before digital music subscriptions and other service-based alternatives to traditional music products can achieve dominance in this industry.

Unfortunately, the music industry is unlikely to undergo such major structural change until it is forced. Vested interests tend to entrench themselves even as the ground they stand on turns to quicksand. A more likely future for the music industry is increasing antagonism between sellers and buyers, and increasing homogeneity in the music market, until the entire system breaks under the strain. If and when this finally comes to pass, the musical community may have an unprecedented opportunity to start over from scratch, building a new industry on the ashes of the old. Fashion provides a promising, if imperfect, blueprint for the job. ✦

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Marissa Gluck is a Principal in Radar Research, providing marketing insights and consulting services to the media, entertainment and technology industries. Prior to co-founding Radar, she was the Senior Analyst at Jupiter Research in the advertising and marketing practices, covering advertising technologies, email marketing, agencies and media buying. In addition to conceiving and producing studies focused on online marketing and revenue strategies, she led strategy sessions with senior executives from clients such as Interpublic, Doubleclick and CBS. Before joining Jupiter, Gluck was the research and emerging technologies specialist at online advertising agency i-traffic, producing strategic analysis of potential client partnerships and integrated sponsorships for clients such as Eddie Bauer, HSN and Disney. Frequently quoted in publications such as *The Wall Street Journal*, *The New York Times* and *Ad Age*, Gluck has appeared on CNN, CBS and NPR, among other media outlets. She earned two master's degrees in global communication from the London School of Economics and the University of Southern California, and received a B.A. in art history at SUNY-Binghamton.

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Aram Sinnreich is a writer, speaker and analyst covering the media and entertainment industries, with a special focus on music. Named "Innovator and Influencer" by *InformationWeek*, Sinnreich frequently is quoted in publications such as *The New York Times*, *Forbes*, *Billboard* and *The Wall Street Journal*, and has appeared on *ABC World News Tonight*, *The CBS Early Show with Bryant Gumbel*, CNN, CNBC, BBC Radio and Fuji TV. He presented prize-winning research at the annual conference of the National Communication Association in Chicago and at the 32nd Research Conference on Communication, Information and Internet Policy (www.tprc.org/TPRC04/2004.htm) in Arlington, Virginia. Sinnreich has served as an expert witness in court cases including *Metro-Goldwyn-Mayer Studios, Inc., et al. v. Grokster, Ltd., et al.* (now before the U.S. Supreme Court) and *RealNetworks, Inc. v. MLB Advanced Media, L.P.* He has written about music and the media industry for publications including *The New York Times*, *Billboard* and *Wired*, as well as the academic journal *American Quarterly*. As a Senior Analyst at Jupiter Research in New York (1997-2002), he produced research reports covering the online music and media industries, and provided hands-on strategic consulting to companies ranging from Time Warner to Microsoft to Heineken. Sinnreich writes and performs music as bassist for groups including ska-punk band Agent 99 and dancehall reggae queen Ari Up, and as co-founder of NYC soul group Brave New Girl, jazz band MK4, and Los Angeles dub-and-bass band Dubistry (www.dubistry.com). Two songs he composed for Brave New Girl were licensed to MTV's animated series *Daria*. Sinnreich earned a B.A. in English at Wesleyan University and received an M.S. in journalism at Columbia University. He is currently a doctoral fellow and lecturer at the USC Annenberg School for Communication. ✦

ENDNOTES

[1] Much of the information on DJ Z-Trip's relationship with Hollywood Records was relayed personally by current *Billboard* journalist Bill Werde, who at the time of publication was in the process of reporting and writing about the story for *Rolling Stone*.
[2] Mash-up artist Osymyso, for instance, has produced a popular track called "Intro-inspection" that incorporates samples from 101 separate songs.
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Brilliant color and draping from an earlier era translate into modern elegance.

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[11] Lucy Green, *How Popular Musicians Learn* (Burlington, VT: Ashgate, 2002).
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[51] "Clear Channel Radio Fact Sheet," published on Clear Channel Web site, undated. Retrieved online Nov. 15, 2004. [www.clearchannel.com/fact_sheets/radio_factsheet.pdf]
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[55] Bridge lines are the lower-priced, higher sales-volume (and generally more profitable) lines by higher-end designers. Some examples of popular bridge lines include Ralph Lauren's Polo, Donna Karan's DKNY and Calvin Klein's CK.
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[57] The music industry's longer lag time compared to fashion is due to its disproportionate investment in the production of demand (i.e., marketing and promotion) and its lack of seasonal and cyclical deadlines, rather than any complexity regarding production or design processes.
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[69] Historically, the low file size and high consumption rate of songs have interacted with the Internet's limited bandwidth so that cutting-edge music applications (such as peer-to-peer file sharing) have predated similar applications for larger, less wieldy media.

Event
HISTORY

Norman Lear playfully takes a turn on the catwalk at the "Ready to Share" conference.

Overview

On January 29, 2005, the Norman Lear Center held a landmark event on fashion and the ownership of creativity. "Ready to Share: Fashion & the Ownership of Creativity" explored the fashion industry's enthusiastic embrace of sampling, appropriation and borrowed inspiration, core components of every creative process. Presented by the Lear Center's Creativity, Commerce & Culture project, funded in part by a generous gift from the Center for the Public Domain and sponsored by The Fashion Institute of Design & Merchandising/FIDM, this groundbreaking conference featured provocative trend forecasts, sleek fashion shows and an eclectic mix of experts from fashion, music, TV and film. Discussion sessions covered fashion and creativity, intellectual property law, fashion and entertainment and the future of sharing.

DVD

Highlights from the event are featured in the DVD included in this book. The DVD contains event footage and commentary from leaders in fashion, entertainment and academia, including John Seely Brown, Danger Mouse, Tom Ford, Michael Patrick King, Norman Lear, David Wolfe and more.
Host: Rick Karr.

MORE INFORMATION

Video, photos and transcripts from the "Ready to Share" event, as well as full project details, are available at: www.readytoshare.org.

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PROGRAM

Welcome
Martin Kaplan

Keynote — Ready to Share, Ready to Wear, Ready or Not!
Introduction: Martin Kaplan, David Bollier
Keynote: David Wolfe

The fashion world is predicated on creating "originals." And yet, virtually all of the mega-millions generated by the industry are the result of a ripple-out effect, which is acknowledged and even encouraged, sometimes formally and legalized, sometimes not. How did this creative model begin? How does it work today? An insider's view into a fragile ecosystem that balances creative and commercial interests, presented by David Wolfe, the most quoted authority in the world of fashion.

Session I — The Ecology of Creativity in Fashion
Introduction: Norman Lear
Moderator: Laurie Racine
Participants: Tom Ford, Guy Trebay

While fashion is surely about individual talent and inspiration, it is also a collaborative enterprise that takes place within fashion houses, among designers and across generations. Designer Tom Ford and cultural commentator Guy Trebay engage in a conversation about the distinctive role of homage, open appropriation and creative transformation in fashion.

Session II — Handing Down the Song: Music, Ownership & the Creative Process
Moderator: Jonathan Taplin
Participants: T Bone Burnett, Danger Mouse, Richard Nichols, Sam Phillips, Rani Singh

This session asks leaders in the music industry to explain how creative traditions are shared and sustained in an industry that's trying to lock down ownership of creative content. Panelists discuss how musical innovation circulates and comment on the conflicting attitudes toward sampling, ownership of creative work and new models of compensation for creators.

Presentation — Fashioning the Future From the Past
Introduction: Barbara Bundy
Participants: Kevan Hall, Kevin Jones, L.A. Models

The glorious glamour of Kevan Hall's Spring 2005 collection harkens to the 1930s, 1940s and early 1950s, and recalls looks favored by his muse, Millicent Rogers, fashion icon and Standard Oil heiress, as well as the hand-tinted palette of Cecil Beaton, famed British portrait photographer. In a live fashion show, Hall's celebrated creations are joined on stage by period garments that inspired them, culled from the FIDM Museum collection. Curator Kevin Jones and the designer focus on how historical research inspires new style directions.

Session III — The Business of Creativity
Moderator: Martin Kaplan
Participants: Cate Adair, Ted Cohen, Michael Patrick King, Norman Lear, Booth Moore, Sheryl Lee Ralph

Known for succeeding by breaking the rules, Norman Lear and Michael Patrick King discuss creative risk-taking in the entertainment industry and King's use of fashion in *Sex and the City*. Following this conversation, a panel of four veterans of the entertainment and fashion industries respond, addressing practical obstacles and opportunities for implementing innovative visions in fashion, film, music and television.

Presentation — Chanel or Fauxnel? The Chanel Jacket ... Unraveled
Introduction: Barbara Bundy
Participants: Cameron Silver, Norman Lear, L.A. Models

Vintage expert Cameron Silver takes us on a guided tour through the hall-of-mirrors history of a fashion icon: the Chanel jacket. Reflected in just about every fashion season since its inception, the Chanel jacket long ago crossed the line from couture into ready-to-wear and has become a staple of many well-respected collections as well as discount knockoff lines.

With models in original Chanel and knockoff interpretations, Silver reviews the history of the design, its unique place in the fashion lexicon and Chanel's perspective on what it perceives as the abuse of the brand.

Session IV — The Future of Sharing: Content and Creativity in the Digital Age
Moderator: Rick Karr
Participants: John Seely Brown, Ted Cohen, Jonathan Taplin, Siva Vaidhyanathan, David Wolfe

Fashion has built a rich tradition around the appropriation and sharing of creativity, a dynamic that has enabled it to evolve constantly and rapidly while remaining globally competitive. A great many new digital media appear to incorporate this perspective by facilitating and celebrating the creative reuse of existing works. In this concluding panel, leaders in academia, industry and the arts discuss the implications of emulating the fashion model — exploring how and why other industries and innovators might adopt or reject fashion's modus operandi — and speculate on the future of different creative sectors and how ownership and compensation models may change.

Presentation — Out on Top: The T-shirt, From Fashion Essential to Revolutionary Icon
Introduction: Barbara Bundy
Participant: Rose Apodaca

It might still serve us as a comfortable basic, but the T-shirt's storied evolution as a statement and staple of emancipation, creativity, commerce and fashion makes it the single most important article of clothing in our collective closets. T-shirts serve as banners of rebellion and uniforms of inclusiveness. They have been interpreted, altered and morphed in more ways than anyone can count — and they continue to be reinvented in ways that can comment on, complement and even shape the culture.

Closing
Martin Kaplan, David Bollier

Highlights and photos

1. Lear Center Senior Fellow Laurie Racine

2. Actress Sheryl Lee Ralph and *Desperate Housewives* costume designer Cate Adair

3. Designer Tom Ford and *New York Times* fashion reporter Guy Trebay

4. Tom Ford

5. Lear Center Director Martin Kaplan and Senior Fellow David Bollier

6. The Roots producer Richard Nichols

7. Keynote speaker and trend guru David Wolfe

8. Journalist Rick Karr

9. EMI Music's Ted Cohen and *Los Angeles Times* Fashion Critic Booth Moore

10. FIDM VP of Education Barbara Bundy

11. Media technology scholars John Seely Brown and Siva Vaidhyanathan with David Wolfe

12. Vintage clothier Cameron Silver

13. Norman Lear

As part of his keynote — "Ready to Share, Ready to Wear, Ready or Not!" — America's foremost fashion trend forecaster David Wolfe announced the demise of youth-oriented celebrity culture and the rise of "deluxe minimalism," which he predicted will appeal to well-to-do baby boomers.

During an investigation of "The Ecology of Creativity," designer Tom Ford said he was flattered by knockoffs of his work — although Gucci, where he served as creative director, was not so pleased — as he discussed his creative process and his own practice of homage. Timely predictions came from *The New York Times'* Guy Trebay, who anticipates a rise in limited editions from the premiere fashion houses that are struggling against piracy.

Discussing "Handing Down the Song: Music, Ownership & the Creative Process," archivist Rani Singh provided background on the free-form sharing of folk music, as renowned producer T Bone Burnett railed against the outdated practices of the music industry. The Roots producer Richard Nichols maintained that sampling is here to stay while mash-ups may be a passing trend. In an ironic twist, Danger Mouse, the creative force behind the illegal mash-up of Jay-Z's *Black Album* and The Beatles' *White Album*, admitted his initial anxiety about the release of the *Grey Video*, an illegal mash-up of Jay-Z footage and Beatles footage, set to Danger Mouse's mix. Impressed by the *Grey Album*, Grammy-nominated singer-songwriter Sam Phillips asked Danger Mouse to "please mash me!"

In "Fashioning the Future From the Past," FIDM Museum Curator Kevin Jones led famed Los Angeles designer Kevan Hall in a live fashion showcase of his glamorous Spring 2005 collection, accented on stage by period garments that inspired him, which were culled from the FIDM Museum archives.

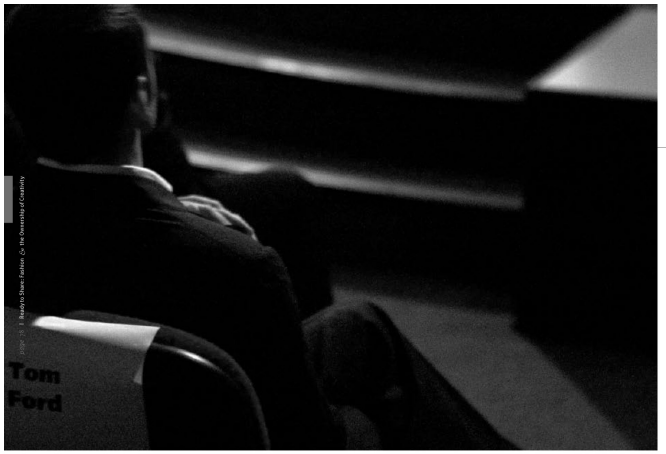
Television innovator Norman Lear discussed some of the riskier creative choices he made in his legendary career, such as allowing Archie Bunker to sing "God Bless America" without legal clearance, and writer-producer Michael Patrick King explained how fashion — and Manolo Blahnik shoes, in particular — became a leading character in *Sex and the City*. The two continued their conversation on "The Business of Creativity," joined by *Desperate Housewives* costume designer Cate Adair, EMI Music's Ted Cohen, *Los Angeles Times* Fashion Critic Booth Moore, and Tony-winning actress and director Sheryl Lee Ralph; the group shared a revealing talk on the fashion-entertainment nexus.

Vintage clothier Cameron Silver, named one of *TIME* magazine's "25 Most Influential Names and Faces in Fashion," produced a unique live fashion show presentation on the evolution of the Chanel jacket and its many imitators. In "Chanel or Fauxnel? A Legendary Jacket ... Unraveled," Silver ultimately challenged the audience — and notably, host Norman Lear, who took a turn on the catwalk — to differentiate the knockoffs from the originals.

In "The Future of Sharing: Content and Creativity in the Digital Age," former Xerox PARC director John Seely Brown considered the correspondence between creativity in fashion and digital entertainment, and the dissonance between new creative technologies and historic copyright norms. USC Annenberg professor Jonathan Taplin argued for the establishment of reasonable "mechanical" licenses to pay for the use or sampling of pre-existent creative works, and David Wolfe noted the impact of technology on fashion's already fast-paced world. In the digital environment, the only thing worse than being sampled, concluded NYU's Siva Vaidhyanathan, paraphrasing Oscar Wilde, "is not being sampled."

Women's Wear Daily's West Coast Bureau Chief Rose Apodaca toured the evolution of the tee from wooly undergarment to couture fashion statement. In "Out on Top: The T-shirt, From Fashion Essential to Revolutionary Icon," Apodaca spotlighted the ubiquity of cotton T-shirts and their incredible markup, particularly for vintage rock tees, noting that she had to plunk down a $15,000 deposit for the assortment of vintage T-shirts she showcased during the segment, some of which can be found "at the Salvation Army."

Following the event, guests attended a grand reception celebrating the opening of the 13th annual Art of Motion Picture Costume Design Exhibition at FIDM, featuring costumes from the 2005 Academy Award-nominated films for Best Costume Design.



Tom Ford, seated at the Ready to Share event.

Participant biographies

CATE ADAIR

Catherine Adair was born in England, spent her primary education in Switzerland, and then returned to the U.K. where she earned her degree in set and costume design from the University of Nottingham. After a series of apprenticeships in the London theater, Adair immigrated to the United States where she initially worked as a costume designer in East Coast theater productions. Her credits there include The Kennedy Center, Washington Ballet, Onley Theater Company, The Studio and Wolf Trap. Adair moved to Los Angeles, joined the West Coast Costume Designers Guild and started her film and television career. Her credits include *The 70s* mini-series for NBC; *The District* for CBS; the teen film *I Know What You Did Last Summer* and Dreamworks' *Win a Date with Tad Hamilton*. Currently Adair is the costume designer for the ABC hit series *Desperate Housewives*.

Cate Adair

ROSE APODACA

The West Coast Bureau Chief for *Women's Wear Daily* (*WWD*) and a contributor to *W*, Rose Apodaca covers the fashion and beauty industries, and reports on Hollywood and the culture at large. Apodaca has been instrumental in the many events and projects tied to *WWD* and the fashion business in Los Angeles, including the establishment of LA Fashion Week, and is active in the Hollywood nightlife revival as a partner in Vine, Beauty Bar and Star Shoes. Before joining Fairchild Publications in June 2000, Apodaca covered fashion and popular and counter culture for over a decade for the *Los Angeles Times*, *USA Today*, *Sportswear International*, *Detour*, *Paper* and others. As Fashion Editor at *ASR* (*Action Sports Retailer*), she developed the annual Top 10 list, naming the most innovative brands in the action sports market. The Southern California lifer has created and taught college courses on street style. A lowbrow and contemporary art fan, she serves as an advisory board member at the Grand Central Art Center in Santa Ana.

Rose Apodaca

DAVID BOLLIER

David Bollier is a senior fellow at the Norman Lear Center and co-founder of Public Knowledge, an advocacy group dedicated to defending the commons of the Internet, science and culture. Since 1984, he has been a collaborator with television and film producer Norman Lear on a wide variety of projects. Bollier also works as an independent strategist and journalist specializing in issues of progressive public policy, digital media and democratic culture. Bollier's recent work has focused on developing a new vocabulary for reclaiming "the commons." The commons refers to the diverse array of publicly owned assets, gift-economies and natural systems that are available to everyone as a civic or human right. Bollier's critique of the commons is set forth in his 2002 book, *Silent Theft: The Private Plunder of Our Common Wealth* (Routledge), and in a number of essays and reports. He has developed the notion of the information commons as a new paradigm for understanding the public interest in the digital, networked environment. His latest book related to the subject is *Brand Name Bullies: The Quest to Own and Control Culture* (Wiley, 2004). Educated at Amherst College (B.A.) and Yale Law School (M.S.L.), Bollier lives in Amherst, Massachusetts.

David Bollier

Barbara Bundy

BARBARA BUNDY

Barbara Bundy is Vice President of Education of The Fashion Institute of Design & Merchandising/FIDM. She is responsible for the administration of all educational programs, the Resource and Research Center, Career Development Center and all student-servicing departments on the college's four campuses — Los Angeles, San Francisco, Orange County and San Diego. She also serves on the four-member Board of Administration that oversees all college activities; is a member of the FIDM Scholarship Foundation Board; and is a Board Member of the FIDM Museum Foundation, which houses a collection of over 10,000 costumes, accessories and rare textiles. Additionally, Bundy developed and co-chairs an Advanced Study Program in International Manufacturing and Product Development, which prepares students to enter the global community of manufacturing and product development. She has been a speaker for the college and the fashion and apparel industry at international events in Mexico, Russia, Italy, France, Japan, Hong Kong and Korea. Bundy joined FIDM in 1978 as Executive Director of Education, following a career in retail buying and management. She began her career at Bullock's Wilshire and Robinson's Department stores, now a division of May Department stores. Bundy is active in numerous professional and civic organizations. She serves on the Boards of Directors of the Junior League of Los Angeles, Costume Council of LACMA (Los Angeles County Museum of Art) and Junior Philharmonic Committee. She was a member of the Advisory Board for the Los Angeles Unified School District's Fashion Magnate High School and she served on the Mayor's Fashion Promotion Advisory Committee under Mayor Bradley. A fourth-generation Californian, Bundy attended UCLA and received her degree in business administration from Mount St. Mary's College.

John Seely Brown

JOHN SEELY BROWN

John Seely Brown is a visiting scholar at University of Southern California and previously was the Chief Scientist of Xerox Corporation and the director of its Palo Alto Research Center (PARC) — a position he held for nearly two decades. While head of PARC, Brown expanded the role of corporate research to include such topics as organizational learning, complex adaptive systems, ethnographic studies of the workscape, and MEMS and NANO technologies. He was a co-founder of the Institute for Research on Learning (IRL). His personal research interests include the management of radical innovation, digital culture, ubiquitous computing and organizational and individual learning. Brown — or, as he is often called, JSB — is a member of the National Academy of Education and a Fellow of the American Association for Artificial Intelligence and of AAAS, and a Trustee of Brown University and the MacArthur Foundation. He serves on numerous public boards of directors (Amazon, Corning, Polycom, Varian Medical Systems) and on various private boards. He has published over 100 papers in scientific journals and was awarded the *Harvard Business Review's* 1991 McKinsey Award for his article, "Research That Reinvents the Corporation," and again in 2002 for his article, "Your Next IT Strategy." In 1997, he published the book *Seeing Differently: Insights on Innovation*. He was an executive producer for the film *Art • Lunch • Internet • Dinner*, which won a bronze medal at Worldfest 1994, the Charleston International Film Festival. With Paul Duguid, he co-authored the acclaimed book *The Social Life of Information* (HBS Press, 2000) that has been translated into nine languages, with a second edition in April 2002. And with John Hagel, he has written *The Only Sustainable Edge: Why Business Strategy Depends on Productive Friction and Dynamic Specialization* (HBS Press, 2005). JSB received a B.A. from Brown University in 1962 in mathematics and physics and a Ph.D. from University of Michigan in 1970 in computer and communication sciences.

T Bone Burnett

T BONE BURNETT

Born Joseph Henry Burnett in St. Louis, Missouri, T Bone Burnett grew up in Fort Worth, Texas, where he first made records in 1965, producing Texas Blues, country, and rock and roll bands. In the early-1970s, he relocated to Los Angeles, where he still lives and works as a producer and recording artist. In 1975, he toured with Bob Dylan's Rolling Thunder Review before forming his own group, the Alpha Band, with others from the tour. Burnett returned to recording solo in the late-1970s and has gone on to record numerous critically acclaimed albums under his own name. In the last five years, he has written music for two Sam Shepard plays — *Tooth of Crime (Second Dance)* and *The Late Henry Moss* — and composed music for a production of Bertolt Brecht's *Mother Courage and Her Children* by Chicago's Steppenwolf Theatre Company. In 2000 Burnett produced the soundtrack for *O Brother, Where Art Thou?* The album sold multimillions and won multiple Grammys, including Album of the Year and Producer of the Year for Burnett. With Academy Award-winning filmmakers Joel and Ethan Coen, he formed DMZ Records, a joint venture with Columbia Records, and produced the label's inaugural releases: a new album by the legendary bluegrass musician Ralph Stanley and the *Divine Secrets of the Ya-Ya Sisterhood* soundtrack. He was nominated for an Academy Award in 2004 as co-writer, along with Elvis Costello, of "The Scarlet Tide" from the Civil War epic film *Cold Mountain*. Burnett served as Executive Music Producer for the film and produced its soundtrack album. The *Cold Mountain* soundtrack, released on DMZ Records, earned Burnett and composer Gabriel Yared a British Academy of Film and Television Arts (BAFTA) award for achievement in film music in February 2004. The *Cold Mountain* soundtrack also spawned a second Academy Award-nominated song, "You Will Be My Ain True Love," which was written by Sting and produced by Burnett. The *Cold Mountain* soundtrack garnered six Grammy nominations, including Best Compilation Soundtrack and Best Song Written For A Motion Picture, Television Or Other Visual Media for "The Scarlet Tide." Burnett also was nominated for Producer of The Year. A prolific and versatile producer, Burnett has produced highly successful recordings for Sam Phillips, Elvis Costello, Roy Orbison, Counting Crows, The Wallflowers, Tony Bennett, k.d. lang and Gillian Welch, among others. He most recently produced the soundtrack to the Coen Brothers' film *The Ladykillers*, as well as the critically acclaimed debut from one of music's new buzz bands, Autolux.

Ted Cohen

TED COHEN

Senior Vice President of Digital Development & Distribution for EMI Music Ted Cohen oversees worldwide digital business development for this "big five" record company, which includes the Capitol, Virgin, Angel/Blue Note, Parlophone and Chrysalis labels. Under Cohen's guidance, EMI has led the industry with its initiatives in new technologies and new business models. In addition to seeking out, evaluating and executing business opportunities for the company, Cohen serves as a strategist and key decision-maker for EMI's global new media and anti-piracy efforts. He has worked to establish company-wide digital policies, which have provided EMI's artists and labels a substantial advantage in the digital music arena. Cohen co-founded and served as chairman of the groundbreaking Webnoize conferences. He currently chairs MidemNet, an international music-technology conference convened in Cannes each year. Cohen also serves on the Board of Directors for the Neil Bogart Memorial Fund, co-chairs the new media arm of the T.J. Martell Foundation and lends his time to the Grammy In The Schools program.

Danger Mouse

DANGER MOUSE

In 2004, artist-producer Danger Mouse was named a *GQ* Man of the Year; called "Eccentric Genius of the Year" by *SPIN*; hailed as "The Hottest Hip-Hop Producer in the World" by *NME*; honored with Album of the Year by *Entertainment Weekly*; and added to *Q Magazine*'s list of the "Industry's 100 Most Influential People." Danger Mouse, AKA Brian Burton, gained his instant notoriety after producing the *Grey Album*, a unique hybrid of The Beatles' *White Album* and Jay-Z's *Black Album*. The infamous album forever raised the bar on hip-hop experimentalism and was dubbed a "bootleg masterpiece" by *GQ*. With one million downloads in just one week and an ensuing battle between major record companies, the Internet and copyright advocates, the release of the *Grey Album* is considered a watershed moment in music history. Following his critically acclaimed 2004 debut CD with Jemini — *Ghetto Pop Life*, featuring The Pharcyde, Tha Alkaholiks and Cee-Lo — Danger Mouse produced the 2005 Gorillaz album, *Demon Days*, on Virgin Records.

Tom Ford

TOM FORD

Tom Ford was born in Austin, Texas, but spent most of his childhood in Santa Fe, New Mexico. During his teens, Ford moved to New York and enrolled at New York University, initially attending courses in art history. He later redirected his studies to concentrate on architecture at Parsons School of Design in New York and Paris, concluding his training at Parsons in New York. In 1990, Ford moved to Milan to join Gucci as the company's Women's Wear Designer. He became Design Director in 1992, and, in 1994, he was appointed Creative Director of Gucci. He was responsible for the design of all product lines, from clothing to perfumes, and for the company's corporate image, advertising campaigns and store design. In January 2000, following the acquisition of Yves Saint Laurent and YSL Beauté by Gucci Group, Ford assumed the position of Creative Director of Yves Saint Laurent Rive Gauche and YSL Beauté. In addition to his existing duties at Gucci, Ford worked with all creative teams at YSL to define the overall image and positioning of the YSL brand. Ford also served as Creative Director of Gucci Group. In July 2002, he was made Vice Chairman of the Management Board of Gucci Group. Ford resigned from his post at Gucci Group in April 2004, following a buyout by Pinault-Printemps-Redoute. Ford's success in the fashion industry has been recognized by his numerous awards, including three awards from the prestigious Council of Fashion Designers of America (CFDA) (1996, 2001, 2002); Rodeo Drive Walk of Style Award (2004); five VH1-*Vogue* Fashion Awards (1995, 1996, 1999, 2002, 2004); two awards from the Fashion Editor's Club of Japan (FEC) (2000); the Style Icon award in the 1999 *Elle* Style Awards (UK); the British *GQ* International Man of the Year award (2000); the Superstar Award at the Fashion Group International's Night of Stars (USA, 2000); Best Fashion Designer, *TIME* magazine (2001); and *GQ* Designer of the Year (2001). Most recently, Ford was awarded the first annual Fashion Design Achievement Award at the Cooper Hewitt Design Museum's National Design Awards (2003).

Kevin Hall

Kevin Jones

KEVAN HALL
As a teenager, Kevan Hall attended Cass Technical High School in Detroit, where he studied fashion design, and won a scholarship sponsored by The Fashion Institute of Design & Merchandising/FIDM in Los Angeles. After graduating, he received the Peacock Award for Outstanding Fashion Design. In 1982, Hall — with his wife and partner, Deborah — launched Kevan Hall Couture. His collection melded a relaxed couture look with sensible pricing that pleased retailers and clients, including celebrities Meg Ryan and Natalie Cole. Hall was among the designers chosen to dress Ethel Bradley (wife of the late Mayor Tom Bradley) for the 1984 Olympics, and was nominated in 1988 by fashion retailers and the press as one of California's top designers. In 1989, he was included in the Soul on Seventh Avenue show sponsored by Fairchild Publications, and was given the NAACP's Great American Designer award. His participation in the national 1990 Absolut Vodka campaign featured in *Vanity Fair* underscored his broad-based appeal. In 1992, he was honored by The Center of Performing Arts in Southern California with a 10-year fashion retrospective. Hall branched out into motion pictures, acting as costume consultant on 1997's *Gridlock* and *Eve's Bayou*. Later, Whitney Houston commissioned Hall to design a liquid gold charmeuse gown for her special appearance in the final episode of *Boston Public*. From 1998 to 2000, Hall revived a "dead" brand to its former glory as Design and Creative Director for Halston. His sleek eveningwear was worn by a distinguished coterie of artists, including Celine Dion, Lauren Holly, Charlize Theron, Mariah Carey, Salma Hayek and Minnie Driver. Hall has made guest appearances on national TV shows such as *Inside Edition*, *The Better Half*, *SoapTalk* and *Extreme Makeover*, discussing fashion's current trends. His current signature Kevan Hall Collection emphasizes purity of style, detailed tailoring and sensuously draped streamlined silhouettes. In 2002, Hall won the 47th Annual Gold Coast Fashion Award in Chicago as Designer of the Year.

Martin Kaplan

KEVIN JONES
A costume historian with a detailed knowledge of 18th, 19th and 20th century high fashion, Kevin Jones was named curator of The Fashion Institute of Design & Merchandising Museum in November 2002. After completing the Fashion Design program at The Fashion Institute of Design & Merchandising/FIDM, Jones went on to receive a B.A. in Art History at the University of California, Santa Barbara. Following graduation, Jones was hired by the Los Angeles County Museum of Art where he worked as a coordinator for Information Systems and coordinator for the Art Museum Council. Jones was then brought back to The FIDM Museum by its former curator to oversee the 12,000-piece costume collection as Collections Manager. Jones has lectured and given tours as well as television, radio and newspaper interviews. He is an active member of the Costume Society of America and a member of the Titanic Historical Society.

Rick Karr

MARTIN KAPLAN
Martin Kaplan, Associate Dean of the USC Annenberg School for Communication, is the Director of the Norman Lear Center. A *summa cum laude* graduate of Harvard in molecular biology, a Marshall Scholar to Cambridge University and a Stanford Ph.D., he has been an Aspen Institute program officer; a federal education staffer; Vice President Walter F. Mondale's chief speechwriter and deputy presidential campaign manager; a vice president of motion picture production for Disney Studios; a film and television writer and producer (*The Distinguished Gentleman*, *Noises Off*, *Max Q: Emergency Landing*); and a radio host and commentator. Kaplan is editor of *The Harvard Lampoon Centennial Celebration, 1876-1973*; co-author (with Ernest L. Boyer) of *Educating for Survival*; and editor of *The Monday Morning Imagination* and *What Is An Educated Person?* At USC he has taught graduate and undergraduate courses in media and politics; campaign communication and entertainment; and communication and society.

Michael Patrick King

RICK KARR
A broadcast and print journalist who contributes regularly to several public television and radio programs, Rick Karr also is an adjunct professor at the Columbia University Graduate School of Journalism. He currently is writing and developing *TechnoPop: How Technology Makes and Un-Makes Popular Music*, a book and documentary television series that examines technology's impact on the sound and business of music from Bach to Britney. The TechnoPop project garnered him fellowships in 2004 from the MacDowell Colony and the Center for the Public Domain. From 1999 to 2004, Karr reported from New York on culture and technology for National Public Radio News. In 1998 and 1999, he hosted the groundbreaking NPR music and culture magazine show, *Anthem*. Karr has written about culture, technology and pop music for *The Nation*, *New Musical Express*, *Sounds* and *Stereo Review*. A longtime musician, record producer, recording engineer and songwriter, Karr performs with his acclaimed band, Box Set Authentic.

MICHAEL PATRICK KING
Michael Patrick King was the leading creative force behind the HBO smash hit *Sex and the City* throughout the show's remarkable six-year run. For the last five seasons, he was the show's head writer and chief executive producer. For his work as a writer on *Sex and the City* he was nominated for three Emmys and three Writers Guild Awards. He was nominated twice for the best director Emmy, winning for "The Real Me," an episode that also garnered him one of his three Directors Guild nominations. King began his career in New York as an aspiring actor, then began performing standup comedy and writing plays. He eventually moved to Los Angeles where he began writing and producing *Murphy Brown*. King also has served as a writer and consulting producer for the hit show *Will & Grace*. In June 2005, he debuted the HBO faux-reality series, *The Comeback*, created with and starring Lisa Kudrow.

Norman Lear

NORMAN LEAR
Norman Lear has enjoyed a long career in television and film, and as a political and social activist and philanthropist. Known as the creator of Archie Bunker and *All in the Family*, Lear's television credits include *Sanford & Son*; *Maude*; *Good Times*; *The Jeffersons*; *Mary Hartman, Mary Hartman*; *Fernwood 2Nite*; and the dramatic series *Palmerstown, U.S.A.* His motion picture credits include *Cold Turkey*, *Divorce American Style*, *Fried Green Tomatoes*, *Stand By Me* and *The Princess Bride*. In 1999, President Clinton bestowed him the National Medal of Arts noting that "Norman Lear has held up a mirror to American society and changed the way we look at it." He has the distinction of being among the first seven television pioneers inducted into the Television Academy Hall of Fame (1984). He received four Emmy Awards (1970, 1971, 1972, 1973) and a Peabody Award (1977) for *All in the Family*, as well as awards from the International Platform Association (1977), the Writers Guild of America (1977) and many other professional and civic organizations. Lear has brought his distinctive vision to politics, academia and business by founding several non-profit organizations, including People For the American Way (1980-present); the Norman Lear Center at the USC Annenberg School for Communication (2000-present) and the Business Enterprise Trust (1989-2000). In 2000, Lear and his wife, Lyn Davis Lear, along with a friend, bought one of only 25 surviving original prints of the Declaration of Independence. The Lears are now the sole owners of this document, the "Dunlap broadside," which was printed on the night of July 4, 1776. From 2001 until the presidential election of 2004, the document toured the country as the centerpiece of the Declaration of Independence Road Trip, and its spinoff, the "Declare Yourself" young voter activism project. Through its aggressive outreach to young and first-time voters, the "Declare Yourself" project resulted in the registration of over 1 million new voters in the 2004 general election. Lear's business career began in 1959 with his co-founding of Tandem Productions, Inc. In 1974, he and his partners created T.A.T. Communications, later known as Embassy Communications. He is currently chairman of Act III Communications, a multimedia holding with interests in the recording, motion picture, broadcasting and publishing industries.

Booth Moore

BOOTH MOORE
A former columnist for the *Washington Post*, Booth Moore joined the *Los Angeles Times* in 1996 in the Calendar section, writing the daily column "SoCal Confidential," and later moving into a field that had always been a passionate interest for her — fashion — joining *The Times*' fashion writing staff. She is now a staff of one, and in June 2004, was named Fashion Critic, the first time that title has been given to a fashion writer in the paper's history. She covers the world of fashion, with a special focus on the industry in Southern California, and twice each year attends and covers Fashion Weeks in New York, Milan and Paris. When the 9-11 tragedy occurred during New York Fashion Week 2001, she was assigned to the event, and received an Editorial Award from *The Times* for her coverage.

Richard Jeremy Nichols

RICHARD JEREMY NICHOLS
Richard Nichols is the thriving force behind an anomaly in music called "The Next Movement," also known as hip-hop soul. Nichols began his career in community outreach, creating a truce between local gangs in Philadelphia while working as a jazz DJ for WRTI-FM. In the early-1990s, he founded Watch Your Back Management with artists including female MC Shorty No Mas (De La Soul), Scott Storch (producer of Dr. Dre and Questlove), and the group that put him on the map, The Square Roots, who later became known as The Roots. Nichols produced The Roots' critically acclaimed *Do You Want More* for Geffen Records. In 1999, he founded a boutique label, Motiver/MCA records, and released The Roots' "You Got Me," featuring Erykah Badu, which won that year's Rap Performance Grammy. Nichols and The Roots support and develop artists with Okayplayer.com; a 24-hour working demo studio and rehearsal space; and an "idea lab" called The Black Lily, which combines open mic with showcases of female artists such as The Jazzyfatnastees and Jaguar.

Sam Phillips

Laurie Racine

Sheryl Lee Ralph

Cameron Silver

Rani Singh

SAM PHILLIPS
Renowned singer-songwriter Sam Phillips made an indelible mark in the music scene with her Grammy-nominated *Martinis and Bikinis* (1994). She's followed her unpredictable muse down a zigzag path, gathering inspiration from a wide range of sources: folk, pop, vintage rock and roll, literature, philosophy, film and all the technical marvels of the recording studio. That has made her hard to categorize and market, but also that much more fascinating to follow. Phillips' 2004 release, *A Boot and a Shoe*, like her 2001 Nonesuch debut, *Fan Dance*, is fiercely intimate in atmosphere and stripped down in arrangement — not so much unplugged as unvarnished. Although Phillips has long been admired for her coolly modern take on Beatles-esque songwriting and studio craft, she decided to move away from elaborate pop production and 21st century technological upgrades with *Fan Dance*. Since then, she has stuck to the road less traveled.

LAURIE RACINE
Laurie Racine is a senior fellow at the Norman Lear Center and co-director of the Lear Center's Creativity, Commerce and Culture Project. Racine is the President of the Center for the Public Domain, a private foundation endowed by the founders of Red Hat, Inc. The Center is devoted to exploring the balance between intellectual property rights and freely reusable knowledge that is the basis of our cultural and scientific heritage. During her tenure, she co-founded Public Knowledge, a Washington, D.C.-based public interest group that is working to sustain a vibrant information commons. She serves as Chair of the Board. Racine is also the President of Doc. Arts, the non-profit corporation that produces the Full Frame Documentary Film Festival. Before joining the Center for the Public Domain, Racine was previously the Director of the Health Sector Management Program at the Fuqua School of Business of Duke University. She has spent many years as a strategist and consultant for non-profit and for-profit enterprises. Racine received a B.A. from New York University and conducted coursework for a Ph.D. in Human Genetics at the University of California, Berkeley.

SHERYL LEE RALPH
Respected actress, singer, writer, director and producer Sheryl Lee Ralph is known for her role of Deena Jones in *Dreamgirls*, for which she earned a Tony Award nomination and a Drama Desk Award nomination for best actress. Ralph scored a top-10 selling dance hit in the mid-1980s with the infectious anthem "In the Evening." On television, she has starred in *It's a Living*, *New Attitude*, *Georgy*, *Designing Women* and *Moesha*. Her extensive film credits include *Sister Act II*, *The Flintstones*, *The Mighty Quinn*, *Mistress* and *The Distinguished Gentleman*. She won the 1991 Independent Spirit Award for best supporting actress in *To Sleep With Anger*. Ralph wrote, directed and starred in the 1998 award-winning film short, *Secrets*, also featuring Alfre Woodard, La Tanya Richardson and Robin Givens. Since 1991, Ralph has created, produced and presented the critically acclaimed "Divas Simply Singing," an annual event featuring top female entertainers in film, stage, television and music and benefiting Project Angel Food and The Safe Place for Pediatric AIDS.

CAMERON SILVER
Named one of *Time* magazine's "25 Most Influential Names and Faces in Fashion," Cameron Silver has dressed A-list celebrities, including Nicole Kidman, Jennifer Lopez and Renée Zellweger, in upscale vintage designs; has appeared on *E! Entertainment*, the Style Network and *Fashion File*; and has written for *Harper's Bazaar*, *V Magazine*, *Elle* and *Harpers & Queen*. Silver is completing his first book on Kainik Wong (Rizzoli). Silver's mini-empire encompasses two retail stores, Decades and Decadestwo, on Melrose Avenue, plus an in-store Decades boutique inside the Comme des Garçons' Dover Street Market in London. *Vogue* calls Decades "the nation's premier source for fabulous '60s and '70s pieces." Fashion designers, including Tom Ford, Anna Sui and Nicolas Ghesquière, have raided the stores for inspiration, while costume designers, including Michael Kaplan and Colleen Atwood, stock up on wardrobe for their stars. In 2004, Silver was named Creative Consultant to the French fashion house, Azzaro, founded in 1962 by the late Loris Azzaro.

RANI SINGH
Rani Singh is Senior Research Associate in the Department of Contemporary Programs and Research at the Getty Research Institute. Her research and programming focus is on the history, preservation and presentation of alternative media and avant-garde film. She also is coordinating the documentation of experimental film and video in Los Angeles since 1945 for the Research Institute's "Modern Art In Los Angeles" project. Singh has been Director of the Harry Smith Archives since 1991. Currently she's directing a documentary on the filmmaker and anthologist Harry Smith.

JONATHAN TAPLIN
Jonathan Taplin, a specialist in international communication management and the field of digital media entertainment, began his entertainment career in 1969 as Tour Manager for Bob Dylan and The Band. In 1973, he produced Martin Scorsese's first feature film, *Mean Streets*, which was selected for the Cannes Film Festival. Between 1974 and 1996, Taplin produced television documentaries, including *The Prize* and *Cadillac Desert* for PBS, and 12 feature films, including *The Last Waltz*, *Until The End of the World*, *Under Fire* and *To Die For*. His films were nominated for Oscar and Golden Globe awards and chosen for the Cannes Film Festival seven times. Taplin was a founder of Intertainer, the pioneer video-on-demand company for cable and broadband Internet markets, and has served as its Chairman and CEO since June 1996. He holds two patents for video-on-demand technologies, and has acted as a consultant on digital media for entities as diverse as McKinsey & Company and the City of Los Angeles. Taplin graduated from Princeton University. He is a member of the Academy of Motion Picture Arts and Sciences, the Annenberg Research Network for International Communication and sits on the advisory board of the Democracy Collaborative at the University of Maryland.

GUY TREBAY
Guy Trebay joined *The New York Times* as a reporter in 2000. He was formerly a columnist at the *Village Voice*, where he covered New York for two decades. He has written for many national magazines, including *The New Yorker*, *Esquire*, *Harper's*, *Travel & Leisure*, *Conde Nast Traveler* and various literary magazines, among them *Grand Street*. A collection of his stories about New York City, *In the Place to Be*, was published in 1994; selections are anthologized in the forthcoming book, *Empire City: Three Centuries of Writing About New York*. Among his journalism awards is Columbia University's Meyer Berger award, which was presented to him twice, in 1992 and 2000. Trebay also received the Deadline Club Front Page Award and a Pulitzer Prize nomination. He lives in New York City.

SIVA VAIDHYANATHAN
Siva Vaidhyanathan, a cultural historian and media scholar, is the author of *Copyrights and Copywrongs: The Rise of Intellectual Property and How It Threatens Creativity* (New York University Press, 2001) and *The Anarchist in the Library* (Basic Books, 2004). Vaidhyanathan has written for many periodicals and online publications, including *The Chronicle of Higher Education*, *New York Times Magazine*, *The Nation*, MSNBC.com, Salon.com and openDemocracy.net. After five years as a professional journalist, Vaidhyanathan earned a Ph.D. in American Studies from the University of Texas at Austin. He has taught at Wesleyan University and the University of Wisconsin at Madison, and is currently an assistant professor of Culture and Communication at New York University. He lives in Greenwich Village, USA.

DAVID WOLFE
David Wolfe is Creative Director for Doneger Creative Services, the trend and color forecasting and analysis department of The Doneger Group, whose clients include an international roster of designers, manufacturers and retailers. As Creative Director, Wolfe analyzes trends influencing the men's, women's and youth apparel and accessories markets as well as big-picture developments in style, culture and society. Wolfe's wit and wisdom have earned him a stellar reputation over his 35 years in the fashion industry. He is known as "America's Foremost Fashion Forecaster" and is the most quoted authority in the industry. His views and quips appear in such diverse publications as *The Wall Street Journal*, *Women's Wear Daily*, *Vogue*, *Glamour* and *Forbes*. Wolfe also serves as International Fashion Editor of *Men Mode* and *Couture* magazines, glossy high-fashion publications in the Far East, and has been featured on *CNN*, *QVC*, *Entertainment Tonight*, *The Today Show*, talk shows and news programs, and as a celebrated speaker at major fashion industry events and shows. Wolfe began his career in a small-town department store, where his responsibilities included that of fashion coordinator, buyer, copywriter, illustrator and advertising manager. In the 1960s, he moved to London, where he quickly established himself as a leading fashion artist published in *Vogue*, *Women's Wear Daily* and *The London Times*. In 1969, Wolfe joined the nascent "fashion service" industry and, as Creative Director of I.M. International, became one of the world's leading fashion forecasters and authorities, among the first to discover talents such as Giorgio Armani, Karl Lagerfeld and Gianni Versace. In the early-1980s, Wolfe helped to found The Fashion Service, and returned to the United States to head TFS as its president for a decade. He joined The Doneger Group in 1990.

Jonathan Taplin

Guy Trebay

Siva Vaidhyanathan

David Wolfe

Resources

Ready to Share: Fashion & The Overlooking of Creativity

Women's Wear Daily editor Rose Apodaca engages a packed crowd at "Ready to Share" with the history of the T-shirt.

Annotated Bibliography

BY PATRICK REED

Agins, Teri. *The End of Fashion*. New York: Quill, 1999.

In this general audience book, the longtime fashion reporter for the *Wall Street Journal* discusses several paradigm-altering changes that occurred within the fashion industry during the late-1980s and throughout the 1990s. According to Agins, the fashion industry's creative model for most of the 20th century — couture largely setting the trends, the rest of the industry following — has been transformed by a shift in consumer expectations. Elite, formal wear is on the wane, and functional yet trendy apparel is booming, meaning that today just as many creative decisions are made in the marketing of clothes as in the designing of them. The author shapes her broader points in specific chapters examining the changing fortunes of several individual designers, including Ralph Lauren and Tommy Hilfiger's competition during the 1990s and Giorgio Armani's successful seduction of Hollywood, from *American Gigolo* onward, as his clothing became a perennial favorite for Oscar night's red carpet fashion.

——. "Fashion: Some Clothes of Questionable Vintage." *Wall Street Journal*, July 27, 2001.

Report and analysis concerns the widespread marketing of "vintage fashion" by established, upscale retailers. Several interview subjects remark on the irony of second-hand, ostensibly cheap clothing selling for like-new prices (for example, at New York retailer Henri Bendel, a Diane von Furstenberg knit dress from the 1970s sells for $190, compared to $225 for a new, silk von Furstenberg dress). The author places this trend in a larger context of cultural recycling, an endemic, recurring pattern of the overall fashion industry that is crucial to its vitality.

Agins, Teri, and Sally Beatty. "In a Style Replay, It's Ralph's Turn to Fight With a Licensee." *Wall Street Journal*, Feb. 5, 2003.

Report on the growing battle between Polo Ralph Lauren Corp. and its licensee for women's clothing, Jones Apparel Group, over the rights to manufacture Lauren, Polo's signature women's line. After the disappointing financial performance of Ralph, Polo's casual women's line, the designer expressed a desire to terminate the license rights for the successful Lauren line early, at the end of 2003 when the Ralph rights were to expire. This dispute is yet another example of designers attempting to regain control over their brands in recent years (i.e., Calvin Klein's near-lawsuit with Warnaco in 2001).

Agins, Teri, and Tara Parker-Pope. "Common Scents: It Isn't a Nose Dive, But Perfume Sales Are Steadily Dropping." *Wall Street Journal*, Dec. 23, 1998.

Extensive report on changing consumer opinions about designer fragrances, and the related adjustments made by companies to their production and marketing methods in an attempt to reverse modest declines in sales during the late-1990s. The authors provide a solid historical overview of the fragrance sector of the fashion industry, detailing the Chanel No. 5-fueled boom in fragrance sales in post World War II America; continued strong growth during the successive decades; and humorous industry stories, such as the unveiling of the potent Giorgio perfume in the early-1980s, during which the first bottle was escorted via stretch limousine to a downtown Cleveland department store. Several experts blame the glut of new fragrances brought to market in the 1990s (813, according to the article) for the current stagnation, and note a consumer movement toward lower-priced (and lighter-smelling) body washes sold in department stores.

Ash, Juliet, and Elizabeth Wilson, eds. *Chic Thrills: A Fashion Reader*. Berkeley: University of California Press, 1993.

Collection of cultural criticism contains several pieces that examine the economic structures of the industry

during the 20th century. Ellen Leopold's "The Manufacture of the Fashion System" argues that the industry's adoption of a rapid turnover in product (apparel) during the 1920s and 1930s — particularly in America — was the result of a failure to "fully embrace mass production techniques" rather than due to the demands of consumers. Angela Partington's "Popular Fashion and Working-Class Affluence" assesses women's fashion in post-World War II Western societies, and disputes the dominant "trickle-down" or emulation model that held working-class women to be passive or deferential to elites in their consumption practices. Other essays focus on such disparate topics as: the catwalk as performance, fashion photography and ethnic dress (Asian, Irish, black street style).

Avins, Mimi. "Red-Carpetbagger." *Los Angeles Times*, March 14, 2003.
Entertaining profile of fashion-celebrity critic Steven Cojocaru, a regular preence in *People* magazine and on television's *Today* show and *Access Hollywood*, as well as at most awards shows' red carpet promenades. The author details Cojocaru's upbringing (as a celebrity-obsessed "nerd") and his dues-paying days at various Hollywood publicity jobs, and places him in a select group of fashion arbiters from past and present that includes Mr. Blackwell and Joan Rivers. With a quick-quipping, unfailingly enthusiastic and gossip-centric demeanor, Cojocaru gives fashion fans what they want from a commentator, according to E! Television's style director, who notes, "Entertainment is No. 1. Learning about fashion is second."

Bache, Abigail. "Is Intellectual Property Fashionable?" Essay entry for the WIPOUT counter-essay contest, Dec. 17, 2001.
[https://www.kent.ac.uk/law/undergraduate/modules/ip/resources/Wipout2.htm]
Perceptive essay examines several aspects of British intellectual property law as it affects the fashion industry — in particular, how the cycle of creativity in design and apparel manufacture may be stifled by restrictive patent and copyright protections. The author argues that loose IP restrictions on fashion throughout the years have enabled the industry to flourish, and allow for appealing, affordable and "cool" replicas of high-end designs for the general public. "It is this cycle of fashion that ensures a healthy and imaginative growth of clothes design and an accessible fashion industry," one that is now threatened by increased restrictions on the patenting of designs, observes the author.

Ball, Deborah. "The Brand Rules Fashion's New World." *Wall Street Journal*, March 12, 2001.
A summer 2000 shakeup of the Jil Sander design group — in which the namesake designer quit and initially was not replaced by the group's new owner, Miuccia Prada — exemplifies an attitude shift within the fashion industry, one that elevates brand promotion to the place of creative ingenuity, according to the author. One interview subject, a New York retail consultant, insists that the industry's demands as a global economic enterprise are necessitating a movement toward overall brand marketing. Others, such as Gucci's Tom Ford, say that designer autonomy is still central to modern fashion, and maintain that individual creativity still flourishes, despite the current climate of corporate acquisition.

Barnard, Malcolm. *Fashion as Communication*. London: Routledge, 1996.
Essay compilation assesses fashion as the product of a communication-rich culture. Building on previous cultural studies scholarship from thinkers such as Georg Simmel and Raymond Williams, the essays include several citations of Dick Hebdige's examination of youth-fashion subcultures and Elizabeth Wilson's writing in *Adorned in Dreams*. Summaries of other scholarly opinions and analyses are organized into specific chapters that deal broadly with fashion as a cultural foundation of modern, Western, capitalist societies.

Beatty, Sally. "Calling Fashionistas! Cable Channels Flock to Fashion Shows." *Wall Street Journal*, Oct. 15, 2002.
Brief report on the increase in fashion-oriented programming on cable television, due to the advent of digital cable's larger channel capacity and to the growing interest of advertisers (including non-fashion companies, such as auto manufacturers). The author cites pioneering shows on CNN and MTV, as well as the successful VH1-*Vogue* Fashion Awards, and analyzes the new efforts at fashion programming individually (including the WE: Women's Entertainment cable network's expansion of the New York-area hit *Full Frontal Fashion* into a nationwide program and E! Entertainment Television network's development of a sister cable channel called Style).

Bellafante, Ginia. "In Love With Asia, Muse and Market." *New York Times*, Feb. 25, 2003.
Intriguing report on a revival of Asian-influenced style in the new apparel lines of several international designers, including Donna Karan, Miuccia Prada and Tom Ford for Gucci. The author discusses the unveiling of several Asian-influenced garments in Prada's Broadway-Manhattan store, as well as the expansion of Pearl River Mart, a 25-year-old Chinese department store located nearby. The article examines Asian culture's longstanding influence in the West in relation to this trend (Wong Kar-wai's stylish 2000 film, *In the Mood for Love*, is a recent inspiration), although a costume curator specializing in Oriental dress opines that many of the new Western adaptations vulgarize the traditional Asian adherence to sexual modesty in clothing design.

Blau, Herbert. *Nothing In Itself: Complexions of Fashion*. Bloomington: Indiana University Press, 1999.
Wide-ranging, highly detailed and analytical assessment of fashion from a cultural studies perspective, often employing a postmodernist, visual-centric approach to examine its impact but also engaging a number of other theories and thinkers (from Walter Benjamin and Charles Baudelaire to artist and *Vogue* contributor Cecil Beaton). The book references many designers and trends from the past century — for example, Chanel's and Balenciaga's creations form the initial backbone of a perceptive chapter investigating the shifting boundaries and interrelations between haute couture and ready-to-wear. Elsewhere, Blau cites designers such as Vivienne Westwood, John Galliano and Alexander McQueen as paragons of historically referential fashion creation, and debates gender-body image issues by using Rei Kawakubo and Jean-Paul Gaultier's designs as referents. Other passages explore the permutations of "trickle up" fashion — i.e., 1970s' punk styles and other subcultural influences — as well as late-90s' developments, including a discussion of logos, brands and mass-market retailers. Voluminous endnotes and astutely chosen photographs buttress the author's myriad observations.

Borrelli, Laird. *Net Mode: Web Fashion Now*. New York: Thames & Hudson, 2002.
Incisive examination of the burgeoning synthesis of Internet technology with fashion's merchandising, brand creation and editorial coverage. Compiled by the editor of Style.com, the guide is sectioned into three areas: Fashion Identity (designer sites); Fashion Sale (e-commerce sites, including "teaser" sites offering product descriptions and directions for offline purchase); and Fashion Talk (fanzine and online periodical sites). The highlighted sites feature clothing lines and topics circa late-2001, and the author does a commendable job of including both widely popular and financially well-supported venues such as Style.com, Dior.com, eLuxury.com (backed in part by the conglomerate LMVH) and Net-a-Porter.com, as well as upstart enterprises more attuned to specific items-consumer bases, such as Spain's itfashion.com, developed by three college students with a mandate to promote "a more heterogeneous, multicultural and extensive vision of fashion." The majority of the sites utilize software programs Flash or Shockwave to achieve their inviting visual interfaces, most of which have been updated since this book's release.

Boucher, François. *20,000 Years of Fashion: The History of Costume and Personal Adornment*. Expanded Edition. New York: Harry N. Abrams, 1987.
Extensively researched, immaculately illustrated history of clothing's evolution, from its prehistoric beginnings through the early-1980s. In minute detail, the author describes changes in apparel from century to century, and era to era. One caveat: After covering costume development in ancient civilizations around the world, the author focuses primarily on Western costume from the 12th century onward. Following his description of the emergence of the haute couture industry during the mid-19th century, the author provides informative capsules on individual designers, primarily European ones.

Bounds, Wendy. "Fashion: The Next Leisure Suit." *Wall Street Journal*, July 17, 1998.
Entertaining assessment of several prevailing fashion trends of the late-1990s that examines how they fit in contextually to the larger culture and speculates on which ones will be regarded as time-capsule embarrassments by future fashion historians. Topics for discussion, analysis and approval-disdain include: monochromatic shirt and tie (initially popularized by the *Today* show co-host Matt Lauer); the blue dress shirt; hip-hop apparel (and the lionization of logos); and decorative formal wear. Regarding the early-1990s grunge fad, designer Donna Karan opines that future critics will declare that the worst part of 90s fashion was, in fact, "the seventies."

Branch, Shelly. "Stayin' Alive: Velour Suddenly Doesn't Rub People the Wrong Way." *Wall Street Journal*, Dec. 6, 2002.
Lively report on a fad-in-the-making in 2002-2003: the hip-hop and celebrity-fueled resurgence of velour fabric into American fashion consciousness. The article briefly recounts the history of the fabric (former velour wearers: Napoleon, Mr. Spock), and velour's association with the 1970s' disco era is remembered less than fondly by several observers. Hip-hop's resurrection of velour as "athleisure" has encouraged mass merchandisers such as the Gap and The Limited, among others, to implement it into their apparel lines, while, on an individual level, upscale fashionistas invent ingenious ways to accessorize what amounts to a jogging tracksuit. Detractors have their say, and some wonder if velour will appeal to fashion-conscious males who don't follow hip-hop, but the urban retailers interviewed believe that the "velour ethic" will endure, at least through the current fashion cycle.

Brubach, Holly. *A Dedicated Follower of Fashion*. London: Phaidon Press, 1999.
Collection of essays dating from the mid-80s to the mid-90s by a fashion writer for *The Atlantic Monthly*, *The New Yorker* and *The New York Times Magazine*. Topics include: Ralph Lauren's image-making empire; Yves Saint Laurent's legacy; and the designer sunglasses boom in the 1980s. In one essay, a New York City megalopolis summer-time travelogue, the author visits several area beaches and comments on the diverse fashion statements on display. Another, particularly insightful essay distinguishes the Parisian conception of fashion as a central, native element of society from American attitudes toward fashion (as ephemera, or as populist "fitting in"). Overall, the writer's engaging and conversational style helps to support her observations on fashion's changing trends and its dissemination into mainstream consumer culture during the past 20 years.

Bruzzi, Stella, and Pamela Gibson, eds. *Fashion Cultures*. London: Routledge, 2000.
Eclectic anthology of academic writings on fashion features essays derived from, among other methodologies, postmodern theory, feminist criticism and subculture analysis. Part Three, "Images, icons and impulses" contains essays on such fashion-entertainment paragons as Marcello Mastroianni, Grace Kelly, Cary Grant and Gwyneth Paltrow. Other topics include: fashion design brand-creation on the Internet; "catwalk politics"; Gianni Versace's exploitation of glamour, celebrity culture and mass media in building his fashion empire; and an overview of U.K. fashion as a culture industry.

Bunn, Austin. "Not Fade Away." *New York Times Magazine*, Dec. 1, 2002: 60+.
Magazine piece focuses on the niche popularity of vintage-styled blue jeans among discerning denim aficionados. The trend toward "new vintage" began in Japan during the 1990s, according to the author's research, as decades-old pairs of extremely worn-out jeans were coveted by Japanese buyers obsessed with authenticity. As it now stands, demand for soiled, torn jeans in the alternative corners of the U.S. fashion scene has spawned a sub-industry focused on replicating vintage jeans of yesteryear (anything pre-1980s). Replicas from a leading, Levi's-contracted "counterfeiter" based in western Kentucky are compared with actual Depression-era jeans to illustrate the degree of similarity.

Buxbaum, Gerda, ed. *Icons of Fashion: The 20th Century.* Munich: Prestel Verlag, 1999.
History of fashion over the previous century offers a concise, appealing format: two pages (verso-recto) devoted to numerous important topics (people, styles, movements, etc.) from designer Paul Poiret's Orientalism in the early-1900s to John Galliano's historically rich, "stagy fashion" of the 1990s, and most everything in between. The illustrations and photographs for each entry generally are wisely chosen, and most complement the four or five para-graphs written on each topic (authors include several highlighted in this bibliography, including Valerie Steele and Elizabeth Wilson). Timeline biographies of fashion designers are featured either with their specific entry, or in an appendix that also includes a select bibliography. One especially informative aspect of this history is its celebration of some of fashion's more influential illustrators, such as Erté (30-31) and René Grau (70-71).

Carr, David. "Anna Wintour Steps Toward Fashion's New Democracy." *New York Times*, Feb. 17, 2003.
Profile of *Vogue* editor Anna Wintour describes her self-assured managerial style and strategy that reversed the fortunes of the 111-year old fashion magazine. Several cohorts and competitors comment on Wintour's shift toward a more democratic, inclusive concept of contemporary fashion. As a "stealth populist," Wintour has opened up the magazine's coverage to decidedly untraditional haute couture areas: more celebrity coverage; pregnancy (the Brooke Shields cover); hip-hop fashion; and, especially, the collaboration with VH-1 for a cable TV fashion awards show.

———. "The News Media; In Style's World of Fashion." *New York Times*, Feb. 25, 2002.
Analysis of the growth and influence of *InStyle* magazine since its debut in 1994 with founding editor Martha Nelson. As Nelson prepares to take the editorial reins at *People*, the author says that her emphasis on availability over exclusivity means that she "will be remembered for taking fashion out of the dressing rooms of Paris and onto the runway of life." *InStyle* is credited with pushing celebrity lifestyle into the forefront of fashion coverage; spurring new designs and clothing lines; and blurring, if not erasing, the distinction between advertising and editorial function. The resulting de-emphasis on articles is brushed off as unimportant, since "nobody actually reads a fashion magazine." High-end fashion magazines such as *Vogue* and *Harper's Bazaar* have shifted their own coverage due to *InStyle*'s success, and an upstart publication, *Lucky*, is viewed as a possible challenger to *InStyle*'s supremacy in the "mag-a-log" market.

Chaplin, Julia. "A Runway Fair That Still Packs the House." *New York Times*, Oct. 14, 2001.
Article covering the yearly *Ebony* Fashion Fair, a national tour sponsored by *Ebony* magazine since 1958, which attracts several hundred thousand spectators and raises money for numerous charities. The longtime success of the Fashion Fair is attributed to its mixture of lavish apparel and localized presentation. Regarding the event's influence, founder Eunice Johnson explains how she persuaded several top French designers during the 1960s to include black models in their runway shows. The current enormous influence of hip-hop fashion (and its envelope-pushing sexuality) is contrasted with the more traditional couture of the *Ebony* Fashion Fair; as the author observes, the lack of "ghetto fabulous" cool among the fair's chosen designs has had no negative impact on its popularity.

Chensvold, Christian. "Past Perfect: Retro Designers See Business Boom." *California Apparel News*, March 28-April 3, 2003.
Article on the revival of "retro" fashion in the Southern California design and merchandising industry. Inspired by the swing revival of 1940s-1950s fashion that occurred during the mid-1990s, this re-revival incorporates more durable fabric design and thus may endure longer and have more of a cultural impact than before, according to industry observers. The article mentions several designers and labels, including Alicia Estrada's Stop Staring label, which specializes in vintage dress designs; Steady Clothing's men's bowling shirts; and the Da Vinci label, a bastion of Rat Pack style founded in 1952 that has found favor with young hepcats. Los Angeles stylist Jenna Kautzky notes, "*West Side Story* seems to be the look right now," and refers to the echoes of 1950s-1960s style in the current output of international designer Marc Jacobs.

Clancy, Deirdre. *Costume Since 1945: Couture, Street Style, and Anti-Fashion*. New York: Drama Publishers, 1996.
Mixing text and illustrations, the author covers fashion's develop-ment during the last half of the 20th century, focusing just as much on the dress of mainstream Western society and subcultures as on the luxurious currents of haute couture. Each illustration is coupled with a description of the garment and its designer (if applicable) and function in the culture of its particular era. The illustrations are primarily black and white line drawings, with three small sections of color drawings. Apart from brief summaries of particular eras at the beginning of each chapter, the writing on fashion is descriptive and informal (as evidenced by the small bibliography).

Coleridge, Nicholas. *The Fashion Conspiracy: A Remarkable Journey through the Empires of Fashion*. New York: Harper & Row, 1988.
Chapter 15, "Beware of Imitations — the Pirates of Seoul," leads with a story of sabotage and theft in China in 1986, when 11,000 counterfeit Lacoste T-shirts were stolen from a crashed truck only to resurface in South Korea months later. This recounting leads into an overview of the prevalence of unauthorized copying in the 1980s fashion industry, and a discourse with several international designers, all of whom agree on the enormity of the situation but offer differing opinions about its degree of harm. Vague intellec-tual property laws are part of the problem, notes the author, who questions whether the industry truly wants rigidly enforced restric-tions on creative reinterpretations. One London designer perfectly expresses the overall ambivalence with her comments regarding plagiarism: "[I]ntellectually, it's lovely, it's flattering. Morally, it's disgusting."

Cunningham, Bill. "Bill on Bill." *New York Times*, Oct. 27, 2002.
Fascinating autobiographical piece by a renowned "street shooter" (fashion photographer) who navigates the bustling grid of Manhattan to capture random, fleeting moments of fashion genesis among the populace. Cunningham recounts his long march toward occupational nirvana: He was first a milliner for society women in the 50s, then a fashion writer before starting his photography career in the mid-60s. Cunningham extols the exciting unpredictability of his job — you never know when you'll find a "stunner" — and shares his impetus: "[T]he main thing I love about street photography is that you find the answers you don't see at the fashion shows. You find information for readers so they can visualize themselves ..... I let the street speak to me." (There is a companion article about Cunningham, written by William Norwich, in the same edition.)

Dickerson, Kitty. *Textiles and Apparel in the Global Economy*. 3rd ed. Upper Saddle River, NJ: Merrill, 1999.
Textbook comprehensively covers the economics of the textile and apparel production industries on an international level. The author examines the historical development of these industries in relation to the overall evolution and expansion of global trade, especially from the Industrial Revolution onward, and recognizes the textile and apparel industries as central, often determining factors in the formulation of new treaties and agreements. Trade policies, import-export procedures, labor disputes and individual sectors of both industries are explored, with informative glossaries and bibliogra-phies following each specific chapter.

Dwight, Eleanor. *Diana Vreeland*. New York: William Morrow, 2002.
Thoroughly researched and well-written biography of one of the leading icons of 20th century fashion. The scope of Vreeland's life is covered by the author, through her voluminous interviews with friends, associates and family members, and her collection of extensive source material from Vreeland's three main careers in fashion: fashion editor at *Harper's Bazaar* from the mid-1930s to the early-1960s; editor in chief of *Vogue* from the early-1960s to the early-1970s; and consultant at the Metropolitan Museum of Art's Costume Institute during the 1970s and early-1980s. Vreeland's social and family life are explored, but the more illuminating passages document her inexhaustible commitment to capturing fashion's vitality as it impacted culture (reflected in, among other things, her demanding leadership style). Insightful sections include: Vreeland's time during the late-1920s and early-1930s in Europe, where she first became attracted to haute couture (Chanel, Schiaparelli); her rela-tionships with fashion photographers and models (Richard Avedon, Veruschka), whom she sent to far-off locales for ambitious shoots during the *Vogue* years; and her willingness to mix historically inap-plicable garments together to achieve the right "look" while at the Met. Excellent photograph selections (color and black and white).

Fairchild, John. *The Fashion Book*. London: Phaidon Press, 1998.
Thick, oversize encyclopedia of fashion, one page per entry, limited to short, approximately 100-word biographies and one photograph or illustration. Five hundred representatives of the fashion world are included: couture and ready-to-wear designers, costume designers, photographers, models, makeup artists, accessory craftspeople, illus-trators, publishers-editors, retailers and icons. Despite the brevity of biographical information, this anthology is quite useful and informa-tive — the picture selection is especially impressive. Without fail, the contributors make illustrative choices (an Art Deco-influenced dress represents 1920s' designer Jean Patou; a sheath dress photographed by Herb Ritts in a risqué 1990s' ad campaign captures Valentino's mastery). The breadth of entries allows for the inclusion of figures from all corners of fashion; interestingly, although Marilyn Monroe appears in several listings, there is no entry for her.

———. *The Fashionable Savages*. Garden City, NY: Doubleday, 1965.
Personalized, opinionated account of the fashion industry during the early- and mid-1960s from the editor-publisher of *Women's Wear Daily*. Brief chapters focus on: individual couturiers based in Paris ("King" Balenciaga, Chanel, Dior, etc.) and America (Norman Norrell in New York, James Galanos in Los Angeles, and others); influential consumers (social elites, movie stars, young trendsetters); and Fairchild's print media peers (*Vogue*'s Diana Vreeland, the *New York Daily Tribune*'s Eugenia Sheppard). Informative chapters on Jacqueline Kennedy and the daily machinations of the industry's U.S. center, New York City's Seventh Avenue, where the "basic instinct," according to Fairchild, is that "someone will copy me, steal my ideas." Therefore, "Seventh Avenue copies Paris."

Frankel, Susannah. *Visionaries: Interviews With Fashion Designers*. London: V&A Publications, 2001.
Captivating interviews with 23 internationally renowned designers feature many citations of influences, and comment on fashion's evolution away from the dominance of haute couture into a more universal, egalitarian organism (not all of those interviewed view this as a favorable development). Retired legends Valentino and Yves Saint Laurent (the latter in a very brief interview via fax) look back on their careers but seem just as excited about the present scene. Asked whether she minds when her singular designs are adapted for more commercial uses, Rei Kawakubo of Comme des Garçons replies, "If my ultimate goal was to achieve financial success, I would have done things differently, but I want to create something new."

Frings, Gini Stephens. *Fashion: From Concept to Consumer*. 6th ed. Upper Saddle River, NJ: Prentice Hall, 1999.
Textbook offers a broad overview of every aspect of the fashion industry, including its historical development, process of fabric production, successful marketing strategies, and retailing and merchandising. Useful timelines cover specific eras in fashion, the popularity of influential designers, and the yearly international schedule for couture collection and apparel line unveilings. While furnishing little in-depth scholarship on fashion, this book is a useful introductory resource for those unfamiliar with the history, creative scope and inner-workings of the industry.

Galante, Pierre. *Mademoiselle Chanel*. Translated by Eileen Geist and Jessie Wood. Chicago: Henry Regnery Company, 1973.
Accessible overview of the life and career of Gabrielle "Coco" Chanel based on extensive research and interviews with people who worked with or were otherwise close to the famous designer, especially during her later years. Chanel's dedication toward the "liberation" of women from the confining nature of the Charles Fredrick Worth-era

style is praised, while her often-contemptuous attitudes toward her employees and peers (e.g., Schiaparelli, Courrèges, Cardin), and her refusal to acknowledge the practicality of the post-World War II "ready-to-wear" surge is criticized. Chanel's refreshing acceptance of imitation of styles and garments surfaces both early in her career (opposing Paul Poiret, she states, "Fashion should not come from the street, but it must reach down into it.") and later on ("A copy is a tribute to creation! A copy is love!"). Compelling sections deal with Chanel's initial foray into 1930s' Hollywood, where she designed for Marlene Dietrich, among other luminaries, and the development of the wildly popular Chanel No. 5 fragrance. Chanel's numerous failed romances, general aloofness from her peers and essentially solitary nature form the emotional thread that runs throughout this biography.

Gerston, Jill. "Oscar Films/Glamour; Win or Lose, It's How You Look That Counts." *New York Times*, March 10, 2002.
Lengthy, entertaining preview piece that bolsters *New York Times* fashion editor Cathy Horyn's subsequent review of the fashion buzz on Oscar Night 2002. Many observers of the 1990s' explosion in Academy Awards fashion coverage offer analysis of the high stakes involved for designers and — even more so, it is claimed — for actresses. The author also provides crucial historical perspective: Even after the Oscars became televised in 1953, actresses regularly wore off-the-rack apparel (or in Joanne Woodward's case, home-made clothing) for nearly 40 years as the world of haute couture remained distant from Hollywood's biggest night. Giorgio Armani's success in dressing several actors and actresses in the late-80s to early-90s is held to be a key breakthrough, and since then, as the author and others note, numerous Academy Awards attendees have impacted celebrity culture (and the fashion pages) even as the majority of Oscar-night dress decisions have become more cautious and conservative.

Golbin, Pamela. *Fashion Designers*. New York: Watson-Guptill Publications, 1999.
Encyclopedia of fashion designers from World War II onward is rich with photographic and illustrative support. The author constructs a thematic thread that runs through many of the entries: the ever shifting relationship between couture and ready-to-wear in setting trends and inspiring designers. Menswear is hardly discussed, but otherwise this is a comprehensive and visually arresting overview of the industry's creative pioneers. Notable entries include: Azzedine Alaïa, Charles James, Halston, Thierry Mugler and Jil Sander, among others.

Granatstein, Lisa. "Fashion Forward." *Mediaweek*, Oct. 23, 2000.
Article quotes *The End of Fashion*'s Agins and others on the changing forces in the fashion-publication marketplace, in which magazines with a more populist ambience, such as *Marie Claire* and *InStyle*, have gained sizeable circulations and newsstand sales. Long-established fashion tomes, such as *Vogue*, *Harper's Bazaar* and *Elle*, are examined in comparison to this fast-rising new wave, and a vice president at Polo Jeans notes that current editors and publishers are far more receptive to consumer and public demand (be it a desire for more celebrity coverage or more emphasis on streetwear) than were their more authoritative predecessors from years past (such as *Vogue*'s Diana Vreeland and *Harper's Bazaar*'s Carmel Snow), who were "not as involved in servicing the times."

Gremillion, Jeff. "They Wear It Well." *Mediaweek*, Jan. 27, 1997.
Report on the widespread upsurge in fashion-related advertising space in entertainment-oriented publications notes the increased amounts of editorial coverage of fashion-related topics as a primary cause for this trend. Many established publications have embraced fashion as a regularly recurring subject, from general pop-culture chronicles (*Entertainment Weekly*, *Us Weekly*) to film (*Premiere*) and music (*Vibe*, *Rolling Stone*) magazines. The nascent circulation growth of the 2-year-old *InStyle* magazine also is cited as evidence of a continuing fashion-entertainment convergence within the publishing world.

Haedrich, Marcel. *Coco Chanel: Her Life, Her Secrets*. Translated by Charles Markmann. Boston: Little, Brown and Co., 1972.
Biography of the fashion designer derives its narrative from personal interviews the author conducted with Chanel beginning in 1959 and continuing until her death in 1971. It follows that the most interesting material concerns Chanel's late career: her return into couture in the 1950s; her delight in devising and pronouncing numerous "maxims" on fashion, style, and life and death (many of which are collected on pages 251-255); her dissatisfaction with many designers of the 50s and 60s; and her lifelong desire to create a lasting style that overcomes the seasonal vagaries of the fashion system.

Heller, Zoë. "Movin' On Up." *Vogue*, March 2003: 554+.
Report on the re-emergence of media darling fashion designer Isaac Mizrahi, one of the most lauded designers of the 1990s and the subject of the 1995 documentary, *Unzipped*, who left Chanel in 1998 after failing to establish any profitable ready-to-wear lines. Mizrahi's comeback is ambitious: It involves the establishment of a super-exclusive haute couture salon, IM to Order, and even more risky, a contract with mass-market retailer Target for modestly priced clothing. The designer intends to maintain his presence on the cable channel Oxygen, where he has hosted *The Isaac Mizrahi Show* for the previous three years. If his gambles pay off, the author believes the likable Mizrahi may rise to the forefront of what has become a fashion-entertainment synergy movement.

Hirschberg, Lynn. "Luxury In Hard Times." *New York Times Magazine*, Dec. 2, 2001: 68+.
Magazine profile of fashion designer Tom Ford, the creative force behind the phenomenal success of Gucci during the late-1990s, and at the writing of this article, in charge of transforming the declining Yves Saint Laurent house into a similarly powerful global brand. In addition to coverage of Ford's personal history, his unequaled business acumen, his eye for others' talent and his belief in astrology ("I'm a Virgo"), Ford's creative energies are praised — in particular, his knack for recombining fashion from past eras into new statements is evidenced by 2001's "shirt of the season," a YSL blouse that reworks a similar, "hippie" look from Saint Laurent's mid-1970s' heyday. Furthermore, Ford insists on envisioning his clothing within a larger framework of a consumer's desires: He comments on the differences between a "Gucci" woman and a (more decadent) "YSL woman," and takes credit for recognizing that, in the age of satellites and the Internet, it is now possible for fashion-conscious people around the world to share the same desires. Other topics in this long, informative piece: French resistance to the American Ford's re-envisioning of the YSL line; Ford's and others' comments concerning the effect of 9-11 on the industry; and the designer's awareness that his stint at the pinnacle of the zeitgeist is, like fashion in general, temporary: "At some point, I'll be picking the shoe that only the people over 50 will pick."

Horyn, Cathy. "Critic's Notebook: As the Dow Falls, Couture Turns Contrarian." *New York Times*, July 23, 2002.
Report from the couture shows in Paris examines the current creative energies of several top design collections — Jean-Paul Gaultier, Karl Lagerfeld, Christian Dior — and declares the discipline of "making expensive clothes for rich women" is enjoying a vibrant renewal of cultural relevance. The British host of E!'s *Fashion File*, Tim Blanks, offers praise for the practice of haute couture, comparing the experience of an elite fashion show to that of film or music. Dior is praised for adapting "ethnic-inspired street styles" into its new clothing, and Lagerfeld's Chanel presentation is viewed as "subversive" in its mixing of tradition and transgression. In the author's estimation, ready-to-wear is suffering from creative stagnation due to the demands of a recession-hindered marketplace, meaning that "couture is now where the action is in fashion."

——. "Critic's Notebook; I'm Wearing ... Fill in the Blank." *New York Times*, March 25, 2002.
Review-analysis of the red carpet cavorting before the 2002 Academy Awards, when actresses draped in couture from the most expensive international designers displayed their choices for the media. Numerous actress-designer combinations are scrutinized, and the author digs beneath the glitz to reveal just how crucial these fleeting moments have become for both creative worlds. The public relations director for Chanel notes that photos of 1993 Oscar winner Marisa Tomei (dressed in Chanel) still circulate in magazines, while a stylist offers an unsettling view of the flipside of the Oscar-night spotlight when she notes that "a lot of actresses are petrified to make a mistake because it doesn't go away for at least a year."

——. "Critic's Notebook; Unbashed Wal-Mart Shopper Speaks." *New York Times*, Aug. 27, 2002.
Insightful, personalized account of the mass-production model of the world's largest retailer, and how it, "in its own quirky way, seemed to be in sync with what the magazines are showing for fall." The author, a *Times* fashion editor, recounts her experiences shopping at Wal-Mart and how she often has fooled top fashionistas with her bargain-bin attire. A telephone discussion with senior apparel executives from Wal-Mart's Arkansas headquarters reveals that, while they are aware of a trend in "cross-shopping" and have increased the fashion-awareness and fitting specifications of several lines, they do not intend to compete with other retailers (Target, Kohl's) that have made more overt efforts at courting the more discerning, style-conscious consumer, instead aiming their marketing toward, as one senior VP says, "the guts of this country."

——. "Is Copying Really a Part of the Creative Process?" *New York Times*, April 9, 2002.
Report concerns the revelation of a "lifting" by Nicolas Ghesquière, the designer for über-hip French couture house Balenciaga, from the deceased San Francisco designer Kaisik Wong. Wong's angular, multi-fabric vest first appeared in a photograph in the 1974 book *Native Funk & Flash*, which Ghesquière admitted to having seen and copied for his own vest for Balenciaga. The author comments that the practice of plagiarism — be it indirect "referencing" or more blatant reproduction — has long existed in the fashion industry on many levels. This current example is chalked up to "postmodernism" by the costume curator of the Metropolitan Museum of Art; criticized by author Tom Wolfe (who personally knew Wong); and defended by Stanford law professor Lawrence Lessig, a noted advocate of free creative exchange. The online article includes color photographs of both designs.

——. "Sexy Clothes, History Lesson Included." *New York Times*, March 3, 2003.
Review of the Fall 2003 fashion lines for several Italian-based design houses in Milan concentrates on Tom Ford for Gucci and Miuccia Prada and their creative invocation of past stylistic eras. According to the author, recent global turmoil has caused designers to become more conservative and predictable: "[I]nstead of trying to offer something that responds to, and even counterbalances, the emotional weight of the times, they've gone down an escapist chute." Thus, the new lines by Ford-Gucci and Prada, with their recollection of 19th century Edwardians and 1950s' high society, respectively, indicate to the author a positive reawakening to the possibilities of creative homage.

——. "Young Stars of U.S. Fashion Can't Seem to Find Right Fit." *New York Times*, Dec. 7, 2002.
Following the successive shop-closings of several once-promising American designers (Isaac Mizrahi, Todd Oldham, John Bartlett, etc.), the *Times* fashion writer interviews several observers who believe that transformations in consumer demand and entrepreneurial climate within the fashion industry mean that up-and-coming, homegrown designers likely will never reach the level of market dominance that Ralph Lauren, Donna Karan and Calvin Klein held for decades. While designers overseas (and select American ones, such as Marc Jacobs) enjoy strong financial backing from publicly owned conglomerates, U.S. designers are faced with increased competition from trendy discount shops and specialty chains as well as more cost-conscious, better-informed customers.

Ignelzi, R. J. "An Accessory to Crime." *San Diego Union-Tribune*, Nov. 19, 2002.
Report on the popularity of "purse parties" among upscale suburban women in Southern California includes interviews with a party organizer and seller, attendees-purchasers and representatives of the fashion industry decrying the events. The merchandise sold at these parties is inauthentic, and illegal, as these "knockoffs" are sold with

brand trademarks attached in Tijuana or on the street corners of the Los Angeles garment district. One buyer rationalizes her activity as "almost a spite thing" due to the exorbitant prices of real designer handbags; another does holiday shopping at the parties.

Kaufman, Leslie. "Après Yves, Le Deluge?" *New York Times*, Jan. 20, 2002.
Examination of the importance of the celebrity fashion designer to the overall industry and culture, using the retirement of Yves Saint Laurent as a sign of an impending changing of the guard among top designers (many of the more established and popular names have reached retirement age). Several observers (including legendary designers Bill Blass and Oscar de la Renta) examine the issue, and two conflicting perspectives are debated. Blass (interviewed months before his death) generally views designers as "brand names" and insists that, managed properly, a designer's creative vision can be maintained after retirement. Others claim that, due to the constant change within the industry and, in many cases, the public's identification with an individual designer's celebrity, the odds are against perpetuating a designer's unique style after the individual no longer is involved personally.

Kaufman, Leslie, and Abby Ellin. "The J.Lo Line Hits a Snag On Its Run for the Top." *New York Times*, June 16, 2002.
Report on the initial underperformance of actress-singer-mega-celebrity Jennifer Lopez's J.Lo clothing line in its first year. The article presents several possible reasons: poor comfort, fit and overall quality; high prices for the juniors market; and lack of coordination during the Christmas 2001 season. Despite criticism from several retailers, other observers (including Russell Simmons of urban-wear trendsetter Phat Farm) believe that Lopez's venture eventually will succeed, and the authors note that the ambitious "barrio girl meets Brooke Astor" already has lured a top designer away from ex-paramour Sean "P. Diddy" Combs' Sean John apparel company.

Kaye, Elizabeth. "Cloning Chic." *Los Angeles Magazine*, Feb. 2001: 44+.
Article explores the business strategy of Los Angeles-based designer Allen B. Schwartz, whose self-named apparel company ABS has earned notoriety and financial success — enough for a $20 million-plus buyout by Warnaco in 2000 — due to its popular replicas of Oscar-night celebrity wardrobes. The author writes, "Call it an egregious act of theft, if you must, but also call it a stroke of brilliance, a marketing gamble emanating from an instinct about who women are and what they want." Several of Schwartz's most lucrative garments are discussed, along with a brief overview of fashion's struggle with design protections. Schwartz defends his design house as more than just a copycat operation, touting its high-quality craftsmanship and increasing celebrity clientele.

Kellogg, Ann, Amy Paterson, Stefani Bay and Natalie Swindell. *In An Influential Fashion*. Westport, CT: Greenwood Press, 2002.
This encyclopedia of 19th and 20th century fashion designers and companies focuses on those that made a lasting impact on the industry and on culture in general. The book includes compact biographies, discussion of stylistic innovations, information on business expansion, and, in some cases, illustrations of a designer's landmark design (i.e., Christian Dior's "New Look" of the late-1940s). The overall emphasis tilts slightly toward the American fashion industry, but there are enough international designers and companies to make this a useful general resource.

Kingswell, Tamsin. *Red or Dead: The Good, the Bad, and the Ugly*.
New York: Watson-Guptill Publications, 1998.
Slim volume recounting the history of the British "street fashion" design house Red or Dead, which began as a market kiosk in London during the early-1980s; introduced Doc Martens work boots into the global fashion vernacular; and throughout the 1990s, established a reputation as a bold, controversial, and often culturally trenchant fashion brand that brought punk-rock attitudes into the present and then exploded them. Interviews with founder Wayne Hemingway and his partner-wife, Gerardine, are interposed with a pictorial history of Red or Dead, with an emphasis on the designers' adherence to a credo of breaking down what they see as the boundaries of fashion: elitism, expense, propriety and political neutrality. In turn, the Hemingways' fashion line draws inspiration from the culture at large (other designers, music, film, current affairs, personal experiences and, of course, "the street"). Pages 19-20 feature some of Red or Dead's T-shirt parodies of corporate logos (the Hemingways sold their ownership stock in Red or Dead a year after this book's publication).

Kuczynksi, Alex. "Trading on Hollywood Magic." *New York Times*, Jan. 30, 1999.
Opening with a declaration from the editor of the monthly fashion magazine *Allure* — "Nobody cares about models anymore" — this report examines the widespread changeover from models to celebrities as cover subjects for women's fashion and lifestyle magazines. Sales figures for 1998 for major magazines with celebrity covers are contrasted with those featuring models, and the results clearly indicate that public interest has changed since the supermodel era of the early-1990s. Cultural critic Neal Gabler opines that models are too one-dimensional for today's celebrity-obsessed culture, while the onscreen personaes and gossip-generating private lives of Hollywood performers give people what the author labels an "illusion of substance." As in other articles, the success of *InStyle* magazine is cited as a prime agent in this shift from model to celebrity; the author observes this trend has not affected overseas markets, where models still dominate magazine covers.

La Ferla, Ruth. "All Fashion, Almost All the Time." *New York Times*, March 29, 1998.
Report on the influx of new fashion-oriented programming on cable television in the late-1990s, focusing on the E! Entertainment Television network. The article discusses programs such as the make-over show *Fashion Emergency*; the how-to, behind-the-scenes format of *Model TV*; and the more adulatory series *Fashion File* and *Video Fashion Weekly*, along with E!'s most popular fashion excursion, the Joan and Melissa Rivers-hosted awards show coverage. Most of those interviewed believe this growth will endure, as Hollywood continues to embrace fashion and style as crucial elements of contemporary entertainment.

———. "Front Row." *New York Times*, Jan. 21, 2003.
Review of the Golden Globe Awards held in Los Angeles, focusing on the fashion-conscious, televised pre-show in which actresses wear couture dresses from top international designers and stroll past dozens of photographers as they enter the venue. Actress Laura Flynn Boyle's faux-ballerina dress is discussed, as is the uncharacteristically reserved tone of traditional red carpet arbiter Joan Rivers. According to the author, rumors of designer payoffs to celebrities in return for adornment surrounded the event, revealing the high-stakes fashion publicity that now is up for grabs at the formerly largely ignored Golden Globes. Just as the Globes now are seen as a gauge of Oscar night revelations, so too are the celebrities' red carpet fashion choices.

———. "This Star for Rent, Now That Stigma Fades." *New York Times*, April 8, 2001.
"As the line between art and commerce continues to erode," more entertainers are signing contracts to advertise fashion products than ever before, according to the author. Numerous examples are listed, from the hiring of Jeremy Irons and Milla Jovovich for a major Donna Karan print campaign to the long-term signing of Uma Thurman to cosmetics titan Lancome. This trend is linked to the increased celebritization of fashion in general, and offers further proof that the supermodel era is over. Some critics warn that the overuse of celebrities in product endorsements might spur a backlash, but others see it as the new preferred marketing paradigm, for both performers and products.

———. "Who Stole Fashion's Show?" *New York Times*, Sept. 12, 1999.
Engaging analysis of the diminished impact biannual fashion shows — and high-end fashion designers in general — have on the daily workings of the industry at large, both in terms of affecting economic strategies and establishing current styles. Now, the author observes, the most influential trends in fashion's cycle more often arise from small boutiques, "fashion titans" such as Donna Karan and Ralph Lauren, Hollywood and the street than from the couturier's catwalk (Tommy Hilfiger's then-hot alignment with hip-hop stars is given as fact of this shift). Teri Agins' recently released book, *The End of Fashion*, is used to support the author's argument, and Target's popularity as a source for affordable, mass-appeal style also is discussed. The evidence points to a continuing erosion of the traditional, top-down hierarchy of fashion dissemination; as the president of Nicole Miller observes, "People want fast fashion. They're not waiting for the runways to find out what these gurus think."

Laboy, Julio. "Clothiers Bring the Barrio to Japanese Teen Rebels."
Wall Street Journal, April 8, 1998.
Enlightening report on the mid- to late-90s phenomenon of Japanese youth purchasing Chicano-style clothing from independent, "street-born" Southern California apparel makers. The growth of this trend is conveyed through the rise of Tribal Streetwear, Inc., the most popular of several cutting-edge, populist brands, and cultural reasons for this cross-Pacific transmission also are examined (the clothes are just a part of a larger Hispanic influence that many young Japanese reformulate to build their own "outsider" subculture). In addition, the article explores the cooperative business relationship between streetwear fashion manufacturers; the founders of several companies believe that word-of-mouth exposure can assist the streetwear fashion industry as a whole in reaching its overseas market more effectively.

Lacher, Irene. "Style Wars." *Hollywood Reporter*, Oct. 22-28, 2002.
Like several entries in this bibliography, this report investigates the importance of Oscar night — "the Super Bowl of fashion" — but delves into the pressure-packed event preparation to spotlight a growing rift between designers and stylists for control of what the stars wear. Accusations are levied on both sides: The stylists are piggybacking on the fame of their clientele and have no innate talent, and the designers are succumbing to super-hyped pressure by lavishing stars and stylists with perks, in some cases even paying them to wear their clothing. Rather naively, the author claims the public is "oblivious to the machinations going on behind the scenes." Lacher's piece bookends three smaller segments by reporter Polly Wilson that feature illuminating interviews with several successful stylists (including teen-pop dresser Stephanie Wolf); fashion designers (Bob Mackie and others); and costume designers (who provide particular insight into the creative process they must manage while creating a "look" for a particular film).

Malossi, Giannino, ed. *The Style Engine*. New York: The Monacelli Press, Inc., 1998.
Featuring over 20 wide-ranging and largely insightful essays, and a unique visual design with numerous striking photographs and illustrations, this book — the result of a collaborative labeled the Fashion Engineering Unit — captures the contemporary fashion industry in all of its hectic appeal. Most of the authors hail from Italy, yet the book's focus is on assessing fashion as a global phenomenon. Standout essays include: Andrea Balestri and Marco Ricchetti's economic history of the industry (158-175); Domenico De Masi's piece on fashion's creative process (128-133); Ted Polhemus' essay on post-modern fashion as an instrument of identity creation (72-79); and the Fashion Institute of Technology's Valerie Steele's rhetorical exercise, "Why People Hate Fashion" (66-70). Overall, the book presents an ambitious and successful synthesis of diverse intellectual perspectives concerning fashion and its effect on culture.

May, Christopher. *A Global Political Economy of Intellectual Property Rights*. London: Routledge, 2000.
Engaging overview of the myriad issues facing the global economy as it relates to the ownership of creative ideas, inventions and designs. The author examines the theoretical underpinnings of intellectual property law and how economic transactions are facilitated through international agreements, the latest being trade-related aspects of intellectual property rights (TRIPS) from the World Trade Organization's (WTO) inaugural charter. Piracy issues are covered on pages 153-157, and the author provides useful commentary on how the fashion industry deals (or chooses not to deal) with the widespread "knocking off" of designs. He concludes with the following insight: "[T]he coverage of intellectual property needs to be tempered by a fully developed and robust public domain but not completely abolished" (178).

McDowell, Colin. *Fashion Today*. London: Phaidon Press, 2000.
Voluminous, discerning overview of the fashion industry at the turn of the millennium that focuses on developments dating from Dior's

"New Look" onward. The author, a fashion writer for London's Sunday Times, dissects the industry from several perspectives, each comprising a separate, non-chronological chapter (representative topics-chapters include: "Designer as Superstar," "Selling the Dream" and "The Lure of Retro"). A staggering array of photographs supplement the textual flow, which, despite its breadth, further manages to illuminate what the author regards is fashion's positive — even potentially liberating — catalyzing role in postwar culture, as stated in the introduction: "For the first time in history, fashion is now perceived as central to existence by vast numbers of people of all ages and social backgrounds, many of whom have been traditionally excluded from its influence."

McKinney, Jeffrey. "Rags to Riches." *Black Enterprise*. Part 4 of a series titled "The Hip-Hop Economy," Sept. 2002: 98+.
In-depth article on the tremendous growth of several "urban apparel" companies with close ties to the hip-hop music community. Performer-producer Sean "P. Diddy" Combs proclaims that the goal of his fashion line Sean John is "to bring entertainment into fashion," and his close relationships with numerous celebrities in and out of hip-hop have enabled Sean John's upscale attire to grab market share from more established designers. Combs, Jay-Z of Rocawear and Russell Simmons of Phat Farm collectively represent "a new breed of hip-hop magnate, who is creating thriving businesses through sartorial innovation, marketing savvy, and star power." The pioneering urban fashion companies Karl Kani and FUBU also are analyzed, and estimated revenues for 2001 are included for all five design houses.

Mencken, Jennifer. "A Design for the Copyright of Fashion." Paper included on the Intellectual Property and Technology Forum's Web site at Boston College Law School, Dec. 12, 1997. [www.bc.edu/bc_org/avp/lawsht_org/iptf/articles/content/1997121201.html]
Exhaustively researched position paper argues for the extension of copyright protection to fashion garment designs. The author reaches into the history of the fashion industry to detail how various trademark, patent and trade restrictions have provided a cumbersome framework of protection for fashion products (only the fabric design is copyrightable), and notes that the blurry, subjective distinction between the aesthetic versus utilitarian functions of clothing has kept courts from making a forceful decision on the issue. While the lack of a clear copyright protection for fashion has not hindered the industry's creative momentum, the author believes the moral rights of artistic fashion designers are usurped habitually by the thievery of copycat manufacturers in the current scenario. Mencken thinks a time-limited, "necessarily thin" copyright protection that includes a licensing system better would serve both consumers and fashion designers.

Moore, Booth. "Redesigning and Redefining the House of Halston." *Los Angeles Times*, Dec. 27, 2002.
Interview-supported report on the leadership shift at the long-beleaguered Halston design house, where Los Angeles designer and TV personality Bradley Bayou is the new creative director. Discussion centers around Bayou's successful track record in fashion and entertainment, which is compared with Halston's rise during the 60s and 70s as "one of the first celebrity-designers" (for Jacqueline Kennedy Onassis, Studio 54, etc.), before the designer and his imprint over licensed and fell into decline in the 80s. Bayou's designing of couture dresses for Halle Berry and Oprah Winfrey; his stint on daytime television's *The View*; and his Lifetime program, *Operation Style*, all point to his populist, entertainment-oriented approach that potentially may resuscitate the brand.

———. "Then Again, Yes: With Minis, Shifts and Lean Jackets, Designers Put a Fresh Spin on the 1960s." *Los Angeles Times*, Feb. 17, 2003.
Report on the Fall 2003 collection fashion shows of several leading designers in New York City begins with commentary on how several lines share stylistic roots in 60s' culture (particularly Carnaby Street-Swinging London, "mod versus rocker" fashion). Also discussed: Los Angeles designer Jeremy Scott's homage to Hollywood's influence with his fashion premiere at the end of the week, which involved filming his models' displays in one red carpet area and then showing the footage in real time to the audience in a screening room.

Mower, Sarah. "The Talent Club." *Vogue*, March 2003: 278-294.
"People with an original aesthetic, thinking laterally about the times we live in." So defined are a group of up-and-coming fashion designers from around the world, a group that "revels in color, beauty, quality, wit, and romance; something altogether different from the rough, oppositional stuff associated with upstart designers through the nineties." In many cases, this "revolt into glamour" movement draws from cross-cultural influences (one British designer updates the 1960s' sci-fi Amazon look of Roger Vadim's *Barbarella*, for instance). Despite the unforgiving economic climate, the author believes that many of these designers have the ingenuity and professional focus to make a lasting international name for themselves.

Mui, Nelson. "Ms. Perfect Opts Out." *New York Times*, Aug. 19, 2001.
Article employs interviews with several young to middle-age Manhattan fashionistas to explore a larger trend-in-the-making: a "quiet revolt" against upscale, expensive designer clothing and the considerable time it takes daily to create a full-fledged, trendy appearance. Valerie Steele of the Fashion Institute of Technology notes that the increasing focus on celebrities in fashion media has made the general populace more susceptible to fashion conformity, resulting in the formation of an opposition (or, more accurately, an "opting out") movement of sorts.

Oldham, Todd. *Without Boundaries*. New York: Universe Publishing, 1997.
This book contains a series of interviews with the popular and eclectic designer Todd Oldham, along with visually arresting photographs of his design (primarily fashion, plus some interior decorating and other materials from the 1990s) and essays from friends and admirers. Oldham, interviewed by New York writer Jen Bilik, expounds on his fondness for the mixing of cultures high and low, past and present, local and international; he discusses his formative influences (growing up in Texas and in Iran, "outsider" art, Sears catalogs); and states his belief that creativity is a process of referencing both past influence and a hope for the future together in a current, momentary form (20).

Olivier, Ellen Appel. "Style & Culture: Star Clients Keep Stylists On the Run." *Los Angeles Times*, Jan. 24, 2003.
Since "the public's interest in red-carpet attire is insatiable," observes the author, "for stars, fashion-consciousness is no longer optional." This report follows one Los Angeles fashion stylist, Fati Parsia, during the Paris haute couture shows as she selects apparel for her A-list clientele to wear during upcoming awards shows and events. Overall, this account provides a concise assessment of the current mutually beneficial interplay between celebrities and couturiers, exemplified by the huge amount of publicity generated by Halle Berry's Oscar dress in 2002, created by Lebanese designer Elie Saab and chosen for Berry by stylist Phillip Bloch.

Patner, Josh. "Cool as a Cupcake." *Slate*, June 20, 2003. [www.slate.msn.com/id/2084044]
Online opinion piece assesses New York designer Marc Jacobs, whose popularity as a purveyor of hip sportswear for the high-end consumer market has come to surpass his more rarefied creations for Louis Vuitton in terms of hipster cachet. According to the author, the key to Jacobs' appeal lies in his willingness to reference past designs — and popular culture in general — with a self-conscious, gleeful panache (making him the "Moby of the runway"). Often erroneously labeled a knockoff artist for the cognoscenti, the author argues Jacobs' "cultural zeitgeisting" talent instead indicates a redefinition of what makes a modern fashion designer successful, elevating cleverness over innovation and thus "shifting the very standards by which the craft will be judged in the future."

Piaggi, Anna. *Anna Piaggi's Fashion Algebra*. Translated by Cecilia Treves. London: Thames & Hudson, 1998.
Massive, visually fascinating anthology of the collage work created by *Vogue* Italia fashion editor Anna Piaggi, covering 10 years of her signature "Double Pages" that appeared in the glamour magazine (selections from 1988-98). Inspired by "the radical simplicity and the natural condition of spreads, of open pages," each of the "Double Pages" expands on a singular, imaginative concept. Piaggi's eye for fashion leads to boundless juxtapositions, some more literal than others, nearly all intriguing (the text is in Italian, but a fold-out page at the end of each chapter lists descriptions of each collage in English). Taken as a whole, Piaggi's oeuvre is a testament to the rapid, unfettered pulse of fashion creativity; nothing is off limits to her and the talents she salutes in every issue. A brief segment closes the book, offering among other items a track listing of one of Gianni Versace's runway mix tapes from the early-1990s.

Presler, Margaret Webb. "Who's Got the Look?" *Austin American-Statesman*, Aug. 27, 1998.
Account of the charges leveled by retailer Abercrombie & Fitch against its chief competitor, American Eagle, in a lawsuit filed in June 1998. Abercrombie & Fitch, then at the height of its popularity as a provider of trendy apparel for teen and young-adult consumers, accused American Eagle of "ripping off" many of its designs, as well as its marketing plan (which featured quarterly catalogs mixing photo spreads, clothing inventory and lifestyle-oriented articles). An industry consultant defends American Eagle by noting that the rapid adaptation of others' design elements is a core practice within the fashion industry. A district court ruled in favor of American Eagle, and in February 2002, the Sixth Circuit Court of Appeals upheld the ruling, citing that the "functionality" of A & F's clothing meant that it couldn't be protected as trade dress.

Quintanilla, Michael. "Gotta Have It: Magazine's Team of Savvy Young Shoppers 'Hot Picks' Coolest Fashions." *Los Angeles Times*, Sept. 6, 2002.
Narrative report dissects the fashion picks and pans of a group of "trend spotters" selected by *Teen People* magazine to attend a Magic International trade convention in Las Vegas. In interviews, the selected teens (ages 16 to 20) describe how their style decisions are made: Fit and appearance matter more than cost, and all the biggest influences come from entertainment (music videos, films, celebrities). The young people's tastes range from mainstream retailers (Target, Abercrombie & Fitch) and new, trendy lines (Sean John) to thrift-store chic. The report notes that during the 2001 economic downturn, teen spending on apparel rose 4 percent from the previous year.

Rochlin, Margy. "Oscar Films/The Show; Taking No Prisoners at the Edge of the Red Carpet." *New York Times*, March 4, 2001.
Profile of E! Entertainment Television's awards show fashion critic Joan Rivers briefly recounts her pre-E! career as a standup comedian and failed Johnny Carson rival in late-night television, but mainly focuses on her relationship with both the entertainers with whom she interacts and her large (for cable) fan base. Regarding Hollywood's recent conservatism on the red carpet, Rivers says, "I want everybody to look pretty, but I am always praying for at least one tramp."

Schoolman, Judith. "Calvin Klein's Sew Mad: Designer and Partner in Rag Trade Legal Battle." *New York Daily News*, Jan. 14, 2001.
Report on the acrimonious litigation between designer Calvin Klein and apparel manufacturer Warnaco, (which was settled days later, just before the trial was set to commence). Designer Klein alleged that Warnaco, which had licensing rights to Calvin Klein jeans and underwear, "diluted" the brand by shipping clothes to discount retailers such as Sam's Club and Costco. Such practices are "the equivalent of counterfeiting," said then-Calvin Klein CEO Barry Schwartz when the suit was filed in the spring of 2000.

Seabrook, Jack. "A Samurai in Paris." *New Yorker*, Mar. 17, 2003: 100+.
Profile of *International Herald Tribune* fashion editor Suzy Menkes, who has covered couture for the newspaper since 1988. Widely regarded as one of the most knowledgeable and influential commentators on fashion, Menkes reflects on her personal history; discusses her relationships with designers both established and up-and-coming; and comments on the overall state of the industry, saving her most cutting criticism for more recent developments that have endangered the "artistry" and exclusivity of couture (American fashion's overemphasis on celebrity coverage, for example). The author, a cultural critic who penned the marketing exposé *Nobrow*, also makes several astute observations about the transformation of the global fashion industry in the 1990s.

Steele, Valerie. *Fifty Years of Fashion*. New Haven: Yale University Press, 1997.
Concise, accessible overview of global fashion from Dior's "New Look" to the trends of the mid-1990s. The author does not attempt to provide a comprehensive history but instead offers an opinionated assessment of prevalent styles, trends and designers through the decades, as well as noteworthy commentary on Dior's popularity in the 1950s; Balenciaga's enduring influence; the 60s' "Youthquake"; the rise of licensing; 70s' "anti-fashion", and Karl Lagerfeld's tenure at Chanel during the 1980s, among other topics. Representative photographs from each era are interposed with apparel from the museum collection of New York's Fashion Institute of Technology, where Steele serves as director.

Tagliabue, John. "Fakes Blot a Nation's Good Names." *New York Times*, July 3, 1997.
In-depth report on the preponderance of counterfeiting in Italy, focusing on the leather goods sector of the fashion industry as well as consumer electronics. Ironically, the author observes, many of the fake Prada and Dior handbags currently disseminated world-wide were crafted by the same people responsible for the original, commissioned articles, resulting in a near-perfect verisimilitude that makes them far harder to detect — and potentially far more devas-tating a problem — than Asian-made counterfeits. The communal, "entrepreneurial" nature of many Italian shop workers and crafts-people results in an environment that values steady employment and local benefits over the intellectual property demands of distant corporate entities, say several experts, who also note that Italy has less stringent legal safeguards against piracy than other EU nations.

Tkacik, Maureen. "The Return of Grunge." *Wall Street Journal*, Dec. 11, 2002.
The MTV-sanctioned arrival of pop and rock music performers Avril Lavigne and The Strokes, among others, signifies a return to "grunge"-like fashions for retailers and designers, according to the author. The brief, early-1990s grunge fad, spurred by the popularity of rock bands such as Nirvana and Pearl Jam (whose members collec-tively embodied a thrown-together, denim- and flannel-saturated fashion image), now is due for a revival of sorts, since the teenage and 20-something fans of these new artists were of elementary-school age when the first wave of grunge fashion hit. This more "authentic" and street-savvy movement may be a reaction to the prefabricated pop music and fashions of teen idols such as Britney Spears and NSYNC, and the author notes that some popular retail stores (such as Abercrombie & Fitch) have been impacted negatively by the grunge semi-revival due to their concentration on more staid, "preppy" designs.

Trebay, Guy. "From Milan, Soccer Cowboys." *New York Times*, June 29, 2003.
Report on the Winter 2003 fashion collection shows from Milan notes the current penchant for stylistic references to past eras by designers such as Tom Ford for Gucci, whose rugged, "wrangler"-esque Western wear is well-suited for a younger, sexier, trendier George W. Bush, according to the author. Other design houses, from Prada to Fendi to Calvin Klein, also feature Western motifs in their new lines, while Dolce & Gabbana's new apparel trends toward attracting the "metrosexual" or David Beckham (U.K. soccer star-celebrity) demo-graphic. The DSquared fraternal twin team constructed a 1950s' "Happy Days" set for their collection, which "wittily" references late-1950s' to early-1960s' American pop culture in its styles (James Dean, Thunderbirds, early Beach Boys).

———. "London: The Town That Would Be King Again." *New York Times*, Nov. 19, 2002.
"As it happens, plurality may be the news from fashionable London, as the design scene here evolves beyond the stale and often monolithic nature of the apparel trade." So begins this account of fashion trends in a formerly dominant global center, which is now an incubator for upstart designers intent on creatively challenging what they regard as the stagnation of the elite global superpowers. These bohemian designers in the East End and brash, politically edgy boutiques dispersed in and around the Soho district already have captured the attention of several major designers, as well as valuable support from names in both mainstream celebrity (football's David Beckham) and the cutting-edge, underground ("electroclash" musicians).

———. "What's Stonewashed, Ripped, Mended and $2,222?" *New York Times*, April 17, 2001.
This analysis of the importance of denim jeans in the fashion industry briefly recounts the history of blue jeans in U.S. fashion: their origin in the California gold rush era; their mass acceptance post World War II, particularly within youth culture; and the designer-jeans boom in the 1970s, etc. The author spends more time analyzing the recent inclusion of denim into the lines of several high-end designer collections (such as Britain's Stella McCartney and New York's Marc Jacobs). Most of these jeans are intentionally ripped or otherwise roughed up in order to create an artificially unique history for each garment (Dolce & Gabbana's most "authentic" version retails for over $2,000).

Trebay, Guy, and Ginia Bellafante. "Prada: Luxury Brand With World-Class Anxiety." *New York Times*, Dec. 18, 2001.
Report on the expansion of the Prada empire into several vast, architecturally unique superstores around the world, and the overall surge in acquisitions that has threatened to over saturate the market with what once was regarded as an exclusive, luxury brand. The conflicting goals of "reaching a broad market" and "also retaining the intrinsic cachet of being the cognoscenti's chosen brand" are discussed, and several observers of Prada's ambitious strategy believe the brand has placed so much financial stake in the mass market that it has no choice but to forsake its elite aura (a poll cited from *Women's Wear Daily* found that Prada did not place in the Top 100 most recognizable international fashion brands).

Troy, Nancy. *Couture Culture*. Cambridge, MA: MIT Press, 2003.
The author states in the introduction: "My interest in haute couture lies in the contradictions engendered by its production of suppos-edly unique garments for elite clients and multiple copies for mass consumption." Using the early-20th century career of successful French couturier Paul Poiret as a guide, Troy examines the tension between artistic aspirations and commercial concerns that the exclu-sive realm of haute couture faced as its influence spread across the world, and especially into the mass-market wonderland of America. Poiret's struggles with this dichotomy after he found his designs were being widely copied in America — his attempts to instigate changes in U.S. copyright law, his introduction of his own line of "genuine reproductions" — are contrasted with Marcel Duchamp's provocative "readymade" art from the same period, which isolated and imbued functional, everyday objects with aesthetic qualities. The author also covers other designers and issues of the era in this exhaustively researched, finely illustrated study (in particular, U.S. and French intellectual property laws of the 1910s and 1920s are analyzed and compared in Chapter Three).

Wellington, Elizabeth. "From Shady Beginnings, Knockoffs Rise to Respectability and Big Profit." *Pittsburgh Post-Gazette*, Nov. 7, 2002.
Brief article on the increasing popularity of "knockoff" fashion apparel focuses on merchandise sold over the Internet. Several young, trend-conscious consumers explain their decision to down-scale (due primarily to the economic downturn and the improvement in knockoff design quality), and the owners-operators of a popular knockoff Web site reflect on the origins and growth of their busi-ness (born out of the mass Internet-related layoffs of 2000-2001). A trend-watcher in New York notes that knockoff merchants are making money off of the talent and creativity of couture designers.

White, Constance. "A Casual Revolution Is Heating Up." *New York Times*, Feb. 27, 1996.
Report on the movement away from high-end couture within the designer community as a result of the growing popularity of casual wear, particularly in America. Citing the influence of *Friends* charac-ters' fashions, the author observes there is a "sea change" underway in style, one in which designers must accommodate their customers' desire for more comfortable, versatile-yet-trendy apparel by shoring up their lower-priced lines. Designers Gianni Versace and Donna Karan are interviewed and both express approval of this cultural shift.

——— "The Rise of the Stylist: A Double-Edged Sword." *New York Times*, Sept. 1, 1998.
Article examines fashion stylists' growing stature within the industry, highlighting the interrelationship between stylist and designer on a designer's clothing line in terms of overall presentation. Several interview subjects are critical of the stylists' responsibilities, stating that stylists' commitment to establishing hip, international trends dilutes competing designers' unique creative visions and results in far-too-similar collections. Hollywood's and celebrities' increased prominence in 90s fashion is discussed as a contributing factor to the stylists' newfound decision-making power.

Wilson, Elizabeth. *Adorned in Dreams: Fashion and Modernity*. Berkeley: University of California Press, 1985.
For the author, 20th century fashion is a central component in self-creation, a way for people to "express and define their individuality." Wilson analyzes fashion as a by-product of modernity and capitalism, inextricably linked to the rise of the metropolis and susceptible to exploitation. However, she also envisions fashion as a "kind of connective tissue of our cultural organism," and a source for much pleasure and creativity. The author devotes individual chapters to such topics as: the economics of the industry, fashion and sexuality, fashion and feminism and fashion in popular culture. In Chapter Three, "Explaining It Away," she examines several well-known theoretical approaches to fashion, from Thorstein Veblen's early-20th century consumerist critiques to Jean Baudrillard's postmodernist assement to Roland Barthes' influential semiotic analysis. Wilson argues that previous theories on fashion too often overlook its important aesthetic appeal; her own perspective draws from the ideas of such critics of modernity as Walter Benjamin, Marshall Berman and Fredric Jameson.

Yokogawa, Joselle. "Steady Rockin'." *California Apparel News*, Feb. 7-13, 2003.
Trade publication interviews two veteran street performers, break-dancers Crazy Legs and Easy Roc of the Rock Steady Crew, about their observations on current underground or "street" fashion trends. Both liken the creativity and fluidity of fashion to that of dance and music, especially hip-hop and punk. Each is outfitted in a photo layout with apparel from designers that also was featured in the March 2003 Magic International industry showcase. ∗

AUTHOR BIOGRAPHY

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Patrick Reed has contributed to several projects for the Norman Lear Center, including "The Tyranny of 18 to 49" and "Ready to Share." He has worked for a variety of businesses and non-profits since the late-1990s as a writer, researcher, film critic, copyeditor and video producer. He received a B.A. in telecommunications with a concentration in film studies from the University of Kentucky and an M.A. in popular culture from Bowling Green State University in Ohio. He lives in Frankfort, Kentucky. ∗

Tom Ford.

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Mr. SMITH. Thank you, Mr. Wolfe.
Ms. Scafidi?

TESTIMONY OF SUSAN SCAFIDI, VISITING PROFESSOR, FORDHAM LAW SCHOOL, ASSOCIATE PROFESSOR, SOUTHERN METHODIST UNIVERSITY

Ms. SCAFIDI. Thank you. Good morning, and thanks to Chairman Smith, Representative Berman, Congressman Delahunt, and all of the Members of the Subcommittee for inviting me to speak to you about intellectual property and fashion design this morning.

Fashion designer Coco Chanel is sometimes quoted as having said, "Protecting the seasonal arts is childish." However, most people who repeat that statement seem to ignore the fact that in the 1930's Coco Chanel herself joined fellow designers as a plaintiff in a landmark French lawsuit that shut down a notorious copyist and helped Chanel build the house that still bears her name. In other words, Coco Chanel was a smart businesswoman who knew how to tell the public what it wanted to hear, while using the law to protect her intellectual capital.

This is the constitutional intent of copyright law, to promote and protect the development of creative industries by ensuring that creators are the ones who receive the benefit of their own intellectual investments. Of course, fashion designers create without the benefit of copyright law, but so would poets and songwriters if there were no copyright. It is what humans do. It is also the case that trends in fashion exist in every creative industry, including those supported by copyright.

The problem today is that, as in other industries like music and film, the digital era has made pursuing a creative business without copyright protection even more difficult. Even Mr. Sprigman just admitted that technology changes things. A digital photograph of a new design can be uploaded to the Internet and sent to a knockoff artist halfway around the world before the model even reaches the end of the runway, as Mr. Banks pointed out. It used to take months to copy a new style. Now it takes mere hours. That ecosystem has been upset.

Creative design at all price levels is vulnerable to copying. H&M, a popularly priced chain that distributes trends to the mass market and is sometimes cited as an example of indifference to copying, was itself knocked-off and brought action last year under E.U. unregistered design protection.

The United States should no longer be a pirate nation with respect to intellectual property, as we were in our early years. We are a global superpower and we work with fellow members of the G-8 group, the WTO, the World Intellectual Property Organization at their bilateral trade negotiations to promote I.P. protection, except in the area of fashion design.

This is particularly surprising in light of those concerns that Congressman Goodlatte mentioned about counterfeit trademarks. After all, those fake trademarks have to be affixed to something, often goods created through design piracy.

At this point in our history, America should not be a safe haven for copyists. The failure to protect fashion design is both inconsistent with our international policy and a disadvantage to our own

creative designers, especially the young designers who represent the future of the American industry and who are particularly vulnerable to copying.

Consider the example of Ananas, a 3-year-old handbag label. Its cofounder is a young wife and mother working from home, actually here in the Washington suburbs, and she has been successful in promoting her handbags, which retail between $200 and $400. Earlier this year, however, she received a telephone call from a buyer canceling the wholesale order. When she asked why, she learned that the buyer had found virtually identical bags in a cheaper material at a lower price.

Shortly thereafter, the same designer looked on the Internet and discovered a post on a message board from a potential customer who had seen one of her bags in a major department store, thought about buying it, but went home and on the Internet found a cheaper bag, a look-alike in lower-quality materials, which she not only bought but recommended to others. So Ananas is still in the business at present, but that loss of those wholesale and retail orders is a huge loss to a small business.

As a law professor with a particular interest in unprotected areas of creativity, I have kept a file on I.P. in fashion design for almost a decade. I have a Web site, as you mentioned, thank you, dedicated to the subject. I also frequently speak with young designers who have been copied or who would like to proactively protect their work.

One of the most difficult things to explain to those young designers is that U.S. law doesn't consider fashion design to be worthy of protection. I hope instead to one day have the law behind them to deter copying in the first place and to protect them against design piracy when the need arises.

So H.R. 5055, with its short-term, narrowly tailored protection for the fashion industry is, I think, a groundbreaking example of how copyright law can be narrowly tailored, and carefully designed to serve the creators and the public interest.

In fact, this kind of short-term protection is exactly the model of copyright suggested by some law professors who have opposed this Subcommittee's actions on other bills. I am surprised and disappointed that various individuals don't believe that the fashion industry deserves even a minimal amount of protection when compared with other forms of creative expression.

So I would like to thank and congratulate the Subcommittee on taking the issue of fashion design seriously and holding this hearing, and I look forward to your questions.

Thanks.

[The prepared statement of Ms. Scafidi follows:]

PREPARED STATEMENT OF SUSAN SCAFIDI

Chairman Smith, Representative Berman, and members of the Subcommittee, thank you for this opportunity to address the issue of intellectual property (IP) protection and fashion design.

INTRODUCTION AND EXECUTIVE SUMMARY

Historically, American law has ignored the fashion industry. While trademark law protects designer logos and patent law occasionally applies to innovative design elements, the Copyright Office has held that clothing design in general is not subject

to protection. As a result of this legal and cultural choice, the United States has been a safe haven for design piracy. Creative fashion designers over the past century have been forced to rely instead on social norms and makeshift means of defending themselves against copyists.

Today, global changes in both the speed of information transfer and the locus of clothing and textile production have resulted in increased pressure on creative designers at all levels, from haute couture to mass market. Digital photographs from a runway show in New York or a red carpet in Los Angeles can be uploaded to the internet within minutes, the 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. Similarly, e-commerce is both an opportunity and a danger for designers, who must battle knockoff artists with ready access to detailed photographs and descriptions of their works. Young designers who have not yet achieved significant trademark recognition, and must instead rely on the unique quality of their designs to generate sales, are particularly vulnerable to such theft.

Despite America's role in promoting the international harmonization of intellectual property protection, the U.S. has not joined other nations in addressing the issue of design piracy and its effects on the fashion industry. The U.S.T.R. has repeatedly targeted the rising global trade in counterfeit trademarked goods, including apparel, but copies of a garment rather than its label remain beyond the reach of American law. H.R. 5055 is a measured response to the modern problem of fashion design piracy, narrowly tailored to address the industry's need for short-term protection of unique designs while preserving the development of seasonal trends and styles.

I. HISTORICAL LACK OF PROTECTION AND CHANGED CIRCUMSTANCES

The lack of protection for fashion design under U.S. law is an anomaly among mature industries that involve creative expression. This exclusion of fashion from the realm of copyright was not inevitable, but was instead the result of deliberate policy choices. Examining the historical and cultural reasons for the differential treatment of fashion design is thus important to understanding the changed circumstances that indicate a greater need for some form of protection today.

A. Theory and Reality: The Historical IP/Fashion Divide

1. Fashion design is part of the logical subject matter of copyright.

While in the early days of U.S. copyright only books and maps were eligible for registration, the scope of protection has since increased to include painting, sculpture, textile patterns, and even jewelry design—but not clothing.

Why has clothing been excluded from protection? The problem lies in a reductionistic view of fashion as solely utilitarian. Current U.S. law understands clothing only in terms of its usefulness as a means of covering the body, regardless of how original it might be. Surface decoration aside, the plainest T-shirt and the most fanciful item of apparel receive exactly the same treatment under copyright law. In fact, a T-shirt with a simple drawing on the front would receive more protection than an elaborate ball gown that is the product of dozens of preliminary sketches, hours of fittings, and days of detailed stitching and adjustment before it is finally complete. The legal fiction that even the most conceptual clothing design is merely functional prevents the protection of original designs.

Fashion, however, is not just about covering the body—it is about creative expression, which is exactly what copyright is supposed to protect. Historians and other scholars make an important distinction between clothing and fashion. "Clothing" is a general term for "articles of dress that cover the body," while "fashion" is a form of creative expression.[1] In other words, a garment may be just another item of clothing—like that plain T-shirt—or it may be the tangible expression of a new idea, the core subject matter of copyright.

Copyright law, of course, has a mechanism for dealing with creations that are both functional and expressive, although it has not been consistently applied to fashion designs. It is conceivable—and perhaps inevitable in the absence of specifically tailored legislation—that a court could invoke the doctrine of "conceptual separability" to distinguish between the artistic elements of a new fashion design and its basic function of covering the human body. Recent judicial treatment of a Halloween costume design follows essentially this course, noting that elements of a costume like a head or tail are at least in theory separable from the main body of the

[1] Joanne B. Eicher, *Clothing, Costume and Dress* in 1 ENCYCLOPEDIA CLOTHING AND FASHION 270 (2005); Valerie Steele, Fashion, in 2 ENCYCLOPEDIA OF CLOTHING AND FASHION 12 (2005).

garment and thus potentially subject to copyright protection.[2] It would require only a small step to find that the uniquely sculptural shape of Charles James' famous 1953 "four-leaf clover gown" or Zac Posen's 2006 umbrella-sleeve blouse are conceptually independent of the human forms beneath them and thus copyrightable. Visual artists, too, have blurred the distinction between art and fashion by designing unique works of art in the shape of clothing.[3]

In short, fashion design is a creative medium that is not driven solely by utility or function. If it were, we could all simply wear our clothes until they fell apart or no longer fit. Instead, the range of new clothing designs available each season to cover the relatively unchanging human body—and the production of specific, recognizable copies—demonstrates that designers are engaged in the creation of original works.

From the perspective of theoretical consistency, then, the relationship between copyright law and fashion design is ripe for change. However, relying on the courts to take this step would be a lengthy and uncertain process, one that might ultimately require a Supreme Court decision to sort through conflicting precedents. The judiciary, moreover, does not have the authority to tailor intellectual property law to the specific needs of the fashion industry and the public, as would H.R. 5055 (discussed further in Section IV infra), but can only apply existing law. The most efficient and reflective way to secure copyright protection for the creators of fashion designs would be an act of Congress.

2. U.S. law does not support the economic development of the fashion industry.

Despite the importance of creative fashion design to the global economy, and to many local economies within the United States, it still operates without the benefits of modern intellectual property protection.

In historical terms, the pattern of industrial development in the U.S. and more recent emerging economies often commences with a period of initial piracy, during which a new industry takes root by means of copying. This results in the rapid accumulation of both capital and expertise. Eventually the country develops its own creative sector in the industry, which in turn leads to enactment of intellectual property protection to further promote its growth. This was the pattern followed in the music and publishing industries, in which the U.S. was once a notorious pirate nation but is now a promoter of IP enforcement.

In the case of the American fashion industry, however, the usual pattern of unrestrained copying followed by steadily increasing legal protection is not present. This situation has led to multiple inefficiencies in the development of the U.S. fashion industry. In the legal realm alone, creative designers have borne the costs of a decades-long effort to craft protection equivalent to copyright from other areas of IP law, particularly by pressing the boundaries of trademark, trade dress and patent law. While each of these areas of intellectual property law offers protection to some aspects of fashion design, most notably logos used as design elements and famous designs that have developed sufficient secondary meaning to qualify for trade dress protection, the majority of original clothing designs remain unprotected. Even design patents, which can in theory protect the ornamental features of an otherwise functional object, are seldom useful in a seasonal medium like fashion. The result is a legal pastiche that is confusing, expensive to apply, and ultimately unable to protect the core creativity of fashion design.

Current U.S. IP law thus supports copyists at the expense of original designers, a choice inconsistent with America's position in fields of industry like software, publishing, music, and film. The most severe damage from this legal vacuum falls upon emerging designers, who every day lose orders—and potentially their businesses—because copyists exploit the loophole in American law. While established designers and large corporations with widely recognized trademarks can better afford to absorb the losses caused by rampant plagiarism in the U.S. market, very few small businesses can compete with those who steal their intellectual capital. In fashion, America is still a pirate nation; the future direction of the industry will be directly influenced by the absence or presence of intellectual property protection.

B. Cultural Explanations and Changed Circumstances

The differential treatment of fashion relative to other creative industries with extensive legal protection is the result of specific cultural perceptions and historical circumstances, many of which have now changed. While it is beyond the scope of this testimony to address the entire cultural history of the fashion industry, several

[2] Chosun Int'l., Inc. v. Chrisha Creations, Ltd., 413 F.3d 324 (2d Cir. 2005).
[3] *See, e.g.,* Poe v. Missing Persons, 745 F.2d 1238 (2d Cir. 1984).

recent developments are particularly important to understanding why a change in the law is appropriate at this time.

1. Fashion design is now recognized as a form of creative expression.

The origins of copyright law date back to the Enlightenment era, a period that also articulated the Western distinction between art and craft. As copyright developed and extended to include various forms of literary and artistic works, it continued to maintain the division between legally protected, high status "fine art" and mere "decorative arts" or handicrafts. The design and manufacture of clothing, which for most families was a household task, did not rise to the level of creative expression in the eyes of the law.

Even after fashion design became increasingly professionalized during the nineteenth century, with the development of both haute couture and ready-to-wear sectors, the U.S. failed to recognize its creative status. Contributing to this low valuation was fashion's association with women rather than men, a shift influenced by the Industrial Revolution. By the end of the nineteenth century, American sociologist Thorstein Veblen famously linked fashion with "conspicuous consumption," concluding that the role of the female was "to consume for the [male] head of the household; and her apparel is contrived with this object in view."[4] Both the feminizing of fashion and the intellectual attention to consumption rather than production prevented the legal recognition of fashion as a serious creative industry.

Modern attitudes toward fashion design as a creative medium, however, have changed dramatically. Institutions from the Smithsonian to Sotheby's take fashion seriously, and organizations like the National Arts Club and the Cooper-Hewitt National Design Museum have recently added fashion designers to their annual categories of honorees. Even a Pulitzer Prize for criticism was awarded for the first time this year to a fashion writer, Robin Givhan of the Washington Post. It is inconsistent with this cultural shift for copyright law to deny fashion's role as an artistic form.

2. Creative design now exists at all price levels.

For most of the history of the fashion industry, a small group of elite, Parisian fashion designers dictated seasonal trends, and the rest of the world followed as best they could. The privileged few were measured for couture originals, the relatively affluent bought licensed copies, and the majority settled for inexpensive knockoffs or sewed their own garments at home.

With the recent democratization of style, creative design originates from many sources and at all price levels. Fashion is now as likely to flow up from the streets as down from the haute couture, and reasonable prices are no guarantee against copyists. Some of the most aggressively copied designs are popularly priced; consider this summer's popular Crocs "Beach" style shoe at $29.99 and its battle with copies sold for as little as $10.00.

In addition, within the past few years high-end designers have shown an increasing desire to reach a wider audience and to collaborate with mass-market producers. Fashion houses are seeking to experiment with new ideas in their runway collections, then to provide customers with affordable versions in their diffusion lines, and finally to adapt the looks for a broad range of consumer needs and budgets. This trickle promises to become a flood, as Isaac Mizrahi's designs for Target are joined by Chanel designer Karl Lagerfeld's line for H&M, Mark Eisen's sportswear for Wal-Mart, and many others.

As a result of these changes, it is no longer necessary for the general public to turn to knockoffs in order to purchase fashionable apparel, as it might have been in past decades. Some creative work is simply affordable; in addition, creators of more expensive designs are now finding ways to enter the mass market as well. A change in copyright law to incorporate fashion would facilitate designers' ability to disseminate their own new ideas throughout the market, much the way copyright law allows book publishers to first release hardcover copies and then, if the book is successful, to print paperbacks.

3. The internet era calls for new strategies to protect creativity.

Creative fashion designers in earlier periods fought copyists by relying on strategic measures like speed and secrecy, the social norms of the industry, and perhaps patterns of consumer behavior. In the absence of copyright protection under U.S. law, these extralegal mechanisms were an important part of the fashion business.

Today, however, the same speed and accuracy of information transfer that affects the music and film industries is also having an impact on fashion. Would-be copyists

[4] Thorstein Veblen, THE THEORY OF THE LEISURE CLASS 132 (1899; Random House 2001 ed.)

no longer have to smuggle sketch artists into fashion shows and send the results to clients along with descriptions of color and fabrication. Instead, high-quality digital photos of a runway look can be uploaded to the internet and sent to copyists anywhere in the world even before the show is finished, and knockoffs can be offered for sale within days—long before the original garments are scheduled to appear in stores. Fifty years ago, design houses may have been able to impose somewhat successful embargoes on the press; now, such efforts are futile.

Similarly, the claim that knockoffs enhance demand for ever-newer luxury goods among status-seeking consumers, an economic argument dating back to at least 1928,[5] fails to take into account the modern speed of production. Once upon a time it may have been that the adoption of a new luxury item by affluent trendsetters was imitated first by wealthy consumers, then by the middle class, and then in form of knockoffs by everyone else, at which point the fashion-forward would abandon the item and demand the next new thing—which producers were happy to provide. Today, however, this "fashion cycle" scenario is rendered obsolete by the fact that poor quality knockoffs can be manufactured and distributed even more quickly than the originals, leaving creative designers little opportunity to recover their investment before the item is already out of style. Even if the fashion cycle were ever sufficient to support the design industry, that is no longer the case.

As in other areas of creative production, the digital age should provoke a reexamination of the legal protection available to fashion design.

4. The future of American fashion is in creativity, not low-cost copying.

Textile and clothing manufacturing have historically played an important role in the American economy, driving the Industrial Revolution and supporting thousands of jobs. With the increased harmonization of global markets and the January 1, 2005, dismantling of import quotas in this sector, however, it has become apparent that the U.S. can no longer compete with China and other centers of low-cost production on price alone. No matter how inexpensively the U.S. can produce knockoffs, other countries can manufacture much cheaper versions.

Instead, the future of the U.S. economy will rest on the ability to develop and protect creative industries, including fashion design. America leads the world in industries like music, film, and computer software, but our history as a pirate nation in the field of fashion has limited our influence in this area. Creative fashion design is a relatively young industry in the U.S., albeit one in which there is growing interest among students choosing their careers. If this industry is to reach its full potential, now is the time to consider the impact of government policies, including intellectual property law.

II. EFFECTS OF DESIGN PIRACY

The lack of copyright protection for fashion design negatively affects both individual designers whose expressions are copied and the intellectual property system as a whole. As a law professor with a website dedicated to IP and fashion, I frequently receive messages from young designers whose work has been stolen or who hope to prevent the copying of their designs. It is with regret that I must repeatedly explain that while that law can protect designers' trademarks against counterfeiters, in the U.S. the actual designs are fair game for copyists.

A. Impact on Designers

Creativity is an intrinsic part of human nature, not a byproduct of the intellectual property system. Poets would continue to write, musicians to sing, and fashion designers to sew even if all copyright protection were eliminated tomorrow. While the concept of intellectual property is only a few hundred years old, archaeologists have recently discovered 100,000-year-old shell necklaces, which they interpret as the first evidence of human symbolic thinking.

The goal of the IP system, however, is not merely to ensure that authors put pen to paper or needle and thread to fabric, but to encourage and reward individuals so that they can continue to develop their ideas and skills in a productive manner. In other words, intellectual property law ideally serves as a tool for harnessing and directing creativity. For this reason, the Constitution empowers Congress "[t]o promote the progress of science and useful arts." It is this "progress" over time that is hindered by the lack of legal protection for fashion design.

Young designers attempting to establish themselves are particularly vulnerable to the lack of copyright protection for fashion design, since their names and logos are not yet recognizable to a broad range of consumers. These aspiring creators cannot simply rely on reputation or trademark protection to make up for the absence of

[5] *See* Paul H. Nystrom, ECONOMICS OF FASHION 18–54 (1928).

copyright. Instead, they struggle each season to promote their work and attract customers before their designs are copied by established competitors.

Over the past century successive waves of American designers have entered the industry, but few fashion houses have endured long enough to leave a lasting impression comparable to the influence of French fashion. While it is difficult to quantify or even identify designers who give up their businesses, particularly for reasons of piracy, there is strong anecdotal evidence that design piracy is harmful to the U.S. fashion industry. Consider just two representative examples, one a historical snapshot from an early attempt to develop American fashion and the other from this year.

In 1938 Elizabeth Hawes wrote a best-selling critique of the fashion industry entitled *Fashion is Spinach.*[6] In it, she chronicled her start working for a French copy house, the only job in the fashion industry available to a young expatriate American in the 1920s; her return to New York to design her own line; and her ultimate disillusionment with the tyranny of mass production and the ubiquity of poor quality knockoffs that undercut her own designs. She ultimately closed her business in 1940, but not before leaving a record of the perils of the industry for a creative designer.

From a legal perspective, little has changed in almost seventy years. Handbag designer Jennifer Baum Lagdameo co-founded the label Ananas approximately three years ago. A young wife and mother working from home, Jennifer has been successful in promoting her handbags, which retail between $200 and $400. Earlier this year, however, she received a telephone call canceling a wholesale order. When she inquired as to the reason for the cancellation, she learned that the buyer had found virtually identical copies of her bags at a lower price. Shortly thereafter, Jennifer discovered a post on an internet message board by a potential customer who had admired one of her bags at a major department store. Before buying the customer looked online and found a cheap, line-for-line copy of the Ananas bag in lower quality materials, which she not only bought but recommended to others, further affecting sales of the original. While Ananas continues to produce handbags at present, this loss of both wholesale and retail sales is a significant blow to a small business.

Copying is rampant in the fashion industry, as knockoff artists remain free to skip the time-consuming and expensive process of developing and marketing new products and simply target creative designers' most successful models. The race to the bottom in terms of price and quality is one that experimental designers cannot win. Nearly every designer or even design student seems to have a story about the prevalence of copying, a situation that makes the difficult odds of success in the fashion industry even longer.

B. Design Piracy and Counterfeiting

Not only does the legal copying of fashion designs harm their creators, it also provides manufacturers with a mechanism for circumventing the current campaign against counterfeit trademarks. If U.S. Customs stops a shipping container with fake trademarked apparel or accessories at the boarder, it can impound and destroy those items. If, however, the same items are shipped without labels, they are generally free to enter the country—at which point the distributor can attach counterfeit labels or decorative logos with less chance of detection by law enforcement. I have personally witnessed the application of such counterfeit logos to otherwise legal knockoffs at the point of sale; after the consumer chooses a knockoff item, the seller simply glues on a label corresponding to the copied design. The continued exclusion of fashion designs from copyright protection thus undermines federal policy with respect to trademarks by perpetuating a loophole in the intellectual property law system.

III. COMPARATIVE IP REGIMES AND FASHION DESIGN

While the U.S. has deliberately denied copyright protection to the fashion industry over the past century, other nations have incorporated fashion into their intellectual property systems—and have consequently developed more mature and influential design industries.

France in particular has treated fashion design as the equivalent of other works of the mind for purposes of intellectual property protection. French laws protecting textiles and fashion design date back in their earliest form to the *ancien régime*; these laws were subsequently updated and clarified in the early twentieth century. As a result, Parisian fashion designers have been able over the course of their careers to develop and protect signature design repertoires, which even after the de-

[6] Elizabeth Hawes, FASHION IS SPINACH (1938).

parture of the founding designers can serve as a form of brand DNA for their design houses. The formal recognition of fashion design as an art form has thus helped maintain the preeminence of the French fashion industry and augmented the lasting creative influence of both native designers and those who have chosen to work in France.

The association between strong intellectual property protection and a successful creative industry has not been lost on other countries that sought to support their domestic design industries. As long ago as 1840 a British textile manufacturer wrote, "France has reaped the advantage of her system; and the soundness of her view, and the correctness of her means, are fully proved by the results, which have placed her, as regards industrial art, at the head of all the nations of Europe, in taste, elegance, and refinement." [7]

While modern French law still offers the most extensive protection to fashion design, Japan, India, and many other countries have incorporated both registered and unregistered design protection into their domestic laws. In addition, E.U. law has since 2002 provided for both three years of unregistered design protection and up to 25 years of registered design protection, measured in five-year terms.

The global legal trend toward fashion design protection has rendered the U.S. an outlier among nations that actively support intellectual property protection, a position that is both politically inconsistent and contrary to the economic health of the domestic fashion industry. Congress should take these factors into account when considering a reasonable level of legal protection for fashion design.

IV. THE ROLE OF H.R. 5055

When analyzed in light of the goals of the intellectual property law system, current challenges to the U.S. fashion industry, and international legal developments, H.R. 5055 is a carefully crafted legal remedy to the inequities resulting from the exclusion of fashion design from copyright law. The bill is narrowly tailored to achieve a balance between protection of innovative designs and the preservation of the extensive public domain of fashion as an inspiration for future creativity. Perhaps most importantly, it is a forward-looking measure that lays the groundwork for the future development of a robust, creative American fashion industry.

The fashion industry's decision not to seek full copyright protection, but instead to request only a limited three-year term, is particularly appropriate to the seasonal nature of the industry. This period will allow designers time to develop their ideas in consultation with influential editors and buyers prior to displaying the work to the general public, followed by a year of exclusive sales as part of the designer's experimental signature line, and another year to develop diffusion lines or other mass-market sales. While many legal scholars have aptly criticized the full term of copyright protection as excessive when viewed solely in light of an incentive-based rationale, a three-year term chosen after careful analysis of the relevant industry is exactly the sort of scheme that "low protectionist" activists have endorsed for copyright as a whole. Such a short term of protection will simultaneously encourage designers to facilitate affordable access to cutting-edge design and contribute to the ongoing enrichment of the public domain.

The choice to amend the Copyright Act, rather than to modify the design patent system or devise a sui generis scheme involving prior review, is also well suited to the needs of the fashion industry. The bill appropriately recognizes that the short lifespan of new fashions is inconsistent with burdensome legal formalities. Indeed, I would suggest that unregistered protection would be even more consistent with the U.S. copyright system, existing European design protection, and the needs of the industry, particularly inexperienced designers. Nevertheless, the establishment of registered design protection is an improvement over the current state of the law.

The language of H.R. 5055, particularly if amended to clarify that only "closely and substantially similar" copies will be considered to infringe upon registered designs, is likewise well crafted to both promote innovation and preserve the development of trends. As with other forms of literary and artistic work, copyright law is clearly capable of protecting specific expressions while allowing trends and styles to form. From a legal perspective, a fashion trend is much like a genre of literature. Granting copyright to a John Grisham novel does not halt the publication of many similar legal thrillers, nor does the protection of Dan Brown's *DaVinci Code* prevent a spate of novels involving Mary Magdalene or the Knights Templar from appearing in bookstores. When an author writes a bestseller, imitators of his or her style tend to follow—but they are not permitted to plagiarize the original. Copyright in this

[7] James Thomson, *quoted in* J. Emerson Tennent, A Treatise on the Copyright of Designs for Printed Fabrics (1841).

sense is merely a legal framework that supports an existing social norm; neither reputable authors nor creative fashion designers engage in literal copying of one another.

The level of generality at which fashion trends exist, moreover, is far too broad to be affected by the proposed bill. To paraphrase next month's *Vogue* magazine, currently on the newsstand, red will still be the new black following the passage of H.R. 5055. In the same way, common trends such as wide neckties in the 1970s or casual Fridays in the late 1990s were not dependent on the presence or absence of design protection, nor would such nonspecific ideas ever be subject to intellectual property protection.

In addition to the protective benefits of H.R. 5055, the legislation may have a beneficial effect on creativity in the industry as a whole. Former copy houses, no longer able to legally replicate other designers' work, will be forced to innovate or at least transform their work so that it no longer substantially resembles the original products. This in turn can be expected to lead to more jobs for design professionals and more reasonably priced choices for consumers.

At present, the bulk of design-related litigation tends to invoke federal trademark and trade dress as well as state unfair competition claims in order to mimic the protections that would be offered by H.R. 5055, with limited success. To the extent that fact-based disputes regarding copying continue to arise, the new legislation will permit parties to engage in more straightforward, simpler litigation. Not only will this avoid the unnecessary distortion of trademark and trade dress law, but it will also clarify the parameters of what constitutes protected design. As in other creative industries governed by intellectual property law, an equilibrium will arise and manufacturers will find it in their best interests to offer retailers innovative rather than infringing work.

H.R. 5055 promises to remedy a historical and theoretical imbalance in the copyright system and to offer protection to the many young American designers whose work is currently vulnerable to knockoff artists. For these reasons, I encourage you to seriously consider this reform.

Mr. SMITH. Thank you, Ms. Scafidi.

Mr. Sprigman?

TESTIMONY OF CHRISTOPHER SPRIGMAN, ASSOCIATE PROFESSOR, UNIVERSITY OF VIRGINIA SCHOOL OF LAW

Mr. SPRIGMAN. Yes, hi. I am Chris Sprigman. I am associate professor of law at the University of Virginia.

My research focuses on innovation and how innovation relates to intellectual property rules. I have been doing this research as an academic and I have been working in this area when I was with the Department of Justice with the Antitrust Division. I am here to try to convince you that H.R. 5055 is both unnecessary and potentially could do harm to this industry.

Now, the first thing I just want to remind you of is something that no one has disagreed with, which is that the fashion industry is thriving. We have an industry probably in the U.S. around $200 billion. We have U.S. firms participating in an industry that is approaching $1 trillion around the world. Never in our 217-year history of copyright has Congress extended copyright or copyright-like protections to the fashion industry.

So we have a 217-year tradition of no copyright in this area. We have the enormous growth and flourishing of a competitive, innovative, vibrant industry. Before we go and change that, we should have more than a few anecdotes about harm. We should have some robust, formal, methodologically rigorous studies of this industry.

My colleague, Kal Raustiala, who teaches at the UCLA law school, and I have begun to try to approach this through an article that we have written called "The Piracy Paradox: Innovation and Intellectual Property in Fashion Design." This article will be pub-

lished in the Virginia Law Review. Many of my comments today will refer to that article, and in fact I have submitted it along with my written testimony.

So my first point is that this legislation is entirely unnecessary. If you look at the way the fashion industry innovates, that will become clear to you. We are talking about copying, but what the fashion industry does is occasionally copies point-by-point, right? It takes a garment and makes a facsimile.

But mostly what the fashion industry does is it recontextualizes it, reinterprets. It takes a design and it adds inspiration to it and makes something recognizably similar, but new; substantially similar, so it would be reached under this bill and be unlawful, but new.

The way the industry creates, the way it creates trends, the way it induces people to treat clothing as something that they buy seasonally, rather than waiting until it wears out, this is the very thing that would be potentially under attack by this bill as currently written.

Okay. Some of the proponents of this bill have said, well, Europe has this protection. If Europe has this protection, why don't we? Professor Raustiala and I have looked closely at Europe. And when you look at Europe, you find that, yes, in fact there is an E.U.-wide rule protecting fashion designs, but virtually nobody uses it.

If you look in the registry, it is true, and it reflects what Mr. Banks predicts, very few registrations and virtually no major firms register anything, and virtually no litigation. It is not as if, in Europe, fashion firms are not copying. In fact, some of the biggest copyists are European: H&M, Zara and Topshop, these retailers, and European fashion firms that copy and that reinterpret and that recontextualize and that create derivative works and do all the things that fashion firms do.

So what do we see in Europe? We see regulation that basically hasn't affected the way the industry actually works. It is unnecessary.

Okay. You might ask, well, if we see a situation in Europe where we regulate, but basically the industry goes on as it has always gone on, why shouldn't we just do this in the States? You know, it might not do any good, but it might do any harm. Well, we are not Europe.

Unlike in Europe where there is a weak civil litigation system, here in the States we have a very powerful civil litigation system and we are a society teeming with lawyers, including obviously a class of litigation entrepreneurs that accesses the Federal courts. I fear that they will take a look at H.R. 5055 and then they will take a look at the way the fashion operates, and they will sense a very nice payday coming their way.

So what we fear is this bill will lead to litigation that breaks up, as Mr. Wolfe has described it, the fashion industry's creative ecosystem that prevents the fashion industry from creating trends and inducing demand for new clothes, but makes the fashion industry a less competitive, less innovative place, that results in higher prices for consumers, that results in less variety being available to consumers, and that takes a very good situation and makes it worse.

So I would encourage you to think hard about this. I would encourage you to do no harm until someone comes to you with a compelling study of the harm that we see in the industry from lack of protection, which I don't think exists.

[The prepared statement of Mr. Sprigman follows:]

PREPARED STATEMENT OF CHRISTOPHER SPRIGMAN

My name is Christopher Sprigman; I am an Associate Professor at the University of Virginia School of Law. In my role as a law professor, and before that in my career as a lawyer with the Antitrust Division of the United States Department of Justice and in private practice, I have focused on how legal rules—especially rules about intellectual property—affect innovation. Over the past two years, along with Professor Kal Raustiala of the UCLA School of Law, I have spent a considerable amount of time studying the fashion industry's relationship to intellectual property law. Professor Raustiala and I have written an academic article on the topic, entitled *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design.* This article, which I am submitting along with my written testimony, will be published in December in the Virginia Law Review. The comments I'll make here today will refer to the findings of that article.

In brief, for reasons I will explain, Professor Raustiala and I are opposed to H.R. 5055. The Framers gave Congress the power to legislate in the area of intellectual property. But for 217 years Congress has not seen the need to extend IP rules to cover fashion designs. During that period the American fashion industry has grown and thrived, and American consumers have enjoyed a wide range of apparel offerings in the marketplace. We are skeptical that Congress ought to begin regulating fashion design now, given the success of the existing system.

We oppose H.R. 5055 for 3 principal reasons:

1) The fashion industry is not like the music, motion picture, book, or pharmaceutical industries. Over a long period of time, it has been both creative and profitable without any IP rules protecting its original designs. Unlike in many other creative industries, copying does not appear to cause harm to the fashion industry as a whole.
2) Fashion design protection has been tried in Europe and has had little effect. Design firms across the Atlantic copy others' designs just the way they do here in the U.S.
3) We fear that a primary effect of H.R. 5055 will be extensive and costly litigation over what constitutes infringement. As such, H.R. 5055 is a lawyer-employment bill, not a fashion-industry protection bill.

In my brief time here let me expand on these 3 points.

Our first point is that this bill is an unnecessary and unwise intervention in the marketplace. The American fashion industry has become a powerhouse in the decades since World War II. The industry does business in excess of $180 billion per year, and U.S. firms play a substantial role in a global fashion industry worth almost $1 trillion annually. In 2005, the fashion industry grew more quickly than the economy as a whole, and the industry's strong recent growth reflects its robust long-term performance. According to recent data from the Bureau of Economic Analysis, sales of apparel and shoes have registered uninterrupted annual increases between 1945 and 2004, growing during this period more than twenty-fold. So we see growth and profit in the fashion industry, and we also see vibrant competition. New designers and companies regularly rise to prominence and compete for the public's attention with innovative new designs. The fashion industry produces a huge variety of apparel, and innovation occurs at such a pace that styles change rapidly and goods are produced for consumers at every conceivable price point. In short, the fashion industry looks exactly as we would expect a healthy creative industry to look.

The important point here is that all of the fashion industry's growth and innovation has occurred without any intellectual property protection in the U.S. for its designs. Indeed, *never in our history has Congress granted legal protection to fashion designs.* From the industry's beginnings copying has been very common both in the U.S. and abroad. Designers and fashion commentators were talking about design copying back in the 1920s and 1930s. Unsurprisingly, this is not the first time that Congress has considered extending the IP laws to fashion designs. But Congress has always refrained from making this change to our tradition—wisely, in our view. Un-

like in the music, film, or publishing industries, copying of fashion designs has never emerged as a threat to the survival of the industry.

Why is that? In our article, Professor Raustiala and I explain how copying and creativity actually work together in the fashion industry. This argument is grounded in the fact that fashion is cyclical and driven by popular trends. Styles come and go quickly as many consumers seek out new looks well before their clothes wear out. This is not new: as Shakespeare put it in *Much Ado About Nothing,* "The fashion wears out more apparel than the man." But the result is that for fashion, copying does not deter innovation and creativity. It actually speeds up the rate of innovation. Copying of popular designs spreads those designs more quickly in the market, and diffuses them to new customers that, often, could not afford to buy the original design. As new trends diffuse in this manner, they whet the appetite of consumers for the next round of new styles. The ability to be copied encourages designers to be more creative, so as to create new trends that capture the attention of consumers. The existing legal rules also help the industry communicate these trends to consumers. In order for trendy consumers to follow trends, the industry has to communicate what the new fashion is each season or year. The industry as a whole does this by copying and making derivatives that take features of a popular design and add new features—this is one of the important ways in which trends are established.

In sum, it is the preference of consumers for change in clothing designs that incentivizes creativity in the fashion industry—not intellectual property rules. Copying simply accelerates this process, intensifying consumers' desire for new styles, and increasing consumers' willingness to spend on the industry's next set of design innovations. Congress does not need to step in to alter the market and protect producers. Indeed, if Congress acts to hinder design copying, it may succeed only in depressing demand for new styles, slowing the industry's growth, and raising prices for consumers.

Our second point pertains to the E.U.'s experience, which suggests that design protection does not affect copying. In 1998 the European Union adopted a Directive on the Legal Protection of Designs. European law provides extensive protection for apparel designs, but the law does not appear to have had any appreciable effect on the conduct of the fashion industry, which continues to freely engage in design copying.

Some may argue that since Europe has design protection legislation, the U.S. should have regulation too. But the European experience suggests precisely the opposite, for two reasons. First, fashion designers have not used the E.U. law very much. We have looked closely at the E.U. registry of designs, and very few designers and design firms have registered their designs—an act that is a prerequisite for protection under the E.U. law, and would also be required for protection under H.R. 5055. Second, copying of fashion designs is just as common in Europe as it is here in the U.S. Indeed, many large fashion copyists, including large retail firms such as H & M, Zara, and Topshop, are European. The law in Europe has had little or no effect on copying, or on innovation in the industry. While the E.U. prohibits fashion design copying, the industry continues to behave as it always has—copying and making derivative works.

Although we find the E.U. law has had little effect, we fear that a similar law in the U.S. may actually have a *harmful* effect. This brings me to our third and final point.

Our third point is that while H.R. 5055 is unlikely to do much good, it potentially could cause significant harm. Unlike most countries in Europe, which have relatively weak civil litigation systems, we Americans are, for better or worse, accustomed to resolving disputes through the courts. As a result, the U.S. is a society teeming with lawyers—including, unlike in Europe, a class of litigation entrepreneurs who turn to the federal courts readily to seek leverage in competitive industries.

Given our significant differences from Europe in this regard, we fear that H.R. 5055 might turn the industry's attention away from innovation and toward litigation. We foresee extensive litigation over the standard of infringement in the proposed bill. Drawing the line between inspiration and copying in the area of clothing is very, very difficult and likely to consume substantial judicial resources. But however the lines are drawn, the result will be a chilling effect on the industry. Every designer and every firm will be obliged to clear new designs through a lawyer. Individual designers and small firms will be particularly disadvantaged—they are the least likely to be able to afford the lawyers' fees that will be the new price of admission to the industry. Over time, the fashion industry might begin to look more like the music and motion picture industries—i.e., dominated by a few large firms. It is hard to imagine an industry re-configured in this way producing the same rich vari-

ety of new designs that today's healthy, competitive fashion industry yields. We believe that the end result of H.R. 5055 could be less consumer choice, fewer opportunities for young designers and small firms to break into the industry, and reduced consumption across the board of fashion goods.

In conclusion, the fashion industry thrives by rapidly creating new designs. Via this continuous re-definition of what is "in style," the industry sparks demand by consumers for new apparel. This process results in consumption of fashion goods at a level above what would otherwise occur. It also permits many apparel items to be sold at lower prices than would be possible were fashion design protected by the intellectual property laws. To remain healthy, the fashion industry depends on open access to designs and the ability to create new designs that are derivative of them. The industry has thrived despite the lack of design protection; we are very hesitant to interfere with such success.

But we also fear that H.R. 5055 may cause harm. In sum, were it necessary to impose design protection rules to protect the American fashion industry, we would support amending the U.S. Code for the first time in our history to include fashion design. But our research suggests that it is not necessary, that we have had the right rule for the past 217 years, and that Congress should be content to leave the industry to get on with the business of creating innovative new fashions.

FORTHCOMING – VIRGINIA LAW REVIEW

THE PIRACY PARADOX:
INNOVATION AND INTELLECTUAL PROPERTY IN FASHION DESIGN

Kal Raustiala[*] and Christopher Sprigman[**]

August 2006 DRAFT

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> 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.
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> -- Samuel Winston, Inc. v. Charles James Services, Inc., 159 N.Y.S.2d 716, 718 (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

[1] According to the 2002 Economic Census, the U.S. book publishing industry reported revenues of $27 billion. See U.S. Bureau of the Census, 2002 Economic Census, available at <http://www.census.gov/econ/census02>. Annual revenues for 2001 for the U.S. motion picture industry are estimated at approximately $57 billion, U.S. Bureau of the Census, 2001 Service Annual Survey: Information Sector Services, Table 3.0.1., available at <http://www.census.gov/svsd/www/sas51.html>. Annual revenues for 2004 for the recording industry are estimated at approximately $12 billion, see <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, NPDFashionworld, Reports 2005 U.S. Retail Apparel Sales Up After Three Years of Decline, Feb. 23 2005, available at <http://www.npd.com/press/releases/press050223>. Globally, the fashion industry is said to produce

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 those other 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 and create at a rapid clip—precisely the opposite behavior of that predicted by the standard theory.

Despite this anomoly, few legal commentators have considered fashion design in the context of IP law. [2] Those who have done so have almost uniformly criticized the

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revenues of about $784 billion. See Nurbhai A. Safia, Style Piracy Revisited, 10 J. L. & Policy 489 (2002). It may well be, as some commentators on this paper 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. But in any event 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 and 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.

[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 (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

current legal regime for failing to protect apparel designs. For example, one article argues that "society 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 the copyright system" and subject to an "injustice" that must be fixed by Congress.[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 their original designs as a fact of life. Design copying is occasionally complained about, but is more often celebrated as "homage" than attacked as "piracy".[6]

> 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. at 39. Consideration of fashion and IP is rising; see also cites in Note 3 infra, Kal Raustiala, Fashion Victims, The New Republic Online (March 15, 2005), and Jonathan Barnett, Shopping for Gucci on Canal Street: Reflections on Status Consumption, Intellectual Property and the Incentive Thesis, 91 Va. L. Rev. 1381 (2005). Recently, Susan Scafidi has created a blog addressing issues of fashion and IP. See Counterfeit Chic, available at http://www.counterfeitchic.com/.

[3] Karina Terakura, Insufficiency of Trade Dress Protection: Lack of Guidance for Trade Dress Infringement Litigation in the Fashion Design Industry, 22 U. Haw. L. Rev. 569, 618-19 (2000). For articles arguing for expanded protection for fashion designs, see, e.g., 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 (2001); S. Priya Bharathi, 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 (1996); Jennifer Mencken, A Design for the Copyright of Fashion, B.C. Intell. Prop. & Tech. F. (1997); Leslie Hagin, 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 (1991).

[4] Briggs, supra n.___ at 213.

[5] Heatherington, supra n.___ at 71.

[6] See Brian Hilton, Chong Ju Choi, & Stephen Chen, The Ethics of Counterfeiting in the Fashion Industry: Quality, Credence and Profit Issues, 55 J. of Business 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. [TO COME]

This diffidence stands in striking contrast to the heated condemnation of piracy – and associated vigorous legislative and litigation campaigns – in other creative industries.

Why are the norms about copying in the fashion industry so different from those 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 explores this puzzle and offers an explanation for it. We argue that the fashion industry operates within a regime of free appropriation in which copying fails to deter innovation because, counter-intuitively, copying is not very harmful to originators. Indeed, we suggest copying may actually promote innovation and benefit originators. We call this the "piracy paradox." We explain how the piracy paradox works, and 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. But 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 only in the fashion industry, or are stable low-IP equilibria imaginable in other content industries as well?

This article proceeds in three parts. Part I provides a brief overview of the apparel industry, examines the industry's widespread practice of design copying, and distinguishes design copying from "counterfeits" or "knock-offs" that involve the copying of protected trademarks. Our focus is the copying of apparel designs, not brandnames.[7]

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[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," Los Angeles Times, C1 (Jan 15, 2006) (discussing recent lawsuits initiated by LA-based textile designers.)

In Part II, we 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 – i.e., styles fall out of fashion and are replaced, often seasonally, by new styles. These twin features help to explain why design copying can be counterintuitively beneficial for designers, and hence help account for the remarkable persistence of the permissive legal regime governing fashion design. Later in Part II, we 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 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 and positionality play 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 offer some initial observations about the implications of our analysis of the fashion industry for other creative industries.

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 everywhere on earth, 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.

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[8] See Safia A. Nurchai, Style Piracy Revisited, 10 J. L. & Policy 489 (2002).

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 an annual series of runway shows. Fall shows are held in consecutive weeks in February and March, first in New York, then London, then Milan, and finally in Paris. Spring shows are held in consecutive weeks in September and October, in the same cities and order.

The fashion industry's products typically are segmented into broad categories that form 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 – i.e., custom clothing, designed almost entirely for women, at very high prices.[10] Directly below is a much larger business in designer ready-to-wear clothing for women and men. This business is further segmented into prestige collections, and the lower-priced bridge collections offered by many famous designers. Another rung 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:

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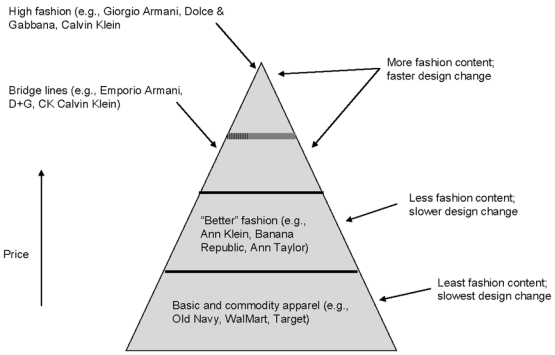
[9] Peter Doeringer & Sarah Crean, Can Fast Fashion Save the U.S. Apparel Industry?, Society for the Advancement of Socio-Economics Working Paper (Draft dated June 15, 2005), available at http://www.sase.org/conf2004/papers/doeringer-crean.pdf.

[10] See Dana Thomas, When High Fashion Meets Low, Newsweek (Dec. 20, 2004); Elizabeth Hayt, The Hands that Sew the Sequins, New York Times, January 19, 2006 (noting that couture customers pay "upwards of…$150,000 for an evening gown").



The borders between product categories are indistinct – some designers' bridge lines, for example, market apparel as expensive as that found in others' premium lines. In addition, particular forms of apparel (for example, jeans) appear in several categories. One difference between the categories is price; it increases as one ascends the pyramid. But 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 and designer ready-to-wear apparel, as well as bridge lines) is characterized by higher design content and faster design turnover. Generally, apparel in the "better" and basic categories contains less design content and designs change less rapidly.[11]

Many fashion design firms operate at multiple levels of the pyramid. One example is Giorgio Armani, which produces couture, a premium ready-to-wear collection

[11] 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 contain more design innovation, generally speaking, then those 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.

marketed via its Giorgio Armani collections, differentiated bridge lines marketed via its Armani Collezioni and Emporio Armani brands, as well as a "better clothing" line distributed in shopping malls via its Armani Exchange brand. 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.[12]

Unlike many other content industries, such as film, music, and even publishing, which are increasingly concentrated, the fashion industry is quite deconcentrated, with a large number of firms of all sizes producing and marketing original designs (often using contract labor to manufacture those designs), and with no single firm or small set of firms representing a significant share of total industry output. Set against the fashion industry's relative atomization, the persistence of the low-IP legal regime is even more puzzling. Economic theory suggests that firms operating in concentrated markets often need IP protection less, especially when they possess non-IP forms of market power (e.g., preferred access to distributors) 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 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

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

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[12] Press Release, Berns Communications Group Unveils 2005 Retail Strategies Noted by Leading Industry Experts, Businesswire (Dec. 6, 2004).

While more extensive today, design copying has long been a widespread practice in the fashion industry, especially in the U.S. As one observer notes, "Seventh Avenue has a long history of knocking off European designs."[13] Indeed, a book on fashion published in 1951 contained an entire chapter on the topic, entitled "Style Piracy--A Fashion Problem," which argued that design piracy "has long plagued the fashion field."[14] In the interwar and early postwar periods the major French couture houses tacitly sanctioned some design copying, permitting a few U.S. producers to attend their Paris runway shows in exchange for "caution fees" or advance orders of couture gowns.[15] 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.[16] 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."[17] 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

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

[14] Jessie Stuart, The American Fashion Industry (Simmons College, 1951) at 28.

[15] Terri Agins, The End of Fashion: How Marketing Changed the Clothing Business Forever (Quill, 2000) at 23.

[16] Id at 24.

[17] Id at 175.

> with copies a stage farther removed. And yet the Paris creators can and do secure special prices for their authentic reproductions of the original - for their "signed artist's copies," as it were.[18]

In 1932 the nascent U.S. industry established a nationwide cartel to limit copying within the small but growing ranks of American designers.[19] (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.[20] Retailers and manufacturers signed a "declaration of cooperation" in which they pledged to deal only in original creations.[21] Non-compliant retailers were subject to "red-carding" (i.e., boycott). Guild members who dealt with noncooperating retailers faced Guild-imposed fines.

The Fashion Originators' Guild was effective at policing design piracy among its members. By 1936 over 60% of women's garments selling for more than $10.75 (approximately $145 in 2005 dollars) were sold by Guild members.[22] But eventually the Guild fell afoul of the antitrust laws. In its 1941 decision in *Fashion Originators' Guild of America v. FTC*,[23] 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

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[18] Arnold Plant, the Economic Aspects of Copyright in Books, 1 Economica (1934).

[19] The American fashion industry, headquartered in New York, really took off in the 1930s. See Leslie Burns and Nancy Bryant, The Business of Fashion (2nd ed., Fairchild Publications, 2002) at 16.

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

[21] Safia Nurbhani, Style Piracy Revisited, 10 J. L. & Pol'y. 489, 495-96 (2002).

[22] See Fashion Originators' Guild v. FTC, 312 US 457 (1941).

[23] Id.

manufacturer, laborer, retailer, and consumer against the devastating evils growing from the pirating of original designs and had in fact benefited all four."[24]

At the same time, the Federal Trade Commission also terminated a similar cartel that organized the designers of women's hats.[25] The Second Circuit, in upholding the FTC's prosecution, acknowledged the utility of the cartel in preventing "style piracy", but concluded that the law offered no remedy and the milliners' coordinated self-help therefore could not be excused as pursuing a lawful end:

> 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 be 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.[26]

As Robert Merges has noted, the only important differences between the early 20th-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."[27] 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

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[24] Id. at 467.

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

[26] Id. at 177.

[27] Merges, supra n. ___, at 1366.

manufacturers alike have freely copied designs first originated here or, more frequently in the immediate postwar era, in Europe.

ii. 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 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 commenced 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 U.S. guilds were a cooperative, extra-legal system that controlled copying so that creators could appropriate the value of their creations. The industry resorted to an extra-legal system 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 formally flows from a more general point of copyright doctrine: namely, the rule largely denying copyright protection to the class of "useful articles" – i.e., goods, like apparel (or furniture or lighting fixtures), in which creative expression is compounded with practical utility.

What this means is 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.[28] For example, a jeweled appliqué stitched onto a sweater may be a separable (and thus protectable) design, because 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 – e.g., in the "cut" of a sleeve, the shape of a pants leg, and the myriad design variations that give rise to the variety of fashions for both men and women. So for nearly all apparel the copyright laws are inapplicable, and as a consequence 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.[29] Fashion

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[28] See, e.g., Galiano v. Harrah's Operating Co., Inc., 416 F.3d 411, 422 (5th Cir. 2005) (casino uniforms unprotected; expressive element not marketable separately from utilitarian function); Poe v. Missing Persons, 745 F.2d 1238 (9th Cir. 1984) (copyright found 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.").

[29] Fashion brands are heavily licensed, and excessive licensing can so tarnish the brand 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 n.____. 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*, 2003 NY Slip Op 51738(U) (Criminal Ct. NY County, Mar. 4, 2003, J. Cooper), 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 n.____, at n.25. We are skeptical of Barnett's claim that copyists produce easily recognizable and "generally imperfect" imitations. Id. at 1385. As an article in the Wall Street Journal

industry firms invest heavily in policing unauthorized use of their marks.[30] Many fashion goods sold by street vendors are counterfeits that plainly infringe trademarks. Some, however, copy designs rather than trademarks. And 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

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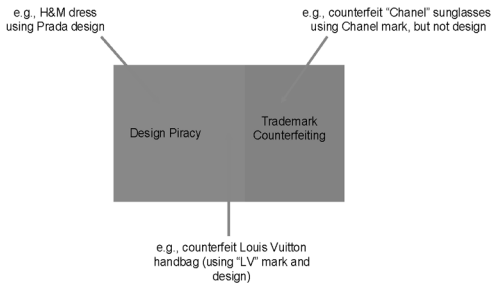
recently described, the quality of knocks-off often is extremely good and distinguishing imitations from originals can be difficult. Counterfeit for Christmas: Gift Givers Tap New Source As Travel to China Eases, Knockoff Quality Improves, *Wall Street Journal*, Dec 9, 2005, B1. In any event, it is clear, as we describe in the note below, that major labels put significant effort into trademark policing but almost none into policing design copying.

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

> Starting out from the 1997-1998 Autumn/Winter season [Dolce & Gabbana] introduced an "anti-imitation" system using 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 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.

See http://eng.dolcegabbana.it/corporate.asp?page=Brand_DolGab.

the mark becomes an element of the design. Burberry's distinctive plaid is trademarked, for example, and many Burberry's garments and accessories incorporate this plaid into the design. Occasionally—and some would argue increasingly—clothing and accessory designs prominently incorporate a trademarked logo on the outside of the garment; think, for example, of a Louis Vuitton handbag covered with a repeating pattern of the brand's well-known "LV" mark. For these goods, the logo is part of the design, and thus trademark provides significant protection against design copying. But for the vast majority of apparel goods, 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.



In addition to protection of 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."[31] 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."[32]

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, however, not yet emerged as a substitute for copyright, in part because trade dress protection is, like copyright, limited to non-functional design elements.[33] Perhaps more importantly, trade dress is limited to design elements that are "source designating", rather than merely ornamental.[34] In *Knitwaves v. Lollytogs*, a 1995 case dealing with appliqué designs on sweaters, the 2nd Circuit noted that few clothing design elements are protected under the "source designation" standard.[35] 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 the design of products (including fashion items) "almost invariably serves purposes other

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

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

[33] Lanham Act, Sec. 2(e)(5). 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, Inc. v. Doc's B.R. Others, Inc., 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.").

[34] See, e.g., Knitwaves, Inc. v. Lollytogs, Ltd., 71 F.3d 996 (2d Cir. 1995) (aesthetic features of girls' sweaters that were not source designating not part of protectible trade dress). See also Wal-Mart Stores, Inc. v. Samara Bros., Inc., 529 U.S. 205, 213 (2000) (product design cannot be "inherently distinctive", and "almost invariably serves purposes other than source designation").

[35] "As Knitwaves' objective in the two sweater designs was primarily aesthetic, the designs were not primarily intended as source identification." Id. at 998.

than source identification."[36] 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.[37] 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."[38]

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, 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 sufficient to undergird trade dress protection. Consequently, for most clothing designs trade dress protection is unavailable.

Patent. Protection for novel fashion designs is available, at least in theory, under the patent laws, which include a "design patent" provision offering a 14-year term of protection for "new, original, and ornamental design[s] for an article of manufacture."[39] But shelter within the design patent provisions is, for two principal reasons, unavailable for virtually all fashion designs.

The first reason is doctrinal. Unlike copyright, which extends to all "original" expression (i.e., all expression not copied in its entirety from others and that contains a

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[36] Samara, 529 U.S. at 213.

[37] Id. at 216.

[38] Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 456 U.S. 844, 851 n.11 (1982) (emphasis supplied).

[39] 35 U.S.C. 171.

modicum of creativity), design patents are available only for designs that are truly "new", and does not extend to designs that are merely re-workings of previously-existing designs.[40] Because so many apparel designs are re-workings[41] 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 18 months, on average, for design patents), and the prospects of protection uncertain (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

Fashion design copying is ubiquitous. Perhaps most obviously, designs are frequently copied by retailers such as H & M, which offers cheap facsimiles of expensive ready-to-wear in its over 1000 stores, including in the U.S.[42] But copying is not limited to large retailers aping elite designers. Equally common is the practice of elite designers

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[40] 35 U.S.C. 102. See also In re Bartlett, 300 F.2d 942, 133 USPQ 204 (CCPA 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.").

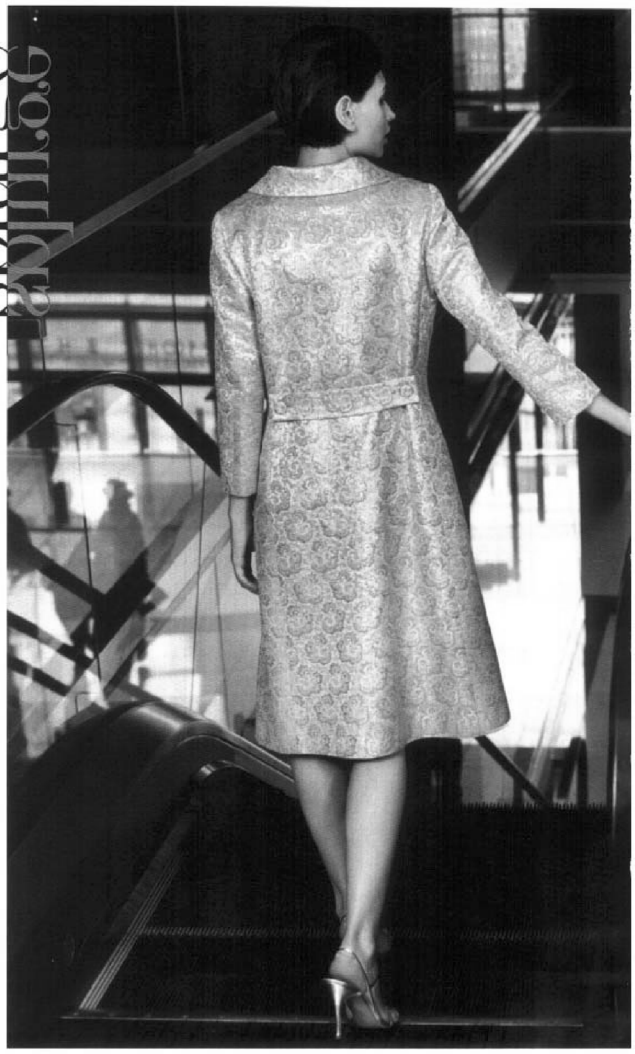
[41] We recognize that this pattern of "remix" innovation may be endogenous; in other words, if not for the practical barriers sharply limiting the availability of design patents, it is at least theoretically possible that the fashion industry would engage less in the endless reworking of existing designs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

[42] H & M 2004 Annual Report, at www.hm.com. See also Eric Wilson, McFashion? Bargains Sell, New York Times (Apr. 24, 2005); Amy Kover, That Looks Familiar. Didn't I Design It?, New York Times, (Jun. 19, 2005). H &M has begun using famous or semi-famous designers to design their collections as well, such as Stella McCartney. See http://www.designerhistory.com/historyofashion/mccartney.html

and design firms copying one another, which is illustrated in Figures C, D and E. These photographs are taken from the magazine *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."[43] These "runway trends," of course, are the works of other designers.

[43] See biography, Allen B. Schwartz, ABS Website, available at http://www.absstyle.com/allen.asp See also Sarah Childress, Proms Go Hollywood, MSNBC.com (May 18, 2005), available at 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.

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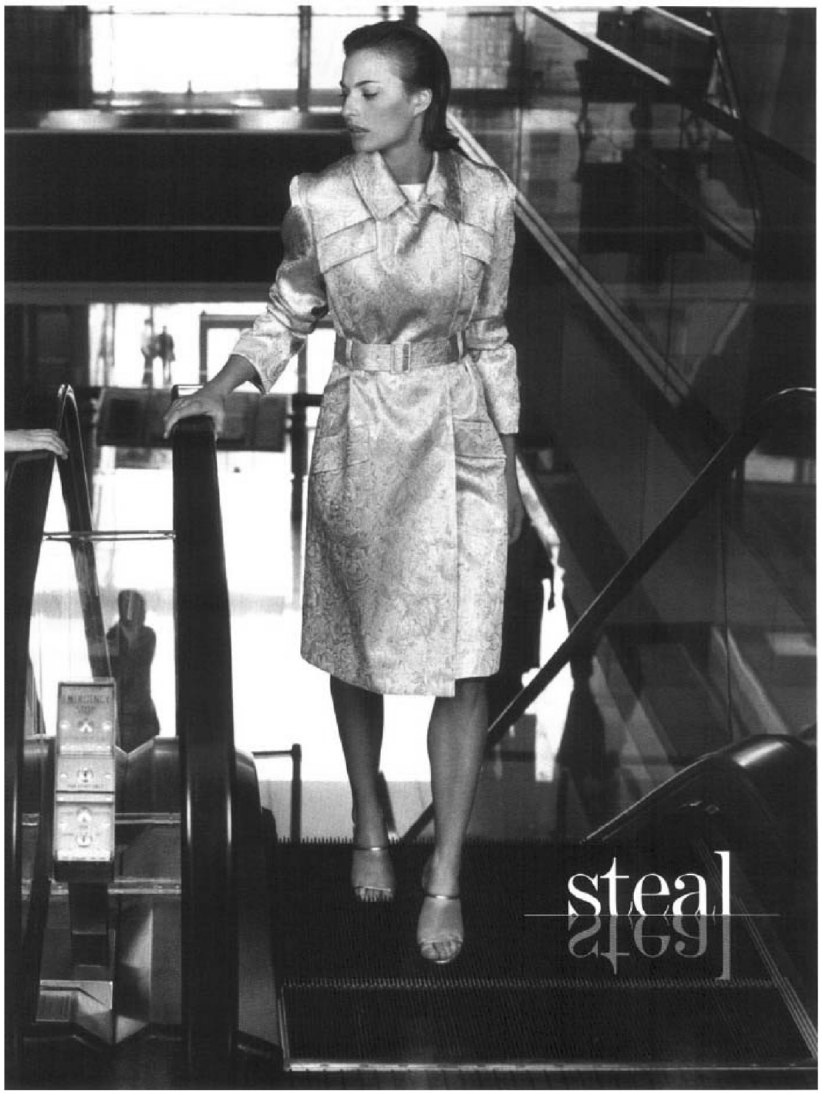
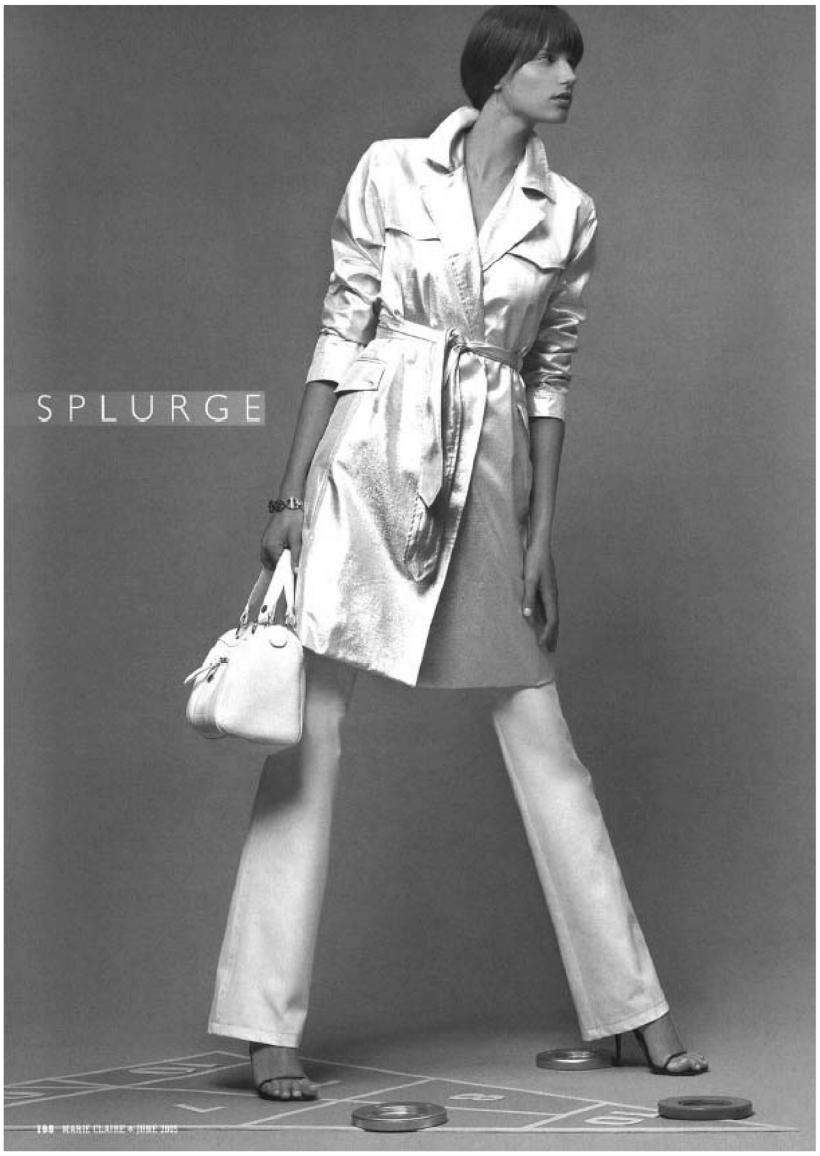

steal


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.
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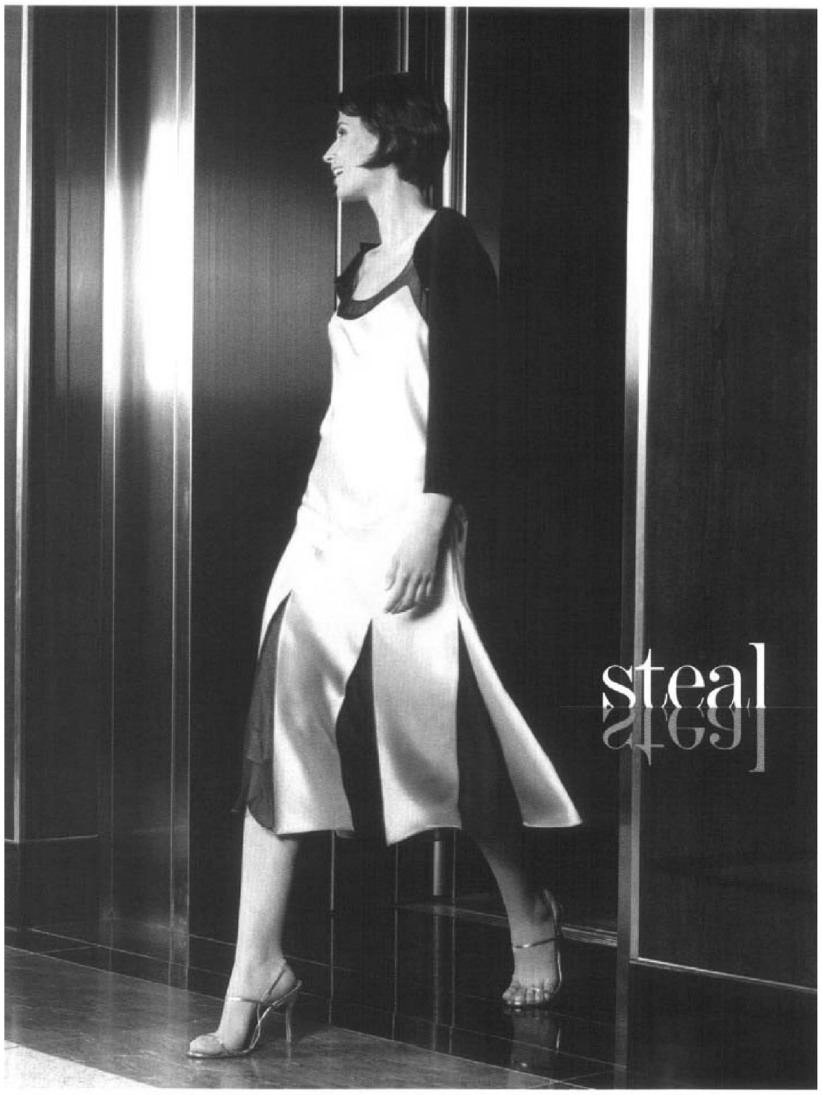
splurge

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.


steal

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

Della Valle (J.P. Tod)

The gommino found a niche audience in the early '80s. That changed, however, in the mid 00's, when dozens of shoe designers began marketing their own versions. A few examples of the derivative driving shoes are shown in Figure G, below:

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 is a threat to most creators only if copies are produced and distributed quickly. Yet increasingly they are. Digital photography and 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 – and sometimes before.

The result is remarkably pervasive appropriation of designs, with marketing of copies and derivatives at every level of the apparel marketplace. Viewed from the perspective of the music or motion picture industries, we know what to call this – piracy. And of course piracy is a principal concern of content owners – this is clear to anyone who has followed the recording industry's battle against online file-trading over peer-to-peer networks like Grokster,[44] or who views the websites of the industries' trade

[44] See, e.g., Metro-Goldwyn-Mayer v. Grokster, 545 U.S. ___ (2005); "New RIAA Lawsuits Target Campus Users," http://www.pcmag.com/article2/0,1895,1866777,00.asp; Jesse Hiestand, "MPAA

associations, the Recording Industry Association of America (RIAA) and the Motion Picture Association of America (MPAA), both of which feature information about and links to anti-piracy initiatives prominently on their front pages.[45]

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), [46] has participated in the drafting of a bill, H.R. 5055, that would extend protection to fashion designs.[47] As of this writing, the bill has been referred to committee. [MORE TO COME]

Even if legislation protecting fashion design is enacted in the next few years, there is still a striking sixty year period from the fall of the fashion guilds in which IP law did not protect fashion designs, despite many opportunities and initiatives to alter the law. This sixty year period encompassed major changes in copyright law, 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 is remarkable. And this 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 – euphemistically referred to by designers as "referencing" or "homage" – is largely taken for granted at all levels of the fashion world. [48] In the words of Tom Ford, former

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Launches Legal Offensive Against Online Pirates," http://www.hollywoodreporter.com/thr/article_display.jsp?vnu_content_id=1000706666.

[45] See <http://www.riaa.com/default.asp> (visited on Oct. 10, 2005); <http://www.mpaa.org/home.htm> (visited on Oct. 10, 2005).

[46] See <http://www.cfda.com> (visited on Oct. 10, 2005).

[47] See H.R. 5055 (introduced 109th Cong., 2d Sess., Mar. 30, 2006). For Congressional Research Service summary of H.R. 5055, see http://thomas.loc.gov/cgi-bin/bdquery/z?d109:HR05055:@@@D&summ2=m&.

[48] Cathy Horyn, Is Copying Really Part of the Creative Process?, New York Times (Apr. 9, 2002).

creative director for Gucci, "appropriation and sampling in every field has been rampant."[49]

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 famously sued Ralph Lauren in a French commercial court for the "point by point" copying of a YSL dress design.[50] YSL's successful suit took place in Europe, where IP laws are more protective of fashion designs, a topic to which we return below.[51] But 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 U.S. The YSL-Lauren lawsuit is in many ways the exception that proves the rule, and the rule is that fashion designs are "free as the air to common use."[52]

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[49] Cara Mia DiMassa, Designers Pull New Styles Out of the Past, Los Angeles Times (Jan. 30, 2005).

[50] Societe Yves Saint Laurent Couture S.A. v. Societe Louis Dreyfus Retail Management S.A., [1994] E.C.C. 512 (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 St. Laurent: "[I]t 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, 520. See also Agins, supra n. ____ (quoting a NY-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 found guilty of copying by a French court in 1985. Terry Agins, The End of Fashion (Quill, 2000) at 43.

[51] See II.___, infra.

[52] See International News Service v. Associated Press, 248 U.S. 215, 250 (1918) (Justice Brandeis dissenting) ("[T]he noblest of human productions – knowledge, truths ascertained, conceptions, and ideas – become, after voluntary communication to others, free as the air to common use . . .," and should have "the attribute of property" only "in certain classes of cases where public policy has seemed to demand it.").

II. THE PIRACY PARADOX

As fashion spreads, it gradually goes to its doom.[53]

Georg Simmel, 1904.

The orthodox view of IP law holds that piracy is a serious, even fatal threat to the incentive to engage in creative labor. And the film, music, software and publishing industries have responded to this threat as the orthodox justification for IP rights would counsel: they have demanded increased protection under the law. 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.[54] And 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.[55]

The fashion industry has done none of these things. Of particular interest for our purposes here, fashion firms and designers have obtained, at least in the U.S., neither expanded copyright protection applicable to apparel designs nor *sui generis* statutory

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[53] Georg Simmel, Fashion 547 (1904).

[54] See, e.g., Metro-Goldwyn-Mayer v. Grokster, 545 U.S. ___ (2005); "New RIAA Lawsuits Target Campus Users," http://www.pcmag.com/article2/0,1895,1866777,00.asp; Jesse Hiestand, "MPAA Launches Legal Offensive Against Online Pirates," http://www.hollywoodreporter.com/thr/article_display.jsp?vnu_content_id=1000706666

[55] Rochelle Dreyfuss and Andreas Lowenfeld, Two Achievements of the Uruguay Round: Puts Trips and Dispute Settlement Together, 37, Va. J. Int'l L. (1997). Compliance with the TRIPs agreement is mandatory for all WTO members. It sets a floor of "minimum standards" for IP protection in member states, and establishes procedures for enforcement of members' obligations. See generally http://www.wto.org/english/tratop_e/trips_e/trips_e.htm for an overview.

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?

The answer is not doctrinal. Later in this Part, we show that no substantial doctrinal barrier prevents copyright's extension to fashion designs.[56] So 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. In other words, what has made the regime of free appropriation a stable equilibrium, one that relevant actors have failed to overturn via the political process in the 65 years since the fall of the Fashion Originators' Guild? The orthodox account of IP suggests that free appropriation ought to drive out innovation and deter investment. Yet the fashion industry continues to innovate and attract investment despite the absence of legal protection for its designs. And historically it has shown surprisingly little interest in obtaining protection. 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

Our first argument begins with the special nature of clothing as 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

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[56] See II.__, infra.

> 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.[57]

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 of that car often diminishes if every person on your block owns 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.[58]

Not all apparel goods are positional, but many are, and that positionality is often two-sided. Particular clothing styles and brands confer prestige. Consumers may value a particular dress or handbag from Gucci or Prada in part because fashionable people have

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[57] Economics A-Z at www.economist.com, "positional goods." For more elaborate treatments of contemporary consumer behavior with regard to status-conferring goods, see Juliet Schor, The Overspent American: Why We Want What We Don't Need (1999), and Robert Frank, Luxury Fever: Why Money Fails to Satisfy in An Era of Excess (1999). Frank portrays much consumer purchasing as an arms race, in which each new purchase spurs others to engage in similar purchasing, with no gain in status since status is inherently relational. Barnett, supra, focuses on this literature to create a three-tiered model of utility: snob utility, aspirational utility, and bandwagon utility. Barnett, supra, passim.

[58] 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.

it but unfashionable ones do not. The dress or handbag is valued so long as it enables its wearer to stand out from the masses but fit in with her particular crowd. As those styles diffuse to a broader clientele, frequently that 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."[59] 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 as this element wanes, the fashion also is bound to die."[60] Perhaps Shakespeare put it most succinctly: "The fashion wears out more apparel than the man."[61]

This process of diffusion leading to dissipation of (social) value occurs for at least two reasons. First, it is possible that 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, and indeed one recent commentator has argued that such low-grade copies actually signal the desirability of the original, thus *enhancing* its value.[62] 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 enough, in most cases, 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 can rapidly become tacky as it is diffuses into the broader public, and for true fashion junkies, nothing is less attractive than last year's hot item.

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[59] New York World Telegram & Sun (Aug. 21, 1960).

[60] Simmel, supra.

[61] Conrade to Borachio, *Much Ado About Nothing*

[62] Barnett, supra, at ___.

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

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.[63] But by August, 2004, writers were calling the Ugg boot a "human rights violation"[64] and urging readers to give them up. 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![65]

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[63] See Lorrie Grant, UGG Boots a Fashion Kick, USAToday (Dec. 10, 2003), available at http://www.usatoday.com/money/industries/retail/2003-12-10-ugg_x.htm.

[64] Defamer, Ugg Poncho, The New Ugg Evil (Aug. 9, 2004), available at http://www.defamer.com/hollywood/culture/ugg-poncho-the-new-ugg-evil-019192.php.

[65] The Budget Fashionista, Alyssa Wodtke Gives Us Her Thoughts on the Demise of the Ugg (Jan. 26, 2005), available at http://www.thebudgetfashionista.com/archives/000540.php. See also Tad Friend, "Letter from California: the Pursuit of Happiness", New Yorker (Jan. 23 and 30, 2006) (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?'

The product cycle of Uggs illustrates the perils of positionality: what goes up eventually comes down. Against this background, the fashion industry's low-IP regime is, we argue, paradoxically advantageous for many players. IP rules providing for free appropriation of fashion designs accelerate the diffusion of designs and styles. As a design is copied by others (often at lower price points) and used in 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 and are copied and diffuse outside the early-adopter group, and the process begins again.

The fashion cycle itself is familiar. What is less commonly appreciated is the role of IP law in fostering the cycle. The absence of protection for creative designs speeds the process of diffusion by allowing copying to occur without legal sanction. This in turn speeds up the cycle. We call this process *induced obsolescence*. If copying were illegal the fashion cycle would occur very slowly, if at all. Fashion's legal regime of free design appropriation speeds diffusion and induces more rapid obsolescence of fashion designs. 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. Trademarks can help

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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.'").

distinguish the original from the various copies, and thus distinguish elites from the masses. But as noted above, in the vast majority of cases the mark is not visible unless one looks *inside* the clothes. Only occasionally do trademarks appear prominently on the outside of clothing, especially with regard to clothing outside the commodity category. In these cases, a visible mark helps distinguish copy from original and blunts some of the effects of copying on the diffusion of innovative designs. (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, within the industry and by knowledgeable consumers, 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 copied 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.

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.[66] Those who splurged might well disdain those who "steal"--though in today's

[66] And perhaps, would 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, supra, relies heavily on this assumption in his analysis of knock-offs. We are unsure about the enhancement effect but it is an empirical question. We not only do not employ this assumption, we stress a fundamentally different aspect of fashion—the desire for the new. For Barnett, "the introduction of copies, provided they are visibly imperfect, may increase the snob premium that elite consumers are willing to pay for a luxury fashion good. Second, the introduction of copies may lead non-elite consumers

consumer environment, where even the wealthy shop at Target, that is a decreasingly safe assumption. But it is often quite difficult to distinguish copies from originals – and sometimes 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.

Of course, many "copies" are not point-by-point reproductions at all, but instead new garments that appropriate design elements from the original and re-cast 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 a large number of garments that use the original design, but that add substantial new creativity. The many variations made possible by unrestricted exploitation of derivatives – a regime 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 – 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 that design (and its derivatives) become less attractive to early adopters.[67]

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to adjust upward their estimate of the status benefits to be gained by acquiring the relevant good, thereby possibly translating into purchases of the original." Barnett, supra. We focus not on the effects of copies on the copied good but on *new purchases*. 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. And 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." WSJ, Counterfeit for Christmas, supra note ___.

[67] A related "first mover" argument would suggest that the head start a design originator enjoys is sufficient to achieve success in the market, even if copying later drives a process of induced obsolescence. Fashion designs come and go quickly. If fashion design originators can sell many units before copyists can produce copies, perhaps they gain the lion's share of the revenues from a particular design before the design becomes obsolete.

This account suggests an obvious response: if copying and derivative re-working have this effect, would this not create an incentive for the originating design house to reproduce its original design and variations 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 exactly this. They 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 &

The first-mover argument relies for its force on an appreciable gap between first movers and copyists. There is little evidence that this gap exists. (The driving shoe example we offered above is very anomalous in this respect: in addition to being a relatively long-lasting trend, it is one where adoption by copyists took several years, but then was quite widespread). A first-mover claim may have had some explanatory power in decades past. But for at least the last ten, if not twenty, years the copying of fashion designs has been easy and fast. Well before digitization made the process of design copying almost instantaneous, ordinary photos and transcontinental air travel allowed copyists to begin work on a design copy within days of photographing or sketching the original. For this reason we are skeptical of the idea of a first-mover advantage in fashion design for any period in the past quarter-century. We are especially skeptical of it for the last decade.

One might suspect that the increasing occurrence of nearly-instantaneous copying may eventually disturb the industry's low-IP equilibrium. Originators' ability to recover investment may depend on there being some period, albeit quite brief, before a given design saturates the market – perhaps because this small time lag is 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(s). While it is too soon to tell, it may be the case that the fashion industry is moving in this direction – toward copying so rapid that it becomes more harmful and less helpful to originators. If this occurs, we would expect to see new efforts at controlling appropriation, either through enhanced use of trademark or through modification of copyright law to bring some elements of fashion design within the purview of the intellectual property system.

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 to knock off one's own signature designs and 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, which may differ from the premier line's audience in age, wealth, and other characteristics. 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-copied designs at multiple price points but using different brands to reduce the risk of brand tarnishment—is not more prevalent is an interesting question for future research. But it is clear that at least some degree of self-appropriation occurs through the common practice of an (often single) bridge line.

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 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 20th century, most of Western society treated clothing as a durable good to be

replaced only when it wore out.[68] None but the wealthiest consumers could afford to move on to new things well before the old was 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" (i.e., 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 familiar to every one, but the theory of this flux and change has not been worked out.[69]

This passage highlights a dynamic that spread, during the 20th 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."[70] 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.[71] 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.

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[68] Most clothing before the early 20th century was home-made or custom-made. Ready to wear as a category first developed for men in the mid-19th century and for women a few decades later. Only by the 1920s was mass-produced clothing available to most consumers in the United States. Leslie Burns and Nancy Bryant, The Business of Fashion (2nd ed., Fairchild Publications, 2002) at 10-14.

[69] Thorstein Veblen, The Theory of the Leisure Class 122 (Houghton Mifflin 1973). Not coincidently, American Vogue began publication in 1892. See Burns and Bryant, supra, at 32.

[70] Id. at 124.

[71] Id. at 125.

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, depending on the situation, cause harm to particular originators. Even when they suffer harm when their designs are copied, originators 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 in advance. Thus in the current system designers viewing their incentives ex ante (and thinking over the long term) are at least partially shrouded within a Rawlsian veil of ignorance.[72] 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, but the existence of fashion trends typically means that many actors copy some originator (or copy a copy of 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".

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[72] John Rawls, A Theory of Justice (Oxford, 1971).

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 are not chosen by committee: they evolve through an undirected process of copying, referencing, and testing of 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.

The important point about anchoring is that for the trendy to follow trends, they need to be able to identify them. And 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 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 – themes that 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 paper. 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 25th anniversary of the original Della Valle (Tod's) driving shoe.[73] 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; a hot shoe style was the snub-nosed high heel pump.[74] There is no functional explanation for the sudden relevance of these themes – i.e., 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, and then fashion firms exploit them, copying from one another, spinning out derivatives and variations, diffusing the themes widely and driving them toward exhaustion. The resulting anchoring of a season's innovation around a set of discrete designs helps drive consumption by defining, in a literal sense, what is, and what is not, in style that season.

We also see this process at work within 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 of which provide fashion advice to consumers. Their proclamations do not always take root, but they are a constant. 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 60s styles a la Nancy Sinatra; 70s styles a la Stevie Nicks; 80s styles a la Gloria Estefan; and 90s styles a la Shirley Manson. It is a

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[73] See Armand Limnander, The Remix: Back to Collage, N.Y. Times Sunday Magazine 92 (Aug. 28, 2005).

[74] "Snub-nosed pumps are everywhere this fall." New York Times, Sunday Styles, Pulse section, Sept 11, 2005, pg 3.

> puzzling sight for fashion seers used to declaring that one style of boot—Midcalf! Thighhigh!—is The One For Fall.[75]

The writer's expectation – which the style promiscuity of the 2005 season violates – is that the industry will anchor narrowly. And there are many examples of narrow anchoring that appear in the fashion press and the fashion racks. One example from Spring/Summer 2005 is the "bohemian" skirt – a style of 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,[76] and served as an anchor for a wider "bohemian look".[77] 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":

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[75] David Colman, "Choices, up to your knees," NY Times E1 Aug 25 2005.

[76] See Pauline Weston Thomas, The Gypsy Boho Summer of 2005, available at <http://www.fashion-era.com/Trends_2006/9_fashion_trends_2006_boho_gypsy.htm> ("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. 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.").

[77] See, e.g., Judy Gordon, "If You Want to be Groovy, You Gotta Go 'Boho'", available at <http://msnbc.msn.com/id/7425693/> ("This season, Fashionistas are rhapsodic about the revival of the bohemian style."); "Spring Fashion: Get the Bohemian Look", available at <http://www.kidzworld.com/site/p5553.htm> ("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.").

If the usual lifespan of trends in women's fashion is a guide, the bohemian look for Spring/Summer 2005 is over. However, it has, by some accounts, influenced a related "Russian" or "Babushka" look for Fall 2005.[78] Figure J shows examples of the Russian style by Oscar de la Renta, Diane Furstenberg, Behnaz Sarafpour, Anna Sui, and Matthew Williamson.[79]

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[78] See Weston Thomas, supra n. ___ ("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.").

[79] Harriet Mays Powell & Amy Larocca, Fall Fashion, New York Magazine, available at <http://newyorkmetro.com/nymetro/shopping/fashion/fall2005/11164/index.html>.

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 – "Midcalf boots are The One For Fall" – and that these trends wax and then wane, only to be replaced by the next set of themes. And again, 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 20th century makes the process of modeling innovation and diffusion in the industry difficult because fashion is no longer a top-down design enterprise.[80] Today many trends bubble up from the street, rather than down from

[80] Agins [book], supra.

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.

What matters for our argument is less *who* determines what is desirable then *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 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. More maximally, these processes actually benefit designers and the industry as a whole. More fashion goods are consumed in a low-IP world than would be in a world of high-IP protection precisely because copying rapidly reduces the status premium conveyed by new apparel and accessory designs, which in turn requires status-seekers to renew the hunt for the new-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 argument is more nuanced: 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 the creation and accelerated extinction of these trends helps to sell fashion.

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 U.S.) it is difficult to say with any certainty whether raising IP protections would raise consumer or producer welfare.[81] And 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 would be quite limited. But it is unlikely 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 is of long-standing—long predating Veblen's observations in the 19th century—and 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.[82] This permitted copying of European designs but not American ones. Once the Supreme Court disrupted that regime on antitrust grounds, however, extensive copying of all designs renewed. In the six decades since, in which copyright law underwent radical expansion in many areas, the legal regime for fashion has been remarkably stable. And the fashion industries in both America and abroad have thrived.

d. EU vs. U.S. – Different Legal Rules, Similar Industry Conduct

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[81] Whether consumers would be better off with less rapid change, or with 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. On this issue see also Barnett, supra.

[82] See discussion at ____, supra.

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 U.S. also do so in the fashion industry's other creative center, Europe. Interestingly, the European regime affecting fashion designs, an amalgam of national laws and European Union law, is in a formal sense markedly different than the American. European 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 U.S., the E.U. provides much more encompassing protection for apparel designs. In 1998 the European Council adopted a European Directive on the Legal Protection of Designs ("Directive").[83] 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 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).
- Protection extends to the "lines, contours, colours, shape, texture and/or materials" of the registered design. It also applies to "ornamentation".

[83] Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the Legal Protection of Designs, 1998 OJ L 289. The Member States implemented the Design Directive on December 9, 2001.

- A design registration in each member state is valid for a total of 25 years.[84]

Shortly after issuing the Directive, the EC adopted a Council Regulation for industrial designs.[85] This regulation applies the very broad design protections set out in the Directive to all member states without the need for national implementing legislation.[86]

Despite the availability of legal protection in the EU, we see little litigation in Europe involving fashion designs.[87] And, perhaps more importantly, we see widespread fashion design copying – often by the same firms offering similar clothing in both the EU and U.S. markets. Indeed, two of the major fashion copyists—H & M and Zara, each with hundreds of retail outlets in multiple countries—are European firms that expanded into North America only after substantial success at home. For example, Figure K shows a reproduction of a Michael Kors shoe by U.K. retailer Morgan.[88] Although there are

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[84] Id., Article 10.

[85] A directive of the European Council 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.

[86] In addition to protection for registered designs, the regulation also provides Community-wide protection for *unregistered* designs. The standards for the unregistered design right closely follow rights previously existing under U.K. law and are narrower than those contained in the Directive. These standards for unregistered design rights do not replace national laws relating to unregistered designs. Thus, subject to certain limitations, an unregistered design rightstholder will have a choice between invoking the national law of the member state concerned or the Community-wide right to protect the unregistered design.

[87] See, e.g., Shirin Guild v. Eskander Ltd., [2001] F.S.R. 38, 24(7) I.P.D. 24,047 (U.K. High Court 2001) (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. Ltd. v. Teddy Smith (UK) Ltd., [2003] RPC 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, book, at 42-3.

[88] See Mark Tungate, When Does Inspiration Become Imitation?, Telegraph (Sept. 8, 2005), available at http://www.telegraph.co.uk/fashion/main.jhtml?xml=/fashion/2005/07/27/efcopy27.xml (last visited ____).

differences, it is reasonably likely that, under the "substantial similarity" standard that applies in both the EU 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. The Tesco dress clearly is "referencing" the Chloe dress in a manner that, under applicable EU law, would potentially condemn the Tesco dress as an unauthorized, and thus infringing, derivative work.

Figure K (Michael Kors shoe)

(Morgan shoe)

Figure L (Chloe, Spring/Summer 2005)

(Tesco)

The paucity of lawsuits in Europe and ubiquity of copying is reflected by the apparently scant utilization thus far of the E.U.-wide system for fashion design registration put into place via the E.U. Council Regulation. 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.[89] (Any firm or individual marketing apparel in the territory of the E.U. may register a design in this database, and thereby gain protection under the regulations governing registered designs.) During the period in question, firms and individuals registered 1631 designs. Although it is impossible to measure the total number of designs marketed in the twenty-five member states of the E.U. during that period, 1631 designs over a 22 month period would, we believe, represent a very small fraction of that total figure. More to the point, when one examines closely the records of registration in the database, it quickly becomes apparent that the number of actual fashion designs registered is much smaller even than 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* – matter already protected under applicable trademark law – and affixed pictorial works, many of which are already protected as trade dress and by copyright. Also registered is a large number of pocket stitching designs for jeans – another feature generally covered by trademark law. Thus the function of the registration for all of these items is not to protect an original apparel design, but as a back-up method of protecting a mark or pictorial work over which the owner already enjoys rights. Another large category of registered designs is for work and protective clothing – e.g., surgery apparel, welders' bibs, military clothing, uniforms for a courier service owned by the German post office. An even larger number of designs pertain to sport apparel (cycling shorts, skiwear, soccer jerseys, etc.) marketed by athletic equipment firms.

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[89] See Office for Harmonization in the Internal Market, Trade Marks and Designs, available at <http://oami.eu.int/RCDOnline/Request Manager>.

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 (i.e., including a large 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 22 month sample period. But 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, 409 of those registrations were made by a *single* firm – Street One GmbH, a mid-tier German "fast fashion" design and retailing firm[90] – and another 391 registrations were made by two other small EU companies that are not familiar names: Creations Nelson[91] (202 registrations) and Mascot International[92] (189 registrations). 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 not a single major fashion design

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[90] Street One produces a new womenswear collection every month , see http://www.street-one.de/en/unternehmen/produkte.html, and sells their design output through shops around Europe owned by others. See http://www.street-one.de/en/unternehmen/distribution.html. Together with its sister companies, Street One claims total revenues of over 400 million Euros, see http://www.street-one.de/en/unternehmen/Kennzahlen_engl-040101.pdf – 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 http://www.forbes.com/finance/mktguideapps/compinfo/CompanyTearsheet.jhtml?tkr=RL&cusip=731572103&repno=00038377&coname=Polo+Ralph+Lauren

[91] A small French firm (22 retail outlets in Paris) that does business under the Comptoir des Cotonniers brand. See http://www.comptoirdescotonniers.com/.

[92] A Danish firm that manufactures mostly durable work clothes. See http://www.mascot.dk/2006/showpage.php?pageid=605228&pid=&cid=&farve=&lang=EN.

firm or individual designer appears as an "owner" of any design registered in the E.U. database.[93]

Europe thus presents a situation of pervasive but unutilized regulation. Despite a regime that permits registration of designs, few choose to register. The difference between the U.S. and E.U. regimes creates a natural experiment: one would expect to observe some difference in the industry's conduct – and 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.

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[93] Among E.U. member states, France protects useful articles as part of its copyright law, a rule which implicitly accords protection to fashion designs, and also has a separate statute extending patent-like protection to designs, the French Design Act. See Annette Kur, The Green Paper's Design Approach: What's Wrong With It, 15(10) European I. P. L. Rev. 374, 375-76 (1993) (summarizing national laws). The U.K. has a statute establishing rights in registered industrial designs, The Registered Designs Act 1949, and this statute includes protection for registered apparel designs. The database recording registered designs is accessible at http://webdb1.patent.gov.uk/RightSite/formexec?DMW_INPUTFORM=tpo/logon.htm. Our search of this U.K. database 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 39 designs are registered in the "dresses" category, 24 in the "skirts" category: two in the "trouser suits" category, and none in the "skirt suits" category. And 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 as well appears to have registered a small number of watches and two 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.

As has previously been mentioned, the U.K. also provides a right for unregistered designs in the Copyright, Designs and Patents Act 1988. See G. Scanlan, The Future of Design Right: Putting s51 Copyright, Designs and Patents Act 1988 in its Place, 26(3) Statute L. Rev. 146 (2005). For both the registered and unregistered right, however, we see little litigation or other evidence of enforcement across the E.U.

Yet we observe no substantial variances in conduct. Instead, we see widespread design copying in both the E.U.'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 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 usually operate in both jurisdictions, and buying by U.S. retailers often takes place in the E.U., and vice versa, making revenue and profitability comparisons across regions difficult or impossible. Yet we can say at least that we detect no obvious disinclination of fashion firms to market in the U.S., and the fact that firms in both the E.U. and U.S. 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 EU 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, with a set of legal rules and procedures that enable lawsuits to be brought readily. 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 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 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 in some important ways prevailing EU law. And 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 of 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 the 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.[94]

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—an equilibrium that has lasted since the 1940s? Below we consider two plausible alternatives – (1) that copyright's useful articles doctrine prevents expansion of copyright to cover fashion designs, and (2) that the fashion industry is unable to organize itself to pursue changes in the law.

i. 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?

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[94] [note here about testimony before the sub-committee]

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 – they are rather a surface feature, and one that could easily be changed. Indeed, in one area 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, on the federal level, to industrial designs in the semiconductor and boat hull industries. The availability of *sui generis* protection would allow an IP-hungry fashion industry to elide whatever difficulties might be involved in altering copyright'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 a tangible medium."[95] Two-dimensional renderings of fashion designs – the precursor to the three-dimensional product – are already protected if they contain a modicum of originality. So a designer's sketch of a new dress design is protected by copyright. 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. But this is plainly not the case: copyright'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.[96]

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[95] Copyright Act, sec. 102.

[96] 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, and U.S. law does not make copying from a garment equivalent to copying from the underlying sketch. 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 (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.

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 – i.e., 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 (i.e., its original, expressive element). The Supreme Court considered copyright in such an article in *Mazer v. Stein.*[97] *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 craftsmanship, insofar as their form but not their mechanical or utilitarian aspects are concerned, such as artistic jewelry, enamels, glassware and tapestries . . ."[98] Following *Mazer*, courts have held artistic jewlery[99], designs printed upon scarves,[100] and dress fabric designs,[101] [Chris: per Lemley we need to have a section or at least more on why fabric designs are protected. At least we need to flag that this is maybe a puzzle or area for future research. Since you know the caselaw I leave this to you] to be protected by copyright. These courts appeared to read the *Mazer* opinion as ratifying copyright for the form of any useful article that is also aesthetically pleasing in appearance.

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[97] 347 U.S. 201 (1954).

[98] 37 C.F.R. sec. 202.10(a) (1959).

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

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

[101] See, e.g., Segrets, Inc. v. Gillman Knitware Co., Inc., 42 F. Supp.2d 58 (D.Mass. 1998), rev'd in part on other grounds, 207 F.3d 56 (1st Cir. 2000); Peter Pan Fabrics v. Candy Frocks, Inc., 187 F.Supp. 334 (S.D.N.Y. 1960).

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'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 [copyrightable] 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].[102]

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 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."[103] 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: "[a]n article that is normally a part of a useful article is considered a 'useful article'."[104]

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[102] 37 C.F.R. sec. 202.10(c) (1959).

[103] Copyright Act, sec. 101 (emphasis supplied).

[104] Id.

The debates over how to implement the useful articles rules aren't particularly important for our purposes here.[105] 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 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 – and thereby extend copyright to fashion design – without disturbing the broader coherence of the copyright laws.[106] And, not

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

[106] 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 factfinders 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 protectable expression by taking material of substance and value." Atari, Inc. v. North American Philips Consumer Electronics 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: "Two 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 (2d Cir. 1998) (internal quotations and citations omitted).

In practice, the courts' implementation of the test has 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 standard that courts have applied to other media, the copying of apparel designs illustrated in the figures above would be actionable. As a result, if the useful articles rules were modified to extend copyright to

surprisingly, 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.[107] 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,[108] 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,

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apparel designs, the current substantial similarity doctrine would expose many designs to challenge under the copyright laws. And this would create substantial disruption for the industry. Fashion firms couldn't resort, as software industry firms do, to designing apparel in a "clean room" – i.e., 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 does not mean, however, that copyright doctrine is a substantial barrier to expansion of copyright 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 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.

[107] 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 don't 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, NYSlipOp 02570 (Apr. 5, 2005) (Graffeo, J.), 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" (i.e., previously distributed) fashion designs.

[108] 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 (E.D. Mich. 1973).

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.[109]

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),[110] 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."[111] The same provision that extended copyright 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."[112] 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 reversed the traditional presumptions of the useful articles doctrine as it applies to a building's design. The same erasure applied to fashion would result in broad copyright protection for original designs.

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[109] 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. v. Underkoffler, 16 F.Supp. 729 (M.D. Pa. 1936). And purely decorative elements of a building – e.g., a gargoyle adorning a building's cornice – were 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.

[110] Title VII of the Judicial Improvements Act of 1990, P.L. 101-650, 104 Stat. 5089 (effective Dec. 1, 1990).

[111] 17 U.S.C. § 101 (2000).

[112] Id. (emphasis supplied). 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 could be protected . . . ." H.R. Rep. 101-735, 101st Cong., 2d Sess. 20-21 (1990).

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 also, on two occasions, elided the rule by constructing *sui generis* forms of protection (i.e., copyright-like protection outside the Copyright Act) for two classes of useful article – semiconductor "mask works" and boat hulls. We will examine each briefly.

Semiconductors. In 1984, Congress adopted the Semiconductor Chip Protection Act.[113] 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 design work they graphically embody, requires significant investment, amounting often to many millions of dollars.[114] Congress stated that the "appropriation of creativity" by those copying mask works would be a "devastating disincentive to innovating research and development."[115] Under the SCPA, a mask work is protected if it is "fixed" (i.e, if it has been employed in creating a semiconductor chip product), and original.[116] Protection is limited to the works of U.S. nationals and domiciliaries,[117] or to works first commercially exploited in

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[113] Act of Nov. 8, 1984, Pub. L. 98-620, 98 Stat. 3347.

[114] As the House Report on the SCPA noted, "A competing firm can photograph a chip and its layers in several months and for a cost of less than $50,000 duplicate the mask work of the innovating firm." House Rep. (SCPA), p. 2.

[115] Id. at 2-3. U.S. protection of mask works also arises from, and is subject to, treaty obligations. The 1992 Washington Treaty was the first instrument to set international standards for the protection of mask works. Treaty on the Protection of the Layout-Designs of Integrated Circuits, 57 Fed. Reg. 56,327 (Nov. 27, 1992), reprinted in Copyright Law Reporter (CCH) Para. 20, 706. the U.S. never adhered to the Washington Treaty. The U.S. is bound, however, by the provisions on mask works contained in TRIPs.

[116] H. Rep. (SCPA), p. 34. 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." This language has prompted a debate whether the SCPA imposes a patent-like standard of novelty. See 2 Nimmer 8A.03[B].

[117] 17 U.S.C. Sec. 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 2 Nimmer 8A.04[D][1].

the U.S., regardless of the nationality of ownership.[118] In addition, the SCPA requires that mask works either be registered with the Copyright Office, or commercially exploited, as a condition of protection.[119]

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."[120] The exclusive right of reproduction granted is, as in the copyright law, 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.[121] The SCPA also gives the owner an exclusive right for the same 10-year period "to import or distribute" a chip for which the protected mask work has been used in production.[122]

Boat Hulls. Congress has also granted *sui generis* design protection in boat hulls. In response to the decision in *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*,[123] 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

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[118] 17 U.S.C. Sec. 902(a)(1)(B).

[119] 17 U.S.C. Sec. 904(a). The SCPA is, therefore, a "conditional" system of protection – i.e., 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 copyright notice, in order to gain the protection of the law. See Christopher J. Sprigman, Reform(aliz)ing Copyright, 57 Stan. L. Rev. 485 (2004). In contrast to conditional schemes like the SCPA, the current "unconditional" copyright laws provide that copyright arises automatically upon unlike the fixation in a tangible medium of an original piece of expression. It also requires that, if protection arises via commercial exploitation, that registration occur within two years, or protection is limited to the two-year period. 17 U.S.C. Sec. 901(a)(5).

[120] 17 U.S.C. Sec. 905(1).

[121] 2 Nimmer 8A.069[A].

[122] 17 U.S.C. Sec. 901.

[123] 489 U.S. 141 (1989)

Vessel Hull Design Protection Act (VHDPA).[124] 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.[125] Protection is limited to "original" designs, which the statute defines as those which 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 copies from another source."[126] The Act grants the owner the exclusive right to "make, have made, or import" any boat hull incorporating the protected design.[127] It also grants the exclusive right to sell or distribute any hull incorporating the protected design.[128] The Act protects any element of a hull design "which makes the article attractive or distinctive in appearance to the purchasing or using public . . . ."[129] In addition, protection is granted even for elements of hull design that are strictly utilitarian in function.[130]

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[124] Act of Oct. 28, 1998, Pub. L. 105-304, 112 Stat. 2860, Sec. 501 (short title).

[125] 17 U.S.C. Sec. 1301(a)(2).

[126] 17 U.S.C. Sec. 1301(b)(1).

[127] 17 U.S.C. Sec. 1308(1).

[128] 17 U.S.C. Sec. 1308(2).

[129] 17 U.S.C. Sec. 1301(a)(1).

[130] Id. 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 forfeit. 17 U.S.C. Sec. 1310(a). And protected designs must be marked with a prescribed form of notice of protection (17 U.S.C. Sec. 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." 17 U.S.C. Sec. 1307(b).

Both the semiconductor and the 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 protectable under copyright 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 just vessel hulls but also fashion or any other form of industrial design. All Congress would have to do is change the non-intuitive definition of "useful article" in § 1301(b)(2) – and 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 3-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.

ii. 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 of 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.[131] 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, succfully organize to keep out cheaper imports.

Many IP-protected industries are highly concentrated, and as a result they 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 was 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 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. But American fashion designers 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. The Council does many things, including working "to advance the status of fashion design as a branch of art and culture," promoting achievement in fashion design, and sponsoring charitable programs.[132] Lately the Council has lobbied on behalf of H.R. 5055. , though it was previously inactive on the issue of IP

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[131] Mancur Olson, The Logic of Collective Action (1965).

[132] www.cfda.com/flash.html

protection [Check this] Since 1980 there have been at least ten bills introduced in Congress that addressed design protection generally. Most 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."[133] 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 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. Fashion designers might desire a high-IP regime, but perhaps the retailers have prevailed over the designers in this struggle. Is there evidence for this "rival rent-seekers" claim?

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 product is derivative. An example of the mingling of original design and retailing is U.S. mass retailer Target, which has for several years offered an exclusive collection by U.S.

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[133] H.R. 3017, 101st Cong, 1st Session.

designer Issac Mizrahi, and this year is offering a "Go International" collection by designers Luella Bartley and Tara Jarmon.[134] (Last year H & M had a similar 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 has also been reported to be interested in buying the Tommy Hilfiger design firm. In the case of retailers that, like Target and perhaps Wal-Mart, 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. But there is little reason to conclude that retailers face markedly strong incentives to favor the current low-IP regime. Similarly, there is only scant evidence, either in the debates preceding the enactment of the Copyright Act of 1976, or the various general design protection measures that from time to time have been proposed, 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 HR 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.[135] But we find no evidence to date that they have coalesced to oppose the bill.

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[134] Ylan Q. Mui, Where Target is Always "Tar-zhay", Washington Post D1 (June 21, 2006).

[135] Email from CFDA head on HR 5055 progress, July 5, 2006

Second, even if most retailers do not currently engage in significant design work, it is not clear, at the level of theory, that even "pure" retailers would inevitably prefer a low-IP regime. In the current low-IP environment, major retailers like Bloomingdales's are free to follow apparel trends by purchasing and reselling original designs and also 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 marks. We cannot predict, at the level of theory and without knowing much 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 some retailers, probably a minority, 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. was the power of retailers, to explain the existence of the different nominal rule in Europe we would need an argument for why European 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 was 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.

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. But 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,[136] thereby replacing the default property rule with a liability rule specific to the music industry. This specialized rule contributes to a creative environment in which the reworking of 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; the law imposes, for example, 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

[136] Copyright Act, sec. 115.

these two settings, and the level of investment required to maintain creativity, is very different.[137]

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, 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.

The first step in thinking about how different industries fit with different 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 copyright'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.[138] If there are any broader conclusions we can draw about the *necessity* (vs. 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

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[137] On industry specificity in IP see Joseph Liu, Copyright Law and Subject-Matter Specificity: The Case of Computer Software, 60 NYU Ann. Surv. Am. L. (2005); Dan Burk and Mark Lemley, Tailoring Innovation Law: Shaping Patent Policy for Specific Industries, forthcoming; Michael Carroll, One for All: The Problem of Uniformity Cost in Intellectual Property Law, forthcoming, 55 Am. U. L. Rev. (2006).

[138] 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 eg. David Nimmer Copyright in the Dead Sea Scrolls: Authorship and Originality, 38 Hous. L. Rev. 1 (2001)

existing 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[139]. 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.

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)

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[139] Litman, supra. That hasn't stopped creative lawyers from seeking alternate forms of protection for culinary creations. See Katy McLaughlin, 'That Melon Tenderloin Looks Awfully Familiar', Wall St. J. June 24 2006 at P1(noting that "Chefs copying other chefs is as time-honored a culinary tradition as snooty sommeliers" but that now "some 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.

"built" food (i.e., the recipe as "fixed" in tangible form for consumption). 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, to those 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 . . . .

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 – the parts that are not covered or only glancingly covered by copyright – 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.[140]

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[140] See U.S. Copyright Office, Recipes, available at <www.copyright.gov/fls/fl122.html>. 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, "Season with black pepper, but no salt as the cheese will make it salty" that passage would probably qualify for copyright. Nimmer, personal communication, 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.[141] But it is doubtful 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.[142] And yet bookstore shelves (and our own) are groaning under the weight of cookbooks, many expensively produced and priced accordingly.

"Built" food – recipes made tangible in a box or on a plate – is even more remote from copyright, at least under current arrangements. And yet this situation could change. It is possible that built food endures long enough to be judged a "fixation" of the recipe in a tangible medium (i.e., the edible material). If so, then the built food is a derivative work – derivative, that is, of the recipe. But even if built food is evanescent – i.e., if, because it persists only until consumed, it does not meet the fixation requirement that the copyright laws ordinarily impose as a predicate – this would not cut off all possibility of protection. If recipes were protected, then the preparation of 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.[143] 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

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[141] See id; and 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 (1991).

[142] 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.

[143] Copyright Act, sec. 106(4).

whether the performance is recorded or not.[144] So if copyright were expanded to include recipes, home preparation of a recipe would be permitted, but public preparations – food cooked in a restaurant – would require the permission of (i.e., a license from) the copyright owner.

That doesn't 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 shouldn't they 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[145]. But that arrangement, like the low-IP regime governing fashion, isn't set in stone. And 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. But 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 6th 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

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[144] Id. See also Copyright Act, sec. 101 (definition of "publicly").

[145] WSJ article, supra (6/24/06)

excel in eager competition with similar inventions." [146] 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.[147]

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 much 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 wide-spread tattoo design copying.[148] Recently, 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

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[146] Athenaeus, The Deipnosophists, trans. Charles Burton Gulick (London, New York, and Cambridge, Mass. 1927-41), V, 348-349.

[147] 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 regulates their use of others' original recipes. See Emmanuelle Fauchart & Eric A. Von Hippel, Norm-Based Intellectual Property Systems: The Case of French Chefs, MIT Sloan Research Paper No. 4576-06, 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. See also WSJ, supra, for hints that informal norms are not deemed sufficient by all parties.

[148] See Jordan S. Hatcher, Drawing in Permanent Ink: A Look at Copyright in Tattoos in the United States, ____ (forthcoming, 2006); Thomas Cotter and Angela Mirabole, Written on the Body: Intellectual Property Rights in Tattoos, Makeup, and Other Body Art, 10 UCLA Entertainment L Rev. 97 (2003)

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 E.U. has, beginning with its 1996 Database Directive,[149] 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 unprotectable 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 E.U.[150] The Commission's report found that the Database Directive had not yet shown any effect in inducing additional production of databases in the E.U.: "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." In fact, the Commission's study showed that the production of databases within the E.U. 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 industry in the E.U., 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. And yet participants in open-source programming projects engage in a variety of licensing and contractual arrangements that avoid the default rules of

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[149] Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, OJ L 77, 27.3.1996.

[150] 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 (Brussels, Dec. 12, 2005).

copyright[151] and patent[152] 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), and 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-licenses, 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.[153] (Perhaps an 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). [Does this fully account for Lemley's objections to including semiconductors?]

- ***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

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[151] See, e.g., GNU General Public License, available at <http://www.gnu.org/copyleft/gpl.html>.

[152] See, e.g., Eric Auchard, Linux Backers Form Patent Sharing Firm, available at <http://news.yahoo.com/s/nm/20051110/tc_nm/linux_dc>.

[153] See National Academies of Science, Patents in the Knowledge-Based Economy 190 (2003).

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 – 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 ASCAP or BMI – to collect annual fees from individual haircutting shops for blanket licenses to perform a large number of copyrighted hairstyles.

- Competition in the illicit market for ***heroin*** apparently focuses heavily on branding[154] – i.e., on words and images stamped on packages of the drug that identify the product and establish product loyalty.[155] The duration of the "brands" is short, and the quality of the information conveyed is uncertain.[156] And of course heroin dealers are in no position to claim any formal IP protection for their "brands", and therefore the words and designs stamped on heroin bags may be freely appropriated.[157] Additionally, marking heroin bags with brands is costly to dealers, in the sense that the branding may increase dealers' risks by making it easier to connect a particular user with a seller.

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[154] We thank Rebecca Tushnet for this suggestion.

[155] P. J. Goldstein et al, "The marketing of street heroin in New York City", *Journal of Drug Issues*, vol. 14, No. 3 (1984), pp. 553-566.

[156] T. Wendel and R. Curtis, "The heraldry of heroin: 'dope stamps' and the dynamics of drug markets in New York City", *Journal of Drug Issues*, vol. 30, No. 2 (2000), pp. 225-260 ("The principle of product recognition, however, is undermined by the frequent manipulation of quality and many stamps last only a few days before being replaced. To compensate for this instability and create the illusion that users have choice, many distributors (particularly large organizations which could afford to do so) simultaneously issue several stamps. Users are aware that different stamps do not necessarily mean different heroin and that one of the bags might often be better than the rest.").

[157] See Ryan Haggerty, Drug dealers pushing 'brand loyalty', post-gazette.com (June 8, 2006), available at http://www.post-gazette.com/pg/06159/696634-85.stm (quoting Pittsburgh police captain: "The problem is there's no copyright law, so as soon as you put a good product on the street, people will copy your stamp.")

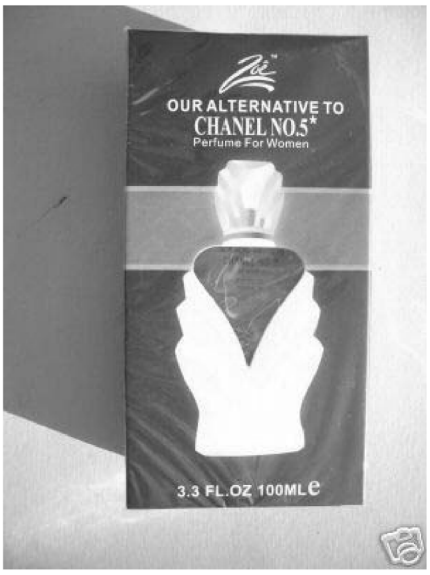
So the market is heroin operates in a no-IP regime within which branding is rarely exclusive and potentially costly. And yet branding is a durable feature of heroin marketing. Why? A spate of recent deaths in Pittsburgh caused by "Get High or Die Trying" (see Figure M, directly below), a particularly potent form of heroin laced with fentanyl, an opioid pain-killer, suggests that heroin consumers believe that branding conveys some meaningful information. A frustrated Pittsburgh doctor offers his theory: "Dealers are competing for the best product . . . The word on the street is that this is the strongest stuff, so demand is high. I think the dealers, especially the high-level ones, know exactly what they're doing."[158] [Chris, isn't this just an example of trying to use TM even tho it is not legally enforceable, and therefore no different than a contract between mobsters? I'm not sure this adds]

- Perhaps the most important product attribute of ***perfume***,[159] its scent, is not protected by IP, though the trademark and often the trade dress (e.g., the design of the bottle) are legally protected against copying, and patents are granted on the *novel chemical composition* of certain perfumes (indeed, the United States Patent

[158] Id.

[159] We thank Neil Netanel for this suggestion. Recently, two European courts have held that scent is copyrightable. In February 2006 a French court ruled that a perfume's scent can be copyrighted; see Societe Bellure NV v. S.A. L'Oreal at http://breese.blogs.com/pi/files/CA_BELLURE.pdf. A similar ruling was handed down in June 2006 by the Dutch Supreme Court. See A.P, Court Upholds Ruling on L'Oreal Copyright, June 16 2006.

and Trademark Office maintains a category for "Perfume Compositions" in its classification and search system).[160] 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 N):[161]



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.

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[160] See United States Patent and Trademark Office, Class Definitions, Class 512, http://www.uspto.gov/web/patents/classification/uspc512/defs512.htm#C512S001000.

[161] For additional examples, see http://www.imitationperfume.com/.

With the exception of open source software, none of the areas mentioned above have been widely studied. That is understandable – from the perspective of most people interested in IP, industries that IP doesn't reach, or that have contracted out of IP, don't seem very interesting. But that view mistakes the means for the end. The means is IP, whereas the end is innovation. When we see innovation occurring over long periods of time, in the absence of the legal rules that are conventionally said to be innovation's necessary predicate, that should command our attention. The lack of protection in some of these areas may be explicable as resulting from their nature 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.[162] But even so, 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 grounds that without such protections innovation will wither. Driven out by cheap copies that destroy the incentive to innovate, and that 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

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[162] We thank Mark Lemley for this suggestion.

protects some attributes—brands—but not others. Indeed, IP law fails to protect the core of fashion, which is 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 does the lack of copyright protection for fashion designs seem not have 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 some particular attributes of 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.[163]

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. Artists who were once the darlings of audio cognescenti—a current example is Coldplay—become too popular, and hence unfashionable, for their original fanbase. 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

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[163] Email from Annette Kur, 10 February 2006

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 where 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 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 the IP law's absence.

Mr. SMITH. Thank you, Mr. Sprigman.

Mr. Banks, let me direct my first question to you. You have just heard Mr. Sprigman say, and we have heard others say as well, that there is a concern about the increased litigation that would come, and the difficulty of determining what is original, shall we say.

It occurred to me, and I have a couple of slides I want to put up in a minute, but it occurred to me that what is to prevent someone from, for instance, seeking to copyright men's striped shirts and just changing the width of a stripe or the distance between the stripes a centimeter or less, and copyrighting every manner of striped shirt?

And also, I want to put, if you can, I think we are prepared to do so, put up a couple of visual aids here. You have, for lack of another word, let me call it a polka-dot dress. You have the real thing on the left and the knockoff on the right. Here you have a difference in the size of the diameter of the polka-dots, for example.

How are you going to copyright something that can be replicated but not exactly duplicated? Is that not going to lead to an excess in litigation?

Mr. BANKS. Well, first of all, Mr. Chairman, if you look at the slides of the two dresses that were shown, they are not a copy of each other. The one dress by Diane von Furstenberg has a cap-sleeve. It is a wrap-dress. The other dress is a slip-dress silhouette. The size of the polka-dot is different. In fact the space between the dots is different. It is a different bracket print. They are both similar polka-dots, but they are not the same.

Mr. SMITH. Suppose the polka-dots on the knockoff, just like the striped shirt I described, were a millimeter smaller in diameter. Would that present a problem?

Mr. BANKS. Well, first of all, you would be talking about prints, and you can already register a print. That is an original design that already you can register. Prints in the home furnishings area, prints in the fashion design area are textiles that can be copyrighted. So we are not really talking about that with this bill. We are not talking about commonplace design either. The jean jackets that David showed us, that is something that is commonplace.

Mr. SMITH. So the striped shirt would be considered to be commonplace, for example?

Mr. BANKS. Exactly. Anything that went before, that went on in fashion before this bill would not be represented, whether it is a white buck shoe or seersucker suit or a spaghetti strap dress.

Mr. SMITH. In the case of the polka-dot dress or even a striped shirt, wouldn't a court find that they are substantially similar and therefore a violation of copyright, or not necessarily?

Mr. BANKS. I don't think they would necessarily do that.

Mr. SMITH. Okay.

Mr. Wolfe, you decried sort of the lack of originality. In one sense that is easy to say because I certainly could not design anything that I have seen, and therefore I would consider someone who could to be designing something very original. Why do you not think at a design can in fact be original if we haven't seen it before?

Mr. WOLFE. I think because the materials involved have been around for centuries. We are talking about fabrics, scissors, needle and thread encasing the human body. Oscar de la Renta once said something to me that I think is worth repeating. He said, "All we can do is go in and out and up and down over and over and over." I don't think anyone in this room is wearing anything that we cannot trace through fashion history and find its derivation.

Mr. SMITH. But they would say they are not trying to copyright trends, and you are talking about trends.

Mr. WOLFE. Oh, no, I am talking about just the reality of the fact that it is impossible to create a new design. It is possible to create a new textile, a new print, but la new design is almost impossible because all we are doing in creating a new one is putting together existing elements in a different way.

Mr. SMITH. It sounds as if you are saying there is nothing new in the world. That reminds me of someone who said at the turn of the century that everything that had been invented had already been invented, or all the patents had already been filed. You don't think someone could come up with something that is not a result of prior effort?

Mr. WOLFE. Not in terms of garment design that human beings wear made out of fabric, needle and thread. When we move to spray-on clothes, great. [Laughter.]

And we may.

Mr. SMITH. Thank you, Mr. Wolfe. Okay, I appreciate it.

Ms. Scafidi, you mentioned I believe in your written testimony, but not necessarily in your oral testimony, that you thought this legislation might be too broad in some of its wording. Would you go into that in a little bit more detail as to how it might be narrowed to better achieve the task that it tries to accomplish?

Ms. SCAFIDI. Certainly, Mr. Chairman. I think that we are all in favor of trends. I think that it is marvelous that Mr. Wolfe is in the business of identifying and selling trends, and therefore de-emphasizing the originality of his clients so that they will keep buying his trends.

I think that it is important, therefore, in this legislation for the industry in general to continue protecting trends. I understand that Congressman Goodlatte has proposed language suggesting that we say that only closely and substantially similar garments will be infringing, those that in their overall appearance are closely and substantially similar to one another. I think that is a wonderful idea.

Mr. SMITH. Do you think that that is a narrow enough definition itself? I can see a lot of courts coming out with different results from that definition.

Ms. SCAFIDI. I think it echoes what we do in copyright generally. I think that a court asked to compare two paintings or two sculptures would engage in a similar process. I don't think we should go as far as Mr. Sprigman suggested would be an improvement, although not a recommendation of his, and say that only line-for-line copies should be protected, the reason being a clever copyist can move one button or raise a hemline and claim that it is an entirely new garment.

Mr. SMITH. You are not saying Mr. Sprigman sees the world in black and white instead of color, are you? [Laughter.]

Ms. SCAFIDI. I wouldn't presume to comment on Mr. Sprigman's eyesight. [Laughter.]

But no, I do think that that language, "closely" and "substantially similar," is perfectly consistent with the rest of copyright.

Mr. SMITH. Okay. Thank you, Ms. Scafidi.

Mr. Sprigman, you say in your testimony that copying does not cause substantial harm, and yet it seems to me that the damage done by knockoffs can be quantified. Perhaps it is $12 billion or perhaps it is some other figure, but why don't you believe that knockoffs actually do create harm, do cost the originators profits, and undercut the market?

Mr. SPRIGMAN. Sir, the question with knockoffs is always not is someone harmed. Someone is harmed. The question is whether the industry in the aggregate benefits. The paradox here, the reason we titled the article The Piracy Paradox, is that the same thing that causes individualized anecdotal harms causes systemic, economy-wide benefits.

It is the way the ecosystem works. In every competitive ecosystem, and of course in this country we prefer competition, right? We view competition as the mainspring of our economy. We introduce IP rights when we think there is a problem with innovation, and we need to incent innovation.

But there is no problem with innovation here. The ecology that we have, the creative system that we have in the fashion industry, incentivizes innovation. There are many more fashion designers entering this business than there are new record companies or new film studios. This is a much more competitive and open industry.

Mr. SMITH. Let me go back. Did you say the industry you felt was harmed, but the economy was helped?

Mr. SPRIGMAN. No, I don't think the industry is harmed. I think the industry is helped.

Mr. SMITH. But aren't individuals harmed if their profits lower as a result of the knockoffs?

Mr. SPRIGMAN. Individuals are harmed by point-by-point knockoffs. Individuals may be harmed or helped by reinterpretations depending on whether those reinterpretations reflect well on their original design. It is a mix. But the industry as a whole depends on this ability to create trends, and by creating trends, that is how they sell so much fashion.

So there is a huge benefit, huge benefit to the way we do things now and the way the industry does things now. Before you put that huge benefit at risk, I would want to know whether this $12 billion has anything to do with design copying or whether this is in fact trademark infringement for which we already have remedies.

Mr. SMITH. Okay. Thank you, Mr. Sprigman.

The gentleman from California, Mr. Berman, is recognized for his questions.

Mr. BERMAN. Well, it is obvious for anyone with good eyesight, fashion and style is not my strong suit. I am trying to, I looked at the picture of those two dresses up there and apparently no one says that would infringe, the knockoff, if that is what it is, it looked to me sort of like two different types of dresses.

Mr. SPRIGMAN. I say it.

Mr. BERMAN. Yes?

Mr. SPRIGMAN. I say it. It would potentially infringe if you pass this law. The substantial similarity standard in the law potentially would make the second an infringement of the first.

Mr. BERMAN. And why is it substantially similar?

Mr. SPRIGMAN. In my copyright classes, I spent a long time on this with my students. The substantial similarity standard is not limited to copying.

Mr. BERMAN. I need the Cliffnotes.

Mr. SPRIGMAN. Yes, the Cliffnotes is that any substantial use of an element of the original design could result in a finding of infringement. So think of it in the music context. Do you know the song, "He's So Fine"? Right? Well, the George Harrison song, "My Sweet Lord" was determined to be substantially similar to "He's So Fine."

If you know these two songs, it doesn't immediately pop into your head that those are copies. George Harrison wasn't copying. He was hearing something in his head and he was recontextualizing it, and it came out a completely different song, but that is substantially similar because of those five notes that are appropriated.

If you look at visual cases and film cases, substantial similarity standard proscribes, prohibits, makes unlawful small——

Mr. BERMAN. Was there an infringement in that music case?

Mr. SPRIGMAN. Yes. And that was considered to be an easy case. So the substantial similarity standard, as it has developed in the courts, has nothing to do with exact copies. It has to do with taking inspiration, which is what the fashion industry does. This bill addresses and makes unlawful what they do.

So where this is going to end up, I mean, I can't tell you that this is going to wreck the fashion industry, but it puts their creative process under threat. You know, to see in color, you have to see the complexity of the creative process. And the complexity of the creative process has resulted in a big thriving industry.

Mr. BERMAN. Well, I would like to hear the other witnesses, Mr. Banks and Professor Scafidi perhaps, address this question.

In books and music, maybe not so much as I would think, but in books and music you could talk about words and notes and the extent to which they are the same. But with fashion design, what aspects, assuming this is law, what aspects must be compared? Is it simply if the appearance is similar? Do you look at the type of fabric, the type of stitching?

It seems to me if it is as narrow as exactly the same, then you simply reward the person who puts the zipper or something in a slightly different place, and you really don't get anything from the bill, but when you start getting these more general standards, what is the analysis a court is going to take in looking at this?

Mr. BANKS. Well, Mr. Berman, I would think a perfect example of blatant out-and-out copying is something that I think almost everybody in this room would be very familiar with.

Mr. BERMAN. Even me?

Mr. BANKS. Even you.

Mr. BERMAN. Okay.

Mr. BANKS. In the springtime, there is something called the Academy Awards, which is also known as the greatest fashion show in the world because we spend an inordinate amount of time in front of our television sets, maybe for an hour before the Academy Awards starts, watching the actors and the people who are associated with the film business coming in on the red carpet and seeing what they are wearing, and having different interviewers, Joan Rivers, et cetera, asking, whose dress are you wearing?; who made that for you?; where did you get that dress?

Within days, usually 2 days after the Oscars, you can turn on Good Morning America or the Today Show and you can see interviewers with manufacturers in this country with line-for-line copies, and they credit the designer who designed those dresses. This is the Zac Posen dress, or this is the Bill Blass dress. But they have line-for-line copies at a fraction of the cost of the original, which they will be shipping to department stores in this country by the end of that week.

Now, the designer who designed that dress, whether he is a European designer or she is a European designer or an American designer, is not benefiting from that. The only person who is benefiting from that is that copyist.

Mr. BERMAN. Let me just challenge that for a second, because I bet those designers at least have their assistants watching those shows hoping that their name will be mentioned by whoever is on that morning show 2 days later talking about it. I mean, there is something about being mentioned that is worth something.

Mr. BANKS. There is something about being mentioned, but that doesn't sell that dress.

Mr. BERMAN. That business we are in.

Mr. BANKS. That doesn't sell your dress. That sells your personality as a designer, but that doesn't sell your dress.

Mr. BERMAN. But it may make your next design more valuable.

Mr. BANKS. It might. It might. Case in point, a few years ago a totally unknown designer named Olivier Theyskens designed a coat for Madonna to wear to the Oscars. Now, people came up to her and said, whose dress is that? And she said Olivier Theyskens. They had never heard of that designer. He was a young kid, 22, 21 years old.

Yes, that made him, that made him as a designer, and he was able to get from that, you know, a very interesting contract with a big French house. But having that garment knocked off when he couldn't even get it made in time to sell to stores does not help his cause.

Mr. BERMAN. Am I out of time?

Mr. SMITH. The gentleman is recognized for an additional minute, both to finish his question and to yield me time when he finishes.

Mr. BERMAN. Okay. The displacement issue, the very close copy that appropriately would be covered by this kind of a bill, maybe not what we saw on the screen, but something else.

First, will the people who could afford the outfit, the coat that Madonna wore, will they be buying those? Like, maybe the reason they could afford Madonna's coat is because when they have a

chance to buy something like that coat for 10 percent of the price, they buy it, and that is how they get rich.

In other words, what are the economics of the displacement? Are all those knockoffs creating a whole new world of buyers and giving some prestige to the designer without any loss to the designer?

Mr. BANKS. I wouldn't say there was no loss to the designer. I definitely don't feel that if the designer is just getting the credit for having designed the dress, when the designer can't even get the dress made, shown to his buyers in time, and through the manufacturing process of creating something that is original——

Mr. BERMAN. Is that what is going on? Is that what is going on?

Mr. BANKS. Yes.

Mr. BERMAN. The knockoff is coming out so quickly that the designer never gets the much more expensive dress for the much more expensive stores even made because those stores know that that knockoff is going to be——

Mr. BANKS. And they would be reluctant then to buy the dress if it has already been knocked off.

Mr. SMITH. Would the gentleman yield?

Mr. BERMAN. Sure.

Mr. SMITH. I want to return, Ms. Scafidi, to a subject that we talked about a while ago, and run a phrase by you. We talked about some phrases that have been suggested as a standard.

If we used, instead, "virtually identical" as a way to describe the item or copyrighted item or a knockoff, would that be a better test because that has a history in copyright law already that has been somewhat established? Obviously, it is a little bit more narrow definition, but wouldn't that help solve some of the problems that we confront?

Ms. SCAFIDI. Chairman Smith, I would be very uncomfortable with the idea of using the phrase "virtually identical." Mr. Berman suggested that a clever copyist could just move a zipper a little bit and thus be outside any kind of reach of this law. I worry that that is exactly where "virtually identical" would take us.

I would also remind you all, with respect to the "substantially similar" standard, which I have been teaching for about a decade now, which is a really long time now that I think about it, that it is not as flexible and as extreme as Mr. Sprigman would suggest. In fact, the music industry has not been destroyed by cases like that one, and in Europe the fashion industry has not been destroyed by the application of similar standards.

Mr. SMITH. Okay. Thank you, Ms. Scafidi.

We made an exception a few minutes ago and allowed Mr. Goodlatte, for the reasons explained, to ask question out of order. We are going to make another exception, and I am going to recognize the gentleman from Massachusetts, Mr. Delahunt, for some questions, even though he is not a member of the I.P. Subcommittee, but because he is an original cosponsor of the legislation. This is a one-time-only exception to the general rule and not setting a precedent.

He will be recognized for his questions.

Mr. DELAHUNT. I thank the Chairman.

I have a number of questions, and some I will submit in writing, again with the forbearance of the Chair.

I would like to pose some questions to Professor Scafidi. Mr. Sprigman is concerned about the lawyers and a subculture, if you will, that will see opportunity here. Although I think it was yourself or Mr. Banks that said that the lack of litigation in the E.U. underscored the fact that the E.U. rule served as a deterrence. Can you describe for us the regimen in the E.U. and its application?

Ms. SCAFIDI. Absolutely. Mr. Sprigman has said that designers in the E.U. don't take advantage of the protections available to them. That is actually inaccurate. First of all, designers in the E.U. automatically have 3 years of unregistered design protection. Moreover, a large number of them continue to register to get longer terms of protection anyway, terms of up to 25 years under the E.U. registered design right.

In fact, 4,013 designs for clothing were registered in 2004; 5,426 in 2005, numbers substantially larger than those suggested by Mr. Sprigman, and about half that much again for fashion accessories. So we do have a large number of registrations taking place.

Concurrently, we have a very small amount of litigation. Why is that? I think it is because these registrations and the unregistered design protection, together serve as a deterrent to would-be copyists. In fact, it forces those copyists to innovate so that we actually get more innovation in the fashion industry as a whole. So I think those two elements work together very nicely.

Mr. DELAHUNT. Thank you, Professor.

Let me direct this question to Mr. Banks. I notice that although the Copyright Office said that the bill before us provides a sound basis for legislation to protect fashion designs, and that while there may be merit, the fashion design should be given protection. The office has, at least at this stage, not been provided with sufficient information to come to a conclusion on the need.

I am aware of the fact that you and your colleagues have had a series of discussions with the Copyright Office. Was the case presented there for protection?

Mr. BANKS. The reason that we wrote to the Copyright Office was to find out if it would be feasible to, and a sort of ready way to make copyrights, or rather registration of designs through that office. Following the European system, which is to take a digital picture of the design, front and back; have that digital picture e-mailed to the Copyright Office; and then it would be registered. It is just that simple. A fee would be paid. It is not obstreperous. It is not a difficult thing to do. It is not particularly time consuming. That was what we approached the Copyright Office about.

Mr. DELAHUNT. Let me just ask one final question here. Do you have a concern, and I think the catalyst of the concern is the reality of electronic commerce, the advent of the Internet has changed, if you will, the need for design protection. I think as Mr. Sprigman talked about 217 years of a tradition, well obviously the Internet is a rather recent innovation.

I have a concern, and tell me if it is a legitimate concern, that since the E.U. has this regimen, this regime of protection, I don't want you running over to Europe and incorporating over there and further exacerbating our trade balance.

Has anyone in the industry, you know, what is the buzz in the industry in terms of if we see an enhancement of, we see an in-

crease in terms of the billions of dollars of piracy, is there a potential for an exodus of American fashion designers to go to Europe and receive the protection under the E.U.?

Mr. BANKS. Well, I would say a perfect example of an American designer flourishing in Europe is Marc Jacobs, who designs for Louis Vuitton, which has a multimillion-dollar business.

Louis Vuitton registers up to 80 designs per season of just accessories alone designed by Marc Jacobs for Louis Vuitton. That is just bags, shoes and other accessories. That doesn't even include the ready-to-wear.

They do a registration of 80 styles per season, and he is a designer who, with the backing of Louis Vuitton, helps pay for his business here in America, his Marc Jacobs business located here in America.

Mr. DELAHUNT. Thank you, Mr. Banks.

Mr. SPRIGMAN. Mr. Delahunt, I would like to be given a chance to respond.

Mr. DELAHUNT. We don't—the rules here are that we ask the questions.

Mr. SPRIGMAN. Mr. Chairman, I would like to respond.

Mr. SMITH. The gentleman is recognized for an additional minute so that Mr. Sprigman can respond.

Mr. SPRIGMAN. Well, I have done some research on the rate of registration in Europe. I have actually looked at the databases. Between January 1, 2004 and November 1, 2005, we have 1,631 registrations. Of those, many, the majority are nothing more than plain T-shirts, jerseys, sweatshirts with either fixed trademarks or pictorial works. These are registrations that are made to protect a trademark, which is already protected. These are not major registrations for the most part made to protect designs.

We see no evidence of any substantial number of registrations by any major design firms. Most of the registrations that we see are from fast-fashion firms like StreetOne, which has about one-third of all the existing registrations during this period. So we don't see this database being used, and reality backs us up.

We don't see the lawsuits. And the copyists in Europe thrive just as well as they do here. Topshop, Zara, H&M, these are fast-fashion firms that are often said to take inspiration, and designers do the same thing, so no working difference in the way the industry operates.

Mr. SMITH. The gentleman's time has expired.

We will go to the gentleman from California, Ms. Issa, for his questions.

Mr. ISSA. Thank you, Mr. Chairman.

Ms. Scafidi, who made your outfit you are wearing today?

Ms. SCAFIDI. Narciso Rodriguez, an American designer who has in fact been copied and has suffered losses from that copying, probably not of this suit, but of a much more unique gown and several other of his items.

Mr. ISSA. And, you know, always on these Committees, at a hearing you kind of look at who is for and against the bill and so on, but in this case, I am sort of looking at academia and the legal profession versus the folks that have to try to make this thing work for designers, but I am concentrating on you first.

From a constitutional law standpoint, and I keep it as simple as can be and so did the founding fathers, it said to promote the progress of science, well, scratch that out, and useful arts, we will assume that applies, by securing for limited times to, and we will scratch out "authors," and say "inventors."

Now, a dress designer is an inventor by anyone's standard, and I think dresses are clearly, let's be honest, it's art. Otherwise, we would all be wearing something that looks like the Russians wore during the Soviet period or worse. Clearly, there is a constitutional obligation for us to secure for a limited period of time for these creations. I guess the question is, how are we meeting that standard if not for this type of legislation?

This legislation does not, although, you know, we are certainly talking about promoting commerce, this is not promoting commerce in the statute. This is a protection that promotes people inventing. It has nothing to do with whether or not we are promoting their financial well being. We are simply incentivizing them to have the pride of inventorship for a limited period of time, which sometimes people miss, and they assume they have to be commercially make it viable.

Well, in patents you don't have to be able to market the product and make a bloody penny. You have a right for 20 years from invention to keep it to yourself. Would you agree with that?

Ms. SCAFIDI. I would agree that there is a constitutional obligation, and moreover that it is to the benefit of the American economy to incentivize and to protect these young designers. Mr. Sprigman has said that there is no harm to the industry even if there is harm to individuals. Individuals are the industry and it is a loss of human capital and a personal tragedy when designers are driven out of business because they are copied.

Mr. ISSA. Now, with all due respect to the laymen here, your outfit looks very classic to me.

Ms. SCAFIDI. Thank you. [Laughter.]

Mr. ISSA. It looks less classic. However, it certainly seems to have inspiration that dates back well to black and white movies and to early color. Would you agree?

Ms. SCAFIDI. I would agree that particularly in the area of more formal wear, men's and women's, you have a greater degree of standardization than you do in the more fanciful clothing that a woman might wear in the evening, for example.

Mr. ISSA. So men are at a considerable disadvantage, unfortunately, on the whole of really appreciating this. I dress to be proven no exception. But if I understand basically the bill, not the nuances we may change in a markup, but basically the bill, we want to give 3 years of broad protection to those who create, while leaving 100 years or more of fashion to inspire the copycats.

Anyone on this panel want to disagree with the basic intent of the bill?

Mr. SPRIGMAN. Oh, yes.

Mr. ISSA. Well, we will let you wait for a second. Anyone else want to disagree with that?

Mr. WOLFE. I have such a problem with the bill because——

Mr. ISSA. No, no, no. The intent—I am thrilled to death to talk about modifications, but then is there anything wrong with in fact

a very limited period of time, much more limited than other pieces of art. Let's be honest, Mickey Mouse and Donald Duck get 100 years more or less of protection for a drawing. Right?

Mr. WOLFE. Right.

Mr. ISSA. Okay. And I am an inventor with 37 or so patents that are still worth something, and I get either 17 years from granting or 20 years from application, depending upon when I did them. We are talking a fraction of that.

Is there anyone that says that the basic intent of this bill is inappropriate? I think you don't like the bill, but you don't say the intent is inappropriate. You have said sort that it is already being met, right?

Mr. WOLFE. I think it is impossible because the bill is predicated on the fact that fashion design is original and it is not. So that is where it is stuck. It is not an invention.

Mr. ISSA. We will take it as, you know, the Mona Lisa is already settled. The question of women's smiles, and that everything else is not original for a moment, and we will accept that that is your position.

My time is expiring, but you were so animated, Mr. Sprigman. In short, because it is limited, what is it that is inherently wrong, not unachievable in your and Mr. Wolfe's opinion, but what is inherently wrong with this fraction of the time that we give to pieces of electronics like mine or works of art like a drawing of Mickey Mouse or Donald Duck?

Mr. SPRIGMAN. Because fashion is not music and it is not film. It has its own particular innovation dynamic which should be respected because it works. And this bill takes that innovation dynamic and applies rules to it which aren't going to do any good and may do it some harm. So if your intent is to help, leave it alone.

Mr. ISSA. So you, just to summarize, you are saying that protection is fine, but the rules are wrong in this bill.

Mr. SPRIGMAN. No. I am saying that you protect the industry by letting it alone. If you want to regulate it, you are likely to do it harm. This is not film. This is not books. This is not music.

Mr. ISSA. Mr. Chairman, I would just close by saying that in fact we protect individuals, not some industry and we are here today to talk about individuals protected under the Constitution.

Thank you, Mr. Chairman.

Mr. SMITH. Thank you, Mr. Issa.

I am going to recognize additional Members who are here for their questions, but I also want to remind the other Members who are present that we had intended to mark up a bill at 10:30, and I would like to conclude our hearing as quickly as we possibly can.

The gentlewoman from California, Ms. Waters, does she wish to be recognized for questions? She is.

Ms. WATERS. Thank you very much, Mr. Chairman and Members. I would like to thank our panelists for being here today.

The first question that I have is I want to know from Mr. Jeffrey Banks whether or not there is a consensus in the industry wanting protection and basically in support of this legislation?

Mr. BANKS. I would say yes, there is, certainly among designers I am associated with and designers that I have spoken with. I am on the board of the Council of Fashion Designers of America which

represents almost 300 designers, men's wear, women's wear, accessory designers, fabric designers, not only in New York, but across the country.

And when we told them that we were going to be working on this bill, I got a plethora of e-mails supporting not only the idea of the bill, but also supporting, and telling me that they have in fact been copied on many occasions. I would say from my point of view and from the point of view of my colleagues that I have spoken to, there is a groundswell of support for this bill.

Ms. WATERS. Thank you.

Mr. Sprigman, you are an associate professor at the University of Virginia?

Mr. SPRIGMAN. Correct.

Ms. WATERS. Why do you believe that your knowledge and background should supersede the wishes of the industry? Why do you think you know more than they do? And what is unique about you and your knowledge that could convince us that someone who is not in the creative industry understands it better than the designers?

Mr. SPRIGMAN. Sure. The designers design clothes. I study innovation. So I don't claim to be a better designer or clothes. I also don't claim to be a fashion design expert in the sense that I am not here to tell you, you know, what designs are inspired by others in particular ways.

But what I do know, and what I have researched for a long time, and my training gives me expertise in, is how firms innovate. If you look at the way firms innovate, if you go shopping, which everybody does, you will see lots and lots of clothes that are working this season and every season off the same design themes, powerfully common-sensical.

Why are these clothes working off the same design themes? Because in the last few months, as runway shows have happened and as the fashion press has talked, designers and the industry have identified some themes that they think are going to be this year's trends and they copy them.

Ms. WATERS. If I may interrupt you for a moment, I am trying to follow your argument, but let's take a look at Diane von Furstenberg's dresses.

Mr. SPRIGMAN. Sure.

Ms. WATERS. Of course, that design has been around for many, many years, and a lot of people have copied the design. Many of those who copied the design do it badly. They do it poorly. The dresses don't fit. As a matter of fact, they use very cheap material in some of the dresses; the patterns that they choose are an insult to the work that she has done. And people think they are getting the same thing, and then they get disgusted when they take this product home.

I think there is probably something called pride in your work, and you don't want it to be undermined by those who would do it poorly, do it badly and have people think it is all one and the same. What do you know about that?

Mr. SPRIGMAN. I would ask what Congress knows about that. My suggestion would be that that argument for putting Congress in

charge of quality control in the fashion industry is not particularly one I am attracted to.

Copyright law in the United States is there to incent individuals to engage in innovation. In the fashion industry, we have high levels of innovation because we have the ability to take inspiration, designers have the ability to feed from one another's work. That is the source of inspiration. If you want to dam up that source, go ahead.

Ms. WATERS. Well, you asked what does Congress know about that. Well, when we talk about women's fashion and design, fortunately there are a lot of women in Congress now. We know a lot about it. We shop. We buy these labels. We understand I think more than a professor from the University of Virginia who comes and gives us an intellectual argument about creative product.

And so I don't think designers in this industry are trying to legislate in the field of law. None of them would try and determine a lot about your business. And while I have great respect for the fact that you have worked here in Government, to be so adamantly opposed to what the designers want, while there is a consensus, and then to make the case that your profession will exploit it by bringing in too much litigation is just not something that I can, you know, receive here very lightly.

And let me just say, this is just for 3 years. The protection is just for 3 years, not 10 years, not 25 years, not 50 years. I don't think the argument that you make about litigation and how it is going to explode and your profession is to exploit this opportunity really holds water here.

I yield back the balance of my time.

Mr. SMITH. The gentlewoman yields back the balance of her time. Thank you, Ms. Waters.

The gentleman from Florida, Mr. Keller, is recognized for his questions.

Mr. KELLER. Thank you, Mr. Chairman.

My wife just made me go see "The Devil Wears Prada." [Laughter.]

I observed that Meryl Streep was even meaner and tougher than Sensenbrenner. [Laughter.]

That fully exhausts my knowledge of the fashion industry, and I will yield back the balance of my time.

Mr. SMITH. Thank you. [Laughter.]

Thank you, Mr. Keller. Your incisive and brief comments are appreciated.

The gentleman from California, Mr. Schiff, do you have questions? If so, the gentleman is recognized.

Mr. SCHIFF. I do, Mr. Chairman, although I have to confess I don't know much more about fashion than Mr. Keller. I wore a seersucker suit for the first time yesterday, and people asked me for a scoop of ice cream. [Laughter.]

I wanted to ask whether there are any unique challenges posed by intellectual property protection for fashion in the sense that will it present questions of first impression for the examiners in this area or the potential litigants in this area about whether design is sufficiently unique and innovative to qualify for protection, or to have been copied?

I assume if a designer comes out with bell-bottoms, that is not intellectual property protected, but at what point do those bell-bottoms become stylistically individualistically distinct enough to warrant protection? Is this different in-kind than other issues that we have wrestled with in this area? Or is it something we have a lot of experience in by analogy?

And the second question I had is, if you could comment a little bit, I know there is a difference of opinion on how successful protection has been in Europe, and I would be interested to hear more of your thoughts on that subject. Whoever would care to comment.

Ms. SCAFIDI. Yes, I think that there is very little difference in the way that a court or any other trier of fact would approach the question of whether two fashions are different, or whether something is part of a trend. There is a huge public domain of fashion. Everything that has ever been made is currently now in the public domain.

And if we make the analogy to an area like novels and publishing, when you have a John Grisham come along and write a legal thriller and it becomes a bestseller, all of a sudden the publishing industry is very excited about legal thrillers and we get a spate of legal thrillers published. None of those authors can plagiarize John Grisham and any court that had to compare an alleged plagiarism would be able to compare the two the way they would compare two paintings or anything else.

So it is not that difficult or that different an approach in this area. And so I don't think it would raise those kinds of issues in a difficult way.

Mr. SCHIFF. With a novel, you can compare how many characters are the same, how many passages are word for word. With a design, are the facets of that design so unique that they can be identified that way? I suppose if you have a yellow lapel and you have another yellow lapel, is that equivalent to having a sub-plot that is the same?

Ms. SCAFIDI. Fashion is a visual medium like sculpture or painting. And it has its own system of recordation of elements. We have words to describe lapels. We have a color system to describe shades of colors. An expert in the field would have no difficulty making those very specific comparisons using the notion of the industry in which we are not all literate, but we all have a sense of how it works.

When a fashion magazine like Marie Claire publishes an original and a knockoff next to one another, the public recognizes that that is a knockoff, whether or not it is a literal line-for-line copy or whether it is something that is substantially similar.

Mr. SCHIFF. Would anyone else like to express a contribution?

Mr. BANKS. I would also like to say, designers don't create trends. Trends are remarked on by people such as my colleague next to me. That is what he does. He goes out. He looks at the market. He looks at what designers have done, what manufacturers have done.

If he sees that there is a recurring theme such as the color black or short lengths, he makes the decision that that is a trend. He along with his other colleagues like fashion editors and buyers for stores, they see the prevalence of short lengths or of the color black

or of sequins and they say that the trend for this fall is black sequined short dresses.

Designers do their own thing creatively and sometimes there is a similarity because we all go to the same fabric resources or we all are inspired by the same films, or we all travel to the same art exhibitions.

Mr. SCHIFF. Which way does that cut, though? I mean, that seems to say there is going to be a merger of fashion in a certain direction which would make it more difficult, potentially, to distinguish one from another.

Mr. WOLFE. I think it makes it impossible. I think that is the problem. I think the major problem is that there is nothing new about black, there is nothing new about sequins, there is nothing new about short. So how can the first designer of the season who makes the black short sequined dress, is that the one that gets protected and no one else can make another? Everything is in public domain in fashion. Everything.

Mr. SPRIGMAN. There is an example in our paper.

Mr. SMITH. The gentleman's time has expired. You will, without objection, be recognized for an additional minute.

Mr. SPRIGMAN. There is an example in our paper in spring 2005 of something called the "driving shoe," which is a shoe that has—it is like a moccasin, and it has a sole that runs up the back. So it is a rubber sole that runs up the back.

And suddenly in spring 2005, if you walked into Nordstrom, you saw a table in the Nordstrom that I walked into right here in D.C., you saw a table, and around the table were about 40-some-odd versions of this driving shoe. And they are all different, right?

Mr. SCHIFF. If I could ask Ms. Scafidi, would that driving shoe be copyright-protected, that little run of strip up the back?

Ms. SCAFIDI. I think what we have here is a clear example of the idea-expression dichotomy, which all of copyright has to deal with. Ideas are never protected; very specific expressions are. I am not an expert in driving shoes, but I think that would be the nature of the inquiry.

Mr. SPRIGMAN. I think it is clearly protectable subject matter under this bill. It is a design. A design is for the sole. And if you get all these driving shoes that are different, but they are using that design and adding new creativity to it, the point of that is the industry is establishing a trend in driving shoes.

It is driving the consumption by men of footwear. Now, many are generally insensitive to footwear and this is how the industry gets them to pay attention, by innovating something. That process is going to be interfered with under the substantial similarity standard in this bill. That is what I worry about.

Mr. SCHIFF. Okay. Thank you, Mr. Chairman.

Mr. SMITH. The gentleman's time has expired. Thank you for yielding back.

That concludes our hearing. I want to thank our witnesses for a very, very interesting hearing and for lots of good information for us to consider.

We stand adjourned on the hearing, and I would ask Members to stay right where they are, if they would. We are going to stand

adjourned for about 3 minutes, and then reconvene in order to mark up a piece of legislation.

Thank you all again.

[Whereupon, at 10:45 a.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF THE HONORABLE HOWARD L. BERMAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA, AND RANKING MEMBER, SUBCOMMITTEE ON COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY

Mr. Chairman,

Thank you for scheduling this hearing on H.R. 5055 which would extend copyright protection to fashion designs. I am open minded about this issue and see the Copyright Office, in their written testimony, has raised the core question for discussion today: is there a need for this legislation and what evidence is available for quantifying the nature and extent of the harm suffered by fashion designers due to the lack of legal protection for their designs.

The global fashion industry is said to have revenues of $784 Billion. According to the NPD Group, total U.S. apparel sales reached $181 Billion in 2005. California alone produces over $13 billion in apparel products and employs 204,000 direct employees and 59,000 indirect workers. Reportedly, apparel and footwear losses due to counterfeiting have been estimated to be $12 Billion annually.

The fashion designers are seeking this protection in order to prevent the rampant piracy of their fashion designs, as well as to maintain the incentive for designers to continue to develop new original fashion designs. This protection would last only three years allowing original designers sufficient time to recoup the expenses incurred in designing and developing their fashion works.

Current copyright law only provides protection to those design elements of a useful article that are separable and independent of the utilitarian function of the article. Therefore, fashion works have traditionally been denied copyright protection on the ground that they are considered to be "useful articles."

Fashion designers do have access to some other Intellectual Property rights both in trademark and patent law. However, trademark law protects the elements of a design that indicate the source of the product but does not provide general protection for designs. In patent law, there is the potential for design patents, but this route of protection often is not practical for designers because of the length of time it takes before the patent issues combined with the typical life span of a fashion design which is only a single season, maybe 3 to 6 months. Further, design patents require a level of novelty and originality that has generally been held to be higher that which is achieved by fashion works.

The fashion industry is unique, in that it epitomizes the ultimate paradox of Intellectual Property protection. The arguments I have heard illustrate both sides of the debate. Is a high level of protection necessary to promote innovation, or does the lack of a high level of protection for fashion designs actually spur increased creativity in the fashion industry? Furthermore, in part as a result of the great speed with which fashion trends come and go, new fashions are available in the high end designer stores and in the low end retail outlets, making these fashions available to virtually all individuals regardless of their income level. Will an increased level of protection for designers, be at the detriment of the retailers and the public?

In the past, Congress has demonstrated flexibility in expanding the Copyright laws, for example providing design protection for buildings (through the Architectural Works Copyright Protection Act (AWCPA)), and providing protection specifically for semiconductor "mask works" and boat hulls.

Should we be extending copyright protection to fashion designs and are there other areas which we should also consider extending protection to such as, for example, the furniture and auto part industries.

I look forward to understanding the extent of the problem of fashion design knockoffs, and what the impact is on the high end market, for example is there fear of lost sales in the couture market as a result of production in retail stores? In addi-

tion I would like for the witnesses to describe what constitutes a design that is "substantially similar." Is it an exact copy? Is it a mere inspiration of a current trend? And how does one determine if it is something in between?

I yield back the balance of my time.

PREPARED STATEMENT OF THE HONORABLE MAXINE WATERS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Chairman Smith, Ranking Member Berman, thank you for holding this legislative hearing, and I appreciate the time and testimony of our witnesses. I commend the gentlemen from Virginia [Mr. Goodlatte] and from Massachusetts [Mr. Delahunt] for their leadership in introducting the legislation before this Subcommittee, H.R. 5055, which would amend Title 17 of the United States Code to provide protection for fashion design.

The Ranking Member would undoubtedly attest that our respective shares of Los Angeles, California are home to numerous stakeholders in the fashion design industry. As such, it is important that this Subcommittee consider legislation to address the issue of piracy as it relates to their primary means of income and thus, their livelihood.

My Congressional District is contiguous with the LA Fashion District—a 90-block section of downtown Los Angeles where the apparel industry comprises 80% of the Fashion District, and is responsible for over $7 billion in annual wholesale revenues that support the City treasury. Over 1.5 million people travel to Los Angeles from around the world to patronize the fashion apparel portion of the Fashion District. The LA Fashion District is truly a part of the new global economy. Legislation that would reduce design piracy is of extreme importance to the primary, secondary, and tertiary beneficiaries of the revenues generated from this industry. Allowing piracy to persist will cause this industry to diminish at a quick pace—given the ease with which designs can be copied, reproduced, and implemented using the internet and other digital communications technology. The LA Fashion District must be rewarded for the ingenuity of its designers, rather than made obsolete by the mercenary tactics of those who violate law designed to protect creativity and intellectual property.

From a legislative perspective, extending Title 17 protection to fashion designs marks a modernization of the United States Code. As the testimony presented by the United States Copyright Office states, design protection legislation for industrial products has passed the House since the 71st Congress—back in 1930. A student of history knows that fashion design has undergone breakthrough changes over the past seven decades and continues to develop. If we want innovation to continue at its current pace, we must allow designers to protect their work. The three-year registration term for fashion designs—as compared to the ten-year period established for vessel hulls, is small and represents a reasonable concession.

I support the legislation that we now consider and urge my Colleagues to support H.R. 5055, lest we lose another industry to global competitors. I yield back the balance of my time.

PREPARED STATEMENT OF THE UNITED STATES COPYRIGHT OFFICE, WASHINGTON, DC

Statement of the United States Copyright Office
to the Subcommittee on Courts, the Internet, and Intellectual Property,
Committee on the Judiciary

United States House of Representatives
109th Congress, 2nd Session

July 27, 2006

Protection for Fashion Design

The Copyright Office submits this written statement to the House Subcommittee on Courts, the Internet and Intellectual Property in connection with the Subcommittee's July 27, 2006 hearing on H.R. 5055, which would amend Title 17 of the United States Code to provide protection for fashion designs.

Summary

Congress has long considered offering *sui generis* protection for designs of useful articles, and came close to enacting such legislation as part of the Copyright Act of 1976. In 1998, as part of the Digital Millennium Copyright Act, Congress finally enacted such legislation, but limited its scope of the protection to the designs of vessel hulls.[1] The Vessel Hull Design Protection Act is codifed in Chapter 13 of Title 17. While the form of protection offered in chapter 13 is in many respects similar to the protection offered by copyright law, it is nevertheless a *sui generis* regime distinct from copyright law.

Over the past year, the Copyright Office has engaged in many discussions with proponents of extending the protection offered under Chapter 13 to fashion designs. Based on those discussions, the tentative view of the Office is that there may well be merit to the view that fashion designs should be given protection similar to that enjoyed by vessel hull designs, but the Office does not believe it has thus far been presented with sufficient information to reach a

[1] Digital Millennium Copyright Act of 1998, Pub. L. 105-304, Title V, 112 Stat. 2860 (1998).

conclusion on the need for such legislation. The Office looks forward to hearing the testimony of parties who would be affected by such legislation, which should shed greater light on the nature and scope of the problem that the legislation is intended to address.

However, without taking a position on the overall merits of such legislation, the Office has worked with the proponents of the legislation on the legislative language that would amend Chapter 13. The Office is pleased that the proponents of the legislation have been receptive to the Office's suggestions, almost all of which have been included in H.R. 5055. The Office believes that if Congress concludes that fashion design protection legislation should be enacted, H.R. 5055 provides a sound basis for balancing competing interests.

Background

1. Prior Congressional Consideration

The issue of federal legislation to protect industrial designs is not new in the United States. Congress has taken up the matter on repeated occasions since 1914. Design protection bills passed the House in the 71st Congress,[2] and the Senate in the 87th, 88th and 89th Congresses.[3]

In the 91st through 94th Congresses, design protection was coupled with the copyright general revision bill then pending in the Senate. The version of the copyright revision bill passed by the Senate in 1975 included a separate title on design protection.[4] The House

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[2] H.R. 11852, 71st Cong. (1930).

[3] S. 1884, 87th Cong. (1962); S. 776, 88th Cong. (1963); S. 1237, 89th Cong. (1965).

[4] S. 22, 94th Cong. (1975); S. Rep. No. 94-473, 94th Cong. (1975).

Subcommittee, however, concluded that design protection should be considered separately from copyright revision. The copyright revision bill was enacted without a design protection component in October 1976, and became effective on January 1, 1978.

Design protection bills were introduced in each Congress from the 96th through the 102d. Extensive hearings were held by the Subcommittee in 1990 and 1992.[5] There has been no further action in Congress on the general design protection issue since the 1992 hearing.

However, the 105th Congress considered and enacted more limited design protection legislation in 1998 as part of the Digital Millennium Copyright Act ("DMCA"). Title V of the DMCA, the Vessel Hull Design Protection Act ("VHDPA"), offered *sui generis* protection to the design of vessel hulls. That legislation, codified in Chapter 13 of Title 17, was based largely on the previous legislation, but narrowed the subject matter of protection from designs of useful articles in general to designs of vessel hulls.

The specific problem addressed in the VHDPA was "hull splashing." As this Committee explained:

> Boat manufacturers invest significant resources in the design and development of safe, structurally sound, and often high-performance boat hull designs. Including research and development costs, a boat manufacturer may invest as much as $500,000 to produce a design from which one line of vessels can be manufactured. When a boat hull is designed and the design engineering and tooling process is complete, the engineers then develop a boat "plug" from which they construct a boat "mold." The manufacturer constructs a particular line of boats from this mold.

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[5] A more detailed account of the history of design protection legislation can be found in the written statement of Ralph Oman, then-Register of Copyrights, submitted to this Subcommittee on September 27, 1990. *Industrial Design Protection: Hearings Before the Subcomm. on Courts, Intellectual Property, and the Administration of Justice of the House Comm. on the Judiciary,* 101st Cong., 2d Sess., on H.R. 902, H.R. 3017 and H.R. 3499, at 436 (1991).

> In contrast, those intent on stealing the original boat design, such as Thunder Craft, can simply use a finished boat hull in place of the manufacturer's plug to develop a mold. This practice is referred to in the trade as "splashing a mold." The copied mold can then be used to create a line of vessels with a hull seemingly identical to that appropriated from the design manufacturer.
>
> "Hull splashing" is a problem for consumers, as well as manufacturers and boat design firms. Consumers who purchase copied boats are defrauded in the sense that they are not benefitting from the many attributes of hull design, other than shape, that are structurally relevant, including those related to quality and safety. It is also highly unlikely that consumer know that a boat has been copied from an existing design. Most importantly for the purposes of promoting intellectual property rights, if manufacturers are not permitted to recoup at least some of their research and development costs, they may no longer invest in new, innovative boat designs that boaters eagerly await.[6]

Although boat designers had previously enjoyed protection against hull splashing under the laws of some states, in 1989 the Supreme Court had held such laws unconstitutional under the doctrine of federal preemption.[7] The Court reasoned that Congress' decision to leave the subject matter in the public domain under federal intellectual property law precluded states from enacting such a prohibition.[8]

In enacting the VHDPA, Congress did not consider whether to expand the newly enacted Chapter 13's *sui generis* design protection to designs of useful articles other than vessel hulls, but it did offer a summary of some of the arguments for and against a more general federal design protection law:

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[6] H.R. Rep. No. 105-436 at 13 (1998).

[7] *Bonito Boats, Inc.* v. *Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989).

[8] *Id.* at 159-60, 167-68.

> Critics from the academy as well as private industry have expressed their concerns that design protection possibly upsets a critical balance struck in intellectual property law, especially the law of patents: namely, that the promotion of innovation must, at some point, give way to imitation and refinement through imitation, both of which are ". . . necessary to invention itself and the very lifeblood of a competitive economy." *Bonito Boats, Inc. v. Thunder Craft Boats*, Inc., 489 U.S. 141, 146 (1989) [hereinafter Bonito Boats]. These critics fear that comprehensive design legislation, practically applied, might diminish rather than stimulate net commercial activity throughout the economy. Their reasoning is that threshold requirements for protection under most design schemes are less demanding than those under traditional intellectual property law. This would result in increased litigation and a general unwillingness to manufacture competing products.
>
> Advocates of design protection insist that these concerns are overstated. They argue that, in the absence of creative development, there can be no imitation. In addition, if the threshold requirements for design protection are more easily met than those applying to copyright, trademark, and patent law, the solution is to offer less protection (usually measured by duration).[9]

2. Design Protection Available under Existing Law

Past proposals for *sui generis* design protection legislation have sprung from a perceived lack of adequate protection at the federal level for the designs of useful articles. All three branches of federal intellectual property protection — copyright, patent and trademark — protect certain aspects of useful articles. In the aggregate, however, they provide only limited coverage[10] for the following reasons:

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[9] H.R. Rep. No. 105-436 at 12 (1998).

[10] *See* Ralph S. Brown, *Design Protection: An Overview*, 34 UCLA L. Rev. 1341, 1341-44 (1987).

First, copyright protection for the designs of useful articles is extremely limited. The design of a useful article[11] is protected under copyright "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."[12] According to the House report accompanying the copyright revision bill, the test for separability can be met by showing either physical or conceptual separability.[13] The purpose of the test is "to draw as clear a line as possible between copyrightable works of applied art and uncopyrighted works of industrial design."[14] In keeping with this congressional intent, courts have applied the separability test in a way that excludes most industrial designs from copyright protection.[15] The Copyright Office has been similarly restrictive in its registration practices.[16]

Second, design patents are difficult and expensive to obtain, and entail a lengthy examination process. An applicant for a design patent must meet the generally applicable

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[11] The Copyright Act defines "useful article" as "an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information. An article that is normally part of a useful article is considered a 'useful article'." 17 U.S.C. § 101 (definition of "useful article").

[12] 17 U.S.C. § 101 (definition of "pictorial, graphic, and sculptural works").

[13] H.R. Rep. No. 1476, 94th Cong. 55 (1976).

[14] *Id.*

[15] *See Brandir Int'l, Inc. v. Cascade Pacific Lumber Co.*, 834 F.2d 1142 (2d Cir. 1987); *Norris Indus. v. International Tel. and Tel. Corp.*, 696 F.2d 918 (11th Cir. 1983).

[16] In order to register a copyright claim in the design of a useful article, the Copyright Office requires pictorial, graphic or sculptural features that are either physically separable or "while physically inseparable by ordinary means from the utilitarian item, are nevertheless clearly recognizable as a pictorial, graphic or sculptural work which can be visualized on paper, for example, or as a free-standing sculpture, as another example, independent of the shape of the useful article . . . ." Compendium II of Copyright Office Practices § 505.03 (1984).

standards of invention[17] — *e.g.*, novelty and non-obviousness.[18] Many original designs that provide a distinguishable and appealing variation over prior designs for similar articles will fail to meet these standards. Even under the reduced fee schedule for small entities, the filing fee for a design patent is $100, the issue fee is $400, and the maintenance fees over the life of the patent are $3,500. This does not include attorneys' fees for prosecuting the application. It is our understanding that the process of applying for a design patent can take several years, which exceeds the life expectancy of the market for many designs.

Third, trademark law does not provide general protection for designs as such. Rather, it protects certain product configurations that serve to identify the source of the product.[19] Aspects of product design that do not serve to identify source are not protected.[20] Even to the extent that a product configuration qualifies for protection under trademark law, the protection is only against uses of the design that confuse or mislead consumers, or create a substantial likelihood of such confusion.[21]

Fourth, supplementary protection is not available at the state level. Boat hull design serves to illustrate the point: As noted above, in order to curb a practice known as "plug molding," whereby an impression of a boat hull is taken and used to reproduce the hull design,

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[17] 35 U.S.C. § 171.

[18] *Id.* §§ 102, 103.

[19] J. Thomas McCarthy, *Trademarks and Unfair Competition,* 229-35 (1973).

[20] *Id.* at 232.

[21] *Id.* at 233-35.

some states enacted anti- plug molding statutes. In *Bonito Boats,* the Supreme Court held that Florida's anti-plug molding statute was invalid under the doctrine of federal preemption. The Court reasoned that Congress' decision to leave the subject matter in the public domain under federal intellectual property law precluded states from enacting such a prohibition.[22]

3. Protection under the Vessel Hull Design Protection Act

Although Chapter 13 of Title 17 currently offers protection only for designs of vessel hulls, H.R. 5055 would extend that protection to fashion designs as well. Therefore, it is necessary to understand the design protection regime of Chapter 13.[23]

Chapter 13 is written in the form of a general design protection statute offering protection to "an original design of a useful article which makes the article attractive or distinctive in appearance to the purchasing or using public." [24] However, the statute's definition of a "useful article" is restricted to vessel hulls:

> A "useful article" is a vessel hull, including a plug or mold, which in normal use has an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information. An article which normally is part of a useful article shall be deemed to be a useful article.[25]

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[22] 489 U.S. at 159-60, 167-68.

[23] The following description of the existing vessel hull design protection law is taken largely from the November 2003 joint study by the Copyright Office and the Patent and Trademark Office, *The Vessel Hull Design Protection Act: Overview and Analysis*, available at http://www.copyright.gov/reports/vhdpa-report.pdf.

[24] 17 U.S.C. § 1301(a)(1).

[25] *Id.* § 1301(b)(2).

Thus, the statute was written is such a way that it could later be amended to cover designs of useful articles in general, simply by revising the statutory definition of "useful article" to reflect the plain meaning of that term. Alternatively, it could be amended to cover additional specific types of useful articles by revising the statutory definition to add those specific useful articles.

Design protection for vessel hulls is for a period of ten years and is available only for original designs that are embodied in an actual vessel hull: no protection is available for designs that exist only in models, drawings, or representations. Staple or commonplace designs, "such as a standard geometric figure, a familiar symbol, an emblem, or a motif, or another shape, pattern, or configuration that has become standard, common, prevalent or ordinary" are not protected. [26] The statute also sets forth several circumstances under which an otherwise original design does not receive protection. A design that is embodied in a vessel hull "that was made public by the designer or owner in the United States or a foreign country more than two years before the date of application for registration" of the design is not eligible.[27] Section 1332 states that there is no retroactive protection: no protection is "available for any design that has been made public under § 1310(b)[28] before" October 28, 1998, the effective date of the VHDPA.[29] And designs may not be protected under chapter 13 of title 17 if they have design patent protection under title 35 of the

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[26] *Id.* § 1302.

[27] *Id.* § 1302(5).

[28] *Id.* § 1310(b) defines when a design is made public.

[29] *Id.* § 1332.

United States Code.[30] As a result, vessel hulls protected under chapter 13 lose that protection if they acquire U.S. design patent protection.

Unlike copyright law, where protection arises at the moment of creation, an original design is not protected under chapter 13 until it is made public or the registration of the design with the Copyright Office is published, whichever date is earlier. Once a design is made public, an application for registration must be made no later than two years from the date on which the design was made public. Making a design public is defined as publicly exhibiting it, distributing it or offering it for sale (or selling it) to the public with the design owner's consent.[31] Only the owner of a design may make an application for registration.[32]

Once an application for registration is received by the Copyright Office, it is evaluated for completeness and sufficiency under the provisions set forth in chapter 13. If the Office refuses to register a design, the applicant may seek reconsideration by filing a written request within three months of the refusal.[33] Should such refusal be upheld, the applicant may seek judicial review of the final refusal.[34] For those applications deemed sufficient, a registration certificate is issued which includes a reproduction of the drawings or other pictorial representations of the design.[35] Notification that a registration has been made must be published by the Copyright Office, and the

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[30] *See id.* § 1329.

[31] *Id.* § 1310(b).

[32] *Id.* § 1310(c).

[33] *Id.* § 1313(b).

[34] *Id.* § 1321(b).

[35] *Id.* § 1314.

effective date of the registration is the date on which publication of it is made.[36] The Copyright Office publishes registrations by posting them on the Copyright Office web site.

Any person who believes that he or she will be damaged by a registration made by the Office under chapter 13 "may upon payment of the prescribed fee, apply to the Administrator[37] at any time to cancel the registration on the ground that the design is not subject to protection under this chapter, stating the reasons for the request." [38]

Protected designs that are made public must bear a proper design notice.[39] Unlike notice of copyright, which is permissive, notice on a vessel hull design is mandatory. The design notice must state that the design is protected and contain the year in which the protection first commenced along "with the name of the owner [of the design], an abbreviation by which the name can be recognized, or a generally accepted alternative designation of the owner."[40] A distinctive identification of the owner may be substituted for the actual name, provided that the distinctive identification has been previously recorded with the Copyright Office. Once a design has been registered, use of the registration number in place of the date of protection and name of

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[36] *Id.* §§ 1313(a) and 1315.

[37] *Id.* § 1331. The Administrator of the VHDPA is the Register of Copyrights.

[38] *Id.* § 1313(c).

[39] *Id.* § 1306.

[40] *Id.* § 1306(a)(1).

the owner on the design notice is sufficient.[41] A design notice must be affixed to a location on the vessel so as to give "reasonable notice" that the vessel contains a protected design.[42]

The owner of a design is entitled to institute an action for infringement of his or her design provided that he or she has first obtained a registration certificate from the Copyright Office.[43] An infringement suit may be brought in Federal[44] court or all of any part of a dispute may be settled by arbitration if the parties to an infringement dispute agree.[45] Remedies available for design infringement include damages, the infringer's profits, attorney's fees, injunctive relief and seizure and forfeiture of the infringing goods.[46] Chapter 13 also sets forth penalties for anyone who brings an infringement action knowing that the registration of the design was obtained through false or fraudulent representation, who knowingly makes a false representation in order to obtain a registration, or who knowingly applies a design notice to an unprotected vessel hull design.[47]

The Proposed Legislation

H.R. 5055 would make very few changes to Chapter 13. While the Copyright Office takes no position at present with respect to the merits of extending design protection to fashion designs,

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[41] *Id.* § 1306(a)(2).

[42] *Id.* § 1306(b).

[43] *Id.* § 1321(a).

[44] *See* 28 U.S.C. § 1338.

[45] *17 U.S.C. §* 1321(d).

[46] *Id.* §§ 1321-1324.

[47] *Id.* §§ 1325-1327.

we believe that if it determined that such protection is warranted, H.R. 5055 in almost all respects strikes the proper balance.

1. Protection for Fashion Designs

The major amendment, of course, would be the extension of design protection to fashion designs, by amending § 1301(a) to provide that "A fashion design is subject to protection under this chapter" and by amending § 1302(b) to include "an article of apparel" in the definition of "useful articles" subject to protection. The bill would make clear that for purposes of Chapter 13 a fashion design is the appearance as a whole of an article of apparel, including its ornamentation. The bill elaborates on what would constitute "apparel" for purposes of Chapter 13:[48]

> (A) an article of men's, women's, or children's clothing, including undergarments, outerwear, gloves, footwear, and headgear;
> (B) handbags, purses, and tote bags;
> (C) belts; and
> (D) eyeglass frames.

As noted above, the Copyright Office takes no position at this time as to whether Chapter 13 should be amended to include protection for fashion designs. Proponents of such legislation have provided the Office with anecdotal evidence that fashion designers are harmed by the sale of "knockoffs" of high-end fashion designs. To be persuaded of the need for such legislation, we would have to see more such evidence, as well as some evidence quantifying the nature and extent of the harm suffered by fashion designers due to the lack of legal protection for their designs. To the extent that the Office has been presented with anecdotal evidence, that evidence relates to clothing designs. While there may well be similar evidence relating to the items

[48] H.R. 5055, 109th Cong. § 1301(b)(9) (2006).

identified in subparagraphs B, C and D of proposed § 1301(b)(9), the Office currently is not aware of such evidence.

(A) Term of Protection

In general, the protection for fashion designs would be identical to the existing protection for vessel hull designs, but with some significant exceptions. First, the term of protection for fashion designs would be only 3 years rather than the 10 years of protection offered to vessel hull designs. Proponents of the legislation have explained that the purpose of the legislation is to protect designs of *haute couture* during the period of time in which such high-end clothing is sold at premium prices of thousands of dollars and to prevent others from marketing clothing with those designs at substantially lower prices during that initial period, thereby undercutting the market for a hot new fashion design. Because the peak demand for such designs is relatively short-lived, a 3-year term is considered adequate to satisfy the designer's reasonable expectation of exclusivity.

The Office applauds the proponents of fashion design legislation for seeking a modest term of protection that appears to be calibrated to address the period of time during which fashion designs are most at risk of being infringed and during which fashion designers are most likely be harmed by the sale of infringing goods. The Office would find it difficult to support fashion design legislation that offered such protection for the 10-year term enjoyed by vessel hull designs, but considers the 3-year term to be reasonable, assuming that the proponents of the legislation are able to make the case for protection.

(B) Time Frame for Registration

Because the term of protection for fashion designs would be significantly shorter than the term of protection for vessel hull designs, existing provisions[49] in Chapter 13 denying protection to a design that is embodied in a useful article that was made public more than 2 years before the application for registration of the design would be amended, with respect to fashion designs but not with respect to vessel hull designs, by changing the 2 year period to a period of 3 months. The purpose of this provision is to require prompt registration of protected designs, which gives notice to the world that design protection is claimed. While registration within 2 years may be considered relatively prompt with respect to vessel hull designs that are protected for a total of 10 years, a 2-year window to register a fashion design that is entitled to protection for only 3 years and that likely is already starting to go "out of fashion" after 2 years would make registration a relatively meaningless formality.

Because offering legal protection to fashion designs would be a new form of legal protection and because we have been informed and believe that protection should and would be claimed only for a small proportion of fashion designs – i.e., primarily designs of *haute couture* for apparel sold at prices of four figures and more – the Office believes that a strong registration requirement as well as the notice requirement currently found in Chapter 13 are essential to any fashion design protection legislation. Competitors should be given clear notice of and opportunity to learn of a designer's claim of protection, so that they may avoid encroaching on the rights of a designer who wishes to claim protection under the new law. A requirement of prompt registration serves that purpose.

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[49] *Id.* §§ 1302(5) and 1310(a).

H.R. 5055 would also amend § 1310(b), which provides that a design is made public (thereby triggering the period in which an application for registration must be made) by clarifying that one of the circumstances that constitute making a design public – when a useful article embodying the design is "offered for sale or sold to the public" – applies to "individual or public sale." We believe that this amendment is probably declarative of the existing meaning of §1310(b).

4. Provisions Relating to Infringement

The bill would also amend Chapter 13 in a few respects that would affect not only fashion designs, but vessel hull designs as well. For example, § 1309, which addresses infringement of protected designs, would be amended in two respects. First, an existing provision that it shall not be an act of infringement to make, import, sell, or distribute, any article embodying a design which was created without knowledge that the design was protected and was copied from such protected design would be amended to provide that the alleged infringer must not have had "reasonable grounds to know that protection for the design is claimed." The Office considers this to be a reasonable amendment.

Section 1309 would also be amended, in subsection (e), to clarify that an infringing article need not be copied directly from an article incorporating the protected design, but may also be copied from an image of the protected design. The Office considers this language to be a mere clarification that is simply declarative of the plain meaning of the existing language of § 1309(e).

The final amendment to § 1309 would be more significant. It would add a new subsection (h) that would ensure that the existing doctrines of secondary liability that are part of the copyright law will also apply to design protection under Chapter 13. In our discussions with

representatives of fashion designers, we were told of the existence of websites that offer detailed photographs of new fashion designs immediately after those designs have appeared for the first time on the runways of major fashion houses. Such websites apparently charge subscription fees and serve a clientele of clothing manufacturers who design knockoffs based on the photographs appearing on the websites. Early drafts of this legislation would have provided for liability for publishing such photographs. We believed that such a provision would encounter significant First Amendment problems and might deter reasonable and desirable news reporting. We suggested that a preferable means of addressing the problem would be to clarify that the doctrines of secondary liability such as contributory infringement, vicarious liability, and inducement of infringement as recently addressed in *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*,[50] apply under the design protection law. This provision makes sense not only as a more reasonable way of addressing the problem of publication of photographs to facilitate infringement, but also as a general matter of sound policy. The same policy considerations that have led to the adoption of these doctrines of secondary liability in the law of copyright would appear to apply equally with respect to design protection.

5. Examination by the Copyright Office

Another provision – requested by the Office – would amend §1313(a), which currently provides that when the Copyright Office examines an application for registration of a design, that examination involves a determination whether or not the application relates to a design which on its face appears to be subject to protection under this chapter. The amendment would replace "subject to protection under this chapter" with "within the subject matter protected under this

[50] 125 S.Ct. 2764 (2005).

chapter," clarifying that the Office does not make judgments as to whether a particular design is sufficiently original or distinctive to qualify for protection, but rather examines the depiction of the design to ensure that it relates to the type of design (currently, a design of a vessel) protected under Chapter 13. Since the Office commenced its registration of vessel hull designs over 7 years ago, the Office has generally refrained from passing judgment on what is or is not an "original" design or a design that makes a vessel hull "attractive or distinctive," requirements for protection under § 1301(a). The Office has no expertise in the design of vessels and cannot judge what is "original" in a vessel hull design. Moreover, the statute offers no clear guidance that would assist the Office in judging what is "attractive or distinctive" to the public in a vessel hull design. In contrast, the Office has made determinations, applying the statutory criteria, as to whether a particular design is a design of a vessel hull. Occasionally, the Office has rejected an application because, in the Office's judgement, it does not relate to the design of a vessel hull – *e.g.*, when it is apparent that the design does not relate to a craft "that is designed and capable of independently steering a course on or through water through its own means of propulsion" and "that is designed and capable of carrying and transporting one or more passengers."[51]

The Office's experience with vessel hull registration has persuaded the Office that a statutory clarification of the Office's examining function would be desirable. Whether a design of a vessel hull meets these statutory requirements is more appropriately determined by a court of law, in an adversary proceeding in which evidence is presented (including the possibility of expert testimony) that permits a more informed determination on these matters.

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[51] *Id.* § 1301(b)(3).

6. Cancellation

The Office also requests that the Subcommittee consider an additional amendment not currently included in H.R. 5055: the repeal of §1313(e), which provides for an administrative *inter partes* cancellation proceeding in the Copyright Office. We believe that disputes between a designer and a third party over whether the designer is entitled to claim protection in the design of a vessel hull or an article of apparel are best resolved in the courts, which are better equipped to weigh the evidence and make such determinations. Indeed, Chapter 13 already gives the courts the power to cancel registrations.[52] Removing the administrative cancellation provision would not remove the possibility of cancellation, but would simply ensure that such determinations are made by the institutions that are most competent to make them.

7. Recovery for Infringement

The proposed legislation would also revise the existing provision governing damages for infringement. Section 1323(a) currently provides:

> Damages. - Upon a finding for the claimant in an action for infringement under this chapter, the court shall award the claimant damages adequate to compensate for the infringement. In addition, the court may increase the damages to such amount, not exceeding $50,000 or $1 per copy, whichever is greater, as the court determines to be just. The damages awarded shall constitute compensation and not a penalty. The court may receive expert testimony as an aid to the determination of damages.

H.R. 5055 would increase the amounts set forth in § 1323(a) to "250,000 or $5 per copy." We note that the effect of this amendment would that the "increased" damages available under Chapter 13 would exceed the maximum award of statutory damages available for copyright

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[52] *See Id.* 17 U.S.C. § 1324.

infringement, which is only $150,000 in cases of willful infringement. While the Office takes no position at present as to whether, in principle, an award of $250,000 should be permitted under this provision of Chapter 13, Congress should not enact such a provision in a vacuum, without giving due consideration to the analogous provision in the Copyright Act. We are not suggesting that the maximum award of statutory damages should necessarily be increased, but only that we are skeptical that the maximum award for infringement of a protected design should exceed the maximum award for copyright infringement.

In any event, the Office considers the existing § 1323(a) to be hopelessly confusing. In its first sentence, § 1323(a) provides for an award of "damages *adequate to compensate* for the infringement." In the second sentence, § 1323(a) permits the court to *increase* the damages to up to $50,000 or $1 per copy (which H.R. 5055 would increase to $250,000 or $5 per copy) as the court determines to be just. And in its final sentence, § 1323(a) states that the damages awarded "shall constitute *compensation* and not a penalty," suggesting that if the court has correctly calculated the damages under the first sentence, there will be no occasion in which the court may increase the damages under the second.

The Office recommends that Congress consider a complete revision of § 1323(a) that would offer clearer guidance relating to the calculation of damages for infringement. It may well be that the second sentence of this provision serves no purpose if indeed the damages it provides for are purely compensatory. In contrast, it may be that the statute should be clarified to permit an award beyond mere compensation in certain cases – e.g., cases involving willful infringement.

8. Savings Clause

The final amendment included in H.R. 5055 would amend the savings clause, § 1330, which currently provides that nothing in Chapter 13 shall annul or limit

> (1) common law or other rights or remedies, if any, available to or held by any person with respect to a design which has not been registered under this chapter; or
>
> (2) any right under the trademark laws or any right protected against unfair competition.

The amendment would add a third class or rights not affected by any provisions of Chapter 13:

> (3) any rights that may exist under provisions of this title other than this chapter.

We believe this is a sensible amendment. In fact, with respect to fashion designs, there will be certain circumstances in which a fashion design might obtain some protection under the copyright law. Although articles of clothing are useful articles and therefore enjoy limited if any copyright protection,[53] there will be some instances in which a fashion design, or at least certain aspects of a fashion design, would enjoy some degree of copyright protection. Offering *sui generis* protection to fashion designs should not result in any diminution of whatever copyright protection might exist for such designs.

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[53] *See Id.* § 101 (definition of "pictorial, graphic and sculptural works": "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."). *See also* the discussion above relating to copyright protection for the designs of useful articles.

9. No Retroactive Effect

In reviewing H.R. 5055 as this hearing approached, the Office has identified an additional amendment that should be considered. Section 1332 provides:

> Protection under this chapter shall not be available for any design that has been made public under section 1310(b) before the effective date of this chapter.

The effective date of Chapter 13 was October 23, 1998. The purpose of § 1332 was to provide for protection of vessel hull designs prospectively, but to deny protection to designs that had been made public before the legislation was effective.

H.R. 5055 contains no provision amending § 1332, meaning that if enacted, it would offer protection to fashion designs that had been made public prior to its enactment. Presumably, the same judgment that Congress made in extending protection to vessel hull designs should apply in extending protection to fashion designs, and§ 1332 should be amended to deny protection for any fashion designs that have been made public before the effective date of H.R. 5055.

Should Fashion Design Legislation be Enacted?

As stated above, the Office does not yet have sufficient information to make any judgment whether fashion design legislation is desirable. Proponents of legislation have come forward with some anecdotal evidence of harm that fashion designers have suffered as a result of copying of their designs, but we have not yet seen sufficient evidence to be persuaded that there is a need for legislation. We look forward to the Subcommittee's hearing, at which proponents of the legislation will have an opportunity to make their case and at which the voices of other affected parties can be heard.

If the case is made for fashion design protection, we believe that H.R. 5055 offers an appropriate, balanced legislative proposal. We have suggested some minor amendments that we believe would improve the legislation, and we believe that some of the amendments included in H.R. 5055 and in our statement above are worthy of consideration whether or not fashion design legislation is enacted.[54]

As always, the Office would be pleased to assist the Subcommittee as it continues its consideration of this legislation.

[54] *See* the discussion above relating to §§ 1313(a) and (e).

PREPARED STATEMENT OF THE AMERICAN FREE TRADE ASSOCIATION, MIAMI, FL

BACKGROUND

This statement is offered on behalf of the American Free Trade Association (AFTA). AFTA is a not-for-profit trade association of independent American importers, distributors, retailers and wholesalers, dedicated to preservation of the wholesale and discount marketplace to assure competitive pricing and distribution of genuine and legitimate products for the benefit of all American consumers.

AFTA has been an active advocate of consumer interests for nearly twenty years. It has appeared as *amicus curiae* in the two leading Supreme court cases affirming the legality of parallel market trade under the federal trademark, customs and copyright acts (the 1985 *Kmart* case and the 1998 *Quality King* case) and in numerous lower court decisions.

SUMMARY POSITION

AFTA strongly opposes HR 5055. H.R. 5055 is not legislation intended to rightfully prosecute pirates stealing logos and trademarks, which activities this Committee is already aware AFTA aggressively combats and rejects. On the contrary, H.R. 5055 is about expanding our U.S. Copyright laws to federally protect what our laws have insisted for 40 years should not be protected at all. H.R. 5055 intends to protect vague concepts of the "overall appearance" of a product, without requisite proof of distinctiveness, uniqueness or its impact on the American marketplace.

AFTA has consistently, for more than 20 years, advocated on behalf of American businesses and American consumers to ensure that protectionist intellectual property laws are not used to deprive consumers and the American marketplace of legitimate products. Manufacturers and intellectual property rights owners must not be empowered—by this Congress or otherwise—to dictate what is sold beyond the rational limits of intellectual property rights and protections.

GENERAL DISCUSSION

Section 102(b) of the Copyright Act states "in no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle or discovery, regardless of the form in which it is described, explained, illustrated or embodied in such work." Relying upon this standard, garment designs have sometimes been deprived copyright protection because they have been said to be "useful articles,[1]" impossible to separate the utilitarian aspects from aesthetic parts. In *Jane Galiano and Gianna Inc., v. Harrah's Operating Company, Inc.; Harrah's Entertainment, Inc* (5th Cir 2005), the Court explained the standard as follows: "There is little doubt that clothing possesses utilitarian and aesthetic value. It is common ground . . . among the courts that have examined this issue [that the 1976 Copyright Act's provisions were] intended to distinguish creative works that enjoy protection from the elements of industrial design that do not." *See Pivot Point Int'l, Inc. v. Charlene Prods., Inc.,* 372 F.3d 913, 920–21 (7th Cir. 2004) (en banc). "The hard questions involve the methodology for severing creative elements from industrial design features."

Recognizing, then, that the Copyright Act offers no federal protection for garments not employing some degree of aesthetic value, separable from other utilitarian aspects of the design, designers have lobbied Congress to draft H.R. 5055 to, instead, provide federal protection simply for the "overall appearance" of each and every design, without definition, limitation for ordinary features or even examination for prior art. This is the exact broadening of existing intellectual property laws in the same type of blatant, undisguised claim of entitlement against which AFTA has advocated time and again.

If H.R. 5055 protects fashion designs why would any other industry's designs still be considered useful embodiments of ideas or discoveries which the Copyright Act is not intended to protect? Why would designers of food packages not believe that the overall appearance of their cartons deserve federal protection? Or designers of shampoo bottles or hair spray cans? What is the difference between the overall appearance of articles of fashion and the overall appearance of lipstick cases or soft drink bottles?

In 2001, the Supreme Court clearly stated that the danger of anticompetitive overprotection is especially high in the case of product design. The Court in *Wal-Mart v. Samara Bros.,* said "It seems to us that design, like color, is not inherently

[1] "A "useful article" is defined in 17 U.S.C. Section 101 as "an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information."

distinctive . . . Consumers should not be deprived of the benefits of competition with regard to utilitarian and aesthetic purposes that product design ordinarily serves by a rule of law that facilitates plausible threats of suit against new entrants." Although that case involved a determination of protectibility under the Trademark Act, the Court's opinion about the role of federal law in protecting product designs is clear and indisputable. This Congress, via H.R. 5055, seeks to contradict that opinion—with the bill's sponsors insisting only that protection of clothing designs is long overdue. This is insufficient evidence to support passage of a law that impacts many product designs and the ability of American consumers to obtain economical alternatives of products inspired by designers' creations otherwise out of their economic reach and otherwise not available to them.

Thus, the problem with H.R. 5055 is that it tips the balance of intellectual property protection overwhelmingly in favor of fashion and other product designers. A fashion design copyright will be relatively easy to obtain because no official with the Copyright Office conducts an examination of prior art to ensure the application's originality. In addition, the copyright would be relatively easy to prosecute. The designer would merely need to show that the copyrighted design is "substantially similar" to the allegedly infringing design. And, because there is no criteria of what constitutes either protectable "appearance" or what will be considered "substantially similar" to that appearance, the one promise that will be realized is the promise of protracted and expensive litigation. Very little in the world of fashion design is truly original. Fashion designers frequently draw inspiration from one another and inspired designs often bear a similarity to the so-called "original." For this reason, cases brought pursuant to a fashion design copyright would be very difficult to defend and mass marketers would very likely be discouraged from taking the legal risk of offering inspired fashions. Thus, the real losers will be the American consumers, who will be cheated out of access to the latest fashions at prices they can afford.

Consumers care about the impact of HR 5055. The Internet is swarming with people—your constituents—critical of the efforts of this Congress to act as "fashion police." Two examples should suffice to show the sentiments being expressed in this wide-spread electronic forum. "Capital Eye" distributed by FYI News Service at *www.fyi-net* includes an article "Copyrighting Fashion Not Only Impossible, But Silly" written by Randi Bjornstad and posted the week of April 9, 2006. "Now, let's be serious," she says, "when was the last time someone designed a dress—or coat, or shoe, or a pair of boxer shorts, for heaven's sake—that was so unusual that anyone would say, "Wow, I've never seen anything like that before. . . . The fact is, in the world of art, everything's derived from everything else, recycled, given a new name and embraced as something new and different and really out there." At *www.reason..com.hitandrun/2006/03/be—serious—dahl.shtml*, Julian Sanchez writes: "Is this necessary? The idea behind intellectual property is supposed to be to provide creators with an incentive to innovate. Are we supposed to believe that Sears is digging into Armani's profits to the point where they're putting out fewer items each year? Are we supposed to believe that this effect is so pronounced that the loss in novelty outweighs the benefit to consumers of inexpensive, attractive clothing?"

AFTA, whose members include major distributors to retailers, are forthright in their analysis and objections to this or any other bill which would eliminate the creation, distribution and sale of competitively priced genuine goods in the US marketplace. The obvious result of H.R. 5055 would be to diminish the right of American consumers to a freely competitive marketplace while providing heretofore unprecedented and uncontrollable dominance of distribution and pricing to a small cadre of designers. There is no method to defend against a claim that one has copied the "overall appearance" of any product design—because there are no standards or criteria in the bill that distinguish distinctive design elements from those that are merely common place or ordinary. And while originally consumers were promised that Section 13 of the Copyright Act was passed only to protect boat hull designs—about which, frankly, not many people could even feign much interest. Now this Congress wants the Copyright Act to also protect the overall appearance of articles of fashion. Tomorrow, then, it could be argued that Congress will have little reason not to permit copyrighting of the "overall appearance" of cosmetic bottles, earring holders or cereal boxes.

AFTA understands that the American fashion industry may feel slighted because protection of fashion design in Europe is greater than currently offered under American intellectual property laws. AFTA knows that the European Union offers a type of community design protection which would certainly cause the envy of our domes-

tic designers looking to protect ordinary features of their products.[2] But, our Congress should never merely mimic the laws of Europe. Our Congress should strike a balance between rights of the American consumer, American industry and American ingenuity, and if it does so, we believe it will reject the EU model and reaffirm our existing law which provides the needed incentives for original design based upon fair use of past creativity.

There is no reason to believe that our countries' top fashion designers are suffering economically because others draw inspiration from their designs. Nevertheless, H.R. 5055 seeks not only to ensure continued and increased prosperity for such designers, but also, to deprive American consumers of the less-expensive, alternative fashions inspired by it.

H.R. 5055 damages rather than protects the American consumer; it does not provide protection for creativity, but stifles future creativity by extending the control of a few designers. AFTA urges this respected Committee not to cede to the interests of the fashion designers to the detriment of all that was intended to be protected by strong intellectual property protection in this country. Do not deviate from the need to protect our country against counterfeiters and thieves. Do not distort the importance of your mission to protect against misappropriation of distinctive creations and original works of art. H.R. 5055 is legislation guaranteed to generate out of control litigation and a bill that would impede our society's ability to rely upon prior art to create new and better inventions.

There is a necessary balance between inventions that need to be rewarded in order to generate greater inspiration and mere product designs deserving no such protection against future amendment or reproduction. The Copyright Act already recognizes such a distinction by refusing protection for useful designs—even those qualifying as articles of fashion under H.R. 5055. AFTA, its members and its supporters sincerely hope that the respected members of this Committee carefully consider the needs of the American consumer against the needs of fashion and other product designers.

Subcommittee members are invited to contact AFTA's General Counsel, Gilbert Lee Sandler, Esq., should they wish to discuss any matter raised in this statement in more detail or in the event there are any remaining questions or doubts regarding the intent or detrimental impact of H.R. 5055 on the American consumer or the competitive, domestic marketplace.

We thank you for providing us with this opportunity to have our testimony made a part of the record of today's hearing.

[2] A registered Community design right may provide protection for the appearance of a product or part of a product. The appearance can result from the shape, lines, contours, ornamentation, colours, texture or materials of the product. In this context, a product means any industrial or handicraft item except a computer program, and includes parts intended to be assembled into a complex product, packaging, "get-up", graphic symbols or typefaces *(see http://www.hindlelowther.com/design2.htm).*