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## The Anti-Economy of Fashion; An Openwork Approach to Intellectual Property Protection

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### Cover Page Footnote

Distinguished Professor of Law, University of the Pacific McGeorge School of Law. The author would like to thank research assistants Veronica Long, Christopher Clemons, and Courtney Hansen for their excellent work. In addition, the author thanks Professors Rachael Salcido and Anne Bloom for comments, as well as participants at the Annual Intellectual Property Scholar's Conference, Stanford University Law School (August 2012).

# The Anti-Economy of Fashion; An Openwork Approach to Intellectual Property Protection

Amy L. Landers\*

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*Fashion's cultural connections provide the groundwork for a theory to resolve the critical questions of protection for works that draw strongly on exogenous inputs. This article proposes that narrow protection for fashion is both economically justified, theoretically sound, and beneficial to the field because it facilitates spillovers in a manner that allows others to create the endless variations that are the lifeblood of this vibrant industry.*

*Such protection relies on a theory of openworks, which applies to designs that have a high level of input from outside of the creator's realm of activity. In fashion, inspiration derives from the street, fine art, music, trends, and other sources of culture. Further, such works have a significant level of interaction with those who engage with the work. Once a piece leaves a designer's hands, wearers inhabit the work and provide individualized authorial inputs by mixing, contextualizing, and visually modifying the designer's original vision. Unlike a static sculpture, the wearer makes fashion his or her own. This creatively open structure, which is inherent in the medium, warrants a correspondingly less restrictive form of intellectual property protection than that provided by the current copyright and patent systems.*

*To further justify protection for fashion design, this Article supplements the traditional economic analysis with one that draws from Pierre Bourdieu's concept of works of cultural production. Such works are not valuable based on function alone, but rather because they include expressive content that contributes to our broader societal conversation. The sale of such works operates in an anti-economy that privileges noneconomic capital, including reputational and symbolic value, at the expense of short-term*

*profitability. Instead of seeking to maximize sales, designers endeavor to establish their reputations as aesthetic leaders in a manner that a classic economic analysis would consider irrational. Yet these qualities are critical to the maintenance of the anti-economy of cultural production, which depends on reputational capital to establish long-term economic viability. To properly analyze the effects of copying on this industry, this Article applies creativity theory, economics, and anti-economics to fully evaluate the potential impact of protection in the industry.*

#### INTRODUCTION

As designer Tom Ford once said, fashion “can be a mirror of where we are culturally at a moment in time, or it can be an indicator of where we are going.”<sup>1</sup> The aesthetic quality of a highly creative work of fashion can be a breathtaking insight into our collective lives, revealing surprising truths, visions of a future, and the destruction of the past. Those who create such works draw on the language of a common culture that is intuitively understood by those who experience the works. Their conception draws heavily on both economic and human capital.<sup>2</sup>

Today, fashion is copied at virtually every price point, from *haute couture* to ten-dollar t-shirts.<sup>3</sup> Current replication technology allows copyists to create duplicates with a quality level that is unprecedented. Copying is a widespread practice, in part because the systems of protection under the current intellectual property laws are infeasible, unworkable, and sometimes unenforceable as a practical matter.<sup>4</sup> Within days of a runway show, the considerable investment spent to create expressive

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<sup>1</sup> *Visionaries: Tom Ford* (Oprah Winfrey Network broadcast Oct. 23, 2011), available at <http://vimeo.com/34182744>.

<sup>2</sup> *See id.*

<sup>3</sup> *See* Shan Li, *Counterfeit Gap Joins the Counterfeit Gucci*, L.A. TIMES, Feb. 2, 2012, <http://articles.latimes.com/2012/feb/03/business/la-fi-cheap-fakes-20120204> (“Five years ago we wouldn’t have seen \$10 and \$15 T-shirts being counterfeited like we do now.”).

<sup>4</sup> *See* Samson Vermont, *The Dubious Legal Rationale for Denying Copyright to Fashion*, 21 TEX. INTELL. PROP. L.J. 89, 94 (2013).

designs dissipates as the most successful are replicated and sold by those who do not bear the cost or risk of creating new designs.

This Article argues that such circumstances should change for highly creative fashion designs that evidence a significant expressive component. This proposal is significantly narrower than the currently available forms of intellectual property for non-fashion expressive works. Referred to as “openwork protection,” this proposal is narrow in scope and duration. In addition, it requires a heightened creativity requirement. This structure is based on the recognition that the creative core of openworks derives from sources external to the design’s creator.<sup>5</sup> In turn, this narrowing incentivizes higher levels of creativity and allows others to create variations without infringement. In this way, protection is fine-tuned to facilitate spillovers, which allows others to continue to create the endless variations that are the lifeblood of this vibrant industry.

This Article considers justifications for protection of highly expressive works within the field of fashion. To do so, the standard economic justifications for intellectual property law are contextualized and supplemented. Particularly, this Article establishes that actors within the field of fashion operate both in an economy and an anti-economy. The latter construct privileges noneconomic capital, including reputational and symbolic capital, at the expense of short-term profitability. Within this realm, designers endeavor to establish their reputations as aesthetic leaders in a manner that a classic economic analysis would consider irrational. Yet these qualities are critical to the maintenance of the anti-economy of cultural production, which depends on reputational capital to establish long-term economic viability. To properly analyze the effects of copying on the industry, this Article applies these principles to fully evaluate the creative, economic, and anti-economic impact of protection.

In Part I, the Article provides an overview of the relevant theory for openwork protection and divides the fashion industry

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<sup>5</sup> See Dean Keith Simonton, *Creativity as Blind Variation and Selective Retention: Is the Creative Process Darwinian?*, 10 PSYCHOL. INQUIRY 309, 312 (1999).

into two fields according to their respective creative contributions—that is, mass-market and highly creative fashion. Fashion designs’ exogenous sources of inspiration are explored in Part II. Consistent with the concept that fashion is a culturally porous medium, Part III examines fashion’s modifications and interaction with those who wear the clothing. Part IV deepens the classic economic analysis of intellectual property law by adding a discussion of the anti-economic world relevant to the production of cultural products. Part V examines how the most recent proposals for fashion protection provide a rational framework for less restrictive type of protection than currently exists under Copyright or Patent law. Finally, this Article concludes by expanding on the earlier sections by examining the specifics of fashion design protection, including the reasons that fashion protection is desirable to allow some private return on the financial and human costs of creativity, to facilitate spillovers, and by providing suggestions for how such protection might be implemented.

## I. A SYSTEM OF OPENWORK PROTECTION

### A. *An Overview*

This Article conceives and develops the openwork theory of intellectual property protection, which will begin with the premise that the inputs and outputs of a creative work exist outside of a creator’s sphere of activity. This principle has firm roots in creativity research.<sup>6</sup> The internal sources might include the creator’s own memories, experiences, emotions, or the results of associative chains of thought.<sup>7</sup> External inputs include domain-specific training, foundational techniques, history, precedents, and trends.<sup>8</sup> Additional exogenous information encompasses broader sources, such as interactions with others, news, the arts, culture, and unrelated areas of interest.<sup>9</sup> Such influences provide a field of

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<sup>6</sup> *See id.*

<sup>7</sup> *See id.*

<sup>8</sup> *See id.*

<sup>9</sup> *Id.* (“[W]hile the creator is incubating on one problem, he or she will be constantly but haphazardly bombarded with priming input . . .”).

options and inspirations that informs the creative work. In total, the creative process includes a blend of external stimuli, which is transformed by the creator's own individuality, training, skill, and ability.

Moreover, some creations interact dynamically with the audience.<sup>10</sup> For these, both the visual impact and meaning of a piece changes as those who experience the work modify, mix, and integrate the work into their individual existence. With these works, the creation does not stop when the article is manufactured. Rather, the last step in the designer's process begins the start of a new phase where the user changes the originally intended significance and context throughout the work's useful life. This subsequent modification is both intended and inherent in the medium.<sup>11</sup>

This account is a sharp divergence compared with the widely held conception that originators are the crucial wellspring of creative works.<sup>12</sup> This author-centric description is the current justification for intellectual property protection.<sup>13</sup> A fair summary of the prevailing theories of intellectual property ownership concludes:

It is the *originality of the author*, the novelty which he or she adds to the raw materials provided by

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<sup>10</sup> An example of this was the *Dynamo: A Century of Light and Motion in Art, 1913-2013* exhibit at the Grand Palais, Paris, France which was displayed from Oct. 4, 2013 to July, 22, 2013 (describing "openwork" artworks to include those that immerse the audience/participants "when the field of vision is literally 'enveloped'") (placard reproduction on file with author).

<sup>11</sup> See Susan Scafidi, *F.I.T.: Fashion as Information Technology*, 59 SYRACUSE L. REV. 69, 79-80 (2008).

<sup>12</sup> See generally JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS 56 (1996) (unraveling "the romantic vision of authorship, of the genius whose style forever expresses a single unique persona").

<sup>13</sup> See, e.g., *Diamond v. Chakrabarty*, 447 U.S. 303, 309 (1980) (finding a bacteria patentable in part because it was "a product of human ingenuity"); *Ets-Hokin v. Sky Spirit, Inc.*, 225 F.3d 1068, 1076 (9th Cir. 2000) (finding a photograph copyrightable because the work evidenced the "personal influence of the author" in decisions about lighting, shading, angle, background, and so forth); see also ROBERT P. MERGES, JUSTIFYING INTELLECTUAL PROPERTY 121-23 (2011) (describing the individual's contribution as the primary justification for awarding ownership of a property right).



culture and the common pool, which ‘justifies’ the property right and at the same time offers a strategy for resolving the basic conceptual problem . . . [of] what concept of property would allow the author to retain some property rights in some works but not others?’<sup>14</sup>

As has previously been recognized, the classic author-centric justification for intellectual property law is incomplete because it “tends to undervalue the importance of sources” in the creation of works.<sup>15</sup> Sociologists and psychologists have broadly agreed that the creative process begins with informational inputs that precede any individual creative act.<sup>16</sup> As one psychologist writes, no one, “no matter how creative, can generate ideas from nothing.”<sup>17</sup> Another writes, “[a]necdotal and historical accounts from real-world settings highlight the fact that new ideas, even highly creative ones, often develop as minor extensions of familiar concepts.”<sup>18</sup>

A theory of intellectual property protection that accounts for these creative inputs has never been implemented. Under the current regime, the law awards protection when a trigger point for a sufficient level of creativity has been met with respect to particular works.<sup>19</sup> For copyright, this standard is quite low.<sup>20</sup> When the prescribed standard is met, a work receives *all* of the

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<sup>14</sup> BOYLE, *supra* note 12, at 54–55 (emphasis added).

<sup>15</sup> *Id.* at 160.

<sup>16</sup> See TERESA M. AMABILE, *CREATIVITY IN CONTEXT* 83 (1996); ROBERT W. WEISBERG, *CREATIVITY: BEYOND THE MYTH OF GENIUS* 21 (1993).

<sup>17</sup> DEAN KEITH SIMONTON, *CREATIVITY IN SCIENCE: CHANCE, LOGIC, GENIUS, AND ZEITGEIST* 171 (2004).

<sup>18</sup> Thomas B. Ward, Steven M. Smith & Ronald A. Finde, *Creative Cognition*, in *HANDBOOK OF CREATIVITY* 189, 195 (Robert J. Sternberg ed., 1999).

<sup>19</sup> See *Feist Publ’n, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 358 (1991).

<sup>20</sup> See *id.* (“[T]he originality requirement is not particularly stringent. A compiler may settle upon a selection or arrangement that others have used; novelty is not required. Originality requires only that the author make the selection or arrangement independently (that is, without copying that selection or arrangement from another work), and that it display some minimal level of creativity. Presumably, the vast majority of compilations will pass this test, but not all will.”).

available legal protection.<sup>21</sup> This leads to significant distortions because under this regime a copyright “will vest equally in a child’s scribble and a great painting, a grocery list and a great novel.”<sup>22</sup> Further, all copyrighted works have the same lengthy term of protection. The aforementioned scribble will be protected under Copyright law for seventy years past the child’s lifetime.<sup>23</sup> Nonetheless, strong protection for fashion design (akin to copyright) is inadvisable for the fashion industry.<sup>24</sup> This protection extends to both literal copies of the scribble, as well as to substantially similar scribbles. Essentially, our current system of intellectual property law has glossed over the fundamental problem that arises from the disparity of creative contributions that exist in different types of expression.

Proposals for reform of maximalist intellectual property systems are too numerous to describe in this article. Much of this work centers on the problem of granting an adequate legal reward to compensate for the creator’s social contribution for a given work.<sup>25</sup> Relevant here, some proposed solutions have included modifications to the effective term of the right of protection.<sup>26</sup> Another has considered raising the minimum standard of

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<sup>21</sup> See *id.* at 348 (although copyright infringement analysis allows sifting out unprotected elements, the portions of the work that are protectable receive the full term of protection and availability of remedies).

<sup>22</sup> Carys J. Craig, *Reconstructing the Author-Self: Some Feminist Lessons for Copyright Law*, 15 AM. U. J. GENDER SOC. POL’Y & L. 207, 214 n.34 (2007).

<sup>23</sup> See 17 U.S.C. § 302(a) (2012).

<sup>24</sup> Comparable protection for fashion design is undesirable because it is too strong. See Jonathan M. Barnett et al., *The Fashion Lottery: Cooperative Innovation in Stochastic Markets*, 39 J. LEGAL STUD. 159, 166 (2010) (concluding that “incomplete” protection is the preferred modality for the fashion industry, which allows some forms of imitation).

<sup>25</sup> See generally Carl Shapiro, *Patent Reform: Aligning Reward and Contribution*, 8 INNOVATION POL’Y & ECON. 111 (2008) (discussing “two major reforms to the patent system designed to spur innovation by better aligning the rewards and contributions of patent holders”).

<sup>26</sup> See F.M. Scherer, *Nordhaus’s Theory of Optimal Patent Life: A Geometric Reinterpretation*, 62 AM. ECON. REV. 422, 427 (1972).

creativity.<sup>27</sup> Still others advocate varying the scope of enforceability to effectuate certain policy goals.<sup>28</sup>

This Article builds on and modifies previous work and endeavors to reconcile these approaches with creativity theory. Specifically, the central thesis of this article is that particular media that are heavily dependent on external inputs for expression and meaning do not fit within current forms of intellectual property protection. Rather, some modification of the existing systems must be made. This is accomplished through a combination of a shorter effective term, a high minimum standard of originality, and a narrow scope of protection compared to those offered under existing intellectual property regimes.

This Article relies on the medium of fashion as the vehicle to develop and apply the theory. Fashion is well-suited for this task. The raw material of the media visibly and explicitly includes culture, relying on the inputs external to those who create the works and those who wear the clothing. In other words, fashion is a *culturally porous* medium in both the creation and user experience, and is therefore referred to herein as *openworks*. Because such influences are visible in many cases, it becomes possible to consider the theoretical impact of external sources on the appearance of a final work, and to account for such inputs, in assessing an appropriate form of intellectual property protection. By mixing culture, expression that originates with the individual designer, and the visual variation introduced by the wearer, expressive works of fashion design can be said to be openworks because the designer's expressive contribution exists within a larger creative context of inputs that inspires and later modifies the works' meaning. In contrast to the misapprehension that the designer is the sole source of creative genius responsible for the work, this perspective expressly accounts for the external inputs that modify the meaning of works.

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<sup>27</sup> See Joseph Scott Miller, *Hoisting Originality*, 31 CARDOZO L. REV. 451, 494 (2009).

<sup>28</sup> See Ann Bartow, *Copyrights and Creative Copying*, 1 U. OTTAWA L. & TECH. J. 75, 77 (2003–04); see also Robert P. Merges & Richard R. Nelson, *On the Complex Economics of Patent Scope*, 90 COLUM. L. REV. 839, 843–44 (1990).

Further, exogenous inputs to openworks do not end with the creation of a piece. Unlike works of fine art, fashion design invites emotional and physical interaction by the wearer.<sup>29</sup> The visual and tactile appearance of each item will be modified—whether physically due to alternation and wear, or contextually as pieces are mixed and remixed with other items. After the clothing leaves the designer’s hands, it can be expected to enter a new life where one might, for example, take a pair of red sneakers and wear them with synagogue socks, layers of seven different plaids, and John Lennon-style glasses.<sup>30</sup> This result may be entirely beyond the vision of the original creator of any one of these pieces. Yet the *point* of fashion design allows the wearer to engage in such creative variation beyond that imagined by the designer. Clothing allows individuals to express multiple identities, typically subject to the constraints of social norms. In this process, works are changed, sleeves are rolled or slashed open, coats are worn as capes, shirts are deliberately half-tucked, and leather acquires a personal patina and molds to the wearer’s body. From a creativity perspective, it is inherent in the medium that end users will have a meaningful and palpable exogenous influence on the works.

Openwork protection allows limited intellectual property protection for many of the same reasons that other works are shielded from copying.<sup>31</sup> Specifically, there are economic, non-economic, and (for highly creative fashion), anti-economic reasons to protect highly original, expressive works within that medium. Nonetheless, because openworks are inherently based on exogenous inputs in both the creation and the user’s manipulation, it is appropriate that protection is narrowed from the current expansive regime. By requiring a higher standard of creativity, a more stringent infringement standard, and a shorter term of protection, openwork protection is more limited than that permitted by copyright, trademark, and patent law. Consequently, the

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<sup>29</sup> See Scafidi, *supra* note 11, at 79–80.

<sup>30</sup> See Leandra Medine, *Exploiting Plaid*, MAN REPELLER (Feb. 1, 2012), <http://www.manrepeller.com/2012/02/exploiting-plaid.html>; see also Leandra Medine, *Lest I Forget*, MAN REPELLER (Feb. 1, 2012), <http://www.manrepeller.com/2012/02/lest-i-forget.html>.

<sup>31</sup> See generally Part III.A.

industry can expect that significant creative spillovers will continue to exist to encourage others to make variations of the original works.

This necessarily requires a departure from a standard economic account of intellectual property law. Moreover, the consideration of fashion as a medium requires an evaluation of the anti-economic capital that forms the currency of highly creative works.<sup>32</sup> Unlike economies that follow the standard rules including supply and demand and are populated with rational, self-interested consumers, the anti-economy of cultural products operates according to rules of disruption and change.<sup>33</sup> In the anti-economy, the longer that a disruptive organization can sustain, its chances of continuing relevance, and eventual economic stability, increase. As Pierre Bourdieu explains, “[t]o introduce difference is to produce time.”<sup>34</sup> This requires protection against immediate reproduction of the primary assets of an avant-garde work—that is, its expressive content.<sup>35</sup>

### *B. Separating Expression from Function*

It is common to discuss the fashion industry as if it is a monolithic whole. In reality, the picture is aesthetically and economically diverse. In any particular season, stores offer a wide array of multiple trends, designs, and prices. One alternative to examining the industry is to consider a market-based approach, differentiating the more expensive clothing lines from those that are more affordable.<sup>36</sup> Another considers distinct construction

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<sup>32</sup> Cf. Arjun Appadurai, *Introduction: Commodities and the Politics of Value*, in *THE SOCIAL LIFE OF THINGS* 3 (Arjun Appadurai ed., 1986).

<sup>33</sup> See generally PIERRE BOURDIEU, *THE FIELD OF CULTURAL PRODUCTION* 39 (Randal Johnson ed., 1993) (stating that in “the field of cultural production . . . the economy of practices is based . . . on a systematic inversion of the fundamental principles of all ordinary economies . . .”).

<sup>34</sup> See *id.* at 106.

<sup>35</sup> See *id.* at 40. As used here, “avant-garde” refers to any works that are highly original, creative, expressive, artistic, or experimental, rather than referring to any particular genre of artistic work.

<sup>36</sup> See, e.g., C. Scott Hemphill & Jeannie Suk, *The Law, Culture, and Economics of Fashion*, 61 *STAN. L. REV.* 1147, 1170–74 (2009) (examining the fashion industry according to its retail structure).

processes, such as clothing that is ready to wear off the rack versus custom fit *haute couture*. This Article takes an entirely different approach and examines the field from a creativity perspective by separating highly creative designs from mass-market apparel “which submits to the laws of competition for the conquest of the largest possible market.”<sup>37</sup>

Clothing is a commodity, and commodities are commonly defined as objects that have economic value.<sup>38</sup> Yet *expressive* fashion occupies a “two-faced reality”—that is, one role as a commercial commodity and another capable of conveying meaning.<sup>39</sup> Items that have these attributes are works of cultural production—that is, objects that function both as a commodity and as a vehicle of expression, culture, and as an engine of intellectual change.<sup>40</sup> Such goods have a meaning and value that goes beyond an item’s utilitarian capacity.<sup>41</sup> Cultural products incorporate expressions common to a group, reflect collective understandings and behaviors, and capture shared activities and belief systems.<sup>42</sup> They reflect coherent points of view that include a mix of intelligence, morality, and emotion, and even parody.<sup>43</sup> Some works contextualize attitudes, practices, and beliefs that are fundamental within a society. It may express shared human experiences.<sup>44</sup>

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<sup>37</sup> BOURDIEU, *supra* note 33, at 115.

<sup>38</sup> See Appadurai, *supra* note 32, at 3.

<sup>39</sup> See Joanne Entwistle & Agnès Rocamora, *The Field of Fashion Materialized: A Study of London Fashion Week*, 40 SOCIOLOGY 735, 738–39 (2006); cf. BOURDIEU, *supra* note 33, at 113 (defining symbolic goods as those that combine cultural and commercial value).

<sup>40</sup> See BOURDIEU, *supra* note 33, at 113.

<sup>41</sup> See Appadurai, *supra* note 32, at 18–19; see also JOANNE ENTWISTLE, *THE FASHIONED BODY* 221 (2000) (“One way to think about fashion is as a *culture industry*.”).

<sup>42</sup> See David Throsby, *Cultural Capital*, J. CULTURAL ECON. 3, 6 (1999).

<sup>43</sup> See Eric Wilson, *McQueen Leaves Fashion in Ruins*, N.Y. TIMES, Mar. 12, 2009, <http://www.nytimes.com/2009/03/12/fashion/12MCQUEEN.html> (describing show presented by designer Alexander McQueen which parodies the styles of the iconic fashion houses as “a slap in the face to his industry,” and a “brave statement about the absurdity of the race to build empires in fashion”).

<sup>44</sup> Throsby, *supra* note 42, at 6.

Certainly not all fashion purports to include creative expression. A typical pair of socks or functional shoes is purely utilitarian. As a contrasting example, Rei Kawakubo's *Dress Meets Body* collection included dresses to which she attached fabric-covered lumps.<sup>45</sup> Kawakubo's message included "something of more profound meaning: she had recreated a reality of the late 20th century—that of the individual seemingly joined to her burdens, like a backpack."<sup>46</sup> Kawakubo's work is emblematic of works of cultural production. Specifically, the dresses can be worn to functionally cover the body, yet the works are freighted with visual and tactile expression that is as expressive as a poem. The distinction between the functional and expressive is lost in our system of laws that is presently blind to the meaning of certain works of fashion design.

Kawakubo's work fits within the category of avant garde design, which is characterized by a significantly greater level of original expression compared to mass-market clothing.<sup>47</sup> In other words, mass-market clothes are not works of cultural production; avant garde designs are. This Article argues that protection for fashion design should be reserved for those works characterized by a higher level of expression and creativity, and withheld from designs that are not. Before the reasons that support this result are set forth, the two markets for these designs are considered in greater detail in the following two subsections.

### 1. The Mass-Market

Content-based works can be considered along a spectrum based on a deviation from highly creative works on one end, to an aesthetic based on commercial demands on the other. This latter category includes bestselling books, blockbuster films, popular

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<sup>45</sup> See Amy M. Spindler, *Is It New and Fresh or Merely Strange?*, N.Y. TIMES, October 10, 1996, <http://www.nytimes.com/1996/10/10/garden/is-it-new-and-fresh-or-merely-strange.html> ("[B]eneath beautiful stretch-fabric dresses she stuffed lumpy masses that looked a bit like collagen injections run amok.").

<sup>46</sup> Cathy Horyn, *Like Mona Lisa, Ever So Veiled*, N.Y. TIMES, May 30, 2012, at E1, available at <http://www.nytimes.com/2012/05/31/fashion/rei-kawakubo-of-comme-des-garcons-veiled-like-mona-lisa.html?pagewanted=all> (statement of Rei Kawakubo).

<sup>47</sup> See Clement Greenberg, *Avant-Garde and Kitsch*, 6 PARTISAN REV. 36 (1939).

music, and other types of copyrightable media that rely on consumer preferences as a primary commercial constraint on the work's development. Similarly, mass-market clothing is designed for broad appeal, although the field reaches across economic sectors from luxury to inexpensive options. For this type, "perhaps the highest compliment one can pay a designer is to say that he or she understands the customer."<sup>48</sup> Such designs incorporate the culturally dominant taste. Some examples focus on items with broad appeal and salability. Generally, such designs seek consumer acceptance and economic profitability.<sup>49</sup> The goal is to reach a large, accepting audience.

Unlike the last-minute rush of changes than one might see in hand-tailored lines, the design of high-volume clothing can be finalized weeks or longer before the pieces are shown to the public runway show.<sup>50</sup> However, it is impossible to cleanly separate the mass-market from avant garde design on a brand-by-brand basis, or based on the lead time of the production schedule. This is because many lines have product mixes to ensure economic stability, and therefore include some items with a highly radical vision along with more traditional pieces that function as the brand's financial mainstays.<sup>51</sup>

From a consumer's perspective, in a physical, emotional, and mental sense, mass-market clothes *fit*. One example that attempts

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<sup>48</sup> Benjamin Schwarz, *Fashion in Dark Times*, ATLANTIC (June 1, 2009, 12:00 PM), <http://www.theatlantic.com/magazine/archive/2009/06/fashion-in-dark-times/307440> ("[A] good part of the art lies in fathoming her mood, her desires, and her ambitions, and the ways these may shift from season to season and year to year and evolve as she ages.").

<sup>49</sup> See Agnès Rocamora, *Fields of Fashion*, 2 J. CONSUMER CULTURE 341, 344–45 (2002).

<sup>50</sup> See, e.g., Jess Cartner-Morley, *The Catwalk, Darling? It's So Last Year*, THE GUARDIAN, Oct. 13, 2003, <http://www.guardian.co.uk/world/2003/oct/13/france.arts> (observing that Dolce & Gabbana, Missoni and Jil Sander clothes are sold weeks before the runway shows, and that Dolce & Gabbana was sold out by the time of the runway show).

<sup>51</sup> See Rocamora, *supra* note 49, at 345 (noting that the lines are increasingly blurred between mass-market and "high culture" clothing). As one example, Chanel maintains a line of classic suits and handbags in the same boutiques as its avant garde couture clothing.



to capture this phenomenon can be seen in an Hermès representative's description that the ideal customer for its menswear line is one who "has an appreciation for timelessness and is looking for an investment piece . . . [T]his is not fashion . . . It fits into your life . . ." <sup>52</sup> Design similarities within this genre are not necessarily attributable to copying, but rather to reliance on shared cultural points of reference. <sup>53</sup> For example, athletic-inspired clothing typically incorporates elements, both literal and symbolic, of clothing worn by professional players. Similarly, clothing designed for business wear typically incorporates classic design elements that reinforce a sense of a common tradition. Because many mass-market styles rely on tried and true formulas, they do not evidence the most groundbreaking designs. Some, including many pieces by Giorgio Armani and Ralph Lauren, specialize in beautifully crafted versions of classics. Others, such as much of the clothing sold at L.L. Bean and The Gap, offer functional clothing for casual and work situations. In intellectual property parlance, one might consider these crowd-pleasing designs obvious because such items are expected variations of predecessor designs that have been successful in the mass-market. Others are street-ready versions of more aesthetically ambitious runway designs.

There are services that provide inputs to mass-market designers to maximize the possibility of public acceptance and sales. For example, trend-forecasting services comb the media, runway looks, and street trends that are incorporated into reports and then sold to mass-market designers. <sup>54</sup> These are used to anticipate the mass customer's preferences. One trend forecaster, Li Edelkoort,

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<sup>52</sup> Jean E. Palmieri, *Hermès Puts Focus on Menswear for Fall*, WOMEN'S WEAR DAILY (Oct. 10, 2012), <http://www.wwd.com/menswear-news/designer-luxury/herms-puts-focus-on-mens-wear-for-fall-6398905>.

<sup>53</sup> See Eric Wilson, *Traditional Tailoring Meets the Younger Pack*, N.Y. TIMES (June 17, 2012), <http://runway.blogs.nytimes.com/2012/06/17/traditional-tailoring-meets-the-younger-pack> (This phenomenon occurs throughout fashion, including for more cutting edge works. As one example, five designers showed black socks with shorts during one London Men's Fashion Week.).

<sup>54</sup> See Katy Chapman, *Inside Design: A Look at the Method Behind the Madness*, in THE FASHION READER 477, 478 (Lisa Welters & Abby Lillethun eds., 2011).

operates based on information fed to her office from agents located worldwide.<sup>55</sup> Her predictions allow lines to gauge the most likely consumer trends anticipated to occur over the upcoming sales cycles.<sup>56</sup> As might be expected given that the design process is driven by existing or anticipated customer tastes, mass-market fashion is a more economically stable endeavor when compared to avant-garde lines. Certainly, all of fashion suffers from unpredictability. Nonetheless, mass-market clothing is designed to appeal to the average consumer and, therefore, is better positioned for ready acceptance at points of sale.

There is little reason to protect mass-market clothing under intellectual property law. As an initial matter, there is little likelihood that such works contain original, expressive content. Standard suits, sportswear, and casual clothing are fundamentally useful and based on aesthetic sources that have existed for many years. Stated simply, such clothing adds little—if anything—to the cultural conversation. Furthermore, because such works are market driven, it can be expected that such clothing will be produced without the incentive system that intellectual property protection is intended to provide.

## 2. The Avant Garde

Highly creative fashion is designed primarily for a comparatively narrower audience than mass-market goods. As works of cultural production, these works have a duality that includes originality and expressive<sup>57</sup> meaning. The avant garde designer's role is to push culture forward. As Alexander McQueen described, “[y]ou’re giving them what they want and at the same time trying to see beyond to what they need.”<sup>58</sup> Culturally, highly

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<sup>55</sup> See Linda Tischler, *Fashion Sorceress*, in *THE FASHION READER* 483, 484 (Lisa Welters & Abby Lillethun eds., 2011).

<sup>56</sup> See *id.*

<sup>57</sup> Although it may seem unusual to ascribe the term “expression” to clothing, cultural expression has always been found within the “trivial details of daily intercourse” that in truth might “have more to do with [a] nation’s future than treaties signed by diplomats.” RUTH BENEDICT, *THE CHRYSANTHEMUM AND THE SWORD: PATTERNS OF JAPANESE CULTURE* 11 (1967).

<sup>58</sup> Chapman, *supra* note 54, at 489 (statement of Alexander McQueen).

creative fashion is incentivized by a desire to displace the established cultural messages. As Pierre Bourdieu explains, “[o]n one side are the dominant figures, who want continuity, identity, reproduction; on the other, the newcomers, who seek discontinuity, rupture, difference, revolution.”<sup>59</sup> Avant-garde clothing fits within the latter category. It is judged under criteria that require originality, a distinct point of view, and an impetus to change. Mass-market clothing is judged at the cash register. In contrast, avant garde clothing is judged by critics, industry insiders, and a segment of those who engage with the works. Such judgments can be harsh, even with prestigious labels attached.<sup>60</sup> An example of criticism that exemplifies this genre’s abhorrence toward the commercial, mass market aesthetic is one fashion critic’s review of the work of Chanel’s lead designer, who had been stated as presenting “mortifying examples of pandering and buffoonery,” including “handbags that reek of self-conscious social climbing.”<sup>61</sup>

By eschewing the mainstream, the avant-garde designer cannot expect economies of scale, widespread acceptance, or early profits. Highly creative fashion operates as an anti-culture because the genre is targeted to disrupt. Conceptual designer Kawakubo acknowledges, “I always had good reactions from people with a good eye and a vision . . . and very terrible reactions from those who are afraid of people who are different [from] others—at the beginning and even now.”<sup>62</sup> This type of fashion attempts to fulfill

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<sup>59</sup> BOURDIEU, *supra* note 33, at 106. As one fashion insider explains, when originally conceived, some fashion “may well look clowny and loopy to the Katie Courics of the world. Then, five years later, the Katie Courics of the world are wearing some version of that original wackadoodly ensemble.” SIMON DOONAN, *THE ASYLUM* 8 (2013).

<sup>60</sup> See Cathy Horyn, *Clothes Worthy of Their Label*, N.Y. TIMES, Mar. 16, 2013, <http://www.nytimes.com/2013/03/07/fashion/miu-miu-hermes-louis-vuitton-fashion-review.html> (describing a Saint Laurent runway show as evidencing “lazy values,” that “[i]n terms of design, the clothes held considerably less value than a box of Saint Laurent labels”).

<sup>61</sup> Robin Givhan, *Is Chanel Designer Karl Lagerfeld Spread Too Thin?*, DAILY BEAST (Jan. 30, 2012, 12:00 AM), <http://www.thedailybeast.com/newsweek/2012/01/29/is-chanel-designer-karl-lagerfeld-spread-too-thin.html>.

<sup>62</sup> Karizza Sanchez, *Rei Kawakubo Talks Future of the Fashion Industry and How She Wants to Be Remembered*, COMPLEX (Apr. 6, 2013, 10:00 AM), <http://www.complex.com/style/2013/04/rei-kawakubo-talks-future-of-the-fashion-industry-and-how-she-wants-to-be-remembered>.

a societal and aesthetic role. As fashion critic Suzy Menkes has observed, the connection between style and society may not be evident until well after the fact, as “fashion history so often comes ahead of what happens in the world, so it is a precursor.”<sup>63</sup> This is visibly evident at certain turning points in women’s history. For example, during the 1920s, women wore shorter skirts at a time when they were seeking greater economic and political freedom. Another example took place during the 1960s, when broad shoulders were trending as women began to take their place in a male-dominated world.<sup>64</sup>

In contrast to operations within mass-market fashion, flowcharts and focus groups are not the foundation of any highly creative collection.<sup>65</sup> Designer Marc Jacobs describes his work as the lead designer of Louis Vuitton’s ready-to-wear collections: “It is not like there is a choice of five different things and I pick one to focus on. It is just ‘the thing.’ It is the thing I am compelled to do. I am not sitting with a bunch of options. This is the commitment.”<sup>66</sup> Jacobs has additionally described his reluctance to repeat commercially successful designs from past seasons.<sup>67</sup> Virtually all avant garde designers disclaim reliance on current trends; as Elbaz explained, “I want to know where is that committee in Switzerland that sits to decide what is in and what is

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<sup>63</sup> Donatien Grau, *An Intellectual Fashion: Suzy Menkes*, ANOTHER (Nov. 20, 2012), [http://www.anothermag.com/current/view/2347/Suzy\\_Menkes](http://www.anothermag.com/current/view/2347/Suzy_Menkes) (statement of Suzy Menkes).

<sup>64</sup> *See id.*

<sup>65</sup> *See* Jo-Ann Furniss, *Marc Jacobs, An American in Paris*, in LOUIS VUITTON / MARC JACOBS 116, 122 (Pamela Golbin ed., 2012) (“Contrary to what might be widely believed, designers at the grand houses do not secretly work with flowcharts, focus groups, and the like to come up with formulas for fashion.”).

<sup>66</sup> *Id.* (statement of Marc Jacobs).

<sup>67</sup> *See Videointerview: Marc Jacobs*, INTERVIEW.DE (May 6, 2012), <http://blog.interview.de/videointerview-marc-jacobs> (transcript on file with author), available at <http://vimeo.com/43171784> (“There was a sweater [in my line] we were looking at the other day. And I really didn’t like it. And it had sold very, very well. And so it keeps getting shown to me as this thing that like, “Oh this was very commercial.” And every time I see it I cringe. Because I think, I don’t want to do things like that. I don’t feel proud of them.”).

out . . . . I don't listen to the formula makers. I think maybe I have a selective hearing disorder."<sup>68</sup>

Many pieces are intellectual and cultural experiments. Some of the most highly regarded designers engage in the fashion equivalent of aesthetic exploration, and the results of these efforts go directly to the runway. Highly creative works engender the sort of surprise that comes with the recognition that "the world has turned out differently not just from the way that we thought it *would*, but even from the way we thought that it *could*."<sup>69</sup> Because this is a realm in which creative chances are taken, this area is replete with some museum-worthy successes and a fair number of catastrophes. Unlike the mass market, failure is an option. Some work can be perceived as quite out of touch with the everyday person, or even ridiculous. At their first introduction, some works are not pleasing to the mass audience, but they may later be recognized as transformative. Because some designs involve the risk of the untried, they may never be widely accepted while others become remarkably successful as a larger circle of customers begins to recognize a work's aesthetic value.

One example of anti-fashion is McQueen's "bumster" pants that revealed areas below the lower spine, including the top of the buttocks, shown on the runway in his shows throughout the early 1990s.<sup>70</sup> According to McQueen, this new cut was done to "change the way women looked," so that the wearer "looked quite menacing."<sup>71</sup> Over the years, the aesthetic appeal of the cut was widely adopted throughout the clothing industry without McQueen's threatening edge.<sup>72</sup> This design was responsible for

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<sup>68</sup> Julia Reed, *Alber Elbaz*, WALL ST. J. (Apr. 23, 2012, 6:05 PM), <http://online.wsj.com/article/SB10000872396390443855804577601261382113568.html>.

<sup>69</sup> MARGARET BODEN, *THE CREATIVE MIND: MYTHS AND MECHANISMS* 31 (Basic Books 1990).

<sup>70</sup> See Susan Frankel, *Introduction* to ANDREW BOLTON, *ALEXANDER MCQUEEN: SAVAGE BEAUTY* 20, 52–55 (2011) (quoting Alexander McQueen).

<sup>71</sup> ANDREW BOLTON, *ALEXANDER MCQUEEN: SAVAGE BEAUTY* 54 (2011) (statement of Alexander McQueen).

<sup>72</sup> See Rajini Vaidyanathan, *Six Ways Alexander McQueen Changed Fashion*, BBC NEWS MAGAZINE (Feb. 12, 2010, 10:50 AM), <http://news.bbc.co.uk/2/hi/8511404.stm> ("It was a look that spread and spread, although few dared go as low as McQueen's signature buttock-baring style.").

later positive spillovers—that is, the design has been identified as the reason that waistbands went low to the hip throughout the entire industry for years thereafter.<sup>73</sup> Further, this design helped establish his reputation and ultimately led to the commercial acceptance and financial viability of his line.<sup>74</sup>

Financial gain is not an immediate incentive that compels designers to choose the subject matter of their collections. As McQueen said of his earliest runway shows, “I don’t want to do a cocktail party. I’d rather people left my shows and vomited.”<sup>75</sup>

Like many cutting edge designers, McQueen worked within an economically fragile business model because he deliberately rejected the dominant marketplace aesthetic of that time. As he described, “[w]hen you start getting into the mindset where this is a business and you’ve got to bring in money, when you’re designing with a buyer in mind, the collection doesn’t work. The danger is that you lose the creativity that drives you.”<sup>76</sup> Instead, the key motivator is to introduce aesthetic difference that attracts acclaim, excitement, and continued cultural relevance. McQueen explained that his work was about change, likening his designs to “plastic surgery, but less drastic” because “ultimately I do this to transform mentalities more than the body.”<sup>77</sup> Not all avant garde fashion is quite so elevated in intent. Indeed, some fashion is deliberately anti-intellectual; other designers convey ideas as broad

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<sup>73</sup> See Sarah Mower, *Alexander McQueen: He Sewed Anger into His Clothes*, TELEGRAPH (Apr. 17, 2011, 6:00 AM), <http://www.telegraph.co.uk/culture/8450364/Alexander-McQueen-He-sewed-anger-into-his-clothes.html>; see also Vaidyanathan, *supra* note 72; Cathy Horyn, *Marc Jacobs Gets the Meaning of It All*, N.Y. TIMES, Sept. 11, 2012, [http://www.nytimes.com/2012/09/12/fashion/marc-jacobs-chado-ralph-rucci-donna-karan-phillip-lim-rodarte-vera-wang-and-wes-gordon-fashion-review.html?\\_r=0](http://www.nytimes.com/2012/09/12/fashion/marc-jacobs-chado-ralph-rucci-donna-karan-phillip-lim-rodarte-vera-wang-and-wes-gordon-fashion-review.html?_r=0) (“Remember McQueen’s bumster trousers from the mid-’90s? That was a frankly raw style that eventually set in motion the near-universal trend of low-riding jeans.”).

<sup>74</sup> See Vaidyanathan, *supra* note 72 (Michael Oliveira-Salac, the director of Blow PR, stated that “[f]or me [the bumster] was the look that put him on the map”).

<sup>75</sup> BOLTON, *supra* note 71, at 12 (quoting Alexander McQueen).

<sup>76</sup> Frankel, *supra* note 70, at 24 (quoting Alexander McQueen).

<sup>77</sup> BOLTON, *supra* note 71, at 44 (quoting Alexander McQueen).

as demonstrating femininity through power, free-spiritedness, and independence.<sup>78</sup>

There is an analogy between the practices of avant garde designers and Pierre Bourdieu's concept that certain cultural goods are targeted to a field of restricted production.<sup>79</sup> According to Bourdieu's work, such items operate in an anti-economy by rejecting the mainstream and producing symbolic meaning.<sup>80</sup> By its nature, the anti-economy of creative fashion is far less interested in crowd-pleasing styles, but rather in attracting the niche customer, critical success, and developing a reputation for originality. As Bourdieu explains, certain producers are seeking to create "symbolic capital," which "is to be understood as economic or political capital that is disavowed, misrecognized and thereby recognized, [and] hence legitimate."<sup>81</sup> The general public may reject certain avant garde works as the natural consequence of the fact that such works are experimental, creative, and directed toward a niche audience.

In theory, mass-market and avant garde clothing might be categorized independently of their respective price points. Hypothetically, highly creative fashion can be produced for a few hundred dollars in one's own home. Yet in practice, designers who have some years of training, experience, and a team of support typically undertake it. According to McQueen, "[i]t's taken me fifteen years to come up with that concept as a designer, to become fully aware that what I'm doing is personal to me."<sup>82</sup> For clothing sold in stores, the infrastructure that supports the most cutting edge designs can range up to millions of dollars. In some lines, it includes reliance on highly skilled ateliers, an in-house

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<sup>78</sup> See generally Cathy Horyn, *Jean Paul Gaultier: Black Magic*, N.Y. TIMES (Jan. 26, 2011, 4:46 PM), <http://runway.blogs.nytimes.com/2011/01/26/jean-paul-gaultier-black-magic> (describing Gaultier's couture show, including works that evoke "glamour, the French obsession with women and how to be a rebel"); Amy Larocca, *Lost and Found*, N.Y. MAG., Aug. 21, 2005, <http://nymag.com/nymetro/shopping/fashion/12544> (quoting Marc Jacobs stating, "I love a blouse that's dumb").

<sup>79</sup> See BOURDIEU, *supra* note 33, at 115.

<sup>80</sup> See *id.* at 75.

<sup>81</sup> *Id.*

<sup>82</sup> Frankel, *supra* note 70, at 24 (quoting Alexander McQueen).

development team to assist in taking a concept to finalized designs, and the costs necessary to develop new fabrics and textiles.

## II. CREATION OF THE AVANT-GARDE: CULTURALLY INFUSED DESIGN

This Part begins with the premise that intellectual property protection should extend solely to avant-garde works. Further, such works can be considered openworks. In the following subsections, the creative process of fashion design is explored to provide the evidentiary basis for these propositions.

Even the most highly creative designers touch on the numerous points of influence that contribute to their designs. This consistent principle demonstrates that, during the design phase, these creators borrow liberally from the world of fashion and beyond. In Part III, the wearer's experience of modifying, mixing, and contextualizing these works into his or her own life is examined. Together, this material demonstrates that the point of fashion design is interaction and integration into the individual inhabitant's own aesthetic. These Parts illustrate that fashion design does not fit intellectual property's dominant narrative, which considers the author/creator as the predominant source of a creative work.<sup>83</sup>

Numerous accounts of fashion's most creative designers evidence a strong connection with culture as the critical starting point to their design. Designer Tom Ford described his job as a designer to "just sort of feel the zeitgeist and to take an idea or a mood and turn it into something tangible, which often was something that had a history and a past."<sup>84</sup> Some inspirations retain their visibility in the final product. One example includes works by the designer Jean Paul Gaultier, who directly appropriates culture into his work including couture versions of

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<sup>83</sup> See *supra* note 13 and accompanying text.

<sup>84</sup> *Ready To Share: Fashion and the Ownership of Creativity*, USC ANNENBERG NORMAN LEAR CENTER CONFERENCE 41 (Jan. 29, 2005), <http://www.learcenter.org/pdf/RTStranscript.pdf> [hereinafter *Ready to Share*] (quoting Tom Ford).



punk and the design of sheer fabrics that mimic tattoos.<sup>85</sup> One controversial collection, called “Rabbi Chic,” used dress elements of Orthodox Jewish rabbis, including voluminous coats, exaggerated curls and yarmulkes.<sup>86</sup>

Some designers describe the creative process much less specifically and literally. These designers describe an immersion into culture as a whole, from which different themes or moods emerge to form the foundation of a new collection. Perhaps one of the most prolific living fashion designers is Karl Lagerfeld, who has been described as an insatiable consumer of new culture.<sup>87</sup> As one journalist chronicled, Lagerfeld has “devoted his existence to living as much as possible in the present, keeping himself attuned to trends, not just in fashion but in art, politics, movies, and music.”<sup>88</sup> In response to a recent question asking him whether he had one great influence, designer Karl Lagerfeld immediately responded, “Zillions. Zillions. I’m like a building with TV antennae. I catch it all . . . .”<sup>89</sup>

Others describe a deep interaction with the everyday to provide source material for the work. Marc Jacobs describes, “I don’t really switch off much, period. There’s very little that I do that isn’t visually stimulating. Watching movies at home or going for a walk in the park, my eyes are always open and I think I’m pretty open to the possibility of anything, really.”<sup>90</sup> Donatella Versace describes, “[i]f you are a creative person, you are inspired

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<sup>85</sup> See Suzy Menkes, *Gaultier’s Talking Heads Astound*, N.Y. TIMES, June 17, 2011, [http://www.nytimes.com/2011/06/18/fashion/18iht-rjpg18.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2011/06/18/fashion/18iht-rjpg18.html?pagewanted=all&_r=0) (describing pieces of the Gaultier museum retrospective, *From Sidewalk to Catwalk*).

<sup>86</sup> See Amy M. Spindler, *Patterns*, N.Y. TIMES (Mar. 16, 1993), <http://www.nytimes.com/1993/03/16/news/patterns-082793.html>; Amanda Walgrove, *Chai Fashion*, TABLET MAG (Nov. 8, 2011), <http://www.tabletmag.com/jewish-arts-and-culture/82783/chai-fashion> (quoting Jean Paul Gaultier).

<sup>87</sup> See John Colapinto, *Where Karl Lagerfeld Lives*, NEW YORKER, Mar. 19, 2007, [http://www.newyorker.com/reporting/2007/03/19/070319fa\\_fact\\_colapinto](http://www.newyorker.com/reporting/2007/03/19/070319fa_fact_colapinto).

<sup>88</sup> *Id.*

<sup>89</sup> Malcolm Venville, *Karl Lagerfeld: Zillions*, NOWNESS (Apr. 18, 2013), <http://www.nowness.com/day/2013/4/18>.

<sup>90</sup> Julien Elbhar, *Marc Jacobs Interview: The Creative Process*, VIMEO, <http://vimeo.com/27007803> (last visited Jan. 28, 2014).

continuously. From the things unexpected.”<sup>91</sup> This is echoed in the statements of Comme des Garçons’ Rei Kawakubo, who states, “[a]s I live my normal life, I hope to find something that click starts a thought, and then something totally unrelated would arise, and then maybe a third unconnected element would come from nowhere.”<sup>92</sup> Consistent with these accounts, designer Tom Ford follows an immersion process as a starting point.<sup>93</sup>

One device used by designers to give voice to the cultural foundation is envisioning a muse, an actual or imagined audience who influences the design. She may be the source of the designer’s ideas, or she may be the ideal for whom the clothes are designed. As one example, Lanvin designer Alber Elbaz designed a collection for a friend who was “his ideal woman: smart, maternal, internal, and uninterested in the glitzy shenanigans of society.”<sup>94</sup> Jacobs describes that he designed for the Louis Vuitton woman who is “an extrovert,” and there is “nothing apologetic or shy about it. She’s strong whether she’s gentle, or whether she’s youthful or more mature.”<sup>95</sup> In contrast, for his own Marc Jacobs line, he likes “things that are wrong. Or imperfect. Or that people may not necessarily look at as an ideal beauty” like “the awkward little sister.”<sup>96</sup> These fictional women carry a host of cultural content that derive from various types of female archetypes. In other words, muses operate as conduits that run from these cultural characteristics into works of fashion design.

Some designers are inspired by alternative or historic cultures. Yves Saint Laurent was credited with taking inspiration from “[m]en’s wear, laborers’ uniforms, peasant garb, modern art,

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<sup>91</sup> *The Day Before: Versace* (Sundance Channel television broadcast Sept. 9, 2010).

<sup>92</sup> Horyn, *supra* note 46 (quoting Rei Kawakubo).

<sup>93</sup> See Ready to Share, *supra* note 84, at 46.

<sup>94</sup> Sally Singer, *Humble’s Gift: How Did Alber Elbaz Transform the House of Lanvin into the Fashion World’s Most-Wanted Label*, VOGUE, March 2005, at 512, 515.

<sup>95</sup> Interview with Marc Jacobs: The Louis Vuitton Woman, HIGHSNOBETTE (Oct. 5, 2011, 4:40 PM), <http://www.highsnobette.com/news/tag/marc-jacobs/page/2>.

<sup>96</sup> Amy Larocca, *Lost and Found*, N.Y. MAG., Aug. 21, 2005, <http://nymag.com/nymetro/shopping/fashion/12544> (quoting Marc Jacobs).

Morocco, and flea-market finds.”<sup>97</sup> McQueen viewed his collection as journalistic, stating, “I’m making points about my time, about the times we all live in. My work is a social document about the world today.”<sup>98</sup> Elbaz attributes one of his collections to a conversation that he had at dinner, which described women sewing jewelry into their clothing as a form a protection during the Bolshevik revolution.<sup>99</sup> This anecdote provided a cultural foundation that was later visually manifested in the final products, inspiring Elbaz to place pearls and other jewelry within sleeves of sheer fabric and to sew jewelry directly onto the surface of dresses.

Some deliberately seek to effectuate or reinforce cultural change. As one example, Jean Paul Gaultier began to create skirts for men in the early 1980s, as a twist on the fact that women’s wear had begun to incorporate suits and other masculine details. At this time, women were in the process of establishing equality and power. As he explained, “[t]hrough clothes you can say something definitely.”<sup>100</sup> He began to dress male models in lingerie and clothes traditionally worn by women because, “I was

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<sup>97</sup> Amy Fine Collins, *Toujours Couture*, VANITY FAIR, Sept. 2009, <http://www.vanityfair.com/style/features/2009/09/couture200909>.

<sup>98</sup> BOLTON, *supra* note 71, at 12 (quoting Alexander McQueen); Lisa Armstrong, *The Diary of a Dress: Alexander McQueen Shares the Saga of How One of His Inspirations Evolved*, in THE FASHION READER 487, 487–89 (Lisa Welters & Abby Lillethun eds., 2d ed. 2011).

<sup>99</sup> Marc Karimzadeh, *Alber Elbaz: An Emotional Pitch*, WOMEN’S WEAR DAILY (Nov. 12, 2008), <http://www.wwd.com/retail-news/people/alber-elbaz-an-emotional-pitch-1855886?full=true>. According to Elbaz:

One night I was having dinner with a friend of mine in a restaurant in Paris,” he recalled. “He was talking to me about the Bolsheviks in Russia. He told me, ‘You know, Alber, when the Bolsheviks went to the palaces in Russia, they were trying to kill all the royal family the men collapsed immediately, but the women survived.’ I was really surprised. They said they took all their jewelry, all their diamonds and their pearls and they had sewn them into their corsets. I thought, how beautiful. So jewelry didn’t really serve as a decoration, but in a way as protection. I did a jewelry collection when I took jewelry and stitched fabrics, and I created jewelry and fabrics as one piece.

*Id.*

<sup>100</sup> *A Conversation with Jean Paul Gaultier and Suzy Menkes*, YOUTUBE (Mar. 24, 2012), [http://www.youtube.com/watch?v=\\_v1aAMVSw1k](http://www.youtube.com/watch?v=_v1aAMVSw1k).

for equality of sex.”<sup>101</sup> He continued, “I wanted to show that there is a part of femininity in the man.”<sup>102</sup> Some designers use culture as the starting point that later becomes invisible, as the designer’s own vision takes over.<sup>103</sup> Fashion critic Cathy Horyn explains, “[t]he hardest thing to realize in fashion is that the future lies in the past. The second hardest thing is to forget the past.”<sup>104</sup> This statement reveals an important truth about the most creative fashion designs. The aesthetically successful design must transform the original inspiration. A designer may “just sort of feel the zeitgeist and to take an idea or mood and turn it into something tangible.”<sup>105</sup> Yet something that too literally mimics its inspiration will not succeed.<sup>106</sup> To be an avant-garde creative, the designer must translate, transform, and process the design in a way that is emotionally and humanly meaningful.

Horyn’s description of forgetting the past is apt. As one designer explains, variation is necessary for transformation:

In the end, the most beautiful thing is that nobody will know where [the inspiration] comes from. The idea is that you look at a dress and say “Well, that’s a great dress.” It doesn’t matter if you take it from the maharajah, from Bridgette Bardot, from the ‘60s or the ‘80s. The important thing is to erase the evidence.”<sup>107</sup>

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<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> See Armstrong, *supra* note 98, at 487–89 (Alexander McQueen used Peter Arnold’s photography for orchid-embossed dresses, but fit the floral pattern within his own vision of a collection inspired by the movie *Signs*, with the rest of the show featuring jumpsuits and tweed suits).

<sup>104</sup> Cathy Horyn, *Simons Starts Triumphantly at Dior*, N.Y. TIMES, July 3, 2012, <http://runway.blogs.nytimes.com/2012/07/02/simons-starts-triumphantly-at-dior>.

<sup>105</sup> Ready to Share, *supra* note 84, at 41 (statement of Tom Ford quoting Chanel).

<sup>106</sup> See, e.g., Cathy Horyn, *In Paris, Tempted by History*, N.Y. TIMES, Jan. 27, 2010, <http://www.nytimes.com/2010/01/28/fashion/28COUTURE.html> (criticizing certain designers for too heavily relying on their source of inspiration, including Givenchy designer Riccardo Tisci for heavy reliance on Renato Zero, stating “It’s just that I want to see something that comes out of Mr. Tisci’s imagination and not from YouTube. Does he know how to filter?”).

<sup>107</sup> Reed, *supra* note 68 (statement of Alber Elbaz).

Along these lines, Gabrielle “Coco” Chanel once said, “[c]reativity is the art of concealing your source.”<sup>108</sup> Her statement reveals an implicit acknowledgement of her external sources. Further, it is illustrative of one of her strengths—that is, repurposing the humblest inspiration into something meaningful. One of her most iconic jackets, a collarless boxy style created in 1916, was derived from a bellboy’s jacket from a certain hotel.<sup>109</sup> Her women’s suit, based on this jacket design, was credited for giving women freedom of movement that symbolized independence and power.<sup>110</sup> The boxy style accommodated a women’s free physical movement and changes in weight, in sharp contrast to the corseted shapes of the previous decades that were impractical and restrictive.<sup>111</sup> Although originally based on a rather prosaic source, the jacket was an adaptation that previsioned modes of dress and accurately predicted women’s future roles. It has been re-designed by Chanel and the line that outlived her, as well as by countless others who have created numerous variations over the years.

### III. CULTURAL MODIFICATION AND THE WEARER

#### A. *Clothing as an Openwork*

Fashion occupies a unique position among expressive media. Although created by an author/designer, the audience for the work is experientially splintered. Most consider the work from a distance when worn by another. The movement of its surfaces, the fit, and the overall impression of the piece vary depending on the characteristics of the wearer and, in some cases, the social context in which the piece is seen. Unlike a film projected on a blank

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<sup>108</sup> Ready to Share, *supra* note 84, at 40 (statement of Tom Ford).

<sup>109</sup> See Tim Blanks, *Jacket Required*, STYLE, Fall 2012, at 154 (quoting Karl Lagerfeld).

<sup>110</sup> See EDMONDE CHARELS-ROUX, CHANEL AND HER WORLD 366 (2005); see also Katherine LaGrave, *Why Chanel’s Little Black Jacket is a Really Big Deal*, HUFFINGTON POST (June 8, 2012, 11:32 AM), [http://www.huffingtonpost.com/katherine-lagrave/chanel-little-black-jacket\\_b\\_1579767.html](http://www.huffingtonpost.com/katherine-lagrave/chanel-little-black-jacket_b_1579767.html).

<sup>111</sup> See CHARELS-ROUX, *supra* note 120, at 366–67.

screen, clothing's shape and appearance is intimately connected to a breathing person.

Openwork invites exploration by enveloping those viewing the piece, which creates a unique sensory experience that moves beyond observation from a distance. An example of openwork is the "Dynamo: A Century of Light and Motion in Art, 1913-2013" exhibition that took place between April 10, 2013 to July 22, 2013 at the Grand Palais in Paris, France. The openwork exhibition "brings into play open and transparent vertical structures . . . moving on to immersion—when the field of vision is literally 'enveloped.'"<sup>112</sup> Fashion fits within this realm because the wearer *inhabits* the clothing.<sup>113</sup> The experience is visual and tactile in a highly experiential and intimate sense. A work's meaning and expression is in flux, continually dependent on the movement of its occupant, as well as more subtle contextual variations. A white dress at a wedding says "bride," while jeans at the same event speak of dissent. A pair of Buddy Holly glasses on a retiree rings of authenticity, but this same item on twenty-year old in Williamsburg becomes an ironic statement of hipster-dom. Thus, the clothing's meanings vary according to our cultural customs that include commonly shared information, assumptions, beliefs, customs, and behaviors.<sup>114</sup> These tacit expressions are as myriad as culture itself, and are both intuitively understood and unbounded by language. Designers intentionally relinquish the final visual impact of the work to end-users, who vary the appearance of the physical object through manipulation, recombination, transformation, and re-contextualizing the designs to both form and express the individual wearer's identity.

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<sup>112</sup> The *Dynamo: A Century of Light and Motion in Art, 1913-2013*, which was on display at the Grand Palais, Paris, France from Apr. 10, 2013 to July 22, 2013 is an example of this (describing "openwork, which brings into play open and transparent vertical structures . . . moving on to immersion—when the field of vision is literally 'enveloped'") (placard reproduction on file with author).

<sup>113</sup> See Cathy Horyn, *Givenchy Looks Back, But Not Too Far*, N.Y. TIMES, Oct. 1, 2012, <http://www.nytimes.com/2012/10/02/fashion/at-givenchy-coming-up-for-air-and-taking-a-step-forward.html>.

<sup>114</sup> See generally Sophie Woodward, *Looking Good: Feeling Right – Aesthetics of the Self*, in CLOTHING AS MATERIAL CULTURE 21 (Susanne Küchler & Daniel Miller eds., 2005).

One who wears clothing makes a piece his or her own by mixing, coordinating and changing the clothing both contextually and physically over time. These acts do not derive from the original designer but they have an unmistakable impact on the visual and tactile effect of the work. One may choose to wear a smaller (or larger) version of a piece than the designer intended, or modify it for a custom fit. Because no one's body is precisely like another's, the same pieces look different on different individuals as body shapes affect the clothing's surface. One's face, expression, hair, and accessories re-contextualize the clothing even further. Some continue to wear clothing as it ages, softens, changes color, and becomes personal. For example, leather becomes softer, darker, and changes shape to fit the body to acquire a patina of personal ownership that cannot be replicated by an off-the-shelf piece. Fabrics soften in color and texture with age, particularly in areas where the body is hardest on the clothing. In this way, the clothing literally and visually reflects the wearer.<sup>115</sup>

Unlike a sculpture set high on a pedestal, which is subject to preserve the work in the same condition as it left the artist's hands, openwork fashion designs become infused into the culture from which the works were born. As explored in the next subsection, this occurs through interaction with those who infuse the clothing with personalized meaning, as agents within and of culture. Justification that maximal, copyright-like protection is warranted for fashion design breaks down as the sensory experience of the work is shared among others. Such circumstances, inherent in the medium itself, are consonant with thinner protection for works of fashion designs.

#### *B. How Openwork Design Functions within Culture*

Clothing has been described as a "social skin."<sup>116</sup> On one hand, clothes touch and visually modify the body; on the other, it faces outward toward others. Like other personal objects, an object of clothing "sits somewhere near the middle of a gradient

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<sup>115</sup> See *id.* at 33.

<sup>116</sup> Terence S. Turner, *The Social Skin*, 2 J. ETHNOGRAPHIC THEORY 486, 503 (2012).

between interior and exterior, or self and society.”<sup>117</sup> As has been acknowledged, because clothes are so eminently malleable, they shape our appearance.<sup>118</sup> This is inherent in clothing design. It is *the point* of it.<sup>119</sup> As designer Dries van Noten explained, “[p]eople have enough personality and sense to make their own selection out of trends and dress the way they want . . . . It’s about showing people who they are and their personality with clothes.”<sup>120</sup> The manner in which this can be done is virtually infinite, and “[t]he process of combining items to be worn involves the process of constructing the individual in the eyes of others.”<sup>121</sup> Fashion is about the physical body, yet “not only is our dress the visible form of our intentions, but in everyday life dress is the insignia by which we are read and come to read others.”<sup>122</sup>

Some disclaim that fashion is driven by the interpersonal and cultural, instead relegating the industry as driven by a closed world of fashion editors, corporations, and designers, who exploit consumers by forcing trend-driven purchases.<sup>123</sup> The work of

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<sup>117</sup> Ian Woodward, *Domestic Objects and the Taste Epiphany*, 6 J. MATERIAL CULTURE 115, 121 (2001) (referring to objects of domestic significance). This work identifies the circumstance that some individuals are “anti-style” about consumer objects. *Id.* at 127–28. By projecting ambivalence about engagement, such individuals emphasize priority on other values. *Id.* (noting that in the domestic setting, an emphasis on shock value of a chosen object is emphasized as a contrast to conventional standards of beauty or taste).

<sup>118</sup> See Karen Tranberg Hansen, *The World in Dress: Anthropological Perspectives on Clothing, Fashion and Culture*, 33 ANN. REV. ANTHROPOLOGY 369, 373 (2004).

<sup>119</sup> See Hadley Freeman, *Land of Dreams*, THE GUARDIAN, Oct. 1, 2004, <http://www.guardian.co.uk/lifeandstyle/2004/oct/02/shopping.fashion1> (quoting designer Alber Elbaz observing, “[i]f you change a woman’s look, you change her persona”); see also, Hal Rubenstein, *One-on-One with Karl*, INSTYLE, July 2012, at 58 (according to Lagerfeld, “[d]esign has no meaning unless people wear the clothes and enjoy them”); Dirk Standen, *The Future of Fashion, Part Six: Alber Elbaz*, STYLE.COM (May 17, 2010 9:30 AM), <http://www.style.com/stylefile/2010/05/the-future-of-fashion-part-six-alber-elbaz> (Elbaz explains that “I think that our job basically is to make women and men look good”).

<sup>120</sup> Lionel Seah, *Making His Own Way in the Fashion World*, BUSINESS TIMES (Nov. 10, 2007), <http://www.asiaone.com/Just+Woman/News/Beauty+%2526+Fashion/Story/A1Story20071112-35975.html>.

<sup>121</sup> Woodward, *supra* note 114, at 22.

<sup>122</sup> ENTWISTLE, *supra* note 41, at 35.

<sup>123</sup> See, e.g., Kaori O’Connor, *The Other Half: The Material Culture of New Fibers*, in CLOTHING AS MATERIAL CULTURE 41, 42 (Susanne Küchler & Daniel Miller eds., 2005)



sociologist Georg Simmel, which is emblematic of this viewpoint, states, “it would seem as though fashion were desirous of exhibiting its power by getting us to adopt the most atrocious things for its sake alone.”<sup>124</sup> Sometimes referred to as the “trickle down” theory of dress, this viewpoint holds that the working class adopts couture trends in less expensive imitations like “good consumers,”<sup>125</sup> who then use fashion to deceive the world about one’s true social or economic situation by “seek[ing] refuge in the leveling cloak of fashion . . . .”<sup>126</sup> In a similar vein, Thorstein Veblen’s 1899 work *The Theory of the Leisure Class*, developed this concept through a theory of conspicuous consumption.<sup>127</sup> For Veblen, fashion was part of a larger trend that evidenced economically wasteful attempts at class differentiation.<sup>128</sup> Consistent with Simmel’s trickle-down theory, Veblen argues that design that is considered beautiful equates to status and, as such, nothing more than “conspicuous waste.”<sup>129</sup>

More recently, Barton Beebe argues that consumers’ fashion choices are based on a desire to reach a state of “optimal distinction”—that is, consumer choices are made in the pursuit of the level where one is “aligning themselves with certain groups and differentiating themselves from certain other groups.”<sup>130</sup> Rather than viewing fashion as individualized expression that is understood in its cultural context, Beebe weaves both status and competition into his analysis of the field:

For those who choose to participate, a ‘positional arms race[]’ of status seeking may condemn them to

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(“[p]roducers were cast at manipulative profiteers”); Georg Simmel, *Fashion*, 62 AM. J. SOC. 541, 544 (1957).

<sup>124</sup> Simmel, *supra* note 123, at 544.

<sup>125</sup> Angela Partington, *Popular Fashion and Working-Class Affluence*, in FASHION THEORY: A READER 220, 221 (Malcolm Barnard ed., 2007).

<sup>126</sup> Simmel, *supra* note 123, at 552.

<sup>127</sup> THORSTEIN VEBLÉN, *THE THEORY OF THE LEISURE CLASS* 43–62 (Dover Publications, Inc. 1994) (1899).

<sup>128</sup> *See id.* at 62 (noting that articles that were more than merely useful were intended to “mak[e] an invidious pecuniary comparison”).

<sup>129</sup> *Id.* at 79.

<sup>130</sup> Barton Beebe, *Intellectual Property Law and the Sumptuary Code*, 123 HARV. L. REV. 809, 819–22 (2010).

an ever-accelerating ‘positional treadmill.’ The implications for human happiness of the zero-sum nature of ordinal status competition are profound and controversial, and we are only beginning to work them out.<sup>131</sup>

Beebe suggests that the multiplicity of differentiation becomes blurred and meaningless, devolving into “intangible forms of distinction offer distinction without meaning, form without content—or, in semiotic terms, value without significance.”<sup>132</sup>

This Article does not align itself with any of those claims. As an initial matter, there is some question as to whether the myriad intentions of all consumers can be so neatly categorized. The following passage aptly captures this critique:

It is not just that there are grounds for doubting whether consumption arises out of emulative desires or production from greed or self-interest, but that there are grounds for doubting whether any general transcultural correspondence exists between particular activities and motives.<sup>133</sup>

Reducing fashion to a vehicle for socio-cultural relations is a challenging proposition. In it, clothing becomes artifact and artifice. In contrast, this Article argues that dressing conforms to one’s state of mind within a relevant cultural, social, and economic context. Those who wear and manipulate works of fashion design infuse the work with their own individuality and creative choices. In doing so, individuals act as authors who incorporate expression into the work. This completes a three-part cycle that begins with sources of cultural inspiration, transformed by the designer, and

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<sup>131</sup> *Id.* at 823–27 (footnotes omitted); *see also* Hemphill & Suk, *supra* note 36, at 1166 (describing a hybrid view that consumers adopt clothing that both differentiates individuals and follows trends).

<sup>132</sup> Beebe, *supra* note 130, at 884; *see also id.* at 882 (arguing that the intellectual property protection for status goods fosters the “pursuit of intangible and otherwise typically quite meaningless and useless forms of relative utility”).

<sup>133</sup> Colin Campbell, *Capitalism, Consumption and the Problem of Motives*, in CONSUMPTION AND IDENTITY 23, 33 (Jonathan Freidman ed., 1994).

finally changed, remixed, and contextualized by those who wear the clothing.

This argument has support in a strand of scholarship that considers that individuals continually use clothing as a social skin to define, display, and sometimes mask the core of one's identity.<sup>134</sup> In this way, wearers place their own original stamp on the final product. This viewpoint holds that fashion can reveal the self and, when this occurs, "the surface is precisely where 'being' is located."<sup>135</sup> Rather than labeling individuals as superficial or mindless followers, individuals are actually agents of culture, giving voice to an already existent social zeitgeist combined with their own interpretative variation.<sup>136</sup> Individuals are significant agents of change *within* culture.<sup>137</sup> This work describes characterizations of fashion as trivial or wasteful as relying on a misguided "depth ontology," which operates on the fallacy that "everything that is important for our sense of being lies in some deep interior and must be long-lasting and solid."<sup>138</sup> Significantly, this ontology holds that the surface is morally inferior because it is shallow, lacking in content, ephemeral, and trivial.<sup>139</sup> Yet culture depends on interactions that "renew culture by continuously subjecting it to new interpretations" and that through variation, interpretation, and rejection of culture, "*individuals* give culture meaning and, ultimately, life."<sup>140</sup> As one sociologist writes, "[p]eople are written by chance and history but are also the authors

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<sup>134</sup> See, e.g., Turner, *supra* note 116, at 503.

<sup>135</sup> David Miller, *Style and Ontology*, in CONSUMPTION AND IDENTITY 71, 90 (Jonathan Friedman ed., 1994).

<sup>136</sup> See, e.g., George Peter Murdock, *The Science of Culture*, 34 AM. ANTHROPOLOGIST 200, 206 (1932) ("[C]ultural innovations spring, not full-fledged from the brains of their purported inventors, but from the cultural background or 'cultural base' . . ."); see also Morris E. Opler, *The Human Being in Culture Theory*, 66 AM. ANTHROPOLOGIST 507, 518 (1964).

<sup>137</sup> See Daniel Rosenblatt, *An Anthropology Made Safe for Culture: Patterns of Practice and the Politics of Difference in Ruth Benedict*, 106 AM. ANTHROPOLOGIST 459, 469 (2004).

<sup>138</sup> Miller, *supra* note 135, at 71.

<sup>139</sup> See *id.*

<sup>140</sup> Madhavi Sunder, *Intellectual Property and Identity Politics: Playing with Fire*, 4 J. GENDER, RACE & JUST. 69, 76 (2000).

of society.”<sup>141</sup> As clothing becomes a personal choice, individuals project aspects of their identity through clothing choices.

Except for limited circumstances, individuals do not slavishly copy fashion magazines, the industry, or celebrities. Particularly today, everyone acts as his or her own editor. As street style photographer Scott Schuman observes, in any one closet “[t]here is an element of new. There is an element of previous seasons. There is your own history, you know your sweatshirt from high school and vintage pieces . . . .”<sup>142</sup> Personal preference, enjoyment, comfort, judgments about the occasion, cultural influences, individualized concepts of modesty, and one’s self image play a role. Some pieces are ruled out in the stores, rejected because those pieces do not speak to one’s own sense of self. Any particular closet might include a mix of pieces, with varying degrees of quality and price, chosen by an owner who ultimately must decide which pieces physically and psychologically fit. Individuals who incorporate separate beliefs, thoughts, and values make selections as both an agent of and within culture that is within a social and cultural context.<sup>143</sup> These are judgments that “involve[] the mediation of factors such as social normativity and expectations” and that reflect “fundamental cultural competences.”<sup>144</sup>

Individual choices about clothing are not always as intentionally expressive as literal statements printed on a t-shirt. As one scholar describes, “neither cultures nor individuals can be said in any simple way to be ‘expressing’ themselves through what is worn; it is more accurate to say that identity is being constructed and reproduced.”<sup>145</sup> Rather than attempting consistency with the designer’s intent, individuals incorporate clothing into a closet that suits the wearer’s own purposes. Individuals select and combine clothing primarily to look and feel *like oneself* in the context in

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<sup>141</sup> Rosenblatt, *supra* note 137, at 469.

<sup>142</sup> *A Big Think Interview with Scott Schuman*, BIGTHINK (Dec. 2, 2009), <http://bigthink.com/ideas/17770>.

<sup>143</sup> Malcolm Barnard, *Fashion Statements: Communication and Culture*, in *FASHION THEORY: A READER* 170, 175 (Malcolm Barnard ed., 2007).

<sup>144</sup> Woodward, *supra* note 114, at 23.

<sup>145</sup> Barnard, *supra* note 143, at 175.

which the clothing is worn.<sup>146</sup> Thus, rather than attempting to establish a fabricated status, clothing presents “*more of a summary image of oneself than a false image.*”<sup>147</sup> The closet becomes a mix of pieces from which one constructs an impression of aesthetic coherence or contradiction.<sup>148</sup> Rather than an attempt to conform or adapt to trends or flock toward particular groups, individuals use clothing as part of a vocabulary that creates a legible self-image against the background of cultural expectations.<sup>149</sup>

Some have observed that clothing can be used to mask the self, to create a sense of invisibility, safety and protection in certain circumstances. This typically occurs where the wearer believes that the event will be subject to judgment or disapproval.<sup>150</sup> As one example, in one survey of female professors, the author observed that women with a “sense of their own worth and power” in fields previously dominated by men also discussed “the need to conceal some aspects of their embodied self, for fear of ridicule or loss of personal authority.”<sup>151</sup> As another, Lanvin designer Alber Elbaz describes a similar circumstance when one of his clients “told [him] that she was in a taxi going to face her husband’s lawyer because she was getting a divorce, but she was wearing Lanvin and she felt so protected.”<sup>152</sup> These instances represent the use of clothing to protect the self in vulnerable circumstances,

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<sup>146</sup> Woodward, *supra* note 114, at 26.

<sup>147</sup> EFRAT TSEËLON, THE MASQUE OF FEMININITY: THE PRESENTATION OF WOMAN IN EVERYDAY LIFE 48 (1995) (emphasis in original).

<sup>148</sup> Woodward, *supra* note 114, at 35.

<sup>149</sup> See Davide Gualerzi, *Economic Change, Choice and Innovation in Consumption*, in THE ACTIVE CONSUMER: NOVELTY AND SURPRISE IN CONSUMER CHOICE 46, 54 (Marina Bianchi ed., 1998) (“Individuals . . . pursue the realization of identity with respect to a constantly changing world of commodities and the evolution of consumption alternatives which that entails . . . [They] strive for identification within the social structure, bending towards their private aims the system of commodities . . .”).

<sup>150</sup> See TSEËLON, *supra* note 147, at 45 (describing that some dress in anticipation of the type of audience for the clothing, keeping in mind “the kind of *atmosphere* induced by that audience: whether supportive or disapproving”) (emphasis in original).

<sup>151</sup> Eileen Green, *Suiting Ourselves: Women Professors Using Clothing to Signal Authority, Belonging and Personal Style*, in THROUGH THE WARDROBE 97, 113 (Ali Guy et al. eds., 2001).

<sup>152</sup> Reed, *supra* note 68 (statement of Alber Elbaz).

which are acts that are revelatory of cultural sensitivities of those who do so.

As other examples, one attending a wedding, or an important meeting, dress accordingly. As one sociologist describes, “[w]earing the right clothes and looking our best, we feel at ease with our bodies, and the opposite is equally true: turning up for a situation inappropriately dressed, we feel awkward, out of place and vulnerable.”<sup>153</sup> Our culture’s standards of appropriate attire demand that one dress in certain conventional ways for a wedding and in quite another for a funeral. Clothing can be used to shape the body in ways that accord to predominant cultural standards or to hide the body from scrutiny.<sup>154</sup> Even those who purport not to care about clothes incorporate cultural norms to the degree necessary to avoid social condemnation.<sup>155</sup> In this way, even individuals who purport to be unaffected by fashion trends do not fully escape cultural influences.<sup>156</sup> These circumstances operate to infuse clothing design with added cultural meaning. Wearers create culture through their modification, mixing, and choice clothing, and they also operate within a larger cultural context that influences the ways that clothing is worn.

Clothing is not simply dictated by designers, or those with an invested stake in the industry. Rather, wearers modify and use clothing as a means of self-identification as part of, and within, a cultural context. To achieve their purposes, wearers have “sampled and re-mixed” elements together in ways that the original designers never intended.<sup>157</sup> By examining how users are “able to consume designed goods ‘improperly;’ i.e., in ways not

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<sup>153</sup> ENTWISTLE, *supra* note 41, at 7.

<sup>154</sup> Woodward, *supra* note 114, at 22 (“The clothing becomes a conduit that allows other people’s intentions to penetrate deeply into the intentions of the wearer.”).

<sup>155</sup> TSEËLON, *supra* note 147, at 134 (resistance to fashion “is a status marker of the rich and famous, those powerful enough or distinguished enough to flaunt conventions, those creative enough and confident enough to invent, or those marginalized enough not to care”); *see also* ENTWISTLE, *supra* note 41, at 7.

<sup>156</sup> Woodward, *supra* note 114, at 27 (discussing a subject who had developed a wardrobe of well-worn pieces “with the intention of convincing others that she does not care about her appearance—the outcome being that she in fact cares a great deal what others think of her appearance”).

<sup>157</sup> *See* Partington, *supra* note 125, at 228–29.

anticipated or understood by designers,” the wearer’s own interpretation becomes integral to the visual appearance of the original work of fashion design.<sup>158</sup> As previously described, reinterpretation by consumers is integral to the medium; it is an acknowledged *purpose* of fashion design.<sup>159</sup> As such, it is an openwork medium and it is unjustifiable that such modification beyond the designer’s control should warrant high levels of intellectual property protection.

#### IV. NARROW PROTECTION FOR A LIMITED CLASS OF WORKS

Fashion design currently relies on a collage of trademark, patent, and copyright law for protection.<sup>160</sup> Yet a workable and comprehensive system of protection for the overall appearance of a work has remained elusive.<sup>161</sup> Court decisions have recognized that copyright protection can cover fanciful costume designs.<sup>162</sup> Similarly, a fashion accessory has been held to warrant copyright protection.<sup>163</sup> Copyright protects less expressive works, including “Beanie Babies” stuffed toys, jewelry, and Barbie dolls.<sup>164</sup> On the other hand, courts have been wary to extend protection for clothing

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<sup>158</sup> See *id.* at 228.

<sup>159</sup> See Noreen Malone, *Simon Doonan: Stop Writing About Politicians’ Clothes!*, NEW REPUBLIC (Aug. 27, 2013), <http://www.newrepublic.com/article/114483/simon-doonan-interview-asylum-and-fashion> (describing fashion as “this massive, unending landscape of products where the consumer can pick over it and pull out things that they feel best express their taste and point of view”) (statement of Simon Doonan, author and creative consultant for Barney’s New York).

<sup>160</sup> See Susan Scafidi, *Intellectual Property and Fashion Design*, in 1 INTELLECTUAL PROPERTY AND INFORMATION WEALTH 115, 121 (Peter K. Yu ed., 2006).

<sup>161</sup> See *id.*; see also *Registerability of Costume Designs*, 56 Fed. Reg. 56,530, 56,531 (Nov. 5, 1991) (although masks and costumes are considered registerable, the designs of garments “are generally considered outside copyright law”).

<sup>162</sup> See *Chosun Int’l v. Chrisha Creations*, 413 F.3d 324, 329–30 (2d Cir. 2005) (Halloween costumes); *Masquerade Novelty, Inc. v. Unique Indus., Inc.*, 912 F.2d 663, 671 (3d Cir. 1990) (costume masks); *Nat’l Theme Prod. v. Beck*, 696 F. Supp. 1348, 1356 (S.D. Cal. 1988) (costumes).

<sup>163</sup> See *Kieselstein-Cord v. Accessories by Pearl, Inc.*, 632 F.2d 989, 990 (2d Cir. 1980).

<sup>164</sup> See Vermont, *supra* note 4, at 13.

design regardless of the creativity that such works embody.<sup>165</sup> Ignoring the role of some works as cultural objects, fashion has been considered akin to works of industrial design, which are not subject to copyright protection.<sup>166</sup> The law's distinction between unprotectable clothing and protected costumes, belt buckles, toys, and computer code has been characterized as "artificial" and resting "on shaky ground."<sup>167</sup> Indeed, no court decision suggests that expressive fashion is not creative or subject to similar market failures that occur when copyrighted works are appropriated. As the theory and understanding of highly creative clothing become more well articulated and understood, this false distinction is likely to dissolve.<sup>168</sup> Yet this result is not necessarily desirable, given the untoward strength and breadth of copyright protection under current law.

At present, perhaps due to the unavailability of copyright protection, trademark law has offered the most consistent mechanism for established companies to assert against copyists where the design incorporates a symbol or logo.<sup>169</sup> Professor Susan Scafidi asserts that some designers "are likely to feature their logos as prominently as possible and incorporate them into their designs to the greatest degree that consumers are willing to

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<sup>165</sup> See *Jovani Fashion Ltd. v. Fiesta Fashions*, 500 F. App'x 42, 44 (2d Cir. 2012) (applying the conceptual separability test to a dress design, and concluding that the design elements did not warrant protection because they did "not invoke in the viewer a concept other than that of clothing"); *Galiano v. Harrah's*, 416 F.3d 411, 421 (5th Cir. 2005) (concluding that fashion designs are not protectable unless the work "could fetch a return functioning purely as an artistic commodity").

<sup>166</sup> See *Galiano*, 416 F.3d at 417 (noting that industrial designs are not protected by copyright law). For a more detailed analysis that refutes this characterization, see *infra* Section VI(B).

<sup>167</sup> Scafidi, *supra* note 160, at 122; Vermont, *supra* note 4, at 2-4.

<sup>168</sup> See Vermont, *supra* note 4, at 2 (observing that "the courts may eventually hold that fanciful clothing is protectable under regular copyright").

<sup>169</sup> See Scafidi, *supra* note 160, at 121. As Professor Scafidi notes, trade dress protection for new fashion design is not a viable method of protection after the U.S. Supreme Court's decision in *Wal-Mart Stores v. Samara Brothers*. *Id.* at 122 (citing *Wal-Mart Stores v. Samara Brothers*, 529 U.S. 205 (2000) (holding that trade dress protection for an article of clothing requires a showing of secondary meaning)); see generally *Christian Louboutin S.A. v. Yves Saint Laurent Am. Holding, Inc.*, 709 F.3d 140 (2d Cir. 2012) (protecting red sole of fashion shoe line as a trademark).



accept.”<sup>170</sup> This circumstance, which results in large or multiple logos rather than unique or novel design elements, is unlikely to foster design creativity or further cultural conversations. As with copyright protection, encouraging designers to rely on trademark protection has the unfortunate consequence of protection that can run for decades. As a practical matter, emerging designers have difficulty relying on trademark law because customers are unwilling to pay more for clothing that features a comparatively unknown mark.<sup>171</sup>

This imposes the heavy trade-offs for the grant of such rights—restricted supply and higher prices—without providing society with a concomitant public good in the form of a creative output. The traditional Ralph Lauren polo shirts that bear the pony logo obtain a theoretically infinite term of protection despite the fact that the design of the shirt dates back decades. An exact copy reproduces both the logo and the shirt design. Essentially, trademark protection enables Ralph Lauren to prevent copyists from appropriating both the logo and the shirt design. This circumstance leads to unjustifiably large welfare implications and offers no incentive for new, creative output of new, expressive shirt designs.

Design and utility patents are plausible ways that can protect ornamental or functional aspects of clothing, the expense and lead-time necessary to secure such protection renders them impracticable for many types of fashion design.<sup>172</sup> This is particularly true for short-cycle fashion that is popular only for a short time, and therefore does not require the multi-year protection that patent law provides.<sup>173</sup>

As detailed below, the economic justifications for intellectual property protection provide some theoretical foundations for the protection of the overall appearance of highly creative works of fashion design. Nonetheless, the economic analysis of the creation

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<sup>170</sup> Scafidi, *supra* note 160, at 121.

<sup>171</sup> *Id.* (quoting an unnamed young designer who stated that established companies “can just sell their trademarks. We have to sell our designs”).

<sup>172</sup> *See id.* at 122.

<sup>173</sup> *Id.*

of expressive works is incomplete for the failure to account for unquantifiable expressive and cultural values. Few could credibly dispute that those who create *haute couture* gowns lose no sales when an imperfect copy is sold at an extreme fraction of the price.<sup>174</sup> The fabric and handwork of custom made, luxury pieces simply look and feel different, and some clients will only buy an original.<sup>175</sup> Those with limited financial resources will access only the less expensive version. Indeed, some scholars have argued that copying benefits the fashion industry because “[m]ore fashion goods are consumed in a low-IP world than would be consumed in a world of high IP protection precisely because copying rapidly reduces the status premium conveyed by new apparel and accessory designs, leading status-seekers to renew the hunt for the next new thing.”<sup>176</sup> Yet such arguments fail to account for the non-economic and anti-economic values that cannot fit easily into the prevailing economic conception of intellectual property law. Perhaps unsurprising, an economic account of intellectual property law cannot be used to analyze this anti-economy.

#### A. *Modifying the Classic Intellectual Property Paradigm*

The most prevalent rationale for intellectual property protection is based on an economic analysis of the law.<sup>177</sup> This subsection provides some background on the relevant portions of the classic intellectual property paradigm, as well as a critique. The next subsection considers the manner in which intellectual

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<sup>174</sup> It should be observed that this question does not resolve the concerns of those whose work is copied by more expensive lines. Further, *haute couture* is not the exclusive source of designs that are copied. Indeed, the price points between originals in ready to wear lines and less expensive copies are narrowing significantly. *See infra* Part II.E.3.

<sup>175</sup> *See, e.g.,* Cathy Horyn, *Q & A: Alber Elbaz of Lanvin*, N.Y. TIMES (June 17, 2007), <http://runway.blogs.nytimes.com/2007/06/17/q-a-alber-elbaz-of-lanvin> (statement of Elbaz, observing, “[t]here is a huge difference when I see a suit, or pants and a shirt being done by the atelier, and the same piece done by a factory. It’s an emotion. Zara can’t copy that.”).

<sup>176</sup> Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687, 1732 (2006).

<sup>177</sup> *See* WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 4 (2003) (“Today it is acknowledged that analysis and evaluation of intellectual property law are appropriately conducted within an economic framework that seeks to align that law with the dictates of economic efficiency.”).

property protection might be considered under anti-economic principles.

As background, the economic justification of intellectual property law holds that a government grant of intellectual property rights is intended to provide the originator with the opportunity to internalize some benefits of the creation.<sup>178</sup> The underlying foundation of this theory accepts that creative works can be expensive to create and cheap for copyists to reproduce.<sup>179</sup> As William Landes and Richard Posner explain, “a firm is less likely to expend resources on developing a new product if competing firms that have not borne the expense of development can duplicate the product” because once that appropriation has occurred “competition will drive the price down to marginal cost and the sunk costs of invention will not be recouped” by the original creator.<sup>180</sup> Intellectual property protection seeks to resolve this problem by giving the creator an exclusive right to their works, by ensuring a remedy to collect a judgment, or to prevent competitors from selling appropriated copies.

This literature recognizes that granting intellectual property protection has costs. Society’s short-term trade-offs for the grant of such rights include restricted supply of the protected good, higher prices because the protected item is available only from a single producer, or sometimes both. This requires proper balance.<sup>181</sup> Optimally, to reduce the societal burden of intellectual property protection, creators should have the lowest possible level of intellectual property protection necessary to incentivize investment in creation. This circumstance is ideal because it

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<sup>178</sup> See WILLIAM D. NORDHAUS, *INVENTION, GROWTH, AND WELFARE: THEORETICAL TREATMENT OF TECHNOLOGICAL CHANGE* 72 (1969); see also LANDES & POSNER, *supra* note 177, at 13 (describing the incentive theory of intellectual property with reference to physical property entitlements, explaining that such a right “enables people to reap where they have sown. Without that prospect the incentive to sow is diminished.”).

<sup>179</sup> See NORDHAUS, *supra* note 178, at 36.

<sup>180</sup> See *id.* at 39; LANDES & POSNER, *supra* note 177, at 13.

<sup>181</sup> See William D. Nordhaus, *Schumpeterian Profits and the Alchemist Fallacy Revised* 17 (Yale Econ. Applications and Policy Discussion Working Paper Series, Working Paper No. 820309), available at <http://ssrn.com/abstract=820309> (study concluding that the tech industry of the 1990s captured modest profits for creators, but generated a comparatively high level of public benefit).

reduces the societal burdens of intellectual property protection. If the level is set too low, it is possible that future innovation will not occur.<sup>182</sup> If protection is too generous, the trade-offs inherent in intellectual property rights have unjustifiably large welfare implications. These trade-offs include the artificial scarcity inherent in the grant of intellectual property's exclusive right, higher prices, and reduced competition.<sup>183</sup> These tradeoffs become excessive if creators are given too much protection. Further, alternative incentives can alleviate the need to grant any intellectual property protection at all. For example, creators may undertake the risk of creating new works to obtain first-mover advantages, to enhance reputations, or are capable of relying on alternatives to prevent appropriation.<sup>184</sup>

Furthermore, creators generate spillovers as a consequence of the creation and distribution of new works.<sup>185</sup> Spillovers can influence the development of later works by inspiring variations, modifications, additions, and commentary.<sup>186</sup> In some cases, the public benefits that derive from the original creations can far outweigh the originators' private gains.<sup>187</sup> Indeed, one estimate suggests that spillovers may be as high as eighty percent of the total benefits that derive from newly created knowledge.<sup>188</sup> This circumstance is consistent with "[t]he economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'"<sup>189</sup> Certainly, society would benefit the most from a 100% spillover

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<sup>182</sup> See *id.*

<sup>183</sup> See NORDHAUS, *supra* note 178, at 88–89.

<sup>184</sup> As an example of an available alternative, those who provide works in digital form might be able to rely on electronic copy protection to curb the appropriation of content.

<sup>185</sup> See NORDHAUS, *supra* note 178, at 36 (noting that there is a "high degree of spillover or externality that accompanies the inventive process"); see, e.g., Brett M. Frischmann & Mark A. Lemley, *Spillovers*, 107 COLUM. L. REV. 257, 268 (2007).

<sup>186</sup> See NORDHAUS, *supra* note 178, at 36.

<sup>187</sup> See Nordhaus, *supra* note 181, at 17.

<sup>188</sup> See WILLIAM J. BAUMOL, THE FREE-MARKET INNOVATION MACHINE 134–35 (2002); see also NORDHAUS, *supra* note 178, at 38.

<sup>189</sup> *Mazer v. Stein*, 347 U.S. 201, 219 (1954).

rate if creators would continue to create for a zero percent return. This is not sustainable for businesses that incur significant costs, including fashion design.<sup>190</sup> The economic and human costs depend on a continuous source of income from newly developed products. Further, the infrastructure needed to research, develop, and create cannot be rationally sustained where assets are continually undermined through appropriation.

Scholars have recognized that the incentive rationale offers an incomplete description of creative motivation.<sup>191</sup> Numerous examples demonstrate that individuals develop creative works for reasons beyond monetary profit.<sup>192</sup> There are numerous examples of those who volunteer, donate, and contribute time, effort, and creativity to projects without any expectation of remunerative compensation.<sup>193</sup> As one example, Wikipedia<sup>194</sup> has thrived based on the work of numerous unpaid volunteers.<sup>195</sup> None of these volunteers obtains any intellectual property or ownership right in return for this work, and the site is free for anyone to copy or modify.<sup>196</sup> The original site and its continual improvements, expansions, and editing, are motivated by an altruistic desire to create a common resource of neutral, accurate information that is freely available to everyone.<sup>197</sup> The reasons that individuals contribute, despite any monetary or legal incentives, include

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<sup>190</sup> See *infra* Part II.D.

<sup>191</sup> See, e.g., LAWRENCE LESSIG, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY 233 (2008) (recognizing that people share creative works freely without any expectation of compensation for reasons that include “connecting with other people, creating an online identity, expressing oneself— and, not least, garnering other people’s attention”); Wendy J. Gordon, *Render Copyright Unto Caesar: On Taking Incentives Seriously*, 71 U. CHI. L. REV. 75, 76 (2004) (observing the existence of free sharing among creators, and that “morality is not always offended when beneficial acts go less than fully rewarded”).

<sup>192</sup> But see KEVIN G. RIVETTE & DAVID KLINE, REMBRANDTS IN THE ATTIC: UNLOCKING THE HIDDEN VALUE OF PATENTS 62 (2000) (revealing additional reasons for obtaining intellectual property rights, including wealth creation).

<sup>193</sup> See Gordon, *supra* note 191, at 84.

<sup>194</sup> See WIKIPEDIA, <http://www.wikipedia.org> (last visited Feb. 1, 2014).

<sup>195</sup> See LESSIG, *supra* note 191, at 155–162.

<sup>196</sup> See *id.* at 157.

<sup>197</sup> See *id.* at 159. As Lessig reports, the site generates no revenue and has foregone advertising to preserve its credibility. See *id.* at 162.

enhanced reputation among peers as well as the potential for better career opportunities.<sup>198</sup> This phenomenon can also be seen in the work of numerous software programmers who donate time to open source projects despite the lack of any legal incentives to do so.<sup>199</sup> Economists Josh Lerner and Jean Tirole have noted that individuals engage despite the fact that many *forgo* monetary and other opportunities because of the time contributed.<sup>200</sup> To highlight a point that will be revisited in the next subsection, ensuring that the contributor's name remains associated with her work is key to ensuring fairness and participation in a volunteer economy.<sup>201</sup>

Economic examination of the intellectual property law excludes consideration of the intangible and immeasurable, including grappling with culture and reputation.<sup>202</sup> Instead, traditional economics is designed to rely on objectively measureable data.<sup>203</sup> For example, economics assumes that rational consumers have preferences and seek to maximize utility subject to constraints that include limited resources.<sup>204</sup> To the

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<sup>198</sup> See Josh Lerner & Jean Tirole, *Some Simple Economics of Open Source*, 50 J. INDUSTRIAL ECON. 197, 218 (2002) (stating “the reputational benefits that accrue from successful contributions to open source projects appear to have real effects on developers”).

<sup>199</sup> See Karim R. Lakhani & Eric Von Hippel, *How Open Source Software Works: “Free” User-to-User Assistance*, 32 RESEARCH POL’Y 923, 924 (2003) (describing non-legal incentives for software programmers’ involvement with open source software, including “altruism; incentives to support one’s community; reputation-enhancement benefits received by information providers; and expectations of benefits from reciprocal helping behavior by others”).

<sup>200</sup> See Lerner & Tirole, *supra* note 198, at 213 (providing examples, such as one who loses compensation by declining paid work, or a researcher who focuses on the open source project rather than the university’s primary mission).

<sup>201</sup> See *id.* at 218 (“[I]t is clear that giving credit to authors is essential in the open source movement.”).

<sup>202</sup> See Shira B. Lewin, *Economics and Psychology: Lessons from Our Own Day from the Early Twentieth Century*, 34 J. ECON. LITERATURE 1293, 1302–03 (1996) (observing that leading economists rejected interdisciplinary perspectives, declaring themselves “interested only in facts of choice and made no assumptions as to the exact motivation behind these choices”); see also EUGENE SILBERBERG & WING SUEN, *THE STRUCTURE OF ECONOMICS* 256 (3d ed. 2001).

<sup>203</sup> See Lewin, *supra* note 202, at 1318.

<sup>204</sup> See SILBERBERG & SUEN, *supra* note 202, at 252.

extent that economics considers consumer preference relevant, such preferences must be grounded on actual buying behavior.<sup>205</sup> As one example, “[a]ccording to Pareto, economic theory should only register ‘the pure and naked fact of choice,’ as the theorist does in the construction of the indifference curve when he starts from the observation of empirical data.”<sup>206</sup> The emphasis on actual consumer behavior creates a conundrum when evaluating intellectual property, culture, and creativity. As one economist has observed, this leads to a circularity in the analysis because “[p]eople choose what they wanted, and what they wanted was defined by what they chose.”<sup>207</sup> Further, the point of a creative enterprise is to make things “that didn’t exist before.”<sup>208</sup> Economics cannot assess the counter hypothetical of creativity that is never realized.<sup>209</sup> Restricting the analysis to that which can be measured on an indifference curve erases considerations relevant to the comparatively messy individual values. This does not mean that such considerations do not exist. Further, individuals are motivated by passions and prejudices for commodities that include a strong expressive component. Consumers sometimes act in “irrational and exceptional” ways and “those forms of passionate behavior . . . lie beyond the realm of economic inquiry.”<sup>210</sup> Predictably, economics lacks a vocabulary to analyze the creative

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<sup>205</sup> See *id.* at 315. As one author describes, a number of prominent economists declared the field “independent of psychological assumptions,” and that their work “was only interested in facts of choice and made no assumptions as to the exact motivation behind these choices.” Lewin, *supra* note 202, at 1304.

<sup>206</sup> Fabio Ranchetti, *Choice without Utility?*, in *THE ACTIVE CONSUMER: NOVELTY AND SURPRISE IN CONSUMER CHOICE*, *supra* note 149, at 28.

<sup>207</sup> Lewin, *supra* note 202, at 1317.

<sup>208</sup> Ronnie Cooke Newhouse, *Rei Kawakubo*, *INTERVIEW MAGAZINE*, [http://www.interviewmagazine.com/fashion/rei-kawakubo/#\\_](http://www.interviewmagazine.com/fashion/rei-kawakubo/#_) (last visited Feb. 7, 2014).

<sup>209</sup> See *Innovative Design Protection and Piracy Prevention Act: Hearing on H.R. 2511 Before the U.S. Subcomm. on Intellectual Property, Competition, & the Internet*, 112th Cong. 8 (2011) (statement of Lazaro Hernandez, designer and cofounder, Proenza Schouler) [hereinafter *Hernandez Testimony*] (referring to “all of the small designers put out of business by your current practices and business models”).

<sup>210</sup> Marina Bianchi, *Introduction to THE ACTIVE CONSUMER: NOVELTY AND SURPRISE IN CONSUMER CHOICE*, *supra* note 156, at 1.

and cultural value of a work and the spillovers that work creates.<sup>211</sup> Having excluded individual values from the analysis, an economic model that attempts to assess the value of creative works (realized and unrealized) is necessarily incomplete.

Nonetheless, an argument can be made that fashion should be protected under a straightforward economic incentive analysis.<sup>212</sup> Exclusive rights for fashion design can be said to operate in the same way as any other creative enterprise.<sup>213</sup> That is, the research and development that a fashion designer puts into a line is lost when a copyist sells a duplicate for less. As one designer described, “designing a fashion collection is no different from the intellectual process involved in creating a painting or a song except perhaps its lengthy process” because development begins ten months before launch.<sup>214</sup> The next subsection considers the reasons why a limited, circumscribed form of legal protection is beneficial to a narrow class of highly creative fashion. These reasons are based on a confluence of considerations from the economic and anti-economic fields.

### *B. Justifications within an Anti-Economy*

The *sine qua non* for an emerging artist engaged in an anti-economy is to be identified as one who originates (or adds to) the cultural conversation.<sup>215</sup> This non-economic capital can be remarkably valuable to those seeking to influence, and thereby

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<sup>211</sup> Jonathan Friedman, *Introduction* to CONSUMPTION AND IDENTITY 6 (Jonathan Friedman ed., 1994) (“[T]he social and cultural properties of existence cannot, and perhaps should not, be properly incorporated into economic theory as it stands.”); Raustiala & Sprigman, *supra* note 176, at 1689 n.1 (The authors of one article noted this difficulty by observing that they were “unsure how to measure [the industry’s creative output] in any reliable way.”).

<sup>212</sup> See Ronald Urbach and Jennifer Soussa, *Is the Design Piracy Protection Act a Step Forward for Copyright Law or is it Destined to Fall Apart at the Seams?*, THE METROPOLITAN CORPORATE COUNSEL (July 1, 2008, 12:00 AM), <http://www.metrocorpcounsel.com/articles/10143/design-piracy-protection-act-step-forward-copyright-law-or-it-destined-fall-apart-sea>.

<sup>213</sup> See *Hernandez Testimony*, *supra* note 209, at 6; see also *infra* Part V.C (outlining the economic costs of developing fashion design).

<sup>214</sup> See *Hernandez Testimony*, *supra* note 209, at 6.

<sup>215</sup> See BOURDIEU, *supra* note 33, at 40.



obtain economic viability. Such capital can inure only to those who produce culture and cultural objects.<sup>216</sup> When society recognizes and legitimatizes these works, the cultural producer who is attributed with the work gains social capital in the form of reputation and influence. Such designs touch on the intellectual, social, and cultural dimensions of society and are thought to provide the designer with an aesthetic authority and sustained aesthetic reputation.<sup>217</sup> Thus, such creators “play[] for stakes that are non-material and not easily quantified.”<sup>218</sup>

Playing for these stakes has a price. For avant garde fashion designers, this effort translates to the creation of original designs that do not appeal to the mainstream. Thus, the avant garde designer must relinquish short-term economic viability to establish legitimacy to ensure long-term relevance. This focus on the incentives to create new, disruptive works is consistent with the *creative* purposes of intellectual property law. In other words, one who seeks to create new, cutting-edge expression is precisely the type of creator who furthers the purpose of creating novel, creative manifestations.

To integrate intellectual property theory with the operation of the anti-economy, one must loosen hold on the concept that one-for-one lost sales are the sole measure of impact. For these designers, it is significant that the wide and immediate availability of literal copies of works exists without attribution. Such copying has an effect on the designer’s non-economic capital. Significantly, fashion knockoffs present a problem that is not faced in other industries, such as open source software programmers, musicians, filmmakers, and authors.<sup>219</sup> Unauthorized copying of a song, film, or other identifiable indicators of the author’s identity can enhance the reputation of the original creator. As an example, one who obtains an unauthorized copy of Adele’s latest song understands that Adele is the creator of the work. This reputation

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<sup>216</sup> See *id.* at 37.

<sup>217</sup> See Appadurai, *supra* note 32, at 16; BOURDIEU, *supra* note 33, at 113 n.3.

<sup>218</sup> PIERRE BOURDIEU, *OUTLINE OF A THEORY OF PRACTICE* 177 (Richard Nice trans., Cambridge Univ. Press 1977) (1972).

<sup>219</sup> See Lewin, *supra* note 202, at 1302 and accompanying text.

and fan base enables Adele to enjoy an enhanced reputation as a cultural producer of expressive works. It gives her bargaining clout with her record label. Indeed, this might enable Adele to build an infrastructure that builds on her reputation through the sale of concert tickets, opportunities to create works for films, obtain awards, and earn remuneration from later variations that promote her creative capabilities and garner economic return. Stated another way, her short-term loss from the unauthorized duplication of her music might not interfere with her long-term reputational (and ultimately economic) gain.

This is because the copied works bear an attributive “stamp” of the original author. To revisit our example, even if her digitized songs do not include her name, listeners can recognize the title, voice, and sound that can be associated with Adele. In such circumstances, the cultural authority of Adele as the original creator is preserved. In contrast, retail copyists in the fashion field rarely (if ever) provide attribution of the original creator through trademark, labeling, or advertising. Consumers who do not scour the runways and trade publications may not be aware of the origin of these designs. In this way, the original designer’s cultural capital is undermined, because he or she obtains no “credit” for the unique design that is sold without the name. A justification for intellectual property law based solely on economics fails to address the values of cultural goods, particularly those produced in an anti-economy, which operates on the less quantifiable values encompassed in culture, identity, and reputational capital.<sup>220</sup>

The economic argument loses sight of the fact that the designer’s cultural capital has been affected, even if her economic capital has not. By narrowing the definition of harm to the economic-specific lost sales, the inquiry disregards that highly

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<sup>220</sup> In other contexts, legal scholars have observed a distinction between the economic values that underlie intellectual theory and less tangible values. *See, e.g.*, ROBERTA ROSENTHAL K WALL, *THE SOUL OF CREATIVITY* 72–73 (2010) (observing that the economic rationale for intellectual property protection fails to consider the internal dimension of the creative process); John Tehranian, *Parchment, Pixels, & Personhood: User Rights and the IP (Identity Politics) of IP (Intellectual Property)*, 82 U. COLO. L. REV. 1, 55 (2011); Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535, 587 (2004).

creative designers are building a reputation as cultural producers. The production of avant-garde cultural products does not operate in terms of lost sales and standard principles of competition, but rather in an economy of reputation and of cultural production. A pure economic definition of harm cannot account for these types of anti-economic concerns. The distinction between traditional commodity enterprises and those that operate in the anti-economy can be described as “the opposition between ordinary entrepreneurs seeking immediate economic profit and cultural entrepreneurs struggling to accumulate specifically cultural capital, albeit at the cost of temporarily renouncing economic profit.”<sup>221</sup> In short, the anti-economy of fashion disclaims short-term profit in favor of increased voice, vision, and reputation as a cultural producer. Only after the reputation has been built might one have the opportunity to create an economically viable line. This concept has no place in classic economic analysis and is, in that sense, irrational.<sup>222</sup> One operating under standard economic principles will maximize profits, but one working in the anti-economy seeks to maximize reputational capital as a cultural producer to the detriment of early profits.

One might expect that the economic motivation to sell clothing is a sufficient alternative justification against any need for legal protection. In fashion, it is easy to find cutting-edge designs that sell for thousands of dollars and it is easy to presume that nearly all of this is profit. In truth, despite the high price tags, some of the most creative, original *haute couture* collections are rarely profitable. It has been estimated that the market for couture sits somewhere between 200 and 4,000 clients worldwide.<sup>223</sup> As Jean-Paul Gaultier has pointed out, he depends on only sixteen clients worldwide to enable his *haute couture* line to financially break

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<sup>221</sup> BOURDIEU, *supra* note 33, at 82–83.

<sup>222</sup> *See id.*; *see also* J.N. KAPFERER & V. BASTIEN, *THE LUXURY STRATEGY* (2009).

<sup>223</sup> *See* DANA THOMAS, *DELUXE: HOW LUXURY LOST ITS LUSTER* 29 (2007) (estimating 200); William Langley, *Haute Couture: Making a Loss is the Height of Fashion*, TELEGRAPH, July 11, 2010, <http://fashion.telegraph.co.uk/news-features/TMG7883236/Haute-couture-Making-a-loss-is-the-height-of-fashion.html> (stating that “the number of couture customers worldwide is no more than 4,000”).

even.<sup>224</sup> When a large stake in Gaultier's house was sold in 2011, the purchaser assumed 14 million euros in debt. It was reported that Gaultier's widely sold fragrances made the purchase financially feasible to the buyer, suggesting that Gaultier's conceptual runway fashion was not the prime financial consideration.<sup>225</sup> As fashion critic Cathy Horyn explains, "nobody expects to make money selling \$30,000 dresses. That's not what haute couture exists for. It's to generate publicity for all the other products, perfume, for instance, that a company sells."<sup>226</sup> As another source confirms, for the most part, the average haute couture line is "forced to convert its financial deficit into an investment in the brand in order to obtain a return on investment through other derivative products."<sup>227</sup>

In part, this is because some designers incorporate significant handmade tailoring and experience few, if any, benefits from economies of scale.<sup>228</sup> As one bespoke suit maker recently explained, "[t]here's no scalability . . . . Whether we're making 50 suits or 1—each unit costs the same."<sup>229</sup> Further, the supply of craftspeople capable of performing such work is quite limited.<sup>230</sup> At the same time, the standards to earn the label *haute couture* are remarkably labor intensive.<sup>231</sup> For example, designer Jean-Louis

<sup>224</sup> See Collins, *supra* note 97.

<sup>225</sup> See Suzy Menkes & David Jolly, *Hermès Is Selling Its Stake in Gaultier's Fashion House*, N.Y. TIMES, May 3, 2011, <http://www.nytimes.com/2011/05/04/business/global/04iht-fashion04.html>.

<sup>226</sup> Cathy Horyn, *Is There Room for Fashion at the Paris Haute Couture Shows?*, N.Y. TIMES (July 25, 1999), <http://www.nytimes.com/1999/07/25/style/fashion-review-is-there-room-for-fashion-at-the-paris-haute-couture-shows.html>.

<sup>227</sup> KAPFERER & BASTIEN, *supra* note 222, at 34.

<sup>228</sup> See, e.g., Eddie Eng, *Why is Japanese Fashion So Expensive?*, HYPEBEAST (April 17, 2013), <http://hypebeast.com/2013/4/why-is-japanese-made-fashion-so-expensive>; see also Eric Wilson, *Shoe Battles: Going Toe-to-Toe in Stilettos*, N.Y. TIMES, June 19, 2013, <http://www.nytimes.com/2013/06/20/fashion/shoe-battles-going-toe-to-toe-in-stilettos.html> (describing the cost of leather and labor in Europe as driving up the prices of luxury shoes).

<sup>229</sup> Adam Davidson, *What's a \$4,000 Suit Worth?* N.Y. TIMES, Sept. 4, 2012, <http://www.nytimes.com/2012/09/09/magazine/whats-a-4000-suit-worth.html> (statement of Anda Rowland of Anderson & Sheppard).

<sup>230</sup> See *id.*

<sup>231</sup> In France, the term "*haute couture*" can only be used by those fashion houses that have been granted the designation by the French Ministry of Industry. See *MODE À PARIS*,

Scherrer disclosed that one piece, which “contained over half a mile of gold thread, 18,000 sequins, and had required hundreds of hours of hand-stitching in an atelier” could only be sold for two-thirds of its fair price.<sup>232</sup>

Several ready-to-wear lines become profitable only after becoming established in the public mind, and some never do.<sup>233</sup> Those who design cutting edge work cannot expect robust sales at the start.<sup>234</sup> By eschewing the mainstream taste in order to change it, the avant garde designer necessarily narrows the potential customer base sometimes almost to a vanishing point. These editorial pieces are intended for those who seek to establish themselves as generating a non-economic form of cultural and social capital. In doing so, the creator maintains relevance, authority, reputation, and ultimately economic sustainability. In fashion, the designer’s viability depends on the ability to continue to revolutionize and thereby gains credibility as a cultural producer. The difficulty for the avant garde designer is sustaining herself long enough to accumulate symbolic, social, and cultural capital which will, in the long run, leads to economic sustainability. As Bourdieu recognized, “[t]here are economic conditions for the indifference to economy which induces a pursuit of the riskiest positions in the intellectual and artistic avant garde, and also for the capacity to remain there over the long period without any economic compensation.”<sup>235</sup> It is not easy, and copying the brightest ideas threatens the designer’s potential to

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<http://www.modeaparis.com/en/federation> (English Language Version; follow “/Federation” hyperlink) (last visited Aug. 5, 2013) (describing “Haute Couture” as “a legally protected and controlled label that can only be used by those fashion houses, which have been granted the designation by the French Ministry of Industry. The group of companies that enjoy the Haute Couture label is reviewed annually.”).

<sup>232</sup> See Langley, *supra* note 223.

<sup>233</sup> For one failure, see Constance C.R. White, *Mizrahi, Designer Most Likely to Succeed, Doesn’t*, N.Y. TIMES, Oct. 2, 1998, <http://www.nytimes.com/1998/10/02/nyregion/mizrahi-designer-most-likely-to-succeed-doesn-t.html>.

<sup>234</sup> See BOURDIEU, *supra* note 33, at 67 (observing that the most risky enterprises are “all avant garde undertakings which precede the demands of the market”).

<sup>235</sup> *Id.* at 40.

remain sustainable until economic viability can be reached.<sup>236</sup> For the designer whose earliest designs are widely copied, it is cold comfort that the total buying levels within the industry as a whole are vibrant once knockoffs are added to the calculus.

As one example, McQueen's shows frequently precipitated visceral reactions among attendees; nonetheless he claimed that the shows were never intended for the buyers in the audience. He said, "I do it for the people who see the pictures in the press afterwards, in newspapers and in magazines. I design the shows as stills and I think that if you look at those stills they tell the whole story."<sup>237</sup> McQueen's vision is an ideal model of the anti-economy in operation. By remaining true to his design aesthetic, which the mass-market found offensive at the time, he was able to create and sustain a high-end line that ultimately outlived him. The people who viewed the stills became acquainted with his work, from which he earned reputational capital. A highly acclaimed aesthetic success, the Metropolitan Museum of Art in New York City held a posthumous retrospective of his work in 2011.<sup>238</sup> His fashion business employs more than 500 individuals worldwide, and has continued its diffusion line, McQ, which sells lower-priced, more affordable works.<sup>239</sup> Having made it through lean years, when he lacked the economic support of the larger fashion houses or history of large retail orders, McQueen ultimately built a business that continues to generate creative goods.<sup>240</sup>

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<sup>236</sup> See *Hernandez Testimony*, *supra* note 215, at 5 (referring to "all of the small designers put out of business by your current practices and business models").

<sup>237</sup> Frankel, *supra* note 70, at 24 (quoting Alexander McQueen).

<sup>238</sup> See BOLTON, *supra* note 71, at 232 (cataloguing the exhibit).

<sup>239</sup> See Università Commerciale Luigi Bocconi, *Bocconi & Jobs Company Profiles* (Mar. 22, 2013), available at [http://www.unibocconi.eu/wps/wcm/connect/4b184d0f-0136-4384-ad1e-c80981793643/B%26JCompanies\\_Profile\\_Shanghai.pdf?MOD=AJPERES](http://www.unibocconi.eu/wps/wcm/connect/4b184d0f-0136-4384-ad1e-c80981793643/B%26JCompanies_Profile_Shanghai.pdf?MOD=AJPERES) (Alexander McQueen company profile); see also Agence France Press, *McQ Alexander McQueen Unveils Autumn-Winter 2013 Fashion Film*, BUSINESS OF FASHION (Feb. 17, 2013), <http://www.businessoffashion.com/2013/02/video-mcq-alexander-mcqueens-autumn-winter-2013-collection.html> (describing the most recent season's line); MCQ, [http://www.alexandermcqueen.com/mcq/en\\_US](http://www.alexandermcqueen.com/mcq/en_US) (last visited Jan. 27, 2014).

<sup>240</sup> Avant-garde fashion is not limited to emerging designers. Certainly, leading designers including Karl Lagerfeld, Tom Ford, Marc Jacobs, Dries Von Noten, among others, have created frequent and significant anti-fashion. However, the reputation of,

This echoes the experience of Yves Saint Laurent, who up until 1970 had produced a number of crowd pleasing shows under his own name and for Christian Dior. In 1971, Saint Laurent produced a show *Hommage aux Années 40*, which created a scandal in France.<sup>241</sup> The collection featured short patterned skirts, platform shoes, and turbans of the kind worn by Parisians during the Nazi occupation in the 1940s. The collection included a green fox fur jacket of the type worn by prostitutes during that era. Called “a tour de force of bad taste” at the time, attendees felt that the show evoked a time period that they had no desire to either recall or popularize.<sup>242</sup> Now that the influence of this show has been understood, it has been observed, “with one collection, Yves Saint Laurent upended everything and made fashion fresh by borrowing elements from the past.”<sup>243</sup> According to one critic, “later on, people recognized it for how influential the show was, and how far-sighted.”<sup>244</sup> Saint Laurent became one of the most influential designers of the later part of the twentieth century.

The careers of McQueen and Saint Laurent illustrate the operation of the anti-economy of fashion. Notably, the significant collections for both designers were produced early in their careers. This is consistent with the view that a designer’s first impression matters. As one industry executive explained, “It’s hard to start with a t-shirt line, then do a runway line. You can always do t-shirts later. You must establish the credibility of the line first.”<sup>245</sup> This is the most difficult time for a designer financially, as it can

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and financial support for, these established designers is comparatively resilient in comparison to emerging designers.

<sup>241</sup> See Rebecca Voight, *Seventies Chic, Eighties Excess—Here’s Where It All Started*, STYLE (Apr. 14, 2010, 2:47 PM), <http://www.style.com/stylefile/2010/04/seventies-chic-eighties-excessheres-where-it-all-started>.

<sup>242</sup> See Suleman Anaya, *What to Make of Saint Laurent?*, BUSINESS OF FASHION (Mar. 5, 2013), <http://www.businessoffashion.com/2013/03/what-to-make-of-saint-laurent.html>.

<sup>243</sup> Tina Isaac, *Fashion Rewind*, 94 FRANCE MAG. 48, 53 (Summer 2010) (statement of Serge Carrera).

<sup>244</sup> Cathy Horyn, *Revolution and Couture*, N.Y. TIMES, June 2, 2008, [http://www.nytimes.com/packages/html/fashion/20080602\\_YSL\\_FEATURE/index.html](http://www.nytimes.com/packages/html/fashion/20080602_YSL_FEATURE/index.html) (multimedia file).

<sup>245</sup> Interview with Jan-Hendrick Schlottman, Chief Executive Officer, Derek Lam (Aug. 8, 2012) (notes on file with author).

take several years before a line becomes profitable.<sup>246</sup> Although both McQueen and Saint Laurent were rejected by the mainstream consumer at the start, once established both went forward to establish creative, productive fashion lines.

Notably, the concept of the development of non-economic capital is related, although palpably distinct, from the concept of moral rights. “The essence of a moral-rights injury lies in the damage caused to the author’s personality, as that personality is embodied in the fruits of her creation.”<sup>247</sup> Moral rights protect “damage to the human spirit, rather than economic harm.”<sup>248</sup> In contrast, protection within the anti-economy protects non-economic capital rather than harm to the individual designer’s human spirit or dignitary interest. Although moral rights protect against distortion of an artist’s work, fashion *invites* modification and distortion by those who wear the clothing. Fashion protection does not endeavor to protect against misattributions or modification of the garments to protect the designer’s personal connection to a work. Rather, legal protection is intended to protect the designer’s non-economic capital as an essential piece of protecting the designer’s ability to develop, and eventually profit, from participating in a cultural conversation. The reputational and cultural considerations inherent in the anti-economy are distinct from intellectual property’s conception of harm under trademark law, which is intended to protect the company’s interest in preserving a goods-source association. Rather, the anti-economy is built on the concept of deliberately limiting one’s market during the early phase by rejecting or avoiding the dominant aesthetic, with the view toward creating leadership as a cultural producer.<sup>249</sup>

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<sup>246</sup> See Vanessa O’Connell, *A Bold Expansion for Derek Lam*, WALL ST. J. (Sept. 18, 2009), <http://online.wsj.com/article/SB10001424052970203440104574403033411996254.html> (noting that Derek Lam, a line founded in 2004, was first profitable in 2007 but had subsequently began losing money again).

<sup>247</sup> Roberta Rosenthal Kwall, *Preserving Personality and Reputational Interests of Constructed Personas Through Moral Rights: A Blueprint for the Twenty-First Century*, 2001 U. ILL. L. REV. 151, 158 (2001).

<sup>248</sup> *Id.* at 166.

<sup>249</sup> Significantly, in the fashion industry an individual designer’s cultural capital is specific to the designer. In other words, the public eye views the singular lead designer



In contrast, trademark owners do not purport to generate creative works or disclaim profits at any time.

## V. PROPOSED FASHION PROTECTION AS A MODEL FOR OPENWORK PROTECTION

### A. *The IDPPPA as an Openwork Model*

A creator who draws heavily on exogenous inputs should receive a limited form of right.<sup>250</sup> Stated another way, one who stands on another's shoulders must acknowledge that one's place is based on such assistance. The current system of intellectual property law fails to adequately grapple with this concept. It is not efficient to provide copyright-like intellectual property rights for works that draw significantly on both predecessors and users for creative strength.<sup>251</sup> Lowering the nature of the substantive right is a viable way to resolve the problem of protection for works while crediting the use of other sources.<sup>252</sup>

The fashion industry had proposed the Innovative Design Protection and Piracy Prevention Act (IDPPPA) that, as of August 2010, sought protection for apparel and certain accessories.<sup>253</sup>

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as the creator of the works, rather than the company that produces and sells the line. This phenomenon as lead houses change designers.

<sup>250</sup> See Gordon, *supra* note 191, at 78 (stating that the "law insufficiently recognizes that, because predecessors also built on tradition, the claims that they can rightfully assert against the makers of later art should be limited").

<sup>251</sup> See generally Vermont, *supra* note 4, at 2 (concluding that "the courts may eventually hold that fanciful clothing is protectable under regular copyright" and that the functionality doctrine is unlikely to prevent this circumstance).

<sup>252</sup> Cf. Joseph E. Stiglitz, *Knowledge as a Global Public Good*, in GLOBAL PUBLIC GOODS: INTERNATIONAL COOPERATION IN THE 21ST CENTURY 308, 315 (Inge Kaul et al. eds., 1999) (querying "How much of the returns to the innovation should be credited to this use of the global commons?").

<sup>253</sup> H.R. 2511, 112th Cong. (2011). The proposed Act defines "apparel" to include (1) "an article of men's, women's, or children's clothing, including undergarments, outer wear, gloves, footwear, and headgear"; (2) "handbags, purses, wallets, tote bags, and belts" and (3) "eyeglass frames." *Id.* at § 2(a)(9). Over the past several years, versions of the fashion legislation have been proposed. See S. 3523, 112th Cong. (2012); H.R. 2033, 110th Cong. (2007); S. 1957, 110th Cong. (2007); H.R. 2196, 111th Cong. (2009); H.R. 5055, 109th Cong. (2006); S. 3728 111th Cong. (2010). For simplicity, this Article focuses on the IDPPPA as a recent version of a proposal for fashion design protection.

Ultimately, this version of the bill failed.<sup>254</sup> In this author's view, although the IDPPPA did not make it to a full Congressional vote, other versions are likely to be proposed in future sessions. Other major pieces of intellectual property legislation have taken years of iterative proposals to reach final enactment.<sup>255</sup> In this author's opinion, efforts to legislate U.S. design protection for articles of fashion design are likely to continue until the effort is successful.<sup>256</sup>

More broadly, any failure of the IDPPPA is key to understanding the intellectual property system's inability to comprehend works that do not place the author in the center of a creative drama. Fashion, as a commercial art, openly acknowledges its sources in a way that might seem foreign to authors, sculptors and scientists. Consistent with the reality of their creative process, supporters of the IDPPPA did not push for copyright-like protection. Rather, the bill was drawn narrowly, in an implicit acknowledgement that limited protection was all that was necessary for the industry. This quiet proposal might not have attracted the attention of Congress. More generally, perhaps certain quarters of the intellectual property system have learned to respond only to the aggrandizement of the romantic author, and might be unresponsive to those that acknowledge that their work

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<sup>254</sup> See Note, *The Devil Wears Trademark: How The Fashion Industry Has Expanded Trademark Doctrine to Its Detriment*, 127 HARV. L. REV. 995, 1000 (2014).

<sup>255</sup> The recent revisions to the Patent Act required six years and several versions prior to its passage into law. See Gregory Mandell, *Proxy Signals: Capturing Private Information for Public Benefit*, 90 WASH. U. L. REV. 1, 45 (2012); Paul Morgan & Dennis Crouch, *The Ambiguity In Section 102(A)(1) Of The Leahy-Smith America Invents Act*, 2011 PATENTLY-O PAT. L.J. 29 (Dec. 7, 2011); Richard Colby, *Rohauer Revisited: 'Rear Window' Copyright Reversions, Renewals, Terminations, Derivative Works And Fair Use*, 13 PEPP. L. REV. 569, 585 n.54 (1986) (observing that the 1976 Amendments to the Copyright Act was a twenty-year process).

<sup>256</sup> Cf. *Exclusive Interview: Julie Zerbo of The Fashion Law*, INVERTED EDGE (Nov. 8, 2013) (statement of Julie Zerbo), available at <http://invertededge.com/thethread/exclusives/exclusive-interview-julie-zerbo-fashion-law/> (one involved in promoting fashion design legislation stating, "I think we will get there one day, but as you likely know, the governmental process is slow and every time a new bill is proposed there is a lot of misinformation is put out there," and that "I hope for the sake of designers and for the US fashion industry that we can pass something soon because it really is upsetting to see young designers getting copied repeatedly by these big fast fashion retailers.").

has a history, an influence, and a place among the rest of human culture.

More specifically, the IDPPPA was a *sui generis* proposal that was narrow in scope and particularly geared to the needs of the fashion industry. In the absence of this specialized form of protection, designers are likely to turn to trademark, copyright, and patent protection to discourage copyists.<sup>257</sup> Each of these is far stronger than the former proposed legislation, out of step with the needs of the fashion industry, and inconsonant with an appropriate regime for an openwork genre. In other words, the IDPPPA offered a narrow, short-term form of protection that sends works into the public domain far more quickly than other types.

Beyond this, this *sui generis* IDPPPA scheme offers a rational template for openwork media. By requiring a heightened standard of creativity, a restricted infringement standard, and a comparatively short three-year term, the IDPPPA can be seen as a balanced accounting of the exogenous inputs that impact the creative works.

To take a close look at the proposal, the IDPPPA was designed to provide limited protection to works that “are the result of a designer’s own creative endeavor,” and “provide a unique, distinguishable, non-trivial and non-utilitarian variation over prior designs for similar types of articles.”<sup>258</sup> In application, such language suggested that a work must demonstrate qualities akin to nonobviousness in patent law. This avoided granting protection for works in the mass-market domain. Thus, even well-crafted and aesthetically pleasing results were not sufficient to justify protection unless the work presented a demonstrable level of creativity. Under this standard, works that relied primarily on

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<sup>257</sup> See generally, Shirin Tefagh & Lynne M.J. Boisineau, *Fighting the Fashion Knockoff War*, AMERICAN LAWYER ONLINE (Dec. 18, 2013), <http://www.americanlawyer.com/id=1202633711744/Fighting-the-Fashion-Knockoff-War?slreturn=20140215190151> (observing that designers will rely more heavily on design patents to seek protection); Vermont, *supra* note 4, at 90 (predicting that designers will successfully open copyright protection to compensate for the failure of a *sui generis* design protection bill); Scafidi, *supra* note 12, at 79–80.

<sup>258</sup> H.R. 2511.

market preferences, already-existing trends, and prosaic function add little original spark to the cultural conversation. By requiring a high level of originality, the IDPPPA protects economically fragile avant-garde work.

Infringement required copying, either from the original design or from an image of the design.<sup>259</sup> The IDPPPA stated that the plaintiff must demonstrate that “it can be reasonably inferred from the totality of the surrounding facts and circumstances that the defendant saw or otherwise had knowledge of the protected design.”<sup>260</sup> Critically, an infringing work must have been “substantially identical,” which required a showing that the infringement article was “so similar in appearance as to be likely to be mistaken for the protected design, and contains only those differences in construction or design which are merely trivial.”<sup>261</sup> This standard allowed the market to translate trends to all price categories. Together with a very limited term of protection, this standard facilitated spillovers, such that highly original works can inspire variations, trends, remixed versions, and variations at the same or different price points.<sup>262</sup> This ensured that no single designer could claim ownership to a trend and allowed the quick dissemination of cutting-edge design ideas for others to vary. Further, infringement did not include protected designs that appeared in images, including photographs and films. This allowed the vibrant industries that have arisen around fashion, including street style photography and blogs, to continue without legal restraint.<sup>263</sup>

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<sup>259</sup> See *id.* § 2(e).

<sup>260</sup> *Id.* § 2(g).

<sup>261</sup> *Id.* § 2(a)(2).

<sup>262</sup> See Brett Frischmann, *Spillovers Theory and Its Conceptual Boundaries*, 51 WM. & MARY L. REV. 801, 813–814 (2009) (arguing that intellectual property systems allow some uses to be allocated by the market and designating other uses as open in order to “enable some internalization and promote some externalities”).

<sup>263</sup> The IDPPPA provides some additional safe harbors from infringement. Works that are independently created are not infringing. See H.R. 2511 § 2(e)(3)(b). Further, the act does include a provision akin to experimental use, which allows the recreation of a single copy for personal or family member use, so long as the design is not sold. *Id.* at § 2(h). In this author’s opinion, these exclusions do not go far enough to protect creators. See *infra* Part V.D.

The IDPPPA limited protection to three years, after which time a work could be reproduced freely and fully as part of the public domain.<sup>264</sup> This was in stark contrast to the current copyright term of protection, which runs for the life of the author plus seventy years.<sup>265</sup> The distinction can be seen by comparing protection for the first Chanel jacket sold in 1916— under a three-year term, the jacket could be identically reproduced after 1919. Under standard copyright law, the jacket would be protected until 2014, seventy years after the death of its designer.<sup>266</sup> As works fall into the public domain after a very short time period, other designers can choose to fully appropriate such designs or to offer creative variations of their own after that time period has passed.

The IDPPPA allowed designers to assert a narrow range of rights for a short period of time. This limited right was consonant with an industry that relies on a significant level of creative inputs as the foundation of the works, moves quickly, and is subject to actual and contextual variation and interpretation by those who engage with the designs. Further, this ensured a high level of spillover effects from original designs.

### *B. Fashion as Dysfunction*

As previously stated, courts consider fashion design to be comparable to industrial design, and regardless of the creativity that such works embody.<sup>267</sup> Clothing is typically considered useful and therefore not subject to protection.<sup>268</sup> This interpretation acts

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<sup>264</sup> See *id.* § 2(d).

<sup>265</sup> 17 U.S.C. § 302(a) (2012).

<sup>266</sup> 17 U.S.C. §§ 302–03 (2012).

<sup>267</sup> See *supra* Part V; see also *Jovani Fashion Ltd. v. Fiesta Fashions*, 500 F. App'x 42 (2d Cir. 2012); *Galiano v. Harrah's*, 416 F.3d 411, 421 (5th Cir. 2005).

<sup>268</sup> See *Whimsicality, Inc. v. Rubie's Costume Co., Inc.*, 891 F.2d 452, 455 (2d Cir. 1989); U.S. Copyright Office, *Circular 40: Copyright Registration for Pictorial, Graphic and Sculptural Works* (June 2013), available at <http://www.copyright.gov/circs/circ40.pdf>; see also *Registrability of Costume Designs*, 56 Fed. Reg. 56,530 (Nov. 5, 1991) (“The Copyright Office has generally refused to register claims to copyright in three-dimensional aspect of clothing or costume design on the ground that articles of clothing and costume are useful articles that ordinarily contain no artistic authorship separable from their overall utilitarian shape.”). There are some exceptions to this

as a legal conclusion that lacks meaningful analysis.<sup>269</sup> As two anthropologists observed, “[w]omen’s evening or formal dress has fulfilled a fairly constant function for several centuries. At the same time it is about as free from utilitarian motivation as dress can well be.”<sup>270</sup> Others have considered that fashion is “relatively little limited or warped by considerations of external utility.”<sup>271</sup> As sociologist Thorstein Veblen stated:

No one finds difficulty in assenting to the commonplace that the greater part of the expenditure incurred by all classes for apparel is incurred for the sake of a respectable appearance rather than the protection of the person . . . . [I]t is by no means an uncommon occurrence, in an inclement climate, for people to go ill clad in order to appear well dressed . . . . The need for dress is eminently a “higher” or spiritual need.<sup>272</sup>

Although fashion does not purport to be a fine art, a number of museums curate fashion for its aesthetic value rather than historic significance.<sup>273</sup> It is difficult to conceive how an ensemble that

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principle. *See Galiano*, 416 F.3d at 421 (works are protectable if they can be considered stand alone works of art).

<sup>269</sup> *See Vermont*, *supra* note 4. *See generally* Margaret Jane Radin, *Rhetorical Capture*, 54 ARIZ. L. REV. 457 (2012).

<sup>270</sup> Jane Richardson & A.L. Kroeber, *Three Centuries of Women’s Dress Fashions: A Quantitative Analysis*, 5 ANTH. RECORDS 111, 111 (1940).

<sup>271</sup> *Id.*

<sup>272</sup> VEBLLEN, *supra* note 127, at 103–104.

<sup>273</sup> *See, e.g.*, Musée de la Mode et du Textile de la Ville de Paris, Les arts Décoratifs, Paris, France; Bata Shoe Museum, Toronto, Canada; Kent State University Museum, Kent, Ohio; and the ModeMuseum Antwerp, Belgium. Some examples of individual fashion exhibits during 2012 include “Elsa Schiaparelli and Miuccia Prada: On Fashion,” The Costume Institute at the Metropolitan Museum of Art, New York (May 10, 2012 to Sep. 19, 2012); “Christian Louboutin,” Design Museum, London (Mar. 28, 2012 to July 1, 2012); “The Fashion World of Jean Paul Gaultier: From the Sidewalk to the Catwalk,” de Young Museum, San Francisco, California (Mar. 24, 2012 to Aug. 19, 2012); “Ballgowns: British Glamour Since 1950” Victoria and Albert Museum, London (May 19, 2012 – Jan. 25, 2013); and “Louis Vuitton Marc Jacobs,” Les Arts Décoratifs, Paris (Mar. 9, 2012 to Sep. 16, 2012).

evokes a combination of obsession, rebellion, and femininity can be considered primarily functional.<sup>274</sup>

Avant-garde fashion is particularly indifferent to utilitarian perfection. It *invests* in being dysfunctional. This trend is exemplified by the use of a stitching technique for premium denim jeans that created by removing fabric guides on sewing machines.<sup>275</sup> This makes the results uneven, as each stitch “is imperfect, slightly askew” to simulate the look of hand stitching.<sup>276</sup> Reliance on mechanical looms was abandoned, because they “make denim look too perfect and mass-produced.”<sup>277</sup> Fabric is hand-slashed, frayed, nicked, and permanently wrinkled.<sup>278</sup> Not surprisingly, these techniques are both labor intensive and expensive.<sup>279</sup> For the more highly valued cultural products, “the products must have character or personality” that demonstrates hand-crafting or artfulness.<sup>280</sup>

Similarly, more expensive clothing is almost never as useful as its less expensive counterpart. To the contrary, a \$200 designer tee shirt may be more diaphanous and fragile than a thicker, heartier Hanes sold at a fraction of the price. Many boots sold at high price points are sometimes made of thinner leathers, which wear out faster, than less expensive ones sold at lower prices. Couture clothing may feature lace, chiffon, satin, and silk, which is destroyed in harsh weather. To those that engage with fashion as a medium, superior function, and even the concept of superiority, is irrelevant.<sup>281</sup> Rather than operating in a competitive market, such

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<sup>274</sup> See generally Cathy Horyn, *Jean Paul Gaultier: Black Magic*, N.Y. TIMES (Jan. 26, 2011), <http://runway.blogs.nytimes.com/2011/01/26/jean-paul-gaultier-black-magic> (describing Gaultier’s couture show, stating, “it is hard to truly surprise people. But I think the audience today was stunned.”).

<sup>275</sup> See generally Julia Fein Azoulay, *Born in the USA: The Growing Premium Market Goes Global*, in FASHION READER 490, 491 (Lisa Welters & Abby Lillethun eds., 2d ed. 2011).

<sup>276</sup> *Id.* at 491.

<sup>277</sup> *Id.*

<sup>278</sup> See *id.* at 493–94.

<sup>279</sup> See *id.* at 492; KAPFERER & BASTIEN, *supra* note 228, at 63 (describing flawed watches that are the hallmark of luxury, hand-made goods).

<sup>280</sup> KAPFERER & BASTIEN, *supra* note 222, at 63.

<sup>281</sup> See *id.*

designers emphasize identity and vision over durability or functional superiority.<sup>282</sup>

One of Jean Paul Gaultier's most famous works is a wedding dress which features a white Native American inspired feathered headpiece, some spare jewelry on bare skin on the top, and an enormous skirt topped by two epaulets over the hips which evoke those worn by the U.S. military during the 1800s as the American West was being settled.<sup>283</sup> There is a contrast between the Native American imagery and that of the military that was in the process of displacing that population from their homelands, which makes a powerful visual statement as it is incongruously made into bridal attire. The message about conflict and marriage is undeniable and fully predominates over any plausible functional aspect of the dress, which includes yards of fabric that impedes movement and scant covering over the chest. Additionally, Gaultier's dress is emblematic of the influence of culture on a work of fashion design. The dress demonstrates a visible appropriation of mid 19<sup>th</sup> century culture, including that of Native Americans and military wear, while also both reflecting and questioning our current cultural conceptions about marriage and relationships. The analysis that fashion, as an entire medium, is functional simply does not withstand scrutiny. Instead, this appears to be a catchphrase that propagates a century-old practice of the copyright office rather than a fair analysis of individual works.

### C. *The Economic Costs of Creativity*

Why is any protection appropriate for fashion design? One might imagine that designers sketch effortlessly from a deep well of imagination, coupled with experience, a keen editorial eye, and a sense of style. In this dream world, the finished design makes a brief spin on the runway, is photographed and promoted, and goes

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<sup>282</sup> See *id.*

<sup>283</sup> See Nick Verreos, *Fashion Museum Minute: The Jean Paul Gaultier Exhibition, de Young Museum San Francisco*, NICK VERREOS (May 24, 2012), <http://nickverreos.blogspot.com/2012/05/fashion-museum-minute-jean-paul.html>; J. Duncan Campbell, *EBook of American Military Insignia 1800-1851*, PROJECT GUTENBURG (Feb. 2, 2012), <http://www.gutenberg.org/files/38738/38738-h/38738-h.htm>.



to the retail floor where is either purchased or eventually sent to a clearance rack. Soon, the cycle repeats with more collections to follow, season after season. Knock offs are sold, perhaps without any financial impact on the original designer, who continues to generate ever-more ingenious designs.

As with most imagined scenarios, this creation story leaves out critically important details. As some scholars have noted, some creative works are generated for personal reasons or those that reach beyond obtaining the market exclusivity that intellectual property protection implies.<sup>284</sup> In contrast, fashion is a commercial art that requires an infrastructure to create, and ultimately produce, creative designs. The field anticipates continual output, of up to six collections a year. Although not all designers follow these constraints, the costs of engaging in the field are far from costless. These costs include both financial and creative outputs, which have both economic and human costs.

### 1. Starting Up

Although a sketchbook design is theoretically without cost, designing clothing and accessories requires significant financial investment. Industry experts suggest starting a line with a minimum of \$1 million to \$5 million.<sup>285</sup> Many start with far less, working from the designer's home and without employees.<sup>286</sup> In 1968, Calvin Klein was able to start his line for \$10,000.<sup>287</sup> In 2001, Doo-Ri Chung started her line with a \$100,000 loan from her parents and working from the basement of her parent's business.<sup>288</sup> This figure was not sufficient for designer Michelle

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<sup>284</sup> See, e.g., Jeanne Fromer, *Expressive Incentives In Intellectual Property*, 96 VA. L. REV. 1745, 1760 (2012) ("Evidence from multiple vantage points demonstrates how significantly authors and inventors care about their personhood and labor interests in the works they create."); Lakhani & Von Hippel, *supra* note 212, at 924 (describing non-legal incentives for software programmers' involvement with open source software).

<sup>285</sup> See MARY GEHLHAR, *THE FASHION DESIGNER SURVIVAL GUIDE* 34 (2008).

<sup>286</sup> See Kathleen Fasanella, *How to Start a Clothing Line*, FASHION INCUBATOR (May 5, 2006), [http://www.fashion-incubator.com/archive/how\\_to\\_start\\_a\\_clothing\\_line](http://www.fashion-incubator.com/archive/how_to_start_a_clothing_line).

<sup>287</sup> See GEHLHAR, *supra* note 285, at 34.

<sup>288</sup> See Doo-Ri Chung, VOGUEPEDIA, [http://m.vogue.com/voguepedia/Doo-Ri\\_Chung](http://m.vogue.com/voguepedia/Doo-Ri_Chung) (last visited June 27, 2012); Amy Odell, *Hungry for Attention, New Designers Struggle Through Fashion Week*, N.Y. MAG. (Feb. 16, 2012), <http://nymag.com/>

Smith, who started her Milly line with \$100,000, and then was required to obtain an additional \$350,000 to fill orders.<sup>289</sup> Others report beginning with amounts in the \$200,000 to \$300,000 range.<sup>290</sup> Marc Jacobs started his line in 1997, after his partner mortgaged his home twice and then later obtained an additional \$140,000 in support from Louis Vuitton Moët Hennessey (LVMH), who had just hired him to become the creative director for the Louis Vuitton ready-to-wear line.<sup>291</sup> Jacob's partner later described this as an agreement to "cough up a relatively small amount" and "[i]t was like they said, 'Let's just do this to shut them up.'"<sup>292</sup> Those beginning their careers are advised to work from home, not hire, and to work other jobs even after shipping their own designs for several seasons.<sup>293</sup>

Some of the costs incurred include samples, which are the original designs. For a starting designer who is watching expenses closely, some estimate that a sample can be created at a cost of up to \$1,000 per piece.<sup>294</sup> Derek Lam's first collection of samples

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[daily/fashion/2012/02/new-designers-struggle-through-fashion-week.html](http://www.nymag.com/daily/fashion/2012/02/new-designers-struggle-through-fashion-week.html) (describing designer Maki Obara's parent's initial investment of \$70,000).

<sup>289</sup> See GEHLHAR, *supra* note 285, at 34.

<sup>290</sup> See *id.* (collecting data); Lauren Murrow, *Designer Anna McCraney Doesn't Care What You Think of Reality TV*, N.Y. MAG., Apr. 13, 2011, [http://nymag.com/daily/fashion/2011/04/designer\\_anna\\_mccraney\\_doesnt.html?mid=373681&rid=399231979](http://nymag.com/daily/fashion/2011/04/designer_anna_mccraney_doesnt.html?mid=373681&rid=399231979) (interview with winner of a \$125,000 fashion prize, noting it was not sufficient for her to start her business); Melanie Kletter, *From Project Runway to Reality*, WOMEN'S WEAR DAILY (Mar. 16, 2006), <http://www.wwd.com/fashion-news/fashion-features/from-project-runway-to-reality-541788?full=true>.

<sup>291</sup> See Larocca, *supra* note 96 (describing that the LVMH funding was used to develop a few season's lines, operationalize the first boutique, and present some fashion shows). This investment was not described as a line item in the LVMH's 1997 annual report, although it does describe Jacob's retention as Louis Vuitton's lead designer. See LVMH ANNUAL REPORT 11 (1997) (on file with author). During the next year, the 1998 LVMH Annual Report describes funding Jacobs line as one of LVMH's "investments in the fashion industry." LVMH ANNUAL REPORT, 11 (1998).

<sup>292</sup> *Id.*

<sup>293</sup> See GEHLHAR, *supra* note 285, at 37–39; see also Rosemary Feitelberg, *Following Their Dreams Without Much Fanfare*, WOMEN'S WEAR DAILY (June 29, 2004), <http://www.wwd.com/fashion-news/fashion-features/following-their-dreams-without-much-fanfare-712210?full=true> (noting that designer Prabal Gurung started line while working full time supporting a major designer, and part time designing tee shirts).

<sup>294</sup> See GEHLHAR, *supra* note 285, at 38.

cost \$60,000 to create, and his second \$85,000.<sup>295</sup> Although Lam spent only \$20,000 to finance his first runway show, a more realistic price is around \$100,000.<sup>296</sup> The major designers show in a primary fashion week venue at a cost that runs over a million dollars.<sup>297</sup> To keep expenses down, fashion houses sometimes pay models in “trade,” meaning they are provided with clothing or accessories rather than cash.<sup>298</sup> Many emerging designers cannot afford to fund runway shows, but instead attempt more intimate gathering in rented showrooms hoping to attract the press and retailers.

The sources of funding for fashion designers are quite limited.<sup>299</sup> Fashion is seen as a very high-risk investment, and therefore unattractive.<sup>300</sup> Investors and banks that are willing to lend to small businesses require a history of orders and a realistic growth plan.<sup>301</sup> Some fashion-specific programs offer alternatives, such as the CFDA/Vogue Fashion Fund, which selects one winner and two runners-up every year.<sup>302</sup> This program, which provides funding, mentoring, and support for emerging designers, requires that a designer have at least two years in business and demonstrate “substantial and recent editorial coverage, and have support (orders) from top retailers,” and “a professional staff, paid or

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<sup>295</sup> See Tracie Rozhon, *Applause Won't Buy Many Buttons*, N.Y. TIMES (Feb. 8, 2004), <http://www.nytimes.com/2004/02/08/style/applause-won-t-buy-many-buttons.html?pagewanted=all&src=pm>.

<sup>296</sup> See *id.*; LaMont Jones, *Fashion Week Called A Wise Investment*, PITTSBURGH POST-GAZETTE, Feb. 13, 2006, at C-1.

<sup>297</sup> See Schwarz, *supra* note 48.

<sup>298</sup> See Misty White Sidell, *Many Models Get Paid in Clothes, Not Cash, but That Might Be Changing*, DAILY BEAST (Mar. 11, 2013), <http://www.thedailybeast.com/articles/2013/03/11/many-models-get-paid-in-clothes-not-cash-but-that-might-be-changing.html>; Jenna Sauers, *Marc Jacobs Doesn't Pay His Models, Says Model [Updated]*, JEZEBEL (Mar. 5, 2012), <http://jezebel.com/5889757/marc-jacobs-doesnt-pay-his-models-says-model>.

<sup>299</sup> See Evan Clark, *When Do Designers Reach the Next Level?*, WOMEN'S WEAR DAILY (Feb. 13, 2012), <http://www.wwd.com/business-news/forecasts-analysis/pinpointing-the-tipping-point-for-designers-5650682> (noting the funding crunch in fashion).

<sup>300</sup> See GEHLHAR, *supra* note 285, at 42.

<sup>301</sup> See *id.* at 43.

<sup>302</sup> See *CFDA/Vogue Fashion Fund*, COUNCIL OF FASHION DESIGNERS OF AMERICA, <http://www.cfda.com/programs/the-cfdavogue-fashion-fund> (last visited June 4, 2013).

volunteer, which can devote the time and effort required to accomplish the stated aims of an applicant's design career plans."<sup>303</sup> The criteria are selective; as one designer observed, "how do you get to that point for the CFDA to even see you? There's a massive problem in this business."<sup>304</sup> Even premium houses have been said to use haute couture designs to promote the company's image, and rely on the low-priced, high-volume handbags, sunglasses, and perfume as the financial backbone of the company.<sup>305</sup>

It may take several successful seasons before a designer can take on any employees. For example, the two designers who comprise Creatures of the Wind continued to draw patterns and print shipping labels after showing collections for five seasons.<sup>306</sup>

The largest organizations employ assistant designers to support a lead.<sup>307</sup> As one example, Marc Jacobs works with others to develop clothing for Louis Vuitton, explaining, "[w]e like to share ideas. Each of us stimulates the other and although we all look to each other for that catalyst and inspiration, no one says, 'Oh, that was my idea.' And I think that makes for a very nice creative environment. It's the only kind of environment I can work in."<sup>308</sup> Many other major designers have come to accept that the team

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<sup>303</sup> *Id.* (describing eligibility requirements).

<sup>304</sup> Odell, *supra* note 288 (quoting Maki Obara, who has worked in the fashion industry for fifteen years).

<sup>305</sup> See, e.g., Cathy Horyn, *In Paris, a Nod to Old Masters*, N.Y. TIMES, Jan. 29, 2009, <http://www.nytimes.com/2009/01/29/fashion/29COUTURE.html>.

<sup>306</sup> See Christina Binkley, *Inside a Tiny Label's Quest for Daring but Wearable*, WALL ST. J. (Sep. 4, 2012), <http://online.wsj.com/article/SB10000872396390443847404577631462556994168.html>.

<sup>307</sup> See, e.g., Amy Odell, *The Curious Case of Peter Copping, Olivier Theyskens, and Nina Ricci*, N.Y. MAG. (Jan. 28, 2009), [http://nymag.com/thecut/2009/01/the\\_curious\\_case\\_of\\_peter\\_copp.html](http://nymag.com/thecut/2009/01/the_curious_case_of_peter_copp.html) (detailing Peter Copping's experience as a designer at Louis Vuitton and Sonya Rykiel); *Interview with Fashion Designer Phillip Lim*, CNN ASIA (Mar. 23, 2001), <http://transcripts.cnn.com/TRANSCRIPTS/1103/23/ta.01.html> (describing that Philip Lim designed for two other houses before starting his own line).

<sup>308</sup> Tamsin Blanchard, *The Rebel Tamed: Marc Jacobs Interview*, TELEGRAPH (Mar. 3, 2012), <http://fashion.telegraph.co.uk/article/TMG9108349/The-rebel-tamed-Marc-Jacobs-interview.html>.

approach leads to the strongest results.<sup>309</sup> Dries Van Noten employs assistants who develop fabric print designs.<sup>310</sup> Other designers hire assistants to develop added product lines, including menswear, accessories, bags, shoes, and perfume.<sup>311</sup> According to one report, Ralph Lauren uses “dozens of assistants and licensees [who] perform[] much of the creating.”<sup>312</sup> Those well-established fashion designers, who continue to do their primary sketching in isolation, require a team of specialists to execute the designs.<sup>313</sup> Many rely on fit models to create or perfect a design.<sup>314</sup>

The true cost of a premium design also entails the cost of trial and error. As described by Lanvin’s Elbaz:

When you do a design and you do it seven or more times to find the right cut and the right proportion, it’s not easy to get there, and that’s why it’s costly. I don’t just buy the dresses somewhere and present them on the runway—I make them. Sometimes it takes me 10 hours to make one jacket, one skirt.<sup>315</sup>

A process of back-and-forth experimentation is evident throughout descriptions of the hands-on design sessions, such as

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<sup>309</sup> See Amy M. Spindler, *Designing as a Collective Effort*, N.Y. TIMES, Mar. 12, 1997, <http://www.nytimes.com/1997/03/12/style/designing-as-a-collective-effort.html> (observing that “[i]t’s no coincidence that fashion’s strongest collections today are led by” designers who work collaboratively).

<sup>310</sup> Cathy Horyn, *Out of Antwerp*, N.Y. TIMES (Aug. 29, 2004), <http://www.nytimes.com/2004/08/29/magazine/out-of-antwerp.html>.

<sup>311</sup> See Graham Hamilton, *Exclusive Interview: The Boys Behind 3.1 Phillip Lim Menswear*, GUEST OF A GUEST (Apr. 19, 2011), <http://guestofaguest.com/interview/exclusive-interview-the-boys-behind-31-phillip-lim-menswear-talk-breakfast-dressing-darren-aronofsky-and-their-secret-project> (interview with Sammy Kim and Wayne Fitzell, who design the menswear collection for Philip Lim).

<sup>312</sup> TERI AGINS, *THE END OF FASHION* 94 (1999).

<sup>313</sup> See, e.g., *Interview with Manolo Blahnik*, CNN TALK ASIA (Mar. 17, 2012), <http://transcripts.cnn.com/TRANSCRIPTS/1203/17/ta.01.html>; Colapinto, *supra* note 87 (describing that Lagerfeld typically sketches in the mornings alone in one of his apartments); Kristina O’Neill, *My List: Karl Lagerfeld in 24 Hours*, HARPERS BAZAAR, Apr. 2012, <http://www.harpersbazaar.com/fashion/fashion-articles/24-hours-with-karl-lagerfeld-0412#slide-1>.

<sup>314</sup> Dana Thomas, *House-Proud*, HARPERS BAZAAR, Feb. 2004, at 180 (discussing the need to design on a model).

<sup>315</sup> Reed, *supra* note 68.

the description “[s]o it’s a sort of process in which you don’t reach your goal immediately. Sometimes it’s a process of destroying in order to rebuild again.”<sup>316</sup> This may entail varying creative choice, or experimenting with materials and construction to ensure the right fit and feel.<sup>317</sup> Needless to say, each of these requires additional costs.

## 2. The Human Cost of the Fashion Cycle

The pace of the fashion industry has accelerated and shows no sign of slowing. The number of collections per year has increased from two to four or even six.<sup>318</sup> Some retailers are giving preference to those designers who can promise almost immediate delivery.<sup>319</sup> The fashion industry places specific constraints on designers. As Marc Jacobs describes:

There is a calendar. It’s not like a painter or a sculptor or something who says “oh, I’ll have a gallery show in two years,” or a recording artist who does a record when they feel like it. You know, we have a calendar and we have a schedule, and everybody kills themselves, basically, or tries to their fullest ability to achieve certain things.<sup>320</sup>

Fashion houses release between two and eight collections every year. For example, Chanel releases six, and two of these are *haute*

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<sup>316</sup> Murray Healy, *The Louis Vuitton Design Team*, in LOUIS VUITTON / MARC JACOBS 124, 141 (Pamela Golbin ed., 2012).

<sup>317</sup> See *id.* at 136; Eric Wilson, *Why Does This Pair of Pants Cost \$550?*, N.Y. TIMES (Apr. 29, 2010), <http://www.nytimes.com/2010/04/29/fashion/29ROW.html>.

<sup>318</sup> See Suzy Hansen, *How Zara Grew Into the World’s Largest Retailer*, N.Y. TIMES (Nov. 9, 2012), <http://www.nytimes.com/2012/11/11/magazine/how-zara-grew-into-the-worlds-largest-fashion-retailer.html>; *The Paris-Byzance Show Interview With Karl Lagerfeld*, CHANEL NEWS (Dec. 10, 2010), <http://chanel-news.chanel.com/en/home/2010/12/the-paris-byzance-show-interview-with-karl-lagerfeld.html> (explaining “[w]e have two Prêt à Porter collections, one pre-fall and one spring, and the same thing for winter. There is the Cruise, but nothing to balance it. I wanted Chanel to have six collections a year, which allows us to renew the stores every two months.”).

<sup>319</sup> See generally Rachel Brown, *WWD MAGIC: All About Speed to Market*, WOMEN’S WEAR DAILY (Aug. 21, 2012), <http://www.wwd.com/markets-news/ready-to-wear-sportswear/wwd-magic-all-about-speed-to-market-6183243>.

<sup>320</sup> *Interview with Marc Jacobs: The Creative Process*, *supra* note 90.

*couture* collections.<sup>321</sup> In part, retailers demand a short producing and buying cycle to refresh inventory in stores quickly to give customers a reason to return. Because of unpredictability and cash flow concerns, many retailers have shifted from placing orders months in advance toward far shorter time frames.<sup>322</sup> This allows the retailer to more accurately gauge and meet customer demand, because more information about the economy, trends, and preferences is available as the season approaches. From the retailer's perspective, larger manufacturers that can deliver copies faster and at a lower cost have the edge. From a designer's perspective, it is not clear whether their items will be bought until very close to the selling season.

The calendar places pressure on lead designers to generate new works with increased frequency. New ideas do not arrive to designers simply because the calendar deadlines loom. In response to the question "are there any days when the ideas don't come?," Marc Jacobs admits, "lots of them."<sup>323</sup> A designer who fails to provide excellence on schedule faces consequences. These are typified by the expression, "[o]ne day you're in and the next day you're out."<sup>324</sup> Lanvin's Alber Elbaz states that every time he hears this expression, he is "dying" and this is "the one thing that actually makes me not want to stay in fashion for many years because I know I cannot take it, because it is very heavy to carry."<sup>325</sup> According to Elbaz, creating a collection "is almost like writing a book or making a movie and I don't know of any other industry that can produce six movies a year by the same

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<sup>321</sup> The collections are in January (Spring/Summer Haute Couture Collection), March (Autumn/Winter Ready-to-Wear Collection), June (Ready-to-Wear Cruise Collection), July (Fall/Winter Haute Couture Collection), October (Spring/Summer Ready-to-Wear Collection), and December (High Summer Collection). *How Many Fashion Collections Are Produced Each Year?*, CHANEL FAQ, [http://www.chanel.com/en\\_US/fragrance-beauty/FAQ-28105#how-many-fashion-collections-are-produced-each-year](http://www.chanel.com/en_US/fragrance-beauty/FAQ-28105#how-many-fashion-collections-are-produced-each-year) (last visited Dec. 1, 2013).

<sup>322</sup> See generally Brown, *supra* note 321 (discussing how retailers have chosen to write much closer to delivery).

<sup>323</sup> Interview with Marc Jacobs: *The Creative Process*, *supra* note 90.

<sup>324</sup> Karimzadeh, *supra* note 99 (statement of Alber Elbaz).

<sup>325</sup> *Id.* (statement of Alber Elbaz).

director . . . . You cannot write six books a year.”<sup>326</sup> Because of the production and fabric source schedules, Elbaz starts work on the next collection almost immediately after the previous collection is shown.<sup>327</sup> He believes that the pace is taking its toll on the entire industry.<sup>328</sup>

Fashion critic Cathy Horyn from the *New York Times* has observed that, “Certainly the demand on designers at big houses to produce multiple collections every year has taken both its creative and personal toll.”<sup>329</sup> Designer Michael Kors acknowledges that the psychological stress on designers has increased with the accelerated pace and scope of fashion expectations.<sup>330</sup> According to Alexander McQueen, “[t]he turnover of fashion is just so quick and so throwaway, and I think that is the big part of the problem. There is no longevity.”<sup>331</sup>

Marc Jacobs explained his position as the lead designer for Louis Vuitton and his own signature lines:

I often feel uncomfortable. I have this feeling like this is only going to be good as long as it’s good. Am I always full of ideas? No. Those things don’t happen every six months. It’s not even like, *You have to change the shape of handbags and the luxury market.* It’s like, *This has to change the shape of history.* And I don’t know how to calculate that. I really don’t.<sup>332</sup>

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<sup>326</sup> Standen, *supra* note 119.

<sup>327</sup> *See id.* (“We finish the show on Friday, and I am in the showroom on Saturday and Sunday, and Monday morning I start with the fabrics, because it takes the fabric manufacturer two to three months to deliver . . . . The last thing I want to do the day after the show is to look at fabrics, but I have to do it.”).

<sup>328</sup> *Id.* (describing the physical ailments of his contemporaries, and noting “we don’t have the time to think, we don’t have the time to project, we don’t have the time to digest”).

<sup>329</sup> Cathy Horyn, *John Galliano Exits the Way That He Entered*, N.Y. TIMES (Mar. 2, 2011), <http://www.nytimes.com/2011/03/03/fashion/03GALLIANO-CAREER.html>.

<sup>330</sup> *See Worries Grow Industry Breeds Substance Abuse*, WOMEN’S WEAR DAILY (Mar. 9, 2011), <http://www.wwd.com/fashion-news/fashion-features/is-fashion-breeding-addiction—3546879?full=true>.

<sup>331</sup> Wilson, *supra* note 43.

<sup>332</sup> Larocca, *supra* note 96.



Designer Azzedine Alaïa explained, “I believe that designers are asked to do too much, too many collections. It’s inconceivable to me that someone creative can have a new idea every two months . . . . There are too many designers who are in a bad state, who are sick, who feel obliged to take drugs.”<sup>333</sup> Some have developed strategies to deal with the pressure, some healthy and others destructive. Alaïa believes that the stress of producing collections contributed to McQueen’s suicide and former Dior designer John Galliano’s anti-Semitic outburst.<sup>334</sup> One fashion critic and industry watcher predicts that, if fashion continues at the current frenetic pace, “there’s going to be a good deal more crash and burn among designers in the future.”<sup>335</sup> One consultant suggests that the impact may influence the level of creative risk that owners are willing to undertake. He opines that the business of fashion will begin to favor “controlled creativity” over “raw creativity,” to reduce the risk associated with the dependence on individual designers.<sup>336</sup>

A shift toward “controlled creativity” implies less expressive risk and suggests a loss of designer autonomy. Some designers are vocal about their distaste for the rapid schedule. For example, Stefano Pilati believes that speed creates a “compromised cultural dynamic” that predominates over design integrity.<sup>337</sup> Designer Dries Von Noten has maintained a small scale, privately owned line to avoid both the pressure of too many collections every year, and to preserve his independence and originality. As he explains, “[o]wning my own company means I can make a difficult

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<sup>333</sup> Dirk Standen, *The Future of Fashion, Part Nine: Azzedine Alaïa*, STYLE, (Mar. 31, 2011), <http://www.style.com/stylefile/2011/10/the-future-of-fashion-part-nine-azzedine-alaia> (statement of Azzedine Alaïa).

<sup>334</sup> See *id.* (In response to the interviewer’s question, “Did the stress contribute to the Galliano situation?” “Yes and [Christophe Decarnin at] Balmain. McQueen. There is too much pressure. If it ends up destroying people, it’s not good . . .”).

<sup>335</sup> Suzy Menkes, *Sign of the Times: The New Speed of Fashion*, N.Y. TIMES STYLE MAG. (Aug. 23, 2013), <http://tmagazine.blogs.nytimes.com/2013/08/23/sign-of-the-times-the-new-speed-of-fashion>.

<sup>336</sup> See *Worries Grow Industry Breeds Substance Abuse*, *supra* note 332 (statements of Lucian James, founder of consulting firm Agenda Inc., which advises creative industries).

<sup>337</sup> See Marc Karimzadeh, *YSL’s New Vintage Bows at Barneys*, WOMEN’S WEAR DAILY, June 10, 2009, at 3.

collection one season if I choose because I only have to answer to myself.”<sup>338</sup>

The notion that a designer is able to generate brilliance in a manner that is virtually costless is a myth. Just as in any other creative industry, the fast pace and variety in fashion design requires both economic and human capital. These elements are only available where a stable and supportive infrastructure is in place. In the end, no creativity is possible without funding, training, sales, and one’s standing as a cultural producer.

### 3. Copying: Undermining Economic and Human Capital

The incentives and facility for reproducing the most successful designs has never been greater. For the vast majority of original and creative clothing designs, one who makes no modifications prior to creating a copy is acting legally. There have been reports of copying in the past. In 1956, a reproduction of Grace Kelly’s wedding dress appeared in a Boston store, Filene’s, by the end of her wedding day.<sup>339</sup> The pink suit worn by Jacqueline Kennedy on the day that the President was shot in Dallas was a line-by-line copy of a Chanel suit sold by Oleg Cassini.<sup>340</sup> Yet over the past decade, the sheer *scale* of copying and the outlets for the sale of duplicates has changed dramatically.<sup>341</sup> Technology has enabled the creation of a sample from a photograph or a sketch within 24 hours, and products for sale within a few weeks.<sup>342</sup> According to one production expert on Asian production shops, once an image is received there are “very elaborate systems where they get the pattern off the image” and “can program a machine to [make] it and then have a sample in two days.”<sup>343</sup> Knockoffs are available in

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<sup>338</sup> Robert Murphy, *La Joie de Dries*, WOMEN’S WEAR DAILY (Sept. 21, 2000), <http://www.wwd.com/fashion-news/fashion-features/article-1199455>.

<sup>339</sup> See Ruth La Ferla, *Waiting for the Dress*, N.Y. TIMES (Apr. 22, 2011), <http://www.nytimes.com/2011/04/24/fashion/24knockoff.html>.

<sup>340</sup> See Blanks, *supra* note 109 (quoting Karl Lagerfeld).

<sup>341</sup> See La Ferla, *supra* note 339.

<sup>342</sup> See *id.*

<sup>343</sup> Cathy Horyn, *Behind the Scenes: The Product Specialist*, N.Y. TIMES (Feb. 5, 2010), <http://runway.blogs.nytimes.com/2010/02/05/behind-the-scenes-the-product-specialist> (statement of Cindy Ferrara).

large numbers before the originals, typically at a fraction of the price.<sup>344</sup>

Sometimes this price differential is due to lower priced fabrics and less expensive labor. However, premium design houses have sold very close copies of the works of emerging designers, producing versions using luxury fabric and selling the items at high prices.<sup>345</sup> The price points between the originals and the copies are narrowing.<sup>346</sup> Recently, Mrs. Obama wore a Maria Cornejo jacket during a pre-inaugural event that was widely copied.<sup>347</sup> Cornejo's clothes are not designed for the wealthy, but rather for "women who are in that I-have-to-pay-a mortgage niche."<sup>348</sup> Cornejo explains that copying hurts her, her patternmakers, production assistants, sample makers and others, "I'm happy to get a press mention that [Mrs. Obama] wears us—but with no photograph."<sup>349</sup> Cornejo's statement illustrates that copying occurs in circumstances in which the price point of the original and the copy are converging, and both are within reach of the average consumer. Similarly, a recent article observes that fake underwear, selling at \$2.00 each, mimicked an original that sold for \$7.50.<sup>350</sup>

This leads to troubling results. Because the practice is legal, second comers have little incentive to hire designers sufficient to

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<sup>344</sup> See, e.g., Eric Wilson, *Fashion Industry Grapples with Designer Knockoffs*, N.Y. TIMES (Sep. 4, 2007), <http://www.nytimes.com/2007/09/04/business/worldbusiness/04iht-fashion.1.7373169.html>; Stacey Solie, *That Most Important Dress, or at Least a Look-Alike*, N.Y. TIMES (Mar. 1, 2013), <http://www.nytimes.com/2013/03/03/fashion/weddings/wedding-gown-designers-face-copycat-dresses-made-cheaply.html>.

<sup>345</sup> See David Graham, *Fashion Icon Pays Up in Copycat Spat*, TORONTO STAR (May 13, 2009), [http://www.thestar.com/life/fashion\\_style/2009/05/13/fashion\\_icon\\_pays\\_up\\_in\\_copycat\\_spat.html](http://www.thestar.com/life/fashion_style/2009/05/13/fashion_icon_pays_up_in_copycat_spat.html) (emerging designer's \$300 modified jacket design was sold by Diane Von Furstenberg for \$1,000); see also *Chanel Loses Lawsuit Over Crochet Design*, ASIA ONE (Jan. 23, 2012), <http://news.asiaone.com/News/Latest%2BNews/Diva/Story/A1Story20121123-385320.html>.

<sup>346</sup> See Robin Givhan, *First Lady's Designers Want A © Change*, WASH. POST (Apr. 26, 2009), [http://articles.washingtonpost.com/2009-04-26/news/36923776\\_1\\_thakoon-pani-chgul-council-of-fashion-designers-jason-wu](http://articles.washingtonpost.com/2009-04-26/news/36923776_1_thakoon-pani-chgul-council-of-fashion-designers-jason-wu).

<sup>347</sup> See *id.*

<sup>348</sup> *Id.*

<sup>349</sup> *Id.*

<sup>350</sup> See Li, *supra* note 3 ("Five years ago we wouldn't have seen \$10 and \$15 T-shirts being counterfeited like we do now.").

create an entire line of original designs. Second comers can cherry-pick the most interesting designs to copy, minimizing the research, development and risk.<sup>351</sup> In addition, copyists do not have to engage in the trial-and-error needed to arrive at a final design. Second comers can concentrate large-scale production solely on the most profitable designs without incurring any expenses to create them. Further, they can avoid the expense and time of the trial-and-error process that generates both successes and failures. By removing risk and creative investment from the equation, copyists are free to use another's design without consequence. As one retailer, Nasty Gal, recently stated in response to a designer's accusation that a bracelet design had been literally copied, "[c]ongrats, you've been knocked off. It's a rite of passage."<sup>352</sup> As one source identifies, the current system has broken down the former network of community norms that discouraged plagiarism through widespread disapproval of the copyist, particularly in the media.<sup>353</sup>

Copying a single design may have a large economic impact, particularly on an emerging designer. This is because, among the experimentation that any designer does in the course of their first several collections, only one may become a commercial success. One example is Diane Von Furstenberg's wrap dress, which she designed and sold during the 1970s as her career began.<sup>354</sup> At the time, this single dress established Furstenberg's reputation and commercial viability.<sup>355</sup> As Furstenberg explains, "[t]hat dress has paid for every single thing in my life."<sup>356</sup> A number of other lines

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<sup>351</sup> See Hemphill & Suk, *supra* note 36, at 1174.

<sup>352</sup> *Nasty Gal Says Design Piracy is a "Rite of Passage,"* FASHION LAW (Jan. 9, 2013), <http://www.fashion-law.org/2013/01/nasty-gal-says-design-piracy-is-rite-of.html> (quoting a Nasty Gal representative).

<sup>353</sup> See Lauren Howard, *An Uningenious Paradox: Intellectual Property Protections for Fashion Designs*, 32 COLUM. J.L. & ARTS 333, 340 (2009).

<sup>354</sup> See *Wrap Superstar: Designer Diane Von Furstenberg Tells Her Story*, INDEPENDENT, Mar. 27, 2008, <http://www.independent.co.uk/life-style/fashion/features/wrap-superstar-designer-diane-von-furstenberg-tells-her-story-801189.html> (describing the history of the wrap dress).

<sup>355</sup> See *id.*

<sup>356</sup> Anthony Mason, *One Dress Changed Diane Von Furstenberg's Life*, CBS NEWS (May 22, 2011), [http://www.cbsnews.com/2102-3445\\_162-20065126.html](http://www.cbsnews.com/2102-3445_162-20065126.html).

began with a highly select number of pieces.<sup>357</sup> The early replication of one or a few early designs can be problematic, particularly because the copying industry has been observed to target emerging designer's work.<sup>358</sup>

Such examples demonstrate that, not only does a lack of intellectual property protection facilitate the broad dissemination of copies; it can also adversely affect the infrastructure of the future of the field. Fashion requires up-front financial and creative investment. For avant-garde designs, which are the most creative works, income and financial viability might be years away. Investment sources for designers are comparatively limited, particularly if compared to the venture capital structure that supports other fields. If the level and speed of copying undermines the infrastructure of the emerging aspect of fashion as a field, a market failure may be introduced that warrants protection. The financially fragile, aesthetic risk takers may find their primary creative assets with another's label attached, at a lower price, and sooner than she is able to reach a retail floor.

A credible assessment of whether intellectual property protection is necessary must consider whether adequate incentives exist in areas other than law.<sup>359</sup> This might include being first to market, selling related goods or services, favorable contractual

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<sup>357</sup> See Kavita Daswani, *Agility Drill*, WOMEN'S WEAR DAILY (Feb. 13, 2007), <http://www.wwd.com/fashion-news/fashion-features/agility-drill-507127?full=true> (describing business that began with yoga bag and another with a hat); Jennifer Hirshlag, *Ugg's First Boutique Set to Bow in Soho*, WOMEN'S WEAR DAILY (Dec. 5, 2006), <http://www.wwd.com/fashion-news/fashion-features/ugg-s-first-boutique-set-to-bow-in-soho-514812> (boots); Chiara Hughes, *Baci & Abbracci Opens Flagship*, WOMEN'S WEAR DAILY (Nov. 15, 2007), <http://www.wwd.com/retail-news/retail-features/baci-abbracci-opens-flagship-476574?full=true> (tees and sweatshirts with apple logo); Kate Mayfield, *Rookie Of The Year- A High-End Handbag Designer Proves a New Business Isn't Necessarily a Struggle*, WOMEN'S WEAR DAILY, July 26, 2005, at 44S (hand made bags); Jean E. Palmieri, *Investors' Big Plans for Robert Graham*, WOMEN'S WEAR DAILY (June 16, 2011), <http://www.wwd.com/markets-news/ready-to-wear-sportswear/new-investors-in-robert-graham-have-high-hopes-for-brand-3659881> (small line of patterned shirts).

<sup>358</sup> See generally Julie Zerbo, *Fast Fashion and its Effects on Emerging Designers*, KENTON MAG. (Dec. 4, 2012), <http://kentonmagazine.com/op-ed-fast-fashion-and-its-effect-on-emerging-designers>.

<sup>359</sup> See generally BOYLE, *supra* note 12, at 140; Peter S. Menell, *Tailoring Legal Protection for Computer Software*, 39 STAN. L. REV. 1329, 1339 (1987).

relationships, or preventing copying through means other than legal enforcement. It is not entirely clear that extra-legal activity can preserve a designer's incentives to a sufficient degree.

Formerly, designers sometimes enjoyed a first-mover advantage, a circumstance that is being quickly chipped away to the extent that copies are available more quickly than originals. It would be difficult to conclude that legal protection acts as a substitute for any failure to aggressively market and modify fashion's business models. Indeed, some might say that fashion is innovating itself to the point of exhaustion.<sup>360</sup> New products are created with high frequency. Fashion organizations have developed diversified business models to maximize the possibility of survival, including numerous online sources. These are bookended by online discounters of luxury fashion to maximize selling exposure for unsold fashion designs. Some of these models include the introduction of mass-appeal, high-margin goods, including accessories, perfume, and beauty, to fund the higher cost design work for the more creative clothing lines.<sup>361</sup>

Other designers have added diffusion lines to lower priced lines for a younger or more cost-conscious consumer.<sup>362</sup> Various high-end designers have collaborated with mass-market retailers including Target, H&M, eBay and Kohls to bring in additional revenue and to increase reputational awareness.<sup>363</sup> Some designers have collaborated with companies outside the fashion industry to

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<sup>360</sup> See generally Lisa Lockwood, *Fashion's Night Out on Hiatus in U.S.*, WOMEN'S WEAR DAILY (Feb. 27, 2013), <http://www.wwd.com/retail-news/retail-features/fashions-night-out-on-hiatus-in-us-6804443> (observing that a multi-city promotional event for the fashion industry would not take place in 2013, based on the promoter's "joint decision to go on hiatus so retailers and designers can focus their budgets on projects that are more in line with their specific objectives, rather than a big event on one night in September").

<sup>361</sup> See Horyn, *supra* note 226.

<sup>362</sup> Examples of such expansions include Paul & Joe to Paul & Joe Sister, Marc Jacobs to Marc by Marc Jacobs, and Derek Lam to 10 Crosby.

<sup>363</sup> See, e.g., Eric Wilson, *A Marriage of Economic Convenience*, N.Y. TIMES (Nov. 16, 2011), <http://www.nytimes.com/2011/11/17/fashion/designer-retailer-union-remains-lucrative.html>; Greg Petro, *Retailer/Designer Collaborations – The Missing Link*, FORBES (Feb. 28, 2013), <http://www.forbes.com/sites/gregpetro/2013/02/28/retailerdesigner-collaborations-the-missing-link> (documenting numerous collaborations between high end designers and lower priced retail stores).

create crossover products, including beverages, electronics, household goods, and even helicopters.<sup>364</sup> Some sources suggest that fashion will begin exploring made-to-order systems that enable consumers to customize designs on a mass scale.<sup>365</sup> In fact, some have begun to do so.<sup>366</sup> A few designs began to offer clothing through diverse sources, including Kickstarter.<sup>367</sup> Only time will tell if these will be sufficient.

There are other advantages that fashion maintains. Perhaps the greatest barrier is the existence of retailers and customers who refuse to buy copies, whether because of brand preference or an aversion based on principle. Nonetheless, one recent survey showed that nearly 75% of the women questioned had knowingly

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<sup>364</sup> See, e.g., David Banzer, *Evian Taps Diane Von Furstenberg*, WOMEN'S WEAR DAILY (Nov. 1, 2012), <http://www.wwd.com/fashion-news/fashion-scoops/water-world-6465522>; Tim Nudd, *How Much Is That Gold Dolce & Gabbana Razr Phone in the Window?*, ADWEEK (Mar. 27, 2006), <http://www.adweek.com/adfreak/how-much-gold-dolce-gabbana-razr-phone-window-19270>; Miles Socha, *Marc Jacobs Plays Strongman in Diet Coke Ads*, WOMEN'S WEAR DAILY (Mar. 11, 2013), <http://www.wwd.com/media-news/fashion-memopad/marc-jacobs-plays-strongman-in-soda-ads-6839449>; Miles Socha, *Karl Lagerfeld's Retail Push*, WOMEN'S WEAR DAILY (Feb. 28, 2013), <http://www.wwd.com/retail-news/designer-luxury/karl-lagerfelds-retail-push-6808056>; Miles Socha, *Karl Lagerfeld to Design VIP Helicopters*, WOMEN'S WEAR DAILY (Apr. 6, 2012), <http://www.wwd.com/fashion-news/fashion-scoops/flying-high-5846930>; *Spirit to Narita on a Luxury Hermes Helicopter*, CNN TRAVEL (August 1, 2012), <http://travel.cnn.com/tokyo/visit/sure-beats-bus-grab-chopper-airport-924527>; *Opening Ceremony Founders Announce More Details About Plans With Intel, Russia*, FORBES (2/10/2014), <http://www.forbes.com/sites/hannahelliott/2014/02/10/opening-ceremony-founders-announce-more-details-about-plans-with-intel-russia> (describing a collaboration between designers Opening Ceremony and Intel for a smart bracelet).

<sup>365</sup> See Teri Agins, *The Future of Luxury: Custom Fashion, Cheap*, WALL ST. J., Jan. 4, 2007, <http://online.wsj.com/article/SB116787361060066579.html> (interview with Tom Ford, who predicts greater customization); *A Big Think Interview with Scott Schuman*, *supra* note 142 (stating "I think there is very . . . a day very soon where you'll be able to get some kind of digital printout of your body and have the clothes made for your shape. It will be a new age of tailoring . . .").

<sup>366</sup> See *How It Works*, INDOCHINO, <http://www.indochino.com/How-It-Works> (last visited Nov. 29, 2013); Nathan Branch, *The Artisan Series: Basil Racuk (Part 2)*, NATHAN BRANCH (Dec. 17, 2010), <http://www.nathanbranch.com/2010/12/the-artisan-series-basil-racuk-part-2.html> (noting that about 60% of orders are customized).

<sup>367</sup> See *Pasko: The First Collection*, KICKSTARTER.COM, <http://www.kickstarter.com/projects/1117243609/pasko-the-first-collection> (last visited Nov. 29, 2013); *Project Piola – Sustainable Sneakers*, KICKSTARTER.COM, <http://www.kickstarter.com/projects/475480645/project-piola> (last visited Nov. 29, 2013).

purchased a counterfeit fashion design.<sup>368</sup> This trend suggests that dependence on consumer choice to support the sources of original design is not a given.

One strong advantage for a portion of the field is a superior form of craft. Some customers will seek out houses that offer custom-fitted clothing.<sup>369</sup> As Alber Elbaz explained:

There is something special about clothes that are made by women and not by machine. They do something for the clothes. There is a huge difference when I see a suit, or pants and shirt done by the atelier, and the same pieces done by a factory. It's an emotion. Zara can't copy that.<sup>370</sup>

Nonetheless, copyists do not target *haute couture* exclusively; ready to wear pieces are copied as well, including those that retail for as low as \$300 and below.<sup>371</sup> Further, the technological capability to make well-crafted originals is being erased as expertise and equipment that was formerly available in a small group of European countries is becoming more widely available throughout the world.<sup>372</sup> Today, it is not uncommon for the same manufacturing facilities to produce both genuine and counterfeit versions of the same product, dramatically narrowing the quality

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<sup>368</sup> See Steven Kolb, *You Can't Fake Fashion 2013*, HUFFPOST STYLE (Mar. 20, 2013), [http://www.huffingtonpost.com/steven-kolb/you-cant-fake-fashion-201\\_b\\_2917273.html](http://www.huffingtonpost.com/steven-kolb/you-cant-fake-fashion-201_b_2917273.html) (noting that handbags and wallets were the most popular items).

<sup>369</sup> See Horyn, *supra* note 227.

<sup>370</sup> *Id.*

<sup>371</sup> See, e.g., *Hernandez Testimony*, *supra* note 209, at 7 (observing that "Our PS1 satchel is one of the most knocked off designs on the market today," referring to a bag that sells around \$2,000); *Nasty Gal Copies Again, Is the New Forever 21*, FASHION LAW (Jan. 30, 2013), <http://www.fashion-law.org/2013/01/nasty-gal-copies-again-is-new-forever-21.html#.UUilEqVgP0c> (documenting near-identical copy of sunglasses that retail just under \$300); *Nasty Gal Says Design Piracy is a "Rite of Passage"*, FASHION LAW (Jan. 9, 2013), <http://www.fashion-law.org/2013/01/nasty-gal-says-design-piracy-is-rite-of.html> (documenting near-identical copy of best-selling Contrarian dress which retails for \$380).

<sup>372</sup> See, e.g., Simona Segre Reinach, *Four Models of Fashion Relationships*, in THE FASHION READER 547, 548 (Lisa Welters & Abby Lillethun eds., 2d ed. 2011) (documenting the exportation of Italian textile machinery and old world expertise to other areas of the world).



gap between originals and unauthorized copies.<sup>373</sup> Thus, the advantage that some houses obtained in generating high quality clothing may be an advantage that will not endure.

*D. The IDPPPA: Suggestions for Improvement*

As described more fully in Part V.A herein, efforts to enact sui generis statutory fashion protection are likely to continue until they are successful. Moreover, this type of protection is an appropriate vehicle for other types of openworks, such as sui generis protection for photographs, software, gaming environments and other highly interactive media.

Nonetheless, the IDPPPA suffers from some flaws. Alternative iterations of sui generis protection should include a fair use exclusion from infringement to continue to facilitate creative expression within this industry. Indeed, fair use within the fashion realm should be akin to, and broader than, the fair use in current Copyright law. Specifically, fair use for fashion should include the ability to engage in homage which allows designers to create pieces that are intended to evoke a specific designer, place or era. Such copying is undertaken as a gesture of respect or to contextualize the rest of an otherwise original collection. As one philosopher has noted, it is common for those within the same field or mindset to engage in repetition that “weaves around the works a complex web of factitious experiences, each answering and reinforcing all the others.”<sup>374</sup> This has the effect of inter-legitimation and engagement allowing for the “play of cultured allusions and analogies endlessly pointing to other analogies.”<sup>375</sup> This vital discussion does not seek to diminish or free ride off of the earlier works, but rather to elevate and continue the cultural conversation. One designer proposes that, to prevent abuses,

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<sup>373</sup> See Simona Segre Reinach, *China and Italy: Fast Fashion versus Prêt à Porter*, 9 FASHION THEORY 43, 49 (2005).

<sup>374</sup> PIERRE BOURDIEU, *DISTINCTION: A SOCIAL CRITIQUE OF THE JUDGMENT OF TASTE* 53 (1984).

<sup>375</sup> *Id.*

homage pieces should be specifically flagged as such, a solution that would preserve attribution to the original designer.<sup>376</sup>

Additionally, fair use would allow parody to perform the vital function that, through ridicule, a distance is created between the present and the formerly important pieces from the past. As Bourdieu explains, parody forces changes in culture “by repeating and reproducing it in a sociologically non-congruent context, which has the effect of rendering it incongruous or even absurd, simply by making it perceptible as the arbitrary convention that it is.”<sup>377</sup>

Remedies should be narrowed to match the necessity for attribution for works that operate in an anti-economy. Unlike the IDPPPA, which provided that monetary and injunctive solutions were the primary remedies to the rights owner, future solutions should protect the creator’s reputation as a cultural producer. For creative fashion, the designer’s name is the paramount asset. One troubling phenomenon that arises in fashion, as occurs in other creative industries, is that creator’s intellectual and creative contributions may be assigned by contract to the investor, owner, or corporate parent rather than to the individual designer. In such instances, the designer’s interest in maintaining a creative reputation can be controlled and preserved. In addition to assisting designers whose works are replicated, this would assist designers who are ousted from their own lines, only to find that alternative designs are being sold by the new owner under the designer’s own name.<sup>378</sup>

#### CONCLUSION

Currently, intellectual property law places works into overly broad categories. Specifically, any work that falls into historically accepted media that meets minimum standards for creativity is given full protection; that which does not is given none at all.

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<sup>376</sup> See *Ready to Share*, *supra* note 84, at 55.

<sup>377</sup> BOURDIEU, *supra* note 33, at 31.

<sup>378</sup> See, e.g., Jessica Lustig, *A Hard Spill in Designer Shoes*, N.Y. TIMES (Aug. 1, 2012), <http://www.nytimes.com/2012/08/02/fashion/taking-a-hard-spill-in-designer-shoes.html>.

Under this standard, a child's scrawl or amateur cell phone picture is provided with decades of robust production against copying and the creation of derivative works. Inexplicably, highly creative fashion has no protection. This result is harmful to emerging designers, who are not well positioned to leverage alternatives such as trademarks or patents. Moreover, this "full protection or no protection" treatment is not supported by any compelling reasons.

The binary approach to intellectual property protection fails to grapple with the problem presented by interactive works and operates as an overly blunt policy tool. The wealth of economic, creative, and sociological information provides substantial support for protection that can be tailored to a work's creative contribution. This alternative provides an essential, albeit narrow, right that encourages investment in the creation of new works that can generate positive spillovers to encourage later variations.

Fashion is an interactive medium that is appropriate for this type of limited protection. Creative clothing design is heavily influenced by exogenous inputs, which are mixed with the designer's creativity. Further, unlike some theories that suggest to the contrary, those who wear fashion design infuse the works with their own individuality. Thus, as a medium, fashion is subject to significant exogenous influence in ways that influence the final products in both its creation and use.

This medium offers an opportunity to rethink intellectual property's stilted "all or nothing" approach. This open work approach discards the law's erroneous and continued reliance on the sole originality of the author as the fundamental justification for protection. This Article proposes that the source of protection should rest on other grounds, including the level of the author's creative contribution, with proper consideration of the mix of influences that are the key to the existence of the final piece.

Finally, this open work theory takes account of the anti-economy in which designers operate. The concept that lower priced items create no harm, and are therefore justifiable, loses sight of the fact that the designer's reputation cannot be built on a system where all of his or her cultural contributions are continually undermined. In such circumstances, the originator obtains no

attribution, and therefore no reputational credit. A narrow *sui generis* approach accommodates appropriate incentives for the creation of new works, and the possibility of copies and variations in later works.