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Who's Afraid of Forever 21?: Combating Copycatting Through Extralegal Enforcement of Moral Rights in Fashion Designs

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Cover Page Footnote

Associate, Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, LLP; Clerk, Judge Timothy Tymkovich, Tenth Circuit Court of Appeals; J.D., Harvard Law School; B.A. Stanford University. I would like to thank Simon Khagi for his support and encouragement, and Innokenty Pyetranker for his wisdom and advice. I would also like to thank Professor Terry Fisher and my classmates at Harvard Law School for helping to inspire this Article.

Who's Afraid of Forever 21?: Combating Copycatting Through Extralegal Enforcement of Moral Rights in Fashion Designs

Irina Oberman Khagi*

This Article examines the often under-explored theory of personality rights, or moral rights, as a justification for protection of intellectual property in the context of protection of fashion designs. Traditional forms of intellectual property protection have thus far proven inadequate to protect the overall design of an article of clothing or accessory; rather, most are only sufficient to protect portions of the design. Advocates for strengthened intellectual property rights regimes traditionally invoke utilitarian rights, or the need to provide an incentive for continued generation of new ideas. But these utilitarian theories appear to be less relevant in the fashion world, where copycatting actually may spur innovation rather than deter it. Instead, this Article examines justifications for intellectual property protection through the spectrum of the personality theory of property. According to this theory, recognition of the designer's right to ban others from copying her design constitutes a recognition of the designer's identity itself, and to deny the right constitutes a denial of this identity. However, it remains an open question whether fashion designers actually feel such personhood interests in their creations and, even if they do, whether such interests justify the costs to society of continued protection of the designer's rights in her fashion designs long after she sells them to others. This Article analyzes existing moral rights regimes in the European Union to determine whether such enhanced legal

* Associate, Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, LLP; Clerk, Judge Timothy Tymkovich, Tenth Circuit Court of Appeals; J.D., Harvard Law School; B.A. Stanford University. I would like to thank Simon Khagi for his support and encouragement, and Innokenty Pyetranker for his wisdom and advice. I would also like to thank Professor Terry Fisher and my classmates at Harvard Law School for helping to inspire this Article.

protection has truly benefitted designers. The conclusion it draws from the case study is that designers do not often take advantage of the moral rights legislation in the European Union, and those who do are mainly larger fashion firms who arguably have minimal-to-no personal identity interest in their creations. Ultimately, this Article concludes that traditional forms of intellectual property rights regimes are overbroad and unwarranted, given the relatively small subset of the design community—such as Etsy or other do-it-yourself (“DIY”) communities—whose moral rights in their creations warrant legal protection against copycats. Rather than enacting legislation or enhancing the scope of existing intellectual property rights, this Article proposes that such design communities cultivate extralegal methods of combating copycatting, primarily by inculcating norms of shunning and shaming copyists and thereby rendering copying unprofitable.

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INTRODUCTION

I am heart broken [sic] to say the least. I work so hard, and take great pride in my designs. I have many fans who know and love my work for it’s [sic] originality. It is painful to have my work ripped away from me behind my back by a giant corporation. Who knows how many of these they have sold already? Hundreds? Thousands? While I sit here in my tiny two bedroom rental, working as hard as I

possibly can to make ends meet, Lindex is cashing in on my designs.¹

The aim of art is to represent not the outward appearance of things, but their inward significance.²

Fashion design has long been the black sheep of the intellectual property world. Although bits and pieces of fashion designs, including the print of the fabric,³ the logo or source-identifying trade dress of a fashion designer,⁴ and new and original ornamental designs,⁵ may be protected by copyright, trademark, and patent law, the creativity embodied in the overall design itself generally remains free for anyone to appropriate without legal ramification.⁶

¹ Savannah Carroll, *Swedish Corporation Steals Design from Sleepy King - Please Help!*, SLEEPY KING BLOG (Oct. 8, 2012), <http://sleepykingblog.blogspot.com/2012/10/swedish-corporation-steals-design-from.html> [https://perma.cc/3KGN-BA82]. Sleepy King is a listed seller on Etsy, a website for independent artists to sell their wares. *See About*, ETSY, http://www.etsy.com/about?ref=ft_about [https://perma.cc/63CD-A6B4] (last visited Oct. 4, 2016). Sleepy King's comments were also posted on a blog where users can share their feelings about "blatant rip off[s] of [their] creative work." Sleepy King, *Lindex.com Alleged to Have Ripped off Sleepy King's "Liam the Fox," YOU THOUGHT WE WOULDN'T NOTICE* (Oct. 10, 2012), <http://www.youthoughtwewouldntnotice.com/2012/10/10/lindex-com-alleged-to-have-ripped-off-sleepy-kings-liam-the-fox> [https://perma.cc/D7CK-FNVY].

² Aristotle, *reprinted in Aristotle Quotes*, BRAINYQUOTE, <http://www.brainyquote.com/quotes/quotes/a/aristotle104151.html> [https://perma.cc/LXQ7-9QUA] (last visited Oct. 20, 2016).

³ *See, e.g.*, *Folio Impressions, Inc. v. Byer Cal.*, 937 F.2d 759, 763 (2d Cir. 1991) (recognizing that fabric designs are entitled to copyright protection); *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960) (finding infringement of copyrighted dress fabric).

⁴ *See, e.g.*, *Wal-Mart Stores, Inc. v. Samara Bros., Inc.*, 529 U.S. 205, 216 (2000); *Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC*, 507 F.3d 252, 257 (4th Cir. 2007).

⁵ *See, e.g.*, 35 U.S.C. § 171 (2012) ("Whoever invents any new, original and ornamental design for an article of manufacture may obtain a patent therefore. . ."). Examples of famous design patents include Bottega Veneta's "Veneta Handbag," U.S. Patent No. D657,952, and Jimmy Choo's "With a Twist," U.S. Patent No. D529,264. *See also* Francesca Montalvo, *Protecting Fashion: A Comparative Analysis of Fashion Design Protection in the U.S. and Europe*, CARDOZO ARTS & ENT. L.J. BLOG (Sept. 19, 2014), <http://www.cardozoelj.com/2014/09/19/protecting-fashion-a-comparative-analysis-of-fashion-design-copyright-protection-in-the-u-s-and-europe> [https://perma.cc/YU5E-YTDB].

⁶ *See* Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687, 1689 (2006) ("Like the music, film, video game, and book publishing industries, the fashion industry profits by

This failure to protect fashion designs stems from a hazy idea that articles of clothing are merely utilitarian objects, undeserving of the types of protection intellectual property bestows on the “creative”⁷ acts of artists protected by copyright, or the arbitrary and fanciful⁸ marks protected by trademark. Instead, courts regard apparel and fashion designs as merely “useful articles”⁹ whose sole purpose is to cover the body, not to convey anything about the aesthetic taste or identity of the designer or the wearer.¹⁰ Similarly, efforts to enact legislation in the United States to offer greater protection to fashion designs have stalled.¹¹

Such a view of fashion design as purely utilitarian in nature seems to collide with the realities of fashion, both historically and in contemporary society. If clothes were merely convenient means for allowing us to evade public indecency laws, what can explain the rise and fall of fashion trends, such as Christian Dior’s “New Look” in 1947,¹² subsequently replaced with the “Beat Look” in 1960 (designed by Yves Saint Laurent),¹³ which was then super-

repeatedly originating creative content. But unlike these industries, the fashion industry’s principal creative element—its apparel designs—is outside the domain of IP law.”)

⁷ See *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991).

⁸ See *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 11 (2d Cir. 1976).

⁹ *Varsity Brands, Inc. v. Star Athletica, LLC*, 799 F.3d 468, 492–93 (6th Cir. 2015), cert. granted in part, 136 S. Ct. 1823 (2016) (“The Copyright Act protects fabric designs, but not dress designs. . . . Creative and arguably attractive as these articles [of clothing] may be, they are merely inventive designs used to cover the wearer’s body and hair.”); *Whimsicality, Inc. v. Rubie’s Costume Co.*, 891 F.2d 452, 455 (2d Cir. 1989) (“We have long held that clothes, as useful articles, are not copyrightable.”); see also 17 U.S.C. § 101 (2012). Section 101 states that the design of a useful article is protected as a “pictorial, graphic, or sculptural work only if, and to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from and are capable of existing independently of the utilitarian aspects of the article.” *Id.*

¹⁰ See *Varsity Brands*, 799 F.3d at 492–93.

¹¹ The most recent legislative proposal to protect fashion designs as a whole is the Innovative Design Protection Act of 2012 (“IDPA”), S. 3523, 112th Cong. (2012). The IDPA proposed to amend the Copyright Act’s definition of a “useful article” to extend copyright protection to fashion designs for a limited time, subject to certain limitations. No action appears to have been taken on the bill since it was introduced. See *Summary: S.3523 — 112th Congress (2011-2012)*, CONGRESS.GOV, <http://beta.congress.gov/bill/112th-congress/senate-bill/3523> [https://perma.cc/C8A4-ULAS]; see also Montalvo, *supra* note 5.

¹² Valerie Steele, *Fashion: Yesterday, Today & Tomorrow*, in *THE FASHION BUSINESS: THEORY, PRACTICE, IMAGE* 7, 7 (Nicola White & Ian Griffiths eds., reprinted 2004).

¹³ *Id.* at 11.

sed by the hippie bohemian chic of the 1970s,¹⁴ and so on, until we arrive at the modern trend of skinny jeans and “Navajo” accessories.¹⁵ Seeking to explain the existence of these trends, scholars often point to the “Veblen effect” of fashion—that is, that elites adopt fashion trends to distinguish themselves from the lower classes and signal their elevated social status.¹⁶ Once the trend has been adopted by the masses, the elites move on to a new trend to reestablish and perpetuate their self-differentiation.¹⁷ Beyond simple status signaling, though, fashion is a means of exploring and asserting the wearer’s identity. To wear a certain fashion design is to demonstrate a “desire for recognition”¹⁸ that manifests itself in dressing differently than the crowd—a desire for attention, interest, approval, and even power over others.¹⁹ For the wearer, fashion is a way to appropriate a new identity through the garments she chooses to clothe herself in: Through fashion designs, “women are promised instant transformation and entry to a realm of desire.”²⁰

But far from just an avenue for the *wearer* to create and establish her own identity, fashion designs are also a way for the *designer* to forge his or her own identity. That identity may entitle the designer to a property right in the resulting creation. Scholars have termed this the “personality theory” of property.²¹ Originally derived from Hegel’s theory of property, an individual’s personality is thought of as the “will” that continually attempts to “actualize” by manifesting itself in external objects that can be recognized by society.²² A designer’s creation of a garment design is thus a way to

¹⁴ *Id.* at 11–12.

¹⁵ See Maura Judkis, *Navajo Nation Sues Urban Outfitters for Trademark Infringement*, WASH. POST (Feb. 29, 2012), http://www.washingtonpost.com/blogs/arts-post/post/navajo-nation-sues-urban-outfitters-for-trademark-infringement/2012/02/29/gIQA1QAoiR_blog.html [<https://perma.cc/BX7D-L4EQ>].

¹⁶ See, e.g., C. Scott Hemphill & Jeannie Suk, *The Law, Culture, and Economics of Fashion*, 61 STAN. L. REV. 1147, 1156 (2009).

¹⁷ *See id.*

¹⁸ PAUL NYSTROM, *THE ECONOMICS OF FASHION* 60 (1928).

¹⁹ *Id.*

²⁰ Reka C.V. Buckley & Stephen Gundle, *Fashion and Glamour*, in *THE FASHION BUSINESS: THEORY, PRACTICE, IMAGE*, *supra* note 12, at 37, 41.

²¹ See Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 330 (1988).

²² *See id.* at 331.

“cause changes in the world” and to “claim” something as his own.²³ Outward assertion of one’s will is necessary, according to personality theorists, because “a self has no real being except in its conscious relations and interactions with others.”²⁴ Recognition of the designer’s right to ban others from copying his design is thus a recognition of the designer’s identity, and to deny the right constitutes a denial of this identity.²⁵

Traditional justifications for protecting the fruits of an artist’s creativity have been grounded in utilitarian and instrumental theories that focus on whether protection is necessary to provide an incentive to create. As many scholars have noted, however, the lack of intellectual property protection has apparently not diminished fashion designers’ incentives to continue to produce new designs; possibly, because copying actually spurs demand for new designs, and thus increases a designer’s potential profit opportunities.²⁶ Restricting the analysis of legal protection of fashion design to an incentive-based theory, however, overlooks the fundamental purpose property rights are meant to play in social institutions: to increase social welfare by producing “social wealth.”²⁷ According to personality theorists, protecting the intellectual property of individuals is necessary to allow them to “achieve proper self-development—to be a *person*.”²⁸ It is possible that the social wealth created by enabling artists to develop their personalities through their creations may outweigh the utility of a faster, less-expensive trend cycle with rapid diffusion of cheap knockoffs. In other words, perhaps we will still end up with low-cost fashion designs without protection against copying. But at what price?

²³ STEPHEN R. MUNZER, *A THEORY OF PROPERTY* 82 (1990).

²⁴ JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* 302 (1988).

²⁵ Hughes, *supra* note 21, at 333 (“Property becomes expression of the will, a part of personality, and it creates the conditions for further free action.”).

²⁶ See Raustiala & Sprigman, *supra* note 6, at 1722 (“The fashion cycle is driven faster . . . by widespread design copying, because copying erodes the positional qualities of fashion goods. Designers in turn respond to this obsolescence with new designs. In short, piracy paradoxically benefits designers by inducing more rapid turnover and additional sales.”).

²⁷ Justin Hughes, *The Personality Interest of Artists and Inventors in Intellectual Property*, 16 *CARDOZO ARTS & ENT. L.J.* 81, 81 (1998).

²⁸ Margaret Jane Radin, *Property and Personhood*, 34 *STAN. L. REV.* 957, 957 (1982).

To answer this question, we must inquire: Do fashion designs embody the personhood interests of the designers and their consumers, and if so, is legal protection necessary to protect those interests against unattributed copying? This Article concludes that, although at least some designers view their designs as invested with personhood, many do not. This wide divergence in attitudes toward their creative property thus makes legal protection for all fashion designs a rather blunt tool to remedy an individualized injury. Further, existing forms of legal protection for fashion designs are either not used or are only employed by large firms whose personhood interests in the fashion designs they produce, if they exist at all, may not actually justify legal protection. Finally, although some relatively insular design communities have been able to control copying through extralegal norms such as online shaming behavior, as these communities grow, such practices tend to become ineffective. Ultimately, this Article argues that the most effective way to control copying—and one that has already shown some success—is for designers to indoctrinate self-enforcing norms among consumers regarding the morality of copying, thereby making copying itself unprofitable.

This Article proceeds in three parts. Part I presents an overview of the personality theory of property. Part II explores whether fashion designers actually do view fashion designs as embodying personhood interests, or whether fashion designs are better viewed as forms of community or fungible property that do not represent an individual designer's personhood interests. Part III examines existing forms of fashion design protection in the European Union and considers alternative methods of controlling unauthorized copying in the absence of legal protection.

I. PERSONALITY THEORY AND PRADA

When an object becomes invested with personhood, it becomes “part of the way we constitute ourselves as continuing personal entities in the world.”²⁹ According to law professor Margaret Radin, once we accept that objects can become invested with person-

²⁹ *Id.* at 959. To illustrate, Radin gives examples of property, such as a wedding ring, that would cause pain if lost and cannot truly be adequately replaced with money. *Id.*

hood, it follows that “the person should be accorded broad liberty with respect to control over that ‘thing.’”³⁰ Further, the relationship between the person and the object justifies protecting the person’s expectation to control it in the future if we believe personhood entails realization of a person’s expectations for her future.³¹ This theory is based in part on the personality theory of Hegel, articulated above, in which the person is an abstract entity possessing free will³² that seeks to “externalize” itself onto the outside world.³³ Hegel assumes that “[a] person has the right to direct his will upon any object, as his real and positive end,” and that people have a fundamental right to “appropriate all that is a thing.”³⁴ Possessing property, according to Hegel, is “the first embodiment of freedom and so in itself is a substantive end.”³⁵ However, it is not only the creator of an object who can invest his or her personality in it; those who come in contact with the object after the creator has brought it into being are also able to invest their personhood interests in the object.

Radin posits that the degree of an individual’s moral right to a type of property varies along a “continuum” in which the more deeply intertwined with personhood the object is, the more rights the person possesses in that object.³⁶ She characterizes this dichotomy as “fungible” if the thing is wholly interchangeable with mon-

³⁰ *Id.* at 960.

³¹ *Id.* at 968 (“If an object you now control is bound up in your future plans or in your anticipation of your future self, and it is partly these plans for your own continuity that make you a person, then your personhood depends on the realization of these expectations.”).

³² G.W.F. HEGEL, *PHILOSOPHY OF RIGHT* § 35 (S.W. Dyde trans. 2001) (“It is implied in personality that I, as a distinct being, am on all sides completely bounded and limited, on the side of inner caprice, impulse and appetite, as well as in my direct and visible outer life. But it is implied likewise that I stand in absolutely pure relation to myself. Hence it is that in this finitude I know myself as infinite, universal, and free.”).

³³ *See id.* § 39 (“But to confine to mere subjectivity the personality, which is meant to be infinite and universal, contradicts and destroys its nature. It bestirs itself to abrogate the limitation by giving itself reality, and proceeds to make the outer visible existence its own.”); *id.* § 41 (“A person must give to his freedom an external sphere, in order that he may reach the completeness implied in the idea.”).

³⁴ *Id.* § 44.

³⁵ Radin, *supra* note 28, at 973 (quoting G.W.F. HEGEL, *PHILOSOPHY OF RIGHT* § 45R (T. Knox trans. 1942)).

³⁶ *Id.* at 986–87.

ey and “personal” if it is not.³⁷ Radin argues that whether the property is fungible or not depends on who currently possesses the property. If an artist, after creating a product, offers it for sale, she regards the property as fungible to the artist: “The wedding ring is fungible to the artisan who made it and now holds it for exchange even though it is property resting on the artisan’s own labor.”³⁸ However, others disagree with the idea that simply because an object is offered for sale, the necessary implication is that the object is not invested with personhood. Justin Hughes, whose works have thoroughly explored the philosophical underpinnings of intellectual property law, points to examples of property such as U.S. Treasury Bonds to which people may sometimes have personal attachments, perhaps because they have been passed down to them from their parents or grandparents.³⁹ Thomas Cotter, another intellectual property scholar, also notes this tension reflected in the treatment of alienability of moral rights and finds its roots in a debate on the subject between Kant and Hegel—a debate which is manifested in the differing treatment of alienability of moral rights, or *droit moral*, in legal regimes. He argues that Kant felt that the author’s right to “speak” was inalienable, and thus that the author could “license, but not alienate, the right to copy his work.” Hegel, however, believed that the author’s external expression of his internal feelings could be alienated.⁴⁰ Whether the product the artist creates and then offers for sale is fully entitled to the same degree of personhood interests in the ultimate product, therefore, is a matter of some debate.

Creators of intellectual property, though, arguably have an even deeper relationship to the created object than the relationship between a woman and her wedding ring. Far from merely receiving an existing object that she has become attached to, the creator of intellectual property has actually given birth to a *new* object by investing her personality in it.⁴¹ The latter position offers support for enhanced protection of intellectual property, including fashion de-

³⁷ *Id.* at 987.

³⁸ *Id.*

³⁹ See Hughes, *supra* note 21, at 337.

⁴⁰ See Thomas F. Cotter, *Pragmatism, Economics, and the Droit Moral*, 76 N.C. L. REV. 1, 8–9 (1997).

⁴¹ Hughes, *supra* note 27, at 87.

signs, regardless of their subsequent commodification and alienation by the creator. Copyright laws in Europe and the United States protect the *droit moral* of artists—rights which traditionally include attribution and integrity—because “according respect to the integrity of the artist’s work also shows respect for the person of the artist, and . . . showing respect for this person (who is, after all, a member of the human community) is a satisfying end in itself.”⁴² Granting moral rights to artists thus communicates that her contributions—her designs—are valued by society as more than mere commodities.⁴³ Further, inculcating a social norm of respect may have positive effects on society for its own sake, apart from the protection the practice affords to artists. Roberta Kwall, who has written extensively on the subject of moral rights and publicity, views moral rights as reflecting “important foundational norms in our society that must, for their own sake, be considered more fully in the dialogue on authors’ rights.”⁴⁴ If legislation helps establish norms of respect for authorship and artistic integrity, it is possible that moral rights legislation can lead to compliance with other laws governing authors’ rights.⁴⁵

Critics of personhood theory point to several defects in using personhood interests as a justification for property rights. First, the personhood interests in a particular object may be conflicting. Recognizing moral rights in fashion designs would create intractable conflicts between the need of others to use the designs to fulfill expressive and creative values in a way the designer did not anticipate, and the designer’s right to preserve her own personhood rights.⁴⁶ For example, is it realistic to allow an artist to dictate how

⁴² Cotter, *supra* note 40, at 5, 42.

⁴³ *Id.* at 43; see also Roberta Rosenthal Kwall, *Inspiration and Innovation: The Intrinsic Dimension of the Artistic Soul*, 81 NOTRE DAME L. REV. 1945, 1972–73 (2006) (“On a theoretical level, moral rights focus on inspirational motivations and the intrinsic dimension of creativity; attribution and integrity rights are protected because they are regarded as integral components of a work’s meaning and message as conceived by the original author as a result of her endowed creative gift.”).

⁴⁴ See Kwall, *supra* note 43, at 1973.

⁴⁵ See *id.* at 1975.

⁴⁶ See Cotter, *supra* note 40, at 39; Hughes, *supra* note 27, at 81–82; see also Amy M. Adler, *Against Moral Rights*, 97 CALIF. L. REV. 263, 265 (2009) (“[T]he right of integrity threatens art because it fails to recognize the profound artistic importance of modifying, even destroying, works of art, and of freeing art from the control of the artist. Ultimately,

consumers should hang a painting once they purchase it, or whether they may wear an individual article of clothing or jewelry? William Landes and Richard Posner, two respected scholars of the law and economics movement, argue that rights of attribution are unnecessary and that it would often be undesirable to spend social resources detecting and punishing these offenses.⁴⁷ For example, “a poor woman who wears a perfume with the same scent as Chanel No. 5 hoping to be thought wealthy” would be “perpetrating a fraud of sorts because [she] would be trying to gain prestige and status.”⁴⁸ But, Landes and Posner argue, neither the designer nor “society as a whole” would find it desirable to prohibit the poor woman’s use of the smell-alike perfume.⁴⁹ To the extent moral rights offer protection for the right of integrity, Landes and Posner contend that such protection would actually harm artists by increasing the transaction costs of selling a work of art.⁵⁰ In an even more nuanced argument, they posit that the mutilation of one of the artists’ works creates scarcity in the supply of works and will thus cause the price of the remaining artists’ works to rise—in effect, helping and not hurting her.⁵¹ Finally, there remains the prob-

I question the most basic premise of moral rights law: that law should treat visual art as a uniquely prized category that merits exceptions from the normal rules of property and contract.”); cf. Lawrence Adam Beyer, *Intentionalism, Art, and the Suppression of Innovation: Film Colorization and the Philosophy of Moral Rights*, 82 NW. U. L. REV. 1011, 1025 (1988) (arguing that personality based justifications for moral rights is fundamentally myopic because it “serve[s] the interests of past and present artist at the expense of future ones” and “is in fact based upon premises that are profoundly conservative and anti-art, and whose implications would threaten artistic creation rather than protect and promote it”).

⁴⁷ See WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 276 (2003).

⁴⁸ *Id.*

⁴⁹ *Id.* In fact, it appears that companies do find it desirable to stop their brands being compared to smell-alikes. For instance, L’Oréal sued Bellure for trademark infringement when it used L’Oréal’s mark in a chart comparing its cheap smell-alike perfumes to L’Oréal’s perfume. The Court of Justice of the European Union found Bellure’s use to be unfair and concluded that there was no need to prove likelihood of confusion if the public associates the two marks. Case C-487/07, L’Oréal SA v. Bellure NV, CURIA (June 18, 2009), [http://curia.europa.eu/juris/celex.jsf?celex=62007CC0487&lang1=en&type=](http://curia.europa.eu/juris/celex.jsf?celex=62007CC0487&lang1=en&type=TXT&ancre=[https://perma.cc/93CY-ZKME])

⁵⁰ See LANDES & POSNER, *supra* note 47, at 277–78.

⁵¹ See *id.* at 279 (citing Henry Hansmann & Marina Santilli, *Authors’ and Artists’ Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. LEGAL STUD. 95 (1997)).

lem that people may become wrapped up in, or fetishize, objects that are not worth the social cost of protecting, despite their associated personhood interests.⁵²

Concerns about rights of integrity seem to have little applicability in the fashion design context. Most fashion designers do not seem to want to control how the customers wear the clothes.⁵³ Perhaps this stems from the fact that this is virtually impossible to regulate, and could hearken back to sumptuary laws that were forbidden long ago.⁵⁴ However, moral rights laws do afford a justification for protecting fashion designers from *unattributed* copying of fashion designs and selling them to the public—the fraud of the fake Chanel No. 5 perfume—which corrodes the market power of the fashion designer, the status-signaling power of the brand, its value for the Veblen elites who wear it, and, ultimately, the personhood of the designer embodied in the scent of the perfume or the cut of the dress itself. These concerns, however, must be weighed against the costs of protection of the personhood interests articulated above, notably their ability to block derivative uses, and generally to limit access to cheaper versions of high-end elite goods that many may not be able to afford.

II. WHO'S REALLY AFRAID OF FOREVER 21?

The fashion world is not a single homogeneous community. On the one hand, there are the celebrity fashion designers who are known by their own names, separate from their work for a fashion house.⁵⁵ These include Marc Jacobs, John Galliano, Tom Ford, and Karl Lagerfeld, to name a few. But there are still a number of independent (“indie”) fashion designers who either sell their wares in

⁵² See Radin, *supra* note 28, at 968–70.

⁵³ Nobody tells me that I cannot mix and match labels or designs, prints, fabrics, or wear one type of shoe with a certain type of clothing.

⁵⁴ See Barton Beebe, *Intellectual Property Law and the Sumptuary Code*, 123 HARV. L. REV. 809, 812, 815 (2010).

⁵⁵ See Susanna Monseau, *European Design Rights: A Model for the Protection of All Designers from Piracy*, 48 AM. BUS. L.J. 27, 34 (2011) (“Over the last forty years the focus on status symbols has led to the increased importance of the individual named designer, and the designer logo has developed, allowing people to seek out and purchase the products of well-known, star fashion designers.”).

small local shops, at flea markets, or in growing online forums—including the website Etsy—dedicated to providing a marketplace for artisans, do-it-yourself (“DIY”) designers, and others.⁵⁶ This Part asks whether designers really do feel that fashion designs are “personal” property that require protection as a moral imperative, or whether fashion designs are better regarded as some form of “community” or “fungible” property. The ultimate answer remains a matter of debate, but it is clear that at least some designers feel a visceral sense of injustice and disrespect when their designs are closely copied by others. This wide divergence in attitudes toward the personhood interests embodied in fashion designs, however, makes across-the-board legal protection a blunt tool to address these individualized injuries.

A. Fashion Designs as “Community” Property

Within the fashion world, many fashion designers are copyists themselves—they engage in “referencing”⁵⁷ by looking to other designers’ work, as well as history, nature, and even what people are wearing on the street to get inspiration for their fashion designs. Marc Jacobs, for example, stated in an interview:

I’ve never denied how influenced I am by [Martin] Margiela, by Rei Kawakubo, those are people that inspire my work; I don’t hide that . . . I’m attentive to what’s going on in fashion, I’m influenced by fashion, that’s the way it is. I have never ever hidden it. I have never insisted on my own creativity, as Chanel would say.⁵⁸

Michael Kors, another top American fashion designer, has even described his own designs as inspired by other designers, including

⁵⁶ Etsy describes itself as “online community where crafters, artists and makers [can] sell their handmade and vintage goods and craft supplies” and its mission as empowering people to make the world one in which “creative entrepreneurs can find meaningful work selling their goods in both global and local markets.” *About, supra* note 1; *Mission*, ETSY, <https://www.etsy.com/mission> [<https://perma.cc/A4MR-Z7NB>] (last visited Oct. 21, 2016).

⁵⁷ Raustiala & Sprigman, *supra* note 6, at 1728.

⁵⁸ Bridget Foley, *Jacobs Blasts Back: Designer Tells Critics Shut Up or Stay Home*, WOMEN’S WEAR DAILY, Sept. 13, 2007, at 10; *see also* KAL RAUSTIALA & CHRISTOPHER SPRIGMAN, THE KNOCKOFF ECONOMY: HOW IMITATION SPARKS INNOVATION 51 (2012).

one that netted him a complaint from the very designer (Tony Duquette) he cited as inspiration for his “Duquette print shantung shift dress.”⁵⁹ Kal Raustiala and Christopher Sprigman, whose works explore the relationship between copycatting and innovation, point to this referencing norm as one of the reasons why fashion designers are tolerant of copying, explaining that they will rationally choose to allowing copying because, in the future, they might be the copiers and not the copied: “[D]esigners viewing their incentives *ex ante* are at least partially shrouded within a Rawlsian veil of ignorance. If copying is as likely a future state as being copied, it is not clear that property rights in fashion designs are advantageous for a designer, viewed *ex ante*.”⁶⁰ Some designers apparently even view copying as true “homage.”⁶¹ Tom Ford, for instance, has said: “Nothing made me happier than to see something that I had done copied.”⁶²

Toleration of copying even extends to smaller designers, who appear to regard it as flattery at best, and as an inevitable by-product of the design industry at worst. One young indie jewelry designer who began to sell jewelry resembling rib cages and other skeletal structures at the Brooklyn Flea market discovered “shockingly similar knockoffs” in an Urban Outfitters catalog fairly soon after she began selling her products.⁶³ Her attitude toward copying was jaded: Copying, to her, is just “part of the business.”⁶⁴ After seeing not only her own necklaces in Urban Outfitters, but others similar to those of another designer she knew, who sold jewelry at the flea market, the designer noted that “[i]t’s depressing, but inevitable that our designs will be ripped off because we’re both real-

⁵⁹ Susan Scafidi, *Sois Belle et Tais-Toi!*, COUNTERFEIT CHIC (Feb. 3, 2009, 12:27 AM), http://www.counterfeitchic.com/2009/02/sois_belle_et_taisstoi.php [<https://perma.cc/55FV-M2SM>].

⁶⁰ Raustiala & Sprigman, *supra* note 6, at 1727.

⁶¹ RAUSTIALA & SPRIGMAN, *supra* note 58, at 38.

⁶² *Id.*

⁶³ Stephen Brown, *For Urban Outfitters, It’s Bling There, Done That*, BROOK. PAPER (May 25, 2010), http://www.brooklynpaper.com/stories/33/22/all_urbancounterfeit_2010_05_28_bk.html [<https://perma.cc/G7WE-TZW6>]. The artist began selling her products in March 2009 and the author of the article estimated that Urban Outfitters released similar designs by or after November 2009. *Id.*

⁶⁴ *Id.*

ly creative” and that it is “kind of the way the industry works.”⁶⁵ She added: “I took it as legitimizing, in a way.”⁶⁶ Indeed, some independent designers are even skeptical of the claim that any design is truly original. In a post on an Etsy forum that discusses how Etsy sellers can stand out from copycats, Stephanie from the Etsy shop barebare noted: “Especially if we all buy our supplies on Etsy we’re bound to come up with the same idea eventually. Plus, every jewelry making technique can be found online, in a book, magazines at the craft store . . . its [sic] all been done.”⁶⁷ In response to copying, most contributors advised each other to ignore it and work on retaining customers through design characteristics that are not vulnerable to appropriation. As one Etsy seller expressed: “[K]eep developing your own talent and style . . . there’s only so much a copycat can copy . . . they can not [sic] copy YOU or your soul or your special way of looking at the world and responding to it. . . .”⁶⁸

The more the relevant community views creativity as a product not solely of the individual creator’s efforts, but of a complex interplay between the creator and others in the community, the higher the tolerance of copying. Legal scholar William Alford, for instance, has attempted to explain the lesser degree of protection for intellectual property in China by looking to Chinese history and the individual’s conception of how he fits in with the rest of the community.⁶⁹ He notes that “the dominant Confucian vision of the nature of civilization and of the constitutive role played therein by a shared and still vital past” contributed to a social regard of intellectual property that was less individualistic and more communitarian.⁷⁰ Rather than being regarded as a product of the author’s sole creation, authors were viewed as transmitting ideas, rather than

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Stephanie (from barebare), *How to Stand Out from Copy Cats*, ETSY: DISCUSSIONS (Aug. 6, 2012, 6:53 PM), <http://www.etsy.com/teams/7722/business-topics/discuss/10721187/page/3> [<https://perma.cc/85UZ-F3CJ>].

⁶⁸ Mary Richmond (from CapeCodArtnNature), *How to Stand Out from Copy Cats*, ETSY: DISCUSSIONS (Aug. 6, 2012, 4:29 PM), <http://www.etsy.com/teams/7722/business-topics/discuss/10721187/> [<https://perma.cc/99BN-R5XG>].

⁶⁹ See WILLIAM ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION* 19 (1995).

⁷⁰ *Id.*

creating them.⁷¹ The People's Republic of China drew, not only on these Confucian values, but also on Soviet attitudes toward intellectual property that similarly placed less emphasis on the individual creator: Each individual was regarded as owing his very existence to the group, thus making every individual act a group act.⁷² Indeed, Alford notes that one common saying during the Cultural Revolution in China went as follows: "Is it necessary for a steel worker to put his name on a steel ingot that he produces in the course of his duty? If not, why should a member of the intelligentsia enjoy the privilege of putting his name on what he produces?"⁷³

But views regarding creativity can shift over time or vary based on the degree of similarity between the original and the copy. An evolution in attitudes toward copying can be seen, for instance, in the stand-up comedy industry. Similar to the fashion industry, copying, or "'refinement' of other comedians' material" was widespread and accepted during the early twentieth-century period of stand-up comedy.⁷⁴ Other comedians would apparently go to comedy shows and write down the jokes so that they could perform them later in their own routines,⁷⁵ and comedians like Phyllis Diller would use comic strips as inspiration for their jokes.⁷⁶ However, as comedy routines became increasingly tailored to individual comedians' stories, conceptions of the creative process appear to have shifted, making comedians less tolerant, and even fiercely protective, of their ideas.⁷⁷ Similarly, fashion designers who also purportedly accept the referencing norms articulated above still refuse to tolerate "point by point" copying.⁷⁸ C. Scott Hemphill and Jeannie Suk, whose works critically examine the effects of copying on fashion design innovation, distinguish between "close copying" and

⁷¹ See *id.* at 25 (quoting Confucius as stating "[t]he Master [i.e., Confucius himself] said: 'I transmit rather than create; I believe in and love the Ancients.'").

⁷² *Id.* at 57. For example, Alford quotes Marx, stating that intellectual property is really a product of society because each individual's "existence is a social activity" and thus whatever that individual produces is produced for society. *Id.*

⁷³ *Id.* at 56.

⁷⁴ RAUSTIALA & SPRIGMAN, *supra* note 58, at 100–02.

⁷⁵ *Id.* at 101.

⁷⁶ *Id.* at 100.

⁷⁷ *Id.* at 101. Raustiala and Sprigman note that one comedian went so far as to physically assault another upon hearing a joke he felt was copied from one of his own. *Id.* at 97–99.

⁷⁸ *Id.* at 36.

non-precise copying by fast fashion firms like H&M and Zara that large designers appear to tolerate.⁷⁹ Instead of being flattered, fashion designers whose designs are closely copied take their copiers to court. Fashion designers including Anna Sui,⁸⁰ Diane von Furstenberg,⁸¹ and Trovata,⁸² among others, have sued fast fashion firm Forever 21 for close copying of fabric designs, but few have sued H&M and Zara.⁸³ Even those who regard creativity as in some sense communal, therefore, appear less tolerant when the copying comes too close to the real thing.

B. Fashion Designs as “Fungible” Property

Some designers may not even feel that they have invested their personhood in the designs at all. For instance, Gwen Stefani, a singer-turned-fashion-designer who sued fast fashion firm Forever 21 for copying her clothing designs,⁸⁴ ironically stated at least once (in an interview to MTV) that fashion, unlike music, is not something that she pours her heart and soul into. Stefani called her fashion collection her “art project,” noting: “It’s a no-brainer, fun thing to do compared to doing music, which is very emotional and hard. . . . [Music is] a draining, emotional process compared to designing, which is very greedy and easy.”⁸⁵ Other celebrity fashion designers also appear to treat designing more as a business than as an art form. In a *Harper’s Bazaar* profile of a day in the life of top American fashion designer Michael Kors, Kors described his day more like that of an executive than a bohemian artist:

⁷⁹ See Hemphill & Suk, *supra* note 16, at 1172–74.

⁸⁰ Lynn Yaeger, *Sui Generis?*, VILLAGE VOICE (Sept. 18, 2007, 4:00 AM), <http://www.villagevoice.com/2007-09-18/nyc-life/sui-generis/> [<https://perma.cc/U496-VY29>].

⁸¹ Danica Lo, *Designer Sues: ‘Evil’ Twin Von Furious at ‘Copycat,’* DANICA LO PERS. BLOG (Mar. 29, 2007), <http://www.danicalo.com/2007/03/designer-sues-evil-twin-von-furious-at.html> [<https://perma.cc/2ETW-9P8D>].

⁸² Faran Krentcil, *Trovata v. Forever 21: Deadlocked*, FASHIONISTA (May 27, 2009), <http://fashionista.com/2009/05/trovata-v-forever-21-deadlocked/> [<http://perma.cc/CY4J-868J>].

⁸³ See Hemphill & Suk, *supra* note 16, at 1172–74.

⁸⁴ Meg Marco, *Gwen Stefani Sues Forever 21 for Trademark Infringement*, CONSUMERIST (July 18, 2007), <http://consumerist.com/2007/07/18/gwen-stefani-sues-forever-21-for-trademark-infringement/> [<https://perma.cc/Z58H-WTW8>].

⁸⁵ Farrah Weinstein, *Gwen Wants LP Out This Year, Finds Fashion Inspiration in ‘Scarface,’* MTV (Sept. 18, 2006), <http://www.mtv.com/news/articles/1541181/gwen-wants-ear-candy-lp-out-this-year.jhtml> [<https://perma.cc/5VYY-WL3W>].

I'll start with, say, a phone interview, then I could jump into a review looking at jewelry samples and then into looking at prints that we are working on for the women's collection. . . . Every day, no matter what, there is going to be a minimum of two design meetings. And there is always going to be something like deciding on models or reading copy for the catalog. I look at all of it.⁸⁶

Further, the myth of the single designer as the genius behind the fashion design may only apply to a chosen few. Most designers cycle in and out of firms that have their own brand and look that the designers must keep in mind when designing.⁸⁷ This view of the fashion design firm is essentially that of a corporate entity in which the designer is only a hired gun, constrained by the marketing and branding orders handed down from above. Most of the work that goes into creating a fashion design is not just drawing and sketching, but doing market research, crunching numbers, and tweaking fabrics. Luigi Maramotti, Chairman of fashion firm MaxMara⁸⁸ and the son of the founding designer of the firm, made this point:

A company producing fashion is the utmost example of forced innovation. It is absolutely necessary to relaunch, recreate, rethink and to discuss things over and over again. . . . I have a high opinion of the 'idea' but I believe we should consider it developed and embodied only when it has passed through some kind of process and become a 'product,' no matter how small the market. Original ideas are only

⁸⁶ Anamaria Wilson, *My List: Michael Kors in 24 Hours*, HARPER'S BAZAAR (July 11, 2012), <http://www.harpersbazaar.com/fashion/designers/a881/24-hours-with-michael-kors-0812/> [<https://perma.cc/3QF6-S9UW>].

⁸⁷ See PATRIK ASPERS, *ORDERLY FASHION: A SOCIOLOGY OF MARKETS* 99 (2010) (Because each firm has a distinct look, designers are constrained in what they can create for the firm. "This is an important reason why individual designers may not be of great importance in a design team that can involve 50 or more people. . . . The reason, in contrast to more free forms of design, is that every designer has to comply with the identity of the firm and its designs.").

⁸⁸ *Company Overview of MaxMara USA, Inc.*, BLOOMBERG, <http://www.bloomberg.com/research/stocks/private/person.asp?personId=7389486&privcapId=4564235> [<https://perma.cc/NCF3-KBDF>] (last visited Oct. 4, 2016).

the first step of a long journey towards a desired success.⁸⁹

Designers are thus subsumed in a design team that is focused on churning out a physical product that can be sold for money. Viewed from this angle, designers begin to look less like the romantic vision of the starving artist dreaming of fabric and drape, and more like a member of the boardroom.

In contrast, some iconic fashion designers still describe their work with terms that evoke the creative process of an artist, even though their work is part of a larger business strategy. Christian Louboutin, whose firm famously sued Yves Saint Laurent for trademark infringement of the red outsole of his shoes,⁹⁰ describes his design process as a mix of the roles of CEO and artist:

I work with the team downstairs, reviewing everything, like the shoes, the bags, and the cosmetics line, all the projects. . . . Everything that takes a lot of dedication and creativity I do in the morning when there is light and I'm really concentrated. When I'm drawing, I'm drawing with the light, being completely open and creative.⁹¹

Even though he may not do the actual "draping" of the fabric, Karl Lagerfeld nevertheless calls the work of drawing the designs "very conceptual."⁹² And in describing his role with the Council of Fashion Designers of America in testimony before a congressional subcommittee, fashion designer Jeffrey Banks characterized fa-

⁸⁹ Luigi Maramotti, *Connecting Creativity*, in *THE FASHION BUSINESS: THEORY, PRACTICE, IMAGE*, *supra* note 12, at 91, 96.

⁹⁰ See *Christian Louboutin S.A. v. Yves Saint Laurent Am. Holdings, Inc.*, 696 F.3d 206, 210–12 (2d Cir. 2012).

⁹¹ Anamaria Wilson, *My List: Christian Louboutin*, *HARPER'S BAZAAR* (Sept. 18, 2012), <http://www.harpersbazaar.com/fashion/designers/a900/24-hours-with-christian-louboutin-1012/> [<https://perma.cc/85Y6-HCGR>].

⁹² Kristina O'Neill, *My List: Karl Lagerfeld in 24 Hours*, *HARPER'S BAZAAR* (Mar. 16, 2012), <http://www.harpersbazaar.com/fashion/trends/a865/24-hours-with-karl-lagerfeld-0412/> [<https://perma.cc/T8QJ-EFZX>].

shion design as “a branch of American art and culture,” not merely a profit-making capitalist enterprise.⁹³

C. Fashion Designs as “Personal” Property

Despite the examples outlined above, a great number of fashion designers—big names and small—view their designs as intensely personal. Interestingly, the outrage they express at the copying of their work does not necessarily come from the fact that someone else is profiting from their work, but from their belief that copyists are disrespecting the designer by stealing their work.

When indie designers from the label Feral Childe sued Forever 21 for copying their “hand-drawn print of teepees,”⁹⁴ a fellow indie designer named Eliza Starbuck started a petition against Forever 21.⁹⁵ In it, she wrote:

Every print Feral Childe designs is an original piece of art—the hand-drawn “Teepees” design that Forever21 so blatantly copied . . . took the designers months of hard work and collaboration to create. . . . By stealing one of Feral Childe’s designs, Forever21 is . . . saying they have no respect for original work from independent designers. . . .⁹⁶

Other designers also articulate feeling a lack of respect for their personal worth when their works are openly copied. For instance, knitwear designer Lily Chin stated: “[I]f my name is not attached to my creation, something is taken away from my reputation. After all, the bigger picture is that it’s really me that’s being sold.”⁹⁷ Si-

⁹³ See *A Bill to Provide Protection for Fashion Design: Hearing on H.R. 5055 Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 109th Cong. 10 (2006) (statement of Jeffrey Banks, fashion designer).

⁹⁴ *Forever Sued: Forever 21 Angers Indie Designers, But Shoppers Still Love It*, AOL (Aug. 15, 2011, 2:50 PM), <http://www.aol.com/article/2011/08/15/forever-21-angers-indie-designers-attracts-shoppers/20017983/> [<http://perma.cc/H8QN-2R36>].

⁹⁵ Eliza Starbuck, *Don’t Let Forever21 Steal from Independent, Eco-Friendly Designers*, CHANGE.ORG, <http://www.change.org/petitions/dont-let-forever21-steal-from-independent-eco-friendly-designers> [<https://perma.cc/H3WB-W63A>] (last visited Oct. 4, 2016).

⁹⁶ *Id.*

⁹⁷ Anne Theodore Briggs, *Hung Out to Dry: Clothing Design Protection Pitfalls in United States Law*, 24 *HASTINGS COMM. & ENT. L.J.* 169, 213 (2002).

imilarly, Tanzanian designer Sheria Ngowi, in response to accusations that he copied one of his own designs from another designer, described his feelings toward copying thus:

Some designers have been quoted saying that fashion imitation is the sincerest form of flattery. When one's designs are copied it goes to show that they have made an impact in the industry. But I say, it is really when the imitation is so blatant that you can't tell a difference between the imitated and the imitator that flattery becomes mockery.⁹⁸

Norms against copying in the Etsy online community, in particular, appear to be very strong and sound in personhood. Etsy sellers generally hand make their wares and, in a way, appear to be more closely invested in their designs. Perhaps this is due to the physical labor that goes into making each piece. In the same Etsy forum on how to prevent copying, one user notes that although her techniques and materials may not be totally original, “when you start seeing shops popping up that have items that appear to be carbon copies of yours, well it's a kick in the gut.”⁹⁹ Another Etsy seller, Sleepy King, specifically posted her outrage on a blog entitled *You Thought We Wouldn't Notice*, where users share examples of “blatant” rip-offs and attorneys may offer commentary.¹⁰⁰ Sleepy King, a designer whose fans e-mailed her when they saw a Swedish corporation's rip-off of her design, wrote that, upon finding out that her creations had been copied, she “instantly felt disgusted and angry.”¹⁰¹ Outrage is equally (and perhaps more) evident when the seller is another “artist” in the Etsy community. Another contributor to *You Thought We Wouldn't Notice* wrote:

I've asked this CRAFTER (artists don't blatantly and/or purposefully copy other artists)... to

⁹⁸ Haki Ngowi, *Fashion Designer Sheria Ngowi Addresses Allegations Regarding One of His 2011 Creations*, H@KI NGOWI (July 12, 2012), <http://www.hakingowi.com/2012/07/fashion-designer-sheria-ngowi-addresses.html> [<https://perma.cc/J9UM-G98U>].

⁹⁹ Luna Lux (from LunasLuxe), *How to Stand Out from Copy Cats*, ETSY: DISCUSSIONS (Aug. 6, 2012, 7:01 PM), <http://www.etsy.com/teams/7722/business-topics/discuss/10721187/page/3> [<https://perma.cc/85UZ-F3CJ>].

¹⁰⁰ Sleepy King, *supra* note 1.

¹⁰¹ Carroll, *supra* note 1.

PLEASE stop ripping off my designs, over and over.
 Being a fulltime [sic] artisan, it's very important to
 me to keep my ORIGINAL DESIGNS just that . . .
 MY original designs¹⁰²

It appears that at least some designers feel that they have been robbed of something deeply personal when their designs are being copied. Yet, does that mean that they will really stop creating, despite their outrage? Probably not. For instance, in testimony before a congressional subcommittee, famous designer Narciso Rodriguez described his mixed feelings after having a wedding dress he designed for Carolyn Bissette Kennedy ripped off:

I designed something with great love for the most important person in my life. That dress spawned somewhere in the 7 million to 8 million copies. I got to sell 40 of those dresses. You know, it was a very personal thing for me, that dress, so I never looked at it like something was stolen from me because I would have made that dress anyway. But all that publicity and the knockoffs didn't pay my bills or get me to where I am today.¹⁰³

Viewed from this angle, perhaps creating art for art's sake—though it hurts when it gets ripped off—would nevertheless be done anyway because of the value of the *process* of making art to the personhood of the designer, regardless of the integrity of the final outcome. This is also consistent with Hegel's concept of personality theory as valuing the process of the artist's self-actualization as a good in itself, which is not inconsistent with allowing the end-product of the creative process to be freely alienable. Thus, even if we accept that copying may occasion some sort of personal injury to the designer who is copied, if she has actually nevertheless been able to express herself through the creative process, legal protection for the result is not merited.

¹⁰² FireChickTick, *I Am So Tired of Etsy Ripoffs*, YOU THOUGHT WE WOULDN'T NOTICE (Nov. 23, 2008), <http://www.youthoughtwewouldntnotice.com/2008/11/23/i-am-so-tired-of-etsy-ripoffs/> [<https://perma.cc/52QA-U9VD>].

¹⁰³ *Design Law—Are Special Provisions Needed to Protect Unique Industries?: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property*, 110th Cong. 22 (2008) (statement of Narciso Rodriguez, designer).

III. COPYRIGHT VS. YOU THOUGHT WE WOULDN'T NOTICE

The wide diversity in attitudes toward copying among fashion designers could justify broad protection against copying, as those who do not feel injured by copying would just regard legal protection as irrelevant. Conversely, it could mean that categorical legal protection will give benefits to those who do not need it, resulting in socially wasteful litigation. An interesting test case is that of Europe, where the moral rights of artists have long been protected, and to a much greater extent than in America.¹⁰⁴ In France and Germany, for example, legislatures developed laws to protect authors' *droit moral*.¹⁰⁵ These moral rights include the right of disclosure, the right to "correct or withdraw works previously disclosed to the public," the right of attribution, and the right of integrity.¹⁰⁶ Many European countries regard the rights as inalienable or substantially restrict the artist's ability to fully alienate and commodify her moral rights in the property.¹⁰⁷ The protection of artists' moral rights extends to fashion designs, which are currently protected in

¹⁰⁴ Notably, fashion designs have been protected by copyright in France since 1793. French copyright law currently provides explicit protection for fashion designs, defining "dress and articles of fashion" as "works of the mind." See Matthew S. Miller, *Piracy in Our Backyard: A Comparative Analysis of the Implications of Fashion Copying in the United States for the International Copyright Community*, 2 J. INT'L MEDIA & ENT. L. 133, 143 (2008) (quoting CODE DE LA PROPRIÉTÉ INTELLECTUELLE [C. INTELL. PROP.] [INTELLECTUAL PROPERTY CODE] art. L112-2 (Fr.)). The only federal protection of artists' moral rights in American intellectual property law appears to be the Visual Artists Rights Act of 1990 ("VARA"), which gives authors of visual works of art rights of attribution and integrity. See 17 U.S.C. § 106A (2012). The scope of the right is very limited, as it does not apply to any "reproduction, depiction, portrayal, or other use of the work," § 106A(c)(3), and the definition of "visual art" itself is limited to artworks consisting of "a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author." 17 U.S.C. § 101 (2012). The moral rights accorded to artists by VARA are waivable and terminate with the life of the author. § 106A(d)-(e).

¹⁰⁵ Cotter, *supra* note 40, at 10.

¹⁰⁶ *Id.*

¹⁰⁷ See, e.g., Neil Netanel, *Copyright Alienability Restrictions and the Enhancement of Author Autonomy: A Normative Evaluation*, 24 RUTGERS L.J. 347, 350 (1993) (noting that Continental doctrine regarding moral rights places numerous restrictions on "copyright commodification," including "unwaivable transferee obligations to disseminate the work" and "restrictions on transferee retransfers"). In Austria and Germany, authors are barred from assigning the copyright in their works, although they may grant users licenses to their works. *Id.*

Europe either by copyright or by EU regulations.¹⁰⁸ This Part shows that fashion designers in Europe have taken advantage—only to a limited extent—of the legal protections afforded to fashion designs. Further, of those that have done so, the litigants are mostly large design firms whose personhood interests in fashion designs may not necessarily warrant legal protection. Finally, I examine forms of extralegal norms that have developed in small design communities, including Etsy, and may be sufficient to protect the personhood interests that are ostensibly threatened by unattributed copying of fashion designs. Although these extralegal norms may be effective when the community is sufficiently tightly knit and shares common values, once the community begins to grow, these norms lose their effectiveness. Ultimately, this Part argues that the most successful strategy for designers has been to inculcate norms about the morality of copying among their consumers, which consumers can then enforce against copyists through social media outlets. Undermining the very source of copyists' profitability thus appears to be the most effective way for those who are hurt to remedy their injuries.

A. European Legal Protection for Fashion Design

In 1998, the European Parliament and Council of the European Union adopted a directive (the "Design Directive") which requires all member countries of the European Union to protect registered designs and protect design rights for five years from the application filing date, a term of protection that is renewable for up to a total of twenty-five years.¹⁰⁹ The Design Directive allows cumulative protection of fashion designs, thus entitling designers to avail themselves of both EU law and the laws of the individual member countries.¹¹⁰ In 2002, the Council of the European Union passed a regulation on community designs (the "Design Regulation"), which gave protection to *unregistered* designs at the European level.¹¹¹ This resulted in harmonization between the countries that af-

¹⁰⁸ See *infra* Section II.A.

¹⁰⁹ See Council Directive 98/71, arts. 3, 10, 1998 O.J. (L 289) 28 [hereinafter Design Directive].

¹¹⁰ See *id.*; Monseau, *supra* note 55, at 57.

¹¹¹ Council Regulation 6/2002, 2002 O.J. (L 3) 1 [hereinafter Design Regulation].

forded automatic copyright protection to designs without registration, and member countries whose laws required registration to protect fashion designs.¹¹² The Design Regulation, however, limits the scope of its protection to designs that are “new” and that have “individual character.”¹¹³ The Design Regulation provides that a design is “new” if “no identical design has been made available to the public”¹¹⁴ and has individual character if “the overall impression it produces on the informed user differs from the overall impression produced on such a user by any design which has been made available to the public.”¹¹⁵ In this sense, European design protection seems at once like copyright protection for “original” works, and at the same time a form of design patent rights that protect any new, original, and ornamental registered designs against infringement (although some scholars argue that European design protection resembles copyright more than patent protection).¹¹⁶

Although litigation based on fashion design infringement is not of the same magnitude as copyright infringement litigation in other industries, the number of suits filed against copycat firms by European fashion design houses has been increasing, particularly following the passage of the Design Regulation in 2002.¹¹⁷ Tod’s, a high-end shoemaker that sells shoes under the trademarks Tod’s and Hogan, sued French boutique Heyraud¹¹⁸ after it found out that

¹¹² See Monseau, *supra* note 55, at 58.

¹¹³ Design Regulation, *supra* note 111, at art. 4.

¹¹⁴ *Id.* at art. 5.

¹¹⁵ *Id.* at art. 6.

¹¹⁶ See Monseau, *supra* note 55, at 58 (noting that “[t]he European design protection system does not require a patent standard of originality, and there is no substantive review of a design”).

¹¹⁷ See *Design Rights*, SHOOSMITHS, <http://www.shoosmiths.co.uk/services/intellectual-property/design-rights-592.aspx> [<https://perma.cc/ND94-5LDW>] (last visited Oct. 4, 2016). Shoosmiths is a law firm in the United Kingdom that represents Jimmy Choo and is particularly known for helping designers enforce design rights. On its website, the firm notes: “Whilst design rights have been around for a long time they really came to prominence in 2002 when the European design right was created. This protected designs across the whole of Europe and gave designers the opportunity to try out designs over a 12 month period after which they could register them for 25 years protection. . . . The European design right has opened up a whole new world of protection as it not only applies to the whole design but also any parts of it especially where a feature is created from a contour, shape, texture or material used.” *Id.*

¹¹⁸ HEYRAUD, <http://www.heyraud.fr/> [<https://perma.cc/MUK3-ETLA>] (last visited Oct. 21, 2016).

Heyraud was selling shoes that “copied or at least imitated the principal characteristics of the Tod’s and Hogan designs.”¹¹⁹ Jimmy Choo, a top fashion firm that designed the very popular Ramona bag sued Towerstone, a shop in London, for making handbags similar to the Ramona.¹²⁰ This resulted in a victory for Jimmy Choo after the court found that an “informed user”—not the ordinary person on the street, but someone who nevertheless had some knowledge about handbag designs—would find the designs similar because any differences in the handbags were not obvious absent intense scrutiny.¹²¹ In addition to suing based on its registered design rights, Jimmy Choo has also brought suit against Oasis and Jane Shilton for copying its shoe designs, and against fast fashion firm New Look and British store Marks & Spencer for allegedly copying one of its evening bag designs.¹²² Although it did not admit to copying the designs, Marks & Spencer was found to have infringed the design and was required to destroy the offending bags.¹²³ In 2005, French fashion firm Chloé sued a mid-tier fashion firm, Kookai for selling a version of one of Chloé’s bags.¹²⁴ Chloé also sued British fast fashion firm Topshop in 2007 for copyright infringement of a dress that Chloé’s lawyers said “was almost identical, which, given Chloé’s determination to prevent copycat designs, could not be ignored.”¹²⁵ In response, Topshop removed the remaining dresses from its stores and paid Chloé a settlement of

¹¹⁹ *Tod’s SpA and Tod’s France SARL v Heyraud SA*, Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Paris, 2e ch., June 30, 2005, C-28/04 (Fr.). The case revolved around a jurisdictional question and did not decide the question of infringement. *Id.*

¹²⁰ *J Choo (Jersey) Ltd. v. Towerstone Ltd.* [2008] EWHC (Ch) 346 (Eng.); *see also* Monseau, *supra* note 55, at 59–60.

¹²¹ *See J Choo* [2008] EWHC 346 [6, 7, 18, 21]; Monseau, *supra* note 55, at 59–60.

¹²² *See Copying: Fair or Unfair?*, INTANGIBLE BUS., <http://www.intangiblebusiness.com/reports/copying—fair-or-unfair-/828> [https://perma.cc/9E84-6Y9T] (last visited Oct. 4, 2016).

¹²³ *Id.*

¹²⁴ Hadley Freeman, *High Street Copies Taken to Court*, *GUARDIAN* (July 23, 2005, 6:27 AM), <http://www.guardian.co.uk/uk/2005/jul/23/fashion.clothes> [https://perma.cc/RK9V-SQAG].

¹²⁵ *Copying: Fair or Unfair?*, *supra* note 122. For a side-by-side comparison of the dresses, *see* Susan Scafidi, *Topped Out*, *COUNTERFEIT CHIC* (July 26, 2007, 10:03 AM), http://www.counterfeitchic.com/2007/07/post_5.php [https://perma.cc/79CA-X7VJ].

£12,000 (or close to \$24,000 at the time), although it did not admit that it had actually copied the designs.¹²⁶

Although these cases show that there has been growing interest in enforcing intellectual property rights through the legal system, the number of suits does not seem to be commensurate with the purported need expressed by the advocates for fashion design protection in the United States. Further, most of the suing firms are large companies, whose personhood interests are arguably more “fungible” than truly personal.¹²⁷ This seeming lack of interest in the copyright protection available for fashion designs does not necessarily mean that fashion designers do not feel that their designs merit legal protection, however. Simply because cases do not appear in an electronic legal database¹²⁸ does not mean that designers have not contacted copyists with cease and desist letters, or settled claims. Further, many small designers or start-ups may not be aware of the avenues of legal protection available to them, or may not have the capital to afford legal assistance in enforcing their rights.¹²⁹ Enforcing design rights through the legal process may simply take too long—by the time the dispute is resolved, the fashion cycle has already passed.¹³⁰ Other scholars have suggested

¹²⁶ See *Copying: Fair or Unfair?*, *supra* note 122.

¹²⁷ See discussion *infra* Section II.B.

¹²⁸ A search of the Westlaw EU-CS-ALL database for the term “Directive 98/71” revealed only 113 hits, most of which are Advocate General opinions and do not appear to be brought by fashion designers or design firms.

¹²⁹ If a designer is preparing to register a trademark, a simple trademark search and report by an attorney apparently costs approximately \$1500 to \$2000. See George Gottlieb, Marc Misthal & Barbara Kolsun, *An Introduction to Intellectual Property Protection in Fashion*, in *FASHION LAW: A GUIDE FOR DESIGNERS, FASHION EXECUTIVES, AND ATTORNEYS* 35, 46 (Guillermo C. Jimenez & Barbara Kolsun eds., 2010). However, legal fees for registering a copyright that automatically attach are fairly low—around \$250 to \$500, in addition to the \$35 filing fee. See Eveline Van Keymeulen, *Copyrighting Couture or Counterfeit Chic? Fashion Design: A Comparative EU-US Perspective*, 7 J. INTELL. PROP. L. & PRAC. 728, 735 (2012). Another problem may be the low expected value of fashion design suits, particularly for unknown or independent designers suing firms who may not have mass-produced their designs.

¹³⁰ See Raustiala & Sprigman, *supra* note 6, at 1704–05 (“The process of preparing a patent application is expensive, the waiting period lengthy (more than eighteen months, on average, for design patents), and the prospects of protection uncertain (the United States Patent and Trademark Office rejects roughly half of all applications for design patents). Given the short shelf-life of many fashion designs, the design patent is simply too slow and uncertain to be relevant.”).

that European designers, on the whole, may just be less litigious than Americans.¹³¹ Finally, even if they do feel injured by unattributed copying of their designs, it is possible that many designers and artists simply do not feel that the legal system is the appropriate venue for expressing that injury; the legal system, with its dryness and emphasis on bulletproof logical soundness, may not jive with the sensibilities of small artists who have little experience with the legal industry and little desire to change that.

Whatever the reasons, if smaller artists are not taking advantage of the legal protections for fashion designs in Europe, categorical legal protection does not seem to be accomplishing its objectives. Although some scholars have justified the existence of laws against copying by arguing that legislation by itself may be a way to change societal norms about copying,¹³² the existence of the law is not costless if it results in designers, who do not need its protection, taking advantage of it to limit competition. If legal protection for fashion designs truly is failing to achieve its intended benefits for fashion designers who need it, such categorical legal protection does not appear to justify the increased costs associated with it, such as increased litigation, socially wasteful destruction of the infringing materials, and the cost to consumers of limited access to a variety of fashion designs at lower prices. In the next Section, I consider whether extralegal alternatives can be used to combat copying by those who are truly hurt by it in the absence of legal protection.

B. Extralegal Alternatives

If the legal system cannot offer an adequate means of protecting personhood interests, it is possible that extralegal solutions may be a better fit. In fact, Raustiala and Sprigman note that social norms are one of the primary reasons why many creative industries, including the cuisine, magic, and comedian industries, can exist within a negative intellectual property space.¹³³ If a community is sufficiently tightly knit, community approval matters, and there are a few widely shared, simple intuitions about morality within the

¹³¹ See Monseau, *supra* note 55, at 61.

¹³² See Kwall, *supra* note 43, at 1975.

¹³³ See RAUSTIALA & SPRIGMAN, *supra* note 58, at 50.

community, it may be possible for that community to enforce norms governing the morality of copying and attribution, even in the absence of legal protection.¹³⁴

But norms are not always effective. According to Raustiala and Sprigman, “norms about creativity probably work best, and are most likely to take root, in contexts that are most social—that is, where individuals are the key actors and where they rub up against each other frequently,” a mode they explicitly contrast to the fashion industry where designers are just one of many employees in a design firm.¹³⁵ The greater control the community exacts over resources that individuals need, be they reputational or social, the more powerful the norms are.¹³⁶ Norms have appeared to effectively constrain copying in the cuisine world, an industry like the fashion industry in that copying is fatal and there exists little effective intellectual property protection.¹³⁷ In an analysis of norms to control copying among chefs, scholars of innovation management Emmanuelle Fauchart and Eric von Hippel show that the chef community has a very strong norm against copying each other’s innovations “exactly,” that is, point by point.¹³⁸ If a chef passes on information to a colleague, the beneficiary of the information cannot disclose the information without the first chef’s permission.¹³⁹ Chefs who create techniques or recipes also have a right of attribution.¹⁴⁰ Importantly, these norms are self-enforcing: The chef

¹³⁴ See Emmanuelle Fauchart & Eric von Hippel, *Norms-Based Intellectual Property Systems: The Case of French Chefs*, 19 *ORG. SCI.* 187 (2008); Jacob Loshin, *Secrets Revealed: How Magicians Protect Intellectual Property Without Law* 29–30, 31–32 (July 25, 2007) (unpublished manuscript) (on file with the Fordham Intellectual Property, Media & Entertainment Law Journal).

¹³⁵ RAUSTIALA & SPRIGMAN, *supra* note 58, at 116.

¹³⁶ See Fauchart & von Hippel, *supra* note 134, at 189 (“Norms are enforceable when groups control stimuli that are valued (or disvalued) by the target person. The more an individual has a personal need for a social reward controlled by the group, the more he or she conforms. Group members who do not need or care about the social rewards which can be provided by their fellows (e.g., very high status members or very low status members not committed to remaining in the group) often conform less than other group members.”).

¹³⁷ See *id.* at 192.

¹³⁸ *Id.* at 192–93.

¹³⁹ *Id.* at 193.

¹⁴⁰ *Id.*

community will punish those who violate the norms, in some cases by refusing to interact with the chef any longer.¹⁴¹

The fashion industry does not, at first blush, appear to be the type of community in which extralegal norms would work effectively. Raustiala and Sprigman are skeptical of the power of extralegal norms—like that of the chef community—to constrain copying among elite designers. The ineffectiveness of norms is evidenced by Marc Jacobs’ shameless copying of other designers, as well as other famous examples of elite copying including that of Nicholas Ghesquière, the head designer of Balenciaga, who “point-by-point” copied another designer’s work.¹⁴² Although they are elites, and thus belong to a small community, fame with the general public allows them to escape the need for group approval by other designers.¹⁴³ Fast fashion firms may also be less constrained by such norms because they may not view themselves in the same “community” as those of the elite designers, rendering community approval about the ethics of their copying irrelevant.

However, the fashion world is not a dichotomous entity. Rather, it is one made up of small, heterogeneous communities that could potentially develop their own self-enforcing norms. One example of such a community, cited above, is the independent designer community served by the website Etsy. Most sellers and artists who flock to Etsy self select into a group that attracts a certain type of customer—one who values handmade objects created by independent artists, or vintage clothing. Many products offered on the website are unique, and each individual seller has her own “shop” that customers can add to their “favorites.” Sellers can also add customers or other sellers to their “circles,” showing that they approve or like their goods, which can signal to their own customers that the wares of the other seller might be of interest.¹⁴⁴ Members can “flag” potential violations of Etsy’s policies, al-

¹⁴¹ *Id.* at 193–95.

¹⁴² RAUSTIALA & SPRIGMAN, *supra* note 58, at 50. It may be significant, however, that the designer that Ghesquière copied was dead. Whether this means that her personhood interests were not violated, however, is debatable, as many moral rights extend even after death.

¹⁴³ *See supra* note 134.

¹⁴⁴ *See ETSY, supra* note 1; ETSY, *supra* note 56.

though Etsy specifically notes that flagging for “intellectual property matters” is prohibited.¹⁴⁵ Instead, Etsy suggests that members simply follow its Intellectual Property Policy.¹⁴⁶ Flagged items are dealt with privately and anonymously by website administrators, so the person who is flagged will not know who reported their products.¹⁴⁷

When Etsy users or others in the crafting community feel that Etsy has not adequately responded to violations, they have created alternative methods of enforcing the norms by attempting to shame the violator into compliance on other websites. Such websites include blogs, such as *Callin' Out on Etsy*, which is dedicated to “calling out blatant mistaggers, resellers, and other hot topics since admin won't let us.”¹⁴⁸ The administrator of *Callin' Out on Etsy* labels herself a “vigilante flagger”¹⁴⁹ and the blog appears to be a forum for people who have flagged products on Etsy as violating Etsy's policies, or who are dedicated to finding and flagging sellers that have reemerged after being shut down.¹⁵⁰

Theoretically, such communities who share a set of purpose and who have tools (such as flagging or increasing a seller's reputation by adding her to a circle) could enforce norms against copying either through the website's administrators or through other websites such as *Regreetsy* or *Callin' Out on Etsy*. However, the effectiveness of these norms depends on whether the sellers that are called out will actually care about their public “shaming” on these websites. Now that Etsy has grown to over 400,000 sellers, many of whom do not share the founders' motivation of creating a com-

¹⁴⁵ *Flagging an Item, Shop, or Review*, ETSY, <https://www.etsy.com/help/article/4537> [<https://perma.cc/RR55-CRC4>] (last visited Oct. 4, 2016).

¹⁴⁶ *Id.* Etsy's Intellectual Property Policy basically consists of a takedown system for violations of copyright that is compliant with the Digital Millennium Copyright Act (“DMCA”). See *Intellectual Property Policy*, ETSY, <https://www.etsy.com/legal/ip/> [<https://perma.cc/9GZD-SZ77>] (last visited Oct. 21, 2016). But, as noted, fashion designs are not protected by copyright, and thus, would not be able to be reported under this policy.

¹⁴⁷ *Flagging an Item, Shop, or Review*, *supra* note 145.

¹⁴⁸ CALLIN' OUT ON ETSY, <http://etsycallout.wordpress.com/> [<https://perma.cc/9G6Y-D2NK>] (last visited Oct. 4, 2016).

¹⁴⁹ *About*, CALLIN' OUT ON ETSY, <http://etsycallout.wordpress.com/about/> [<https://perma.cc/7XE6-HK4U>] (last visited Oct. 4, 2016).

¹⁵⁰ *Id.*

munity of close-knit relationships between buyers and sellers via handmade goods,¹⁵¹ the effectiveness of such shaming practices is questionable.

Alternatively, a more powerful norms-based approach is to increase the reputation costs from copying by empowering *consumers* to enforce norms against copycatting through social media. Both elite designers and fast fashion firms who copy do so because they can rely on one thing: that they will not suffer retaliation at the hands of their customers if they know that the designs they are purchasing have been copied. But the consuming public may not be as blasé as we thought. Take, for instance, the phenomenon of blogs dedicated to “calling out copying” of designs when they see it.¹⁵² Most are manned by individuals who do this as a kind of volunteer service to the fashion world.¹⁵³ One example is the blog *The Fashion Law* created by twenty-five-year old law student Julie Zerbo.¹⁵⁴ Zerbo posts blog entries, including pictures, when she believes that a designer is being copied.¹⁵⁵ For example, one of her posts, entitled “Dear Kanye, You’re Being Knocked-Off” noted that “Kanye’s Yeezi necklaces just barely made it to Collette Paris (the exclusive retailer of all things Kanye) in time to have a lovely little online shop called RSVP Sweatshop already selling them,” and warned RSVP that they may be committing trademark in-

¹⁵¹ See Rob Walker, *Can Etsy Go Pro Without Losing Its Soul?*, WIRE (Sept. 26, 2012, 6:30 AM), <http://www.wired.com/design/2012/09/etsy-goes-pro/all> [<https://perma.cc/6USA-WGAL>]. The founder, Rob Kalin, viewed Etsy “as a cultural movement that could revive the power and voice of the individual against the depersonalized landscape of big-box retail.” *Id.* This vision, however, appeared to clash with the growth of Etsy as a virtual marketplace, leading to Kalin’s ouster as CEO in 2011. *Id.* To retain some of its largest sellers, Etsy has also partnered with retail firm West Elm, which means that the products that some sellers create will be available for mass consumption—the ultimate weakening of the close bond that was supposed to exist in the transfer of handmade objects from buyer to seller. See Elizabeth Blair, *Etsy Crafts a Strategy for Staying Handmade and Profitable*, NPR (Dec. 13, 2012, 3:21 AM), <http://www.npr.org/2012/12/13/167080018/etsy-crafts-a-strategy-for-staying-handmade-and-profitable> [<https://perma.cc/C3PP-D8XP>].

¹⁵² Ray A. Smith, *Hunting for Fashion’s Copycats*, WALL ST. J. (Apr. 25, 2012, 7:03 PM), <http://online.wsj.com/article/SB10001424052702303592404577364333707766366.html> [<https://perma.cc/8KEY-BELE>].

¹⁵³ See *id.*

¹⁵⁴ See *id.*

¹⁵⁵ See *id.*

fringement.¹⁵⁶ Why does she spend time blogging about copying? “[T]o educate about fashion law and give credit where credit is due.”¹⁵⁷ Other blogs similar to Zerbo’s have also sprung up, perhaps modeled on Fordham law professor Susan Scafidi’s own website, *Counterfeit Chic*,¹⁵⁸ and some firms have actually removed their copied designs after being called out on such blogs.¹⁵⁹ Increased media scrutiny in the form of these citizen-blog watchdogs could create the reputational costs to copying designers that norms-based approaches require to be effective.

Indie designers and customers have also been able to successfully combat fashion copycatting through the use of websites such as *You Thought We Didn’t Notice* and social media, including Facebook and Twitter.¹⁶⁰ Importantly, the negative coverage created by social media has actually resulted in the copyists settling with designers or ceasing production of the copied designs. For instance, after Sleepy King posted her complaint on *You Thought We Didn’t Notice*, she later updated her post to note that her story “went viral” in the news media and that “[h]undreds of people complained on the Lindex Facebook page.”¹⁶¹ After the increased media attention, Sleepy King and Lindex settled and the company stopped producing the allegedly infringing designs, although it does not appear that it actually admitted to copying her designs per se.¹⁶² Another testament to the power of social media is the experience of Urban Outfitters after a designer who sold a necklace that looked almost exactly like one sold at Urban Outfitters posted on her

¹⁵⁶ *Dear Kanye, You’re Being Knocked-Off*, FASHION L. (Dec. 12, 2012), <http://www.thefashionlaw.com/home/dear-kanye-youre-being-knocked-off> [https://perma.cc/R8TC-47XV].

¹⁵⁷ Smith, *supra* note 152.

¹⁵⁸ COUNTERFEIT CHIC, <http://counterfeitchic.com> [https://perma.cc/6RHF-WVED] (last visited Oct. 4, 2016).

¹⁵⁹ See Smith, *supra* note 152.

¹⁶⁰ See *supra* Section II.C.

¹⁶¹ Carroll, *supra* note 1. A number of newspapers in Sweden reported on the story. See, e.g., Linus Kendall, *Major Swedish Retailer Lindex Blatantly Copies Independent Designs*, STORIFY (Oct. 10, 2012), <http://storify.com/linuskendall/major-swedish-retailer-blatantly-steals-independent> [https://perma.cc/9P5N-9QJQ].

¹⁶² See Kendall, *supra* note 161.

Tumblr page that the company had stolen her design.¹⁶³ After other people saw her post and began tweeting about it, *The Huffington Post* then reported the story, and hundreds of people began posting on Urban Outfitters' Facebook page about the alleged copying.¹⁶⁴ After the Facebook posts began exploding, Urban Outfitters pulled the inflammatory material from the floor.¹⁶⁵ Urban Outfitters now appears to exercise more caution when buying from independent designers and attempts to make absolutely sure that their designs are not copied from somewhere to avoid bringing down the wrath of the crafting and DIY community upon its shoulders.¹⁶⁶

The fashion design community has already begun to undermine copying by changing how consumers view the morality of copying. Designer Anna Sui, who has sued fast fashion firm Forever 21, stuffed bags at her runway show with T-shirts showing the owners of Forever 21 “on a Wild West-style poster with the legends ‘Forever Wanted’ and ‘Thou Shalt Not Steal.’”¹⁶⁷ Collective action problems and differences between designers in the reputational costs they attach to copying may limit the efforts of individual designers like Sui to change purchasing norms among their consumers. However, the Council of Fashion Designers of America (“CFDA”), a group that represents fashion designers as a group, can potentially overcome these collective action problems—and it appears to have done so to a limited extent. The CFDA created a “design manifesto” that it posted on the seats at fashion designer Prabal Gurung’s runway show in September 2012, and then sent to all members and friends of the CFDA.¹⁶⁸ A poster for the “design

¹⁶³ See Jamie Frevele, *How Social Media Flummoxed Urban Outfitters*, MARY SUE (May 30, 2011, 11:59 AM), <http://www.themarysue.com/social-media-urban-outfitters/> [<https://perma.cc/95DT-B75T>].

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ See Brown, *supra* note 63 (noting that some indie designers who sell to Urban Outfitters report that now, when Urban Outfitters buys from them, “they specifically ask if it is ‘inspired by’ someone” in an effort to combat its image as a corporation ripping off indie artists).

¹⁶⁷ See Yaeger, *supra* note 80.

¹⁶⁸ See Dhani Mau, *The CFDA Hopes to Inspire Originality with New Design Manifesto*, FASHIONISTA (Sept. 8, 2012), <http://fashionista.com/2012/09/the-cfda-hopes-to-inspire-originality-with-new-design-manifesto> [<http://perma.cc/9CSJ-E82A>]; see also Uma

manifesto” featured a black needle on a red background emblazoned with the words “Design it, Protect it.”¹⁶⁹ The CFDA and eBay have also joined hands in a “You Can’t Fake Fashion Campaign” to “educate shoppers on the dangers of counterfeits, raise awareness of our mutual dedication to the fight against fakes and emphasize the importance of original design.”¹⁷⁰ As part of the campaign, seventy-five top American designers created tote bags with some form of the words “You Can’t Fake Fashion” featured on them.¹⁷¹ These turned out to be wildly popular with both celebrities and the public alike, possibly indicating the initiative’s success in changing consumer norms among the general buying public. Similar movements could further change consumers’ very notions of what is desirable in fashion and what they should find desirable to buy—the ultimate way to stop fashion piracy. Although such group efforts still suffer from collective action problems, not all consumer-awareness movements need involve organizations like the CFDA. As shown by the experience of Urban Outfitters, collective action can result from a chain reaction of individual acts powered by social media, creating a snowball effect that does not require a planned top-down strategy.

CONCLUSION

It is fairly evident that copying does not decrease the incentives for fashion designers to create fashion designs. But even if designers’ incentives to create are affected, copying may still negatively affect the personhood interests that fashion designers invest in their creations. Whether fashion designers truly feel that their designs embody personhood interests is an open question. At least some designers, however, do seem to feel a sense of outrage and injustice when seeing their designs closely copied without any attribution given to them. Blatant ripping-off seems, in a sense, to

Jerripotula (@uma.jerripotula), FACEBOOK (July 7, 2015), <https://www.facebook.com/uma.jerripotula/posts/962306833832450> [<https://perma.cc/8FGR-TPXP>].

¹⁶⁹ See Mau, *supra* note 168.

¹⁷⁰ Avery Spofford, *You (Still) Can’t Fake Fashion: Get a Sneak of the Latest CFDA/eBay Totes*, SHE FINDS (Mar. 16, 2012), <http://www.shefinds.com/2012/you-still-cant-fake-fashion-get-a-sneak-of-the-latest-cfdaebay-totes> [<https://perma.cc/SFH2-NRBM>].

¹⁷¹ *Id.*

evinced a sense of entitlement to a private part of the artist's soul that is not, as it were, up for grabs.

Even if we accept that copying does injure at least some designers, does this injury merit the use of legal protection? The very diversity of views regarding the personhood interests embodied in fashion designs already tips the scale against categorical safeguards, which could result in socially wasteful protection against copying for designers who do not feel injured by it. On the other hand, legal protection could be harmless if it is not employed by those who do not feel injured. In Europe, fashion designers appear to have taken little advantage of the copyright protections of fashion designs accorded to them. But there is some evidence that large fashion houses are beginning to sue copyists on a wider scale. This suggests that fashion design protection is either not viewed as necessary by many fashion designers or has been ineffective in redressing the wrongs of small independent designers who are most likely to feel wronged by unattributed close copying.

Alternative solutions, such as extralegal norms, appear to have some potential for controlling copying. Shaming websites and the power of social media have effectively allowed consumers and independent designers to combat copying by larger firms. However, intra-community extralegal norms, modeled on those of the French chefs, for instance, probably will not be effective given the fragmented nature of the fashion design community. Even if websites such as *Regretsy* currently have the power to shame sellers, as the relevant community grows and many sellers cease to share the values of the original community, these norms will soon become ineffective. A better solution, and one that shows some promise, is to begin to rework the values of the consumers, themselves, so that copying no longer becomes profitable at all. Through the power of Twitter and Facebook, norms about copying that are instilled in consumers can quickly become self-enforcing and self-perpetuating without the need for top-down, planned action by designers. It is the last method that ultimately offers the most promise for the protection of fashion designers' personhood interests, if they truly exist at all.