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

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Abstract

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 that 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.
Table of Contents

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

I. Introduction .................................................................................................................................................. 3

II. A System of Openwork Protection ...................................................................................................... 5
    A. An Overview .......................................................................................................................................... 5
    B. Separating Expression from Function ............................................................................................... 9
        1. The Mass-Market .......................................................................................................................... 11
        2. The Avant Garde .......................................................................................................................... 13

III. Creation of the Avant Garde: Culturally Infused Design .................................................................... 17

IV. Cultural Modification and the Wearer ................................................................................................. 23
    A. Clothing as an Openwork .................................................................................................................. 23
    B. How Openwork Design Functions within Culture ............................................................................ 24

V. Narrow Protection for a Limited Class of Works .............................................................................. 30
    A. Modifying the Classic Intellectual Property Paradigm .................................................................. 33
    B. Justifications within an Anti-Economy ............................................................................................. 38

VI. Proposed Fashion Protection as a Model for Openwork Protection .............................................. 44
    A. The IDPPA as an Openwork Model ................................................................................................... 44
    B. Fashion as Dysfunction .................................................................................................................... 47
    C. The Economic Costs of Creativity ..................................................................................................... 49
        1. Starting Up ...................................................................................................................................... 49
        2. The Human Cost of the Fashion Cycle .......................................................................................... 53
        3. Copying: Undermining Economic and Human Capital ................................................................ 57
    D. The IDPPA: Suggestions for Improvement ....................................................................................... 62

VII. Conclusion ........................................................................................................................................... 63
I. 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.”¹ 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.

Today, fashion is copied at virtually every price point, from haute couture to ten-dollar t-shirts.² 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.³ Within days of a runway show, the considerable investment spent to create expressive 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 this circumstance 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. Called 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. 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.

In addition, this article considers justifications for protection for 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 later 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 this industry, this article applies these principles to fully evaluate the creative, economic, and anti-economic impact of protection.

In Section II, the article provides an overview of the relevant theory for openwork protection and divides the fashion industry 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 Section III. Consistent with the concept that fashion is a culturally porous medium, Section IV examines fashion’s modifications and interaction with those who wear the clothing. Section V 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. Section VI 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. Section VII expands 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, as well some suggestions for how such protection might be implemented.
II. A System of Openwork Protection

A. An Overview

Openwork theory begins 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. The internal sources might include the creator’s own memories, experiences, emotions, or the results of associative chains of thought. External inputs include domain-specific training, foundational techniques, history, precedents, and trends. Additional exogenous information encompasses broader sources, such as interactions with others, news, the arts, culture, and unrelated areas of interest. Such influences provide a field of 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. 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.

This account is a sharp divergence compared with the widely held conception that originators are the crucial wellspring of creative works. This author-centric description is the current justification for intellectual property protection. A fair

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4 Dean Keith Simonton, Creativity as Blind Variation and Selective Retention: Is the Creative Process Darwinian?, 10 PSYCHOLOGICAL INQUIRY 309, 312 (1999).
5 Id.
6 Id. (“while the creator is incubating on one problem, he or she will be constantly but haphazardly bombarded with priming input. . .”).
7 See, e.g., Dynamo: A Century of Light and Motion in Art, 1913-2013, Grand Palais, Paris, France (4/10/13 to 7/22/13) (exhibit)(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).
8 See generally, James Boyle, Shamans, Software and Spleens 56 (Harvard 1996) (unraveling “the romantic vision of authorship, of the genius whose style forever expresses a single unique persona.”).
9 See generally, Ets-Hokin v. Skyy Spirits, 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); Diamond v. Chakrabarty, 447 U.S. 303, 309 (1980) (finding a bacteria patentable in part because it was “a product of human ingenuity”); see also Robert P.
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 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?”

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. Sociologists and psychologists have broadly agreed that the creative process begins with informational inputs that precede any individual creative act. As one psychologist writes, no one, “no matter how creative, can generate ideas from nothing.” Another writes, “[a]ncendental and historical accounts from real-world settings highlight the fact that that new ideas, even highly creative ones, often develop as minor extensions of familiar concepts.

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. For copyright, this standard is quite low. When the prescribed standard is met, a work receives all of the available legal protection. 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.” 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. Nonetheless, strong protection for fashion design (akin to copyright) is inadvisable for the fashion industry. This protection extends to both literal copies of

MERGES, JUSTIFYING INTELLECTUAL PROPERTY 121-23 (Harvard 2011) (describing the individual’s contribution as the primary justification for awarding ownership of a property right).

10 BOYLE, supra note 8, at 54-55 (emphasis added).

11 Id. at 160.


13 Dean Keith Simonton, Creativity in Science: Chance, Logic and Zeitgeist 171 (Cambridge 2004).


16 Although the 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.


18 Comparable protection for fashion design is undesirable because it is too strong. Jonathan M. Barnett, Gilles Groulleau, and Sana El Harbi, The Fashion Lottery: Cooperate Innovation in Stochastic Markets,
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. Relevant here, some proposed solutions have included modifications to the effective term of the right of protection. Another has considered raising the minimum standard of creativity. Still others advocate varying the scope of enforceability to effectuate certain policy goals.

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

39 J. LEGAL STUD. 159, 167 (2010) (concluding that “incomplete” protection is the preferred modality for the fashion industry, which allows some forms of imitation).
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.

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. 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, wear them with synagogue socks, layers of seven different plaids, and John Lennon-style glasses. 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, modified, 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. 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, openwork protection is more limited than that permitted by copyright, trademark, and patent law. As a consequence, the industry can expect that significant creative spillovers will continue to exist to encourage others to make creative 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

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works. 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. 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.” This requires protection against immediate reproduction of the primary assets of an avant garde work—that is, its expressive content.

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. Another considers distinct construction 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.”

Clothing is a commodity, and commodities are commonly defined as objects that have economic value. Yet expressive fashion occupies a “two-faced reality”—that is, one role as a commercial commodity and another capable of conveying meaning. Items that have these attributes are works of cultural production—that is, objects that

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26 Id. at 106.
27 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.
29 BOURLIEU, supra note 25, at 115.
30 Cf. Appadurai, supra note 24, at 3.
function both as a commodity and as a vehicle of expression, culture, and as an engine of intellectual change. Such goods have a meaning and value that goes beyond an item’s utilitarian capacity. Cultural products incorporate expressions common to a group, reflect collective understandings and behaviors, and capture shared activities and belief systems. They reflect coherent points of view that include a mix of intelligence, morality, and emotion. Some parody. Some works contextualize attitudes, practices, and beliefs that are fundamental within a society. It may express shared human experiences.

Certainly not all fashion purports to include creative expression. A typical pair of socks or functional shoe is purely utilitarian. As a contrasting example, Rei Kawakubo’s Dress Meets Body collection included dresses to which she attached fabric-covered lumps. 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.” 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. 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.

32 BOURDIEU, supra note 25, at 113
33 Appadurai, supra note 24, at 19; see also JOANNE ENTWISTLE, THE FASHIONED BODY 221 (Polity Press 2000) (“One way to think about fashion is as a culture industry”).
34 David Throsby, Cultural Capital, J. OF CULTURAL ECON. 3, 6 (1999).
35 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”).
36 Throsby, supra note 34, at 6.
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 later category includes bestselling books, blockbuster films, popular 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." 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. 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. 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 brands’ financial mainstays.

From a consumer’s perspective, in both a physical, emotional, and mental sense, mass-market clothes fit. One example that attempts to capture this phenomenon can be seen in a 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. It is not fashion. It fits into your life....” Design similarities within this genre

38 Benjamin Schwarz, Fashion in Dark Times, THE ATLANTIC, June 1, 2009, 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.").
40 See, e.g., Jess Carter-Morley, The Catwalk, Darling? It’s So Last Year, THE GUARDIAN UK, Oct. 13, 2003, http://www.guardian.co.uk/world/2003/oct/13/france.arts (observing that Dolce & Gabbana, Missoni and Jil Sander are sold weeks before the runway shows, and that Dolce & Gabbana was sold out by the time of the runway show).
41 Cf., Rocamora, supra note 39, 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.
are not necessarily attributable to copying, but rather from reliance on shared cultural points of reference.\textsuperscript{43} 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 formula, 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.\textsuperscript{44} These are used to anticipate the mass customer’s preferences. One trend forecaster, Li Edelkoort, operates based on information fed to her office from agents located worldwide.\textsuperscript{45} Her predictions allow lines to gauge the most likely consumer trends anticipated to occur over the upcoming sales cycles.\textsuperscript{46} As might be expected given that 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,

\textsuperscript{43} This phenomenon occurs throughout fashion, including for more cutting edge works. As one example, during one London Men’s Fashion Week five designers showed black socks with shorts. See Eric Wilson, \textit{Traditional Tailoring Meets the Younger Pack}, N.Y. TIMES, June 17, 2012, \url{http://runway.blogs.nytimes.com/2012/06/17/traditional-tailoring-meets-the-younger-pack}.


\textsuperscript{46} \textit{Id.}
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 meaning. The avant garde designer’s role is to push culture forward. As Alexander McQueen described, “You’re giving them what they want and at the same time trying to see beyond to what they need.” Culturally, highly 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.” Avant garde clothing fits within the latter category. It is judged under criteria that require originality, a distinct point of view, and the 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.

One 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.”

By eschewing the mainstream, the avant garde designer cannot expect economies of scale, widespread acceptance, or early profits. Highly creative fashion

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47 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 (Houghton Mifflin Harcourt 1967).

48 Chapman, supra note 44, at 489 (statement of Alexander McQueen).

49 BOURDIEU, supra note 25, at 106.

50 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 (critic described a Saint Laurent runway show as evidencing “lazy values,” that “[i]n terms of design, the clothes held considerably less value that a box of Saint Laurent labels”).

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.”52 This type of fashion attempts to fulfill 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.”53 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 1940s, when broad shoulders were trending as women began to take their place in a male dominated world.54

Flowcharts and focus groups are not the foundation of any highly creative collection.55 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.”56 Jacobs has described his reluctance to repeat commercially successful designs from past seasons.57 Virtually all avant garde designers disclaim reliance on current trends. Elbaz explained, "I want to know where is that committee in Switzerland that sits to decide what is in and out?"58

54 See id.
55 Jo-Ann Furniss, Marc Jacobs, An American In Paris, in LOUIS VUITTON / MARC JACOBS 116, 122 (Pamela Golbin ed., Les Arts Decoratifs/ Rizzoli 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”).
56 Id. (statement of Marc Jacobs).
57 As Jacobs stated:

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.

what is out. . . . I don't listen to the formula makers. I think maybe I have a selective hearing disorder.”

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.” 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. Certain of these might later be recognized as transformative. Because some designs involve the risk of the untried, some are never widely accepted. 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. According to McQueen, this new cut was done to “change the way women looked,” so that the wearer “looked quite menacing.” During this phase of his career he wanted “to empower women,” and as he explained, “I want people to be afraid of the women I dress.” Over the years, the aesthetic appeal of the cut was widely adopted throughout the clothing industry without McQueen’s menacing edge. Further, his bumster design has been identified as the reason that waistbands went low to the hip throughout the entire industry for years thereafter.

62 Id. at 60.
helped establish his name and, in later years, ultimately led the commercial acceptance and viability of his line.

Financial gain is not an immediate incentive that compels designers to choose the subject matter of their collections. As McQueen said of his earliest runways shows “I don’t want to do a cocktail party. I’d rather people left my shows and vomited.”\(^6^4\) Clearly, McQueen was not concerned with immediate sales to a mass-market. Yet over time, his work, including his skull-patterned scarves that have been widely copied, have become successes as the world adjusted to his aesthetic.

Like many cutting edge designers, McQueen worked within an economically fragile business model because he deliberate rejected the dominant marketplace aesthetic of that time. As he described, “When 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.”\(^6^5\) Instead, the key motivator is to introduce 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.”\(^6^6\) Not all avant garde fashion is quite so elevated in intent. Indeed, some fashion is deliberately anti-intellectual; other designers convey ideas as broad as demonstrating femininity through power, free-spiritedness, and independence.

There is 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.\(^6^7\) According to Bourdieu’s work, such items operate in an anti-economy by rejecting the mainstream and producing symbolic meaning. 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.”\(^6^8\) 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.

\(^{6^4}\) BOLTON, supra note 61, at 12 (quoting Alexander McQueen).
\(^{6^5}\) Frankel, supra note 60, at 24 (quoting Alexander McQueen).
\(^{6^6}\) BOLTON, supra note 61, at 44 (quoting Alexander McQueen).
\(^{6^7}\) See BOURDIEU, supra note 25, at 115.
\(^{6^8}\) Id. at 75.
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, “It’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.”69 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 development team to assist in taking a concept to finalized designs, and the costs necessary to develop new fabrics and textiles.

III. Creation of the Avant Garde: Culturally Infused Design

This section 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 Section IV, 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 sections 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.70

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.”71 Some inspirations retain their visibility in the final product. One example

69 Frankel, supra note 60, at 24 (quoting Alexander McQueen).
70 See supra note 9 and accompany text.
includes works by the designer Jean Paul Gaultier, who directly appropriates culture into his work including couture versions of punk and the design of sheer fabrics that mimic tattoos. One controversial collection, called “Rabbi Chic,” used dress elements of Orthodox Jewish rabbis including, voluminous coats, exaggerated curls and yarmulkes. As he described his inspiration, “I saw a group of rabbis leaving the New York Public Library on Fifth Avenue. I found them very beautiful, very elegant, with their hats and their huge coats flapping in the wind. It was a fantastic scene.”

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 is described as an insatiable consumer of new culture. 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,” and that his apartment where he sketches was filed with “hundreds of magazines, CDs, photographs, promotional brochures and books, which lay in heaps spilling on every surface, including the floors. Scattered through the rooms were dozens of iPod nanos of every hue.” According to a stylist who has worked with him, “Karl reads everything, looks at everything,” and he is “permanently filling himself with independent culture and establishment culture, so basically he knows everything, and he’s like a sampling machine.” 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 . . . .”

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

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76 Id.
77 Id.
possibility of anything, really." Donatella Versace describes, “If you are a creative person, you are inspired continuously. From the things unexpected.” This is echoed in the statements of Comme des Garçons’ Rei Kawakubo, who states, “As 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.”

Consistent with these accounts, designer Tom Ford follows an immersion process as a starting point. This course ultimately leads him to reject the present and to start fresh:

The first step is to look at everything, read every fashion magazine, keep my eyes open, live simultaneously in cities, watch what people are wearing, see every movie, read – try to become so immersed, as you do, with what’s happening, so you say, “I hate this. I’m sick of it . . . ” And then, you have to trust yourself as a designer to say, “Well, what do I want to see?”

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.” Jacobs, who designs both a ready to wear line for Louis Vuitton and for his own Marc Jacobs lines, has different muses for each. He describes that the Louis Vuitton woman is “an extrovert,” and there is “nothing kind of apologetic or shy about it, she’s strong whether she’s gentle or whether she’s youthful or more mature.” In contrast, for his 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.” These fictional women carry a host of cultural content that

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81 Cathy Horyn, supra note 37 (statement of Rei Kawakubo).
82 Ready to Share, supra note 71, at 46 (statement of Tom Ford).
83 Id.
84 Sally Singer, Humble's Gift; How Did Alber Elbaz Transform the House of Lanvin into the Fashion World's Most-Wanted Label, in VOGUE (March 2005).
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 are inspired by alternative or historic cultures. Yves Saint Laurent was credited to take inspiration from “[m]en’s wear, laborers’ uniforms, peasant garb, modern art, Morocco, and flea-market finds.” 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.” For example, McQueen has pointed to some sources that have inspired particular collections included a particular artwork, a specific film, and a photograph. 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. This anecdote was visually manifest 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. This original story provided a key cultural input into his design, which furthered the theme of his collection of clothing as both physical and emotional protection.

Some deliberately seek to effectuate or reinforce cultural change. As one example, John 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, “Through clothes you can say something definitely.” He began to dress

90 Elbaz describes:

“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.”

male models in lingerie and clothes traditionally worn by women because, “I was for equality of sex.” He continued, “[s]ome men were not like accepting their part femininity. . . . Men can be sensitive. They have been traumatized by their education that wanted to make them like a John Wayne. . . . I wanted to show that there is a part of femininity in the man.”

In this same vein, Tom Ford’s designs for Gucci during the late 1990s were an effort to reawaken the sensuality of the 1970s. As he explains, “We had come out of the 1980s devastated...by AIDS. It was reflected in all the arts.” Ford explained that 1980s fashion expressed sensuality as “hard, because it was dangerous. There was an off-putting quality to it.” During the 1990s, Ford’s work at Gucci has “been credited, and responsible somewhat, for bringing [a 1970s era] that sort of exuberant sex back.”

Some designers use culture as the starting point that later becomes invisible, as the designer’s own vision takes over. Fashion critic Cathy Horyn explains, “The hardest thing to realize in fashion is that the future lies in the past. The second hardest thing is to forget the past.” 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.” Yet something that too literally mimics its inspiration will not succeed. The avant garde 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.”  

Along these lines, Gabrielle Chanel once said, “Creativity is the art of concealing your source.” 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 hotel located near Salzburg, Austria. Her women’s suit, based on this jacket design, was credited for giving women freedom of movement that symbolized independence and power. 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. Although originally based on the 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.

Highly creative fashion requires a departure from the heritage of the lines that finance and produce the clothing. Regarding his work for Louis Vuitton, a company established during the 1800s, Jacobs explains, “I think you have to have a healthy respect and a healthy disrespect for an institution. You need to be respectful in order to persevere, but you also have to be somewhat disrespectful in order to evolve.” Chanel designer Karl Lagerfeld refuted criticism that he had modified Coco Chanel’s original designs too much by explaining, “they didn’t want the homage—the respectful shit—either. So to survive you have to cut the roots to make new roots. Because fashion is about today. You can take an idea from the past, but, if you do it the way it was, no one wants it.” He points out that Gabrielle Chanel failed to understand the world as prevailing moods changed from the 1920s to the 1960s and beyond. For highly creative designers, cultural inputs form critical inputs to design. However, the designing process does not end at that point. Successful designs contribute to the cultural

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102 Reed, supra note 58 (statement of Alber Elbaz).
103 Ready to Share, supra note 71, at 40 (statement of Tom Ford).
104 Tim Blanks, Jacket Required, STYLE.COM/PRINT, Fall 2012, at 154 (quoting Karl Lagerfeld).
106 Id.
107 Furniss, supra note 55, at 121.
108 Colapinto, supra note 75.
conversation. This conversation continues through the contribution of those who wear and experience the clothing, a concept explored in the next Section.

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

Openworks invite exploration by enveloping those experiencing the piece, which creates a unique sensory experience that moves beyond observation from a distance.110 Fashion fits within this realm because the wearer inhabits the clothing.111 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 20-year old in Williamsburg becomes an ironic statement of hipster-dom. Thus, the clothing’s meanings vary according to our cultural customs that includes commonly shared information, assumptions, beliefs, customs, and behaviors. These tacit expressions are as myriad as culture itself, and 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,

110 See, e.g., Dynamo: A Century of Light and Motion in Art, 1913-2013, Grand Palais, Paris, France (4/10/13 to 7/22/13) (exhibit)(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).
and re-contextualizing the designs to both form and express the individual wearer’s identity.

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 a 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 recontextualize the clothing even further. Some continue to wear clothing as it ages, softens, changes color, and become personal. For example, leather become 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.112

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.”113 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 gradient

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between the interior and the exterior, or self and society.”\footnote{Ian Woodward, *Domestic Objects and the Taste Epiphany*, 6 J. OF 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. (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).} As has been acknowledged, because clothes are so eminently malleable, they shape our appearance.\footnote{Karen Tranberg Hansen, *The World in Dress: Anthropological perspectives on Clothing, Fashion and Culture*, 33 ANNU. REV. ANTHROPOL. 369 (2004).} This is inherent in clothing design. It is the point of it.\footnote{Designer Alber Elbaz as observed, “If you change a woman's look, you change her persona.” Hadley Freeman, *The Land of Dreams*, THE GUARDIAN, Oct. 1, 2004, http://www.guardian.co.uk/lifeandstyle/2004/oct/02/shopping.fashion1; see also, Dirk Standen, *The Future of Fashion: Part Six: Alber Elbaz*, STYLE.COM, May 17, 2010, 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”); According to Lagerfeld, “[d]esign has no meaning unless people wear the clothes and enjoy them.” Hal Rubenstein, *One-on-One with Karl*, InSTYLE, July 2012, at 58 (quoting Karl Lagerfeld).} As designer Dries van Noten explained, “People 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.”\footnote{Lionel Seah, *Making his Own Way in the Fashion World*, THE BUSINESS TIMES, Nov. 10, 2007, http://www.asiaone.com/Just+Woman/News/Beauty+%2526+Fashion/Story/A1Story20071112-35975.html.} 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.”\footnote{Woodward, supra note 112, at 22.} Fashion is about the physical body, yet “not only is dress the visible form of our intentions, but in everyday life is the insignia by which we are read and come to read others.”\footnote{Entwistle, supra 33, at 35.}

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.\footnote{See Kaori O’Connor, *The Material Culture of New Fibers*, in CLOTHING AS MATERIAL CULTURE 41, 42 (Susanne Küchler & David Miller eds., 2005) (“Producers were cast at manipulative profiteers”); Georg Simmel, *Fashion*, 62 THE AM. J. OF SOC. 541, 544 (1957).} The work of 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.”\footnote{*Id.*} 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,”\footnote{Angela Partington, *Popular Fashion and Working-Class Affluence*, in FASHION THEORY: A READER 220, 221 (Malcolm Barnard ed., Routledge 2007).} who then use fashion to deceive the
Landers [DRAFT 9/15/13]

world about one’s true social or economic situation by “seek[ing] refuge in the leveling cloak of fashion.” 123 In a similar vein, Thorstein Veblen’s 1899 work The Theory of the Leisure Class, developed this concept through a theory of conspicuous consumption. 124 For Veblen, fashion was part of a large trend that evidenced economically wasteful attempts at class differentiation. 125 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.” 126

More recently, Barton Beebe argues that consumer’s 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.” 127 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 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. 128

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.” 129

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 for greed

123 Simmel, supra note 120, at 552.
125 Id. at 62 (noting that articles that were more that merely useful were intended to “mak[e] an invidious pecuniary comparison”).
126 Id. at 79.
128 Id. at 823-27 (footnotes omitted). For a hybrid view, see Hemphill & Suk, supra note 28, at 1166 (describing that consumers adopt clothing that both differentiates individuals and follows trends).
129 Beebe, supra note 127, 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.”).
or self-interest, but that there are grounds for doubting whether any
general transcultural correspondence exists between particular
activities and motives.130

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 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. 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.”131 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.132 Individuals are significant agents of change within culture.133
This work describes characterizations of fashion as a trivial or wasteful rely 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.”134 Significantly, this ontology holds that surface is morally inferior because it is
shallow, lacking in content, ephemeral, and trivial.135 Yet culture depends on
interactions which “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.”136 As one sociologist writes, “[p]eople are

130 Colin Campbell, Capitalism, Consumption and the Problem of Motives, in CONSUMPTION AND
131 See id. at 90.
132 See generally George Peter Murdock, The Science of Culture, 34 AM. ANTHROPOLOGIST 200, 206
(1932) (“cultural 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) (collecting authorities).
133 Daniel Rosenblatt, An Anthropology Made Safe for Culture: Patterns of Practice and the Politics of
134 See David Miller, Style and Ontology, in CONSUMPTION AND IDENTIY 71 (Jonathan Friedman ed.,
Harwood 1995).
135 Id.
136 Madhavi Sunder, Intellectual Property and Identity Politics: Playing with Fire, 4 THE J. OF GENDER,
written by chance and history but are also authors of society.”¹³⁷ 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.”¹³⁸ 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 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 and agent of and within culture within a social and cultural context.¹³⁹ These are a judgment that “involves the mediation of factors such as social normativity and expectations” and that reflects “fundamental cultural competencies.”¹⁴⁰

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.”¹⁴¹ 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 which the clothing is worn.¹⁴² Thus, rather than attempting to establish a fabricated status, clothing presents a “more of a summary image of oneself than a false image.”¹⁴³ The closet becomes a mix of pieces from which one constructs an impression of aesthetic coherence or contradiction.¹⁴⁴ Rather than an attempt to conform or adapt to trends or

¹³⁷ Rosenblatt, supra note 133.
¹⁴⁰ Woodward, supra note 114, at 23.
¹⁴¹ Barnard, supra note 139, at 175.
¹⁴² Woodward, supra note 114, at 26.
¹⁴⁴ Woodward, supra note 114, at 35.
flock toward particular groups, individuals use clothing as part of a vocabulary that creates a legible self-image against the background of cultural expectations.\textsuperscript{145}

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.\textsuperscript{146} 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.”\textsuperscript{147} 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.”\textsuperscript{148} These instances represent the use of clothing to protect the self in vulnerable circumstances, 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.”\textsuperscript{149} Our culture’s standards of appropriate attire demand that one dress in certain conventional ways for a wedding, and a funeral quite another. Clothing can be used to shape the body in ways that accord to predominant cultural standards or to hide the body from scrutiny.\textsuperscript{150} Even those who purport not to care about clothes incorporate cultural norms to the degree necessary to avoid social condemnation.\textsuperscript{151} In this way, even individuals who purport to be unaffected by fashion trends do not fully escape cultural

\textsuperscript{146} TSEÉLON, supra note 143, 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)).
\textsuperscript{147} 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., Berg 2001).
\textsuperscript{148} Reed, supra note 100 (statement of Alber Elbaz).
\textsuperscript{149} ENTWISTLE, supra note 33, at 7.
\textsuperscript{150} Woodward, supra note 112, at 22 (“The clothing becomes a conduit that allows other people’s intentions to penetrate deeply into the intentions of the wearer”).
\textsuperscript{151} TSEÉLON, supra note 143, 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 32, at 7.
influences.\textsuperscript{152} These circumstances operate to infuse clothing design with added cultural meaning. Wearers create culture through their modification, mixing, and choice of 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.\textsuperscript{153} By examining how users are “able to consume designed goods ‘improperly’; i.e., in ways not anticipated or understood by designers,” the wearer’s own interpretation becomes integral to the visual appearance of the original work of fashion design.\textsuperscript{154} As previously described, reinterpretation by consumers is integral to the medium; it is an acknowledged purpose of fashion design.\textsuperscript{155} As such, it is an openwork medium and that such modification beyond the designer’s control warrants high levels of intellectual property protection unjustifiable.

V. Narrow Protection for a Limited Class of Works

Fashion design currently relies on a collage of trademark, patent, and copyright law for protection.\textsuperscript{156} Yet a workable and comprehensive system of protection for the overall appearance of a work has remained elusive.\textsuperscript{157} Court decisions have recognized

\textsuperscript{152} Woodward, supra note 112, at 27 (discussing 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”).

\textsuperscript{153} Partington, supra note 122, at 228-29.

\textsuperscript{154} Id. at 228.

\textsuperscript{155} See Noreen Malone, Simon Doonan: Stop Writing About Politicians’ Clothes!, THE NEW REPUBLIC (8/27/13) at 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).

\textsuperscript{156} Susan Scafidi, INTELLECTUAL PROPERTY AND FASHION DESIGN, 1 INT. PROP. AND INFORMATION WEALTH 115, 121 (Peter K. Yu, ed. 2006).

\textsuperscript{157} Id.; see also U.S. Copyright Office, REGISTERABILITY OF COSTUME DESIGNS, 56 F.R. 56530, 56531 (11/5/91) (although masks and costumers are considered registerable, the designs of garments “are generally considered outside copyright law”).
that copyright protection can cover fanciful costume designs. Similarly, a fashion accessory has been held to warrant copyright protection. Copyright protects less expressive works, including Beanie Babies® stuffed toys, jewelry, and Barbie dolls. On the other hand, courts have been wary to extend protection for clothing design regardless of the creativity that such works embody. 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. 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.” 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. Yet this result is not necessarily desirable, given the untoward strength and breadth of copyright protection under current law.

Perhaps due to the unavailability of copyright protection, at present trademark law has offered the most consistent mechanism for established companies to assert against copyists, where the design incorporates a symbol or logo. 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 accept.” This circumstance, which results in large or multiple logos rather than unique or novel design elements, is unlikely to foster design creativity or

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159 Kieselstein-Cord v. Accessories by Pearl, Inc., 632 F.2d 989, 990 (2d Cir. 1980).
160 Vermont, supra note 3.
161 See Jovani Fashion Ltd. v. Fiesta Fashions, 2012 COPR. L. DEC. P 30,329 (2nd Cir. 10/15/12) (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”).
162 Id. at 417 (noting that industrial designs are not protected by copyright law). For a more detailed analysis that refutes this characterization, see Section VI(B), infra.
163 Scafidi, supra note 156 at 122; Vermont, supra note 3 at 3.
164 Id. at 2-3 (observing that “the courts may eventually hold that fanciful clothing is protectable under regular copyright”).
165 Scafidi, supra note 156 at 121. As Prof. 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 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 America Holding, Inc., 709 F.3d 140 (2nd Cir. 2012) (protecting red sole of fashion shoe line as a trademark).
166 Id.
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.167

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.168 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.169

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 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.170 The fabric and handwork of custom made, luxury pieces simply look and feel different, and some clients will only buy an original.171

167 Id. (quoting an unnamed young designer who stated that established companies “can just sell their trademarks. We have to sell our designs”).
168 See Scafidi, supra note 156 at 122.
169 Id.
170 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 Section IV(e)(3), infra.
171 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, “There 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.”).
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.” 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. 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 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. The underlying foundation of this theory accepts that creative works can be expensive to create and cheap for copyists to reproduce. 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.

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174 See William D. Nordhaus, Invention, Growth, and Welfare: Theoretical Treatment of Technological Change 72 (M.I.T. Press 1969); see also Landes & Posner, supra note 171 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”).
175 Id.; NORDHAUS, supra note 174, at 36.
176 Id. at 39; LANDES & POSNER, supra note 174, at 13.
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.\(^{177}\) 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 reduces the societal burdens of intellectual property protection. If the level is set too low, it is possible that future innovation will not occur.\(^{178}\) 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.\(^{179}\) 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.\(^{180}\)

Furthermore, creators generate spillovers as a consequence of the creation and distribution of new works.\(^{181}\) Spillovers can influence the development of later works by inspiring variations, modifications, additions, and commentary.\(^{182}\) In some cases, the public benefits that derive from the original creations can far outweigh the originators’ private gains.\(^{183}\) Indeed, one estimate suggests that spillovers may be as high as eighty percent of the total benefits that derive from newly created knowledge.\(^{184}\) This


\(^{178}\) *Id.*

\(^{179}\) Nordhaus, *supra* note 174, at 88-89.

\(^{180}\) 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.

\(^{181}\) See Nordhaus, *supra* note 174, at 36 (noting that there is a “high degree of spillover or externality that accompanies the inventive process”); see, e.g., Brett M. Frischmann and Mark A. Lemley, *Spillovers*, 107 *COLUM. L. REV.* 257 (2007).

\(^{182}\) Nordhaus, *supra* note 174, at 36.

\(^{183}\) Nordhaus, *supra* note 177.

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.’”\footnote{Mazer v. Stein, 347 U.S. 201, 219 (1954).} Certainly, society would benefit the most from a 100% spillover 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.\footnote{For more information on this point, see infra Section VI(D).} 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.\footnote{See, e.g., LAWRENCE LESSIG, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY (Bloomsbury 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.”)(quoting Caterina Fake, cofounder of Flickr); Wendy J. Gordon, Render Copyright Unto Caesar: On Taking Incentives Seriously, 71 U. CHIC. 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”).} Numerous examples demonstrate that individuals develop creative works for reasons beyond monetary profit.\footnote{But see, KEVIN G. RIVETTE & DAVID KLINE, REMBRANDTS IN THE ATTIC: UNLOCKING THE HIDDEN VALUE OF PATENTS 62 (Harvard 2000) (revealing additional reasons for obtaining intellectual property rights, including wealth creation).} There are numerous examples of those who volunteer, donate, and contribute time, effort, and creativity to projects without any expectation of remunerative compensation.\footnote{See Gordon, supra note 187.} As one example, Wikipedia has thrived based on the work of numerous unpaid volunteers.\footnote{LESSIG, supra note 187, at 155-162.} 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.\footnote{Id. at 157.} 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.\footnote{Id. at 159. As Lessig reports, the site generates no revenues and has foregone advertising to preserve its credibility. Id. at 162.} The reasons that individuals contribute, despite any monetary or legal incentives, include enhanced reputation among peers as well as the potential for better career opportunities.\footnote{Josh Lerner and Jean Tirole, Some Simple Economics of Open Source, 50 THE JOURNAL OF INDUSTRIAL ECONOMICS, 197, 218 (2002) (stating, “the reputational benefits that accrue from successful contributions to open source projects appear to have real effects on developers”).} 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. 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. 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.

Economic examination of the intellectual property law excludes consideration of the intangible and immeasurable, including grappling with culture and reputation. Instead, traditional economics is designed to rely on objectively measurable data. For example, economics assumes that rational consumers have preferences and seek to maximize utility subject to constraints that include limited resources. To the extent that economics considers consumer preference relevant, such preferences must be grounded on actual buying behavior. 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.” 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.” Further, the point of a creative enterprise is to make things “that didn’t exist before.” Economics cannot

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195 Josh Lerner and Jean Tirole, Some Simple Economics of Open Source, 50 THE JOURNAL OF INDUSTRIAL ECONOMICS, 197, 213 (2002) (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).
196 Id. at 218 (“it is clear that giving credit to authors is essential in the open source movement”).
198 Lewin, supra note 197, at 1318.
199 Silberberg & Suen, supra note 197, at 252.
200 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 180 at 1304.
202 Lewin, supra note 197, at 1317.
assess the counter hypothetical of creativity that is never realized. 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.” Predictably, economics lacks a vocabulary to analyze the creative and cultural value of a work and the spillovers that works create. 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. Exclusive rights for fashion design can be said to operate in the same way as any other creative enterprise. 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. 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.

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206 Jonathan Friedman, Introduction to CONSUMPTION AND IDENTITY 6 (Jonathan Friedman ed., Harwood 1994) (“the social and cultural properties of existence cannot, and perhaps should not be properly incorporated into economic theory as it stands”); 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.” Raustiala & Sprigman, supra note 172 at 1689.

207 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 2008, at 28.

208 Hernandez Testimony, supra note 204, at 6; see also, section VI(D), outlining the economic costs of developing fashion design.

209 Hernandez Testimony, supra note 204, at 6.
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. This non-economic capital can be remarkably valuable to those seeking to influence, and thereby obtain economic viability. Such capital can inure only to those who produce culture and cultural objects.\(^{210}\) When society recognizes and legitimizes 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.\(^{211}\) Thus, such creators “play[] for stakes that are non-material and not easily quantified.”\(^{212}\)

Playing for these stakes has a price. For avant garde fashion designers, this effort translates to the creation of excellent, original designs that do not appeal to the mainstream. Thus, the avant garde designer must relinquish short-term economic viability to establish legitimacy. Doing so is vital to the long-term survival of the avant garde designer. 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.\(^{213}\) 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 the creator of the work is Adele. This reputation 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.

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\(^{210}\) *BOURDIEU, supra* note 25, at 37.

\(^{211}\) See Appadurai, *supra* note 24, at 16; *BOURDIEU, supra* note 25, at 113 n.3.

\(^{212}\) *PIERRE BOURDIEU, OUTLINE OF A THEORY OF PRACTICE* 177 (Cambridge 1977).

\(^{213}\) See note 196, *supra*, and accompanying text.
opportunities to create works for films, obtain awards, and earn remuneration from follow-on works 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 that 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. 214

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 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.” 215 In short, the anti-economy of fashion disclaims short-term profit in favor of increased voice, vision, and reputation as a cultural producer. It is only after the reputation has been built, one might have the opportunity to create an economically

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214 In other contexts, legal scholars have observed a distinction between the economic values that underlie intellectual theory and less tangible values. See, e.g., John Tehranian, Parchment, Pixels, & Personhood: User Rights and the IP (Identity Politics) of IP (Intellectual Property), 82 COLO. L. REV. 1 (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); ROBERTA ROSENTHAL KWALL, THE SOUL OF CREATIVITY 72-73 (Stanford 2010) (observing that the economic rationale for intellectual property protection fails to consider the internal dimension of the creative process).

215 BOURDIEU, supra note 25, at 82-83.
viable line. This concept has no place in classic economic analysis and are, in that sense, irrational.216 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 is somewhere between 200 and 4,000 clients worldwide.217 As John Paul Gaultier has pointed out, he depends on only sixteen clients worldwide to enable his haute couture line to financially break even.218 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.219 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.”220 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.”221

In part, this is because some designers that incorporate significant handmade tailoring and experience few, if any, benefits from economies of scale.222 As one bespoke suit maker recently explained, “There’s no scalability. Whether we’re making

216 Id.; see also J.N. Kapferer & V. Bastien, THE LUXURY STRATEGY (Kogan Page 2009).
218 Fine Collins, supra note 87.
221 Kapferer & Bastien, supra note 216, at 34.
50 suits or 1 – each unit costs the same.” Further, the supply of craftspeople capable of performing such work is quite limited. At the same time, the standards to earn the label *haute couture* are remarkably labor intensive. For example, designer Jean-Louis 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.

Several ready-to-wear lines become profitable only after becoming established in the public mind, and some never do. Those who design cutting edge work cannot expect robust sales at the start. By eschewing the mainstream taste in order to change it, the avant garde designer necessarily narrows the potential customer base sometimes to almost to a vanishing point. These editorial pieces are intended to who seek to establish themselves are 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.” It is not easy, and copying the brightest ideas threatens the designer’s potential to sustain until economic viability can be reached. For the designer whose earliest designs are widely copied, it is cold

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224 *Id.*
225 In France, the term “haute couture” is can only be used by those fashion houses, which have been granted the designation by the French Ministry of Industry. See Mode à Paris - Fédération Française de la Couture du Prêt-à-Porter des Couturiers et Créateurs de Mode, at http://www.modeaparis.com/en (English Language Version/ “Federation” tab) (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.”) (last visited 8/5/13).
228 *BOURDIEU, supra* note 25, at 67 (observing that the most risky enterprises are “all avant garde undertakings which precede the demands of the market”).
229 *BOURDIEU, supra* note 25, at 40.
230 Hernandez Testimony, *supra* note 204, at 5 (referring to “all of the small designers put out of business by your current practices and business models”).
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 if you look at those stills they tell the whole story.” 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, in 2011, The Metropolitan Museum of Art in New York City held a posthumous retrospective of his work. His fashion business employs more than 500 individuals worldwide, and has continued its diffusion line, McQ, which sells lower-priced, more affordable works. 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.

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 create a scandal in France. 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

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231 Frankel, supra note 60, at 24 (quoting Alexander McQueen).
232 BOLTON, supra note 61, at 232 (cataloguing the exhibit).
234 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, and financial support for, these established designers is comparatively resilient in comparison to emerging designers.
time period that they had no desire to either recall or popularize.\textsuperscript{236} Now that the influence of this show have been understood, it has been observed, “with one collection, Yves Saint Laurent upended everything and made fashion fresh by borrowing elements from the past.”\textsuperscript{237} According to one critic, “later on, people recognized it for how influential the show was, and how far-sighted.”\textsuperscript{238} 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. In other words, one needs the cultural platform on which one can later build other avenues of income.\textsuperscript{239} 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.”\textsuperscript{240} This is the most difficult time for a designer financially, as it can take several years before a line becomes profitable.\textsuperscript{241} 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. Were McQueen and Saint Laurent film directors, rather than fashion designers, the IP system of copyright laws would have protected their fledgling efforts at the start. In fashion, the reputation-building stage depends on a designer’s ability to claim authorship of a design.

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.”\textsuperscript{242} Moral rights protect “damage to the human spirit, rather than economic harm.”\textsuperscript{243} In contrast, protection within the anti-economy

\textsuperscript{237} Tina Isaac, Fashion Rewind, in 94 FRANCE MAG. 48, 53 (Summer 2010) (statement of Serge Carrera).
\textsuperscript{239} Interview with Jan-Hendrick Schlottman, Chief Executive Officer of Derek Lam (Aug. 8, 2012) (notes on file with author).
\textsuperscript{240} Id.
\textsuperscript{243} Id. at 166.
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. In contrast, trademark owners do not purport to generate creative works or disclaim profits at any time.

VI. Proposed Fashion Protection as a Model for Openwork Protection

A. The IDPPA as an Openwork Model

A creator who draws heavily on exogenous inputs should receive a limited form of right. 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

\[244\] 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 as the creator of the works, rather than the company that produces and sells the line. This phenomenon as lead houses change designers.

\[245\] Wendy J. Gordon, Render Copyright Unto Caesar: On Taking Incentives Seriously, 71 U. OF CHI. L. REV. 75, 78 (2004)(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.”).
on both predecessors and users for creative strength.\textsuperscript{246} 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.\textsuperscript{247}

The fashion industry has proposed the Innovative Design Protection and Piracy Prevention Act (IDPPA), that as of August 2010 sought protection for apparel and certain accessories.\textsuperscript{248} This \textit{sui generis} 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 IDPPA offers a rational accounting of the exogenous inputs that impact the final products.

The IDPPA limits 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."\textsuperscript{249} In application, such language suggests that a work must demonstrate qualities akin to nonobviousness in patent law. This avoids granting protection for works in the mass-market domain. Thus, even well crafted and aesthetically pleasing results are not sufficient to justify protection unless the work presents a demonstrable level of creativity. Under this standard, works that rely primarily on market preferences, already-existing trends, and prosaic function add little original spark to the cultural conversation. Further, such works are typically developed and sold in an economically robust realm where aesthetic and economic risks are minimized. By requiring a high level of originality, the IDPPA protects economically fragile avant garde work.

Infringement requires copying, either from the original design or from an image of the design.\textsuperscript{250} The IDPPA states that the plaintiff must demonstrate that "it can be reasonably inferred from the totality of the surrounding facts and circumstances that the

\textsuperscript{246} See generally, Vermont, \textit{supra} note 3 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).

\textsuperscript{247} \textit{Cf.} Joseph E. Stiglitz, \textit{Knowledge as a Global Public Good}, 308, 315, in \textit{GLOBAL PUBLIC GOODS} (1999) (querying “How much of the returns to the innovation should be credited to this use of the global commons?”).

\textsuperscript{248} H.R. 2511, 112\textsuperscript{th} Cong. (2011-2012). 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, duffel bags, suitcases, tote bags, and belts" and 3) "eyeglass frames." \textit{Id.} at §2(a)(9). Over the past several years, versions of the fashion legislation have been proposed. See S. 3523, 112\textsuperscript{th} Cong. (2012); H.R. 2033, 110\textsuperscript{th} Cong. (2007); S. 1957, 110\textsuperscript{th} Cong. (2007); H.R. 2196, 111\textsuperscript{th} Cong. (2009); H.R. 5055, 109\textsuperscript{th} Cong. (2006); S. 3728 111\textsuperscript{th} Cong. (2010). For simplicity, this article focuses on the IDPPA as a recent version of a proposal for fashion design protection.

\textsuperscript{249} \textit{Id.}

\textsuperscript{250} \textit{Id.} at § 2(e).
defendant saw or otherwise had knowledge of the protected design. Critically, an infringing work must be "substantially identical," which requires a showing that the infringement article is "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." This standard allows the market to translate trends to all price categories. Together with a very limited term of protection, this standard facilitates spillovers, such that highly original works can inspire variations, trends, remixed versions, and variations at the same or different price points. Further, this ensures that no single designer can claim ownership to a trend and allows quick dissemination of cutting-edge design ideas for others to vary. Further, infringement does not include protected designs that appear in images, including photographs and films. This allows the vibrant industries that have arisen around fashion, including street style photography and blogs, to continue without legal restraint.

The IDPPA limits protection to three years. After that time, a work can be reproduced freely and fully as part of the public domain. This is in stark contrast to the current copyright term of protection, which runs for the life of the author plus seventy years. 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. As works fall into the public domain after 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 IDPPA allows designers to assert a narrow range of rights for a short period of time. This limited right is 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 ensures a high level of spillover effects from original designs. This construct might be used as a model for other forms of creative works that share these same characteristics.

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251 Id. at § 2(g).
252 Id. at § 2(a)(1).
254 The IDPPA provides some additional safe harbors from infringement. Works that are independently created are not infringing. H.R. 2511, 112th Cong., at § 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 Section VI(E), infra.
255 Id. at § 2(d).
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.\textsuperscript{256} Clothing is typically considered useful and therefore not subject to protection.\textsuperscript{257} This interpretation acts as a legal conclusion that lacks meaningful analysis.\textsuperscript{258} As two anthropologists observed, “Women’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.”\textsuperscript{259} Others have considered that fashion is “relatively little limited or warped by considerations of external utility.”\textsuperscript{260} 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.\textsuperscript{261}

Although fashion does not purport to be a fine art, a number of museums curate fashion for its aesthetic value rather than historic significance.\textsuperscript{262} It is difficult to conceive how

\begin{footnotesize}
\textsuperscript{256} See Section V, supra; see also Jovani Fashion Ltd. v. Fiesta Fashions, 2012 COPR. L. DEC. P 30,329 (2\textsuperscript{nd} Cir. 10/15/12); Galliano v. Harrah’s, 416 F.3d 411, 421 (5th Cir. 2005).
\textsuperscript{257} See, Whimsicality, Inc. v. Rubie's Costume Co., Inc., 891 F.2d 452, 455 (2\textsuperscript{nd} Cir. 1989); see U.S. COPYRIGHT OFFICE, RULES AND REGULATIONS FOR THE REGISTRATION OF CLAIMS TO COPYRIGHT, BULL. NO. 15 (1917). (“garments” are not registerable); 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 principle. Galliano, 416 F.3d 421 (works are protectable if they can be considered stand alone works of art).
\textsuperscript{258} See Vermont, supra note 3; see generally, Margaret Jane Radin, Rhetorical Capture, 54 ARIZONA L. REV. 457 (2012).
\textsuperscript{259} Jane Richardson & A.L. Kroeber, Three Centuries of Women’s Dress Fashions: A Quantitative Analysis, 5 ANTH. RECORDS 111 (Berkeley 1940).
\textsuperscript{260} Id.
\textsuperscript{261} Veblen, supra note 124, at 103-104.
\end{footnotesize}
an ensemble that evokes a combination of obsession, rebellion, and femininity can be considered primarily functional.\textsuperscript{263}

Avant garde fashion is particularly indifferent to utilitarian perfection. It \textit{invests} in being dysfunctional. As designer Marc Jacobs described, “I love a blouse that’s dumb.”\textsuperscript{264} This trend is exemplified by the use a stitching technique for premium denim jeans that created by removing fabric guides on sewing machines.\textsuperscript{265} This makes the results uneven, as each stitch “is imperfect, slightly askew” to simulate the look of hand stitching.\textsuperscript{266} Reliance on mechanical looms was abandoned, because they “make denim look too perfect and mass-produced.”\textsuperscript{267} Fabric is hand-slashed, frayed, nicked, and permanently wrinkled.\textsuperscript{268} Not surprisingly, these techniques are both labor intensive and expensive.\textsuperscript{269} For the more highly valued cultural products, “the products must have character or personality” that demonstrates hand crafting or artfulness.\textsuperscript{270}

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.\textsuperscript{271} Rather than operating in a competitive market, such designers emphasize identity and vision over durability or functional superiority.\textsuperscript{272}

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


\textsuperscript{264}Larocca, supra note 86.


\textsuperscript{266}Id. at 491.

\textsuperscript{267}Id.

\textsuperscript{268}Id. at 493-94.

\textsuperscript{269}Id. at 492; KAPFERER & BASTIEN, supra note 216, at 63 (describing flawed watches that are the hallmark of luxury, hand-made goods).

\textsuperscript{270}KAPFERER & BASTIEN, supra note 216, at 63.

\textsuperscript{271}Id.

\textsuperscript{272}Id.
evoke those worn by the U.S. military during the 1800s as the American West was being settled. There is a contrast between the Native American imagery and that of the military, which 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 19th 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 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. 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 to $5 million. 273 Many start with far less, working from the designer’s home and without employees. 274 In 1968, Calvin Klein was able to start his line for $10,000. 275 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. 276 This figure was not sufficient for designer Michelle Smith, who started her Milly line with $100,000, and then was required to obtain an additional $350,000 to fill orders. 277 Others report beginning with amounts in the $200-300,000 range. 278 In 1997, 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 Moet Hennessey (LVMH), who had just hired him to become the creative director for the Louis Vuitton ready to wear line. 279 Jacob’s partner later described this as an agreement to “cough up a relatively small amount” and “It was like they said, ‘Let’s just do this to shut them up’. 280 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. 281

275 GEHLHAR, supra note 273, at 34.
277 GEHLHAR, supra note 273, at 34.
279 Larroca, supra note 86 (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. 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).
280 Id.
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.282 Derek Lam’s first collection of samples cost $60,000 to create, and his second $85,000.283 Although Lam spent only $20,000 to finance his first runway show, a more realistic price is around $100,000.284 The major designers show in a primary fashion week venue at a cost that runs over a million dollars.285 To keep expenses down, fashion houses sometimes pay models in “trade,” meaning they are provided with clothing or accessories rather than cash.286 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.287 Fashion is seen as a very high-risk investment, and therefore unattractive.288 Investors and banks that are willing to lend to small businesses require a history of orders and a realistic growth plan.289 Some fashion-specific programs offer alternatives, such as the CFDA/Vogue Fashion Fund, which selects one winner and two runners-up every year. 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 volunteer, which can devote the time and effort required to accomplish the stated aims of an applicant’s design career plans.”290 The criteria are selective; as one designer observed, “[H]ow do you get to that point for the CFDA to even see you? There’s a massive problem in this business.”291 Even premium houses have been said to use haute couture designs to promote the company’s image, and rely on the low-priced,

282 GEHLHAR, supra note 273, at 38.
284 Id.; LaMont Jones, Dollars and Design: Money, Time, Invested in Fashion Week is Worth Promotional Payoff, PITTSBURGH POST-GAZETTE, Feb. 13, 2006, at C-1.
285 Schwarz, supra note 38.
288 GEHLHAR, supra note 273, at 42.
289 Id. at 43.
291 Odell, supra note 276 (quoting Maki Obara, who has worked in the fashion industry for fifteen years).
high-volume handbags, sunglasses, and perfume as the financial backbone of the company.\footnote{292}

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.\footnote{293}

The largest organizations employ assistant designers to support a lead.\footnote{294} As one example, Marc Jacobs works with others to develop clothing for Louis Vuitton, explaining, “We 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.”\footnote{295} Many other major designers have come to accept that the team approach leads to the strongest results.\footnote{296} Dries Van Noten employs assistants who develop fabric print designs.\footnote{297} Other designers hire assistants to develop added product lines, including menswear, accessories, bags, shoes, and perfume.\footnote{298} According to one report, Ralph Lauren uses “dozens of assistants and licensees [who] perform[] much of the creating.”\footnote{299} Those well-established fashion designers, who continue to do their primary sketching in isolation, require a team of specialists to execute the designs.\footnote{300} Many rely on fit models to create or perfect a design.\footnote{301}

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\footnote{296}{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 “It’s no coincidence that fashion’s strongest collections today are led by” designers who work collaboratively).}
\footnote{299}{TERI AGINS, THE END OF FASHION 94 (Harper Collins 1999).}
\footnote{300}{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 75 (describing that}
\end{footnotes}
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. 302

A process of back-and-forth experimentation is evident throughout descriptions of the hands-on design sessions, such as the description “So 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.” 303 This may entail varying creative choice, or experimenting with materials and construction to ensure the right fit and feel. 304 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. 305 Some retailers are giving preference to those designers who can promise almost immediate


301 Dana Thomas, House-Proud, HARPER'S BAZAAR, Feb. 2004, at 180 (discussing the need to design on a model).
302 Reed, supra note 58.
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.\(^{307}\)

Fashion houses release between two and eight collections every year. For example, Chanel releases six, and two of these are *haute couture* collections.\(^{308}\) 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 are shifted from placing orders months in advance toward far shorter time frames. 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. As Marc Jacobs explained in response to the question of whether “there are days when the ideas don’t come?,” and he admits “lots of them.”\(^{309}\) A designer who fails to provide excellence on schedule faces consequences. These are typified by the expression, “One day you’re in and the next day you’re out.”\(^{310}\) Lanvin’s Alber Elbaz states that every time he hears this expression, he is “dying”:

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\(^{307}\) *Interview with Marc Jacobs: The Creative Process*, supra note 79, at 5:47.

\(^{308}\) 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.


\(^{310}\) Karimzadeh, *supra* note 90 (statement of Alber Elbaz).
People will tell me, 'You are a genius . . . now,' and 'I really like what you do . . . now,' . . . But this is the story of our life because every collection ends and then we have a new future, that we have to think and to bring birth to. That fear 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.  

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 director. . . . You cannot write six books a year.”  

Because of the production and fabric source schedules, Elbaz starts work on the next collection almost immediately after the previous collection is shown. He believes that the pace is taking its toll on the entire industry.

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.” Designer Michael Kors acknowledges that the psychological stress on designers has increased with the accelerated pace and scope of fashion expectations. According to Alexander McQueen, “The 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.”

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

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311 Id. (statement of Alber Elbaz).
312 Standen, supra note 116.
313 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. . . . It’s the last thing I want to do the day after the show is to look at fabrics, but I have to do it.”).
314 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.”).
317 See Wilson, supra note 35.
like, This has to change the shape of history. And I don’t know how to calculate that. I really don’t.318

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.”319 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.320 One fashion critic and industry watchet 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.”321 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.322

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.323 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. Known for his technically intricate work, Von Noten produces only two collections every year, and has declined to do any accessories or added lines. He takes a thoughtful approach to design, working incessantly and spending time “[t]o go to exhibitions, to talk with people, to think, to research.”324 As he explains, “Owning my own company means I can make a difficult collection one season if I choose because I only have to answer to

318 Larocca, supra note 86.
320 Id. (In response to the interviewer’s question, “Did the stress contribute to the Galliano situation?,” A Yes and [Christophe Decarnin at] Balmain. McQueen. There is too much pressure. If it ends up destroying people, it’s not good…”).
322 Worries Grow Industry Breeds Substance Abuse, supra note 316 (statements of Lucian James, founder of consulting firm Agenda Inc., which advises creative industries).
323 Marc Karimzadeh, YSL’s New Vintage Bows at Barneys, WOMEN’S WEAR DAILY, June 10, 2009, at 3.
This approach allows Von Noten to evolve the line gradually and to develop specialty products that would not otherwise be possible.

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 Filenes in Boston by the end of the day. 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. Over the past decade, the sheer scale of copying and the outlets for the sale of duplicates has changed dramatically. 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. 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. They can program a machine to [make] it and then have a sample in two days.” Knockoffs are available in large numbers before the originals, typically at a fraction of the price.
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. The price points between the originals and the copies are narrowing. Recently, Mrs. Obama wore a Maria Cornejo jacket during a pre-inaugural event that was widely copied. Cornejo’s clothes are not designed for the wealthy, but rather for “women who are in that I-have-to-pay-a mortgage niche.” 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.” 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.

This leads to troubling results. Because the practice is legal, second comers have little incentive to hire designers sufficient to create an entire line of original designs. Second comers can cherry-pick the most interesting designs to copy, minimizing the research, development and risk. 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, “Congrats, you've been knocked off. It's a rite of passage.” As one source identifies, the current system has broken down the former

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333 Id.

334 Id.

335 Li, supra note 2 ("Five years ago we wouldn't have seen $10 and $15 T-shirts being counterfeited like we do now.").

336 See Hemphill & Suk, supra note 28, at 1174.

network of community norms that discouraged plagiarism through widespread disapproval of the copyist, particularly in the media.\footnote{338}

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.\footnote{339} At the time, this single dress established Furstenberg’s reputation and commercial viability. As Furstenberg explains, “[t]hat dress has paid for every single thing in my life.”\footnote{340} A number of other lines began with a highly select number of pieces.\footnote{341} 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.\footnote{342}

Such examples demonstrate that, although a lack of intellectual property protection can facilitate the broad dissemination of copies, the infrastructure of the future of the field can be adversely affected. 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. This might include such things as being first to market, selling related goods or services, favorable contractual relationships, or preventing copying through means other than legal enforcement. It is not entirely clear that extra-legal activity can preserve 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. 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.

Other designers have added diffusion lines to lower priced lines for a younger or more cost-conscious consumer. 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. Some designers have collaborated

343 See generally, BOYLE, supra note 8, at 140; Peter S. Menell, Tailoring Legal Protection for Computer Software, 39 STAN. L. REV. 1329, 1339 (1987).
344 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 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.’’).
345 Horyn, supra note 220.
346 Examples of such expansions include Paul & Joe to Paul & Joe Sister, Marc Jacobs to Marc by Marc Jacobs, and Derek Lam to 10 Crosby.
with companies outside the fashion industry to create crossover products, including beverages, electronics, household goods, and helicopters.\textsuperscript{348} Lines have engaged in award winning social media campaigns and collaborations. Some sources suggest that fashion will begin exploring made-to-order systems that enable consumers to customize designs on a mass scale.\textsuperscript{349} In fact, some have begun to do so.\textsuperscript{350} A few designs began to offer clothing through diverse sources, including Kickstarter.\textsuperscript{351} 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 purchased a counterfeit fashion design.\textsuperscript{352} 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. 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

\begin{footnotes}

\footnoteref{349} Teri Agins, The Future of Luxury: Custom Fashion, Cheap, THE WALL STREET JOURNAL ONLINE, Jan. 4, 2007, http://online.wsj.com/article/SB116787361060066579.html (interview with Tom Ford, who predicts greater customization); Scott Schuman, supra note 138 (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…”).


\footnoteref{352} 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 (noting that handbags and wallets were the most popular items).
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.\textsuperscript{353}

Nonetheless, copyists do not target \textit{haute couture} exclusively. To the contrary, ready to wear pieces are copied, including those that retail for as low as $300 and below.\textsuperscript{354} 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.\textsuperscript{355} 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 gap between originals and unauthorized copies.\textsuperscript{356} Thus, the advantage that some houses obtained in generating high quality clothing may be an advantage that will not endure.

\section{The IDPPA: Suggestions for Improvement}

Although the IDPPA offers an intriguing framework, the statute is far from perfect. Any form of fashion protection that might ultimately be adopted should include a fair use exception.

Such an exception is important to continue to facilitate creative expression within this industry. This homage, which are pieces 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. TAs one philosopher has

\textsuperscript{353} Horyn, \textit{supra} note 220.

\textsuperscript{354} See, \textit{e.g.}, Hernandez Testimony, \textit{supra} note 203, 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); \textit{Nasty Gal COPIES AGAIN, Is the New Forever 21}, THE FASHION LAW, Jan. 30, 2013, http://www.fashionlaw.org/2013/01/nasty-gal-copies-again-is-new-forever-21.html#.UUilEqVgP0c (documenting near-identical copy of sunglasses that retail just under $300); \textit{Nasty Gal Says Design Piracy is a "Rite of Passage"}, THE 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).

\textsuperscript{355} See, \textit{e.g.}, Simona Segre Reinach, \textit{Four Models of Fashion Relationships}, in THE FASHION READER 547, 548 (Lisa Welters & Abby Lillethun eds., 2d ed. Berg 2011) (documenting the exportation of Italian textile machinery and old world expertise to other areas of the world).

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.”357 This has the effect of inter-legitimation and engagement of “play of cultured allusions and analogies endlessly pointing to other analogies.”358 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, homage pieces should be specifically flagged as such, a solution that would preserve attribution to the original designer.359

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."360

Further, the IDPPA’s remedies section should be revised to more closely track the necessity for attribution for avant garde designers. Rather than accord monetary and injunctive as the primary remedies to the rights owner, the legislation should protect the creator’s reputation as a cultural producer. In such instances, the designer’s name is the paramount asset of the operation. The IDPPA should be modified to provide that the primary remedy in cases of infringement should be one tailored to address attribution. 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.361

VII. Conclusion

358 Id.
360 BOURDIEU, supra note 25, at 31.
The IDPPA serves as a rational model for creative media that are based on significant external inputs, including those media that are interactive with those who experience the works. This model is particularly appropriate for fashion, which has visible connections to cultural and historic inputs. Although there are direct economic consequences from copying within that industry, there are additional justifications that arise from the operation of the anti-economy for highly creative fashion works. If such a theory is adopted, clothing makers have a greater incentive to create clothes that are protectable—that is, highly creative designs.