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Presents

The Piracy Paradox: How Copying Can Be Good for Creativity

by

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In 2007, viewers of "The Late Show with David Letterman" saw celebrity Paris Hilton wearing a flower-printed dress designed by Foley + Corinna. Dana Foley, a one-time aspiring playwright, had begun making vintage-inspired women's clothing many years earlier. After meeting Anna Corinna, a vintage clothing reseller, at the 6th Avenue flea market in New York City, the two women went into business together. They opened a store on the Lower East Side in 1999 and, years later, another in West Hollywood. They eventually emerged as a leading design team, which does substantial revenue--according to the New York Times, in 2008 they sold over $20 million worth of garments and accessories—but is hardly a household name.

After Paris Hilton's appearance on the David Letterman show, fast fashion retailer Forever 21 began selling a $40 dress strikingly similar to the one Hilton had worn.1 The Foley + Corinna dress was not expensive by the standards of high-end fashion. But it still sold for about 10 times as much as Forever 21's dress. Shortly after the two dresses were shown, side-by-side, on some apparel websites, Anna Corinna was interviewed by the New York Post. "It's awful," she declared. "To me, the most awful part is that they're huge companies and they [employ] designers, and a designer's job is to design...I totally understand being influenced by or inspired by, because everybody does that. But this obviously is neither. To me, they should be embarrassed. They're not designing, they're stealing it."2

Many of Forever 21's customers may have been unaware of Foley + Corinna's dress, and simply bought Forever 21's model because they liked it. Others may have just preferred the cheaper version. As Ms. Corinna argued to the Post, "A lot of people don't know they're
buying a knockoff, or they just don’t care, they’d rather buy the cheaper one...If you’re in Forever 21 in whatever city, you see it and think, ‘Oh, that’s pretty,’ and you buy it.”

The story of Forever 21 and Foley + Corinna is not unusual. Every season—indeed, every week—clothing designs are copied, reinterpreted, and “referenced” by other firms in the apparel industry. Some companies, such as Allen B. Schwartz, even center their business strategy around copying and reinterpreting striking designs. The practice is so widespread that the magazine *Marie Claire* features a regular section entitled “Spurge vs. Steal” that pairs an expensive version of a given design (perhaps the original, but not necessarily) against a far cheaper version. At times the two versions are virtually indistinguishable.

The pervasive nature of knockoffs in the fashion world is the direct result of a hole in American copyright law. Copyright protection in the United States does not extend to fashion designs, and in the more than 200 year history of regulating creative endeavors it never has. As we will explain in this chapter, some elements of apparel, such as the label or the fabric print, are fully protected by American intellectual property law. But as far as designs go, the legal regime is one of free appropriation. Anyone can copy or reinterpret a successful design, and there is nothing the original designer can do about it. In the case of Foley + Corinna, the Lower East Side designers received substantial attention from the incident, which struck a chord with reporters and bloggers alike. But they did not receive any legal judgment, nor could they stop Forever 21 from copying.

The standard justification for copyright protection in American law is simple. Property rights are necessary to ensure that copying does not drive out creativity. Since copying is cheaper than creating, creators will not create if they know that others will simple copy their ideas. This rationale is instrumental. That is to say, it is not based on a sense of moral rights or justice, but rather on the belief that property rights are necessary for innovation. The desired goal of copyright, and of virtually all intellectual property laws, is more innovation. Property rights are merely a tool to achieve that goal. We call this the property theory of copyright.

* Nonetheless, Dana Foley and Anna Corinna soon became poster children for the issue of design copying; Foley even appeared along side New York Senator Chuck Schumer at a press conference touting the proposed Design Piracy Prohibition Act. As we explain below, Congress has periodically considered, and thus far rejected, revising copyright law to address fashion designs. In August 2010, Schumer reintroduced this bill, recast as the Innovative Design Protection and Piracy Prevention Act.
The property theory suggests that the behavior at the heart of the Forever 21-Corinna + Foley dispute—the outright and pervasive copying of creative designs—ought to precipitate a crisis in the industry. Creativity should be driven out by the specter of rampant copying, and investment should dry up. The industry should be in a freefall economically. (Something like what we see in the mainstream music industry today, perhaps). Yet quite the opposite has happened. The apparel industry is as creative as ever today. Arguably, it is more creative than ever. Whatever economic woes it currently faces are almost entirely the result of the severe global economic crisis that began in 2008, rather than of a cataclysm of copying. Indeed, for the past few decades fashion revenues have been high and rising; copying was nonetheless ubiquitous.

What is perhaps most striking is that despite the ubiquity of copying, there is a greater diversity of designs available to consumers today than ever before. To be sure, some fashion insiders bemoan today’s world of high-end fashion, yearning for a more storied, glamorous past. But it is hard to contend that the contemporary world suffers from too few designs or too little creativity. New labels abound, clothing is cheaper than ever, and designs come pouring out of small niche firms and major chains alike.

Copying, in short, is pervasive in the fashion world, yet it has not produced a calamity for the industry. Some designers have clearly been harmed by copying. Yet the industry as a whole has thrived. Why do fashion designers continue to create in the face of such widespread copying? And what does this tell us about the nature of creativity and copyright?

A Very Short History of the Fashion Industry

Fashion may seem trivial, but it is not insignificant. Worldwide, the industry sells more than $900 billion of apparel annually. It is a truly global industry, with major and often iconic brands, enormous advertising budgets, integrated international supply chains, and, increasingly, retail footholds around the world.

For a long time fashion, in its higher forms at least, was synonymous with Paris. The great couture houses operated out of Paris, and throughout the world elites, especially in 19th century America, looked to Paris for guidance on how to dress. Paris today remains
the center of the tiny market in elaborate, hand-made dressmaking. Traditionally, of course, all clothing was handmade and the market for "ready-to-wear" apparel—which today is essentially all clothes bought in the United States—was either nonexistent or very small.

The industrialization of apparel-making, which would ultimately transform the industry, began with the invention of the sewing machine in the mid-19th century, and grew, particularly in the United States, in the wake of the Civil War. The United States was in forefront of the move away from traditional tailors to ready-to-wear clothing one bought in a department store or boutique. Indeed, by the early 20th century America was the world leader in ready-to-wear. \(^6\) In 1902 a British apparel trade magazine presciently bemoaned the dangers of an American-led "ready-made invasion," noting that "a visit to America cannot fail to impress the stranger with the relative importance of the ready-made clothing industry there...It seems ludicrous to say so, but there is a considerable and respected trade in ready-made suits...." \(^7\)

Over the course of the 20th century hand-made clothing would essentially die out in the West, save for the ever-shrinking couture industry and a tiny slice of high-end custom suits and the like. The rise of ready-to-wear not only meant cheaper clothing, made using some of the same mass production techniques pioneered by Henry Ford; it also meant the average consumer was now presented with a wide range of pre-determined choices aimed to entice them to buy. In this way, our contemporary idea of fashion—something produced for fickle consumers in an ever-changing array of styles developed by competing designers—was born.

The American apparel industry grew dramatically during the 20th century. As the infamous Triangle Shirtwaist fire of 1911 illustrated, early in the century New York was already the site of substantial garment-making. The industry grew further when, during the Great Depression, as part of the infamous Smoot-Hawley tariffs, the federal government imposed punitive tariffs on imported clothes. \(^8\) The war also meant that American editors and buyers could not travel to Paris to see the latest designs. American designers like Claire McCardell became "overnight sensations" as the nation increasingly looked to New York to fill the style void. \(^9\) By the onset of the Second World War many of the features of the contemporary fashion industry had fallen into place: an increasingly international set of
brands; diversified, factory-based production of ready-to-wear clothing; and, over time, declining prices as the cost of production went down.∗

For true luxury apparel, less had changed. In the early postwar years France retained its central role in the high end of women's fashion. (For men, Mecca remained further north, on London's Savile Row and Jermyn Street.) But increasingly Italian and American firms were becoming central players in the burgeoning high end of the ready to wear market. The notion of brands and labels, rather than tailors and dressmakers, was becoming paramount. Early licensers, such as Pierre Cardin, tapped into this new mindset to market enormous arrays of goods that were manufactured by many different firms, but which all shared the all-important label and mark.

For the United States, the postwar era was a time of continued growth and diversification. Established national brands such as Brooks Brothers, founded in 1818, were soon joined by a new wave of sophisticated home-grown (if not always home-born) postwar designers: Bill Blass in the 1950s, Halston (Roy Halston Frowick) in the 1960s, Ralph Lauren and Diane von Furstenberg in the 1970s, as well as associated editors and tastemakers, such as Diana Vreeland, Grace Mirabella, and Baron Nicolas de Gunzburg. New York, with its thriving garment district, increasingly become a center of design and brand management rather than mere assembly.

During this era the high end of the fashion industry also became truly global. Expensive boutiques stocking the leading labels opened around the world, catering to an increasingly mobile and moneyed elite. With the success of OPEC in the 1970s, the Arab oil states became major destinations for fine clothing, and helped keep the faltering—and now breathtakingly expensive—haute couture market alive in the face of an onslaught of ready-to-wear. For many major firms couture was becoming a loss leader; a way to maintain a famous brand and foster lucrative licensing opportunities, but not a way to make money. Indeed, by 1993, Jean Francois Debreq, who engineered the purchase of Yves Saint Laurent's eponymous firm, would go so far as to joke that “if [YSL] dies, I think I make even more money because then I stop the couture collections.”10

∗ This was also the birth period of standardized clothing sizes; in 1939 the U.S. Dept of Agriculture took the measurements of 15,000 women in an effort to arrive at a few standard dimensions. (Each underwent 59 discrete measurements). These sizes were finally standardized by the government in the late 1950s, and, until the onset of modern “vanity sizing,” were largely followed by the major American manufacturers.
Fashion continued to globalize and grow in the 1980s and 1990s. Italy became the new hotspot due to the dramatic rise (or rebirth) of firms such as Gucci, Giorgio Armani, Versace, and Prada. Japan, devastated by the war, was rich by the 1980s and soon became both a source of innovative designs (Rei Kawakubo, Issey Miyake) and, for a time, the number one luxury goods market in the world. Russia, after the fall of communism, likewise saw more than its share of expensive apparel. This clothing was supplied by the increasingly global brand names that dominated the public consciousness: Armani, Chanel, Louis Vuitton, and the like.

The economic boom of the 1990s fueled ever more attention to and consumption of fashion, particularly luxury ready-to-wear. Magazines such as Vogue and Elle grew fatter with advertising pages touting global brands, and fashion became a form of conquest and fascination epitomized by the hit series *Sex and the City’s* silent fifth friend, Manolo Blahnik. Fashion grew ever more synonymous with coveted labels, which were adorned most profitably to accessories rather than actual clothing. (The average price of a luxury handbag, which can sometimes cost as much as a new car, is ten to twelve times the production cost.) Just as couture had become a loss leader for many parent firms, for some entities even ready-to-wear was becoming, if not an actually losing proposition, more of a vehicle for image management than an actual profit center.

The modern conception of the fashion industry—large factories rather than small ateliers; large firms rather than small family shops; label and trademark the dominant value of the firm—was now fully ascendant. In this system many labels were often consolidated under one roof, usually with an acronymic name, such as Gruppo Finanzario Tessile, (GFT); Louis Vuitton-Moet Hennessy (LVMH) and Pinault-Printemps-Redoute (PPR). These giants controlled an important and highly visible slice of the industry, though the mass market was still dominated by huge-volume firms such as Sears, JC Penney, and Walmart.

At the same time another front in the business of apparel was opening: fast fashion. By the end of the 20th century, rapidly shrinking tariffs and shipping costs meant that new labor sources, such as China and Bangladesh, could produce clothing at astonishingly low prices. Fast fashion retailers tapped into this global supply chain (as well as local producers closer to home) to churn out cheap but stylish articles at a very rapid rate. The Spanish firm Zara reportedly offers some 10,000 new products a year; UK-based Topshop perhaps
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15,000. Some of these firms have long histories—H & M was founded in 1947 in Sweden—but others, such as Zara and Forever 21, only grew globally prominent in the 2000s. (The first Zara opened in the U.S. in 1989, in New York). Fast fashion retailers soon challenged the established design houses on a surprising number of fronts.

Fast fashion is epitomized by many designers’ *bête noire*, Forever 21. At her Fall 2007 show designer Anna Sui gave out t-shirts emblazoned with "Thou shalt not steal" and the likenesses of the co-owners of Forever 21, portrayed as wanted criminals.\(^{13}\) Started by Korean immigrants, who placed their first store, opened in the 1980s, in then-seedy downtown Los Angeles, Forever 21 is today a nearly $2 billion business. As Anna Corinna and Dana Foley discovered after Paris Hilton’s appearance on David Letterman, Forever 21 can quickly and fairly accurately ape a striking and saleable design. Its ability to do this—and its amazingly cheap prices—keep customers coming back for more on a regular basis. Not all the customers are 21; indeed, many are the mothers of 21 year olds who navigate the store in an effort to stay on trend and inexpensively fill out closets.

By the 21st century fashion had become a popular obsession. Traditional fashion magazines now compete with a host of other media outlets. The Gray Lady’s fashion reporting has increased with the addition of the *New York Times* Style Section (now twice weekly), and many celebrity-driven magazines, such as US Weekly, feature substantial coverage of trends and designers. Blogs such as Fashionista and the Sartorialist are widely read and increasingly influential. Perhaps most striking is the rise of apparel-oriented television hits such as *Project Runway*, *What Not to Wear*, and *America’s Next Top Model*, which, particularly in the case of the first, try to illuminate the creative process behind fashion design—and have millions of viewers. The same fascination with fashion and its workings is shown in the success of films such as *Unzipped*, *The Devil Wears Prada*, and *The September Issue*.

In short, over the 20th century apparel was transformed from a largely small-scale, often hand-made and relatively expensive craft that, aside from the very highest end, typically followed set rules of tradition, to a much more diverse and creative industry producing garments in vast and far-flung factories for a global audience far more attuned to trends than tailoring. A tiny alternative world exists, exemplified by high-end menswear, which still adheres to the ideal of traditional styles tweaked into custom clothing. But for
the vast majority of customers, ready-to-wear is the only thing they have ever owned. More than any other nation, the United States led the way to this new world of apparel.

Today, the fashion industry is a riotous blend of high and low: the nearly-free--and largely disposable--clothing offered by firms like H&M standing side-by-side with stratospherically-priced brands like Thom Browne. Occasionally odd hybrids occur, such as Vogue-darling Rodarte designing a collection for Target. Hunting and gathering at all these price levels is an ever-more sophisticated and knowledgeable fashion consumer, often armed with the latest magazine spreads and street blog photos. Copying is rampant and often met with a shrug rather than a salvo of complaints. Perhaps the signal feature of American fashion today is its dizzying diversity of design and style. The vast array of designs on offer today has no precedent.

**Restraining Copying: The Fashion Originators’ Guild of the 1930s**

Striking or popular fashion designs have long been reinvented, reinterpreted, and sometimes simply copied. Disputes over copying date back at least to the beginning of the 20th century (and some elements of copying probably go back to the toga). Likewise, proposals to amend American law to protect garment designs via copyright are nearly as old as the practice of copying. Writing in 1934, a federal judge in New York noted the prevalence of copying among apparel makers but stated that he could do nothing about it, because although “in recent years bills have been introduced in the Congress to amend the copyright statutes” to include apparel, none of the bills had yet passed.14

Today, the same is true. While the sketch of a dress is protected by copyright--just as all drawings are--the design itself can be freely copied by anyone. Indeed, in the same year that the New York judge wrote of his inability to stem copying, British economist Arnold Plant described in detail how design copying worked in Europe—and what its effects were:

> [T]he leading twenty firms in the *haute couture* of Paris take elaborate precautions twice each year to prevent piracy; but most respectable “houses” throughout the world are quick in the market with their copies (not all made from a purchased original), and “Berwick Street” follows hot on their heels with copies a stage farther removed. And yet the Paris creators can and do
secure special prices for their authentic reproductions of the original - for their “signed artist’s copies,” as it were.  

The British certainly had no monopoly on copying. During the 1930s and 1940s, American garment makers also copied designs widely, and some of the more upstanding ones paid a fee to Paris houses like Balenciaga and Dior that entitled them to send their best sketchers to France to copy original looks for manufacture back at home.

It was against this backdrop that, in the 1930s, the burgeoning U.S. apparel industry established an unusual cartel to limit copying, at least amongst their own kind. The “Fashion Originators’ Guild of America” registered U.S. designers and their sketches and urged major retailers to boycott anyone known to have copied a registered design. Participants signed a “declaration of cooperation” in which they pledged to deal only in original creations.

To police this system, the Guild employed some 40 investigators to discreetly browse in member stores and ascertain that all the garments complied with the rules. Non-compliant stores were subject to “red-carding,” in other words, their names were distributed to all the participating manufacturers, who in turn would refuse to fill their orders. Those who violated the boycott in turn faced Guild-imposed fines. The Fashion Originators’ Guild seemed to have been fairly effective at limiting copying among its members. And its membership was substantial. By 1936, over 60% of women’s garments sold in the U.S. for more than $10.75 (approximately $165 in 2010 dollars) were sold by its members. In all, nearly 12,000 retailers across the nation signed the Guild’s cooperation agreements. The Guild, in short, was not a small operation.

As with any cartel, however, the Guild faced internal conflict. Much of it turned on the differing interests of retailers and designers. But also at play was the difference between cheaper, commodity clothing and its more expensive cousins. A signature example of this conflict—and one that ultimately led to the downfall of the Guild—is the lawsuit brought against the Guild by Wm. Filene’s Sons Co, progenitor of the famous Filene’s Basement chain of stores.

At the root of Filene’s lawsuit was a disagreement between retailers and the Guild over the scope of the cartel’s rules. The conflict was sparked by what some retailers saw as “highbanded abuse of the Guild’s position.” As a contemporaneous story in Time Magazine
colorfully recounted the events, the dispute began with a single incident in 1936: “[o]ne day last month at Strawbridge & Clothier, a swank Philadelphia department store, a Guild investigator became quietly uppish.” The investigator demanded that “a certain dress, in her opinion a copy, be removed from the floor and that she be told the name of the manufacturer.” Strawbridge & Clothier’s management refused, believing that they maintained the right to determine what was, and what was not, a copy.

Two days later, the store was served with notice that it had violated Guild rules and that other members were consequently instructed to boycott it. Within a few days the same had happened at Bloomingdale’s in Manhattan and at R.H. White in Boston, a Filene’s-owned department store. All three red-carded emporiums were members of the Associated Merchandising Corp., a buying cooperative. Soon, 16 out of 20 Associated Merchandising Corp. members had been red-carded. The Filene’s suit against the Guild, charging conspiracy in restraint of trade and thus a violation of American antitrust law, was a punch back.

“Five years ago the possibility of group of dress manufacturers being powerful enough to draw fire on grounds of monopoly seemed so remote as to be funny,” wrote Time. The industry was a “hodgepodge of feverishly busy small houses” competing intensely. “Dirty tricks” were ubiquitous:

Among such tricks was the universal and highly developed practice of copying original styles. By the early Depression years it had gone so far that no exclusive model was sure to remain exclusive 24 hours; a dress exhibited in the morning at $60 would be duplicated at $25 before sunset and at lower prices later in the week. Sketching services made a business of it; delivery boys were bribed on their way to retailers.

The Guild’s purpose was to squelch this sort of behavior, though in its early years it concentrated solely on higher priced dresses (largely those wholesaling for the refreshing price of $16.75). The Filene’s suit stemmed from a newer effort to clamp down on more down-market copying as well. As Time noted, high and low priced garments were seen as different by many industry insiders. “It was one thing to guard against copies in expensive lines,” wrote Time, ”and another thing to give the same attention to lower-priced dresses, which are bought in greater quantities and sold to people who cared not at all whether
they were copies or not. The retailers did not like the prospect of competing in these lines under Guild restrictions with the chain stores.” These chain stores were also not party to the Guild system.

In a narrow sense the Filene’s suit was unsuccessful; the federal court held that the Guild had not illegally conspired to restrain trade. But eventually the Guild did fall afoul of the antitrust laws, and did so fatally. The Federal Trade Commission, which is tasked with protecting consumers from unscrupulous sellers, took notice of the suit and soon went after the Guild. Agreeing with Filene’s, it decreed that the Guild was operating illegally. That view was upheld by on appeal.

Eventually the case reached the Supreme Court. In a famous 1941 decision called *Fashion Originators’ Guild of America v. FTC*, the Supreme Court concurred with the Fair Trade Commission that the Guild’s practices constituted unfair competition and were therefore illegal. In its defense, the Guild pointed to the difficulties of eradicating copying in the apparel industry. Its practices “were reasonable and necessary to protect the manufacturer, laborer, retailer, and consumer against the devastating evils growing from the pirating of original designs and had in fact benefited all four.” The Court rejected this argument. Rampant piracy, wrote the justices, did not give manufacturers a license to violate antitrust law and collude against competition. With that decision, the Fashion Originator’s Guild was out of business.

For those who had favored the Guild system, the underlying issue of course remained: what to do about copying in the industry? If the former Guild members could no longer organize a private cartel to stop copyists, perhaps they could have Congress do the work for them. Amending American copyright law to encompass fashion designs soon became a cause of some designers, just as it had in the 1920s and early 1930s, in the days before the Guild was organized. Just six years after the Supreme Court’s decision, Maurice Rentner, the former head of the Guild, was busy lobbying Congress on the grounds that resurgent fashion piracy in the postwar period would again “write finis” to the dress industry, just as it had done, he claimed, before the Guild’s inception. America ought to adopt the French system of protecting garment design, suggested Rentner.

Others in the industry were less sure. Leon Bendel Schmulen, of the Henri Bendel department store, told the *New York Times* that design copying posed “no danger to the
business” and was instead “a natural consequence of fashion.” “By the time a design of ours is copied in the cheaper dress lines,” said Bendel, “it’s probably time for it go. A threat to American design that is getting under our skin is the Paris influence. However, even here it is creating an incentive to the American designer.”

Leon Bendel and Maurice Rentner represented two enduring poles in the American debate over apparel and copyright. Bendel subscribed to the view that design copying was not only inevitable, but perhaps even an essential part of the ecology of fashion. As he suggested, a design that was widely copied was a signal to start over and sell something new, and of course one made money by selling new things.

This view has a distinguished pedigree in fashion; no less a personage than Coco Chanel claimed that “being copied is the ransom of success.” Rentner, on the other hand, saw copying as a serious threat that would eventually drive the industry into penury. Without protection, how could designers afford to keep designing? This view too had a distinguished pedigree, for it was the basis of the entire apparatus of copyright law in America (and much of the world) and it possessed an impeccable-seeming logic.

Nonetheless, Bendel’s view prevailed. Rentner’s efforts to convince Congress to adopt French-style copyright protection for fashion went nowhere, despite his prediction that 500,000 American garment employees would lose their jobs due to piracy. Yet in the decades after the fall of the Fashion Originator’s Guild the U.S. apparel industry grew rather shrunk. And while in recent decades substantial production capacity has moved overseas in search of cheaper labor—leading to the decline of New York’s Garment District—American designers are more numerous and more successful than ever before. Since the fall of the Guild, in other words, the American apparel industry has survived and even thrived despite widespread--and usually entirely legal--copying.

The Copying Debate Today

The issue of copying remained of enduring interest throughout the postwar period, even as the Guild and its red cards became a distant memory. In particular, the meteoric rise of fast fashion retailing in recent years has helped renew Maurice Rentner’s 1947 call for amending American copyright law to protect garment designs.
These new calls for reform have arisen against a changed backdrop of American copyright law. The fundamentals are the same, but copyright's strength and scope have markedly increased. Since Rentner's unsuccessful effort to amend the law in the 1940s, Congress has expanded copyright protection in a wide variety of areas. Architectural works—previously unprotected—became protected by the Architectural Works Copyright Protection Act of 1990. Likewise the arcane design of boat hulls was added to the copyright roster in 1998.

Congress also dramatically expanded the length of copyright protection. In 1976, and again in 1998, the term of protection was markedly increased. Thanks to the latest amendments, named for Sonny Bono, the singer and former Congressman, the standard copyright term is now life plus 70 years for the creations of individuals and 120 years for those of corporations. Adding force to these measures was a more powerful rhetoric of property rights, which increasingly characterized copyright (as well as trademark and patent) not as the regrettable-but-necessary government interventions into the free market they once were thought to be, but instead as sacrosanct species of property that ought to be staunchly defended—not balanced against other economic and social concerns.24

Against this backdrop, in 2006 the Design Piracy Prohibition Act was introduced in Congress. The Act was championed by the New York-based Council of Fashion Designers of America. The group pursued the usually dubious approach, at least as far as Congress is concerned, of appealing—as had Rentner himself—to the example of France. Proponents argued that because France and many other nations afforded copyright protection to apparel designs, the United States ought to as well, lest it lose out in the global fashion competition.

The bill did not come up for a vote, and after a brief interregnum and some rewriting, it was reintroduced in 2009. A co-sponsor, Rep. Bill Delahunt of Massachusetts, announced that "one of our most vibrant industries—the fashion industry—is currently at risk because the copyright laws of the United States, unlike virtually all other industrialized countries, fail to protect fashion designs."25 Updating Maurice Rentner's now six decade old prediction of catastrophic job losses (Rentner predicted 500,000), Delahunt declared that 750,000 jobs were at stake due to design piracy, and that the proposed law would, in his
words, promote and protect the nation's entrepreneurs "by ensuring a just and fair marketplace at home, and a level playing field abroad."

The Design Piracy Prohibition Act sought to amend American copyright law to create a unique, three year form of copyright protection for fashion designs. The federal copyright office would create a searchable database of apparel designs, which would (in theory, at least) enable designers and retailers to ascertain what was currently protected. After the three years had passed, a registered design would fall into the public domain, becoming fair game for others to copy. The proposed law also featured an unusual safe harbor for copies that follow trends. It defined a trend is "a newly popular concept, idea, of principle expressed in, or as part of, a wide variety of designs of articles of apparel that create an immediate amplified demand for articles of apparel embodying that concept, idea, or principle." Accordingly, any design that embodied a trend would, were the law to pass, be exempt from the new rules of copyright it creates. In other words, the bill criminalized copying engaged in by a single manufacturer. But it endorsed widespread copying of a design. This "trend safe-harbor" was added after the original version of the bill caused considerable worry among industry insiders.

We will return to the importance and meaning of trends below. Here it is worth noting, however, that this unusual provision suggests that the partisans of copyright protection for fashion recognize that there is something distinctive about copying in the apparel context--something not present in other, more traditional, creative industries, none of which have a "trend exception" to infringement.

As this book goes to press, the Design Piracy Prohibition Act has yet to come up for a vote in Congress. If it passes, it will mark a sea change in American law. For over 200 years the United States has treated fashion design as an unprotected form of creativity, there for the taking by any entrepreneurial passerby.

* In touting the bill neither the sponsors in Congress nor Steven Kolb, the head of the CFDA, denied that the American fashion industry was in great shape. In the press release trumpeting the Act's introduction, Rep. Goodlatte noted that "America's fashion design industry continues to grow." Likewise, Kolb declared that the United States was "the world leader in fashion" and nation's fashion industry was "growing steadily and adding jobs to our domestic workforce."
The World of Knockoffs

As the history of American apparel suggest, knockoffs have long been ubiquitous in the fashion world. To give a flavor of their variety, the photographs on the following pages are taken from the magazine Marie Claire's well-known feature titled “Splurge or Steal.” We think most observers would agree that in these pairings one designer is copying another—or perhaps both are copying a third. (It is always possible, though improbable, that two designers simply lit upon the same design more or less simultaneously).

Who is the originator and who is the copyist in these pairings is not always clear, however. But at least for Figure [], the identity of the copyist is no mystery. The “steal” in that figure is a copy by Allen B. Schwartz, who, in the biography offered by his own company, states that he is “revered and applauded for the extraordinary job he does of bringing runway trends to the sales racks in record time.” These “runway trends,” of course, are the works of other designers. As the other photos illustrate, the paired designs are not always identical, and there may be (and probably are) large quality differences as well as myriad hidden but differing details. But to the naked eye, the photographs suggest a quite substantial similarity.

[INSERT PHOTOS HERE]

We could give many more examples, but the basic point is familiar to anyone who pays even a modicum of attention to clothing. Knockoffs of designs are everywhere. Some are more fairly called derivative works; others are really "point by point" copies. But none are hard to find.

If the ordinary rules of American copyright law were applied to fashion, all of these examples would be illegal, and the guilty copyist would face substantial fines and penalties. Indeed, the level of copying within the garment industry is so great that “normalizing” fashion within the regular copyright system would probably result in a staggering array of lawsuits, fines, and injunctions—so much so that even strong proponents of amending American law argue, as we have just noted, that fashion needs it own special, and much more permissive, rules, rules. The notion that any new copyright system for fashion would
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only require an extremely short term—not a century or more, as with films and books, but instead a mere handful of years—reflects this widespread agreement that fashion is somehow different than other creative industries.

It is also essential to recognize that copying in the fashion world varies in time and in type. Not all copying entails the replication of an entire garment. In many cases only a feature of a design is copied, and that feature often becomes part of that year’s body of trends. The result is not a point-by-point copy but instead an adaptation of a striking design feature. Often these features are familiar, recycled elements that under no imaginable legal system would protected: a cap sleeve, kitten heels, or a beaded, bohemian front. But sometimes the feature is new, such as the pointy, peaked shoulders of recent Martin Margiela jackets. Either way, it is the widespread copying of such features that often gives rise to (or evidences) a trend. Even the clichéd rise and fall of hemlines can be thought of this way.

This distinction between design feature and overall design is important, since many of the examples used in the debate over fashion and copyright are really examples of overall or entire designs that copied more or less accurately. The Foley & Corinna/Forever 21 spat is a good example of (nearly) point-by-point copying. Copying can also vary in time. Some copying of apparel designs occurs in the same year or season that the original garment appears.27 At times copying may occur before the original arrives in stores.* Other copying occurs with a lag, and indeed this kind of copying is so common it is hardly treated as copying. Think of how often a style from a decade or two ago reemerges, perhaps slightly tweaked, on the runways in Paris or New York. Digging through the past for ideas only rarely raises eyebrows, and in fact this kind of copying would be expressly permitted under nearly every proposed legislative “fix” to the copying problem—as long as the “past” was more than 3 years old.

In short, if we step back and compare the fashion world to other creative industries, the contrast is striking. The existing system is one of remarkably pervasive

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* We have heard this claim several times, and while it has some degree of truth, we doubt it is pervasive or systematic—if for no other reason that a truly accurate ability to predict what will sell in advance would be a remarkable skill coveted by any buyer for a large department store or chain. Indeed, the person possessing this preternatural ability would likely earn more money picking the eventual fashion winners and selling them than actually doing the work of making copies themselves.
appropriation of designs. Copies and derivatives can often be found at every level of the apparel marketplace. Viewed from the perspective of traditional copyright-oriented industries such as the music or motion picture industries, this is more than surprising. In these arenas, copying is illegal piracy.

And of course combating piracy is a principal concern in these industries. This is clear to anyone who has followed the recording industry’s battle against online file-trading, or the political lobbying engaged in by representatives of the industries’ trade associations, such as the Recording Industry Association of America (RIAA) and the Motion Picture Association of America (MPAA). Indeed, the strength of the MPAA’s views on copying were exemplified by their legendary leader Jack Valenti, who, in testimony before Congress, famously compared the original VCR to a rapist.

By contrast, the freedom to copy apparel designs – euphemistically referred to referencing or homage – has been taken for granted by a surprisingly large swath of the fashion world. Some designers are fatalistic about it: Alber Elbaz of Lanvin recently declared that “I don’t care if people copy me,” though he quickly added, “well, I do care. For me, I create prototypes. They can copy yesterday but they can’t copy tomorrow.” Others view copying as a kind of badge of honor. We already have noted the legendary Coco Chanel’s aphorism that copying is the “ransom of success.” Tom Ford, former creative director for Gucci, has likewise said that “Nothing made me happier than to see something that I had done copied.” Prada CEO Patricio Bertelli was even blunter: “I would be more worried if my product wasn’t copied.”

And while the fashion copying debate is often depicted as one that pits great artists (read: fashion press favorites) against sneaky pirates (read: Forever 21 and fly by night knockoff artists), famed designers don’t just acquiesce in copying—they sometimes engage in it. In 2002, for example, Nicholas Ghesquiere, a heralded young designer for Balenciaga, admitted to copying point-by-point a vest originated some three decades earlier by a largely-forgotten designer named Kaisik Wong. As the New York Times’ fashion critic opined, this incident was more commonplace than many realized:

Were it not for Mr. Ghesquiere’s fame and Mr. Wong’s obscurity -- were it not, indeed, for the recent examples of plagiarism in publishing and the continuing
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debate in the music and art worlds about sampling and ownership -- this latest instance of copying might not merit special attention. After all, copying is part of the history of fashion...Today, under the postmodern rubric of "referencing," copying flourishes so openly that nobody bothers to question it. And the practice isn’t confined to the low end of the business, to knockoff kings like Allen B. Schwartz of ABS and Victor Costa. Tom Ford, Marc Jacobs and Miuccia Prada have all dipped into other designers’ wells.

None of this gainsays the fact that designers sometimes bridle when they believe they have been knocked off egregiously. Certainly Dana Foley and Anna Corinna did when a version of their dress appeared on the racks of Forever 21. On rare occasions, designers even sue one another. In 1994 Yves Saint Laurent famously sued Ralph Lauren in a French commercial court for copying a YSL design. Saint Laurent’s successful lawsuit took place in Europe, where copyright laws are, as Maurice Rentner long ago pointed out, far more protective of fashion designs. (And of course, the revered French designer prevailed and the parvenu American lost--a result Ralph Lauren later called "totally ludicrous"). Whatever the rules in France, however, in the United States the law is different. Fashion designs are, for better or for worse, “free as the air to common use.”

Why Are Knockoffs Legal?

In the 1930s, the American apparel industry resorted to an extra-legal approach--the Fashion Originator’s Guild and its private boycotts--because copyright law did not protect clothing designs. Today’s champions of protection seek to revamp the system through new legislation. Yet it is worth pausing to consider why a legal system that permits copying has persisted for so long.

The lack of protection for fashion designs in American law does not arise from any specific statutory exemption of apparel from copyright’s domain. Rather, it flows from a more general feature of copyright law: so-called "useful articles" are usually denied legal protection. Useful articles are goods, like apparel, furniture, or lighting fixtures, in which
creativity is closely compounded with practicality. A painting has no functional use, whereas a dress is functional. The core of copyright law is aimed at art forms that are either not at all functional (such as songs) or have only the most minimal functional attributes.

This approach to copyright— that functionality precludes copyrightability—leads to a curious result when applied to apparel. A two-dimensional sketch of a fashion design is protected by copyright as a pictorial work. The three-dimensional garment produced from that sketch is, however, ordinarily not separately protected. Hence copying that uses the garment as a model typically escapes copyright liability. The same basic principle—two dimensions are protected, but three are not—applies to prints that appear on fabric. A printed fabric is protected, just as an ink print or drawing would be. There is no utility, or functionality, in a print. But the cut and shape of the garment that employs the fabric—which can be worn, and in theory will keep you warm—remains unprotected.

Copyright law is not totally inapplicable to apparel, however. Following the same basic principles, copyright can sometimes apply when the garment's expressive component is "separable" from its useful function. For example, a jeweled appliqué stitched onto a sweater may be a protectable design because the appliqué is physically separable from the garment. It is also conceptually separable in the sense that the appliqué does not contribute to the garment's utility. Very few fashion designs are separable in this way, however. The expressive elements in most garments are not "bolted on" in the manner of an appliqué, but are distilled into the form of the garment itself—e.g., in the cut of a sleeve or the shape of a pants leg. So for most apparel the copyright laws are inapplicable, and as a consequence most of the fashion industry's products, aside from prints, exist in a copyright-free zone.

What about other forms of intellectual property? Trademark is the most significant, and applies in fashion in the same way it applies in other industries. Trademarks help to maintain a prestige premium for particular brands and are often extremely valuable. Consequently, apparel firms invest heavily in policing unauthorized use of their marks. Many fashion goods sold by street vendors are counterfeits that plainly infringe trademarks: for example, the cheap handbags one can readily find in areas such as Canal Street in New York and Santee Alley in Los Angeles. These counterfeits are illegal because they violate trademark law.
The utility of trademark law in protecting fashion designs, as distinct from fashion brands, is quite limited, however. Occasionally a fashion design will visibly integrate a mark so that it becomes an element of the design. Burberry’s distinctive plaid is trademarked, for example, and many Burberry garments and accessories incorporate this plaid into the design. And occasionally—some would argue increasingly—clothing and accessory designs prominently incorporate a trademark on the outside of the garment; for example, Louis Vuitton handbags covered with a repeating pattern of the brand’s well-known “LV” mark.

For these goods, the logo is part of the design, and as a result trademark provides significant protection against design copying. But for the vast majority of apparel goods, the trademarks are either inside the garment or subtly displayed on small portions such as buttons. Thus for most garments, trademarks are not a weapon against design copying. The figure below clarifies the distinction between knockoffs and counterfeits.

Trademark law also protects “trade dress,” a concept originally limited to a product’s packaging, but which, as the Supreme Court has noted, “has been expanded by many courts of appeals to encompass the design of a product.” Many of the attributes of trade dress are central to the appeal of clothing designs. Trade dress has not a useful
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substitute for copyright, however, because trade dress protection, like copyright, is limited to non-functional design elements.\textsuperscript{39} Perhaps more importantly, trade dress is also limited to those design features that courts label “source designating”, rather than merely ornamental.\textsuperscript{40} This means the consumer has to perceive the trade dress as a signifier of a manufacturer, much like a trademark does. In 2000 the Supreme Court markedly restricted trade dress law in a case called \textit{Wal-Mart Stores, Inc. v. Samara Bros., Inc}, involving Wal-Mart knockoffs of children’s clothing. The Court held that the design of products “almost invariably serves purposes other than source identification.”\textsuperscript{41} As a result, a designer seeking trade dress protection must show that, “in the minds of the public, the primary significance of a product feature or term is to identify the source of the product rather than the product itself.”\textsuperscript{42}

For clothing designs, such a standard will rarely be met. Implicit in the Supreme Court’s approach is the notion that consumers may admire a design, but they seldom think that particular design elements are linked to a particular brand. To be sure, savvy consumers might associate with Chanel a group of trade dress elements consisting of contrasting-color braided piping along the lapels of a collarless, four-pocket woman’s jacket. But few apparel design elements are likely to meet such an exacting standard. Consequently, for most clothing trade dress protection is unavailable.

The other major source of intellectual property rights is patent. Protection for novel fashion designs is available, at least in theory, via a “design patent”. Under American law design patents offer a 14-year term of protection for “new, original, and ornamental design[s] for an article of manufacture.”\textsuperscript{43} As a practical matter, however, design patents are unavailable for virtually all fashion designs. Unlike copyright, which extends to all “original” expression (that is, to all expression not copied in its entirety from others and that contains a modicum of creativity), design patents are available only for designs that are truly “new.” Design patents do not extend to designs that are merely re-workings of previous designs.\textsuperscript{44} Because so many fashion designs are re-workings and are not “new” in the sense that the patent law requires, most will not qualify for protection.\textsuperscript{45}

Patent also creates procedural hurdles. The process of preparing a patent application is expensive, the waiting period lengthy, and the prospects of ultimately gaining protection uncertain. The United States Patent and Trademark Office rejects roughly half of
all applications for design patents. Given the one or two season life of many fashion designs, the design patent is simply too slow and unpredictable a form of protection to be relevant in most cases. Design patents’ main use to date has been in the world of handbags and shoes, which tend to have slower turnover in style and, as already noted, cost more, and are quite a bit more profitable, than the average garment.

The bottom line is that when we look across the universe of intellectual property rights, it is clear that trademark is very significant for apparel makers, many of whom seek to capitalize on their brands and cultivate an image of exclusivity or specialness. Patent, by contrast, is largely irrelevant outside of the important, but limited, world of accessories. Copyright could be very relevant, but under existing law is simply inapplicable to apparel designs, absent a few minor exceptions such as appliqués and the like. The result is a world of powerful and valuable labels but very extensive copying of designs.

**The Piracy Paradox**

To appreciate how striking this system is, we must return for a moment to the basic foundations of intellectual property law. The conventional view holds that copying is a serious, even fatal threat to the incentive to engage in creative labor. If a creator knows her creation will be copied, she will—according to this view—not invest in creation in the first place. Property rights are, consequently, essential.

As copying has become prevalent, traditional content industries have demanded—and received—ever stronger property rights. In Congress, they have sought broader and more durable protections through new laws such as the Digital Millennium Copyright Act and the Sonny Bono Copyright Term Extension Act. In the courts, they have aggressively fought pirates and their enablers. And at the international level they have pushed for strict new intellectual property treaties, and tied the enforcement of minimum intellectual property standards to the powerful rules of the World Trade Organization.

These efforts have fortified American intellectual property law. Yet the fashion industry has benefited little from these developments. Why has the industry, for over 200 years, lacked protection against copying, despite what all observers agree is rampant
appropriation of designs? And, most importantly, how does the industry remain so creative, despite such a high level of copying?

We offer two interrelated arguments to explain how fashion creativity persists despite copying. Accordingly, these help us understand how the legal framework of copying has persisted unchanged for so long. Both of these theories relate to the unusual economics of fashion, and draw on a tradition of thinking about fashion as a distinguishing marker that goes back at least to Thorstein Veblen’s landmark *Theory of the Leisure Class*. Together, these two arguments help explain why the lack of design protection in fashion is not especially harmful to innovation—and hence why designers are not all that incentivized to change it. Indeed, we argue that free and easy copying benefits the fashion industry more than it harms it.

The Fashion Cycle

While many goods can confer status on their buyers, clothing is particularly prone to do so. Clothing is very personal, and it sends signals about the wearer, whether intended or not. Those signals are often socially complex and context-dependent—in Los Angeles, the valet parking the Aston Martin is often wearing a tie, and the studio mogul who drove it a baseball cap. But the signaling features of clothing are omnipresent.

Put in economic terms, most forms of clothing function as “positional goods.” The *Economist* magazine helpfully defines positional goods as:

Things that the Joneses buy. Some things are bought for their intrinsic usefulness, for instance, a hammer or a washing machine. Positional goods are bought because of what they say about the person who buys them. They are a way for a person to establish or signal their status relative to people who do not own them: fast cars, holidays in the most fashionable resorts, clothes from trendy designers.\(^47\)

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\(^{46}\) The use of clothing to signal status is ancient; in her exploration of the luxury goods industry, *Deluxe: How Luxury Lost its Luster*, Dana Thomas quotes an antiquities expert at the Getty Museum in Los Angeles who asserts that debates over status-signaling via apparel date back almost 3000 years. The many “sumptuary codes” that limited certain clothing to certain professions or classes are one manifestation of this concern. What is not much debated, of course, is that fashion does signal status, at least to many individuals.
Positional goods purchases, consequently, are interdependent: what we buy is partially a function of what others buy. But the positionality of a particular good is often two-sided: its desirability may rise as some possess it, but then subsequently fall as more possess it. Take the examples used by the Economist. A special car is most desirable when enough people possess it to signal that it is a desired object, but its value diminishes if every person on the block owns one. Nothing about the car itself has changed, except for its ability to place its owner among the elite, and to separate her from the crowd. For these goods, the value of (relative) exclusivity may be a large part of the goods’ total appeal.48

Not all apparel goods are positional, but many are, and that positionality is often two-sided. Consumers may value a particular dress from Lanvin or Marc Jacobs in part because stylish people have it but unstylish ones do not. The dress is valued so long as it enables its wearer to stand out from the masses, but fit in with her particular crowd. Many historical and sociological studies of fashion argue that this distinguishing quality is central. Fashion is said to be "a vehicle which marks distinctions and displays group membership or individuality."49 Consequently, as fashionable styles diffuse to a broader clientele their prestige diminishes, especially for the early adopters of the style. The right signal is no longer sent. The style in question becomes unstylish.

This is the fashion cycle. Whether the fashion cycle is a good thing or a bad thing in its own right is not the focus of our story here, though it has consumed many previous authors. However, it is fair to say that fashion in its contemporary manifestation routinely gets pilloried by intellectuals. Some reflexively view fashion's seemingly capricious changes as pernicious: socially wasteful and divisive. The rapid rise and fall of apparel designs has even been called “a symptom of intellectual, emotional, and cultural immaturity.”50 Along these lines, Jean Baudrillard declared fashion "immoral."51 Other thinkers have celebrated fashion designers as artists on par with any painter or composer. Indeed, this is one of the arguments used by proponents of copyright protection--that fashion designers ought to be treated like other great artists.

For most of us, though, the fashion cycle is not a subject of great debate. It is just a fact of (social) life; perhaps even an entertaining one that allows us to enjoy new clothes and occasionally scratch our heads at old photographs. Whatever its normative value, the
fashion cycle is clearly a central feature of the apparel industry. Styles come, and then they go. Soon after, many of us wonder what we were thinking.

An example of the ascent and descent of a fashion item is the Ugg, a sheepskin boot originating in Australia. Uggs, which date back to the 1930s, had sold steadily for years but became a must-have fashion item for many young women in 2003 and 2004. The style was then widely copied and gained broad distribution. But soon a backlash began, with writers calling the lumpy Ugg a "human rights violation" and urging the fashion-conscious to give them up. By 2005, the Ugg trend was, at least in some quarters, declared to be over.

In a New Yorker article about Los Angeles, writer Tad Friend described a telling story of the rise and fall of the Ugg. A local news helicopter was searching for actress Lindsay Lohan following a minor car crash on Robertson Boulevard, in which she was involved. The news dispatcher, Beth Shilliday, radios the chopper pilot:

"I know it’s a long shot, but check the street for a skinny, movie-star looking woman. Channel 2 says she and her assistant ran into an antiques store across the way." [The pilot] panned down Robertson toward the Ivy. "Problem is, every girl on the street kind of fits the profile. How’s this?" He zoomed in on a Lohanish figure in dark glasses. "She’s wearing Uggs," Shilliday pointed out. "Those are so last year, couldn’t be her."

One might quibble with the details of when (and, for diehard Uggs fans, even if) Uggs lost their cool. Nonetheless, Uggs illustrate a basic point about fashion: the perilous nature of positionality. In the fashion world, success can lead to the rapid diffusion of a design. But rapid diffusion typically dooms a design to decline and even death. Debut, diffusion, decline, death: that is the fashion cycle in a nutshell.

* Indeed, against all odds Uggs's continue to appear in some fashion-driven stores. In early 2010 the window of Fred Segal on Melrose Blvd, ground zero for many fashion-conscious shoppers in Los Angeles-and less than a mile from the Robertson Boulevard site of the Lohan car crash--featured a large painted sign declaring the arrival of new styles of Uggs.
Induced Obsolescence

“Art produces ugly things which frequently become more beautiful with time. Fashion, on the other hand, produces beautiful things which always become ugly with time.”55


That styles rise and fall is of course not a new observation. Before Cocteau wrote his wonderful apercu, sociologist Georg Simmel noted the same process: “As fashion spreads, it gradually goes to its doom. The distinctiveness which in the early stages of a set fashion assures for it a certain distribution is destroyed as the fashion spreads, and as this element wanes, the fashion also is bound to die.”56 Even earlier than this, Shakespeare declared in Much Ado About Nothing that "the fashion wears out more apparel than the man."

What Cocteau, Simmel, and Shakespeare noticed was not merely the rise and fall of apparel designs. Instead, they highlighted the fact that the rise actually led to the fall. The fall was not merely inevitable, in the sense of a ball thrown into the air which gradually succumbed to gravity. They drew a causal connection: as fashion spreads, its distinctiveness is destroyed. That it turns destroys much of its value, because the essence of fashion—again, for many consumers—is that it supplies status through distinctiveness. Once it is no longer distinctive, it has lost that status.

Of course, not everyone seeks distinctiveness in fashion—just look at America’s political class, for whom an orange or purple tie is mark of outright zaniness. But for the class of fashion early-adopters, the mere fact that a design is widely spread is enough, in most cases, to diminish its value. These early adopters seek to stand out, whereas the next tier of buyers seeks to "flock" to the trend.57 As the flockers flock, the early adopters depart.

Again, that fashion cycles is well known. What has not been appreciated, however, is the interaction between copyright law and the fashion cycle. Legal rules that permit copying accelerate the diffusion of designs and styles. That diffusion, in turns, leads to more rapid decline. And more rapid decline creates a faster, larger appetite for new designs, and therefore new sales. Copying, in short, is the functional equivalent of a great new feature on
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a cell phone: the thing that makes a consumer discard a perfectly useful item and go out and buy something new. 58 Unlike cell phones, which clearly get more powerful and useful over time, clothes do not improve in any clearly defined way. Garment makers rarely can tout the great new features of their products as improvements --and indeed in practice, unlike cell phone makers, they do not claim this season's offerings are qualitatively better than last season's.59 Ordinary apparel, in short, lacks functional progress, and functional progress is one important way that producers get buyers to buy. For the most part clothes just change, and that change is what drives buyers to buy. Copying is in turn an engine of change that accelerates the spread of styles, and therefore accelerates, in George Simmel's words, their impending "doom." Copying makes the original obsolete.

We call this induced obsolescence--that is, obsolescence induced by copying. An design is launched and, for some reason that few can predict (or even explain), it becomes desirable. Early adopters begin to wear it and fashion magazines and blogs write of it glowingly. Other firms observe its success and seek to ape it, often at lower price points. As that now-hot design is copied and used in derivative works, it becomes far more widely purchased and therefore more visible. For a time, this trend helps sell items that embody the design in some way. Past a certain point, however, this process reverses course. The once-desirable item becomes anathema to the fashion-conscious, and, eventually, to those who are somewhat less style-focused. The early adopters move to new designs; those new designs too are copied and diffuse, and the process begins again.

The key point is that American copyright law permits fast, free copying--and thereby induces more rapid obsolescence of designs. Obsolescence would happen anyway, eventually. But the fashion cycle is driven faster by widespread and legal copying, because copying more rapidly erodes the positional qualities of fashion goods. The result has profound effects on the apparel industry. Piracy paradoxically benefits designers by inducing more rapid turnover and greater sales.

We can understand the role of copyright law in inducing more rapid obsolescence of designs in at least two broad ways. First, copying often results in the marketing of less expensive versions, which prices-in consumers who otherwise would not be able to purchase the design. A middle-class woman might be able to put a Louis Vuitton handbag on her credit card occasionally, but absent extraordinary measures (or very sticky fingers)
it cannot be done regularly. Copying permits the design to spread to lower-income consumers, who are far more plentiful.

Second, copying facilitates induced obsolescence through what lawyers call "derivative works." These are garments that use the original design, but tweak it in some new way. Under standard copyright law, the originator has the exclusive right to make or authorize any derivative works. The legal rule for fashion is the opposite, and the many variations on a theme this makes possible contributes to product differentiation. This differentiation in turn induces consumption by those who prefer a particular variation to the original. And to the extent that derivatives remain visibly linked to the original design, they help diffuse the original design, thereby further accelerating the process by which that design (and its derivatives) become less attractive to early adopters.

Of course, the desire for novelty in clothing is more than a product of positionality; new clothes are intrinsically fun and entertaining for many people. Nor is the desire for novelty unique to apparel; indeed, if it were, we would all own just one book and one song, for we could read and listen to them over and over again. The desire for novelty and differentiation is nonetheless particularly powerful in fashion--a context were social signals are easily sent, and the goods themselves do not improve in any obvious way.

As we mentioned earlier, sometimes only a particular feature of a garment is copied—a certain sleeve or cut—and sometimes the entire garment is copied. And what is copied is not necessarily part of a hot trend. Consider the Foley + Corinna story that opened this chapter. The dress in question was striking and somewhat popular, but it was not the Must Have item of the season. Still, the basic dynamic of induced obsolescence applies even here. The Forever 21 version surely sold at levels that Dana Foley and Anna Corinna could only dream of. The Foley + Corinna customers, many of whom trekked to the Lower East Side or West Hollywood for their dress, were not wild about seeing that dress in shopping malls across the suburbs and on the backs of thousands of more women. The key point remains the same: current copyright law, by permitting this kind of copying, acts as a kind of turbo-charger to the fashion cycle.

* On the other hand, every hot trend, almost by definition, involves some copying. A trend is a series of things that look alike and that are widely sold in the marketplace. Unless many designers somehow arrive at the same design or theme simultaneously, this necessarily must involve copying.
There is, of course, a downside to this. While induced obsolescence generally helps the industry sell more goods over time, widespread copying can and does harm particular originators in particular cases. Certainly that is the view of Dana Foley and Anna Corinna. But the aggregate effect of a system of free and easy copying, across the fashion industry and over time, is beneficial. More copies mean a faster fashion cycle; a faster cycle means more designs and more sales. Debut, diffusion, decline, death—and then it starts over again.

**Anchoring**

Our second argument about fashion and copying is related but subtly different. The legal freedom to copy not only induces a faster fashion cycle; it also helps the industry establish trends. It does this via a process we refer to as anchoring. Anchoring, like induced obsolescence, helps the industry remain creative even in the face of extensive copying.

While the apparel industry produces a wide variety of designs at any one time, identifiable trends nonetheless emerge and define a season’s style (some of which last longer than a season). What drives these trends is hard to untangle. Trends are not chosen by committee, nor are they simply the accreted musings of god-like designers, as Meryl Streep famously suggested in the “cerulean sweater” scene in *The Devil Wears Prada.* Instead, trends evolve through an undirected process of copying, referencing, and reworking, coupled to communication with buyers for key retailers and coverage and commentary in the press. Insiders often talk of the convergence of designs as a reflection of the *zeitgeist.* Like a school of fish moving first this way and then that, designers follow the lead of other designers and tastemakers in a process that, while bewildering at times,

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*“You go to your closet and you select... I don't know... that lumpy blue sweater, for instance because you're trying to tell the world that you take yourself too seriously to care about what you put on your back. But what you don't know is that that sweater is not just blue, it's not turquoise. It's not lapis. It's actually cerulean. And you're also blissfully unaware of the fact that in 2002, Oscar de la Renta did a collection of cerulean gowns. And then I think it was Yves Saint Laurent... wasn't it who showed cerulean military jackets? I think we need a jacket here. And then cerulean quickly showed up in the collections of eight different designers. And then it, uh, filtered down through the department stores and then trickled on down into some tragic Casual Corner where you, no doubt, fished it out of some clearance bin. However, that blue represents millions of dollars and countless jobs and it's sort of comical how you think that you've made a choice that exempts you from the fashion industry when, in fact, you're wearing the sweater that was selected for you by the people in this room from a pile of stuff.”*
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results in the emergence of particular trends--as a look in any fashion magazine or blog will make clear.

Copying is central to this process. Copying creates trends by anchoring the new season to a limited number of design themes – themes that are freely workable by all firms in the industry and that become trends. For the trendy to follow trends, however, they need to be able to identify them. And in practice, there is always a set of major trends and a myriad of minor ones. Anchoring thus encourages buying by conveying to consumers important information about the season's dominant styles: suits are slim, or relaxed; skirts are tweedy, or bohemian; the hot handbag is small, rectangular, and made of white-stitched black leather, or large and made up of ivory macramé; and so forth. Anchoring helps fashion-conscious consumers understand (1) when the mode has shifted, (2) what defines the new mode, and (3) what to buy to remain within it.

Again, there is no rational explanation for the sudden emergence of a trend. Somehow, the fashion community converges on an idea, and then firms exploit it, copying from one another, spinning out variations, diffusing it widely. The resulting anchoring of a season's innovation around a set of discrete designs helps drive consumption by defining, in a literal sense, what is and is not in style that season. We also see this process at work within a large adjunct to the fashion industry—magazines such as Glamour, Marie Claire, and Vogue, television shows such as What Not to Wear, and fashion blogs of various stripes, all of which (to differing degrees) provide fashion advice to consumers. These proclamations do not always take root, but they are a constant.

In the fall of 2005, for example, the New York Times described the appearance of a large number of women's boot designs. The article highlights the unusual existence of multiple designs at once:

There are 60s styles a la Nancy Sinatra; 70s styles a la Stevie Nicks; 80s styles a la Gloria Estefan; and 90s styles a la Shirley Manson. It is a puzzling sight for fashion seers used to declaring that one style of boot—Midcalf! Thigh high!—is The One For Fall.61

The writer's expectation – which the style promiscuity of 2005 violates – is clearly that the industry will anchor narrowly, as it generally does.
This is not to say that the styles produced by closely-watched designers always resonate with consumers, or with the major retailers that must make decisions about purchases well before the clothes hit the racks. But it is undeniable to any fashion watcher that particular designs are identified as anchoring trends – “Midcalf boots are The One For Fall” – and that these trends wax and wane, only to be replaced by the next set of themes.

To summarize, we argue that copying plays two central but counterintuitive roles in fashion. By allowing others to imitate and rework successful designs, copying acts like a turbocharger that spins the fashion cycle faster. Designs quickly go up, and then even more quickly they come down. We call this *induced obsolescence*. Apparel designs don’t become obsolete because a “better” design comes along. They become obsolete because they become too popular and too familiar. Copying also anchors the multifarious output of the apparel industry around a few key trends. Each season these trends develop in a process no one really understands. But it is copying that allows trends to develop, and it is through trends that the fashionable understand what to wear that season or year. We call this *anchoring*.

Dresses are not like cell phones. For the most part they don’t improve; they just change. In this context, the freedom to copy is, paradoxically, a very powerful economic spur to creativity. Pervasive copying helps to kill popular designs and birth new ones. This is the piracy paradox.

**Other Arguments**

Let’s briefly consider some alternative arguments that might explain why creativity thrives in fashion despite rampant copying. The first, the role of social norms, plays an important role in several later chapters in this book and has been the subject of a lot of academic research on law and policy. The impact of social norms in the fashion industry, however, appears to be far lower than in other areas we look at, such as stand-up comedy and cuisine. We are skeptical that such norms meaningfully influence either the level or type of copying that takes place. The second argument relates to what economists call "first mover advantage." While first mover advantage appears to have some role to play in the apparel industry, that role is also relatively small. Finally, we take up some possible
implications of our argument, in particular the argument that if we are correct, fashion designers ought to sometimes knockoff their own designs.

Social Norms

Many areas which demonstrate creativity without copyright—such as creativity among chefs—survive in some measure thanks to the power of social norms. These norms act as extra-legal checks on copying; they keep copying within certain bounds or act to exact costs for copying that goes "too far." Up till now we have not discussed norms that might limit copying in the fashion world. Do such norms matter among designers?

There is no question that at the high end of the apparel market overt copying is sometimes frowned upon. To be derided as derivative can derail a young designer’s career. A recent analysis of knockoffs in fashion presents this view, arguing that the American fashion industry indeed operates in a norm-based system, one that is not dissimilar to the system we discuss in Chapter 4 with regard to chefs. The norms in the apparel world, it is said, constitute an effective control system which "can render stiff penalties on offenders, such as critical disparagement or neglect from the American fashion media, that can ultimately harm their brand name and their bottom line."62

The evidence that norms really constrain copying by fashion designers is fairly limited, however. Certainly, copying by elite designers does happen, as the example we gave earlier about Nicholas Ghesquiere and Kasik Wong illustrates. But the sheer fact that a norm is violated does not mean the norm has no power. And to be sure, Ghesquiere’s point-by-point copy of a lesser known (and dead) designer is, as a practical matter, different than copying the work of a living, breathing fashion titan such as Marc Jacobs.

Yet Ghesquiere’s perspective on the affair suggests that norms against copying among the fashion elite are not especially powerful. According to the New York Times, Mr. Ghesquiere not only spoke candidly about the matter; he also didn’t sound embarrassed. "I’m very flattered that people are looking at my sources of inspiration," he said, comparing what he did to the practice of sampling in the music industries. "This is how I work. I’ve always said I’m looking at vintage clothes." He didn’t think the incident would hurt his
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reputation. "No, I’m known for many things," he said. Moreover, the Times suggested, Ghesquiere was not alone in his optimism that the incident would produce no lasting harm: "Although Julie Gilhart, the fashion director of Barneys New York, expressed astonishment when she saw how similar the two garments were, she said: "I don’t think this diminishes Balenciaga’s creativity at all. How many people have copied Yves Saint Laurent? My question is always: Who can do it better? We’re all savvy enough to know what’s been borrowed and what hasn’t.""

Ghesquiere is just one designer, albeit a well known one, and so we cannot rest much on this particular vignette. But a look around at the fashion press suggests that he is hardly alone in either his actions or his views. Marc Jacobs has been widely accused of being derivative of the work of John Galliano, Chanel, Martin Margiela, and others. (Jacobs himself offered an interesting defense to this charge: "I’m attentive to what’s going on...I’ve never insisted on own creativity, as Chanel would say"). In 2008, the design team of Proenza Schouler was ironically criticized for riffing too much off of Ghesquiere’s work at Balenciaga. Earlier Calvin Klein was said to rip off Helmut Lang and Giorgio Armani. And so on.

Interestingly, some designers even see parallels with chefs, whom they perceive as largely reinterpreting the work of others rather than copying. Christian LaCroix opined that "a designer has to at least put his or her own twist on a look." “Inspiration is not enough,” he said. “You have to bring your own strength, energy and imagination to push further. It's like cooking. When you cook directly from a book, you just copy a recipe. When you adapt it, adding this spice or that ingredient with your own fantasy or intuition, you make the dish your own creation.”

It is inherently difficult to assess the power of social norms, but responses like these make it difficult to believe that they play any meaningful role in shaping or restraining copying among designers. And of course the sheer fact of extensive and often open copying is hard to explain if the norms against copying are strong. For these reasons, we doubt that social norms against copying help limit the extent of copying, or help explain how fashion designers remain so creative in the face of extensive copying.

* To all this, Vera Wang offered her own riff on the famous "nobody knows nothing" line of Hollywood screenwriter William Goldman: in fashion, she said, "Nothing has never been done before."
First Mover Advantage

Perhaps fashion designers remain creative despite copying because the benefits that accrue to the “first mover” are large enough to sustain repeated innovation, even if copies are freely made shortly after the item is introduced. In other words, if a clothing designer can sell enough units before copies begin to flood the market, his or her return may be sufficient, on average, to make creativity profitable. If this first mover effect were generally true, we might expect to see creativity persist even in the face of quite extensive copying.

To work, the first-mover argument depends on an appreciable gap between first movers and copyists. It is verity of fashion commentary to note that apparel designs come and go quickly, however. Given this, is there evidence that a meaningful gap between creator and copy exists? We are skeptical. Indeed, as we noted earlier it is often claimed that today copyists are as quick, or even quicker, to market than originators. While we doubt that the instances in which copyists beat originators to market are numerous enough to really matter, many copyists are remarkably fast. Hence the lead time enjoyed by originators is certainly fairly brief. At a minimum, this fact casts some doubt on the power of first mover advantage to make a difference in the fortunes of designers.

But let’s dig a little deeper. There is no good data on the speed of copying, and therefore it is hard to know the length of any first mover advantage that might exist. But it seems likely that copyists are faster today than they were the past. At least, this is a very widely held view by insiders. (And is often given as a reason why, whatever the failures of Maurice Rentler in the 1950s to convince Congress to amend the copyright laws to protect fashion, such an amendment is necessary now.)

If it is true that copyists are far quicker today, it makes first mover advantages less likely than ever to matter. For at least the last ten, if not twenty, years the copying of fashion designs has been easy and fast. Well before digitization made the process of design copying almost instantaneous, ordinary photos and transcontinental air travel allowed copyists to begin work on a design copy within days of photographing or sketching the original. For this reason we doubt that there has been much of a first-mover advantage in fashion design in the last decade or two. We are especially skeptical of it in 2010. So while a
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first-mover claim may have had some explanatory power in decades past, it is less likely to explain much about current practice.

That said, it is true that the increasing occurrence of nearly-instantaneous copying may eventually undermine the piracy paradox we have described. The ability of innovative designers to recover investment may depend on there being some period, albeit quite brief, before a given design saturates the market – perhaps because this small time lag is necessary for early-adopter consumers to identify particular designs with a particular firm, thereby helping that firm build its reputation as an innovator and consequently grow the value of its brand(s).

While it is too soon to tell, perhaps the fashion industry is moving in this direction – toward copying so rapid that its aggregate effects become harmful rather than helpful to creativity. There is no easy way to know. And as we suggested above, one way to understand the renewed calls for copyright protection for fashion designs is in terms of an eroding first mover advantage, perhaps one that gradually destroys the power of induced obsolescence and anchoring. As this happens, the most creative designers can no longer reap the benefits of a faster fashion cycle--in other words, selling more clothes--and begin to suffer greater harms as even early adopters flock to copies.

Again, we question how fast copying can really occur, given that thousands of designs are released each season and only some become truly successful. This puts a tangible limit on whatever shrinking of first mover advantage may exist. Picking winners in the fashion world is quite a bit harder than doing so at the track.

Self-Knockoffs

Our arguments about the piracy paradox tell us to welcome copying in the fashion world, for whatever the occasional harm to individual designers, the industry as a whole is benefiting—and has done so for many years. This argument has an interesting corollary. If copying has the effect of bolstering creativity—and sales-- does it also create an incentive for the originator to reproduce and rework its original design at different price levels? In other words, should designers pursue what economists call a “single-firm price discrimination strategy” and knock off their own designs? Indeed, some have provocatively
suggested we might even counsel innovating firms to give away cheaper, visibly-inferior versions of the product. It appears likely that brand protection—the desire to maintain the exclusivity of a brand such as Gucci—stops this from occurring in the real world. Diluting a famous and valuable brand is very undesirable. Yet the question remains why the same design could not be introduced by the same firm, but under a different brand. Perhaps the business press would easily expose this practice; perhaps it would risk alienating customers.

In practice, of course, we do observe a version of this single-firm strategy: bridge lines. Bridge lines are lines by a famous designer that sell at lower price points. While some fashion insiders stress the danger of bridge lines blurring a brand’s identity and tarnishing a mark—and cite the story of Halston, whose fall from grace and fortune was dramatic after he tried marketing clothes to the masses at JC Penney—many well-known design houses have a second or even third line that is lower-priced, such as Dolce & Gabbana’s D & G. One way to understand the phenomenon of bridge lines is precisely as a strategy to knock off one’s own signature designs and price discriminate among consumers. Themes developed in the premier lines are echoed in the bridge lines, but with cheaper materials, lower prices, and design variations pitched to the particular tastes of that bridge line’s constituency, which may differ in age, wealth, and other characteristics.

The most prominent user of this strategy is Armani, which has up to five distinct lines, depending on how one counts. Most fashion firms, however, do not follow the Armani model, and we rarely see multiple differentiated lines. Why the Armani model—or a model in which a single firm self-copied designs at multiple price points but using different brands to reduce the risk of brand tarnishment—is not more common is an interesting question for future study. But it is clear that at least some degree of self-copying occurs through the common practice of bridge lines. While not decisive, this is more evidence in favor of the complementary relationship between copying and creativity we have advanced.

**CONCLUSION**

The received wisdom about copying and copyright tells us that property rights are essential—that without them, creators will not create and investment in innovation will
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atrophy. Yet as this chapter has shown, fashion is a huge industry that exhibits remarkable levels of copying—and nonetheless remains creative. Despite this, the industry has received surprisingly little serious analysis, and in particular its unusual relationship to creativity and copyright has, until recently, hardly been noticed. Within the fashion world intellectual property law protects some attributes of a product, such as brands, but not others. Yet the central feature of apparel—the design—has long been freely and legally available for anyone else to copy.

Given this system, it is unsurprising that copying is ubiquitous. But it is surprising that the lack of copyright protection for fashion designs has not reduced innovation in designs, which are plentiful each season and arguably are being produced in greater numbers than ever before in history. Copying in fashion is certainly no secret. And as we have described, there is widespread, though certainly not total, acceptance of knockoffs as simply part of the business. Some cases of copying, such as the Foley + Corinna story that opened this chapter, lead to public spats and occasionally even legal action. Yet there are many other examples that simply pass unnoticed or accepted as the price of success by the originators. At least on its face, this pattern of extensive copying and extensive creativity challenges, and even contradicts, the conventional justification for copyright law. If widespread copying is killing the music industry, why is it not also killing the fashion industry?

A different way to ask this question is: how do fashion designers remain so creative? To a large degree, the answer is that creativity in fashion thrives due to copying, not in spite of copying. Extensive copying accelerates the fashion cycle, rendering once-desired designs to the apparel scrapheap. And extensive copying allows trends, the cornerstone of contemporary fashion, to develop and spread.

In this way copying provides the functional equivalent of the striking new feature on a cellphone—the feature that makes a customer toss out a perfectly usable item in favor of a new one. In fashion, of course, the new design is not an improvement so much as it is a distinction. But this is a distinction with a difference: for many consumers, a key appeal of any garment is whether it sends the right kind of signal. As the garment’s design spreads via copying, the distinction offered by the design is lost—and the shopper is ready to buy a new
design. The property rights theory of copyright has virtually no place in this story. And subsequent chapters will show, fashion is not alone in this regard.

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1 Eric Wilson, Simply Irrestible, NY Times, May 21 2008
2 SERENA FRENCH, KNOCK IT OFF! FASHION FIGHTS BACK AT YEAR OF THE COPYCAT NY Post, May 1, 2007
3 Eg. Dana Thomas, Deluxe: How Luxury Lost its Luster
5 See e.g. Francois Baudot, Fashion: The Twentieth Century and Teri Agins, The End of Fashion. Of course, apparel (and variation in apparel) dates back millennia, but scholars generally view the Renaissance as the birth of fashion, by which they mean clothing used to distinguish individuals from one another in terms of status. See e.g. Jean Baudrillard, fashion is "born with the Renaissance, with the destruction of the feudal order by the bourgeois order and the emergence of overt competition at the level of signs of distinction." Quoted in Veronica Manlow, Designing Clothes: Culture and Organization in the Fashion Industry (Transaction, 2007) at 9.
6 Manlow at 35. On the role of the civil war see Nancy Green, Ready to Wear and Ready to Work (Duke University Press, 1997), at 45
7 Eric Musgrave, Sharp Suits (Pavilion, 2009) at 97
8 Baudot, supra at 123.
9 Manlow at 47
10 Agins, at 34
11 Thomas, at 4
12 Thomas at 316. Zara changes 3/4 of its merchandise every month, or less. Ghemawat and Nueno, supra, at 13
18 Fashion Originators’ Guild v. FTC, 312 US 457 (1941).
19 Dress War, Time Magazine, March 23, 1936
Id. The Filene’s case was significant, however, as we discuss below. The Supreme Court noted in its first footnote that it agreed to hear the case because of the difference in opinion on the legality of the Guild between the First Circuit, which heard Filene’s claim, and the Second Circuit, which agreed with the FTC that the Guild was illegal.

Simultaneous with its action against the Fashion Originators’ Guild, the Federal Trade Commission also successfully struck down a similar cartel that organized makers of women’s hats. See Millinery Creators’ Guild, Inc. v. FTC, 109 F.2d 175 (2d Cir. 1940).


On this shift see Jamie Boyle, The Public Domain and Adrian Johns, Piracy: The Intellectual Property Wars from Gutenberg to Gates.


Eric Wilson, Before Models Can Turn Around, Knockoffs Fly, NY Times, Sept 4, 2007


Hearings before the House Subcommittee on Courts, Civil Liberties, and the Administration of Justice, April 12, 1982.

Lau, W Magazine (at the USC Conf)


Societe Yves Saint Laurent Couture S.A. v. Societe Louis Dreyfus Retail Management S.A., [1994] E.C.C. 512 (Trib. Comm. (Paris)) (“YSL”). Interestingly, Yves Saint Laurent’s position was illustrative of the significant measure of legitimacy copying enjoys in the fashion industry, relative to other content industries. According to St. Laurent: “[I]t is one thing to ‘take inspiration’ from another designer, but it is quite another to steal a model point by point, as Ralph Lauren has done.” Id. at 519, 520. See also Agins, supra n. ____ (quoting a NY-based fashion consultant as saying that “Yves Saint Laurent has blown the whistle on the dirtiest secret in the fashion industry. None of them are above copying each other when they think they can make a fast buck.”)

Vanessa Lau, Can I borrow That? When Designer “Inspiration” Jumps the Fence to Full-On Derivation, the Critics’ Claws Pop Out, W Magazine, Feb 2008
34 See International News Service v. Associated Press, 248 U.S. 215, 250 (1918) (Justice Brandeis dissenting) (“[T]he noblest of human productions – knowledge, truths ascertained, conceptions, and ideas – become, after voluntary communication to others, free as the air to common use . . .,” and should have “the attribute of property” only “in certain classes of cases where public policy has seemed to demand it.”).

35 See, e.g., Galiano v. Harrah’s Operating Co., Inc., 416 F.3d 411, 422 (5th Cir. 2005) (casino uniforms unprotected; expressive element not marketable separately from utilitarian function); Poe v. Missing Persons, 745 F.2d 1238 (9th Cir. 1984) (copyright found in “three dimensional work of art in primarily flexible clear-vinyl and covered rock media” shaped like a bathing suit; evidence suggested article “was an artwork and not a useful article of clothing.”).

36 Fashion brands are heavily licensed, and excessive licensing can so tarnish the brand that its status is lost. But many firms put significant effort into ensuring that their trademarks are neither diluted nor counterfeited. We use dilution here in a general sense to mean “watered-down” through excessive exposure and licensing, rather than in its legal, doctrinal mode. Trademark infringement cases are common in the fashion industry, but courts carefully distinguish trademark from design piracy claims. Barnett gives the example of People v. Rosenthal, 2003 NY Slip Op 51738(U) (Criminal Ct. NY County, Mar. 4, 2003, J. Cooper), noting that “while it is perfectly legal to sell merchandise that copies the design and style of a product often referred to as ‘knockoffs,’ it is against the law to sell goods that bear a counterfeit trademark.” Barnett, supra n.____, at n.25. We are skeptical of Barnett’s claim that copyists produce easily recognizable and “generally imperfect” imitations. Id. at 1385. As an article in the Wall Street Journal described, the quality of knocks-off often is extremely good and distinguishing imitations from originals can be difficult. Counterfeit for Christmas: Gift Givers Tap New Source As Travel to China Eases, Knockoff Quality Improves, Wall Street Journal, Dec 9, 2005, B1.

37 The lengths to which firms will go to prevent unauthorized use of their marks is illustrated by Dolce & Gabbana’s anti-counterfeiting policy:

Starting out from the 1997-1998 Autumn/Winter season [Dolce & Gabbana] introduced an “anti-imitation” system using made up of both visible and invisible elements. The aim of this system is to protect the articles of some of the lines which are to a greater degree the object of numerous attempts at imitations on the part of counterfeiters and, on the part of Dolce & Gabbana S.p.A., to safeguard its clientele. The by now consolidated system of anti-imitation principally consists of the use of a safety hologram (in the foreground showing an “&”, together with a series of micro-texts which reproduce the trademark): the graphic elements were ideated by Dolce & Gabbana whereas the hologram is produced and guaranteed by the Istituto Poligrafico e Zecca della Stato (the Italian State Printing Works and Mint). The anti-imitation elements used by the “D&G Dolce & Gabbana” line which make up the system consist of a certificate of authenticity bearing the hologram, a woven label placed inside every article with the trademark with the same hologram heat-impressed on it, a safety seal whose braiding contains an identification thread that is reactive to ultra-violet rays and a woven label with the Company’s logo incorporating the same identification thread. Furthermore, Dolce & Gabbana S.p.A. has stipulated agreements with the Customs Authorities of the most important countries throughout the world with the intention of monitoring the articles bearing its trademark. Dolce & Gabbana has also provided these Authorities with anti-imitation kits which reproduce and elucidate the elements mentioned above, divided by way of each line forming part of the anti-imitation
system, with the aim of individuating and blocking the transit of counterfeited goods bearing our trademark by the same customs personnel.


39 Lanham Act, Sec. 2(e)(5). The non-functionality requirement for trade dress may be somewhat lower than obtains in copyright law, because most courts have held that functional design elements may be protected as trade dress if they are part of an assemblage of trade dress elements that contains significant non-functional items. See Fuddruckers, Inc. v. Doc’s B.R. Others, Inc., 826 F.2d 837, 842 (9th Cir. 1987) (“[O]ur inquiry is not addressed to whether individual elements of the trade dress fall within the definition of functional, but to whether the whole collection of elements taken together are functional.”).

40 See, e.g., Knitwaves, Inc. v. Lollytogs, Ltd., 71 F.3d 996 (2d Cir. 1995) (aesthetic features of girls’ sweaters that were not source designating not part of protectible trade dress). See also Wal-Mart Stores, Inc. v. Samara Bros., Inc., 529 U.S. 205, 213 (2000) (product design cannot be “inherently distinctive”, and “almost invariably serves purposes other than source designation”).

41 Samara, 529 U.S. at 213.


44 35 U.S.C. 102. See also In re Bartlett, 300 F.2d 942, 133 USPQ 204 (CCPA 1962) (“The degree of difference required to establish novelty occurs when the average observer takes the new design for a different, and not a modified already-existing, design.”).

45 We recognize that this pattern of “remix” innovation may be endogenous; in other words, if not for the practical barriers sharply limiting the availability of design patents, it is at least theoretically possible that the fashion industry would engage less in the endless reworking of existing designs and turn attention toward designs that would meet patent’s novelty requirement.

46 Veblen, 1899

47 Economics A-Z at www.economist.com, “positional goods.” For more elaborate treatments of contemporary consumer behavior with regard to status-conferring goods, see Juliet Schor, The Overspent American: Why We Want What We Don’t Need (1999), and Robert Frank, Luxury Fever: Why Money Fails to Satisfy in An Era of Excess (1999). Frank portrays much consumer purchasing as an arms race, in which each new purchase spurs others to engage in similar purchasing, with no gain in status since status is inherently relational. Barnett, supra, focuses on this literature to create a three-tiered model of utility: snob utility, aspirational utility, and bandwagon utility. Barnett, supra, passim. An earlier treatment with regard to fashion is Paul M. Gregory, An Economic Interpretation of Women’s Fashions, Southern Economic Journal, 14, 2, (1947)

48 In this respect two-sided positional goods are very different from those goods subject to positive externalities and network effects. Goods like fax machines or computer operating systems are continually more valuable as they are more widely used. The rate at which these
goods increase in value may slow past a certain threshold of distribution, but there is no inflection point at which the good begins to decline in value as it is more widely spread.

49 Manlow, supra

50 Gregory, supra, at 161

51 Symbolic Exchange and Death, 2000 at 98


56 Simmel, supra.

57 We borrow the language of differentiation and flocking from Scott Hemphill and Jeannie Suk, XXX Stanford Law Review (2009)

58 Earlier analyses, such as economic Paul Gregory’s in the 1940s, have noted the obsolescing quality of apparel, but have not drawn the link to copyright. Instead, Gregory stressed factors like deliberately poor quality. Paul M. Gregory, A Theory of Purposeful Obsolescence, Southern Economic Journal, July 1947.

59 The exceptions, such as inventions of new fabrics that wick moisture or retain heat, are usually limited to outdoor and technical apparel and moreover tend to be patented—not for the design, but for the fabric itself.

60 In interviews, the designers told us of a woman returning to the store in tears with her dress, after discovering the existence of the Forever 21 version.

61 David Colman, “Choices, up to your knees,” NY Times E1 Aug 25 2005.


63 Horyn, Is Copying Really a Part of the Creative Process?, NY Times April 9, 2002

64 Horyn, id.

65 Lau, supra

66 Lau

67 A classic treatment of first mover advantages is Marvin B. Lieberman and David B. Montgomery, First Mover Advantages, Strategic Management Journal, 9, 1 (1988)

68 Jonathan Barnett