Volume 61, Issue 5 Page 1227

Stanford Law Review

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REPLY

REMIX AND CULTURAL PRODUCTION

C. Scott Hemphill* & Jeannie Suk**

We are pleased that our Article, *The Law, Culture, and Economics of Fashion*,[1] attracted a long and thoughtful response from two distinguished participants who have been so influential in this debate. The simultaneous desire for differentiation and flocking is alive and well. In their response, *The Piracy Paradox Revisited*, Kal Raustiala and Christopher Sprigman (RS) point out agreement on key issues, and simultaneously stress disagreement with aspects of our model, adhere to their "induced obsolescence" account of fashion trends, which we reject, and raise doubts about our policy proposal.[2] The exchange embodies the dynamics that are pervasively in tension, in creative—including academic—pursuits.

Our differences in analysis are quite fundamental. First, we identify a key distinction between close copying and remixing, and they reject the importance of such a distinction. We think the distinction is important because of the differential effects of close copies and interpretations on innovation, which we discuss at length in our article. The lumping of the two activities together under the label of "piracy" has led to confusion here and elsewhere in intellectual property. Our purpose in emphasizing the line between the two is of course not to map how current copyright law treats copying, but rather to consider what distinction would make most sense in the fashion design context, an area that current copyright law does not reach.

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

2. Kal Raustiala & Christopher Sprigman, *The Piracy Paradox Revisited*, 61 STAN. L. REV. 1201 (2009).

Highlighting the difference between close copying and remixing also helps to clarify the contours and stakes of the policy debate in other industries. In our article, we noted Lawrence Lessig's frustration that his promotion of a robust remix right in his book *Remix*[3] has been taken, wrongly, as a defense of piracy.[4] A recent interview on *The Colbert Report* makes the point vividly. Stephen Colbert asked Lessig, "You say our copyright laws are turning our kids into criminals, because they're keeping kids from doing all the remixing they want of pre-existing art and copywritten material, right? Isn't that like saying that arson laws are turning our kids into pyromaniacs? They're breaking the law!"[5] In response, Lessig pointed to the recording industry's "failed war" against teenage file-sharers.[6]

The exchange left inexplicit a crucial point: the "war" against teenagers is not properly against remixing but against file-sharing of exact copies.[7] Exact copying—not the remixing that current copyright law also considers infringement—is one reason the Virgin Megastore in Times Square has closed. (It is being replaced by a Forever 21.[8]) Similarly in fashion design, we argue, the robust remix practice of which fashion innovation consists should not be considered "piracy" because it is not what threatens innovation. Close copying is. The fact that fashion designers currently innovate tells us no more about whether a different regime would be preferable than the observation that even in the face of file-sharing, musicians are still producing music. We disagree with RS's claim that in fashion, unlike other creative arts, "piracy substitutes for functional innovation," and that "[p]iracy is the fashion industry's equivalent of the new feature on a cell phone."[9] Fashion piracy is like other types of piracy of creative products, such as file-sharing or photocopying of copyrighted material. Fashion design's equivalent of functional innovation is, well, design innovation, which pulls consumers to the new.

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3. LAWRENCE LESSIG, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY (2008).

4. *See* Hemphill & Suk, *supra* note 1, at 1195-96 n.196 (citing Lessig Blog, http://lessig.org/blog/2008/10/news_flash_i_dont_defend_pirac.html (Oct. 13, 2008 16:14 EST)).

5. *See The Colbert Report* (Comedy Central television broadcast Jan. 8, 2009), *available at* http://www.colbertnation.com/the-colbert-report-videos/215454/january-08-2009/lawrence-lessig.

6. *Id.*

7. With some notable exceptions, most amateur remixing is tolerated. *See* Robert P. Merges, *Locke Remixed ;-)*, 40 U.C. DAVIS L. REV. 1259, 1263 (2007) ("High-value content is still worth protecting from massive market-displacing copying, but low-volume copying at the hands of dedicated remixers flourishes due to the cost of shutting them down (and, increasingly, the realization that allowing remixing on this scale adds to rather than detracts from profits)."); *cf.* Bridgeport Music, Inc. v. Dimension Films, 383 F.3d 390, 396-97 (6th Cir. 2004) (holding that reuse of brief sample violates copyright in sound recording).

8. *See* Patrick McGeehan, *Clothier to Replace Music Store in Times Square*, N.Y. TIMES, Jan. 15, 2009, at A28.

9. Raustiala & Sprigman, *supra* note 2, at 1209.

Second, we see the dynamics of fashion trends much differently. RS's induced obsolescence account is moored to a status account of fashion. But fashion is a complex phenomenon that is not limited to status-conferral and the leader-follower process to which RS restrict their attention.[10] Status signaling is a narrow subset of what happens from the formation to the demise of fashion trends. Our account of fashion broadens the cultural frame to take account of how trends reflect people's desire to move together with others while at the same time expressing their individuality within limits. Trend death as a result of too many followers is far from the core, let alone an exhaustive account, of what drives innovation in fashion. As in other areas of consumption of creative goods such as books and music where people often enjoy consuming new works in conjunction with others, fashion trends are driven by the collective desire for change that reflects the zeitgeist. But even within the collective movement, the desire for the expression of individuality is crucial to fashion trends. (Of course in a world of mass production, people are generally not buying or producing unique one-of-a-kind pieces, and individuality in dress is generally not assumed to consist in being the only person in the world to own a certain garment.) Innovation is driven by the desires for both collective change and individual expression. This key relation between collectivity and individuality is what our theory of fashion as flocking and differentiation means to capture.

Third, we have a different understanding of the facts on the ground. Small designers are hurt by close copying, and fast-fashion copyists (as opposed to the broad numbers of designers participating in trends) pose a special threat to innovation. We detail the evidence from lawsuits and press accounts, in the United States and Europe, buttressed by the historical example of the Fashion Originators' Guild and confirmed informally through extensive interviews. We have collected complaints from many U.S. fashion copying cases as evidence and as a resource for future researchers. Though of course evidence in this area is difficult to find and interpret, the evidence for induced obsolescence seems comparatively thin. We agree that empirical evidence is important, and our ongoing effort to collect and make available complaints of design copying is a step in bridging that gap.

One factual difference is particularly important. RS think that we are currently in a stable low-IP equilibrium. To the contrary, we show that instability is pervasive. As can be seen from the cases we have collected, even in the absence of legal protection against design copying, originators currently pursue design copyists using the doctrinal instruments that do exist, including copyright, trademark, patent, and state law. We observe that these lawsuits are design copying cases pursued through other means. Unable to sue for design

10. As RS suggest, however, their status-based argument can be recast as a subset of our differentiation/flocking account and is thus compatible with our framework. *See id.* at 1209.

copying, designers sue, for example, for infringement of a trademark or a copyright in a pattern on a fabric. Designers make use of more extensive protections in Europe, Japan, and other jurisdictions. They went out of their way to create and enforce private protection by means of the Fashion Originators' Guild.[11] They have pressed on dozens of occasions for formal recognition of their parity with other areas of cultural production thought to be harmed by copying.[12]

The factual claim of stability leads RS to make a related theoretical assumption with which we also disagree. They take the view that that stability here—for them, the absence of full-fledged design protection in the United States—reveals the normative desirability of the status quo. But what is the reason to think that the law we have is the law we want? The efficiency of the common law is a debatable proposition;[13] the efficiency of statutory law is even more doubtful. The current long duration of copyright and the removal of formalities as a condition of copyrightability are very stable outcomes. But does that reveal or imply that they are desirable? We doubt that RS would think so.[14]

RS also emphasize the political economy dangers of any policy change toward increased protection. The current lack of protection for fashion design has a political economy story as well. As RS note, some producers in the apparel industry are opposed to protection. Many retailers, who profit from design copies, are too. This opposition is not new. As Judge Giles Rich, father of modern patent law, explained in testimony in favor of design protection, *any* protective measure is "against the private interest of someone," and design protection is "definitely against the interests of 'knock-off' artists, counterfeiters, and copyists generally who contribute nothing to improvement or innovation in the design of our manufactures."[15] The Council of Fashion

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11. *See* Fashion Originators' Guild of Am. v. Fed. Trade Comm'n, 312 U.S. 457, 461 (1941) (detailing activities of Fashion Originators' Guild).

12. *Cf.* Jonathan M. Barnett, Gilles Grolleau & Sana El Harbi, *The Fashion Lottery: Cooperative Innovation in Stochastic Markets* (USC Ctr. in Law, Econ. and Org., Working Paper No. C08-17, 2008), *available at* http://ssrn.com/abstract=1241005 (collecting examples of varied mechanisms used by fashion originators to protect against design copying).

13. *Compare* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 98-100 (1972) (arguing that the common law is economically efficient), *with* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 252-53 (7th ed. 2007) (acknowledging that "economic efficiency does not provide a complete positive theory of the common law").

14. *Cf.* Christopher Sprigman, *Reform(aliz)ing Copyright*, 57 STAN. L. REV. 485 (2004).

15. *Industrial Innovation and Technology Act: Hearing on S. 791 Before the Subcomm. on Patents, Copyrights and Trademarks of the Senate Comm. on the Judiciary*, 100th Cong. 15 (1987) (testimony of Giles S. Rich, Judge, United States Court of Appeals, Federal Circuit); *see also id.* at 14, noting:

> I have always been greatly puzzled as to why this design protection has heretofore always died short of passage by both houses after the expenditure of great amounts of time and energy. It is my guess—and yours may be better—that it is because the multitude of small

Designers of America (CFDA), whose power RS emphasize, is actually a minor player. Despite the CFDA's objection, the press coverage of the piracy paradox argument against design protection has been extensive and positive. Those opposed to protection have secured a highly respected law professor to advise them—more evidence of political strength.[16] The most plausible explanation for the lack of design protection is the simplest: that fashion designers have so far lacked the power to secure protection, given the contrary power of those who profit from close copies.

Relatedly, RS think any legal right against copyists is and will be wielded almost exclusively by "elite" or high-end firms like Louis Vuitton, or by members of the CFDA. The existing legal complaints against fast-fashion copyists that we have collected show smaller designers as frequent plaintiffs.[17] These complaints provide some evidence that smaller designers *can* sue copyists, and that this is not merely a CFDA vanity project. This evidence also supports our view that the current intellectual property regime, with its existing protection of trademark and trade dress without copyright protection for design, pulls fashion production toward high-end brand name and luxury goods. Adding copyright protection gives emerging designers—who do not have the legal protection currently available to established firms that can engage in brand investments—a tool that will induce innovation from them.

We agree that there is a lot of fruitful work still to be done. One promising direction for future work, as RS helpfully suggest, is to identify with more precision at what levels of generality differentiation occurs, and what other forms of differentiation are important in addition to product design. A second question to explore is why certain kinds of fashion articles are best understood with reference to a status-based leader/follower account, while other kinds exhibit a fuller range of differentiation amidst flocking. Third, empirical work could exploit the fact that fashion designs are partly protected, and partly not—thanks to the useful articles doctrine and existing trademark and trade dress protection—and test whether the market's bifurcation draws capital and labor toward the creation of protected articles. A fourth line of research could investigate European practice: has protection impeded design innovation there? We predict the answer is no (contrary to an induced obsolescence account), but further study would be very useful. A fifth study is closer to home: what happened during the era of the Fashion Originators' Guild? Contemporaneous observers thought that would-be copyists were converted into designers. Can

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businesses who would benefit from this bill are not politically organized and are perhaps even unaware of pending legislation. Congress therefore feels no pressure from them. Then, when a bill seems on the verge of passage, very few, even one or two, very vocal strong opponents make themselves heard in the right places and action on the bill comes to a halt.

16. *See* Raustiala & Sprigman, *supra* note 2, at 1223 n.53 (describing Raustiala's work advising an interest group opposed to protection).

17. *See* C. Scott Hemphill & Jeannie Suk, The Law, Culture, and Economics of Fashion: Intellectual Property Lawsuits Against "Fast Fashion" Firms, http://hub.law.harvard.edu/fashion (last visited Apr. 4, 2009).

we tell whether this was so, and how innovation was affected? Finally, as we note, some fast-fashion firms, such as Forever 21, which does not operate in Europe, engage in a lot of close copying, while others, such as Zara and H&M, which do operate in Europe, seem to avoid close copying for the most part in favor of borrowing an overall look or aesthetic. What accounts for the difference? Studying whether this is attributable to the existence of design protection in Europe would give us useful knowledge of the effects of protection.

The evidence collected so far tends to support our contention that fashion is relevantly similar to other types of creative activity for the purpose of legal regulation. While we favor the kind of industry-specific analysis in which we try to engage, the similarities of fashion consumption and production to other protected creative goods lead us to question the treatment of fashion as so outlying as to deny design protection altogether. Our drawing of the infringement line at close copying might induce reflection on the viability of this line—which does not map current copyright—for other areas of cultural production currently protected by copyright. RS fear that our proposal to extend limited protection to fashion design would invite a dreaded sweeping propertization. To avoid suggesting any extension of intellectual property rights for fear that further extension beyond what is proposed would be politically unstoppable would not leave room for the project we are engaged in: examining how carefully limited protection can promote, rather than simply hinder, remix-based creativity. The close copying line we highlight and propose is inspired by a vision of innovation and creativity as remix, and we mean to encourage exploration of its broader desirability in the regulation of cultural production.