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THE PIRACY PARADOX REVISITED

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RESPONSE

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Kal Raustiala* & Christopher Sprigman**

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INTRODUCTION

For over two centuries the United States has used copyright and patent to stimulate the production of many forms of creativity. Over time these rights have grown more economically significant; today intellectual property (IP) law is rightly seen not as a fringe topic, but as part of the core of contemporary economic and cultural policy debates. Increasingly, both lawyerly and lay discussions about creativity in the arts and sciences touch upon issues of ownership, control, and incentives, which together comprise the foundational questions of IP law.

Some forms of creative work, however, have never been protected by American law. These forms of creativity exist in IP’s “negative space”—by which we mean the territory where IP law might regulate, but (perhaps for

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accidental or nonessential reasons) does not. The study of these unprotected forms of creativity ought to be of great interest. If we see these creative endeavors languishing as a result of uncontrolled copying, we might decide to extend IP law in order to curtail appropriation and induce investment and innovation. On the other hand, if an unprotected area of creative work thrives in the absence of legal rules against copying, we would do well to know how. We might also ask whether other currently protected forms of creativity could also flourish without expensive and potentially inefficient monopoly protections.

Nonetheless, IP's negative space has rarely been explored in any depth. Earlier analyses of unprotected creativity tended simply to note the absence of IP protections, assume a market failure in the absence of protection, and move reflexively to a proposal to beef up the law.¹ This tendency has started to change in recent years as studies of the fashion industry, stand-up comedians, magicians, typefaces, academic scientists, "jam bands," chefs, and perfumers have begun to appear in the nation's law reviews and economics journals. Much of this recent work has been thoughtful and balanced regarding the implications of the lack of IP protections in these areas.²

1. See, e.g., Anne Theodore Briggs, *Hung Out to Dry: Clothing Design Protection Pitfalls in United States Law*, 24 HASTINGS COMM. & ENT. L.J. 169, 194, 213 (2002); Samantha L. Hetherington, *Fashion Runways Are No Longer the Public Domain: Applying the Common Law Right of Publicity to Haute Couture Fashion Design*, 24 HASTINGS COMM. & ENT. L.J. 43, 71 (2001); Laura C. Marshall, *Catwalk Copycats: Why Congress Should Adopt a Modified Version of the Design Piracy Prohibition Act*, 14 J. INTELL. PROP. L. 305 (2007); Shelley C. Sackel, *Art is in the Eye of the Beholder: A Recommendation for Tailoring Design Piracy Legislation to Protect Fashion Design and the Public Domain*, 35 AIPLA Q.J. 473 (2007); S. Priya Bharathi, Comment, *There Is More than One Way to Skin a Copycat: The Emergence of Trade Dress to Combat Design Piracy of Fashion Works*, 27 TEX. TECH L. REV. 1667, 1669–72 (1996); Leslie J. Hagin, Note, *A Comparative Analysis of Copyright Laws Applied to Fashion Works: Renewing the Proposal for Folding Fashion Works into the United States Copyright Regime*, 26 TEX. INT'L L.J. 341, 364–66 (1991); Karina K. Terakura, Comment, *Insufficiency of Trade Dress Protection: Lack of Guidance for Trade Dress Infringement Litigation in the Fashion Design Industry*, 22 U. HAW. L. REV. 569 (2000); Jennifer Mencken, *A Design for the Copyright of Fashion*, 1997 B.C. INTELL. PROP. & TECH. F. 121201, http://www.bc.edu/bc_org/avp/law/st_org/iptf/articles/content/1997121201.html.

2. See, e.g., Michele Boldrin & David Levine, *The Case Against Intellectual Property*, 92 AM. ECON. REV. 209, 212 (2002); Christopher J. Buccafusco, *On the Legal Consequences of Sauces: Should Thomas Keller's Recipes Be Per Se Copyrightable?*, 24 CARDOZO ARTS & ENT. L.J. 1121 (2007); Emmanuelle Fauchart & Eric von Hippel, *Norms-Based Intellectual Property Systems: The Case of French Chefs*, 19 ORG. SCI. 187 (2008); Jacob Loshin, *Secrets Revealed: How Magicians Protect Intellectual Property Without Law*, in LAW AND MAGIC: A COLLECTION OF ESSAYS (Christine A. Corcos ed., 2008), available at <http://ssrn.com/abstract=1005564>; Dotan Oliar & Christopher Sprigman, *There's No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy*, 94 VA. L. REV. 1787 (2008); Mark F. Schultz, *Fear and Norms and Rock & Roll: What Jambands Can Teach Us About Persuading People to Obey Copyright Law*, 21 BERKELEY TECH. L.J. 651 (2006); Katherine J. Strandburg, *Curiosity-Driven Research and University Technology Transfer*, in 16 ADVANCES IN THE STUDY OF ENTREPRENEURSHIP, INNOVATION AND ECONOMIC GROWTH 97 (2005); Jacqueline D. Lipton, *To © or Not to ©?*

Fashion has emerged as a central focus of this new exploration of IP's negative space. Fashion is a large and vibrant global industry, yet the core of the creative enterprise in fashion—the design—is not, and never has been, protected by U.S. copyright law. For this reason fashion presents a fascinating puzzle for orthodox theories of IP. How does the industry maintain high levels of investment in new designs without protection against copying? Every season thousands of new designs are produced by the large number of firms competing in a market approaching \$200 billion in U.S. sales annually. And a significant portion of this output involves copying. The major policy question is whether to continue to permit such copying, or to reverse the current low-IP regime in favor of some kind of system of copyright protection.

We are not disinterested bystanders in this debate. In a previous article, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*,³ and two shorter follow-up pieces,⁴ we sought to answer the question at the heart of the fashion industry—why does that industry prosper when copying of new designs is perfectly lawful? We made two major claims. First, we argued that design copying contributes to a process of *induced obsolescence*—that is, copying helps to diffuse designs into the mainstream, where they lose their appeal for fashion cognoscenti. The desire for new designs is “induced” by this process. Second, we argued that copying helps *anchor* trends. Fashion-conscious consumers seek to follow trends; copying helps the industry create trends and communicates to consumers what these new trends are, thereby allowing consumers to follow them.

These two arguments explain what we characterized as the “piracy paradox”: piracy is paradoxically beneficial to the fashion industry. This paradox helped in turn to explain the political economy question that drove our initial analysis: why, with regard to copyright, is fashion so unlike other

Copyright and Innovation in the Digital Typeface Industry (Case Research Paper Series in Legal Studies, Working Paper No. 09-1, 2009), available at <http://ssrn.com/abstract=1311402>; Fiona Murray et al., Of Mice and Academics: Examining the Effect of Openness on Innovation (Nov. 5, 2008) (unnumbered working paper, MIT Sloan School of Management), available at http://fmurray.scripts.mit.edu/docs/MADKS_Draft_11.05.2008.pdf; Charles Cronin, Genius in a Bottle: Perfume, Copyright, and Human Perception (unnumbered working paper, presented at UCLA Law School, Feb. 9, 2009). An early and exemplary recognition of the anomalous nature of fashion (and food) within IP is Jessica Litman, *The Exclusive Right to Read*, 13 CARDOZO ARTS & ENT. L.J. 29, 44–45 (1994).

3. Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687 (2006).

4. Kal Raustiala & Christopher Sprigman, *Where IP Isn't* (UCLA Sch. of Law Pub. Law & Legal Theory Research Paper Series, No. 07-05, 2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=962736; Kal Raustiala & Christopher Sprigman, *How Copyright Could Kill the Fashion Industry*, NEW REPUBLIC ONLINE, Aug. 14, 2007, <http://www.law.ucla.edu/home/News/Detail.aspx?recordid=1188> [hereinafter Raustiala & Sprigman, *How Copyright Could*]; see also Kal Raustiala, *Fashion Victims*, NEW REPUBLIC ONLINE, Mar. 15, 2005, http://www.law.ucla.edu/raustiala/publications/tmr/fasion_victims.pdf.

creative industries? Why has Congress not afforded the high levels of IP protection we see elsewhere?

In recent years other scholars have begun to publish analyses of innovation in the fashion industry as well.⁵ Yet there is still much we do not know about how law, norms, markets, and creativity interact in the apparel business. For these reasons, Scott Hemphill and Jeannie Suk's Article, *The Law, Culture, and Economics of Fashion*,⁶ in this issue of the *Stanford Law Review* is very welcome. Their treatment of the fashion-IP nexus is stimulating and unique in its marriage of economic and cultural analysis. In this brief essay we look closely at their arguments and offer some critiques and suggestions for future research. Because they devote significant attention to our earlier work, we consider at some length the areas of tangency and tension between our respective analyses.

On the whole, we find much to agree with in *The Law, Culture, and Economics of Fashion*. Indeed, we believe the article has usefully employed, extended, and in some cases refined several of our original insights. We do inevitably part company in several places, and we will detail three primary disagreements here. First, we see the issue of design copying somewhat differently than do Hemphill and Suk. In particular, we define and analyze fashion copying consistent with the understanding of "copying" embedded in U.S. copyright law, and this leads us to different conclusions. Second, we believe that Hemphill and Suk understate the diversity of consumer interests at stake in the consumption of fashion goods, and that a proper understanding of these interests makes the Hemphill/Suk model fit our views as well as, if not better than, theirs. Third, we hold a different, and we think more accurate, view of the political economy of IP law. As a result, we are far less sanguine about the legislative fix proposed in *The Law, Culture, and Economics of Fashion*. In fact, we think this policy prescription is both misguided, and—perhaps more importantly—likely to mutate into something more malignant than its authors intend.

The issue of appropriate policy is of great contemporary interest. Just prior to the publication of *The Piracy Paradox*, a group of elite designers, operating through the New York-based Council for Fashion Designers of America, convinced a Republican congressman from rural Virginia to introduce a bill that would for the first time extend copyright protection to fashion design.⁷

5. See, e.g., Jonathan M. Barnett, *Shopping for Gucci on Canal Street: Reflections on Status Consumption, Intellectual Property, and the Incentive Thesis*, 91 VA. L. REV. 1381 (2005); Susan Scafidi, *F.I.T.: Fashion as Information Technology*, 59 SYRACUSE L. REV. 69 (2008); Jonathan M. Barnett et al., *The Fashion Lottery: Cooperative Innovation in Stochastic Markets* (USC Legal Studies, Research Paper No. 08-21, 2008), available at <http://law.usc.edu/academics/centers/cleo/working-papers/cleo/2008.cfm>.

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

7. See Design Privacy Prohibition Act, S. 1957, 110th Cong. (2007); Design Privacy

This bill has failed in two successive Congresses, but there is every reason to believe that we will soon see debate joined again over the merits of extending American IP law to fashion design.

Our differences over the proper regulatory regime for fashion design should not obscure the larger areas of agreement. Hemphill and Suk agree with us on a fundamental point: that the fashion industry operates best in an environment of comparatively weak IP rules. They, like us, think that fashion design should not be “normalized” within copyright law. We also share a basic interest in the phenomenon of creativity without copyright. Remarkably little is known about either the contours of IP’s negative space or the mechanisms by which creativity persists, and even blossoms, within that space.

In the next Part of this Article we summarize our original approach in *The Piracy Paradox* and compare and contrast it to Hemphill and Suk’s analysis. We identify some of the difficulties we see in their model, take on some of their specific claims about copying in the fashion world, and discuss several areas where we believe *The Law, Culture, and Economics of Fashion* either misfires or raises more questions than it answers.

I. THE COPYING CONUNDRUM IN FASHION

The Law, Culture, and Economics of Fashion advances an analysis of the interrelationships among law, apparel, social norms, and preferences. First, the Article distinguishes between two forms of appropriation: (1) line-by-line copying, and (2) the creation of derivative works. “Derivative” in this context means a work that appropriates certain design elements of a model design, but is nonetheless visually distinguishable to the average observer. Second, it offers a theory of consumer preferences for new apparel designs. Demand arises from consumers’ desire simultaneously to differentiate themselves from others, and also to “flock” together with others, via their clothing choices. Hemphill and Suk summarize their theory of demand concisely: “[I]n fashion we observe the interaction of the tastes for differentiation and for flocking, or more precisely, differentiation within flocking.”⁸

Based on these postulates, Hemphill and Suk acknowledge that derivative reworking of original designs is beneficial to the fashion industry. The existence of derivative reworking contributes to consumers’ opportunities to flock, because the derivatives partake of a common design element and thus provide a shared design vocabulary. These derivatives do not, they contend, impair consumers’ ability to differentiate because they are visually distinguishable.

On the other hand, Hemphill and Suk argue that line-by-line or “close” copies, while they serve consumers’ flocking interest, harm their differentiation

Prohibition Act, H.R. 2033, 110th Cong. (2007); H.R. 5055, 109th Cong. (2006).

8. Hemphill & Suk, *supra* note 6, at 1165.

interest (because the garments are visually indistinguishable except at very close range). Because consumers desire both to flock and to differentiate, the article concludes that close copies are harmful and should be made unlawful.⁹ A showing of “substantial difference,” however, would serve as a valid defense to infringement.¹⁰ Quoting Tim Gunn of *Project Runway* (and of the Parsons School of Design)—“I draw a line at something that, if you squint your eyes, you really can’t discern it from the original”—Hemphill and Suk offer the “squint test” for infringement.¹¹ If one can discern a difference in the two garments even when squinting, that difference is likely to be substantial enough to negate an infringement claim. In short, they propose a sui generis legal standard to regulate design piracy in fashion.¹²

While Hemphill and Suk understandably seek to distinguish their analysis from the one we presented in *The Piracy Paradox*, we believe they overstate the differences. We will leave the details of our argument for a full reading of our original article, but in the interests of clarity will provide a quick summary of our main points. In *The Piracy Paradox* we advanced an explanation for fashion’s unusual low-IP regime—unusual both in its political stability and its ability to generate substantial innovation in the face of widespread copying—that rests on two features: induced obsolescence and anchoring. Both reflect the

9. To the extent that Hemphill and Suk argue that copyright should apply in order to protect consumers’ interest in differentiation, that is an idiosyncratic reading of copyright law and policy. See Hemphill & Suk, *supra* note 6, at 1179 (“Fashion has the potential to afford a broad vocabulary for the expression of a vast range of possible messages. Conscious or not, people’s fashion choices signify and communicate, with meaningful individual and collective valences. We have identified this dynamic between differentiation and flocking as the key to the experience of fashion in social life. People use fashion to signal individual differences while also partaking in common movement with the collectivity. This model has informed our analysis of the formation and function of fashion trends among producers and consumers.”). Unlike trademark, copyright is not designed to protect consumers against confusion or to protect the integrity of consumer purchasing decisions. Copyright is designed to provide authors exclusivity as needed for an incentive to create original works. Within copyright’s producer-focused incentives framework, close copies are harmful only to extent that they impair sales or reasonable licensing of the original, not because consumers might be less satisfied with what they have purchased per se.

10. *Id.* at 1188.

11. *Id.*

12. The possibility of a standard of this sort, limited to proscription of close copies, was originally raised at a congressional hearing on H.R. 5055. See *A Bill to Provide Protection for Fashion Design, House of Representatives: Hearing on H.R. 5055 Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 109th Cong. 7 (2006) [hereinafter *Hearings*] (Rep. Bob Goodlatte asking whether language in bill should be tightened “to make it clear that it only protects against copies that are significantly similar and not those merely inspired by other designs”). We understand, based on private conversations with various industry participants, that in later negotiations between the CFDA and a number of important apparel industry firms, the possibility of a liability standard limited to “near exact” copies was raised by firms opposed to a broad “substantial similarity” liability standard, but was rejected by the CFDA as insufficient.

status-conferring power of fashion, and both suggest that copying, rather than impeding fashion-industry innovation and investment, promotes them.

First, what do we mean by induced obsolescence? Fashion is a status-conferring, or “positional,” good. In affluent societies, apparel purchases are motivated to a large degree by status seeking, rather than a desire to cover nakedness or stay warm. And fashion goods are subject to an unusual form of “two-sided” positionality. As an attractive design begins to spread, its positional or status-conferring value grows as fashion-forward consumers consume it. But as the design diffuses beyond the fashionable to the ordinary consumer, its positional value declines, and fashion-conscious early adopters are primed for the next new thing. Obliging, the fashion industry has a new round of design innovations ready for them to consume. The cycle of innovation and diffusion starts again.

This is the fashion cycle, which is familiar stuff to anyone who has thought about the industry or even paged through an issue of *Vogue*.¹³ Less well-appreciated is the fashion cycle’s connection with fashion’s low-IP regime. The industry’s practice of copying and reworking attractive new designs—a practice made possible by the low-IP rule—speeds up the fashion cycle by diffusing designs more quickly, and then driving them toward exhaustion. Copying and derivative reworking produce a faster creative cycle and more consumption of fashion due to the quicker deterioration of apparel’s status-conferring value. And as we will discuss below, both line-by-line copying and the more limited appropriation involved in derivative reworking feed this process.

In *The Piracy Paradox* we also described a second dynamic—anchoring—that works along with induced obsolescence in stabilizing fashion’s low-IP equilibrium. The basic thrust of the anchoring dynamic is simple: The consumption cycle, if it is to work well, must quickly exhaust the status-conferring value of our clothing and induce us (the consumer) to chase the new thing.¹⁴ For a new trend to drive consumption, the industry must somehow communicate to us what the new thing is (or what the set of new things are). It does that by turning out a large number of copies and derivative reworkings of

13. We are grateful to Hemphill and Suk for uncovering an insightful analysis of the fashion cycle from the 1930s. Helen Everett Meiklejohn, *Dresses—The Impact of Fashion on a Business*, in PRICE AND PRICE POLICIES 299, 338-39 (Walton Hamilton ed., 1938).

14. Hemphill and Suk do not directly address our “anchoring” arguments, and they offer no argument countering our model of how copies lower information costs and facilitate fashion purchases. This is an elision in the Hemphill and Suk Article, and one which weakens the foundation of their policy proposal. This is especially true because there is no reason to think that line-by-line copies are less effective than looser derivative works in reducing the information costs of apparel purchases. As a consequence, it is not enough simply to assert that line-by-line copies cause harm to innovation incentives—a claim that in any event we think incorrect. We also must consider whether eliminating line-by-line copies might harm the industry’s ability to lower transaction costs and induce fashion purchases via the anchoring dynamic.

a limited number of designs each season. In other words, the industry “anchors” its seasonal output to a discrete set of designs—trends—that characterize what is, at least for the moment, in fashion. In this way, copying and derivative reworking create trends—and trends are the basis of much fashion consumption.¹⁵ In turn, trends send signals that reduce the information costs that all of us face in getting dressed—namely, what are we to wear? These signals about trends are useless to some, but for many they are significant. Put in trademark language, trends reduce the search costs of style.

Together, anchoring and induced obsolescence help explain the otherwise-puzzling persistence of continuous fashion creativity in the face of extensive copying. Certain designers and firms suffer from the appropriation of designs so common in the industry. But in the aggregate, over time, copying is helpful, not harmful. And this, in turn, helps explain why fashion design has never been subject to copyright protection under U.S. law. The existing regime has served many interests, and thus a political coalition powerful enough to overturn the legal status quo has never appeared. Over the years various scattered efforts to enact copyright protection have ensued; none has yet proved successful.

In writing *The Piracy Paradox* we sought not only to explain the unusual stability of fashion’s low-IP regime. We also aimed to open up a new frontier in IP theory. Many creative industries live in what we have called IP’s “negative space.” This space encompasses those creative arenas that in theory could be regulated by some aspect of IP law, but, like fashion design, are not. The concept of IP’s negative space points toward two important challenges for legal theory. One is to explain why some creative acts fall in the negative space and some in the positive space. Why are fashion designs, fennel-crusted pork chops, and football plays unprotected, but painting, poetry, and pharmaceuticals protected? The other challenge is to account for how creativity thrives in the negative space despite the lack of legal protection. This latter issue, with its clear policy implications, has begun to attract some attention and deserves more. Understanding how innovation persists absent legal protection is, given the great costs of IP rights, an extremely important task. We intend to address both of these issues at length in future work, but our early article flagged them as important and relatively unexplored areas of IP theory.

15. Hemphill and Suk note that “[g]oods that are part of the same trend are not necessarily close copies or substitutes.” They later suggest, inaccurately, that we equate “trend-joining with copying.” Hemphill & Suk, *supra* note 6, at 1153, 1161. We in fact agree that goods that are part of the same trend are not necessarily close copies or substitutes, and we do not equate (and never have equated) trend-joining with copying—although much trend-joining does in fact involve copying. In practice, trends vary widely but most incorporate a mix of what they would call close copies and a set of looser derivative works and, perhaps, even independent but similar creations. It is even theoretically possible for trends to develop without any copying: for many firms to alight on the same design by chance (or by tapping into an ineffable but powerful zeitgeist) and thereby create a trend. But much more common, we believe, is a trend that develops through some mix of copying, remixing, and derivative works.

The Law, Culture, and Economics of Fashion has a narrower ambit; it is concerned primarily with making the case for a legislative change that would tweak current copyright doctrine to render a small subset of design copies unlawful. There are nonetheless important areas of connection between our article and Hemphill and Suk's; primarily in the explication of the dynamics of fashion and IP and, closely related, in the policy questions raised by these dynamics. And on these foundational points we agree much more than we disagree. Most importantly, Hemphill and Suk conclude, as do we, that the production of derivative designs helps to drive the fashion cycle—i.e., that the low-IP legal regime, which permits the creation of fashion design derivatives, is symbiotic with design change. Indeed, the low-IP regime acts as an accelerant of innovation.

Again, the important point here is not that there is a fashion cycle. It is instead the role that law plays in driving that cycle. Hemphill and Suk, like us, see copying as an essential part of the creative ecology of fashion. Fashion piracy may be parasitic on original designs, but it is a parasite that does not kill its host: though it may weaken individual designers it also, paradoxically, strengthens the industry and drives its evolution.¹⁶ In an industry that cannot look to continuous improvements in quality to drive demand, piracy substitutes for functional innovation. This is a very important point: piracy is the fashion industry's equivalent of the new feature on a cell phone. It is a force that encourages a consumer to discard a perfectly serviceable garment and purchase the new, new thing.

For these reasons, we have argued that ordinary rules of copyright ought not to govern the fashion world, and Hemphill and Suk apparently agree. This view, which cuts against nearly all prior legal writing on the topic, is one reason we perceive substantial common ground between our analyses.¹⁷ Below we explore what we believe are the chief remaining areas of disagreement.

A. Differentiation, Flocking, and the "D/F Ratio"

An important area of disagreement between the analysis in *The Law, Culture, and Economics of Fashion* and ours is over the proper treatment of nearly exact, or line-by-line, copies. Whereas Hemphill and Suk wish to ban line-by-line copies, we find no reason to treat them differently from the

16. The "parasitism" of fashion piracy plays out in ways that are analogous at a general level to the function of parasites in the natural world: parasites can harm individual organisms, but they also drive evolution and indeed have served as one of the primary forces inducing biological diversity. See CARL ZIMMER, *PARASITE REX: INSIDE THE BIZARRE WORLD OF NATURE'S MOST DANGEROUS CREATURES* (2000).

17. We also agree with Hemphill and Suk that normative claims that fashion is a wasteful or harmful status-reinforcing pursuit—the sort of considerations that undergird traditional sumptuary laws—are not very persuasive. We have taken a broadly liberal view about fashion design, in which more design choice—i.e., more innovation—is better because it gives consumers more options.

copying done to create derivative fashion designs. The significance of the distinction between line-by-line and derivative works rests partly on the claim that line-by-line copies are particularly harmful. In support of this claim, *The Law, Culture, and Economics of Fashion* develops a model of consumer preferences about fashion which distinguishes between individuals' desire to flock together and to differentiate themselves from others. This is a useful distinction. But the analysis misfires, in our view, when it treats differentiation and flocking as desires fixed together in the psyches of individual consumers.

We think it is far more useful and accurate to view an individual consumer's desire to flock and differentiate as located somewhere on a continuum. Conceptualizing this way, one can talk of a "D/F ratio," which represents where along the continuum between pure differentiation and pure flocking an individual's preferences fall.¹⁸ Some consumers (though a very small group) are oriented strongly toward differentiation—think of Bjork and her famous swan dress.¹⁹ These consumers have a relatively high D/F ratio. Others, perhaps the vast majority, are dedicated flockers, who seek to stand out as little as possible. These consumers have a relatively low D/F ratio. In between are many varied middle positions—positions that probably change over time even for a single person, according to that individual's age, wealth, marital status, and a host of other social circumstances.

Once differentiation and flocking are seen in terms of a ratio that varies among individuals and even within the life of particular persons, the Hemphill and Suk model may actually support our analysis better than it does theirs. To see this, let us restate our model from *The Piracy Paradox* in the argot of *The Law, Culture, and Economics of Fashion*. In our model, the early adopters are those who manifest a much higher D/F ratio than the ordinary apparel consumer.²⁰ Early adopters sample many new (and sometimes outlandish) designs, most of which will never be adopted widely. Eventually, the purchases of some early adopters catch on—in a process both we and Hemphill and Suk treat as exogenous—and signify a trend. Derivative works based on the model design, as well as some line-by-line copies, begin to flood the market as those with lower D/F ratios (i.e., ordinary consumers) join the trend. As many ordinary consumers adopt the design, the early adopters begin to flee it. Soon they move on to the next new design, and the cycle begins again.

Copying, in other words, signals a trend, solidifies it, and then exhausts it. Why does it exhaust the trend? Because the early adopters' relatively powerful

18. Hemphill and Suk note that differentiation and flocking ratios can vary, but they do not explore the implications of these observations for their model.

19. See Bjork.com images, <http://www.bjork.com/db/images/103-1g-sfw.jpg> (last visited Feb. 18, 2009).

20. Those with high D/F ratios are not necessarily runway fashion followers, however. Some are idiosyncratic stylists who only wear vintage clothes from the 1920s or favor unusual signature garments. But for many high D/F individuals, the ever-changing offerings of the high fashion industry serve as the primary palette for their sartorial self-expression.

desire for differentiation is retriggered soon after the ordinary consumer's relatively powerful flocking inclination leads to wider adoption of the previously vanguard design.²¹ The market for new designs is driven by the high D/F ratio consumers, who tend to discard their old clothes and buy new designs when too many ordinary consumers buy the copies, thereby impairing

21. Hemphill and Suk use Dr. Seuss's story *The Sneetches* as a parable to illustrate a separate criticism of our model in *The Piracy Paradox*. Hemphill & Suk, *supra* note 6, at 1182. In the story, an enterprising and amoral salesman named Sylvester McMonkey McBean encounters a group of bird-like beach dwellers, the Sneetches. Some Sneetches have stars on their bellies, and the star-bellies disdain their plain-bellied counterparts. The plain-bellies resent the social snubs they receive from the star-bellies; they are both treated and view themselves as a subordinate group.

McBean, sensing an opportunity to play on the Sneetches' star-consciousness, deploys a machine that, for a fee, stamps stars on the plain-bellies. This angers and confuses the over-Sneetches, who find that their stars no longer distinguish them from the formerly plain-bellied. McBean responds by offering the original star-bellies admission—again for a fee—to a star-removal machine. Racial separation is thereby restored, but only for as long as it takes McBean to convince the under-Sneetches that plain bellies are now preferable, and that they must pay for removal of the stars he recently applied. The cycle of applying and removing stars continues until the Sneetches are out of money. And in the frenzy of star application and removal everything becomes jumbled—no one can tell who was originally starred and who wasn't. At the end of the story, the Sneetches drop their star-based discrimination and kumbaya reigns. In all, a hopeful ending—the Sneetches are suckers, but even suckers can learn. DR. SEUSS, *THE SNEETCHES AND OTHER STORIES* (Random House 1961) (1953).

The Sneetches is obviously a parable about race. But the moral that Hemphill and Suk draw from *The Sneetches* is about microeconomics. The problem with the Sneetches, Hemphill and Suk say, is that they are bad at lifecycle pricing—i.e., they fail to understand that neither the star-based distinctiveness nor sameness they seek is fated to last for long. If only the Sneetches understood this, Hemphill and Suk suggest, they would not have paid McBean in the first place. Yet unlike the Sneetches, Hemphill and Suk assert, fashion consumers *are* competent lifecycle pricers. And as a result, they claim, the fashion industry does not profit in the aggregate from copying. Consumers will understand that a faster cycle means that the differentiation or flocking that they seek will be less durable, and therefore less valuable. As a result, copying might drive consumers to buy clothing more often, but it would also cause them to pay less for each purchase.

We are very skeptical of this argument. First, Hemphill and Suk have raised empirical questions—do fashion consumers lifecycle price? do they do so effectively?—but they offer no evidence in favor of their claims. And even at a theoretical level the role of lifecycle pricing in fashion consumption is complex. From the perspective of the early-adopters, the ferreting out of an up-and-coming design may well be one of the pleasures of being a fashionista. So too is the experience of watching the masses tag along behind you: the fashion-forward may not want to dress like the fashion-follower, but the opportunity to watch everyone else try to catch up can be an important part of the return to investment in trend-spotting. So for an important class of fashion consumer, rapid style change is arguably not a cost, but a benefit, as it provides more opportunity both to engage in connoisseurship and to observe the followers emulating one's good taste. Whether or not fashion buyers lifecycle price is an empirical question the answer to which no one yet knows. But the foregoing suggests it may well be just as likely that if fashionistas lifecycle price, they do so in reverse—less durable trends are preferred. It is therefore also not clear that the fashion originator would benefit from longer trend cycles—the originator cannot charge more for something a consumer does not especially value.

the originality and status of the previously new design. So in a sense the market for new designs is driven by the “harm” caused to one set of consumers by purchases of copies by another, generally larger, set of consumers. This is part of the paradox that underlies our decision to title our article *The Piracy Paradox*. Importantly, given this dynamic and in the absence of empirical evidence to the contrary, there is no compelling reason to distinguish between line-by-line copies and derivative reworkings for the purposes of differentiation and flocking. Both forms of design copying fuel the fashion industry’s cycle of induced obsolescence.

Perhaps what Hemphill and Suk mean to argue is that some consumers are content with the minor differentiation permitted by derivative works; in other words, they want some differentiation, but don’t need much—a few minor details are enough. If true, that suggests that the D/F ratio of these consumers is not very high. More dedicated differentiators will not be content to merely be distinguished from the crowd by minor details: they will want more. As this suggests, without knowing much more about consumer preferences, and how they are manifested in actual purchases, we are ill-equipped to move from simple models to the development of actual legal proposals.

This skepticism fits well with the thrust of *The Piracy Paradox*, which offers arguments that are essentially conservative. The American legal system has gone some two centuries without formal design protection for fashion, and the industry itself has lacked any effective self-help against design copying since the government terminated, via an antitrust lawsuit, the Fashion Originators Guild cartel that operated between 1933 and 1941. In the decades since the toppling of the Guild, the fashion industry has grown despite (or, in our view, partly *because of*) its low-IP regime. Indeed, there is no compelling evidence that copying, whether close or not, has produced systematic harm for the industry.²²

Historically minded opponents of this view sometimes point to the example of the Fashion Originators Guild itself. Hemphill and Suk, for example, contend that the Guild episode is “[s]trong real-world evidence” for the utility of design protection.²³ We disagree for two reasons. First, whether or not the Guild “reduced copying greatly,” as they suggest it did, is largely beside the point.²⁴ The Constitution makes plain that copyright exists to “promote the Progress of Science and Useful Arts.” At the most fundamental level it is enhanced creativity and innovation, not reduced copying, that is the goal of copyright law. Whether a regime of relatively free appropriation promotes or inhibits innovation in any particular creative field is an empirical question, and

22. We are not suggesting that no one is harmed by copying; we recognize that often substantial harm accrues to individual firms and designers. But in the aggregate we are skeptical that there is meaningful harm, and indeed we think in the aggregate copying is beneficial.

23. Hemphill & Suk, *supra* note 6, at 1193.

24. *Id.*

we believe the answer with regard to apparel is clear, if admittedly counterintuitive: over time and across the industry as a whole, copying does not inhibit fashion innovation. So the success of the Guild in reducing copying is not tantamount to an argument that the Guild was good for innovation. Second, even if the Guild system led some firms to shift from copying to originating, as Hemphill and Suk claim, that does not mean that there was more innovation overall. Like all anticompetitive cartels, the Guild was set up to restrict—and succeeded in restricting—supply. The key policy question therefore is whether *aggregate innovation* was higher, not whether incumbents changed their market strategy. On that question the jury is decidedly out.

What is unassailable is that in the decades since the fall of the Guild the American fashion industry has not only survived absent design copyright; it has thrived. For this reason alone we believe the burden of persuasion rests heavily on those who seek to overturn the legal status quo. In our view, advocates for copyright protection for fashion designs have not yet met that burden. Moreover, because what is proposed is a wholesale alteration of the regulatory environment, the case for change requires systematic evidence. In an industry as big, dynamic, and competitive as fashion, there are always winners and losers. The proponents of copyright protection for fashion often tell stories about designers who suffered harm from copying; they rarely tell stories about designers who benefited by joining an emerging trend, or by originating a design that became popular and widely consumed via trend-driven copying.²⁵ The broader question is whether innovation and competition are better served under a form of regulation more restrictive than what we have now. Persuasive evidence for this proposition is lacking. Until we see such evidence, Congress should let well enough alone.

B. *Some Difficulties with Differentiation*

Again, none of this criticism gainsays the fact that we believe that the concepts of differentiation and flocking are helpful, and that these concepts better orient the analysis of copying in the fashion world. But there remain many unanswered questions about consumers' desire simultaneously to flock and differentiate. Here are a few we believe deserve more attention in future work.

1. *Why is the desire for differentiation better served in an environment in which there are lots of derivatives but no line-by-line copies?*

Hemphill and Suk assume that consumers' desire for differentiation can be sated so long as we preserve the uniqueness of small details in a design. That has to be their view, or their “squint test” recommendation (i.e., that

25. See, e.g., *Hearings*, *supra* note 12.

appropriation should not be actionable so long as it results in a design that is minimally visually distinguishable) makes no sense. But how do we know that the wide production of derivatives—i.e., garments that recognizably appropriate the appealing trend element of the model design—does not erode consumers' ability to differentiate? Put differently, what if consumers' differentiation desire focuses on *styles* rather than small details? In that case, the production of derivatives of the same general style would interfere with differentiation as surely as line-by-line copies. We do not know if this is true. But for the differentiation concept to have more purchase as a normative construct, we need to know at what level consumers differentiate. *The Law, Culture, and Economics of Fashion* does not offer much evidence about this issue (nor have we seen evidence presented elsewhere). This would not be a problem if Hemphill and Suk had confined themselves to offering a general model. But without a more complete understanding of differentiation, their policy prescriptions are premature.

2. *Is differentiation only a matter of design?*

The idea that line-by-line copies interfere with consumers' ability to differentiate themselves lends support to a ban on such copies. But of course possession of a desirable and unusual design is not the only way to differentiate. For example, it is possible that the desire for differentiation could be satisfied via quality differences in a garment that cannot be reproduced by a cheaper copy. Expensive originals are generally of markedly superior quality in terms of fabric, craftsmanship, and tailoring.²⁶ Sometimes these quality differences are readily apparent to others, at least to the careful observer. Sometimes they produce pleasure only for the wearer. Perhaps quality differences can serve as differentiators too.

Much the same can be said of distinctive trademarks. Trademarks are widely used in the apparel industry, central to the value of many famous brands, and vigorously protected against infringement. Distinctive brands feed the desire for differentiation and arguably provoke it as well. For some consumers it is probably enough to know that inside their jacket is a label that reads "Marc Jacobs." Yet there are many subtle (and not so subtle) ways that apparel companies display trademarks aside from relatively hidden interior

26. Not all copies are cheap, and not all originals are expensive. L'affaire Nicholas Ghesquiere is a good example. In 2002, Ghesquiere, young designer for the fabled house of Balenciaga, was lambasted for passing off a patchwork vest originally designed in 1973 by Kaisik Wong, a virtually unknown designer from San Francisco, as his own. See Booth Moore, *Still Dazzling*, L.A. TIMES, Dec. 16, 2002, at 11. Borrowing from a lesser-known designer is not unusual, nor is borrowing from the street (as in the frequent raiding of Japanese teen styles from Tokyo neighborhoods such as Harajuku). But the more common pattern, at least according to the major designers, is that their designs are appropriated and tweaked by lesser, or less successful, lights.

labels; buttons often feature brand names, for example, and some companies put small but visible external labels or insignia on garments. Some have even trademarked colors and patterns, as in Burberry's famous tan plaid.

In *The Piracy Paradox* we did not focus on trademarks per se, but they played an important subsidiary role in our analysis. Labels and marks are essential to many apparel buyers, and not only in relation to the paradigmatic consumer search cost and producer reputation concerns that undergird the economics of trademark.²⁷ Some consumers appear to treat labels as almost an end in themselves, and are eager to get whatever Gucci or Prada put out. And many apparel companies differentiate within a single family of brands by using submarks. So-called bridge or diffusion lines are a common example; Giorgio Armani uses some five different submarks (Emporio Armani, Armani Exchange, Armani "black label," etc.) to differentiate his garments into multiple brands operating at different price points.²⁸

The central point is that while fashion design operates in a low-IP regime, it does not operate in a no-IP regime. Rather, while copyright protection for fashion designs is almost entirely absent, the apparel industry is strongly protected by, and invested in, trademark law. The existence of powerful brands is an important aspect of the economics of fashion. Once a trend becomes widely adopted, its days are usually numbered. But in the interim, as the trend is building, buyers face a plethora of similar designs. To a large degree consumers choose among these based on price, quality, and the like. But they also choose based on labels. The fact that major fashion houses aggressively protect their trademarks provides a potent contrast to their behavior with regard to design, notwithstanding the recent efforts by the CFDA and its supporters. To understand the role of differentiation and flocking, we need to better understand the degree to which brand-based differentiation can substitute for, or complement, design-based differentiation.²⁹

27. WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 166-209 (2003).

28. See generally Jonathan M. Barnett, *Shopping for Gucci on Canal Street: Reflections on Status Consumption, Intellectual Property, and the Incentive Thesis*, 91 VA. L. REV. 1381 (2005). Consumers are also differentiated by time. High-valuing consumers get exclusivity and status for new designs for a short period of time—and this is a function not so much of the lack of copies (indeed, copies and derivative reworkings often appear very quickly) but the length of time it takes for low-valuing consumers to understand the trend and decide to join it. As low-valuing consumers enter the market, high-valuing consumers increasingly move on to the next new designs and so on. The premium charged to high-valuing consumers provides fashion designers with return on investment, while the masses enjoy new fashions that can be copied and sold to them more cheaply.

29. Hemphill and Suk equivocate about whether they think the law ought to discriminate among consumption patterns. At some points in the article they eschew normative judgments about the value of fashion, such as those underlying traditional sumptuary laws. But later they decry the "distorting" nature of trademark protection, arguing that the resulting "logoification" is somehow problematic. While as an aesthetic matter we share some of this concern, as an analytic matter we think "distortion" is inherent in the

There are other potential forms of differentiation as well. Fabric designs, or patterns, have long been covered by copyright law, and they obviously provide an important source of differentiation even when the shape or cut of two garments is identical.³⁰ The shopping experience itself is another potential form of differentiation, though not one intrinsic to and attached to the garment. There are surely others. The important point is that, absent a careful consideration of these varied forms of differentiation, policy recommendations to alter copyright law to include apparel design are premature.

3. *You can't always get the differentiation you want (but you might get the differentiation you need)*

Hemphill and Suk write that “[f]ashion-conscious people generally do not seek to wear precisely the same outfit as someone else.”³¹ Though not a major element in their article, this claim seems to miss a basic point about the logic of differentiation. Even if there were absolutely no copying of a given design, there could still be large numbers of the same dress produced by its originator. Except for the highest-end custom couture, apparel is not a one-off product. The fear of “the same dress” they identify is only partly the result of design copying.

We point this out because it illustrates a difficulty that attends their analysis throughout: any system in which some appropriation is allowed will always interfere with the ability of those with high differentiation desires to achieve stable differentiation. But that is in fact precisely the dynamic that drives the industry. It is important that sufficient differentiation opportunities exist such that early adopters receive a reward for their investment in differentiation. And it is also important that this reward be evanescent—the loss of differentiation is the fuel for the next round of innovation and consumption. Whether inadvertently or by design, the industry’s current low-IP environment appears to us to strike this balance remarkably well.

creation of monopolies, and we think normative judgments in favor of one or another type of innovation should largely remain outside our policy analysis unless truly compelling reasons exist. To name just one aspect of the “distortion” argument that strikes us as problematic, Hemphill and Suk assert that a focus on differentiation via trademarks constrains the ways in which apparel can aid individuals in constructing identity and communicating messages. *See* Hemphill & Suk, *supra* note 6, at 1179. There is a substantial literature describing the ways in which both trademark owners and consumers use marks to do precisely these things. The argument against trademarks here seems to us to devolve into an argument not in favor of increased communication and identity-construction, but against *a particular form* of these activities. Thus the argument is heavily value-laden and contestable, and, for that reason alone, requires much more development and justification before it can be used as a reason to extend copyright protection to fashion design.

30. Indeed, several of the examples used in Hemphill & Suk, *supra* note 6, are really examples of fabric pattern copying, rather than design copying.

31. Hemphill & Suk, *supra* note 6, at 1166.

C. Line-By-Line vs. Derivative Copying

In *The Law, Culture, and Economics of Fashion*, Hemphill and Suk assert that in our original article on fashion and copyright we failed to disaggregate different forms of copying. We plead guilty. Our goal in writing *The Piracy Paradox* was not primarily normative or focused on policy recommendations. Rather, as the first major article in the field we sought to address what we thought to be the fundamental questions: why the low-IP equilibrium in the fashion industry had been stable for many decades, and why firms continue to make significant investments in the production and distribution of new fashion designs that others are perfectly free to copy. To answer these questions, we had no need of distinctions—mostly irrelevant as a legal matter—between line-by-line copying and the creation of derivative works. Both involve copying. Both would be unlawful if the normal rules of copyright applied. Because copyright law does not apply, both are engaged in freely.

In later writing,³² and in testimony before Congress,³³ we took a more strongly normative stance. We did so in response to the legislative proposals then pending to extend copyright to fashion designs. These proposals did not distinguish between line-by-line copying and derivatives, but instead extended the standard copyright liability test of “substantial similarity” to fashion design. We thought then, and think now, that this is an exceptionally bad idea. The substantial similarity liability standard “presents one of the most difficult questions in copyright law, and one that is least susceptible of helpful generalizations.”³⁴ But the standard, as it has been worked out by the courts over a large number of cases, is apt to condemn as infringement any not-insubstantial taking of protected material if the material taken is qualitatively significant.³⁵ The appealing element of a fashion design trend would be, almost

32. See Raustiala & Sprigman, *How Copyright Could*, *supra* note 4.

33. See *A Bill to Provide Protection for Fashion Design: Hearing on H.R. 5055 Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 109th Cong. 87-89 (2006) [hereinafter *Hearings on H.R. 5055*] (statement of Christopher Sprigman, Associate Professor, University of Virginia School of Law).

34. 4 NIMMER ON COPYRIGHT § 13.03[A] (2008).

35. See, e.g., *Cavalier v. Random House, Inc.*, 297 F.3d 815 (9th Cir. 2002) (finding drawing in children’s book that included arrangement of stars and clouds similar to plaintiff’s drawing substantially similar, despite significant overall differences in the drawings); *Castle Rock Entm’t, Inc. v. Carol Publ’g Group, Inc.*, 150 F.3d 132 (2d Cir. 1998) (finding trivia book questions quizzing readers about their knowledge of plot incidents from “Seinfeld” television series substantially similar to television show); *United States v. Hux*, 940 F.2d 314 (8th Cir. 1991) (sustaining criminal copyright conviction in a case involving computer programs, despite evidence that only 205 bytes of defendant’s program were similar to copyright claimant’s 16,384 bytes), *overruled by United States v. Davis*, 978 F.2d 415 (8th Cir. 1992); *Baxter v. MCA, Inc.*, 812 F.2d 421 (9th Cir. 1987) (use of six-note sequence creates substantial similarity); *Whelan Assocs., Inc. v. Jaslow Dental Lab., Inc.*, 797 F.2d 1222 (3d Cir. 1986) (finding substantial similarity based on appropriation of computer program’s structure and organization, despite parties’ agreement that there was no literal copying of program code); *Horgan v. MacMillan, Inc.*, 789 F.2d 157 (2d Cir. 1986)

by definition, a qualitatively substantial taking. And that fact points toward very wide copyright liability under the substantial similarity standard. This is especially true in light of an *aperçu* from Judge Learned Hand's opinion in *Sheldon v. Metro-Goldwyn Pictures Corp.*, an early motion picture copyright case, which has become a commonplace in courts' judgments of substantial similarity: "no plagiarist can excuse the wrong by showing how much of his work he did not pirate."³⁶

Our primary concern, in weighing in on these policy questions, was to show that this particular approach was apt to interfere substantially with the industry's ability to develop and sustain trends via design copying. Placed in the fashion context, the substantial similarity standard would sweep a lot into its net. On that basis (and our concern over the economic impact of extensive and uncertain litigation) we thought the harms that would flow from this extension of this standard were likely to substantially outweigh the benefits. Again, in this branch of the debate neither we nor, apparently, anyone else, had need of fine distinctions between line-by-line copying and copying to create derivative works. Indeed, when the possibility of such a distinction was raised early in the consideration of the House bill,³⁷ it was, to our understanding, rejected immediately by the representatives of Council for Fashion Designers of America (CFDA) and has never surfaced again, at least in the form of any proposal for changes to legislative language.

For these reasons, the assertion that we failed to separate line-by-line copying from the creation of trends misses the mark. Our point was that a broad

(finding three black and white photographs of ballet performance infringe copyright in choreography of lengthy ballet); *Grand Upright Music Ltd. v. Warner Bros. Records, Inc.*, 780 F. Supp. 182 (S.D.N.Y. 1991) (finding use of three words and short musical phrase creates substantial similarity); *Kisch v. Ammirati & Puris, Inc.*, 657 F. Supp. 380 (S.D.N.Y. 1986) (finding substantial similarity based on similar "underlying tone or mood" of photographs, despite significant differences in subject, pose, lighting, and other elements); *Bright Tunes Music Corp. v. Harrisongs Music Ltd.*, 420 F. Supp. 177 (S.D.N.Y. 1976) (finding substantial similarity in unconscious copying of three-note and five-note phrase from musical composition); *Robertson v. Batten, Barton, Durstine & Osborne, Inc.*, 146 F. Supp. 795 (S.D. Cal. 1956) (finding copying two bars of musical composition creates substantial similarity); *see also Universal Pictures Co. v. Harold Lloyd Corp.*, 162 F.2d 354, 360 (9th Cir. 1947) ("[A]n infringement is not confined to literal and exact repetition or reproduction; it includes also the various modes in which the matter of any work may be adopted, imitated, transferred or reproduced, with more or less colorable alterations to disguise the piracy."); *Davis v. E.I. du Pont de Nemours & Co.*, 240 F. Supp. 612, 621 (S.D.N.Y. 1965) ("[P]araphrasing is tantamount to copying in copyright law."); *cf. Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 798 (6th Cir. 2005) (finding two-second sample of guitar solo infringing, noting "no substantial similarity or de minimis inquiry should be undertaken at all when the defendant has not disputed that it digitally sampled a copyrighted sound recording").

36. 81 F.2d 49, 56 (2d Cir. 1936).

37. *See Hearings on H.R. 5055, supra* note 33, at 7 (Rep. Bob Goodlatte asking whether language in bill should be tightened "to make it clear that it only protects against copies that are significantly similar and not those merely inspired by other designs.").

freedom to copy is vital, because copying drives the trend cycles that in turn drive consumption of fashion. Yet the creation of fashion design derivatives involves “copying” just as surely as the creation of exact copies does, at least as the copyright law understands the meaning of the term.

At this later point in the debate, Hemphill and Suk want to shift the ground away from the substantial similarity standard and its wholesale condemnation of both line-by-line and derivative copying. We think they are right to do so. But Hemphill and Suk err when they characterize themselves as occupying a middle position between us and the high-protectionists who wish to impose standard copyright rules on the industry.³⁸ They do not occupy the middle, but rather a position very close to our own. Their “squint test” standard is a far cry from the sweeping understanding of substantial similarity that undergirds contemporary copyright doctrine.

We also have an important prudential concern. As an empirical matter, Hemphill and Suk’s distinction between line-by-line copies and derivative works is unobjectionable—although, for reasons we detailed above, they make rather more of this distinction than we think it merits. It is crucially important, however, to underscore that U.S. copyright law does *not* distinguish between the two types of copying in the way that Hemphill and Suk do. Indeed, in defending the superiority of their distinction, Hemphill and Suk argue that our usage of “copy” in the *Piracy Paradox* is “contrary to ordinary and fashion-industry usage.” They contend that “copy” suggests a close copy, not a reworking.³⁹

Again, we are guilty as charged, and deliberately so. They are correct that there is not a single meaning for the word “copy” in ordinary language. One may differentiate colloquially between many types of copies—close, exact, partial, and so forth. But U.S. copyright law is different, and it does not follow the usage of fashion insiders or the general public.⁴⁰ Instead there is a well-developed set of doctrines, internal to the copyright law and the judicial opinions interpreting it, that controls what constitutes a “copy” for purposes of infringement. As applied to fashion design, these doctrines make clear that both line-by-line copying and the more limited appropriation required to create a derivative design would be unlawful.⁴¹ In short, for analytic purposes we believe the relevant meaning of “copy” is that of a judge interpreting copyright law, not a fashion designer operating within her very different world.

38. Hemphill & Suk, *supra* note 6, at 1153.

39. *See id.* at 1181-82.

40. Fashion insiders, moreover, often traffic in apocryphal rules about permissible copying, such as the common belief that copying more than twenty percent of a garment will result in infringement. Interview with Ilse Metchek, President, California Fashion Association (Mar. 25, 2009).

41. *See* 17 U.S.C. § 106(1) (2006) (reproduction right); 17 U.S.C. § 106(2) (2006) (derivative work right).

This point is not only doctrinal. If the past is any guide, any copyright standard that is enacted for fashion design—even one initially narrower than the generally applicable substantial similarity standard—will tend to become increasingly expansive and prohibitory over time.⁴² This is the clear trend in copyright law as a whole. Copyright started as a very limited right to control “printing, reprinting, publishing, and vending” of maps, charts, and books for fourteen years, renewable once if the author survived the initial term.⁴³ Even this limited right was extended only to authors who complied with a demanding set of formalities, including registration, deposit, marking of published copies, and renewal.⁴⁴ Today, copyright extends a very broad range of rights that afford rightsholders powerful control over the use of a much wider range of creative works. Copyright law today defines as infringing conduct any not-insubstantial use of material protected by copyright, and it employs this inaptly named “substantial similarity” standard to judge the legality of copies, derivative works, public performances, and public displays. These broad rights are granted for terms that average nearly a century and are no longer conditioned on compliance with any mandatory copyright formality. The result has been a tremendous expansion both in the amount of creative work subject to copyright law and the types of conduct that are treated as infringing.

The law’s expansion has been accompanied and in some ways induced by an ideological shift. The exclusive rights granted by copyright law were, at copyright’s inception into U.S. federal law, treated as a limited and wholly instrumental departure from the norm of free competition in creative works.⁴⁵ Over time, copyright’s ideology shifted toward a conception that treats exclusive rights as the baseline, and competition as the threat to creative incentives. Copyright’s exclusive rights are, moreover, no longer viewed wholly or even mostly in utilitarian or instrumental terms, but as reflecting basic fairness toward creators. These developments have laid IP policymaking (and judicial decision making) wide open to inapt analogies between real and intellectual property.⁴⁶ IP rights ought to be crafted to ensure proper incentives for innovation and creativity, while also facilitating wide public access to knowledge. But they are increasingly talked about and treated as if they are absolute property rights that need vigilant defense against any and all trespasses by “pirates.” Too often the result is that initially limited IP rights are either

42. See Neil Netanel, *Why Has Copyright Expanded?: Analysis and Critique* (UCLA Sch. of Law Pub. Law & Legal Theory Research Paper Series, No. 07-34, 2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1066241.

43. Act of May 31, 1790, ch. 15, 1 Stat. 124 (1790).

44. Christopher Sprigman, *Reform(aliz)ing Copyright*, 57 STAN. L. REV. 485, 492 (2004).

45. See, e.g., JAMES BOYLE, *THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND* (2008).

46. See generally *id.*; WILLIAM W. FISHER III, *PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT* (2004); LAWRENCE LESSIG, *REMIX* (2008); Mark Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031 (2005).

extended beyond reason by Congress or interpreted ever more stringently by the courts.

A full exploration of this shift is far beyond the scope of this essay. But Hemphill and Suk's "squint test," based as it is in an instrumentalist model of fashion consumption, will likely be caught up in the powerful noninstrumentalist current that is sweeping the whole of copyright law toward complete proprietization. For these reasons, even a narrow expansion of copyright law to cover fashion design would likely soon grow into something much more encompassing—and possibly harmful to the fashion industry.⁴⁷

D. *Who Benefits from Stronger Design Protection?*

Let us set these problems aside and take the squint test exactly as Hemphill and Suk present it. One immediate question is, who is doing the squinting? It appears that it is the ultimate fact finder (the jury, or the judge in a bench trial) who must determine (1) that the defendant copied, and (2) that the copying is so close that it meets the squint standard. A fashion copyright case based on a squint test that involves any contested issues of fact—Did the defendant copy? Would an ordinary person perceive a difference between the two garments?—is poorly suited for summary disposition. And a form of litigation that must in most circumstances proceed to a trial on the merits disfavors resource-poor parties even more than expensive federal court litigation typically does.

This observation is important in part because Hemphill and Suk assert that fashion's current low-IP equilibrium disfavors less-well-known and new designers. In our view, the converse is more likely true. First, the assertion that fashion's low-IP regime harms small designers lacks empirical support. Even a cursory look at the fashion industry will reveal thousands of new and young designers competing for their place in the industry, seemingly undeterred by the prevalence of fashion copying—and, often, engaging in it. But more importantly, extending copyright is likely to harm, not help, new or small designers. Relatively unknown and poorly funded entrants are at a disadvantage, relative to a rich and well-known incumbent, in most any market. However, fashion's low-IP equilibrium does at least deprive large fashion firms of one anticompetitive tool that big firms operating in high-IP markets often use to grind down upstarts: lawyers.

47. There is yet another problem with the proposal for a limited copyright for fashion design: how to determine what is the "original" and what is the "copy." The Senate version of the Design Piracy Prohibition Act, S. 1957, for example, proposed addressing this through a registry system. The administrative burden of this system would of course be great. As the head of the California Fashion Association has noted, in spring '09 alone some 300 runway shows took place in Milan, each featuring dozens of items. To create the capacity for registering 10,000 or more garments per season is likely well beyond the current capacity of the Copyright Office. Interview with Ilse Metchek, *supra* note 40.

Given this baseline, it is unlikely that introducing lawyers into the mix will make things better for the weak at the expense of the strong. We should not forget that in a system of fashion copyright new entrants may be defendants as well as plaintiffs, and that the threat of lawsuits, the creative and even frivolous use of cease-and-desist letters, and the potentially massive statutory damages and other powerful remedies available under current law⁴⁸ (remedies which the proponents of fashion copyrights have attempted to further increase), will oblige small-fry and large incumbents alike to spend time and resources “clearing” designs and contesting claims. These costs—and the residual risk of litigation even when efforts are made to avoid liability—are more easily borne by large firms. (Indeed, the support for a new legal regime shown by many leading fashion designers, as discussed in the next section, is consistent with this view—they are the relative beneficiaries).⁴⁹ The effect of a fashion copyright regime may be precisely the opposite of what Hemphill and Suk intend.

E. What Does the Fashion Industry Want?

Finally, some might argue that the proper legal regime in a given economic domain ought to reflect the stated preferences of the regulated industry. We disagree with this producerist perspective in general: it ignores consumer interests and therefore cannot fairly assess policy in terms of overall social welfare. Aside from this general objection, we think there is substantial reason to be particularly wary of enacting the preferences of the regulated parties in the context of IP policy. Collective action problems are especially intense in the context of IP policymaking, and they distort policy in favor of producer interests. In IP-producing industries such as recorded music, motion pictures, and commercial software and book publishing, a few large producers control a significant share of output. In contrast, consumers of these IP goods are many and dispersed. Producers are therefore in a much better position to overcome the costs of organizing to seek favorable changes to the law. Large producers internalize significant benefits from favorable legal changes, whereas individual consumers benefit only marginally.⁵⁰ The result is policy skewed

48. See 17 U.S.C. § 504 (2006) (specifying measures of actual and statutory damages available to prevailing copyright plaintiffs); 17 U.S.C. § 505 (2006) (authorizing courts to award costs and attorney fees to prevailing copyright plaintiffs).

49. The role of litigation threat is of course hard to discern. Hemphill and Suk focus on existing litigation trends to suggest that design protection is desirable. While we welcome their efforts to look empirically at the question of fashion litigation, what they offer is a mélange of different types of cases, including trademark and fabric print cases (both covered by existing IP law). See Hemphill & Suk, *supra* note 6, at 1174 tbl.1. Given that the design protection they espouse does not apply to either category, and given that current law already does, it is hard to know what inferences ought to be drawn from these cases.

50. See generally BOYLE, *supra* note 45; LESSIG, *supra* note 46; MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION (1965); George J. Stigler, *The Theory of Economic*

toward producer interests, at the expense of consumers and overall social welfare.

A version of this same story applies in the fashion industry. Elite designers—the people who run the CFDA—are few and probably would be positioned to benefit from the legal change that they have proposed. But there is certainly little reason to believe that their interests align with those of nonelite designers, or of manufacturers, distributors, retailers, consumers, or, indeed, overall welfare. That said, even if we are skeptical that the designers' preferences are likely to coincide with social welfare, it may nonetheless be helpful to know what industry preferences are.

We think there is substantial evidence against the view, espoused by Hemphill and Suk, that the American fashion industry is strongly opposed to design copying.⁵¹ The CFDA in reality only represents a small number of elite and often very successful designers. (Members include such luminaries as Tom Ford, Calvin Klein, Ralph Lauren, and Diane von Furstenberg.)⁵² CFDA designers tend to dominate the press on the issue of design piracy in fashion, in part because they are famous names and sometimes colorful figures. But they cannot be said to represent the industry as a whole. A large number of apparel firms, particularly those in the California Fashion Association (fashion is the largest manufacturing industry in Los Angeles, the second largest city in the nation), have made clear that they are opposed to legal protection for fashion designs.⁵³ And the member firms of the American Association of Footwear and Apparel (AAFA), the major national trade association representing apparel companies, held a vote and found that opinion was too divided to allow it to support the proposed design protection legislation.

If this was not evidence enough of the substantial disagreements within the fashion industry over expanding copyright protection, one need only look at the

Regulation, 2 BELL J. ECON. & MGMT. SCI. 3 (1971). Aside from the policy distortions arising from collective action asymmetries, the content industries have a substantial record of misjudging which intellectual property and technology policies will serve their long-term interests. The motion picture industry was deeply opposed to the VCR and fought it in the courts; that they lost is probably one of the best things that ever happened to the industry, which went on to earn billions from the sale of videos and DVDs. See *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984). A similar and more recent example is the early resistance of the recorded music industry to online music selling. The industry's failure to get behind a consumer-friendly online market contributed first to an explosion of illegal music file-swapping over peer-to-peer networks, and then the rise to market dominance of Apple's iTunes service—which now threatens to displace the record labels as the major player in the distribution of recorded music. See Christopher Sprigman, *The 99¢ Question*, 5 J. ON TELECOMM. & HIGH TECH. L. 87 (2006).

51. Hemphill & Suk, *supra* note 6, at 1183-84.

52. For the membership roll, see Council of Fashion Designers of America, <http://www.cfda.com> (follow the "Members" hyperlink) (last visited Feb. 18, 2009).

53. One of us (Raustiala) has consulted with the California Fashion Association regarding its efforts to meet with California Senators and Congressmen and women in order to express opposition to the proposed design copyright legislation.

long-term stability of the current low-IP regime. Despite scattered and generally feeble efforts over the last few decades to amend the law, fashion design has remained outside the scope of American copyright.⁵⁴ In a world in which content providers have, in recent years, successfully lobbied Congress for an amazing array of new protections, it bears repeating that the persistence of the current legal regime for apparel is remarkable. We think the most compelling explanation for this doctrinal persistence is the simplest: the industry's preferences have been too heterogeneous, and too many players have perceived ample benefit and little downside from the freedom to copy and draw inspiration.

CONCLUSION

To many, the IP dimensions of the fashion industry probably seem trivial. Fashion has never received the scholarly attention granted to other creative industries, such as music, film, or even fine art. Yet the apparel industry is both economically significant and highly creative. Most significantly, fashion operates under an unusual legal regime, in which design appropriation is a pervasive aspect of the business. That the industry remains viable, and even vibrant, in the face of widespread copying is both interesting and important.

The Law, Culture, and Economics of Fashion is a welcome contribution to the growing literature on the IP of fashion. We certainly disagree with Hemphill and Suk on the particulars of legal reform in the area, and we have deeper theoretical disagreements as well. But we are nonetheless pleased that they have tackled the issue in a serious manner, and have offered a novel synthesis of cultural and economic analysis.

Like other recent work on fashion, cuisine, magic, and the like, *The Law, Culture, and Economics of Fashion* also helps us to better understand IP's negative space. It is understandable why lawyers and legal scholars would largely focus on what IP law protects, rather than what it ignores. But we believe that understanding why some forms of creativity are in IP's domain while others are out is an urgent and important task. The larger lessons that can be drawn from fields like fashion and food are not yet clear. But to some degree this is a function only of our long-standing inattention and resultant (albeit remediable) ignorance, and for this reason we are glad that more scholars now see fit to explore these unusual fields.

Moreover, a better understanding of the dynamics of creativity in fashion and other fields where intellectual production takes place without, or with little,

54. Hemphill and Suk claim that the reason we do not see copyright protection for fashion design—the central question in our original paper—is that the designers “are not sufficiently powerful” and were opposed by retailers and manufacturers. Hemphill & Suk, *supra* note 6, at 1184. We addressed this hypothesis at length in *The Piracy Paradox* and rejected it. While the question is hardly closed, nothing in *The Law, Economics, and Culture of Fashion* changes our view on this point.

IP law will shed new and important light on the ongoing debates over the proper scope of IP rights. As many scholars before us have argued, IP rights are costly monopoly grants that ought to be created only when necessary to foster innovation. If, indeed, substantial innovation occurs absent legal protection, we ought to know why and when. The fashion industry, which survives and even thrives without substantial IP protections for its designs, provides an excellent window on this question.

