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**Upstairs/Downstairs, Fashionwise: A View of Design Protection from Lower Down the
Food Chain**
Diane Leenheer Zimmerman¹

“NYC: Tolerant of your beliefs, judgemental of your shoes.”²

Introduction:

The claim that fashion designers need intellectual property protection to thrive and maximize their creative output is one that has prompted sharp disagreements for decades, particularly in the United State. Under American law, the stuff of fashion must grab its scant protections higgledy-piggledy under trademark law, design patents, and from the fringes of copyright.³ To some, that result is just fine.⁴ Jonathan Barnett has hypothesized that counterfeit fashion items of obviously lower quality than the originals may actually benefit designers by increasing the “snob value” of the real thing, and by encouraging people to buy the “real thing.”⁵ Professors Raustiala and Sprigman have concluded that the lack of comprehensive protections for designers, net-net, has been generally beneficial: we have enjoyed gains to innovation, they argue, from allowing the fashion cycle to be driven at high speed, at least in significant part, by

¹ Samuel Tilden Professor of Law Emerita, New York University School of Law

² Advertisement for Manhattan Mini-Storage Company, 2012.

³ FN on existing law

⁴ Cite to opponents of fashion design protection

⁵ Cite to Barnett

the absence of serious intellectual property protection.⁶

Others, as one might expect, vigorously disagree.⁷ Many countries, they point out, do offer such protection, a strong hint to the skeptical that, once more, the United States is behind the international curve in modernizing its law. The interests of established designers and new ones are delineated at length. Even the claim of wealthy consumers not to have their distinctive brands imitated by the lower classes is given credence as a reason to maintain design exclusivity.⁸ The success of major copyists – Forever 21, Zara’s and H & M – are put forth to illustrate the damage designers face from dilution of the relative inaccessibility to ordinary folk of their output.⁹ Advocates of protection less sympathetic to the snob value of fashion nevertheless may remain convinced that designers need (and deserve) more comprehensive coverage under

⁶ Cite to Sprigman and Raustiala. Indeed to some scholars, the constant change in style is what defines fashion. Svendsen says that “something is fashion only if it functions in a socially distinctive way and is part of a system that replaces it relatively quickly with something new.” Lars Svendsen, *Fashion: A Philosophy* at 14 (trans. John Irons 2006) (2004).

⁷ List articles favoring design legislation

⁸ Kristin L. Black, *Crimes of Fashion: Is Imitation Truly the Sincerest Form of Flattery?*, 19 *Kansas J. L. & Pub. Pol.* 505, 524 (2010). Black suggests that adoption of things like the Burberry plaid by lower class groups in Britain reduced demand for the original because the wearing of garments using the plaid had ceased to be a mark of distinction for Burberry’s wealthy consumers. See also, Nizar Souiden, Bouthaina M’Saad & Frank Pons, *A Cross-Cultural Analysis of Consumers’ Conspicuous Consumption of Branded Fashion Accessories*, 23 *J. Intern’l Consumer Marketing* 329, 339-40 (2011) (arguing that luxury fashion houses should not mass-market their brands because if they do, their products will no longer appeal to individuals engaged in conspicuous consumption); Dwight E. Robinson, *The Economics of Fashion Design*, 75 *Quarterly J. Econ.* 376, 398 (1961) (purchasers of luxury goods do so because they are in pursuit of “demonstrable rarity for its own sake”).

⁹ Cites

intellectual property law. Fashion design, they remind the reader, is akin to the kinds of creativity that go into the creation of formal artworks or literary works.¹⁰

It is not my aim in this Article to enter the fray over the merits of the fashion debate as it has been framed thus far. Rather, my purpose is to suggest that Congress exercise caution in changing the existing regime in light of an interest that thus far has only surfaced only in the briefest and most tangential way in this debate: the consumer's stake in "knock-off" fashion. Although this Article makes no case for counterfeits,¹¹ fashion articles that overtly claim to be what they are not, it does suggest that positive social benefits flow from a legal regime that allows ready access to "knock-offs." This position will undoubtedly seem odd to some, akin perhaps to inquiring whether we should take into account in deciding whether to enforce copyrights whether consumers are benefitted if they can acquire pirated copies of sound recordings or books. Certainly, they would likely benefit from lower prices, but increasing consumer surplus has not been considered a sufficient justification for permitting copyists to operate outside the confines of an intellectual property regime.

But the situation here is different. The design of articles of clothing, with the narrow exceptions of patentable designs, decorative overlays and textile patterns, have never been

¹⁰ "The right to intellectual property ownership is crucial for encouraging innovation among our country's artist and scientists, and the exact same reasoning applies to fashion design." Sara R. Ellis, Comment: *Copyrighting Couture: An Examination of Fashion Design Protection and Why the DPPA and IDPPA Are a Step Towards the Solution to Counterfeit Chic*, 78 Tenn. L. Rev. 163, 186 (2010).

¹¹ By a counterfeit, I mean an item that falsely purports to come from a particular designer or design house by bearing a fake label or trademark.

protected in the United States. Although French copyright law has covered clothing design since the eighteenth century,¹² designers of clothing, shoes and handbags elsewhere generally have made do without, or with largely ineffective, intellectual property protection, aside from trademarks, around the globe during much of the modern history of fashion as a business. Protection, to the extent it exists, has been a work-in-progress -- ratcheting up mostly in the later half of the twentieth century, well after the development of a modern, mass-manufactured clothing industry. Sweden, for example, did not include fashion under its intellectual property laws at all until 1960.¹³ Clothing protection in most countries tends to be lumped under the general category of design protection, along with washing machines and kitchen gadgets. The impetus for the earliest form of design protection in Japan, which did not widely adopt Western-style clothing (and with it the so-called fashion cycle) until the mid-twentieth century,¹⁴ was for textiles rather than the clothes made from them.¹⁵ As the scope of design protection expanded, it nevertheless tended to be weak and rarely much enforced.¹⁶ Only starting with the Design Act of 1959, was heightened general design protection through a modernized registration system put

¹² France has protected the design of clothes since its first copyright act in 1793. **Cite**

¹³ Marianne Dahlén, *Copy or Copyright Fashion? Swedish design protection law in historical and comparative perspective*, 54 *Business History* 88, 100 (2012).

¹⁴ Toby Slade, *Japanese Fashion: A Cultural History* at 7 (2009) (“In terms of making that ultimate self-identification as modern, donning Western-style clothing, the majority of the population waited until well into the twentieth century.”)

¹⁵ Christopher Heath, *Intellectual Property and Anti-Trust in History of Law in Japan Since 1868* at 459 (ed. Wilhelm Röhl 2005).

¹⁶ *Id.* at 406.

into place.¹⁷ Although Britain, like Japan, had long offered special protection to its textile industry, for a very long time fashion seems not to have been a particular focus of interest. Even after a comprehensive design registration system became available in 1949,¹⁸ the fashion industry felt underprotected; as a result, more particularized protection was enacted in 1988 in the form of the Copyright, Designs and Patents Act.¹⁹ The European Union has continued to be concerned about the spottiness and inconsistencies in its members' national law on the subject of design. They proposed the first new directive protection in 1991,²⁰ a scheme that did not go into effect, however, until 1998.²¹

¹⁷ Id. at 459. See Design Act, Act No. 25 of 1959 available in an unofficial translation at <http://www.cas.go.jp/jp/seisaku/hourei/data/DACT.pdf>. The law was amended in 2006 to extend the term from 15 to 20 years. <http://www.wipo.int/wipolex/en/details.jsp?id=7080>.

¹⁸ Intellectual Property Office, History of Designs, at <http://www.ipso.gov.uk/types/design/d-about/d-what/d-history.htm>.

¹⁹ British Copyright Council, Protection of Designs in the UK: Fashion Design (Information Sheet 17), available at <http://www.britishcopyright.org/pdfs/info/infosheet017.pdf> (Last visited May 7, 2012). Under this law, a garment can be protected under copyright if it is a work of artistic craftsmanship. Other garments receive shorter terms of protection under the design right. Id.

²⁰ At the time the European Union began to consider harmonization of design protection law, 11 member states had some kind of design registration system domestically, and seven member states adhered to the 1925 Hague Agreement on the International Deposit of Models and Designs. Some states had no domestic law on the subject. Commission of the European Communities, Green Paper on the Protection of Industrial Design at 2 (1991), available at http://aei.pitt.edu/1785/1/design_gp_1.pdf.

²¹ European Parliament and Council, Directive 98/71/EC on the Legal Protection of Designs (Oct. 1998), available at <http://eur-lex.europa.eu/LexUriServ.do?uri=CELEX:31998L0071:en:html>. The initial Design Directive required that members permit registration of designs, giving the owner exclusive rights for a minimum of five years, with renewals that could extend protection up to 25 years.

In short, the reliance of designers on intellectual property protection is either nonexistent at present or at best of relatively recent vintage. The result is that evidence of the need for, and benefits from, a serious legal regime of protection is at best empirically murky on the merits. If the United States Congress finally decides to adopt protection for fashion design after decades of considering and tabling design protection generally, its position – given the uncertainties -- will have to be based on conjecture rather than solid evidence about whether going that route will lead to a more favorable outcome for designers. In the process of deciding, hopefully, it will also give serious thought to the impact of its decision on all the players in the mix, including not just designers and manufacturers, garment workers, and retailers but on the clothing customer her- or himself.

The focus of this paper will be on the interests of fashion consumers, particularly those of middling to modest means, who have, for various reasons, remained barely visible in the current debate. The article in Section I attempts to explain why this important interest has played such a minor apparent role in the debate here and abroad about how to protect fashion designers. Part II then turns to an examination of the consumer and what is at stake for him or her, from a political and psychosocial perspective. It discusses the expressive role of dress as well as its role in supporting basic beliefs in social egalitarianism. Finally, it turns to the actual legislative regime proposed in the United States, and to a discussion of why the author remains unconvinced that fashion design protection, at least as currently conceived, is simply a bad idea for the population

Subsequently, in 2002, an additional change was made, allowing “new” designs with “individual character” to be protected without registration for three years. Council Regulation 6/2002, 2002 O.J. (L 3) 1 (EC). Apparel is a category subject to such registration.

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as a whole.

I. She's Frivolous, She's Female, and She's Unliberated Besides

When the House of Representatives held hearings on proposed versions of bills to protect fashion design in 2006, and again in 2011, the witnesses were either representatives of the fashion industry or academics who debated the wisdom of passing such laws based on economic theory and disparate views of what constituted appropriate spurs to innovation.²² No consumer representatives testified.²³ In short, the consumer of fashion has remained largely underground and invisible in the design protection debate. This result is partly attributable to the workings of public choice theory, but I would argue that it is also fairly attributable to three quite different but inexorably linked beliefs: fashion is frivolous, fashion appeals mostly to women, and women who care about fashion simply are exhibiting their unfortunate tendencies toward consumerism and toward embracing their male-defined roles as sex symbols.

With such a trifecta of suspicious attributes, it can scarcely be surprising that the interest

²² In 2006, the witnesses were a fashion designer, Jeffrey Banks, Professor Christopher Sprigman (an opponent of the bill), Professor Susan Scafidi (an advocate for designers) and David Wolfe of the Doneger Group, a leading fashion forecasting group. H. R. Comm. On Jud. Hearing Information on H.R. 5055, 109th Cong., 2nd Sess., July 27, 2006, available at <http://www.gpo.gov/fdsys/pkg/CHRG-109hhr28908/mods.xml>. In 2011, they were again Professor Sprigman, Professor Jeannie Suk of Harvard, Lazaro Hernandez (the designer for and co-founder of Proenza Schouler) and Kurt Courtney, representing the American Apparel and Footwear Assoc. See House of Rep. Comm. on Jud. Hearing Info. On H.R. 2511, 112nd Cong., July 15, 2011. See http://judiciary.house.gov/hearings/hear_07152011.html. (Visited May 7, 2012)

²³ Objections to the proposed legislation were filed by **Complete footnote!! Re industry positions**

of the average consumer has played such a minor role in determining the desirability of fashion design protection. The only consumer who seems to count at all is the one whose means allow her to purchase the high-end couture, ready-to-wear clothes and accessories produced by the would-be protected class of designers. It is this consumer who act as an advertisement for the skills of the designers and whose purchases reinforce their claims to exclusivity. This customer, too, is female, “frivolous” and “unliberated,” but without her and the contents of her wallet, the endeavor of “fine design” in apparel would lack an economic point.

The presence of these elements clearly account for the defensive tone many academics feel compelled to take in explaining their interest in fashion as a discipline. As one such scholar remarked, “One who dares broach the topic [of fashion to a group of academics] will have confessed an interest in a subject that the group agrees bespeaks vanity or worse.”²⁴ Another observed that “Much of what has been written on this subject by philosophers has been negative”²⁵ Even those who cared a great deal personally about their appearance could be dismissive of the desire in others to be fashionable. Emmanuel Kant, one of the earliest modern thinkers to write about clothes, is described by Lars Svendsen as much given himself to silk shirts and silver

²⁴ Samantha Brennan, *Fashion and Sexual Identity, or Why Recognition Matters*, in *Fashion: Philosophy for Everyone* (Jessica Wolfendale & Jeanette Kennett eds) (2011) [hereinafter *Philosophy*] at 121. Kant was not alone. John Harvey points out that, in his criticism of attention to dress in Plato’s Republic, Socrates directed his greatest annoyance at articles having “to do with women’s adornment.” John Harvey, *Clothes* at 8 (2008).

²⁵ Marguerite La Caze, *A Taste for Fashion*, in *Philosophy*, supra note 10, at 200.

shoe buckles,²⁶ but, nevertheless, he denigrated the practice of following fashion as belonging “to the style of courtiers, especially ladies.”²⁷

The evils attributed to an interest in clothing and physical appearance have been numerous. Centuries ago, the charge was attempting to climb above one’s station, and such effrontery was countered with sumptuary laws, laws not coincidentally (as we will see below), largely enforced against women.²⁸ Charges range from creating an overemphasis on “change for its own sake, the body, imitation, superficiality,” to “limiting of independence of women.”²⁹ Add to this list such other ills as fostering of “depthless materialism,” and encouragement of “perpetual dissatisfaction over one’s current lifestyle and physical appearance,”³⁰ and it is easy to assume that any interest a consumer may have in fashion and “looking good” has received less than comprehensive attention in the debate over protection of designers.

Further muddying the fashion waters is the assumption that clothes are a trap sprung by

²⁶ Lars Svendsen, *Fashion: A Philosophy at 18* (John Irons trans. 2006) (2004). Kant is quoted by Svendsen as having once said that “It is always better ...to be a fool in fashion than a fool out of fashion.” *Id.*

²⁷ Immanuel Kant, *Anthropology from a Pragmatic Point of View*, at 246 (Robert B. Louden trans. 2006). See also Dwight E. Robinson, *The Economics of Fashion Demand*, 75 *Quarterly J. Econ.* 376, 378 (1961) (noting that the study of fashion “has had a rather checkered career; after all, it bespeaks a side of life which rationally disposed men are bound to dismiss as sheer feminine caprice”).

²⁸ Alan Hunt, *The Governance of Consuming Passions* at 214 (1996).

²⁹ La Caze, *supra* note __, at 200.

³⁰ Craig J. Thompson & Diana L. Haytko, *Speaking of Fashion: Consumers’ Uses of fashion Discourses and the Appropriation of Countervailing Cultural Meaning*, 24 *J. Consumer Res.* 15, 16 (1997).

men on hapless (or infantilized) females. Thorstein Veblen, in his much celebrated book, The Theory of the Leisure Class, contended that clothes were not merely a marker of social status (more on this later), but also a way of turning the women in the families of prosperous men into display objects, embodying tangible evidence of the male's success by making clear that he could afford costly clothes for "his females," but perhaps even more important, that they need not lift a hand in common labor. Veblen called this phenomenon Conspicuous Leisure, and tartly noted, "The substantial reason for our tenacious attachment to the skirt is just that: it is expensive and it hampers the wearer at every turn and incapacitates her for all useful exertion."³¹

Although times and the lives of women have changed and enlarged since Veblen's day, his take on fashion as a constraint on the freedom of women remains, expressed now in the writings of modern feminists who see women as bullied by cultural pressures to model themselves after some feminine ideal, and even as guilty of colluding with their own oppression. Simone de Beauvoir in her famous work, The Second Sex, expressed early on what has become a received wisdom on the sexist forces at work in promoting the interest women in clothes:

A man's clothes, like his body, should indicate his transcendence and not attract attention; for him neither elegance nor good looks call for his setting himself up as object. Moreover, he does not normally consider his appearance as a reflection of his ego.

"Woman, on the contrary, is even required by society to make herself an erotic object. Fashion, to which she is enslaved is not to reveal her as an independent individual, but rather to cut her off from her transcendence in order to

³¹ Thorstein Veblen, The Theory of the Leisure Class at 126 (Modern Library 2001) (1899).

offer her as prey to male desires...³²

It is certainly fair to state that women have been bullied not only by the expectation that they always look their best, but also by the accusation when they make the effort to do so of frivolousness, triviality and conformity to a stereotype.³³ Particular styles and colors of clothes have also been imposed to mark off distinctions between males and females and to set standards for what is considered appropriate for each sex³⁴ and deviations from those standards can carry with them considerable peril. Western women wear skirts and pink and panty hose and high

³² Simone de Beauvoir, *The Second Sex* at 498 (trans. H.M. Parshley, Bantam 1961) (1949). See also e.g., Germaine Greer, *The Female Eunuch* at 48-50 (arguing that “are required to look expensive, fashionable, well-groomed, and not to be seen in the same dress twice”). **Add cites** A study done in the 1950s by a Columbia sociologist was an example of how scholarship lent credence to the opinion that women were socialized to dress in ways that would appeal to men. The scholar found that women were conscious of dressing for prestige and status, but, he added, “The real basis of conformity [to fashion] seems to be the desire to be attractive to men, though this fact was not consciously recognized.” W. Godfrey Cobliner, *Feminine Fashion as an Aspect of Group Psychology: Analysis of Written Replies Received by Means of a Questionnaire*, 31 *J. Soc. Psychology* 283, 289 (1950). To that, Charlotte Perkins Gilman, a sociologist writing in the early 20th century, would likely have replied, well, what would you expect them to dress for as long as they remain dependent on men for their economic well-being? Charlotte Perkins Gilman, *The Dress of Women: A Critical Introduction to the Symbolism and Sociology of Clothing* at 95-96, 105 (eds. Michael R. Hill, and Mary Jo Deagan(2001)) (collecting Gilman’s 1915 essays)..

³³ There have been psychoanalytic interpretations as well. John Harvey reports that clothing is thought to be used in a masquerade, according to Neo-Freudians, in which “the performance of womanly identity, including the priority given to clothes, is conditioned by anxiety about the absence of a phallus.” John Harvey, *Clothes* at 8 (2008).

³⁴ “Dress demarcates and secures gender. Clothing is one of the basic mechanisms that provides for the legibility of sex and gender. If clothes convey and represent gender it follows that projects concerned with the regulation of dress must, whether intentionally or not, have an impact on the regulation of gender.” Alan Hunt, *The Governance of the Consuming Passions: A History of Sumptuary Law* at 216 (1996).

heels; men only rarely wear pink (shirts on occasion), and – with the exception of kilts – would be seen as engaging in seriously transgressive behavior if they were to appear in such “female” attire as a skirt. Women who wanted to wear pants, which are comfortable and afford greater ease of movement, had an uphill fight to do so against social norms that took a long while to overcome. As an example, four members of the Women Air Force Service Pilots corps (WASPS) were arrested in a town in Georgia during World War II for wearing pants on the street during the evening.³⁵ I remember well in the 1960s Manhattan restaurants that would not seat a woman in a pants suit and in the 1970s law firms that did not permit female attorneys to wear trousers to the office. What woman of a certain age, wearing pants, has not been chastised -- only partly in jest -- by a male who remarks, “Is something wrong with your legs?”

No matter which way one approaches the subject of fashion, the wall of sexism stands ready to facilitate a crash. Women’s interest in their appearance is so commonly used to trivialize them that one is apt not to notice when it happens. Gail Collins, in her book America’s Women, gives an excellent illustration. She tells the story of courageous military nurses who survived imprisonment during World War II in the Japanese camp in Manila. The women who lived through the Bataan death march and got to the prison managed as a group to continue to stay alive during their captivity while others died of “malnutrition and tropical diseases.”³⁶ But, Collins reports, after their release, it was not their heroism that reporters wrote about. Rather,

³⁵ Gail Collins, *America’s Women: Four Hundred Years of Dolls, Drudges, Helpmates, and Heroines* at 368 (2003).

³⁶ *Id.* at 364.

she notes, “[T]he stories about them almost always focused on things like their eagerness to buy cosmetics and to investigate the newest hairstyles.”³⁷

While the stories hopefully would be written differently now, stereotypes remain. What is deemed important, and what is deemed insignificant or even morally deficient, is all too often defined against a male norm.³⁸ As a woman lawyer and academic, I cannot imagine opening a discussion with female colleagues in the faculty lounge about clothes shopping -- not because women in my position are not interested in clothes but because we are more interested in being taken seriously by our peers, and having males overhear that particular conversation would not further the cause. On the other hand, lively discussions of sports or restaurants or the latest films are completely “appropriate” topics for discussion because they fall into familiar male or cross-gendered territory.

At this point hopefully enough has been said to alert interested readers and policy makers alike of the risk that under-explored assumptions may have masked the possibility that significant interests are at stake in the fashion design protection debate that cannot be captured by paying attention almost exclusively to concerns over designers and their high end clients.

³⁷ Id.

³⁸ Note that this norm of male “indifference” to fashion is both overstated and also highly variable over time. Quentin Bell points out that men were often dandies in other periods of Western history, changing their dress to keep current with the times. Quentin Bell, *On Human Finery* at 91-92. He notes that even in the late twentieth century, fashions for men have continued to undergo great changes. He gives the example of having been refused entry to a box at the opera in the 1930s because he was not in evening dress; but by the mid-1970s, one rarely saw men wearing black tie or white waistcoats to the opera – unless, of course, you look at the members of the orchestra. Evening dress, he pointed out, had become by the time he wrote his book largely the purview of waiters rather than of their clients. Id. at 138-40.

II. What Do Women Want? An Examination of What We Might Really Be After When We Shop for Clothes

A. The Politics of Clothes

The subject of clothes and their importance to those who wear them is a matter both of psychological, aesthetic and creative significance, and also of sociopolitical concern, implicating issues of personal freedom, distributive justice and the power dynamics within a nation.

a. Clothes and Self-creation: the Politics of Dressing

An observer once asked, “What does fashion have to do with politics? Many people take fashion to be private and trivial, while politics is public and important, yet from time to time, fashion’s political importance is easier to see.”³⁹ What he has pointed out is both that clothes speak, and that people dress to say something. While the consumer’s interest in having an extensive choice of what styles to adopt does not ordinarily resonate with the casual observer as a serious liberty interest, in fact it is more often one than commonly recognized.

The political significance of symbolic communication through dress is not always subtle. The choice of Muslim women is an obvious example of a case where whether to adopt or reject the wearing of head scarves or veils is not merely personal. It tells us something about the nature of the women’s religious beliefs, and also, in many countries, how she chooses to relate to the will of the state and of authority figures. When women in Polynesia adopted the Mother Hubbard dress, they were not making a charmingly frivolous fashion statement, but were responding to the

³⁹ Jonathan Miller, *Fashion and Democratic Relationships*, 37 Polity 3 (2003). See also Jennifer Craik, *Fashion: The Key Concepts* (2009) at 298 (“Very often, overt political action and ideology have been at the heart of clothing conventions”).

pressure and shaming they experienced from Western missionaries who were appalled by the amount of flesh revealed by indigenous forms of attire.

Dress embodies visually a society's image of itself. In class-bound, hierarchical societies, sumptuary laws attempted to delineate people by class and occupation by means of designating for various groups the appropriate costuming for their stations in life. Societies can also flip the use of dress and turn it into a device that ameliorates class and social markers. Uniform dress as a leveler was a favorite trope of utopian writers,⁴⁰ and marked out the Maoist period in China. The unadorned grey and blue Mao suits adopted by the Chinese for at least three decades not only blurred distinctions between the formerly wealthy and the proletariat, but ameliorated gender lines as well.⁴¹ In a study of the relationship between women's status and attire, the author found that adoption of a unisex style of clothing in the People's Republic of China corresponded with the government's encouragement of women working for the first time outside the home. Their labor was seen as necessary to achieve increased economic productivity.⁴² In the 1960s and 1970s in

⁴⁰ See, e.g., Thomas More, *Utopia, Of Their Trades and Manner of Life* (Project Gutenberg 2005)(1516): "Throughout the island they wear the same sort of clothes, without any other distinction except what is necessary to distinguish the two sexes and the married and unmarried. The fashion never alters, and as it is neither disagreeable nor uneasy, so it is suited to the climate, and calculated both for their summers and winters." Available at <http://www.gutenberg.org/files/2130/2130-h/2130-h.htm>.

⁴¹ It should be noted, however, that distinctions were not totally erased. In a visit in the early 1980s, the author observed that people in positions of power or authority often wore Mao suits of distinctly better cut, fit and fabric than ordinary people.

⁴² Darlene Ora Standridge Ford, *Fashion Indicators of Women's Social Status* at 210-215 (UMI Dissertation Information Service 1986). As a visitor to large cities in China in the late 1980s, when uniform dress was in decline, it was fascinating to see people wearing whatever Western clothes they could get to express a desire for modernity and sartorial freedom, even

the United States, styles of dress were markers for social and political views as much as personal taste. Hippie-style attire, along with miniskirts and the wearing by men of facial hair all spoke to the atmosphere of youthful rebellion against an unpopular war and an older (and presumably out-of-touch) generation.

That unorthodox choices of attire are transgressive is well understood, and societies do not need sumptuary laws or the imposition of formal dress codes to erect standards that one crosses at one's peril. The author Quentin Bell has observed that a sort of morality attaches to dress. When he was writing in the late 1970s, he pointed out that it would be viewed as a violation of an important social code to attend the theater unshaven, or to wear suspenders over the most impeccably correct evening clothes.⁴³ But he goes on to add:

In 'good' society it is not however sheer lunatic eccentricity such as the absence of trousers or a wig worn back to front which excites the strongest censure; far worse are those subtler forms of incorrect attire: the 'wrong' tie, the 'bad' hat, the 'loud' skirt, the 'cheap' scent, or the flamboyant checks of the overdressed vulgarian. Here the censure excited is almost exactly comparable to that occasioned by dishonourable conduct.⁴⁴

Efforts to ensure conformity to such social norms in appearance can come perilously (if not always obviously) close to censorship. The effort of professional women entering the workplace in the 1970s and 1980s to overcome patriarchal assumptions about their capabilities

when the attire was arguably dangerous to the wearer, given his or her activity. The author, for example, observed a young woman repairing the tile on the roof of a temple, dressed in a flowered skirt and a pair of heeled sandals.

⁴³ Quentin Bell, *On Human Finery* (1976) at 19.

⁴⁴ *Id.*

was expressed through the perceived imperative to be very careful about what to wear.⁴⁵ A difficult balance had to be maintained among competing and sometimes inconsistent objectives: avoiding sexualized clothing while also avoiding overly masculine dress, and while choosing clothes that communicated “competence.”⁴⁶ Schools’ and employers’ expectations of conformity to sartorial norms could also exert subtle racist pressure by demanding, for example, that African-Americans eschew Afro hair styles or corn braids. Paulette Caldwell has written movingly on experiencing the reactions of non-blacks to such elements of appearance. She concluded:

Hairstyle choices are an important mode of self-expression. For blacks, and particularly for black women, such choices also reflect the search for a survival mechanism in a culture where social, political, and economic choices of racialized individuals and groups are conditioned by the extent to which their physical characteristics, both mutable and immutable, approximate those of the dominant racial group. Hair becomes a proxy for legitimacy and determines the extent to which individual blacks can “crossover” from the private world of segregation and colonization (and historically, in the case of black women, service in another's home) into the mainstream of American life.⁴⁷

⁴⁵ Susan Faludi, *Backlash: The Undeclared War Against American Women* (1991) at 171, 176 (women dressing for work wanted suits; they did not want frills or clothes that made them look like young girls).

⁴⁶ Kate Gillan, *Choosing an Image: Exploring Women’s Images Through the Personal Shopper*, in *Through the Wardrobe: Women’s Relationships with Their Clothes* at 74 (Ali Guy, Maura Green & Eileen Banim eds. 2001). Quentin Bell commented on the up side of this phenomenon. He noted that as women have become more and more emancipated, they have more freedom to choose more functional clothes because they are less and less forced into the role of symbolizing “conspicuous consumption.” Quentin Bell, *On Human Finery* (1976) at 164.

⁴⁷ Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, [1991] *Duke L. J.* 365, 383. Anita Franklin agrees. She writes that the sexualization of hair braids in the movie *10*, “cost many professional Black women time, money, and valuable energy in their subsequent fight for the right to be able to (continue to) wear braids on their job.” Anita Franklin, *Black Women and Self-Presentation: Appearing in (Dis)guise*, in *Through the Wardrobe: Women’s Relationships with Their Clothes* at 155 (Ali Guy, Maura Green & Eileen Banim eds. 2001).

William Keenan generalizes on the point by arguing that, “Dress is clearly neither culturally nor politically neutral. It is loaded with significance.”⁴⁸ The ability to choose freely what to wear implicates, in his view, “freedom of expression and self-determination, individual liberty and human rights.”⁴⁹

I do not want to make too much of this argument or to imply that limiting variety in available dress through design legislation is ipso facto a free speech violation. But nonetheless it is important to remember that freedom to dress as one chooses is inextricably intertwined with self-expression and personal autonomy. This connection does suggest that cutting off access to knockoffs of new designs implicates interests that go far deeper than mere vanity.

b. The Politics of Clothes: The psychology of self-creation

We dress not merely for warmth or to cover our nudity, but to communicate about ourselves to others. Modern writers on the sociology and psychology of clothing choice claim that today people dress to express their identities or to create them, rather than to raise their apparent social status by emulating wealthier consumers as they did in the late nineteenth century. As this article will show, the latter claim may be turn significantly overstated, but it is clear that the wide availability at a range of prices of fashionable attire has enabled a large swath of the population in Western, and increasingly in non-Western ones as well, to experiment with dress for

⁴⁸ William J. F. Keenan, *Dress Freedom*, in *Dressed to Impress: Looking the Part* at 181 (William Keenan ed. 2001). Keenan writes: “The last thing an open society needs is an all-encompassing shroud of uniform dress rules and regulations. Any and every step in that illiberal direction is to be feared and resisted.” *Id.* at 188.

⁴⁹ *Id.* at 186.

pleasure, to play with identities and to affiliate with desirable groups or role models that are may be, but often are not defined by levels of affluence.

The use of adornment as a source of pleasure and play may be innate across the universe of primates. Hurlock reports that when gestalt psychologist Wolfgang Köhler , who was famous for his studies of chimpanzees, gave the animals ribbons, they draped them around themselves and pranced around displaying their finery, giving every appearance of enjoying themselves enormously. “As Professor Kohler has said,” she wrote, “the objects hanging about the body serve the function of adornment in the widest sense. The trotting about of apes with objects hanging around them not only looks funny, it also seems to give them naive pleasure.”⁵⁰

That dress is a source of pleasure is beyond doubt. At least three sources of pleasure have been identified: touch – the feel of the fabric; bonding with others through the sharing, discussion of or shopping for clothes; and enablement of fantasy.⁵¹ And that pleasure is cross-cultural as well as cross-species. The authors of a study of the second-hand clothing market in Zambia, for instance, concluded that “There is genuine pleasure to be gained from being dressed well which in the view of local observers is a sign of well-being.”⁵²

⁵⁰ Elizabeth B. Hurlock, *The Psychology of Dress: An Analysis of Fashion and Its Motive* at 22 (Ayer Co. 1984)(1929).

⁵¹ Margaret LaCaze, *A Taste for Fashion*, in *Fashion: Philosophy for Everyone* at 211 (eds. Jessica Wolfendale & Jeanette Kennett 2011). See also Stuart U. Rich & Subhash C. Jain, *Social Class and Life Cycle as Predictors of Shopping Behavior*, 5 *J. Marketing Res.* 41, 44 (1968) (women across social classes took pleasure from the “recreational and social aspects of shopping”).

⁵² Karen Tranberg Hansen, *Youth, Gender and Second-hand Clothing in Lusaka, Zambia*, in *Fabric of Cultures: Fashion, Identity and Globalization* at 131 (Eugenia Paulicelli & Hazel Clark eds. 2008).

Even though today there is no one “fashion” standard dictated from on high and individuals who can gain access to contemporary styles put them together in their own ways,⁵³ the interaction with “fashion” remains significant across economic and social lines. Being able to select from a wide range of interesting clothing facilitates the central human activity of identity creation because, as one scholar pointed out, clothes are an extension of the person wearing them. Their role in establishing identity has become much more crucial in an era when the details of sartorial appearance are no longer imposed by tradition.⁵⁴

One use of dress is to engage in the usually pleasurable process of self-enhancement, displaying our bodies in ways that, in our eyes, are attractive to ourselves and appealing to others.⁵⁵ In fact, it has often been said that we dress not so much for ourselves as for others. But what does the other-directedness of our choice of attire mean? That turns out to be a complex and meaty topic. Writers on fashion identify a number of motives for the interest in and choice of clothing, ranging from a desire to fit in to attraction of members of the opposite sex to a desire to stand out from the crowd. But there is general agreement that, whatever else dress facilitates, it is a way of experimenting with and projecting one’s preferred social identity.⁵⁶ Goffman has posited

⁵³ Diana Crane, *Fashion and Its Social Agendas: Class, Gender, and Identity in Clothing* at 134-35 (2000).

⁵⁴ Svendsen, *supra* note __, at 19. He says that aesthetics is central to “the formation of identity.” *Id.* at 141-42.

⁵⁵ Jane Schneider, *From Potlach to Wal-Mart: Courtly and Capitalist Hierarchies Through Dress*, in Paulicelli & Clark, *supra* note __, at 30; Susan B. Kaiser, Richard H. Nagasawa, & Sandra S. Hutton, *Fashion, Postmodernity and Personal Appearance*, 14 *Symbolic Interaction* 165, 172 (1991).

⁵⁶ In this eclectic age, that identification could be with Goth styles, or with athletics ones, or with “ethnic” dress, to give a few examples.

that when individuals interact with others, they strive to present an “idealized performance” of the identity they want others to see. “When an individual plays a part,” Goffman wrote, “he implicitly requests his observers to take seriously the impression that is fostered before them. They are asked to believe that the character they see actually possesses the attributes he appears to possess... .”⁵⁷ Although this sounds as though people are seriously engaged in the perpetration of fraud by creating their preferred identity, Goffman denies that this is typically the case. Some image-making may indeed be in the service of illegal or anti-social behavior, but most falls within the limits of complete acceptability, such as dying one’s hair to appear younger than one is.⁵⁸ In other instances, the image one wishes to present is one that will be congruent with the role one is playing at a particular moment. For example a man who dresses carefully for business in a grey suit, white shirt and conservative tie is not “lying” about his identity, even if, when he returns home, he relaxes in tattered shorts and tennis sneakers.

The management of one’s public persona is facilitated by the use of what Goffman calls “sign equipment” associated with social class or with a particular group with which the individual wishes to affiliate. Prominent among such sign equipment is attire. He gives as one example of the delicacy of maintaining the performance with appropriate signs the shame of having one’s slip show below the hem of a dress. “[W]e must be prepared to see that the impression of reality fostered by a performance is a delicate, fragile thing that can be shattered by very minor mishaps.”⁵⁹ Not surprisingly, therefore, students of self-creation through fashion see the process

⁵⁷ Erving Goffman, *The Presentation of Self in Everyday Life* at 17 (1959).

⁵⁸ *Id.* at 61.

⁵⁹ Goffman, *supra* note __, at 55-56.

as one “fraught with anxiety.”⁶⁰ Although slip-ups in our image making partly explains that anxiety, another reason for it is that access to the appropriate sign equipment is not equally available to everyone.⁶¹ Also, individuals in creating their public identities must negotiate complex balances between standing out, fitting in, establishing boundaries, making politicized statements, and the other operations to which clothes are integral. As one commentator put it, “[I]mmense psychological work ... goes into the production of the social self, of which clothes are an indispensable part.”⁶²

Appearance can be an end itself, as it might be for a performance artist; it may involve the expression of a fantasy, as when one leaves behind everyday garments for a glamorous reincarnation in elaborate evening dress. (One thinks, for example of brides or of seniors dressing for their proms.) Feeling well dressed enhances the sense of validation, well-being and empowerment.⁶³ But in all its various guises, “appearance management”⁶⁴ represents a search for

⁶⁰ Jennifer Smith Maguire & Kim Stanway, *Looking Good: Consumption and the Problems of Self-Production*, 11 *European J. Cultural Studies* 63,66 (2008).

⁶¹ Id. at 67. Crane estimated in 2000 that about 43 per cent of the population had the attitudes and wherewithal to be what she terms “postmodernist consumers.” Diana Crane, *Fashion and Its Social Agendas: Class, Gender, and Identity in Clothing* at 12 (2000). She adds that adolescents are particularly major consumers of high-fashion items. Id. at 14-15.

⁶² E. Wilson, *Adorned in Dreams: Fashion and Modernity* at 246 (1985), quoted in Susan Kaiser, Richard H. Nagasawa & Sandra S. Hutton, *Fashion, Postmodernity and Personal Appearance: A Symbolic Interactionist Formulation*, 14 *Symbolic Interaction* 165, 173 (1991).

⁶³ Jane Schneider, *supra* note __, at 30; Marilyn J. Horn & Louis M. Gurel, *The Second Skin* at 147 (3d ed. 1981).

⁶⁴ This term comes from Kaiser et al, *id.* at 180.

meaning and for the appropriate tools to communicate that meaning.⁶⁵ Sometimes meaning comes from adopting visual cues that associate the individual with a particular group – sports lovers, or hip-hop fans. Whereas the upper classes were once a major source of inspiration for the clothes desired by the less well-to-do, today celebrities are more likely to influence the styles with the greatest cachet within a particular stratum.⁶⁶ In any event, how we dress “‘speaks’ with enormous force and immediacy; dress can entirely ‘capture’ a social position, make a status claim and even secure the moral high-ground.”⁶⁷ Clearly those with little disposable income are likely to “speak” the language of constraint through their clothes, but as long as a wide range of clothing, including reasonable approximations of currently fashionable garb, remain available to as broad a group of income levels as possible, the opportunity to create identity and play with it will continue to offer substantial psychic rewards to large swathes of the population.

b. Money, Class and Power

“New Yorkers aren’t better than anyone else. We just dress like it.”
⁶⁸

⁶⁵ Clothes are sufficiently important to their owners as symbolic expression that many keep long-outdated, no longer worn outfits because they continue to want “to revisit the images that these clothes achieve. ...[T]hey are unwilling to let go of the images that the clothing had allowed them to achieve.” Maura Banim & Ali Guy, *Dis/continued Selves: Why Do Women Keep Clothes They No Longer Wear?* in Guy, Green & Banim, supra note __, at 212.

⁶⁶ See, e.g., Hansen, supra note __, at 125 (young male street vendors in Zambia adopt the styles made fashionable by internationally known performers); Pamela Abbott & Francesca Sapsford, *Young Women and Their Wardrobes* in *Through the Wardrobe: Women’s Relationships with Their Clothes* at 22 (Ali Guy, Maura Green & Eileen Banim eds. 2001) (young women like to imitate the clothes of pop music stars).

⁶⁷ Hunt, supra note __, at 59.

⁶⁸ Advertising logo for Manhattan MiniStorage Company.
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*“Important policies are obviously at stake. Should we encourage the artist and increase the compensation to the creative? Or should we allow cheap reproductions which will permit our less affluent to afford beautiful artifacts? Appellant sold the original for \$600.00 and up. Defendant's version went for one-fiftieth of that sum.”*⁶⁹

The connection between money, class, power and clothes is one of longstanding. In relatively static societies, distinctions based on dress were commonly relied on as markers of status.⁷⁰ Once a group lower in the social ranking, such as a commercial middle class, was able to control the economic resources to allow them to begin mimicking the dress of their betters, a common response was to enact sumptuary laws to reassert the invariability of the social order. Numerous examples of such laws from Europe as well as from Asia can be found, limiting who was entitled to wear certain fabrics or types of fur or colors, sometimes even using fabric type and color to make fine distinctions among people in the lower orders according to their occupations.⁷¹

Generally speaking, however, those who could imitate the clothes of the nobility during the late Middle Ages and the early Modern period were few. Clothes and the fabrics from which they were made were hand-crafted; what the nobility wore was commonly distinguished by opulent fabrics, rare furs, and jewels, and were altogether too costly for many to attempt to copy them. According to historian Olwen Hufton, “Most people did not buy new clothes or did so only

⁶⁹ Kieselstein-Cord v. Accessories by Pearl, Inc., 632 F.2d 989, 999 (2nd Cir. 1980) (Weinstein, J., dissenting).

⁷⁰ Today, that function, as Barton Beebe has trenchantly observe, is increasingly being performed by intellectual property laws. **Cite.**

⁷¹ See generally Alan Hunt, *The Governance of the Consuming Passions: A History of Sumptuary Law* (1996); see also Barton Beebe, *Intellectual Property Law and the Sumptuary Code*, 123 Harv. L. Rev. 809, 810-12 (2010) **Get cite from Tuchman**
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at very special periods in their lives.”⁷² Clothes, even of the most modest sort, she notes, were handed down to the next generation on the death of the owner and also were sold by second-hand dealers. So valuable were garments that they were “the most commonly stolen goods across the length and breadth of the [European] Continent.”⁷³

With the Industrial Revolution, the growth of the middle class, coupled with the mechanized mass production of fabrics and of garments, began to reduce significantly the cost of clothing, thereby causing a corresponding increase in the market for new clothes across the classes.⁷⁴ That did not prevent clothes throughout the nineteenth century from remaining a source of social demarcation, a point that was made vividly at the end of the century by Thorstein Veblen in his famous text, The Theory of the Leisure Class. Veblen understood that fashion was being used as a symbol of “invidious distinction,” because the current styles in expensive fabrics and trims were used by the wealthy, in much the same they had been used in earlier times, to denote their favored position in the larger society.⁷⁵ He wrote, “In order to gain and hold the esteem of men it is not sufficient merely to possess wealth or power. The wealth or power must be put in evidence. . . .”⁷⁶ One easy and difficult-to-miss tactic for such display was what Veblen characterized as the “waste” of resources on fashionable dress for rich men’s wives and

⁷² Olwen Hufton, *The Prospect Before Her* at 172 (Vintage Books 1998) (1995).

⁷³ *Id.* at 173.

⁷⁴ See, e.g., Marilyn J. Horn & Lois M. Gurel, *The Second Skin* (3d ed.) at 438 (1981) (relating the effect of industrialization on clothes and incomes).

⁷⁵ Thorstein Veblen, *The Theory of the Leisure Class* (Modern Library 2001) (1899).

⁷⁶ *Id.* at 29.

daughters.⁷⁷ But the effect was not merely a static differentiation among classes, as it might have been in earlier centuries. Those lower in the socioeconomic scale looked upward for their standards of respectability and reputability, and because they had some disposable income, they then spent what they could to adopt the visible markers of elite society by emulating elite styles and appearance.⁷⁸ Thus, according to Veblen's interpretation, fashion trickled down the socioeconomic ladder from above. Only those at the very bottom of society, who lacked even the means to meet the most basic needs, did not attempt, in Veblen's view, to use what he termed "conspicuous consumption" in an attempt to keep up with the Joneses.⁷⁹ Because this emulation must in most cases rely on machine-made garments in less expensive fabrics rather than the custom made attire of the rich, the charade was, of course, at its best incompletely successful.⁸⁰

This top down understanding of fashion as a marker for the power to which the lower classes could only partially aspire was refined a bit further by sociologist Georg Simmel. Simmel explained why we have what is known as the fashion cycle – the arrival of a style, followed by a rapid exhaustion of it as an object of desire, and by its speedy replacement by something new – by

⁷⁷ Edith Wharton's mother, a member of the New York City elite in the nineteenth century, is a good example. She is described as exhibiting "an advanced case of what Newland Archer, the male protagonist of *The Age of Innocence*, refers to as 'the religious reverence of American women for the social advantages of dress.'" Kennedy Fraser, *Ornament and Silence: Essays on Women's Lives* at 66 (1996). Fraser notes that Wharton herself followed suit and "dressed in French couture to the end of her days." *Id.*

⁷⁸ *Id.* at 63.

⁷⁹ *Id.* at 64.

⁸⁰ *Id.* at 114-119. At a later point in the book, Veblen comments that "Cheap and nasty" is recognized to hold true in dress with even less mitigation than in other lines of consumption." *Id.* at 124.

explaining that the upper classes must abandon a style or fashion as soon as it is taken up by those below it on the social scale because it then loses its signally capacity.⁸¹ Once imitated, the visual cues that mark out the top strata of society must be replaced by a new set of markers.⁸²

Because both Veblen and Simmel were writing at the end of the Gilded Age, income and class disparities in the society, though less than in previous centuries, remained huge. Furthermore, their conclusions may have been based on a narrow range of observations. As Diana Crane points out, it is probable that their descriptions of how conspicuous consumption by the upper classes led to successive imitation by the classes below was actually only applicable to the behavior of the middle class vis-a-vis the upper, since the incomes of the working class were too small to allow them to incorporate stylish clothes into their lives.⁸³

Today, however, it has become fashionable, if I may be allowed to so use the word, to treat the trickle-down, class- imitation/maintenance understanding of fashion cycles as outmoded and a

⁸¹ Simmel was not the first to try to parse the reasons for the fashion cycle. In a book published three-quarters of a century earlier, John Rae wrote: “The progress of art has been such, that there is scarcely any material or fabric, or color, the production of which does not so much facilitate as to bring it within of a large mass of consumers. It then loses its value as a distinction, and ceases to serve the purposes of vanity. Hence arises the necessity for the variety, and seeming caprice, of fashion.” John Rae, *The Sociological Theory of Capital* at 250-51 (McMillan 1905) (1834).

⁸² Georg Simmel, *Fashion*, reprinted in 62 *Am. J. Sociology* 541, 547 (1957). The article originally appeared in 10 *Intern’l Quarterly* 130 (1904).

⁸³ Diana Crane, *Fashion and Its Social Agendas: Class, Gender, and Identity in Clothing* at 7 (2000). She qualifies this observation, however, by noting that by the end of the nineteenth century, clothes had become enough of a consumer item that some working class people – in particular, young, unmarried working women – did spend money on “fashionable items.” *Id.* at 4.

creature of the time in which Veblen and Simmel wrote.⁸⁴ Many have suggested that, particularly since the Second World War, we have entered a post-modern period in which the increasing affluence of society at large has rendered social class distinctions blurred, or even largely obsolete.⁸⁵ Instead, marking social status has been replaced by a use of fashion to express individuality⁸⁶ and group affiliation.⁸⁷ Style, in this new world, trickles up from the street as well as down from the grand salons of high fashion designers.

Clearly, one reason for the change in how appearance has worked as a marker was the rapid development of the modern clothing industry, making up-to-date styles available across a range of price points. By the time Elizabeth Hurlock was writing in 1929, she was able,

⁸⁴ See, e.g., Susan B. Kaiser, Richard H. Nagasawa, & Sandra S. Hutton, *Fashion, Postmodernity and Personal Appearance: A Symbolic Interactionist Formulation*, in 14 *Symbolic Interaction* 165, 166 (1991) (“macro-based, class-structural explanations” cannot account for current multiplicity of fashionable styles and individualized personal appearances).

⁸⁵ Paul Blumberg, *The Decline and Fall of the Status Symbol: Some Thoughts on Status in a Post-Industrial Society*, 21 *Social Probs.* 480, 483 (1974). See also John Harvey, *Clothes at 25* (2008) (clothes not so distinctive by class as in Simmel and Veblen’s day); Crane, *supra* note ___ at 244 (we live in a “post-class” society). However, others prefer to correct the theory, rather than reject it. Bourdieu, for example, has suggested that high status individuals respond to the desire to distinguish themselves from those down the socioeconomic ladder because they view the efforts at emulation as “vulgar” and pretentious. **CITE** Bottero speaks of contemporary society in terms of hierarchical relationships, rather than ones of class, although it is not clear that the distinction is functionally very different. As she notes, “Hierarchies, by their nature, generate feelings of shame, suffering and degradation. Such feelings are, of course, unevenly distributed, with the most disadvantaged suffering the most.” Wendy Bottero, *Class Identities and the Identity of Class*, 38 *Sociology* 985, 994 (2004).

⁸⁶ *Id.* at 5-6, 14-15. See also Peter Corrigan, *The Dressed Society: Clothing, the Body and Some Meanings of the World at* (2008) (use of clothes to establish social hierarchy has been replaced by use to create “status groups” that are not necessarily hierarchical); Wendy Bottero, *Class Identities and the Identity of Class*, 38 *Sociology* 985, 988 (2004) (noting a body of scholarship that agrees on “the ‘death’ of class” and the growth of individuality).

⁸⁷ See Horn & Gurel, *supra* note ___, at 138-40.

optimistically, to claim that commercial clothing designers and manufacturers understood how much less affluent women wanted to be in fashion and, in response, they “imitated in cheap materials the clothing of the fashion leaders. A hasty glance at any group of people gathered together in an American city would reveal scarcely any differences in wealth, social position or breeding, so completely are these hidden behind clothing of a uniform kind.”⁸⁸ Or, as other, later commentators put it (with a substantial dose of irony), “The big push for copies of high-fashion merchandise has created an America with the best-dressed poverty the world has ever known.”⁸⁹

All of this suggested to students of dress that apparel had undergone democratization, and that this was a good thing. No longer was the choice of what to wear, particularly in the post-World War II, post-class society, solely an assertion of status or aspiration to it – everything was available to almost anyone at the price point she chose.⁹⁰ In the middle of the twentieth century, just as one example, a favorite activity of style-conscious New Yorkers was to flock to a department store, Ohrbach’s, as soon as that season’s line-for-line copies of the latest styles from the Paris and Milan runways were available. Ohrbach’s sent buyers to the shows to buy the

⁸⁸ Elizabeth B. Hurlock, *The Psychology of Dress: An Analysis of Fashion and Its Motive* at 40 (Ayer Co. 1984) (1929).

⁸⁹ Horn & Gurel, *supra* note __, at 285. Blumberg, in a similar vein, writes of the modern mass-production fashion industry, which is quick to copy the latest “look”, is “one of the great levelers of all times, diffusing class lines and permitting easy visual passage from one class to another.” Blumberg, *supra* note __ at 491.

⁹⁰ Crane, *supra* note __, at 11-12. She refers to modern society as “post-class.” *Id.* at 244. Or, as other authors put it, “Socioeconomic changes in income, education, leisure time, and movement to suburbia cut across traditional class lines and various stages in the life cycle. ...[R]ecent writings seem to indicate that social class distinctions have been obscured by rising incomes and educational levels.” Stuart U. Rich & Subhash C. Jain, *Social Class and Life Cycles as Predictors of Shopping Behavior*, 5 *J. Marketing Res.* 41, 47 (1968). Rich and Jain reported that their own research supported that conclusion. *Id.*

clothes they liked most and then had them reproduced under its own label in New York, held a fashion show attended by a crowd of celebrities, and watched the clothes walk out the door.⁹¹ And they were not alone – competitors like Alexander’s also rushed to make competing copies.⁹² The fashion press coverage was generally adoring. The prevailing view was, as far as one can tell from the news stories from that period, that what the U.S. copyists were doing was giving publicity to the design houses (and selling clothes to fashion-conscious women who either could not or would not pay for the originals). The fall of this kind of following of the high fashion houses ultimately gave way in the late 1960s and 1970s to a loss of status for designer clothes and their clones as more women went to work and also as more adopted a more casual style of dress.⁹³

⁹¹ Part of Ohrbach’s success was its “editing” – focusing on the most wearable clothes. The initial copies might even be in the original fabrics, but the prices could be cut further by using domestic fabrics. For example, the New York Times reported in 1966 that a copy of a Balenciaga in the original fabric cost \$300 whereas one in an American fabric was expected to cost \$69. Bernadine Morris, *They’re Curious About Ohrbach’s Copies*, N.Y. Times, September 22, 1966, in ProQuest New York Times (1923 - Current file) at 77. To illustrate the price differential between an original Balenciaga and a copy in the same fabric, the Times reported that costing a sari dress cost \$3,000 if purchased from the designer, but was reproduced in “the original silver lamé” for \$495. Marilyn Bender, *Ohrbach’s Shows Its Picks of Paris*, N.Y. Times, March 16, 1965, ProQuest New York Times (1923-Current file) at 34.

⁹² Enid Nemy, *Ohrbach’s and Alexander’s Battle to Hectic Draw in High-Fashion Clash: 34th Street Team is Sales Victor*, NYT, September 27, 1966, available in ProQuest Historical Newspapers: The New York Times (1851-2008).

⁹³ Author Susan Faludi documented the fall from grace of high fashion in her book, *Backlash: The Undeclared War Against American Women*. She wrote that, because women were attempting to establish themselves in the workplace, “Between 1980 and 1987, annual sales of suits rose by almost 6 million units, while dresses declined by 29 million units. The \$600 million gain in suit sales in these years was nice– but it couldn’t make up for the *billions* of dollars the fashion industry could have been getting in dress sales. Matters worsened when manufacturers raised their suit prices to make up for the shortfall – and women just started buying cheaper suits from foreign manufacturers.” Susan Faludi, *Backlash: The Undeclared War Against American Women* at 176 (1991). In a chapter she titles “Dressing Dolls”, Faludi tells of the frustration felt by designer Christian Lacroix at the failure of his effort to get women back into “feminine” clothes, including his ill-fated bubble skirts. *Id.* at 169-74. Bollier and Racine
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Certainly, as outlined in the previous section of this Article, contemporary women now have many reasons for the apparel they choose to wear, much of it related to statements about personal identity or group affiliation rather than to a desire to emulate the wealthier strata of the society. Nevertheless, even in a society that ostensibly values the absence of a rigid class system, clothes “speak” about status.⁹⁴ As Alan Hunt in his study on sumptuary laws put it, “With regard to dress, women have long turned the burden of conspicuous consumption to their advantage by taking a close interest in clothing and their personal appearance. In an important and material sense it secures for women a claim on both capital and income, and beyond this it provides a socially important form of cultural capital.”⁹⁵

This observation is consistent with the conclusions of the late sociologist Erving Goffman. Goffman pointed out that in stratified societies (that is to say, in most places), a desire for upward mobility is widely shared, partly from a desire for increased prestige and partly because the lifestyle, practices, tastes and appearance of the well-off help set community norms. The use of status symbols not only serve to distinguish economic classes, but to allow aspirants to those idealized

also point to the movement of women into the workforce as diminishing the appeal of high fashion and encouraging stores and clothing manufacturers to offer fashionable clothes suitable for the office at lower prices. David Bollier & Laurie Racine, *Ready to Share: Creativity in Fashion & Digital Culture* at 12 (The Norman Lear Center, U.S.C. Annenberg 2005), available at www.learcenter.org/pdf/RTSBollierRacine.pdf.

⁹⁴ Id. at 111. See also Jennifer Smith Maguire & Kim Stanway, *Looking Good: Consumption and the Problems of Self-Production*, 11 Eur. J. of Cultural Studies 63, 67 (2008) (“Despite the advertising rhetoric of equality and free choice ... and the heralding of the end of class ..., the objects, spaces and times of consumption are more and less available to different groups, enabling processes of distinction while also restraining who is able to participate, and how, thereby reproducing class positions.”); Nizar Souiden, Bouthaina M’Saad & Frank Pons, *A Cross-Cultural Analysis of Consumers’ Conspicuous Consumption of Branded Fashion Accessories*, 10 J. Inter. Consumer Marketing 329, 331 (2011) (similar point)

⁹⁵ Hunt, *supra* note __, at 249.

strata to “embellish and illumine one’s daily performances with a favorable social style.”⁹⁶

A careful reading of the literature supports the claim that clothes, whatever else they may say, have continued to function as indicators of status. For many (although certainly not all⁹⁷) wealthy people, consumption in the form of dress still conveys their success at a glance. Trademarks do some of that work, but much is also done by the apparent quality of materials, cut, fit and contemporaneity of style. One student of the relationship between women and their choice of attire conducted interviews of personal shoppers to get their take on how their customers make decisions about what to purchase. Wealthy women, she found, “knew that they had to be seen in designer outfits in order to preserve their own and others’ image of them as rich and high-status individuals... .”⁹⁸

Another study underlines how powerfully visual clues continue to convey information about status. Research subjects, drawn from a university community, were shown 17 bridal portraits taken from a newspaper in Syracuse, New York.⁹⁹ The portraits were all the same size,

⁹⁶ Erving Goffman, *The Presentation of Self in Everyday Life* at 36 (1959). See also, John Harvey, *Clothes at 12* (2008) (“There is also the whole question of social status, and the work that clothes do as status symbols, which is not in itself attractive. Clothes may use their expensiveness like a weapon. Clothes perhaps converse between themselves, in the accents of an exclusive society. The smartness of smart clothes says, ‘Respect me’.”).

⁹⁷ A recent news article, for example, indicated the kinds of status symbols that were and were not considered acceptable in Silicon Valley among its rich (often fabulously rich) entrepreneurs. Fancy cars and mansions: out; super-expensive bicycles: in. Certainly, if Mark Zuckerberg’s trademark hoodies or the late Steve Jobs’ black turtlenecks are any example, fancy clothes are out, too. Somini Sengupta, *Preferred Style: Don’t Flaunt It in Silicon Valley*, N.Y. Times, May 18, 2012, at A1.

⁹⁸ Kate Gillan, *Choosing an Image: Exploring Women’s Images Through the Personal Shopper*, in Guy, Green & Banim, *supra* note __, at 74.

⁹⁹ Allan Mazur, *Signs of Status in Bridal Portraits*, 8 *Sociological Forum* 273 (1993).
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were all head shots, and all featured white women. In light of the occasion for which the pictures were taken, it is likely that all the women depicted had exercised considerable care and expense on their appearance. Nevertheless, subjects were able accurately to classify the brides by social class far more often than would have occurred by chance alone.¹⁰⁰

Research reports in recent years have continued to give support to the idea that people who are not wealthy continue to use clothes to convey an appearance of higher status. While it is likely that many will be unsuccessful in creating the visual illusion of social equality because their cheap copies are detectable and because they may fail to capture some of the more subtle markers that contribute to the image of distinction, the importance of creating a visual semblance of equality continues to matter. Both life experience and research have documented, for example, that being marked out as “different” by virtue of one’s inability to participate on the so-called “level playing field” by a lack of the resources needed to acquire the basic markers of fashionability hurts.

Researchers studying a group older high school girls in Britain, for example, found that socioeconomic status was conveyed to others not only by what the young woman were able to buy, but where they bought the items.¹⁰¹ But most significantly, they noted, “Those who are excluded from purchase by the poverty of their parents find it difficult to be part of the culture of young women.”¹⁰² In another study of 600 consumers, a compelling majority of subjects in ages

¹⁰⁰ To test whether extraneous factors were influencing the judgment of the subjects, the researchers tested successive groups with the photographs grouped in different configurations and also, in one case with the brides’ facial features obscured. *Id.* at 278.

¹⁰¹ Pamela Abbott & Francesca Sapsford, *Young Women and Their Wardrobes*, in *Through the Wardrobe: Women’s Relationships with Their Clothes* (eds. Ali Guy, Maura Green & Eileen Banim 2001) at 24 (while the styles in the various stores catering to young women are similar, the prices are very different).

¹⁰² *Id.* at 25.

ranging from late teens through the fifties shared the conviction that women can improve their social position simply by improving their dress.”¹⁰³ Further underlining the point is the recent entry of high fashion labels into children’s wear. Parents aspiring to the appearance of affluence may be unable to dress themselves in Burberry or Marc Jacobs, but with a bit of a stretch, they can clothe their pre-school daughters, if they are so-inclined, in a Gucci silk dress.¹⁰⁴

Thus, rather than assume that the Veblen-esque desire to dress as though one were a success is now simply outdated, it would seem more accurate to suppose that the intensity of the emulation motive among women who cannot afford designer clothes but who desire copies or clones to blur markers of socioeconomic status has not vanished, although it may indeed vary depending on a variety of economic indicators. Were the world of Veblen and Simmel to be reproduced or even somewhat approximated, one might expect the emulation motive to increase in importance as well. And, in fact, their world does not, at the moment, seem so remote.

The concern now over growing inequalities of wealth have caused public expressions of concern by economists, politicians and the press, and has been made famous by the Occupy Wall Street Movement. Berkeley economist Emmanuel Saez recently updated a report on income inequality that he had originally done with Thomas Picketty.¹⁰⁵ He found that between the years 2002 and 2007, two-thirds of income growth was captured by the top 1 per cent of Americans. For the bottom 99 per cent, income growth rates fell from over 20 percent in the 1990s to under 7

¹⁰³ Tamar Horowitz, *Excitement vs. Economy: Fashion and Youth Culture in Britain*, 17 *Adolescence* 627, 634 (1982).

¹⁰⁴ Cathy Horyn, *That Dress is So Preschool*, N.Y. Times, April 26, 2012, E 1, E7.

¹⁰⁵ The original report covered the period from 1913 to 1998. Thomas Picketty & Emmanuel Saez, *Income Inequality in the United States: 1913-1998*, 118 *Quarterly J. Econ.* 1 (2003).

percent in the 2002-07 time period.¹⁰⁶ In the two years following the major recession of 2007 to 2009, the income of the wealthiest rebounded to an increase of 11.6 per cent; that of the rest averaged a 0.2 per cent rise.¹⁰⁷ The disparity is sometimes described as paralleling that which existed in the Gilded Age,¹⁰⁸ although now extreme wealth is generated more from salary and wages than from business income, dividends and capital gains.¹⁰⁹ In practice, however, that difference probably does not much matter; the fact is that the purchasing power of most Americans, their disposable income, is stalled at a time when jobs are tight and many homeowners find their major investment is now, as the unfortunate expression goes, “under water.” According to the Census Bureau, 8.7 per cent of households in America had incomes of less than \$15,000 in 2009.¹¹⁰

The growth in income inequality is not something that began in this century – it began to

¹⁰⁶ Emmanuel Saez, *Striking It Richer: The Evolution of Top Incomes in the United States (Updated with 2009 and 2010 Estimates)* at 3 (March 2, 2012), available at elsa.berkeley.edu/~saez-UStopincomes-2010.pdf.

¹⁰⁷ *Id.* at 4.

¹⁰⁸ R. A., *Income Inequality: Growing Apart*, *The Economist*, March 5, 2012, at www.economist.com/blogs/freeexchange/2012/03/income-inequality. Actual data for income disparities during the 1890s is difficult to cobble together because neither income tax nor detailed census data exist. It is interesting to note, however, that at late as 1925, many of the top 200 tax payers in the United States had fortunes made during the 1890s. Claudia Goldin & Lawrence F. Katz, *Decreasing (and then Increasing) Inequality in America: A Tale of Two Half-Centuries* at 23 (1999), available at ___. **Get cite to book: *Increasing Income Inequality in America***

¹⁰⁹ *Id.* This change took place quite a long time ago. See John E. Jacobi & S. George Walters, *Social Status and Consumer Choice*, 36 *Soc. Forces* 209, 210 (1958) (noting that social status, except for a very small number of individuals, is now based on occupation rather than lineage).

¹¹⁰ Table 696, from U.S. Census Bureau, *Income, Poverty and Health Insurance Coverage in the United States: 2009*, Current Population Reports, Sept. 2010, available at www.census.gov/compendia/statab/2012/tables/1250695/pdf.

pick up in earnest in the 1970s¹¹¹ -- and assuredly the average family in the first half of the twentieth century, despite significant wage compression, never came terribly close to the wealth of the top tier.¹¹² But what may make the current period a more sensitive one with regard to relative financial well-being is a the fact that more and more, people have lost faith in the expectation that their life style and that of their children are on a steady upward trajectory. During the early part of the last century, unionization helped pull up wages for manual laborers,¹¹³ and increased educational opportunities resulted in a sharp rise in the percentage of people who graduated from high school.¹¹⁴ After World War II, the G.I. Bill allowed many who could otherwise not have afforded it to attend college.¹¹⁵ The belief in the possibility of upward mobility became a firmly embedded component of the American psyche. The erosion of that expectation, coupled with the

¹¹¹ Emmanuel Saez & Thomas Piketty, *Income Inequality in the United States, 1913-1998*, 118 *Quarterly J. Econ.* 1, 3 (2003).

¹¹² Blumberg, writing in 1974, noted that “the distribution of income has not narrowed appreciably in recent decades, with the top fifth of the nation’s families continuing to receive over 40 percent of total earnings, and the poorest fifth accounting for only about five percent.” Paul Blumberg, *The Decline and Fall of the Status Symbol: Some Thoughts on Status in a Post-Industrial Society*, 21 *Soc. Probs.* 480, 483 (1974).

¹¹³ An illustration of how the gap between incomes of blue collar workers and highly educated professionals in the earlier half of the twentieth century did diminish can be had by looking at the incomes of college professors vis-a-vis those employed in manufacturing. In 1910, professors earned on average 3.75 times more, but by the 1950s, their earnings were only double those of manufacturing workers. See Goldin & Katz, *supra* note __, at 15.

¹¹⁴ By early in the twentieth century, vast numbers of students began to attend high school, with the result that the period of 1910-1940 has been called the “high school movement.” *Id.* at 17.

¹¹⁵ In 1890, only 15,539 bachelor’s degrees were earned in the United States; that number increased to 186,500 in 1939-40, and then took a huge leap in 1949-50 (to nearly 400,000). Table 258, *Degrees Conferred by Degree-Granting Institutions, by Level of Degree and Sex of Student, Selected Years, 1869-70 through 2016-17* (2007), at http://nces.ed.gov/programs/digest/d07/tables/dt07_258/asp.

gulf between the wealth of the upper 1 per cent and that of the rest of the society suggests that one should be cautious about piling on extra layers of intellectual property protection in a form that Barton Beebe has trenchantly observed amounts to a new iteration of sumptuary law.¹¹⁶ While preserving the appearance of an egalitarian society is not the same as preserving actual distributive justice, it clearly has psychic as well as economic significance. This makes it difficult for me to agree that Veblen can safely be tossed into a bin labeled “ancient history” and that high style be given back more or less exclusively to the well-to-do.

C. Why Design Protection is an Idea Whose Time Should Probably Not Be Now

Caution is always advisable when injecting new legal principles into complex existing markets because how they will impact them is inherently unpredictable. The apparel market is an important, indeed, huge market. Despite the downturn in consumer spending attributable to the 2007-2009 recession, some 100,000 retail clothing stores in the United States have been estimated to bring in some \$150 billion a year.¹¹⁷ The manufacture of apparel world-wide is an industry worth more than \$315 billion,¹¹⁸ about \$14 billion of which is earned by manufacturers in the United States.¹¹⁹ About 85 per cent of the domestic market for clothes, however, is served by

¹¹⁶ Beebe, supra note __, at 880.

¹¹⁷ Fulcrum Inquiry, Industry Guides: Retail Clothing Store (2010), at http://www.fulrum.com/clothing_appraisal.htm.

¹¹⁸ First Research, Apparel Manufacturing Industry Profile (Excerpt) (2012), at <http://www.firstresearch.com/industry-research/Apparel-Manufacturing.html>. The members of the European Union claim collectively to be the largest market in the world for textiles and clothing and to account for third place in clothing exports. Euratex, Annual Report: Activities of the Year 2010 at 54, available at www.euratex.org/content/annual-report-euratex-2010.

¹¹⁹ First Research, supra note __.

foreign manufacturers, largely because they are cheaper.¹²⁰ Clearly, much of the massive production and sales are not of Louboutins and Armanis or even of up-and-coming young designers, but are mid- and lower-priced merchandise, including the kinds of inexpensive knockoffs that are the target of design protection.¹²¹ It is important to understand that sanctioning the manufacture and sales of such items could have significant impacts on the welfare of consumers¹²² and not just on the garment industry.¹²³ Clearly, the business aspects of design

¹²⁰ China is by far the largest supplier of apparel both to the U.S., see Fulcrum Inquiry, supra note __, and to the European Union, Euratex, supra note __ at 53 (chart showing Main Trading Partners in Textile-Clothing).

¹²¹ Quentin Bell made this point in his delightful book on fashion. Bell wrote that the best customer for fashionable clothes today is not “the rich elite, but ... the unmarried girl in a good job. It is she, if I understand the business correctly, who is now the best customer, for although as an individual she will not compete with the wives of oil magnates, collectively her purchasing power is enormous. ...Such clientele cannot be interested in workmanship and is probably more concerned that the goods be pretty than that they should be durable.” Quentin Bell, *On Human Finery* (1976) at 170.

¹²² In a recent article, Michael Carroll pointed out that beneficiaries of intellectual property rights tend to skew “toward the interests of those with an ability to pay, who more often than not are the relatively rich. Using prices to allocate access to goods and services does not accurately reflect how relatively important that access is to different individuals because what a dollar is ‘worth’, and therefore the value of what a dollar buys, sometimes depends on how many dollars one has.” Michael W. Carroll, *One Size Does Not Fit All: A Framework for Tailoring Intellectual Property Rights*, 70 Ohio State L. J. 1361, 1377 (2009). Echoing that point in a slightly different way, another commentator on the 2006 version of the proposed design protection legislation wrote: “Until the act is passed, ... the budget fashionista will continue to rejoice at the choices of affordable trend-setting styles available at her local department store.” Olivera Nedenica, *Designers Seek to Prevent Cheaper Knockoffs*, National Law J., August 28, 2006, available at Lexis/Nexis, legal news tab.

¹²³ Forever 21, the company designers love to hate because it specializes in inexpensive knockoffs, does a \$3 billion a year in business, and employs 35,000 people at its 477 stores. Kay Tasker, *The Innovative Design Protection and Piracy Prevention Act: Litigation, Uncertainty, and Economic Harm*, Public Knowledge, July 15, 2011, at <http://www.publicknowledge.org/print/5917>. There seems to be considerable agreement that intellectual property rights will push manufacturers to buy licenses to avoid potential suits, and that prices of clothes will increase. Lewis R. Clayton, *Fashion Design Protection Bill: The Right First Draft: Quote with permission only* May 28, 2012

legislation do have an influence on legislators. For example, when fashion design protection legislation was reintroduced in the U.S. Senate in its most recent iteration, a section providing for secondary liability, which had been present in a previous version and could have ensnared retailers, was removed.¹²⁴ But the accounting for industry's interest is not a perfect stand-in for the interests of the consumers who drive this huge economic engine, a point that seems to get lost in the shuffle.

Design protection for fashion presents many problems that can have a negative impact on consumers. For example, exactly what would be protected in the United States, and what is protected in the European Union is problematic. It seems that when people advocate for protecting designers by compromising the market for cheaper copies, what they have in mind is the protection of the highly creative artists of the fashion world – the Alexander McQueens, not the designers and makers of “ordinary” (or what used to be called “dumb”) attire. In itself, this desire runs counter to the deeply held belief, at least in American copyright doctrine, that the availability of intellectual property protection should not depend upon aesthetic judgments.¹²⁵ Translated into simple terms, consumers should not have more limited access to high concept fashion simply because it is “better” than other kinds. In any event, I suspect this argument contains more than a little misleading romanticism because today, many of the famous design

Balance?, National L. J., Sept. 13, 2010 (available at Lexis/Nexis, legal news tab). But see Lauren Howard, *An Ingenious Paradox: Intellectual Property Protections for Fashion Designs*, 32 Colum. J. L. & Arts 333, 355 (2009) (arguing that properly crafted legislation would enable copying of trends, while eliminating close replication).

¹²⁴ S. 3728, Dec. 6, 2010, 113th Cong., 2d Sess. (Reported by Sen. Leahy, with amendment).

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houses are owned by huge corporations, and designers are employees who are hired and fired with sometimes startling frequency.¹²⁶ Hence the bulk of the benefit of design protection is as or more likely to flow to the corporate management and shareholders than to individual artists.¹²⁷ Also, the assumption that pure creativity is what is being protected must be further modified to take account of the way in which designers recycle one another's work,¹²⁸ and of the heavy reliance they place on so-called fashion bureaus to research and predict shifting consumer tastes and likely trends. This reliance is why, according to experts, there is often considerable coherence in the "looks" among many designers in a particular season.¹²⁹

¹²⁶ Many examples have made press headlines. For example, when Tom Ford left Gucci, his successor, Alessandra Facchinetti lasted through only two collections. Susie Rushton, *Catcalls on the Catwalk drive out Ford's Successor at Gucci*, *The Independent*, May 23, 2012, at <http://www.independent.co.uk/news/world/europe/catcalls-on-the-catwalk-drive-out-fords-successor-at-gucci-6150812.html>. Other examples abound. See, e.g., Aisling O'Connor, *This season's fashionable new look is hiring and firing ... and we're not just talking about John Galliano*, *Independent I.E.*, April 12, 2012, at <http://www.independent.ie/opinion/comment/aisling-oconnor-this-seasons-fashionable-new-look-is-hiring-and-firing-and-were-not-just-talking-about-john-galliano-3079597.html>; Robb Young, *Superstar Designers: The End of an Era?*, *Luxury Society, The Bulletin*, March 5, 2011, at <http://luxurysociety.com/articles/2011/03/superstar-designers-the-end-of-an-era>.

¹²⁷ LVMH, PPR and Richemont are three of the major players in the luxury apparel (and other luxury goods) market. New York City Marketing, *The Big 3 in the World of Luxury Brands – Infographic*, May 18, 2012, at <http://themainstreetanalyst.com/2012/05/18/the-big-3-in-the-world-of-luxury-brands-infographic/>. <http://themainstreetanalyst.com/2012/05/18/the-big-3-in-the-world-of-luxury-brands-infographic/> Each of them is publicly traded.. Richemont owns Chloe, Azzedine Alaia, and Shanghai Tang as well as makers of luxury watches and other goods. <http://www.richemont.com/our-businesses.html>. LVMH owns Louis Vuitton, Donna Karan, Emilio Pucci, and Marc Jacobs, to name a few. <http://www.lvmh.com/the-group/lvmh-companies-and-brands>. PPR owns Stella McCartney, men's clothing design house Brioni, Yves St. Laurent, and Alexander McQueen among others. <http://www.ppr.com/en/brands>.

¹²⁸ **Footnote giving examples of downright copying by one designer of another.**

¹²⁹ According to Crane, "Fashion bureaus play a major role in predicting future trends and what types of clothing will sell." Crane, *supra* note __, at 140. See also Jennifer Craik, **First Draft: Quote with permission only** May 28, 2012

But, leaving these issues aside, stating a rule that reaches only the target class of established and rising designers, and not a broad swath of not-particularly-trendy companies, is clearly not easy to do. In the European Union, design protection, by means of registration, is supposedly available only to apparel¹³⁰ that embodies “novelty” in its design (in the sense that “no identical design has been made available to the public” before application for registration is filed).¹³¹ Furthermore, the design in question must differ “from the overall impression produced on such a user by any design” made available before the date of applying for registration.¹³² Such designs are given up to 25 years of protection (and unregistered designs can also be protected for three years from disclosure to the public¹³³). But a random exploration of the registry reveals, for example, countless examples of athletic shoes and other pedestrian items with design elements that are certainly not in any obvious way unique. My impression that most of the registered designs are short on real distinctiveness is not idiosyncratic. Another commentator on fashion design protection reported that in 2006, Nike registered 471 designs in Europe. “One hundred of these designs are shirts that are remarkably similar in appearance with minimal variance.

Fashion: The Key Concepts at 227 (2009) (fashion forecasting used to predict trends 18 months to two years in advance).

¹³⁰ Apparel includes various accessories, including shoes, handbags and so forth.

¹³¹ Article 4, Directive 98/71/EC of the European Parliament and the Council of 13 October 1998 on the legal protection of designs, at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31998I0071:en:HTML> . Designs are deemed identical “if their features differ only in immaterial details.” *Id.*

¹³² *Id.* at Article 5.

¹³³ Office for Harmonization in the Internal Market (Trademarks and Designs), Unregistered Community Designs (April 24, 2008) at <http://oami.europa.eu/ows/rw/pages/RCD/protection/UCD.en.do>.

Differences between the shirts are a slight as fabric color, color of trim, color of accent fabric, presence of stripes, slightly longer length of the back of the shirt, slightly longer sleeves, or the presence of a patch on the front of the shirt.”¹³⁴

Various drafts of proposed United States design protection bills have stated the standard for eligibility in various ways, all, to one degree or another, problematic. In 2006, the house bill was essentially silent on the requirement, presumably relying instead on the low-level originality test applied to copyrighted works generally.¹³⁵ In the 2010 Senate draft, protection is limited to designs that include original elements that “(I) are the result of a designer’s own creative endeavor, and (ii) provide a unique, distinguishable, non-trivial variation over prior designs.”¹³⁶ In addition, actionable infringement is limited by the most recent bills to designs that either are independently created (a sticky point since fashion designers have been known to copy one another and present the results as if they were original¹³⁷) or “are not substantially identical in overall visual appearance to and as to the original elements of the protected design.”¹³⁸ Although this language helps limit the right of action, it certainly does not limit coverage to “artistic” design, suggesting that makers of mass-market clothing are going to be inclined to license when in

¹³⁴ Lisa Hendrik, [Note] *Tearing Fashion Design Protection Apart at the Seams*, 65 Wash. & Lee L. Rev. 215, 256-57 (2008)

¹³⁵ H.R. 5055, 109th Cong., 2nd Sess., Mar. 20, 2006.

¹³⁶ Section 2(b) (7)(B)(I), (ii), S 3728, 111th Cong., 2nd Sess., Dec. 6, 2010 (with amendment). The House version contained the same language. H.R. 2511, 112th Cong. 1st Sess., July 13, 2011.

¹³⁷ Refer to Ralph Lauren case, other examples

¹³⁸ Section 2 (e)(3)(A),(B) in both bills.

doubt and that consumers will have more expensive and fewer (not as some have speculated,¹³⁹ more) choices about what to buy, even if their tastes do not run to the fashion-forward..

Furthermore, even this limited language promises to instigate some fairly vigorous litigation before the terms are satisfactorily defined.

And, certainly, nothing explains why the EU has found it desirable to offer up to two-and-a-half decades of protection to fashion designs of such motley sorts or for that matter, why three years is currently the presumed proper duration in the United States. Much of the expressed concern over “piracy” seems to be over the speed with which copies make it into retail outlets, reducing or even eliminating the first mover advantage of the original designer.¹⁴⁰ If that is the real problem, a month or two of protection would seem to cure the disease. The longer term seems designed either to cut less affluent consumers out of the fashion game entirely, or to assume that, with longer protection, the fashion cycle will slow down, giving designers a breather from pressure to innovate over and over.. On that supposition, perhaps clothes styles would remain fashionable when the term expired, and those of us down the food chain could then partake in the party. Somehow, though, that seems unlikely. Styles change because designers get bored repeating themselves, and so do their customers. It is hard to imagine devourers of Vogue, Glamour and W getting excited about year three of wearing the same old stiler of gladiator-type platform and stiletto-heeled sandals.¹⁴¹ Or as one author puts it, the rapid turnover in styles

¹³⁹ Howard, supra note __, at 355.

¹⁴⁰ **CITES**

¹⁴¹ Lauren Howard argues that design protection has the advantage of forcing designers actually to design novel clothes rather than trying to be in synch of the current trend, thereby increasing consumer choice. Howard, supra note __, at 355-56. This could be an advantage, but it could also make the profession of clothing design far riskier; without input from advisors on
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“preserves us from what would otherwise be the Midas-like curse of durability.”¹⁴²

One possibility, of course, would be to open more space for designers themselves to appropriate more of the lower-price market. They do so to some degree now by means of so-called “bridge” lines, and some have even experimented with offering a limited number of garments to consumers at prices attractive to shoppers in Target and H & M. This is not likely to cure the problem, however, because the danger of too much egalitarianism from the top would be to damage the very air of exclusivity and scarcity that gives luxury brands their edge in the marketplace.¹⁴³ The other possibility is that designers and their owners will benefit because people who want to stay in style or experiment with new looks (and this includes men and children as well as women) will be pushed to funnel more money into luxury goods in the absence of cheaper alternatives. While consumerism is certainly a lifestyle many choose, encouraging proliferation of conspicuous consumption and economic waste by those who cannot actually afford it is not what most of us would consider the furtherance of an undeniably desirable public policy.¹⁴⁴ Adding irony to the mix, in an era when it is widely conceded that fashion trickles up as

what the most likely successful trends will be in a given season, the probability of guessing wrong and ending up with an unsaleable collection seems higher than it does under current conditions. While one might prefer the latter scenario from the perspective of innovation, being pushed to innovate things no one wants is not clearly a social benefit.

¹⁴² Dwight E. Robinson, *The Economics of Fashion Demand*, 75 *Quarterly J. Econ.* 376, 392 (1961).

¹⁴³ See, e.g., Nizar Souiden, Bouthaina M’Saad & Frank Pons, *A Cross-Cultural Analysis of Consumers’ Conspicuous Consumption of Branded Fashion Accessories*, 23 *J. Inter’l Consumer Marketing* 329, 339 (2011) (urging luxury fashion houses not to dilute their brands)

¹⁴⁴ Social theorists have argued that ...glamorizing discourses [on high fashion] have facilitated the emergence of the consumer-driven capitalist economy by widely diffusing an image of “the good life” based on the attainment of material affluence.

well as down, design protection could have the effect of limiting consumer access to styles that are largely attributable to appropriation of their own fashion sense.¹⁴⁵

Conclusion

My conclusion, then, is that romanticism over great designers, passion for moral rights, a desire to shift more wealth from consumers to the higher tiers of the fashion industry, or a firm conviction that innovation would on balance be furthered by the move should not be the sole considerations in deciding whether to adopt protection for the fashion industry or increase the protections they already have.¹⁴⁶ The interests of retailers, manufacturers, and workers in the apparel industry obviously must also be taken into account. But in the process, it is especially important not to leave out the majority of consumers who do not choose to, or cannot, buy Gucci and Vuitton. They have interests that broad access to a free-form and scrappy fashion domain has actually served quite well over the past hundred years. Messing with success is often a very bad idea.

Craig J. Thompson & Diana L. Haytko, *Speaking of Fashion: Consumers' Uses of Fashion Discourses and Appropriation of Countervailing Cultural Meanings*, 24 J. Consumer Res. 15, 17 (1997).

¹⁴⁵ Lars Svendsen points out that in the 1990s styles he refers to as “heroin chic” were adopted by designers and their wealthy clients from the street. “[C]onsiderable innovation has taken place in the lower classes ..., not least in the form of sometimes major modifications of upper-class fashions.” Lars Svendsen, *Fashion: A Philosophy* at 46 (trans. John Irons 2006) (2004). See also Diana Crane, *Fashion and Its Social Agendas: Class, Gender, and Identity in Clothing* at 5-6, 14, 160 (2000) (noting importance of styles originating in working class as well as styles taking off from second-hand clothes); Blumberg, *supra* note __, at 493 (fashion now frequently set by “the *declassé*, anti-class youth”).

¹⁴⁶ Euratex, in its 2010 report, discussed its advocacy of stronger protections for textile and fashion designers, including new criminal sanctions against copyists, before the EU, and expressed disappointment that some of these measures had been blocked at the European Parliament the previous year. Euratex 2010 Report, *supra* note __, at 32.

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