The Space Between: An Openwork Approach to IP Protection

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Scholars have raised criticisms toward contemplated protection for fashion design.[1] Some consider fashion to be subject to a "piracy paradox," which holds that the industry thrives in the absence of IP protection. Such scholarship considers fashion a part of a vital "negative IP space" that demonstrates success due to characteristics exogenous to legal protection. Such arguments maintain that, conversely, creativity within that industry might be stifled if IP protection extends to that media.

This work examines the extent to which the fashion industry is exceptional. To some degree, the arguments against protection for fashion protection apply to any number of industries that enjoy strong copyright protection. Some misperceptions might arise from treating fashion monolithically,[2] or perhaps treating functional articles of clothing in the same manner as those that evidence brilliance. For example, this treatment masks the fact that design businesses bear similar characteristics to startups in other fields. To consider this point, this article will consider some, including Proenza Schouler, a leading design team seeking to establish itself in the current climate. This firm's story is emblematic of the goals of a growing business in almost any industry—a minimum of a ten-year path to viability, difficulty finding financing, determining an appropriate expansion model, and establishing distribution mechanisms. The company has had designs literally copied and sold at lower price points. To the extent that IP can justifiably extend to more traditional industries, fashion does not facially appear to be fundamentally different.

The current concept of fashion protection is narrowly drawn. At this juncture, there is no real controversy about whether trends, simple t-shirts, and classic driving shoes are intended to be the subject of fashion protection. The answer is no. Unlike some protectionist industries, fashion appears to have recognized a distinction between a pair of socks and, as one example, an ensemble that evokes a combination of obsession, rebellion, and femininity.[3] A higher level of originality (akin to novelty) and a high standard to demonstrate infringement are required in the proposed legislation.

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[1] *See, e.g.,* Kal Raustiala and Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687 (2006); Christopher A. Cotropia and James Gibson, *The Upside of Intellectual Property's Downside*, 57 UCLA L. REV. 921(2010).

[2] An effort to study the impact of intellectual property on stakeholders has been performed at a more granular level in the patent field, for example. *Cf.* Stuart J.H. Graham, et al., *High Technology Entrepreneurs and the Patent System: Results of the 2008 Berkeley Patent Survey*, 24 BERK. TECH. L.J.125 (2009) (considering the manner in which high technology startups use the patent system).

[3] *See generally* Cathy Horyn, *Jean Paul Gaultier: Black Magic,* THE NEW YORK TIMES (1/26/11) (describing Gaultier's couture show, stating, "it is hard to truly surprise people. But I think the audience today was stunned.") available at http://runway.blogs.nytimes.com/2011/01/26/jean-paul-gaultier-black-magic/.

These challenging standards appear to be roughly consonant with fashion's contribution as an expressive medium. This work argues that this is because fashion's connection with culture is manifest. It is intended as a reflection, and a revolution, of the zeitgeist as a form of collective vision and thought. Both fashion's creation and expression are not intended as the isolated expression of an author's single vision, but rather mixed and individualized by the wearer. For example, Christian Louboutin is not intending to make individual shoes akin to untouchable sculptures. Rather, he is intending to stop traffic with the beauty of a female form.[4]

In both its creation and the viewer's experience of its expression, fashion is an openwork medium. As such, a higher standard of originality and infringement are appropriate. Rather than treating fashion as a "negative space," this article treats it as "a space between" individualized creativity and culture.

Further, this work examines the extent to which this limited concept of protection might be applied to other copyrighted media. The primary example explored in this article is photography, which bears many of the same creative characteristics that are evidenced in fashion design. One might say that photography as a medium could be subject to a "piracy paradox," in that the sheer numbers of photographs created, copied, and distributed has mushroomed with the rise of easy copying and redistribution mechanisms. Yet unquestionably the medium evidences a spectrum of works, from those that factually record to those that represent highly introspective or imagined visions. Further, although any individual photograph may take little effort or thought, others require a developed and nurtured eye. Further, a limited number of images hold considerable expressive power along the same order as a song, film, or novel.

Like fashion, photographs are a product and driver of the zeitgeist. They are (sometimes simultaneously) artifacts of expression as well as a reflection of culture.[5] Photographs capture facts about the world and, like fashion, are built on exogenous inputs rather than a single authorial statement. Their expressive power depends on their ability to evoke visual symbolism to viewers who speak a common cultural language. As Gary Metz has said, "the serious photographer must use such related 'familiar' photographic phenomenon for the explication and expression of an intensely personal sensibility in a social context where photography has statistically, as if by accident, become a pervasive ingredient for our collective experience."[6] As one example, Andy Warhol's photographs of then-body builder Arnold Schwarzenegger during the 1970's appear (at a superficial level) no different than millions of snapshots taken at any party. However, once the cultural context is overlaid, a meaning that evidence's Warhol's

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[4] That protection for Louboutin's works are analyzed under trademark law is, in this author's view, a fundamental distortion. Further, it illustrates that functionality might be an inadequate solution for limited forms of protection.

[5] Thomas F. Barrow et al., READING INTO PHOTOGRAPHY, 2 (1982) (noting that a photograph can be a work of art and simultaneously an artifact of popular tradition).

[6] Quoted in Nathan Lyons, THE GREAT WEST: REAL/IDEAL, 9 (1977).

examination of gender, power, and celebrity begin to emerge. In 2012, these same photographs shift their meaning as Schwarzenegger has modified his public persona in the ensuing years. In other words, beyond anything Warhol has done, culture has changed the expressive meaning of those photographs. Because photographs depend on exogenous inputs for both their creation and their expressive power, a more limited form of protection becomes appropriate.

Other examples may be appropriate for heightened copyrightability and enforcement requirements. Fundamentally, this category may be applied to any media that is dependent of exogenous factors for the existence and expressive power of its works.