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ARTICLE

INTELLECTUAL PROPERTY LAW
AND THE SUMPTUARY CODE

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INTELLECTUAL PROPERTY LAW AND THE SUMPTUARY CODE

*Barton Beebe**

This Article assesses intellectual property law's emerging role as a modern form of sumptuary law. The Article observes that we have begun to rely on certain areas of intellectual property law to provide us with the means to preserve our conventional system of consumption-based social distinction, our sumptuary code, in the face of incipient social and technological conditions that threaten the viability of this code. Through sumptuary intellectual property law, we seek in particular to suppress the revolutionary social and cultural implications of our increasingly powerful copying technology. Sumptuary intellectual property law is thus taking shape as the socially and culturally reactionary antithesis of the more familiar technologically progressive side of intellectual property law. The Article identifies the conditions that are bringing about this peculiar juncture of intellectual property law and sumptuary law and evidences this juncture in various evolving intellectual property law doctrines. The Article further predicts that intellectual property law cannot succeed in sustaining our conventional system of consumption-based social distinction and identifies in this failure the conditions for a different and superior system of social distinction, one characterized more by the production of distinction than by its consumption and one in which intellectual property law promises to play a crucial — and progressive — social role.

INTRODUCTION

The Roman *leges sumptuariae* sought to regulate luxury expenditure and enforce social hierarchy in republican and imperial Rome.¹ Since these early Roman precursors, the history of sumptuary

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¹ See generally DAVID DAUBE, *ROMAN LAW: LINGUISTIC, SOCIAL AND PHILOSOPHICAL ASPECTS* 117–28 (1969); Jonathan Edmondson, *Public Dress and Social Control in Late Republican and Early Imperial Rome*, in *ROMAN DRESS AND THE FABRICS OF ROMAN CULTURE* 21 (Jonathan Edmondson & Alison Keith eds., 2008); Charlene Elliott, *Purple Pasts: Color Codification in the Ancient World*, 33 *LAW & SOC. INQUIRY* 173, 182–86 (2008). Roman sumptuary law was itself based in part on Greek sumptuary law. See AILEEN RIBEIRO, *DRESS AND MORALITY* 21–22 (Berg Publishers 2003) (1986).

law has been a bizarre one.² Consider the Japanese decree of 1668 that provided that “[p]uppet costumes must not be sumptuous. Gold and silver leaf must not be used on anything. But puppet generals only may wear gold and silver hats.”³ Or consider a sumptuary ordinance of seventeenth-century Nuremberg that lamented that “[i]t is unfortunately an established fact that both men- and womenfolk have, in utterly irresponsible manner, driven extravagance in dress and new styles to such shameful and wanton extremes that the different classes are barely to be known apart.”⁴ Most remarkable, perhaps, is the behavior of the Venetian Senate. In 1472, it called for the appointment of *Provveditori sopra le Pompe*, supervisors of luxury, to enforce the state’s sumptuary laws,⁵ and in 1511, it issued, not for the last time,⁶ a decree to the effect that “all new fashions are banned . . . [H]enceforth no new fashion that may be imagined or told shall be suffered.”⁷ The next year, as the powerful League of Cambrai prepared to attack, the Senate found itself debating sleeve widths and shoe designs.⁸ But it is not just the content of such laws that may strike the reader as strange. For all of the “enormous sumptuary productivity”⁹ of early modern Europe or the “ferocity of detail”¹⁰ of Tokugawa sumptuary law, these laws were almost invariably ignored, circumvented, or openly defied¹¹ — so that an eighteenth-century London stage character

² See generally ALAN HUNT, GOVERNANCE OF THE CONSUMING PASSIONS: A HISTORY OF SUMPTUARY LAW (1996); CATHERINE KOVESI KILLERBY, SUMPTUARY LAW IN ITALY 1200–1500 (2002); SUSAN MOSHER STUARD, GILDING THE MARKET: LUXURY AND FASHION IN FOURTEENTH-CENTURY ITALY 84–121 (2006); Donald H. Shively, *Sumptuary Regulation and Status in Early Tokugawa Japan*, 25 HARV. J. ASIATIC STUD. 123 (1964–1965).

³ Donald H. Shively, *Bakufu Versus Kabuki*, 18 HARV. J. ASIATIC STUD. 326, 345 (1955) (quoting Japanese decree 3/1668 (*Ofure* 2695)); accord HUNT, *supra* note 2, at 1. I am indebted to Professor Alan Hunt’s remarkable history for this and several of the quotations that follow.

⁴ 3 MAX VON BOEHN, *MODES AND MANNERS* 173 (Joan Joshua trans., 1935) (quoting Nuremberg sumptuary law of 1657).

⁵ HUNT, *supra* note 2, at 36–37; see also Catherine Kovesi Killerby, *Practical Problems in the Enforcement of Italian Sumptuary Law, 1200–1500*, in CRIME, SOCIETY AND THE LAW IN RENAISSANCE ITALY 99, 109 (Trevor Dean & K.J.P. Lowe eds., 1994) (dating the appointment of the *Provveditori* to 1514).

⁶ See THOMAS OKEY, *THE OLD VENETIAN PALACES AND OLD VENETIAN FOLK* 286–87 (1907).

⁷ *Id.* at 281 (emphasis omitted).

⁸ Diane Owen Hughes, *Sumptuary Law and Social Relations in Renaissance Italy*, in DISPUTES AND SETTLEMENTS: LAW AND HUMAN RELATIONS IN THE WEST 69, 71 (John Bossy ed., 1983).

⁹ HUNT, *supra* note 2, at xii.

¹⁰ LAFCADIO HEARN, *JAPAN: AN ATTEMPT AT INTERPRETATION* 187 (1904); see also Elizabeth B. Hurlock, *Sumptuary Law*, in DRESS, ADORNMENT, AND THE SOCIAL ORDER 295, 299 (Mary Ellen Roach & Joanne Bubolz Eicher eds., 1965) (referring to Tokugawa sumptuary law as “the strictest . . . the world has ever seen”).

¹¹ See, e.g., 1 JOHN HENRY GRAY, *CHINA: A HISTORY OF THE LAW, MANNERS, AND CUSTOMS OF THE PEOPLE* 362 (photo. reprint 1974) (William Gow Gregor ed., 1878) (reporting that the sumptuary laws of China are “very badly executed,” due not only due to “maladministra-

would declare: “I don’t care for it, now it is not prohibited.”¹² Indeed, the history of sumptuary law is filled with the likes of one Hannah Lyman, who, in 1676, chose to appear before a court in Northampton, Massachusetts, in the very dress that she was proscribed from and there being tried for wearing.¹³

Though historians have advanced many competing theories to explain the pervasiveness and persistence of sumptuary regulation in human social history, one general proposition appears to be well accepted: societies impose sumptuary laws in an effort to regulate and enforce their sumptuary codes. A society’s sumptuary code¹⁴ is its system of consumption practices, akin to a language (or at least “a set of dialects”¹⁵), by which individuals in the society signal through their consumption their differences from and similarities to others. Laws that seek to control and preserve this code are sumptuary laws. Historically, laws seeking to govern a society’s system of consumption-based distinction have most commonly taken the form of direct controls on consumption — an example, by no means atypical, is the 1463 English ordinance limiting to two inches the extent to which the shoes

tion,” but also because “they are attempts to restrain what cannot be restrained”); Killerby, *supra* note 5.

¹² C. WILLETT CUNNINGTON & PHILLIS CUNNINGTON, HANDBOOK OF ENGLISH COSTUME IN THE EIGHTEENTH CENTURY 14 (1957) (quoting COLLEY CIBBER, *The Double Galleon*, in 3 THE DRAMATIC WORKS OF COLLEY CIBBER, ESQ. 1, 39 (London, J. Rivington & Sons 1777)).

¹³ See ALICE MORSE EARLE, 1 TWO CENTURIES OF COSTUME IN AMERICA 63 (1903) (quoting the court record as reporting that Lyman was censured for “wearing silk in a flau]nting manner, in an offensive way, not only before but when she stood P[re]sented”).

¹⁴ The metaphor of the “code” is adopted from Thorstein Veblen, who makes extensive use of it. See, e.g., THORSTEIN VEBLER, THE THEORY OF THE LEISURE CLASS 51 (2d ed. 1912) (discussing the “latest accredited code of the punctilios as regards decorous means and methods of consumption”); *id.* at 201 (“The code of proprieties, conventionalities, and usages in vogue at any given time and among any given people has more or less of the character of an organic whole; so that any appreciable change in one point of the scheme involves something of a change or readjustment at other points also, if not a reorganisation all along the line.”); see also ROLAND BARTHES, THE FASHION SYSTEM 35 (Matthew Ward & Richard Howard trans., Univ. of Cal. Press 1990) (1967) (discussing the “real vestimentary code” and the “written vestimentary code”); JEAN BAUDRILLARD, THE CONSUMER SOCIETY: MYTHS AND STRUCTURES 60 (Chris Turner trans., Sage Publ’ns 1998) (1970) (describing the “code” of consumer society as the system of exchange, classification, and differentiation “into which consumption practices fit and from which they derive their meaning”); PIERRE BOURDIEU, DISTINCTION: A SOCIAL CRITIQUE OF THE JUDGMENT OF TASTE 2 (Richard Nice trans., Harv. Univ. Press 1984) (1979) (“Consumption is . . . a stage in a process of communication, that is, an act of deciphering, decoding, which presupposes practical or explicit mastery of a cipher or code.”); MARSHALL SAHLINS, CULTURE AND PRACTICAL REASON 180 (1976) (discussing, with respect to apparel fashion, the “code of object properties and their meaningful combinations”). For a discussion of the nature of this code, see *infra* section I.A, pp. 819–24.

¹⁵ DIANA CRANE, FASHION AND ITS SOCIAL AGENDAS: CLASS, GENDER, AND IDENTITY IN CLOTHING 247 (2000).

of persons of rank could extend beyond their toes.¹⁶ Societies have regularly imposed such controls when their governing classes come to believe that too much of their society's wealth is being wasted on conspicuous or decadent forms of consumption¹⁷ or that their society's system of relative consumption no longer operates reliably to differentiate and distinguish — if not to discipline¹⁸ — the various members of the society.¹⁹ This latter problem — the breakdown of a society's consumption-based system of social distinction — has typically occurred when formerly rare commodities or their equivalents suddenly become abundant or when lower-status social groups gain the economic power to consume goods that formerly only upper-status social groups consumed.²⁰ It has also occurred with urbanization, which tends to complicate the signaling and recognition of social position.²¹ The former problem — the squandering of national wealth — has been a constant concern but seems to be most acutely felt in times of war.²²

In this Article, I argue that we have recently undertaken a new round of sumptuary lawmaking, not just in the United States, but globally, and for reasons comparable to those that drove previous sumptuary turns. Sumptuary law did not disappear with industrialization and democratization, as is generally believed. Rather, it has taken on a new — though still quite eccentric — form: intellectual property law. To be sure, the express purpose and primary effect of intellectual property law remains the prevention of misappropriation and the promotion of technological and cultural progress. But for various reasons,

¹⁶ R. TURNER WILCOX, *THE MODE IN COSTUME* 59 (2d rev. & expanded ed. 1947). An early example of direct controls on consumption — probably the earliest — is found in the seventh-century B.C.E. Locrian Code. See MICHAEL GAGARIN, *EARLY GREEK LAW* 58–62, 67, 78 (1st paperback prtg. 1989). As Montaigne tells it, the lawgiver Zaleucus of Locri stipulated that, among other things, “no free woman should be allowed any more than one maid to follow her, unless she was drunk,” and, “bravos excepted, no man was to wear a gold ring, nor be seen in one of those effeminate robes woven in the city of Miletum.” 1 MICHEL DE MONTAIGNE, *ESSAYS OF MONTAIGNE* 360 (William Carew Hazlitt ed., Charles Cotton trans., 1877).

¹⁷ See, e.g., KILLERBY, *supra* note 2, at 41–42 (noting that preambles to sumptuary laws in late medieval and Renaissance Italy frequently cited “dissipation of capital,” *id.* at 41, as a justification for such laws).

¹⁸ See generally Alan Hunt, *Governing the City: Liberalism and Early Modern Modes of Governance*, in FOUCAULT AND POLITICAL REASON 167 (Andrew Barry et al. eds., 1996).

¹⁹ See, e.g., RIBEIRO, *supra* note 1, at 15 (“[T]he real purpose [of early modern English sumptuary law] was to enforce class distinctions which it was felt were being eroded by dress.”).

²⁰ See Hughes, *supra* note 8, at 99.

²¹ See VEBLEN, *supra* note 14, at 87–88 (“[T]he serviceability of consumption as a means of repute, as well as the insistence on it as an element of decency, is at its best in those portions of the community where the human contact of the individual is widest and the mobility of the population is greatest.” *Id.* at 87.); see also HUNT, *supra* note 2, at 136 (discussing the “crisis of recognizability” that marked the transition to urbanization and modernity in early modern Europe (internal quotation marks omitted)).

²² See, e.g., Hunt, *supra* note 18, at 170.

we are increasingly investing intellectual property law with, and forcing the law to adapt to, a new purpose. This purpose is to preserve and stabilize our modern sumptuary code in the face of emerging social and technological conditions that threaten its viability and that intellectual property law is uniquely well-suited to address. We are thus increasingly relying on intellectual property law not so much to enforce social hierarchy as simply to conserve — or in Pierre Bourdieu's terminology, to “reproduce”²³ — our system of consumption-based social distinction and the social structures and norms based upon it. The result is that intellectual property law now consists of two conflicting sides: the familiar progressive side of the law, which works, in the terms of the U.S. Constitution, “To promote the Progress of Science and useful Arts,”²⁴ and the unappreciated sumptuary side of the law, which is not progressive but rather socially and technologically reactionary. This Article seeks, as a descriptive matter, to identify the conditions that are bringing about this peculiar juncture of intellectual property law and sumptuary law. It further seeks, as a predictive matter, to consider whether intellectual property law can ultimately succeed as sumptuary law and, as a normative matter, to assess whether it should.

Part I begins the descriptive side of the Article by examining why modern societies have resorted to sumptuary law, albeit in a new and indirect form. For the past two centuries, our system of consumption-based social distinction has performed an important social function: it has facilitated the construction of individual and group identity. But for two reasons, one primarily social, the other primarily technological, our modern sumptuary code is breaking down. First, be they hierarchical or nonhierarchical in nature, forms of competitive consumption tend to neutralize each other's distinctiveness, potentially making all consumers less distinctive over time. As various cultural practices attest, this potential has lately become a reality. Our ever quickening “arms race” of competitive consumption is increasingly producing little more than indistinction, meaningless difference, noise. Second and closely related, our material conditions no longer support the particular conditions of scarcity — or its aestheticized form, which we call rarity — that our sumptuary code requires to operate. In a time when “cul-

²³ See PIERRE BOURDIEU & JEAN-CLAUDE PASSERON, REPRODUCTION IN EDUCATION, SOCIETY AND CULTURE (Richard Nice trans., Sage Publ'ns 1977) (1970); Pierre Bourdieu, *Cultural Reproduction and Social Reproduction*, in KNOWLEDGE, EDUCATION, AND CULTURAL CHANGE 71, 97 (Richard Brown ed., 1973); see also CULTURAL REPRODUCTION (Chris Jenks ed., 1993).

²⁴ U.S. CONST. art. I, § 8, cl. 8. For a still-timely critique of the progressive ideology of intellectual property law, see Margaret Chon, *Postmodern “Progress”: Reconsidering the Copyright and Patent Power*, 43 DEPAUL L. REV. 97 (1993).

tured diamonds” are said to be more perfect than “natural diamonds,”²⁵ and when most competitively consumed goods can be persuasively simulated, our increasingly powerful copying technologies threaten quickly to dilute the rarity and thus the distinctiveness of otherwise distinctive goods. While a “post-scarcity society”²⁶ no doubt remains as far off as it has ever been, a *post-rarity* society is already upon us. The power of our mimetic technology has thus forced a difficult question: how can a “culture of the copy”²⁷ dedicated to and increasingly capable of the reproduction and near-production of nearly everything also produce distinctions, rarities, *uncopies*, and how can it protect these distinctions from the very forces of dilution that characterize the culture? More essentially, how can a powerfully mimetic culture maintain a sumptuary code?

As Part II explains, the answer has emerged, if ultimately by default, in intellectual property law. If we wish to preserve our system of consumption-based distinction, then we require a set of laws to do the work that our material conditions once did; if technology has stripped nature of its ability to enforce rarity, then culture must fill that role. Crucially, however, we can no longer control competitive consumption directly, for no free market democracy would countenance such restrictions on consumer sovereignty. We have thus turned to intellectual property law because it is the one area of law (outside of prohibitions against fraud) that is capable of protecting forms of distinction from imitation and overproduction. Simply stated, while many characteristics of goods may now be both technologically and legally imitated (for example, the physical structure of diamonds), those characteristics protected by intellectual property law, while they may be technologically imitated, may not be legally imitated (for example, brands of diamonds). While intellectual property law will not directly control which class of consumers may consume which distinctive goods, as did previous forms of sumptuary law, it does provide us with the means to govern the modern sumptuary code indirectly, by facilitating the private control of the *production* of such goods through the prevention of the unauthorized copying of them. This alone may explain why so much of our sumptuary code is now based on distinctive intellectual properties (such as trademarks) and why so much of our intellectual property enforcement is devoted to protecting such properties from unauthorized copying. Intellectual properties are typically easily commodifiable, widely available, and clearly legible forms of rarity. More importantly, for all of their susceptibility to counterfeiting, they

²⁵ See Vanessa O’Connell, *Gem War*, WALL ST. J., Jan. 13–14, 2007, at P1.

²⁶ MURRAY BOOKCHIN, *POST-SCARCITY ANARCHISM*, at xvi (3d ed. 2004).

²⁷ HILLEL SCHWARTZ, *THE CULTURE OF THE COPY* (1996).

are the most stable such forms of rarity that we have left. Thus, intellectual property law has not so much assumed the role of sumptuary law as had that role thrust upon it, with the result that certain areas of intellectual property law are undergoing a “functional transformation”²⁸ orienting them toward the governance of our sumptuary code.

Part II focuses on two areas of intellectual property law that are especially revealing of the law’s sumptuary turn. The first is antidilution protection, a once obscure form of intellectual property protection that was thought to apply only to trademarks, if even to them, but that is now being implemented in one form or another across the full field of intellectual property law, including copyright and design protection law. Antidilution protection is being implemented so widely because it provides the means to address the quintessential problem of a relentlessly mimetic culture: the problem of dilutive copying. It is well understood that substitutive copying damages creators’ incentives to create copyable works. It is less well understood that dilutive copying not only damages creators’ incentives but does much worse, for dilutive copying also damages the utility, specifically, the relative utility, of the works themselves by diluting their distinctiveness, by rendering them commonplace. Antidilution protection recognizes that the utility of certain intellectual works is exhaustible and that their consumption is rivalrous. It seeks to do what antisubstitution protection often cannot, which is to preserve the distinctiveness of such works and ensure that they may continue to distinguish their consumers.

The second and related area consists of what might be termed “authenticity protection.” Geographically and historically authentic goods, such as European wines or Australian aboriginal graphic expression, confer on modern consumers a special form of distinction: the distinction of possessing authentic originals rather than copies. Yet modern mimetic practices have proved capable of reproducing the material characteristics of authentic originals, which is diluting the distinctiveness not only of these characteristics, but also of their originating cultures. More essentially, such practices are reducing authenticity to a purely intangible, intellectual characteristic of goods. Traditional producers have accordingly turned to various forms of intellectual property law, such as geographical indications law and traditional cultural

²⁸ See KARL RENNER, *THE INSTITUTIONS OF PRIVATE LAW AND THEIR SOCIAL FUNCTIONS* 81 (O. Kahn-Freund ed., Agnes Schwarzschild trans., 1949) (discussing the process of “functional transformation” in which the function of a law or set of laws may change even though the form and content of the law may remain the same); see also HUNT, *supra* note 2, at 13 (arguing that the history of sumptuary law provides a “case study of the ‘functional transformation’ of legal norms whereby the same legal framework is deployed in changed circumstances and in the service of different projects”).

expressions protection, to advance and defend the authenticity of their goods and their cultures.

As Part II seeks to show, the adaptation of antidilution and authenticity protection to serve sumptuary ends is especially revealing because, in serving these ends, both modes of protection operate according to assumptions that run contrary to nearly everything we conventionally believe about the nature of intellectual property and the purposes of intellectual property law. Both reveal the extent to which the sumptuary side of intellectual property law is emerging as a strange, inverted version of the progressive side of the law, with possibly severe implications for the coherence and efficacy of the law as a whole.

Part III predicts that sumptuary intellectual property law cannot succeed in stabilizing the modern sumptuary code, but asserts that this outcome is normatively desirable. In its sumptuary aspect, intellectual property law aggressively protects existing intangible forms of distinction from unauthorized copying and dilution, but in its progressive aspect, intellectual property law also strongly encourages the development of new such forms of distinction. The result is a dangerously open-ended form of sumptuary law that will only destabilize our sumptuary order all the more. Yet this promises to be a fortunate failure. In advanced post-industrial economies if not elsewhere, intellectual property law has been embraced as a last redoubt for a social system so much of whose received social and cultural norms are based on conditions of scarcity and rarity and so much of whose technology is increasingly able to overcome those conditions. In its sumptuary aspect, intellectual property law is an effect of, at the same time that it has become a cause of, social “inertia.”²⁹ By contrast, the phenomena of dilution and inauthenticity attest to the socially progressive, even liberatory potential of our mimetic technologies to render obsolete, by flooding it with copies, our system of consumption-based social differentiation. We have enlisted intellectual property law in a last-ditch and ultimately futile effort to suppress this socially revolutionary potential of our copying technology. Part III argues that our doing so is inconsistent with the progressive project of intellectual property law specifically and of modernity more generally.

I. THE SUMPTUARY CODE AND THE PROBLEM OF COPYING TECHNOLOGY

In France, as in certain other European countries, it is a criminal act not simply to manufacture or sell, but also to possess, a counterfeit

²⁹ See TALCOTT PARSONS & NEIL J. SMELSER, *ECONOMY AND SOCIETY: A STUDY IN THE INTEGRATION OF ECONOMIC AND SOCIAL THEORY* 263 (1st paperback ed. 1965).

good, regardless of where one purchased it.³⁰ Yet this did not dissuade a South Korean university student from walking into a Chanel store in Paris in 2002 and demanding that the store repair the broken shoulder strap of her Chanel bag, which the store did without charging and with “profuse apologies.”³¹ As the student well knew, the bag was a counterfeit, but the Chanel employees, even upon closely inspecting the bag, simply could not tell.³² Unbeknownst to them, they had come face to face with a legendary South Korean “super copy,”³³ the three-dimensional analogue of the perfect digital copy.

The purpose of this Part is to explore the implications, and, in particular, the social implications, of the kinds of mimetic technologies that produce super copies and that empower modern-day Hannah Lymans the world over to defy our sumptuary code — and now our sumptuary law as well. Too often in discussions of intellectual property law, we focus solely on the economic implications of such technologies, on how they undermine authors’ and inventors’ incentives to create or invent and thus slow “Progress.” This Part focuses instead on the implications of such technologies for our system of consumption-based social distinction. With their ability rapidly to reproduce and disseminate imitations of distinctive material goods, such technologies are destroying the capacity of material goods reliably to confer distinction and are shifting the emphasis of our system of social distinction toward the consumption of distinctive intellectual properties. This shift has profound consequences. Most significantly, we can no longer rely on the materiality of material forms of distinction to mod-

³⁰ See CODE DE LA PROPRIÉTÉ INTELLECTUELLE art. 716-10 (Fr.), available at http://www.legifrance.gouv.fr/telecharger_pdf.do?cidTexte=LEGITEXT000006069414. Italy has also imposed large fines on those who knowingly buy or possess counterfeit goods. See Adam L. Freeman & Sara Gay Forden, *In Italy, ‘Buying a Fake Bag Isn’t a Joke’ — It’s a Crime*, INT’L HERALD TRIB., Jan. 13, 2006, available at <http://www.nytimes.com/2006/01/13/business/worldbusiness/13iht-fake.html> (reporting that a woman in Florence was fined €3333 for buying fake sunglasses for €11).

³¹ Velisarios Kattoulas, *Bags of Trouble*, FAR E. ECON. REV., Mar. 21, 2002, at 52, 52.

³² *Id.* The Third Circuit case of *Gucci America, Inc. v. Daffy’s, Inc.*, 354 F.3d 228 (3d Cir. 2003), stems from a comparable set of facts. There, the defendant purchased 594 “Jackie-O”-style Gucci bags from a reputable third-party distributor and eventually sold all but six of them. In an effort to verify the authenticity of the bags, the defendant sent an employee to a Gucci outlet on the pretext that the employee had received the bag as a gift and wanted to check its authenticity. A store clerk inspected the bag and stated that it was authentic. The defendant also sent another, damaged bag to a Gucci repair center, which repaired and returned the bag without question. In fact, all 594 bags were counterfeit. *Id.* at 229–30. Remarkably, the district court declined to order the defendant to recall the counterfeit bags “because the quality of the counterfeit bags and the relatively high price Daffy’s consumers were willing to pay for them undermined claims of a tarnished Gucci trademark.” *Id.* at 234. The Third Circuit affirmed. *Id.* at 243.

³³ Kattoulas, *supra* note 31, at 52; see also RADHA CHADHA & PAUL HUSBAND, *THE CULT OF THE LUXURY BRAND: INSIDE ASIA’S LOVE AFFAIR WITH LUXURY* 269–70 (2006) (discussing the high quality of Chinese and Korean “genuine fakes”); Ray Tai, *Label Conscious*, MANAGING INTEL. PROP., Apr. 2007, at 50, 50 (discussing “A grade” “super fakes”).

erate the velocity of the fashion process. This threatens to intensify the fundamental problem of competitive consumption, which is that it tends to take the form of a competitive “arms race” in which forms of distinction neutralize each other’s distinctiveness. Indeed, the shift to immaterial forms of distinction, which are themselves highly susceptible to unauthorized copying, threatens to do more than merely intensify this problem. It has the potential to exhaust altogether our system of consumption-based social distinction.

To defend this reasoning, I first briefly discuss the function and operation of this system. I concentrate in particular on the nature of the fashion process because it is through the complex operation of this process that consumer societies allocate social distinction. I then address the negative consumption externalities problem that besets competitive consumption. Finally, I consider the potential of our mimetic technologies to overwhelm the operation of the fashion process and our system of consumption-based social distinction along with it.

A. *The Sumptuary Code and the Fashion Process*

While traditional sumptuary law may have gone into decline with the rise of industrialization and democratization, the sumptuary code did not. With the emergence of consumer society, it has only intensified. A large body of empirical social science work has demonstrated that human beings feel a need to conceive of themselves as distinctive, both to support their self-esteem and, more fundamentally, to form and preserve a coherent sense of self.³⁴ In constructing a distinctive identity, individuals do not necessarily seek to feel hierarchically superior or diametrically opposed to others,³⁵ nor do they seek to feel absolutely unique. On the contrary, in their search for an equilibrium of “opposing drives for assimilation and differentiation,”³⁶ individuals seek a level of “optimal distinctiveness”³⁷ by aligning themselves with certain

³⁴ See, e.g., C.R. SNYDER & HOWARD L. FROMKIN, UNIQUENESS: THE HUMAN PURSUIT OF DIFFERENCE (1980); Vivian L. Vignoles, Xenia Chrysochoou & Glynis M. Breakwell, *The Distinctiveness Principle: Identity, Meaning, and the Bounds of Cultural Relativity*, 4 PERSONALITY & SOC. PSYCHOL. REV. 337 (2000).

³⁵ See C.R. Snyder, *Product Scarcity by Need for Uniqueness Interaction: A Consumer Catch-22 Carousel?*, 13 BASIC & APPLIED SOC. PSYCHOL. 9, 20–21 (1992) (“[T]he underlying engine that drives the Catch-22 carousel is not social status, although this may be an important contributing source of energy that keeps the wheel going. Rather, it is the sense of specialness per se that the scarce possessions impart to the individual’s self that is the critical force.”); see also Wilfred Amaldoss & Sanjay Jain, *Pricing of Conspicuous Goods: A Competitive Analysis of Social Effects*, 42 J. MARKETING RES. 30, 30 (2005) (“An important implication of [uniqueness research] is that people could choose to buy a different product merely for the sake of being different from other consumers rather than to display their wealth or social status.”).

³⁶ Marilyn B. Brewer, *The Social Self: On Being the Same and Different at the Same Time*, 17 PERSONALITY & SOC. PSYCHOL. BULL. 475, 478 (1991).

³⁷ *Id.* at 475 (emphasis omitted).

groups and differentiating themselves from certain other groups.³⁸ Importantly, the individual's pursuit of distinctiveness depends at least in part on the perception of others; to feel distinctive, the individual must believe that he is perceived by others as distinctive.³⁹

Though the need to feel distinctive appears to be a universal human motivation, standards of optimal distinctiveness and the specific means of achieving it may vary considerably across cultures and time.⁴⁰ As social theorists such as Georg Simmel⁴¹ and Edward Sapir⁴² (and Caroline Foley⁴³) hypothesized a century ago, and as has since been well demonstrated,⁴⁴ individuals in modern, urban societies tend to experience an especially intense "counterconformity motivation"⁴⁵ to differentiate themselves from the mass of others, albeit by asserting their similarity to some subset of those others. Over the past century, and particularly in the kinds of urban, industrialized societies to which Simmel and Sapir devoted much of their attention, individuals have increasingly acted on this motivation through the consumption of what they perceive to be and what they believe others perceive to be differentiating goods.⁴⁶ Other traditionally powerful dimensions

³⁸ See GEORG SIMMEL, *The Philosophy of Fashion*, in SIMMEL ON CULTURE 187, 189 (David Frisby & Mike Featherstone eds., 1997) (discussing the "two opposing tendencies" of "social equalization" and "individual differentiation"); see also C. Scott Hemphill & Jeannie Suk, *The Law, Culture, and Economics of Fashion*, 61 STAN. L. REV. 1147, 1164-66 (2009) (discussing consumers' and producers' inclination to engage in "flocking" and "differentiation").

³⁹ See Marilynn B. Brewer, *Optimal Distinctiveness, Social Identity, and the Self*, in HANDBOOK OF SELF AND IDENTITY 480 (Mark R. Leary & June Price Tangney eds., 2005); see also Jonah Berger & Chip Heath, *Who Drives Divergence? Identity Signaling, Outgroup Dissimilarity, and the Abandonment of Cultural Tastes*, 95 J. PERSONALITY & SOC. PSYCHOL. 593 (2008) (emphasizing the social nature of identity signaling).

⁴⁰ See Vignoles et al., *supra* note 34, at 342-46.

⁴¹ See, e.g., GEORG SIMMEL, *The Metropolis and Mental Life*, in THE SOCIOLOGY OF GEORG SIMMEL 409 (Kurt H. Wolff ed. & trans., 1950).

⁴² See, e.g., EDWARD SAPIR, *Fashion*, in 3 THE COLLECTED WORKS OF EDWARD SAPIR 265 (Regna Darnell et al. eds., 1999).

⁴³ See Caroline A. Foley, *Fashion*, 3 ECON. J. 458 (1893). Foley's work has only recently begun to be recognized. See Edward Fullbrook, *Caroline Foley and the Theory of Intersubjective Demand*, 32 J. ECON. ISSUES 709, 709-10 (1998).

⁴⁴ See, e.g., Angela Chao & Juliet B. Schor, *Empirical Tests of Status Consumption: Evidence from Women's Cosmetics*, 19 J. ECON. PSYCHOL. 107, 114 (1998) (finding empirical support for the hypothesis that "an urban setting leads to a greater need to use visible consumption to gain status, following Veblen" and noting that "[t]his expectation is based on the observation that the social culture of urban areas is more fluid, thereby making non-consumption dimensions of status less salient").

⁴⁵ Kelly Tepper Tian & Karyn McKenzie, *The Long-Term Predictive Validity of the Consumers' Need for Uniqueness Scale*, 10 J. CONSUMER PSYCHOL. 171, 172 (2001); see also Paul R. Nail, *Toward an Integration of Some Models and Theories of Social Response*, 100 PSYCHOL. BULL. 190, 197-200 (1986) (discussing the concept of "counterformity" in individuals' responses to their social context).

⁴⁶ See, e.g., Michael Lynn & C.R. Snyder, *Uniqueness Seeking*, in HANDBOOK OF POSITIVE PSYCHOLOGY 395, 399-402 (C.R. Snyder & Shane J. Lopez eds., 2002) (reviewing research on

of assimilation and differentiation such as gender, race, religion, class, or caste are still operative in such societies, but even these dimensions are now often expressed in and mediated by habits and communities — in short, “lifestyles” — of consumption.⁴⁷

Far from being a static system of meaning, the various significations and values of the modern sumptuary code evolve according to the logic of the fashion process. This process is the recursive social mechanism by which (1) individuals pursue optimal distinctiveness through the innovation and copying of inter- and intragroup forms of distinction; (2) certain of these forms are copied so extensively that they no longer define or differentiate the group as against other groups or the individual as against other individuals in the group; and (3) the individual or the group then innovates new or copies other forms of distinction.⁴⁸ Dilutive copying, be it authorized or not, is the primary driver of this process, or as Simmel famously remarked: “As a fashion spreads, it gradually goes to its doom.”⁴⁹ Such copying both destroys the distinctiveness of existing fashions and creates the need for new ones.⁵⁰ To take a notorious example from the luxury goods sector, Pierre Cardin licensed his trademarks so profligately — “by the 1980s he had lent his name to up to 800 products, including toilet-seat covers”⁵¹ — that the distinctiveness of his brand was quickly diluted, clearing the way for the rise of other luxury brands more careful about the risks of overexposure.⁵²

Though typically the most familiar examples of the relation between dilutive copying and the fashion process come from the world of

the relation between individuals’ pursuit of self-distinctiveness and consumption); *see also* MIKE FEATHERSTONE, *CONSUMER CULTURE AND POSTMODERNISM* 84 (2d ed. 2007) (“The modern individual within consumer culture is made conscious that he speaks not only with his clothes, but with his home, furnishings, interior decoration, car and other activities which are to be read and classified in terms of the presence and absence of taste.”); ALISON LURIE, *THE LANGUAGE OF CLOTHES* 3 (Owl Books 2000) (1981) (“For thousands of years human beings have communicated with one another first in the language of dress.”). *But see* Colin Campbell, *When the Meaning Is Not a Message: A Critique of the Consumption as Communication Thesis*, in *BUY THIS BOOK: STUDIES IN ADVERTISING AND CONSUMPTION* 340 (Mica Nava et al. eds., 1997) (disputing the consumption as language hypothesis).

⁴⁷ *See* MARGARET MAYNARD, *DRESS AND GLOBALISATION* (2004); *see also* *CLOTHING AND DIFFERENCE: EMBODIED IDENTITIES IN COLONIAL AND POST-COLONIAL AFRICA* (Hildi Hendrickson ed., 1996) [hereinafter *CLOTHING AND DIFFERENCE*].

⁴⁸ *See, e.g.*, Giacomo Corneo & Olivier Jeanne, *Segmented Communication and Fashionable Behavior*, 39 *J. ECON. BEHAV. & ORG.* 371, 371 (1999) (“[F]ashions develop according to life cycles, with each cycle being subdivided into different stages: introduction, emulation, mass conformity and decline.” (emphasis omitted)); *see also* A.C. Pigou, *The Interdependence of Different Sources of Demand and Supply in a Market*, 23 *ECON. J.* 19 (1913).

⁴⁹ Georg Simmel, *Fashion*, 10 *INT’L Q.* 130, 138–39 (1904).

⁵⁰ *See generally* Peter M. Kort et al., *Brand Image and Brand Dilution in the Fashion Industry*, 42 *AUTOMATICA* 1363 (2006) (discussing and modeling brand image maintenance strategies).

⁵¹ *Business Sense*, *ECONOMIST*, Mar. 6, 2004, 50 (*Fashion Survey* insert), at 8.

⁵² *See id.*

high-status apparel goods, it cannot be emphasized enough that the fashion process involves far more than mere changes in apparel fashion. It is crucial to separate the well-advertised myths of *Vogue* magazine or the cinematic license of *The Devil Wears Prada* from the reality of the fashion process as it operates across a wide range of goods and social groups⁵³ (and academic disciplines⁵⁴). The traditional economic account of the fashion process incorrectly assumes that individuals and groups innovate new fashions primarily to assert their status as hierarchically superior to others and copy preexisting fashions primarily to assert their status as hierarchically equal to others.⁵⁵ These assumptions may have been appropriate when the likes of Bernard Mandeville or Adam Smith made them centuries ago, or even when Thorstein Veblen and Simmel made them last century, but they no longer offer a comprehensive explanation of the modern global fashion process.⁵⁶ While the “trickle-down” theory of the fashion process may greatly aid quantitative analysis, it has, as an empirical matter, long been discredited.⁵⁷ Studies of the fashion process in the United States,⁵⁸ the developing world,⁵⁹ and elsewhere⁶⁰ show that new fashions emerge from and spread to diverse locations throughout global culture.⁶¹ In innovating or copying them, individuals seek a level of optimal distinctiveness that need not necessarily confer hierarchical status.⁶² Indeed, as

⁵³ See GILLES LIPOVETSKY, *THE EMPIRE OF FASHION* 5 (Catherine Porter trans., Princeton Univ. Press 1994) (1987) (“[T]he dominant feature of our societies . . . is precisely the extraordinary generalization of fashion: the extension of the ‘fashion’ form to spheres that once lay beyond its purview, the advent of a society restructured from top to bottom by the attractive and the ephemeral — by the very logic of fashion.”); *id.* at 6 (“Fashion is no longer an aesthetic embellishment, a decorative accessory to collective life; it is the key to the entire edifice.”).

⁵⁴ See Scott Jaschik, *Academic Fashions Aren't Just Sartorial*, INSIDE HIGHER ED, Dec. 28, 2006, <http://www.insidehighered.com/news/2006/12/28/papers> (describing a Modern Language Association panel on literary-academic fashion).

⁵⁵ See, e.g., H. Leibenstein, *Bandwagon, Snob, and Veblen Effects in the Theory of Consumers' Demand*, 64 Q.J. ECON. 183, 184 (1950); see also Philip R.P. Coelho & James E. McClure, *Toward an Economic Theory of Fashion*, 31 ECON. INQUIRY 595, 596 (1993); Paul Frijters, *A Model of Fashions and Status*, 15 ECON. MODELLING 501, 502 (1998); Wolfgang Pesendorfer, *Design Innovation and Fashion Cycles*, 85 AM. ECON. REV. 771, 772 (1995).

⁵⁶ See generally CRANE, *supra* note 15.

⁵⁷ See, e.g., Diana Crane, *Diffusion Models and Fashion: A Reassessment*, 566 ANNALS AM. ACAD. POL. & SOC. SCI. 13 (1999); George A. Field, *The Status Float Phenomenon: The Upward Diffusion of Innovation*, 13 BUS. HORIZONS 45 (1970); see also Herbert Blumer, *Fashion: From Class Differentiation to Collective Selection*, 10 SOC. Q. 275, 277–82 (1969).

⁵⁸ See, e.g., Dorie S. Goldman, “Down for La Raza”: *Barrio Art T-Shirts, Chicano Pride, and Cultural Resistance*, 34 J. FOLKLORE RES. 123 (1997).

⁵⁹ See MAYNARD, *supra* note 47; see also CLOTHING AND DIFFERENCE, *supra* note 47.

⁶⁰ See, e.g., DICK HEBDIGE, *SUBCULTURE: THE MEANING OF STYLE* (Terence Hawkes ed., 1979); TED POLHEMUS, *STREET STYLE: FROM SIDEWALK TO CATWALK* (1994).

⁶¹ See CRANE, *supra* note 15, at 237 (“In the late twentieth century, global culture is multicentered: styles flow from centers to peripheries and vice versa.”).

⁶² See ROBERT G. DUNN, *IDENTIFYING CONSUMPTION* 123 (2008) (“[S]tatus claims are now often predicated on forms of expressive behavior differentiating people along a horizontal

the modern marketplace of kaleidoscopic distinctions, the “marketing of no marketing,”⁶³ “indie brands,”⁶⁴ and “mass customization”⁶⁵ suggest, commodified forms of distinction often demonstrably reject the norms of hierarchical status competition in order to achieve their ultimate purpose, which is to produce in the fashion innovator or adopter a feeling of “significant difference,”⁶⁶ of being something other than a mere copy in a mass world of equivalence — thus the emerging phenomenon in which consumers display obvious fakes of high-status luxury goods as especially *recherché* signs of distinction.⁶⁷ As Thomas Frank has convincingly demonstrated, this commodification of counterconformity was, for example, a defining characteristic of the “Peacock Revolution” in men’s apparel fashion in the 1960s and has fostered the “hip consumerism” (captured most effectively by Apple’s Steve Jobs) that has followed ever since.⁶⁸

Recognizing that an individual need not feel hierarchically superior in order to feel distinctive allows us to appreciate a fundamental point about the modern sumptuary code, one that helps to explain why we have come to rely on intellectual properties to serve as distinctive goods: a good need not be especially expensive in order to confer distinction on its consumer. This is because a good may be perceived as distinctive to the extent that it is perceived as rare along one or both of at least two different dimensions.⁶⁹ First and perhaps obviously, a good may be perceived as rare because it exists in very few copies, or at least in far fewer copies than are demanded (for example, an expensive, limited-edition automobile). But second and perhaps less obviously, a good may also be perceived as rare because there are per-

axis of noneconomic criteria. To the extent this is the case, lifestyle patterns have become markers of *difference* rather than inequality, leaving the concept of status increasingly ambiguous.”)

⁶³ Rob Walker, *The Marketing of No Marketing*, N.Y. TIMES, June 22, 2003, § 6 (Magazine), at 42.

⁶⁴ See, e.g., Julie Naughton & Matthew W. Evans, *Color Outperforms Fragrance in 2005 Department Store Tally*, WOMEN’S WEAR DAILY, Apr. 14, 2006, at 1 (discussing the success of “indie” and “artist and alternative” cosmetics brands).

⁶⁵ See Benedict G.C. Dellaert & Stefan Stremersch, *Marketing Mass-Customized Products: Striking a Balance Between Utility and Complexity*, 42 J. MARKETING RES. 219, 219 (2005); see also DANA THOMAS, *DELUXE: HOW LUXURY LOST ITS LUSTER* 318 (2007) (discussing the marketing of “massclusivity” (internal quotation marks omitted)).

⁶⁶ HEBDIGE, *supra* note 60, at 102 (“The communication of a significant difference . . . is the ‘point’ behind the style of all spectacular subcultures.” (emphasis omitted)).

⁶⁷ See Susan Scafidi, *Bag Lady*, COUNTERFEIT CHIC, July 13, 2009, <http://counterfeitchic.com/2009/07/bag-lady.html> (showing examples of handbags marked “FAKE”); see also Frédéric Glaize, *Contrefaçon*, LE PETIT MUSÉE DES MARQUES, Nov. 15, 2006, <http://www.pmdm.fr/wp/2006/11/15/contrefacon> (discussing an applicant’s attempt to register the mark “*contrefaçon*” (“counterfeit”) for apparel at the French Institut National de la Propriété Industrielle).

⁶⁸ See THOMAS FRANK, *THE CONQUEST OF COOL* 184–205 (1997).

⁶⁹ See generally Dwight E. Robinson, *The Economics of Fashion Demand*, 75 Q.J. ECON. 376, 385–90 (1961) (discussing the role of rarity in the fashion process).

ceived to be few other goods in the marketplace like it (for example, an iPhone). It is along this second dimension of rarity that a firm's advertising may enhance the perceived rarity of a good at the same time that the firm is mass-producing more and more copies of it. It is also along this second dimension of rarity that a brand can become so ubiquitous, can exist in so many copies, that its very ubiquity is the basis of its perceived rarity — if not quite famous for being famous, the brand Coca-Cola is distinctive, if not unique, for its unrivalled ubiquity. This strange, seemingly paradoxical logic of rarity in the modern sumptuary code (and of the concept of “distinctiveness” in trademark law⁷⁰) is recapitulated in the ambiguity of the term “copy,” which may refer to (1) identical reproductions of a particular good; (2) other subsequent goods that resemble, but are not identical to, the original good; or (3) identical reproductions of those subsequent goods.⁷¹ Thus, while a limited edition good may lose its distinctiveness by being reproduced in too many identical copies, a mass-produced good — or limited edition good, for that matter — may lose its distinctiveness by being copied by too many other similar but not identical goods (for example, a BlackBerry Storm or a Palm Pre). In either case, the harm is the dilution of distinctiveness — a harm that, as we will see, intellectual property law is uniquely well-suited to address.

B. The Limits of Competitive Consumption

A fundamental problem with the fashion process is that social distinction is a “social scarcity,”⁷² not a natural one. For all of our technology, we cannot create a greater overall sum of social distinction. We can only allocate among ourselves the sum that we have. Economic thought has long recognized this problem, though sometimes grudgingly,⁷³ with respect to hierarchical distinction in a society, competition for which is theorized to be zero-sum in nature along a single vertical dimension. Economic thought has been less attuned, however, to the problem of the social scarcity of distinction as it affects nonhierarchical, multidimensional distinction in a society. Yet the problem of social scarcity operates here as well and is arguably more serious. For

⁷⁰ See Rosemary J. Coombe, *Embodied Trademarks: Mimesis and Alterity on American Commercial Frontiers*, 11 *CULTURAL ANTHROPOLOGY* 202, 206 (1996) (discussing trademarks' “paradoxical promises of standardization and distinction”).

⁷¹ Cf. WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 48–49 (2003) (“The word ‘copies’ has two distinct referents. It refers to the output of a copier; but it also refers to the physical output of the producer of the copied work . . .”).

⁷² FRED HIRSCH, *SOCIAL LIMITS TO GROWTH* 3 (2d ed. 1999).

⁷³ See generally ROGER MASON, *THE ECONOMICS OF CONSPICUOUS CONSUMPTION: THEORY AND THOUGHT SINCE 1700* (1998) (surveying the history of economic thought on status-conscious consumption).

in seeking to create ever more forms of nonhierarchical distinction, a system of consumption-based social distinction has the potential to reach a limit, a congestion threshold, beyond which social distinction itself is rendered indistinct. This latter point is not obvious, but is crucial to understanding how intellectual property law may affect the fate of our sumptuary code. It is best approached within the framework of relative utility.

For the purposes of this Article, I define relative utility as utility that one derives from how one's consumption compares to the consumption of others, while absolute utility is utility that one derives regardless of how one's consumption compares to that of others.⁷⁴ In isolation, in a Rousseauian state of nature, the consumer consumes only the absolute characteristics of a good, "qualities inherent in the commodity itself."⁷⁵ In society, however, a consumer may become conscious of and begin to consume a good's relative characteristics — and the empirical evidence overwhelmingly shows that consumers are highly conscious of such characteristics.⁷⁶ We may derive warmth from clothing regardless of what others are wearing (absolute utility), but in comparison to what others are wearing, we may also derive distinction (relative utility).

The difference between absolute and relative utility has important implications for how we talk about intangible forms of property. It is conventional wisdom in intellectual property thinking that intellectual properties constitute nondepletable goods, the consumption of which is nonrivalrous.⁷⁷ My use of an idea (for example, a method of winemak-

⁷⁴ See Bruno S. Frey & Alois Stutzer, *Testing Theories of Happiness*, in *ECONOMICS & HAPPINESS* 116, 123–25 (Luigino Bruni & Pier Luigi Porta eds., 2005) (discussing "relative utility"); Michael R. Hagerty & Ruut Veenhoven, *Wealth and Happiness Revisited — Growing National Income Does Go with Greater Happiness*, 64 *SOC. INDICATORS RES.* 1, 1–2 (2003) (discussing theories of "absolute utility" and "relative utility"); Matthew D. Rablen, *Relativity, Rank and the Utility of Income*, 118 *ECON. J.* 801, 801 (2008) (defining "relative utility" as involving comparisons to others and to one's self over time); see also Robert H. Frank, *The Demand for Unobservable and Other Nonpositional Goods*, 75 *AM. ECON. REV.* 101, 101 (1985) (defining "positional goods" as "those things whose value depends relatively strongly on how they compare with things owned by others," and "nonpositional goods" as goods that "depend relatively less strongly on such comparisons"). See generally Nestor M. Davidson, *Property and Relative Status*, 107 *MICH. L. REV.* 757, 764 (2009) (exploring the status-signaling function of property and the "role of law in this phenomenon"); Richard H. McAdams, *Relative Preferences*, 102 *YALE L.J.* 1, 2–26 (1992) (reviewing economic theories of relative preferences).

⁷⁵ Leibenstein, *supra* note 55, at 188–89.

⁷⁶ See, e.g., Fredrik Carlsson, Olof Johansson-Stenman & Peter Martinsson, *Do You Enjoy Having More than Others? Survey Evidence of Positional Goods*, 74 *ECONOMICA* 586, 596 (2007); Olof Johansson-Stenman & Peter Martinsson, *Honestly, Why Are You Driving a BMW?*, 60 *J. ECON. BEHAV. & ORG.* 129, 134, 143 (2006); Erzo F.P. Luttmer, *Neighbors as Negatives: Relative Earnings and Well-Being*, 120 *Q.J. ECON.* 963, 965 (2005).

⁷⁷ See, e.g., Alex Kozinski & Christopher Newman, *What's So Fair About Fair Use?*, 46 *J. COPYRIGHT SOC'Y U.S.A.* 513, 521 (1999) ("A piece of land can't serve both as your living room and Trump Towers, but a piece of intellectual property suffers from no such limitations. I would

ing, a method of knotting a tie) does not preclude your use of exactly the same idea, nor, it is generally thought, does my use of the idea lessen the utility of the idea to you. We must recognize, however, that when we speak here of utility, we mean absolute utility. There are in fact many forms of intellectual property the consumption of which is rivalrous in the sense that they are susceptible to negative congestion externalities. One or both of us may initially benefit from the other's use of an intellectual property, particularly if we seek assimilation. But at some point, my or yet another's use of the property (for example, a method of winemaking, a method of knotting a tie) may lessen the utility of the property to you by impairing the ability of the property socially to differentiate you — just as your use may impair the ability of the property socially to differentiate me. In this sense, the utility of such forms is rivalrous and depletable. Too many users may render the property indifferent and indistinct. By utility here, we mean not absolute utility, but relative utility.

The concept of relative utility also raises important questions about how the process of competitive consumption operates and to what ultimate end. If we assume, as the conventional economic account does, that in engaging in competitive consumption, consumers seek to gain rank over or equal to others, then it follows that one consumer's gain in rank or assertion of equality of rank must always result in another consumer's loss of rank. By this logic, status competition is thought to be zero-sum in nature, if not within society as a whole, then at least within specific groups within that society.⁷⁸ Worse, all may lose as each devotes more and more resources that might better be spent elsewhere to the pursuit of a fixed supply of intragroup or intrasocietal distinction.⁷⁹ For those who choose to participate, a “positional arms

be willing to wager that by this time next year, the copyrighted character Harry Potter will have provided the basis of a McDonald's promotion, a Saturday morning cartoon, a Saturday Night Live sketch (which of course will inevitably be turned into a movie), and a Nintendo game. None of these uses conflicts with any of the others.”) *But see* STEPHEN BROWN, WIZARD!: HARRY POTTER'S BRAND MAGIC (2005) (discussing the importance of protecting the “Harry Potter” brand from overexposure); Parija Bhatnagar, *Is Harry Potter Dead?*, CNNMONEY.COM, July 11, 2005, http://money.cnn.com/2005/07/11/news/fortune500/brand_harrypotter (discussing whether the “Harry Potter” brand is overexposed).

⁷⁸ See Will Wilkinson, *Out of Position: Against the Politics of Relative Standing*, POLICY, Spring 2006, at 3, 7 (“[W]hile the number of positions on any single *dimension* of status may be fixed, there is no reason why dimensions of status cannot be multiplied *indefinitely*. . . . Surfer dudes don't compete with Star Trek geeks for status.”).

⁷⁹ See FRANK, *supra* note 68; JOHN RAE, THE SOCIOLOGICAL THEORY OF CAPITAL 283–84 (Charles Whitney Mixter ed., 1905); Ben Cooper, Cecilia García-Peñalosa & Peter Funk, *Status Effects and Negative Utility Growth*, 111 ECON. J. 642, 643 (2001); Robert H. Frank, *Positional Externalities Cause Large and Preventable Welfare Losses*, AM. ECON. REV., May 2005, at 137, 137. *But see* GARY S. BECKER & KEVIN M. MURPHY, SOCIAL ECONOMICS 125 (2000) (arguing that status seeking enhances entrepreneurial activity and results in a net increase in social welfare).

race[]”⁸⁰ of status seeking may condemn them to an ever-accelerating “positional treadmill.”⁸¹ The implications for human happiness of the zero-sum nature of ordinal status competition are profound and controversial, and we are only beginning to work them out.⁸² Some have argued that consumption-based status competition furthers economic, technological, and even civilizational advance.⁸³ Others contend that it has become a leading cause of human unhappiness, particularly in advanced consumer societies.⁸⁴

The basic economic account of ordinal status competition as zero-sum in nature is admirably clean in theory, but it has little to say about the messy realities of consumption in modern, highly diverse global consumer societies. Indeed, as noted above, studies of the fashion process encourage us to reject the assumption that there exists some vertical, lock-step status hierarchy — a “Great Chain of Status,”⁸⁵ a normalizing Whuffie index,⁸⁶ a *U.S. News & World Report* league table of individual rank — to which all members of a given group or society subscribe. Instead, in engaging in competitive consumption, consumers more commonly pursue nonhierarchical, “qualitative differentiation.”⁸⁷ Through their consumption, they sort themselves

⁸⁰ Robert H. Frank, *Taking Libertarian Concerns Seriously: Reply to Kashdan and Klein*, 3 *ECON. J. WATCH* 435, 436 (2006), http://www.aier.org/ejw/archive/doc_view/3597-ejw-200609?tmpl=component&format=raw.

⁸¹ ROBERT H. FRANK, CHOOSING THE RIGHT POND: HUMAN BEHAVIOR AND THE QUEST FOR STATUS 153 (1985).

⁸² For a popular press treatment, see RICHARD LAYARD, HAPPINESS SCIENCE (2005). See also Richard A. Easterlin, *Will Raising the Incomes of All Increase the Happiness of All?*, 27 *J. ECON. BEHAV. & ORG.* 35, 36 (1995) (positing that the increase in happiness resulting from an individual income increase may be offset by the decrease in happiness resulting from rising average income); Richard A. Epstein, *Happiness and Revealed Preferences in Evolutionary Perspective*, 33 *Vt. L. REV.* 559, 564 (2009) (considering the argument that happiness depends on relative prosperity).

⁸³ See, e.g., BERNARD MANDEVILLE, THE FABLE OF THE BEES (London, J. Tonson 4th ed. 1725) (1714); WERNER SOMBART, LUXURY AND CAPITALISM 113–14 (W.R. Dittmar trans., 1967) (1913); see also BECKER & MURPHY, *supra* note 79, at 124–25.

⁸⁴ See, e.g., ROBERT H. FRANK, LUXURY FEVER: WHY MONEY FAILS TO SATISFY IN AN ERA OF EXCESS (1999); Cooper et al., *supra* note 79, at 653; cf. JULIET B. SCHOR, THE OVERSPENT AMERICAN: WHY WE WANT WHAT WE DON’T NEED (1999).

⁸⁵ Will Wilkinson, *The Great Chain of Status?*, THE FLY BOTTLE, Oct. 31, 2006, <http://www.willwilkinson.net/flybottle/2006/10/31/the-great-chain-of-status>.

⁸⁶ See CORY DOCTOROW, DOWN AND OUT IN THE MAGIC KINGDOM (2003), available at http://craphound.com/down/Cory_Doctorow_-_Down_and_Out_in_the_Magic_Kingdom.pdf (imagining “Whuffie” as a quantifiable property of each individual that indicates the degree of respect accorded to that individual by others); see also Dylan Tweney, *Q&A: Cory Doctorow*, SFGATE, Jan. 23, 2003, <http://www.sfgate.com/cgi-bin/article.cgi?file=/gate/archive/2003/01/23/cdoctorow.DTL> (“In some ways, Whuffie is a way to make you more socially normative. It’s not necessarily a good thing.” (quoting Cory Doctorow)).

⁸⁷ SIMMEL, *supra* note 41, at 421; see also Douglas B. Holt, *Postmodern Markets*, BOSTON REV., Summer 1999, at 17, 17 (“What is now driving consumption is not *upscale emulation*, but — in a word — *differentiation*.”).

into a wide variety of equilibria of assimilation and differentiation that simply yield identity.⁸⁸ But shifting to this more limited assumption does not extinguish the issue of negative consumption externalities. On the contrary, it invites the question of whether the pursuit of non-hierarchical distinction confronts the same problem of “social congestion”⁸⁹ that the pursuit of hierarchical distinction is theorized to confront. Clearly, when two or more consumers or groups of consumers consume the same distinctive good, the capacity of the good to distinguish them horizontally — and, a fortiori, vertically — is impaired. But this leaves open a far more interesting question. The economic account of relative utility emphasizes the social scarcity of hierarchical status across a society, regardless of whether consumers are consuming the same goods. The question is whether there is a similar social scarcity of nonhierarchical distinction at the level of a society as a whole. Do consumers *compete* across society for a limited supply of qualitative distinction? Is there some social limit on the amount of qualitative distinction that societies can achieve, or at least, that members of a society can perceive in and thus bestow upon others?

There is no clean answer, and I will defer much of this Article’s discussion of this issue until Part III, because we have much more ground to cover before we are in a position to understand how intellectual property law’s role as sumptuary law might inform that discussion. But for our purposes here, it may be enough to suggest, as various social theorists of modernity have,⁹⁰ that in increasingly massified and complex urban and now global consumer societies, it grows ever more difficult for individuals (and firms) to differentiate themselves from and make sense of the cacophony of differences, the “living crowd,”⁹¹ that envelops them in the marketplace. Members of such a society grow inured to all but the most outrageous gestures of individuation — thus the “blasé attitude”⁹² that Simmel identified as characteristic of the metropolitan (to which I will return below), thus the practice of “shock advertising”⁹³ to overcome consumers’ “advertising

⁸⁸ See LIPOVETSKY, *supra* note 53, at 46 (emphasizing the importance of the “desire to express individual uniqueness” as what drives the fashion process).

⁸⁹ HIRSCH, *supra* note 72, at 3.

⁹⁰ See, e.g., ZYGMUNT BAUMAN, *INTIMATIONS OF POSTMODERNITY*, at xx (1992) (“Constantly bombarded, the absorptive powers of the public are unable to cling to any of the competing allurements for longer than a fleeting moment. To catch the attention, displays must be ever more bizarre, condensed and (yes!) disturbing; perhaps ever more brutal, gory and threatening.”).

⁹¹ WALT WHITMAN, *Crossing Brooklyn Ferry*, in *LEAVES OF GRASS* 144, 155 (Doubleday 1997) (1855).

⁹² See SIMMEL, *supra* note 41, at 413.

⁹³ See MARK TUNGATE, *ADLAND: A GLOBAL HISTORY OF ADVERTISING* 146–49 (2007) (discussing the practice of shock advertising).

avoidance”⁹⁴ strategies, thus much of contemporary runway fashion and some of contemporary art. As individuals and groups pursue more and stronger forms of qualitative distinction, the ability of individuals to comprehend these forms approaches a limit, a point of “sensory overload”⁹⁵ or “social saturation,”⁹⁶ a sort of “Gruen transfer”⁹⁷ of interpretation. At this limit, distinction itself becomes so abundant as to be perceived as indistinct; it becomes noise.⁹⁸ The result, though not exactly the same, should at least be familiar to economic theorists of relative preferences: a spiraling game of one-upmanship akin to the increasing noise of a crowded restaurant or the amplifying synesthesia of a Times Square. The result, in other words, seems very much akin to a zero-sum game, or at least to a tragedy of the commons, where commodified distinctions fail because commodified distinction is itself so commonplace. Generalizing Simmel, as the fashion process spreads, the process itself gradually goes to its doom — an endpoint that Jean Baudrillard quite pessimistically termed the “hell of the Same.”⁹⁹

Regardless of whether we adopt a theoretically more cautious approach and conceive of distinction as merely hierarchical or one-dimensional in nature or go further and seek to make sense of it also as horizontal or multidimensional in nature, we are thus still left with the problem of a sumptuary code whose system of commodified dis-

⁹⁴ Paul Surgi Speck & Michael T. Elliott, *Predictors of Advertising Avoidance in Print and Broadcast Media*, J. ADVERTISING, Fall 1997, at 61, 61.

⁹⁵ DAVID HARVEY, THE CONDITION OF POSTMODERNITY: AN ENQUIRY INTO THE ORIGINS OF CULTURAL CHANGE 286 (1990).

⁹⁶ KENNETH J. GERGEN, THE SATURATED SELF: DILEMMAS OF IDENTITY IN CONTEMPORARY LIFE 49 (1991); see also TODD GITLIN, MEDIA UNLIMITED: HOW THE TORRENT OF IMAGES AND SOUNDS OVERWHELMS OUR LIVES 38–44 (2001) (discussing “supersaturation” and the blasé); Coombe, *supra* note 70, at 203 (“The visual cultures of national mass markets are often saturated by signs of social difference.”).

⁹⁷ See Margaret Crawford, *The World in a Shopping Mall*, in VARIATIONS ON A THEME PARK: THE NEW AMERICAN CITY AND THE END OF PUBLIC SPACE 3, 14 (Michael Sorkin ed., 1992) (“The Gruen Transfer [is] immediately visible in the shift [of consumers] from a determined stride to an erratic and meandering gait.”).

⁹⁸ See RICHARD SENNETT, THE CONSCIENCE OF THE EYE: THE DESIGN AND SOCIAL LIFE OF CITIES 129 (1990) (“I suffer from abundance, the promised remedy of the Enlightenment. My senses are flooded by images, but the difference in value between one image and another becomes as fleeting as my own movement; difference becomes a mere parade of variety.”); Douglas Kellner, *Baudrillard: A New McLuhan?*, ILLUMINATIONS, <http://www.gseis.ucla.edu/faculty/kellner/essays/ baudrillardanewmcluhan.pdf> (last visited Jan. 9, 2010) (“In a society supposedly saturated with media messages, information and meaning ‘implode,’ collapsing into meaningless ‘noise,’ pure effect without content or meaning.” (paraphrasing JEAN BAUDRILLARD, *The Implosion of Meaning in the Media*, in SIMULACRA AND SIMULATION 79 (Sheila Faria Glaser trans., Univ. of Mich. Press 1994) (1981))).

⁹⁹ JEAN BAUDRILLARD, THE TRANSPARENCY OF EVIL 122 (James Benedict trans., Verso Books 1993) (1990).

tinctions faces a limit, a congestion threshold,¹⁰⁰ at which overall relative utility — and possibly, absolute utility as well — begins to decline. The reader may object that, in proposing this outcome, both approaches take the logic of the system to its extreme, a destination that our actual system of consumption has not yet reached and may never reach — and admittedly, this is a valid criticism of much of contemporary academic cultural theory. But we should not underestimate the significance of a fundamental transformation that has occurred in recent times in our system of relative consumption, one that has changed the nature of the goods we rely on to confer distinction and greatly accelerated the production and circulation of such goods. Like so much else of value in a post-industrial economy, our positional goods are increasingly taking the form of intellectual property. This is because intellectual property law is the one body of law that does what we have always relied on nature to do, which is to enforce the scarcity of individual forms of distinction. It is to the technological conditions that have driven this transformation that I now turn.

C. *The Social Problem of Copying Technology*

Consider the following diverse examples of copying, some of them highly sophisticated, others decidedly less so. First, in 1954, engineers at General Electric developed a process to manufacture minute synthetic diamonds to be used primarily in abrasives.¹⁰¹ Since that time, a variety of companies have developed methods to produce gem-quality “cultured diamonds” that are said by many to be indistinguishable from natural diamonds.¹⁰² In 2004, the De Beers cartel began for the first time literally to brand its diamonds with a laser-inscribed trademark.¹⁰³ Second, in his 2001 memoir *Pinochet and Me*, Marc Cooper records: “A recent police checkpoint in the posh Vitacura neighborhood [of Santiago de Chile] found that a high percentage of drivers ticketed for using their cell phones while in motion were using toy — even wooden — replicas. Other middle-class motorists bake

¹⁰⁰ Cf. Jonathan M. Barnett, Essay, *Shopping for Gucci on Canal Street: Reflections on Status Consumption, Intellectual Property, and the Incentive Thesis*, 91 VA. L. REV. 1381, 1389 (2005) (discussing a “saturation threshold” after which demand for a fashion begins to fall (internal quotation marks omitted)).

¹⁰¹ See H.P. Bovenkerk et al., *Preparation of Diamond*, 184 NATURE 1094 (1959); F.P. Bundy et al., *Man-Made Diamonds*, 176 NATURE 51 (1955).

¹⁰² See Ziv Hellman, *A Multi-Faceted Industry*, JERUSALEM REP., Mar. 18, 2008, at 32, 33 (“Put one of today’s synthetic diamonds in front of a *diamantaire* with 50 years’ experience, give him a microscope to work with, and he still won’t be able to distinguish it from a natural diamond.” (quoting Guy Benhamou, C.E.O. of the gemological lab E.G.L. Ltd.)).

¹⁰³ See *Changing Facets*, ECONOMIST, Feb. 24, 2007, at 75.

with their windows closed pretending they have air conditioning.”¹⁰⁴ Third, in *Jacques Pépin Fast Food My Way*, the famed chef Jacques Pépin suggests in a recipe for “Scrambled eggs with mushrooms and truffles” that “[i]f you can’t find good truffles, substitute good truffle oil.”¹⁰⁵ Pépin neglects to note that actual truffles, even “good” ones, do not produce oil of any kind; rather, “truffle oil” is a synthetic substance widely, though surreptitiously, used in high-end restaurants whose most important ingredient is usually the intensely pungent organic compound 2,4-dithiapentane.¹⁰⁶ Fourth and finally, between 1969 and 1973, the Italian automobile manufacturer Ferrari produced exactly one hundred 365 GTB/4 Daytona Spyder convertibles.¹⁰⁷ In 1985, by which time Daytona Spydery were being purchased in the resale market for up to two million dollars each, one Carl Roberts of Kingsport, Tennessee, began to sell “Miami Spyder” conversion kits, the principle component of which consisted of a fiberglass hull that could be bolted on to the undercarriage of a Chevrolet Corvette to make it appear to be an authentic Daytona Spyder.¹⁰⁸ Roberts sold approximately eighty such kits for as little as \$8500 each before Ferrari filed suit for trademark and copyright infringement,¹⁰⁹ as it had already against at least one other company also engaged in the production of “Fauxrrari” kits.¹¹⁰

Each of these examples of copying involves some application of copying technology, and each threatens, in its own way, the sumptuary order. By copying technology, I mean to refer to all practices — manual, mechanical, digital, genetic, and possibly other techniques — by which we make persuasive tangible copies of an intangible design or form (or in intellectual property parlance, an intangible “work”), whether this design be human-made or found in nature. Such copies

¹⁰⁴ MARC COOPER, PINOCHET AND ME: A CHILEAN ANTI-MEMOIR 85–86 (2001), quoted in Luuk van Kempen, *Fooling the Eye of the Beholder: Deceptive Status Signalling Among the Poor in Developing Countries*, 15 J. INT’L DEV. 157, 157 (2003); see also David Barboza, *Where False Rings True*, N.Y. TIMES, Apr. 28, 2009, at B1; cf. Simulated Car Phone, U.S. Patent No. 4,973,285 (filed Oct. 5, 1989).

¹⁰⁵ JACQUES PÉPIN, *JACQUES PÉPIN FAST FOOD MY WAY* 58 (2004).

¹⁰⁶ See Daniel Patterson, *Hocus-Pocus, and a Beaker of Truffles*, N.Y. TIMES, May 16, 2007, at F1; cf. Peter Kiefer, *Diner Beware: Tourists Pay More in Roman Restaurants*, N.Y. TIMES, Aug. 9, 2006, at A4 (describing the practice of preparing food with cheaper ingredients for non-discriminating tourists); Editorial, *Truffle in Paradise*, GLOBE & MAIL, Jan. 20, 2003, at A14 (commenting on French government efforts to develop a DNA test for Perigord truffles to distinguish them from Chinese truffles).

¹⁰⁷ Ferrari S.P.A. *Esercizio Fabriche Automobili E Corse v. Roberts*, 944 F.2d 1235, 1237–38 (6th Cir. 1991).

¹⁰⁸ Ferrari S.P.A. *Esercizio Fabriche Automobili E Corse v. Roberts*, 739 F. Supp. 1138, 1140 (E.D. Tenn. 1990), *aff’d*, 944 F.2d 1235.

¹⁰⁹ *Id.*

¹¹⁰ See Ferrari S.p.A. *Esercizio Fabbriche Automobili E Corse v. McBurnie Coachcraft Inc.*, No. 86-1812-B (IEG), 1988 WL 391519 (S.D. Cal. Aug. 31, 1988).

are persuasive in the rhetorical sense that they need not and often do not perfectly embody some intangible design, but merely approximate that design in a way sufficient to achieve the purposes for which the embodiment of the design is used. The first and the thousandth copy of a design of a mass-produced automobile (or even of a mass-produced book) are not exactly alike, but we typically find each to be a persuasive copy of the design to the extent that each functions in the way that we would expect copies of the design to function. We have come to expect that most natural, authorized, or otherwise permissible embodiments of an intangible design sufficiently approximate that design so as easily to qualify as “super copies”; the question of persuasion hardly seems relevant. But persuasion becomes relevant when we consider instead the production of synthetic, unauthorized, or near-productive embodiments of a design, whether the design be protected by intellectual property law or not. It is thus persuasion that the wine critic has in mind when he speaks of the New World’s “convincing copies”¹¹¹ of the sparkling wines of the Champagne region of France or that the art critic has in mind when he struggles to distinguish between lifetime and posthumous casts of Rodin sculptures.¹¹² It is also persuasion that is the concern of the luxury goods manufacturers of Italy when the market for their goods is flooded with so-called “true fake[s],”¹¹³ that is, unauthorized manufacturing overruns produced by the same subcontracted workers using the same materials as those used to produce authentics.¹¹⁴ The overriding issue in such cases is not what the good is, but how it is perceived.¹¹⁵

In this last sense, copying technology has proved to be especially powerful and especially threatening to the sumptuary order when it is used to make persuasive copies of designs the main function of which is to yield relative rather than absolute utility. It has proved to be especially powerful because such copies typically need not convey the same absolute utility as the original in order successfully to persuade.¹¹⁶ Purchasers of Roberts’s conversion kits well knew that it

¹¹¹ Jancis Robinson, *Make Sure Your Fizz Is the Biz*, FIN. TIMES, Dec. 28–29, 2002, at x.

¹¹² See Deborah M. Hussey, *The Sine Qua Non of Copyright*, 51 J. COPYRIGHT SOC’Y U.S.A. 763, 789–90 (2004).

¹¹³ See Richard Boudreaux, *In Italy, It’s Survival of the Fakest*, L.A. TIMES, Oct. 6, 2000, at E1.

¹¹⁴ See TIM PHILLIPS, *KNOCKOFF: THE DEADLY TRADE IN COUNTERFEIT GOODS* 69–70 (2005); Boudreaux, *supra* note 113.

¹¹⁵ See THOMAS, *supra* note 65, at 280 (“What I realized from my tour is that people don’t believe there is a difference between real and fake anymore. Bernard Arnault’s marketing plan had worked: consumers don’t buy luxury branded items for what they *are*, but for what they *represent*. And good fakes — the kind that can pass for real — now represent socially the same thing as real.”).

¹¹⁶ Cf. Gene M. Grossman & Carl Shapiro, *Foreign Counterfeiting of Status Goods*, 103 Q.J. ECON. 79, 82 (1988) (“[C]ounterfeiters unbundle the status and quality aspects of the product, and

was no more likely that the kits would invest the underlying “donor car” with the absolute utility of the Daytona Spyder — for example, its handling or acceleration — than that a wooden cell phone would yield the same absolute utility as an authentic one. Importantly, the donor car had to provide some degree of absolute utility or the ruse would fail. But just as importantly, it appears that given the reality of U.S. speed limits and traffic conditions, Roberts’s customers deemed the Corvette — or, as it turned out, even a Pontiac Fiero¹¹⁷ — to be sufficient for the task. Quite obviously, copying technology of this sort relies on the limits of human perception to detect, or the willingness of human perception to accept, artifice. When the demands of absolute utility are relaxed, or when the claims of absolute utility exceed reasonable human perception, so that not even connoisseurs or counterfeit investigators can tell the difference, then near-production (truffle oil) rather than reproduction (actual truffles) is often adequate.

The persuasive imitation of distinctive goods has proved to be especially threatening to the sumptuary order because the circulation of such imitations impairs the ability of the imitated goods to yield relative utility, which in many cases is the only form of utility that they have to offer.¹¹⁸ The mined diamond industry is as concerned now as the natural pearl industry was a century ago by the appearance of highly persuasive imitations, but the primary basis of its concern is not substitution. It is not that the consumer who would have bought a natural diamond as an engagement ring will instead buy a cultured diamond.¹¹⁹ Instead, the primary basis of the industry’s concern is dilution — a phenomenon to which the De Beers cartel has clearly long been quite sensitive.¹²⁰ Its concern is that an abundance of persuasive imitations will erode over time the perceived rarity of diamonds, both along the dimension of the total number of natural diamonds perceived to be in circulation and along the dimension of the number of products closely similar to natural diamonds also perceived to be in circulation. Indeed, the dilution of the perceived rarity of diamonds has apparently already begun.¹²¹ This is arguably the primary concern

thereby allow some consumers to purchase the former who would not be willing to pay the high price of purchasing the two together.”)

¹¹⁷ See *Ferrari S.P.A. Esercizio Fabriche Automobili E Corse v. Roberts*, 739 F. Supp. 1138, 1141 (E.D. Tenn. 1990), *aff’d*, 944 F.2d 1235 (6th Cir. 1991).

¹¹⁸ *But see* Barnett, *supra* note 100, at 1382–83 (arguing that under certain conditions, imperfect counterfeits may increase the revenues of legitimate producers).

¹¹⁹ Sophia Chabbott, *Industry Splits on Natural vs. Man-Made Diamonds*, WOMEN’S WEAR DAILY, July 9, 2007, at 14 (“The luxury consumer will want the natural diamond, not the synthetic.” (quoting Anjanette Clisura, president of Diamond in the Rough, a mined-diamond seller)).

¹²⁰ See generally JANINE ROBERTS, GLITTER & GREED: THE SECRET WORLD OF THE DIAMOND CARTEL 83–98 (2d ed. 2007).

¹²¹ See Edward Simpkins, *The Changing Face of Diamonds*, SUNDAY TELEGRAPH, Dec. 14, 2003, at 6.

of the relative goods industry with respect to counterfeiting as well, including the counterfeiting of high-technology goods (such as super-cars¹²² or mobile phones¹²³).

Admittedly, copying practices of one sort or another are as old as human mimesis itself, and as the history of sumptuary law attests, they have long been especially effective when applied to distinctive goods. Theodosius II decreed in the fifth century that anyone who unauthorizedly dyed wool “with any color resembling the Imperial purple” or caused silk “to be dyed rose-color, and afterwards with another tint . . . shall suffer the punishment of death.”¹²⁴ A sumptuary ordinance of seventeenth-century France was careful to prohibit all but nobles from wearing linen embroidered with gold, silver, cord, or lace, “either real or imitation.”¹²⁵ The seminal *Trade-Mark Cases*¹²⁶ of 1879 arose from the counterfeiting of imported champagne,¹²⁷ while Judge Hand, in a trademark opinion a half century later, paused to take judicial notice of the ease with which “an unscrupulous restaurant keeper” might “substitute the domestic champagne,” “especially as an evening wears on.”¹²⁸

But we have arguably reached a new stage of such conduct. It is conventional wisdom that in the “Digital Age,” the cost of producing persuasive — indeed, perfect — digital copies has collapsed, and that the losses to the digital content industry are immense. It is less well recognized that in our own incipient “Diamond Age,”¹²⁹ the costs of persuasive simulation of tangible goods have also sharply declined,

¹²² See Christian Fraser, *Italy Arrests “Fake Ferrari” Gang*, BBC NEWS, Feb. 28, 2008, <http://news.bbc.co.uk/2/hi/europe/7269774.stm> (describing Italy’s recent arrest of a group of individuals engaged in the manufacture of counterfeit Ferrari 328 GTBs).

¹²³ See Shunsuke Tabeta, *Apple’s Sophisticated Marketing Expertise Faces Tough Test in China*, NIKKEI WKLY., July 28, 2008, at 11 (discussing the spread of iPhone look-alikes in China); Jason Tan, *Banking on the Look Factor*, NEW STRAITS TIMES (Malaysia), Dec. 6, 2007, at 9 (same).

¹²⁴ Code Just. 11.8.3 (Theodosius, Arcadius & Honorius 393/395) (S.P. Scott trans.).

¹²⁵ CARL KÖHLER, A HISTORY OF COSTUME 289 (Emma von Sichart ed., Alexander K. Dallas trans., 1933); cf. Cissie Fairchild, *The Production and Marketing of Populuxe Goods in Eighteenth-Century Paris*, in CONSUMPTION AND THE WORLD OF GOODS 228 (John Brewer & Roy Porter eds., 1993) (discussing lower class consumption of “cheap copies of aristocratic luxury items” beginning in late-eighteenth-century Paris after the lifting of sumptuary laws).

¹²⁶ 100 U.S. 82 (1879).

¹²⁷ See Zvi S. Rosen, *In Search of the Trade-Mark Cases*, 83 ST. JOHN’S L. REV. (forthcoming) (manuscript at 32), available at <http://ssrn.com/abstract=1268558>.

¹²⁸ G.H. Mumm Champagne v. E. Wine Corp., 142 F.2d 499, 501 (2d Cir. 1944) (Hand, J.); see also David Hancock, *Commerce and Conversation in the Eighteenth-Century Atlantic: The Invention of Madeira Wine*, 29 J. INTERDISC. HIST. 197, 216–18 (1998) (describing eighteenth-century Madeira producers’ attempts to suppress imitations).

¹²⁹ See generally NEAL STEPHENSON, THE DIAMOND AGE (1995); Ralph C. Merkle, *It’s a Small, Small, Small World*, TECH. REV., Feb./Mar. 1997, at 25, extended version available at <http://www.zyvex.com/nanotech/MITtecRvwSmlWrld/article.html> (discussing the manufacturing potential of molecular nanotechnology).

and the quality and speed of simulation have increased dramatically.¹³⁰ Consider that in the recent closely watched case of *Tiffany (NJ) Inc. v. eBay, Inc.*,¹³¹ of the 186 pieces of Tiffany-branded silver jewelry that Tiffany bought from various eBay sellers, Tiffany admitted that it could not be sure if nearly one-quarter were counterfeits or authentic.¹³² Or consider that fashion designers now frequently complain (or admit), as they have to Congress, that copiers are able to distribute “perfect copies”¹³³ of their runway designs to discount stores before the designers themselves can distribute their own authentic copies.¹³⁴ Nearly every material rarity, every material embodiment of relative utility, can be and is technologically simulated,¹³⁵ with the result that many relative goods have become, like paper currency, little more than the means of conveyance and display of authentication devices — which are themselves retained and displayed (and imitated) as distinctive goods.

What such practices may ultimately portend — and here this Article does take things to their extreme — is a sort of Diamond Age of the sumptuary code, if not of much else. The metaphor of the Diamond Age comes to us from science fiction writing,¹³⁶ and on that basis alone many readers may reject it — though scientists and technologists apparently do not.¹³⁷ In any event, it is at least worth brief consideration. The metaphor imagines an age of human development in which human technology is capable of cheaply replicating any material form through the manipulation of individual atoms and their structural relations, and in which this technology is widely available. The representative achievement of such an age would be humans’ ability cheaply to manufacture diamond in various forms. Our increasing ability persuasively to imitate relative goods (though without necessarily imitating their absolute utility) anticipates what *social* role

¹³⁰ See, e.g., *Imitating Property Is Theft*, ECONOMIST, May 17, 2003, at 52, 54 (discussing improvements in counterfeiting technology).

¹³¹ 576 F. Supp. 2d 463 (S.D.N.Y. 2008).

¹³² *Id.* at 485. I am grateful to Ann Bartow for calling this fact to my attention.

¹³³ *Protection for Fashion Design: Hearing on H.R. 5055 Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 109th Cong. 12 (2006) [hereinafter *Hearing on H.R. 5055*] (statement of Jeffrey Banks, Fashion Designer, on behalf of the Council of Fashion Designers of America).

¹³⁴ See *id.* at 81–82 (statement of Susan Scafidi, Visiting Prof. of Law, Fordham Law School); see also THOMAS, *supra* note 65, at 283 (“Counterfeiters take the original item and do a three-D scan of it. . . . The process produces perfect copies of patterns.” (quoting an anticounterfeiting expert)); Hemphill & Suk, *supra* note 38, at 1170–74 (discussing “fast-fashion copyists”).

¹³⁵ See, e.g., Org. for Econ. Co-operation & Dev., THE ECONOMIC IMPACT OF COUNTERFEITING AND PIRACY 262 (2008) (“Almost anything can be counterfeited.”). But see Barnett, *supra* note 100, at 1385 (“[I]n markets where purchasing behavior is strongly driven by status preferences, unauthorized imitation is generally imperfect.”).

¹³⁶ See generally, e.g., STEPHENSON, *supra* note 129.

¹³⁷ See generally, e.g., Paul W. May, *The New Diamond Age?*, 319 SCIENCE 1490 (2008).

intellectual property law might play in such an environment. For what the mimetic technologies discussed above ultimately predict is a kind of post-rarity world, perhaps one in which certain material forms of absolute utility remain scarce, but persuasive copies of material forms of relative utility become superabundant. Taking this further, these technologies suggest that what might be termed the “universal printer” is not simply imaginable, but an increasingly realistic possibility.¹³⁸ It may not be too much to suggest that at some point the distinction between the fifteenth-century two-dimensional printer and the twenty-first-century three-dimensional printer, capable of “printing out” tangible goods according to a digitally recorded design, will be seen to be a distinction of degree, rather than of kind. Conceptually, all industrial production has been more or less an approximation of this universal printer; the difference now is in the extreme flexibility, vaguely analogous to moveable type,¹³⁹ of our production technology.¹⁴⁰ In such an economy of universal printers, printing out a rhetoric of expressions and of things, all goods would be essentially intellectual goods (that is, embodiments of intangible designs) and all property, excluding space and the self, would be essentially intellectual property (as it is already in virtual worlds, though there including virtual space and possibly also the virtual self). And most significantly for our much more limited purposes here, the regulation of relative goods and of the sumptuary order would be left entirely to intellectual property law, to whose role as sumptuary law in the present day I now turn.

II. INTELLECTUAL PROPERTY LAW AS SUMPTUARY LAW

Technologically, we are of course far from a world of universal printers, but let us pause to question how a system of consumption-based social distinction might operate in such a world. The short answer is that without some form of intellectual property protection, it would hardly operate at all. Reproduction and near-production would

¹³⁸ See Duncan Graham-Rowe, *3-D Printing for the Masses*, TECH. REV., July 31, 2008, <http://www.technologyreview.com/Infotech/21152/?a=f>; Saul Hansell, *Beam It Down from the Web, Scotty*, N.Y. TIMES, May 7, 2007, at C1 (discussing the development of three-dimensional printers); Ian Mount, *Rise of the Instapreneur: Manufacture and Sell Anything*. In *Minutes*, WIRED, Apr. 2008, at 129.

¹³⁹ Cf. MARSHALL MCLUHAN, *ESSENTIAL MCLUHAN* 307 (Eric McLuhan & Frank Zingrone eds., 1995) (“Movable type was already the modern assembly line in embryo.”).

¹⁴⁰ On flexible specialization, see generally MICHAEL J. PIORE & CHARLES F. SABEL, *THE SECOND INDUSTRIAL DIVIDE: POSSIBILITIES FOR PROSPERITY* (1984). Cf. BOOKCHIN, *supra* note 26, at 61–62 (discussing “highly versatile, multi-purpose machines” that “make it possible to produce a large variety of products in a single plant”); J. Storrs Hall, *Utility Fog: The Stuff that Dreams Are Made Of*, in *NANOTECHNOLOGY: MOLECULAR SPECULATIONS ON GLOBAL ABUNDANCE* 161 (B.C. Crandall ed., 1996) (envisioning swarms of robotic “foglets” capable of assuming various shapes and performing various functions).

rapidly diminish the capacity of most relative goods to differentiate. While there might remain certain relative goods that would continue to set the very rich apart (for example, superyachts, space travel, English soccer clubs), the majority of consumers would likely confront a marketplace consisting of goods that will set them apart only briefly, if at all, before quickly being copied and rendered commonplace. Indeed, a system of consumption-based differentiation in such a world might operate very much like the current system of apparel fashion in the United States — which grants no significant intellectual property protection to clothing designs — but with signs of difference burned through at an even more accelerated pace, and with designers of those signs complaining even more desperately that unauthorized copying is bankrupting them.¹⁴¹ It is likely, therefore, that if our goal were to perpetuate a system of consumption-based social distinction, then we would offer exclusive rights in the intangible designs of distinctive goods or at least in some distinguishing characteristic of those designs (such as a word- or image-mark or other design feature) in order to prevent the unauthorized copying of them. We would do so not simply to promote the further production of commodified forms of distinction (by incentivizing designers with the assurance that they can recoup the costs of innovating and advertising their designs), but also to preserve distinction that has already been commodified (by preserving the rarity of designs or their design features and thus their capacity to distinguish). It is likely, furthermore, that designers (and consumers) would respond accordingly, by gravitating toward the production (and consumption) of designs that are protectable. And to ensure, in the name of technological progress, that the promotion of relative utility does not conflict with the promotion of absolute utility, we would insist that any design that yields the latter be protected only by a utility patent. In sum, confronted with a world in which reproduction technology had transcended any limits on the reproduction or near-production of commodifiable rarities, we would use intellectual property law to enforce those limits in order to ensure that individuals could continue to differentiate themselves by means of the copies, otherwise copious, that they consume.

This is, of course, what intellectual property law is already doing, be our world one of universal printers or not. We are already relying on intellectual property law and laws akin to it to preserve the conditions of commodifiable rarity that our system of consumption-based distinction requires to operate. For a simple example, handbag makers, such as Louis Vuitton or Coach, have long resorted to the expe-

¹⁴¹ See, e.g., *Hearing on H.R. 5055*, *supra* note 133, at 12 (statement of Jeffrey Banks, Fashion Designer, on behalf of the Council of Fashion Designers of America).

dient of imprinting their marks in repeating patterns on the visible surface of their products not just to amplify the projection of the status symbol but also, and possibly more importantly, to ensure that copyists cannot make persuasive copies of the unprotected material good without also infringing the protected trademark. The primary limitation of intellectual property law in this respect is that it will only preserve the rarity of design characteristics that qualify for intellectual property protection. This is why so many of our relative goods have assumed dematerialized form, and in particular, the dematerialized form of trademarks,¹⁴² which typically have the virtue of being highly demonstrable. The emergence of very powerful copying technology has thus proved to be both a crisis and an opportunity for intellectual property law, though we tend to focus only on the former. The very technology that makes intellectual property law so difficult to enforce is the same technology that has compelled us to turn to intellectual properties to perform the role of positional goods and to intellectual property law to perform the role of sumptuary law. It is because our copying technology can now produce persuasive simulations of diamonds, for example, that our system of competitive consumption has come to focus on brands of diamonds and on preventing that same technology from counterfeiting such brands.

The sumptuary side of intellectual property law manifests itself in various obvious ways. Most notably, anticounterfeiting laws, which are particularly stringent in Europe¹⁴³ and growing increasingly so in the United States,¹⁴⁴ have turned our courts, police, and customs officials into modern-day *Provveditori sopra le Pompe*. Intellectual property-based restrictions on resale and parallel imports also work to preserve product exclusivity.¹⁴⁵ Our national trademark systems,

¹⁴² See Hemphill & Suk, *supra* note 38, at 1177–78 (discussing “logoification,” *id.* at 1178). *But see* Kate Betts, *Fashion: The Height of Luxury*, TIME, Apr. 23, 2006, <http://www.time.com/time/magazine/article/0,9171,1186563,00.html> (describing Bottega Veneta’s strategy of not using logos, which assumes that “the consumer can recognize a brand by the design and quality of the product instead of by a logo”).

¹⁴³ See, e.g., Corrigendum to Council Directive 2004/48, 2004 O.J. (L 195) 16 (EC); Council Regulation 1383/2003, 2003 O.J. (L 196) 7 (EC).

¹⁴⁴ See, e.g., Prioritizing Resources and Organization for Intellectual Property Act of 2008, Pub. L. No. 110-403, 122 Stat. 4256 (codified as amended in scattered sections of 15, 17, and 18 U.S.C.); *see also* Margot Kaminski, Recent Development, *The Origins and Potential Impact of the Anti-Counterfeiting Trade Agreement (ACTA)*, 34 YALE J. INT’L L. 247 (2009) (discussing the proposed ACTA).

¹⁴⁵ See, for example, Case C-59/08, *Copad SA v. Christian Dior Couture SA* (Apr. 23, 2009), http://curia.europa.eu/jcms/jcms/j_6 (enter “C-59/08” in “Case no” field and select “Search”), in which the European Court of Justice held that the breach of the terms of a licensing agreement prohibiting the resale of luxury goods to discount stores will constitute trademark infringement if the producer can show that the resale “damages the allure and prestigious image which bestows on those goods an aura of luxury.” *Id.* at Ruling 1; *see also* Case C-337/95, *Parfums Christian Dior SA v. Evora BV*, 1997 E.C.R. I-6013, I-6033 (opinion of Advocate General Jacobs) (“The

meanwhile, quite deliberately offer exclusive rights in status symbols¹⁴⁶ and promotional or “merchandising” uses of trademarks,¹⁴⁷ while our patent systems do not hesitate to grant utility patents for inventions the stated utility of which is clearly relative rather than absolute in nature.¹⁴⁸ Finally, our right of publicity laws are best explained as protecting from overcopying the celebrity’s persona,¹⁴⁹ which itself may fall prey to a variety of mimetic practices, such as look-alikes,¹⁵⁰ sound-alikes,¹⁵¹ miniature dolls,¹⁵² and most impressively, life-sized animatronic robots formed in the celebrity’s image.¹⁵³

Less obvious, but more revealing of the degree to which intellectual property law is being employed to govern the sumptuary code are two closely related modes of intellectual property protection that are the

owner of the trade mark may . . . oppose the use of his mark by a reseller for the purposes of advertising where such advertising is liable to damage significantly the reputation of the trade mark and of its owner. In the case of luxury goods such as perfumes, such damage may consist in damage to the luxurious image of the goods.”)

¹⁴⁶ See Jeffrey L. Harrison, Essay, *Trademark Law and Status Signaling: Tattoos for the Privileged*, 59 FLA. L. REV. 195 (2007); cf. *Benton Announcements, Inc. v. FTC*, 130 F.2d 254, 255 (2d Cir. 1942) (per curiam) (“[I]f the buyers wish to be snobs, the law will protect them in their snobbery.”).

¹⁴⁷ See, e.g., *Boston Prof’l Hockey Ass’n v. Dallas Cap & Emblem Mfg., Inc.*, 510 F.2d 1004 (5th Cir. 1975); see also *Univ. of Ga. Athletic Ass’n v. Laite*, 756 F.2d 1535 (11th Cir. 1985); *Arsenal Football Club Plc v. Reed*, [2003] EWCA (Civ) 696 (Eng.); Stacey L. Dogan & Mark A. Lemley, *The Merchandising Right: Fragile Theory or Fait Accompli?*, 54 EMORY L.J. 461 (2005); Jane C. Ginsburg, *Exploiting the Artist’s Commercial Identity: The Merchandizing of Art Images*, 19 COLUM.-VLA J.L. & ARTS 1 (1994–1995).

¹⁴⁸ See, e.g., *Long-Sleeved Garment with Wristwatch Accommodations*, U.S. Patent No. 7,380,287 (filed July 1, 2005); *Watch Cuff*, U.S. Patent No. 7,120,936 (filed June 17, 2004).

¹⁴⁹ See, e.g., *Matthews v. Wozencraft*, 15 F.3d 432, 437–38 (5th Cir. 1994) (“Without the artificial scarcity created by the protection of one’s likeness, that likeness would be exploited commercially until the marginal value of its use is zero.”); see also LANDES & POSNER, *supra* note 71, at 224 (“But the total utility might decline if the lack of excludability and resulting proliferation of the Bogart image led to confusion, the tarnishing of the image, or sheer boredom on the part of the consuming public. Eventually the image might become worthless.”). But see Stacey L. Dogan & Mark A. Lemley, *What the Right of Publicity Can Learn from Trademark Law*, 58 STAN. L. REV. 1161, 1185 (2006) (“[T]he proliferation of celebrity images . . . only extends the reach of the images, making them more available to those who wish to use and enjoy them.”); Mark P. McKenna, *The Right of Publicity and Autonomous Self-Definition*, 67 U. PITT. L. REV. 225, 269 (2005) (“[A]dditional uses of identity neither prevent anyone else’s use of that identity nor use up any of the resource in a physical sense.”).

¹⁵⁰ See, e.g., *Allen v. Nat’l Video, Inc.*, 610 F. Supp. 612 (S.D.N.Y. 1985) (Woody Allen look-alike); *Onassis v. Christian Dior-N.Y., Inc.*, 472 N.Y.S.2d 254 (Sup. Ct. 1984) (Jacqueline Kennedy Onassis look-alike).

¹⁵¹ See *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992) (Tom Waits sound-alike); *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988) (Bette Midler sound-alike).

¹⁵² See, e.g., *Landham v. Lewis Galoob Toys, Inc.*, 227 F.3d 619, 621 (6th Cir. 2000) (action figure based on actor’s role as “Billy, the Native American Tracker” in the film *Predator*).

¹⁵³ See *Wendt v. Host Int’l, Inc.*, 125 F.3d 806 (9th Cir. 1997); see also *White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395 (9th Cir. 1992); *Young v. Greneker Studios, Inc.*, 26 N.Y.S.2d 357, 358 (Sup. Ct. 1941) (finding that mannequin made in plaintiff’s likeness is “portrait or picture” within statute).

subject of this Part: antidilution protection, which is primarily national in nature, and authenticity protection, which is primarily international in nature. Both of these modes seek to suppress the social implications of copying technology, the former by seeking to protect commodified forms of distinction in general from dilutive copying, the latter by seeking to protect commodified forms of geographical and historical authenticity in particular from forms of dilutive copying that corrode the “aura” of their authenticity. Authenticity protection is essentially a more specific form of antidilution protection. First, however, to give context to my discussion of these modes of intellectual property protection, this Part begins by considering two works that together go far toward registering precisely the ideology of progressive intellectual property law that sumptuary intellectual property law reacts against when it functions as antidilution and authenticity law.

A. *The Ideology of the Copy*

Conventional progressive intellectual property law subscribes to what might be termed the ideology of the copy, which equates copying with progress. This ideology holds that the practice of copying (be it of books or of automobiles) should not be restricted except when doing so will ultimately result in more or better copying — or, in the face of ecological limits, ultimately avoid less or worse copying. Emphatically modern in orientation, the ideology of the copy shares in the Enlightenment view that more copies, like more speech, is always better. It holds this view because it assumes that intellectual works possess the public goods characteristics of being inexhaustible and nonrivalrous in consumption. Relatedly, it assumes that such works convey only absolute utility. We therefore prevent unauthorized copying of protected works in order to preserve creators’ incentives to create them (by preventing defendants from substituting their copies for plaintiffs’), not to preserve the utility of the works themselves, which is thought to remain intact regardless of defendants’ conduct — or plaintiffs’ conduct, for that matter.¹⁵⁴ As Thomas Jefferson did in his famous letter to Isaac McPherson,¹⁵⁵ the ideology of the copy conceives of intellectual works in optimistic, almost naïve terms as works unaffected by the quality or quantity of their material embodiments and uncorrupted by their contact with society.

¹⁵⁴ See, e.g., Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031, 1055 (2005).

¹⁵⁵ Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813), in 13 THE WRITINGS OF THOMAS JEFFERSON 326, 334 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1905) (“He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me.”).

The ideology of the copy is, furthermore, an intensely unsentimental ideology, one that has little regard for historical origins and that is suspicious of that which defines itself in opposition to copying (for example, authentic, genuine originals) or which otherwise resists copying (for example, secrets, or more generally, the esoteric). This unsentimentality is most apparent in progressive intellectual property law's relation to history. Established to "promote the Progress,"¹⁵⁶ intellectual property law conventionally privileges innovation and discontinuity, "non-obvious"¹⁵⁷ breaks with tradition. To the extent that it is concerned with origins, its concern is typically directed toward determining whether such origins are found in the present and may thus form the basis for property rights in the future. Origins found in the past, in history, preclude such rights. Intellectual property law begins where history ends. Progressive intellectual property law is similarly irreverent of authentic originals, which it refers to as "copies" like any other. Copyright law in the United States, as elsewhere, distinguishes between the intangible "work" (or design) and the tangible "copies" (or embodiments) in which that work is fixed. We do not speak of "originals." Even a unique painting, one that the painter painted only once, is nevertheless a "copy" (albeit a unique copy) of the copyrightable work as it exists or existed in the painter's mind.¹⁵⁸ Once the term of protection on this work has run, intellectual property law conventionally holds that it should be as open to copying as any other unprotected intellectual work. No work is sacred in this regard. For proponents of progressive intellectual property law, the concern that further copying of the work might damage the work by vitiating its aura of uniqueness is, in their view, as frivolous as the indigenous belief that the rampant copying of their sacred expressions may deplete those expressions of their magical powers.

This ideology — which many readers may well take for granted as no "ideology" at all — has progressive technological and economic consequences that are clear and well understood, but it also has progressive, even radical cultural and social consequences as well, and it is these consequences that we are calling upon sumptuary intellectual property law to suppress. These consequences are made especially apparent in two strangely related works about copying: Walter Benja-

¹⁵⁶ U.S. CONST. art. I, § 8, cl. 8.

¹⁵⁷ 35 U.S.C. § 103 (2006).

¹⁵⁸ See 17 U.S.C. § 101 ("The term 'copies' includes the material object, other than a phonorecord, in which the work is first fixed."); cf. WALTER BENJAMIN, *The Work of Art in the Age of Mechanical Reproduction*, in ILLUMINATIONS 217, 224 (Hannah Arendt ed., Harry Zohn trans., Schocken Books 1968) (1955) ("To an ever greater degree the work of art reproduced becomes the work of art designed for reproducibility. From a photographic negative, for example, one can make any number of prints; to ask for the 'authentic' print makes no sense." (citation omitted)).

min's famous — and much criticized¹⁵⁹ — 1936 essay *The Work of Art in the Age of Mechanical Reproduction*¹⁶⁰ and Justice Antonin Scalia's remarkable opinion in the recent intellectual property case of *Dastar Corp. v. Twentieth Century Fox Film Corp.*¹⁶¹ To be sure, Walter Benjamin (the German Marxist critical theorist) and Justice Scalia (the American conservative jurist) make for an odd and no doubt unintentional theoretical partnership. But together they register the radical potential of our ideology — and culture — of the copy.

Consider first Benjamin's *Work of Art* essay. In it, Benjamin looked to the politicization of art — and to the politicization of film, in particular — as an antidote to European fascism's aestheticization of politics. In the process, Benjamin famously asserted that:

[T]hat which withers in the age of mechanical reproduction is the aura of the work of art. This is a symptomatic process whose significance points beyond the realm of art. One might generalize by saying: the technique of reproduction detaches the reproduced object from the domain of tradition. By making many reproductions it substitutes a plurality of copies for a unique existence.¹⁶²

In Benjamin's view, multiple reproduction destroys the "authenticity" and "authority of the [aesthetic] object," the "aura" of historicity that is otherwise generated by its "unique existence."¹⁶³ Reproductive technology establishes the material conditions for a regime of cultural expression in which there are no historical origins and no unique originals, no "domain of tradition" and no unique expressions of that domain. Instead, there are only multiple copies, a mass of them, the first in possession of the same status as the thousandth or the millionth — all of them indistinct from each other; none of them bearers of reactionary "aura." For Benjamin, mechanical reproduction thus constituted a progressive, liberatory technology. Its "liquidation of the traditional value of the cultural heritage"¹⁶⁴ would free cultural expression from the restraints of conservative "ritual" and invest it with the revolutionary dynamism of mass — that is, communist — "politics."¹⁶⁵

¹⁵⁹ See, e.g., Antoine Hennion & Bruno Latour, *How To Make Mistakes on So Many Things at Once — and Become Famous for It*, in *MAPPING BENJAMIN: THE WORK OF ART IN THE DIGITAL AGE* 91 (Hans Ulrich Gumbrecht & Michael Marrinan eds., 2003).

¹⁶⁰ BENJAMIN, *supra* note 158, at 217.

¹⁶¹ 539 U.S. 23 (2003).

¹⁶² BENJAMIN, *supra* note 158, at 221.

¹⁶³ See *id.* ("The authenticity of a thing is the essence of all that is transmissible from its beginning, ranging from its substantive duration to its testimony to the history which it has experienced.")

¹⁶⁴ *Id.*

¹⁶⁵ See *id.* at 224.

Justice Scalia's *Dastar* opinion — an opinion, appropriately enough, about intellectual property rights in a political film¹⁶⁶ — fully supports the break with the “domain of tradition” that Benjamin celebrated, albeit for reasons altogether different from those given by Benjamin. More significantly, it assumes that this break has already occurred. In *Dastar*, Justice Scalia found that the defendant, Dastar, did not engage in reverse passing off when it produced and sold as its own work a revision of Fox's public domain work. In doing so, he asserted, as an empirical matter, that consumers have little concern for who originated the intangible work embodied in the tangible copies that they consume:

The consumer who buys a branded product does not automatically assume that the brand-name company is the same entity that came up with the idea for the product, or designed the product — and typically does not care whether it is. The words of the Lanham Act should not be stretched to cover matters that are typically of no consequence to purchasers.¹⁶⁷

Justice Scalia admitted that in the case of “communicative products” such as novels or, as in *Dastar*, a video series, consumers may be interested “primarily” in who is the “creator of the content that the physical item conveys.”¹⁶⁸ Yet he concluded that “according special treatment to communicative products”¹⁶⁹ would conflict with the fundamental and overriding principle that “[t]he right to copy, and to copy without attribution, once a copyright has expired”¹⁷⁰ properly “passes to the public.”¹⁷¹ Furthermore, “[r]eading ‘origin’ in § 43(a) [of the Lanham Act] to require attribution of uncopyrighted materials would pose serious practical problems,” for when it is read to refer to intangible designs or communicative content, “the word ‘origin’ has no discernible limits.”¹⁷² Justice Scalia offered the example of the motion picture *Carmen Jones*, a video edition of which would require attribution, on

¹⁶⁶ See *Dastar*, 539 U.S. at 25–27. The basic facts of *Dastar* are as follows: In the 1970s, Fox neglected to renew the copyright in its television documentary series entitled *Crusade in Europe* based on President Dwight D. Eisenhower's book of the same title, with the result that the television series fell into the public domain. *Id.* at 26. In 1995, Dastar began selling a video series entitled *World War II Campaigns in Europe*, which was a close adaptation — essentially, an abridgement — of Fox's previous series, but which nowhere credited Fox. *Id.* at 26–27. In the cause of action that the Supreme Court reviewed, Fox claimed that Dastar was engaging in “reverse passing off” — that is, that Dastar was passing off a product actually made by Fox as Dastar's own. *Id.* at 27 (internal quotation marks omitted).

¹⁶⁷ *Id.* at 32–33.

¹⁶⁸ *Id.* at 33.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.* (quoting *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 230 (1964)) (internal quotation mark omitted).

¹⁷² *Id.* at 35. Fox claimed that Dastar had violated the provisions of section 43(a)(1) of the Lanham Act by failing properly to attribute the true “origin” of the video series to Fox. See *id.* at 31.

Fox's proposed reading of "origin," not just to MGM, but also to Hammerstein, Bizet, and Mérimée, if not others.¹⁷³ He concluded: "We do not think the Lanham Act requires this search for the source of the Nile and all its tributaries."¹⁷⁴

Dastar anticipates the austere, dispassionate sensibility of a world of universal printers, which is the sensibility of "commodity fetishism"¹⁷⁵ updated for a post-industrial age. *Dastar* implies that the utility of the work and its copies is intrinsic and absolute; their utility does not rely on the circumstances of their production or indeed their consumption. The imperative to copy overrides any concerns about history and authenticity. In any event, authenticity is ultimately unknowable; history has "no discernible limits."¹⁷⁶ The "source of the Nile" is neither the consumer's nor the law's concern, so long as it keeps on flowing.

In Benjamin's *Work of Art* essay and Justice Scalia's *Dastar* opinion, then, we see prefigured the full consequences of the ideology of the copy. At the same time that it produces profound technological and economic progress, the imperative to copy and disseminate also continually disenchant "aura," both the aura of uniqueness and the aura of authenticity. This disenchantment conduces to the development of social structures in which distinction is not based on the consumption of unique or authentic objects, because uniqueness and authenticity are no longer tenable. The utopian endpoint of the ideology of the copy is a post-scarcity culture in which a "plurality of copies" are possessed by all who desire them, so that the possession of a copy may yield only absolute but not relative utility, in other words, so that the possession of a copy — as the term implies — may form no basis for distinction.

We are calling upon intellectual property law now to counteract the social and cultural leveling that the law, in its progressive aspect, otherwise assumes to be a beneficial incident of technological and economic progress. Through sumptuary intellectual property law, we seek the means in essence to re-enchant copies, to render them as somehow unique or authentic. In this sense, while progressive intellectual property law is essentially *modern* in orientation, sumptuary intellectual property law is essentially *anti-modern*. In the form of antidilution protection, sumptuary intellectual property law seeks to preserve consumers' perception that certain copies, though they are merely copies, possess an aura of uniqueness. In the form of authenticity protection,

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 35–36.

¹⁷⁵ ÉTIENNE BALIBAR, *THE PHILOSOPHY OF MARX* 56 (Chris Turner trans., Verso Books 1995) (1993).

¹⁷⁶ Cf. MAX HORKHEIMER & THEODOR W. ADORNO, *DIALEKTIK DER AUFKLÄRUNG* 244 (1988) ("All reification is a forgetting." (translated from "Alle Verdinglichung ist ein Vergessen"))).

sumptuary intellectual property law goes further. It provides the means to invest certain copies with the aura of authenticity on the basis that they are not copies but rather originals. I turn first to antidilution protection.

B. Intellectual Property Law as Antidilution Law

The Venetian Senate was not the only legislative body to seek to ban new fashions in apparel or other demonstrable forms of consumption. In fact, nearly all past sumptuary regimes sought to do so. For example, an English proclamation of 1575 prohibited anyone from “devising any new forms of apparel,”¹⁷⁷ while a century later, Charles II declared his “resolution of setting a fashion for clothes, which he will never alter.”¹⁷⁸ In the interim, the Scottish Parliament did essentially the same.¹⁷⁹ But the prohibition of new fashion only made sense, to the extent that it made any sense at all, if existing fashions continued to do their differentiating work. Sumptuary law has thus generally consisted of two sets of prohibitions: prohibitions against new fashions and prohibitions against unauthorized uses of currently existing fashions. It is to modern forms of this second type of prohibition that I turn here, under the rubric of “dilution.”

Dilution is one of the most elusive concepts in all of intellectual property law, and also one of the most important — yet few give the concept its due. The concept is elusive because it is an essentially semiotic rather than economic or political concept, one that is concerned not so much with the construction of identity, which is relatively easy to understand, as with the construction of difference, which is not. The concept is important because an increasing number of intellectual property laws are taking on the characteristics of antidilution law. In an intensifying brand culture, it should not be surprising that trademark law is emerging as a net exporter of doctrinal inspiration. In what follows in this section, I first seek to define the phenomenon of dilution and then assess how various areas of intellectual property law have been adapted to serve as antidilution law.

1. *The Legal and Cultural Concept of Dilution.* — The U.S. trademark lawyer and scholar Frank Schechter first identified the phenomenon of trademark dilution in an enormously influential 1927 article in

¹⁷⁷ HUNT, *supra* note 2, at 120 (quoting HUMPHREY DYSON, A BOOKE CONTAYNING ALL SUCH PROCLAMATIONS AS WERE PUBLISHED DURING THE REIGN OF THE LATE QUEEN ELIZABETH No. 168 (1618)) (internal quotation marks omitted).

¹⁷⁸ SAMUEL PEPYS, THE DIARY OF SAMUEL PEPYS 427 (Macmillan & Co. 1905) (1825) (footnote omitted).

¹⁷⁹ 1621 Scot. Parl. Acts 25 § 13, available at <http://www.rps.ac.uk/mss/1621/6/37> (“It is statuted that the faschioun of cloathes now presentlie used not to be cheingit by men or women . . .”).

this journal entitled *The Rational Basis for Trademark Protection*,¹⁸⁰ which is still frequently cited by courts and commentators both in the United States and abroad.¹⁸¹ There Schechter observed, quite rightly at the time, that U.S. trademark law only protected against consumer confusion as to source.¹⁸² This presented a serious problem for owners of famous marks, who had no legal means to prevent others from attaching such famous marks to all manner of goods and services (such as “Tylenol snowboards, Netscape sex shops, and Harry Potter dry cleaners”¹⁸³) so long as consumers were not confused as to the true source of such goods. Schechter argued that such uses of a famous mark, if left unchecked, would result in the “gradual whittling away or dispersion”¹⁸⁴ of the distinctiveness of the mark in the marketplace: “If ‘Kodak’ may be used for bath tubs and cakes, ‘Mazda’ for cameras and shoes, or ‘Ritz-Carlton’ for coffee, these marks must inevitably be lost in the commonplace words of the language, despite the originality and ingenuity in their contrivance”¹⁸⁵ Drawing from German unfair competition case law, Schechter advocated for the development of antidilution protection, which would prevent any copying of qualifying marks regardless of whether that copying confused consumers as to source.¹⁸⁶ In doing so, Schechter nowhere spoke of the mark’s connotations or associations with luxury or anything else — many of his examples of diluted trademarks were hardly high-status brands (“Odol” for mouth wash¹⁸⁷). Rather, he repeatedly emphasized that antidilution protection should be directed toward the “preservation of the uniqueness or individuality of the trademark,”¹⁸⁸ its “singularity,”¹⁸⁹ its “arresting uniqueness,”¹⁹⁰ the degree to which “it is actually unique and different from other marks.”¹⁹¹ Schechter was concerned only with the preservation of the mark’s formal distinctiveness, because he

¹⁸⁰ Frank I. Schechter, *The Rational Basis for Trademark Protection*, 40 HARV. L. REV. 813, 821–24 (1927).

¹⁸¹ See, e.g., *Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418, 429 (2003) (citing Schechter, *supra* note 180); *Case C-252/07, Intel Corp. v. CPM U.K. Ltd.* (June 26, 2008), http://curia.europa.eu/jcms/jcms/j_6 (enter “C-252/07” in “Case no” field and select “Search”), at ¶ 10 (Opinion of Advocate General Sharpston) (referring to Schechter’s theory of dilution); *Case C-408/01, Adidas-Salomon AG v. Fitnessworld Trading Ltd.*, 2003 E.C.R. I-12537, I-12548 (opinion of Advocate General Jacobs) (same); see also TONY MARTINO, TRADEMARK DILUTION 16 (1996) (describing Schechter’s article as “the article which launched a thousand lawsuits”).

¹⁸² Schechter, *supra* note 180, at 821–22.

¹⁸³ *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 903 (9th Cir. 2002).

¹⁸⁴ Schechter, *supra* note 180, at 825.

¹⁸⁵ *Id.* at 830 (footnote omitted).

¹⁸⁶ See *id.* at 831–32.

¹⁸⁷ *Id.* at 830.

¹⁸⁸ *Id.* at 822.

¹⁸⁹ *Id.* at 831.

¹⁹⁰ *Id.* at 830.

¹⁹¹ *Id.* at 831.

recognized, as did others at the time,¹⁹² that in an increasingly massified culture characterized by “dedifferentiation,”¹⁹³ distinctiveness itself constituted value, or, in his terms, “selling power.”¹⁹⁴

In formulating what was essentially a “need for uniqueness”¹⁹⁵ theory for trademarks, and by implication for consumers, Schechter’s crucial insight was to recognize that certain forms of copying will damage the intellectual work itself and not simply the creator’s incentives to create it. As noted above, intellectual property law conventionally assumes that intellectual works are nonrivalrous and inexhaustible. It thus prevents unauthorized copying solely to promote the creator’s incentives to create the work, not to protect the utility of the work itself. Schechter observed that this conventional theoretical framework fails with respect to trademarks. It fails not simply because a defendant’s unauthorized use of a trademark will impair the mark’s ability reliably to identify the plaintiff, but also because a defendant’s unauthorized use will otherwise dilute the uniqueness of the mark as a mark that only the plaintiff, and no one else, uses. In this sense, Schechter recognized that the utility of a trademark is in fact exhaustible and its use is in fact rivalrous. On this basis, Schechter came to the fairly startling conclusion that the true “rational basis for [trademark] protection” is the prevention of the dilutive copying of trademarks rather than the prevention of their substitutive copying,¹⁹⁶ because the former destroys their “selling power”¹⁹⁷ while the latter only confuses consumers — such was Schechter’s devotion to trademarks.

Given the peculiar characteristics of trademarks as compared to other forms of intellectual property, it makes sense that a trademark lawyer would have been the first to fasten upon the significance of the dilutive copying of intellectual property — and that he would have done so in the 1920s, when the mass production and mass promotion of consumer goods was becoming a pervasive reality in the industri-

¹⁹² See, e.g., WARREN I. SUSMAN, *CULTURE AS HISTORY: THE TRANSFORMATION OF AMERICAN SOCIETY IN THE TWENTIETH CENTURY* 271–85 (1973); T.J. Jackson Lears, *From Salvation to Self-Realization: Advertising and the Therapeutic Roots of the Consumer Culture, 1880–1930*, in *THE CULTURE OF CONSUMPTION: CRITICAL ESSAYS IN AMERICAN HISTORY, 1880–1980*, at 1 (Richard Wightman Fox & T.J. Jackson Lears eds., 1983).

¹⁹³ See STEPHEN CROOK, JAN PAKULSKI & MALCOLM WATERS, *POSTMODERNIZATION: CHANGE IN ADVANCED SOCIETY* 47–48 (1992); see also JONGRYUL CHOI, *POSTMODERN AMERICAN SOCIOLOGY: A RESPONSE TO THE AESTHETIC CHALLENGE* 5–7 (2004).

¹⁹⁴ Schechter, *supra* note 180, at 819.

¹⁹⁵ Snyder, *supra* note 35, at 11.

¹⁹⁶ Schechter, *supra* note 180, at 831 (referring to “[o]ur conclusion that the preservation of the uniqueness of a trademark should constitute the only rational basis for its protection”).

¹⁹⁷ See *id.* at 830.

alized economies of the West.¹⁹⁸ But in speaking only of *trademark* dilution, Schechter identified only one early symptom, albeit a prominent one, of the onset of what has arguably become a more general cultural condition, a condition that other areas of intellectual property law have since been enlisted to address. More broadly understood, dilution denotes the leveling process, akin to a kind of osmosis, by which our system of consumption-based distinction continually searches out, reproduces, and disseminates commodifiable forms of difference and thereby dissolves them into indifference, now at such a speed and with such a geographic reach as to threaten the very possibility of consumption-based distinction. Dilution denotes, in other words, the social and cultural consequences of the ideology of the copy. But where Benjamin saw “liquidation” as liberatory, Schechter saw uncontrolled dilution as potentially ruinous, as does much of intellectual property law currently. This is because dilutive copying may harm not merely trademarks but also copyrighted works (for example, novels, architectural works, musical compositions, or movies, the dilutive copying of which may impair their own uniqueness as well as their capacity to confer it on their consumers¹⁹⁹) and patented works (for example, biotechnology, software, or design patents, the dilutive copying of which may also impair their distinctiveness if not their owners’ capacity to assert “sustainable differentiation”²⁰⁰). But Schechter never spoke of the problem of dilutive copying in general, let alone of its cultural implications, and so fields of intellectual property law outside of trademark law have never fully assimilated his concept of dilution. Instead, they are in the process of reinventing it.

2. *Trademark Law as Antidilution Law.* — The irony is that the one area of intellectual property law that we would expect to perform the function of antidilution law, the very area of trademark law that we call “antidilution law,” does no such thing. This has necessitated the development of other, indirect forms of antidilution protection in trademark law and elsewhere.²⁰¹ Before turning to these forms, I first consider the failure of trademark antidilution law to live up to its name.

¹⁹⁸ See generally JACKSON LEARS, *FABLES OF ABUNDANCE: A CULTURAL HISTORY OF ADVERTISING IN AMERICA* 218–34 (1994).

¹⁹⁹ See, e.g., *Ice Music Ltd. v. Schuler*, No. 95 CIV. 4669 (KMW), 1995 WL 498781, at *3 (S.D.N.Y. Aug. 21, 1995) (discussing plaintiff’s claim that defendant’s conduct would result in “the dilution of the value of Ice Music’s copyrights” (internal quotation marks omitted)).

²⁰⁰ For a discussion of the importance of “sustainable differentiation” to technology firms, see Ronald J. Mann, *Do Patents Facilitate Financing in the Software Industry?*, 83 *TEX. L. REV.* 961, 974–97 (2005).

²⁰¹ Cf. Dev Gangjee, *The Polymorphism of Trademark Dilution in India*, 17 *TRANSNAT’L L. & CONTEMP. PROBS.* 611, 612 (2008) (“[W]hile dilution has flourished within the context of passing off actions [in India], it appears to have floundered as a statutory form of infringement.”).

Since Schechter's time, trademark antidilution law has proved to be a dead letter both in the United States, as recent empirical work confirms,²⁰² as well as abroad.²⁰³ This is largely due to the economic turn in our understanding of this area of trademark doctrine. Most nations, including the United States, have codified some form of trademark antidilution law,²⁰⁴ as has the European Union.²⁰⁵ Yet the antidilution cause of action itself continues to meet with resistance — bordering on nullification — by courts around the world.²⁰⁶ There is a simple reason for this. Though we still dutifully cite to Schechter's 1926 article, trademark case law and commentary have transformed the concept of dilution from one based essentially on a theory of the fashion process to one based on a theory of "search costs." In an effort to fit the concept of dilution into an efficiency framework, we now

²⁰² See Barton Beebe, *The Continuing Debacle of U.S. Antidilution Law: Evidence from the First Year of Trademark Dilution Revision Act Case Law*, 24 SANTA CLARA COMPUTER & HIGH TECH. L.J. 449 (2008); see also Clarisa Long, *Dilution*, 106 COLUM. L. REV. 1029 (2006) (finding a significant reduction in the number of successful dilution claims from 1995 to 2006).

²⁰³ See, e.g., William Michael Darling, *Depreciation in Canadian Trade-Mark Law: A Remedy in Search of a Wrong*, 21 INTELL. PROP. J. 49, 72 (2007) (noting the lack of judicial attention to the statutory depreciation of goodwill cause of action in Canada); Gangjee, *supra* note 201, at 611 (noting that since coming into effect in 2003, Indian statutory antidilution provisions "have remained on the shelf, largely untouched for half a decade"); Kenneth L. Port, *Trademark Dilution in Japan*, 4 NW. J. TECH. & INTELL. PROP. 228, 231 (2006) ("[I]t appears that Japanese judges have an inherent distrust of the notion of dilution. Japanese judges seem reluctant to apply the [statutory] language as written and, instead, seek other options to attempt to confine the expansion of the trademark right.")

²⁰⁴ See, e.g., 15 U.S.C. § 1125(c) (2006); The Trade Marks Act, 1999, No. 47 § 29(4)(c), Current Indian Statutes [C.I.S.], 2000 (India); Trade Marks Act 2002, 2002 Statutes of New Zealand [S.N.Z.] No. 49 § 89(1)(d) (N.Z.); Trade Marks Act 194 of 1993 § 34(1)(c) (S. Afr.); Trademark Act, Act No. 4210 art. 7 § 1(12) (1990) (S. Kor.); Trademark Act art. 23 § 12, available at <http://www.tipo.gov.tw/en> (follow "Laws & Regulations" hyperlink; then follow "Trademark" hyperlink; then follow "English" hyperlink after "Trademark Act of 2003") (Taiwan); Decree-Law No. 556 Pertaining to the Protection of Trademarks, as amended by Law No. 4128 of June 27, 1995, art. 9(c) (Turkey). China does not yet have explicit statutory antidilution provisions. See Luckie Hong, *China's Dilution of the Dilution Doctrine*, WORLD TRADEMARK REV., April/May 2009, at 24, 25; Jing "Brad" Luo & Shubha Ghosh, *Protection and Enforcement of Well-Known Mark Rights in China: History, Theory and Future*, 7 NW. J. TECH. & INTELL. PROP. 119, 155 (2009).

²⁰⁵ Parliament and Council Directive 2008/95, arts. 4(4)(a), 5(2), 2008 O.J. (L 299) 28, 29 (EC) [hereinafter *Trade Marks Directive*].

²⁰⁶ See, e.g., *Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418 (2003) (requiring antidilution plaintiff to show actual rather than a likelihood of dilution); Case C-252/07, *Intel Corp. v. CPM U.K. Ltd.* (Nov. 27, 2008), http://curia.europa.eu/jcms/jcms/j_6 (enter "C-252/07" in "Case no" field and select "Search"), at ¶ 77 (judgment of the court) (requiring antidilution plaintiff to show evidence that defendant's mark has or will likely cause a change in the economic behavior of the average consumer); *Veuve Clicquot Ponsardin v. Boutiques Cliquot Ltée*, [2006] 1 Supreme Court Reports [S.C.R.] 824 (Can.) (finding no depreciation of goodwill); *Remo Imports Ltd. v. Jaguar Cars Ltd.*, [2008] 2 Federal Courts Reports [F.C.] 132 (Can.) (same); *Raymond Ltd. v. Raymond Pharms. Private Ltd.*, (2007) Patents and Trade Marks Cases [P.T.C.] 35 (Bom.) 334 (High Ct. of Bombay, India) (finding no dilution).

speak of dilution in terms of “blurring,”²⁰⁷ in which a defendant’s use of a mark that is similar or identical to a plaintiff’s mark is thought to “blur” the immediacy of the link between the plaintiff’s mark and the plaintiff itself. This in turn is thought to require consumers to “think for a moment”²⁰⁸ before linking the mark to the plaintiff, which increases consumers’ “imagination cost[s],”²⁰⁹ which is inefficient. Thus, a law that was originally designed to promote differentiation, both among branded goods and among the people who consume them, has been transformed into a law understood to promote identification of a brand with its goods.²¹⁰ This allows trademark theorists to maintain the fiction that trademarks yield only absolute utility, that they do no more than denote the source of the goods to which they are affixed — a fiction that Schechter worked so hard to expose. But the result is that judges who might otherwise be willing to protect distinctiveness or uniqueness as something of social value (and we will see in a moment that they are certainly willing to do so) are instead hostile to the trademark antidilution cause of action because they see no harm worth enjoining in trivial increases in “internal search costs.”²¹¹ Ironically, then, the very theorists who have sought with the search costs rationale to offer a strong defense of the antidilution cause of action and the added property rights that it yields have instead largely buried it.²¹²

²⁰⁷ See, e.g., *Moseley*, 537 U.S. at 425 (internal quotation marks omitted).

²⁰⁸ Richard A. Posner, *When Is Parody Fair Use?*, 21 J. LEGAL STUD. 67, 75 (1992); see also *Ty Inc. v. Perryman*, 306 F.3d 509, 511 (7th Cir. 2002) (Posner, J.) (discussing the search costs rationale).

²⁰⁹ LANDES & POSNER, *supra* note 71, at 207 (internal quotation marks omitted). For a more persuasive account of dilution by blurring, but one that has not yet been adopted by courts, see Laura R. Bradford, *Emotion, Dilution, and the Trademark Consumer*, 23 BERKELEY TECH. L.J. 1227 (2008).

²¹⁰ See, e.g., *Louis Vuitton Malletier v. Dooney & Bourke, Inc.*, 340 F. Supp. 2d 415, 450–51 (S.D.N.Y. 2004) (giving “little, if any,” *id.* at 451, weight to dilution survey that asked if defendant’s conduct would lessen the “perceived distinctiveness, exclusivity, value and desirability,” *id.* at 450, of the plaintiff’s mark because, among other things, “desirability is unrelated to a mark’s ability to identify and distinguish Louis Vuitton’s handbags,” *id.* at 450–51).

²¹¹ Rebecca Tushnet, *Gone in Sixty Milliseconds: Trademark Law and Cognitive Science*, 86 TEX. L. REV. 507, 509 (2008). Tushnet is highly critical of this concept. See *id.* at 527–46.

²¹² *Tellingly*, in *Academy of Motion Picture Arts & Sciences v. Creative House Promotions, Inc.*, 944 F.2d 1446 (9th Cir. 1991), in which the defendant produced Oscar statuette knockoffs for sale as motivational awards, the Ninth Circuit used antidilution doctrine to accomplish what was a clear sumptuary purpose, but it avoided referencing “blurring” when it did so. Instead, in reversing the district court’s finding of no dilution, the Ninth Circuit cited Schechter’s concept of “whittling away,” *id.* at 1457 (internal quotation marks omitted), and spoke in general terms of the dilution of distinctiveness:

[T]he Star Award is available to corporations, television stations, theater groups, and any member of the general public who desires to purchase one. If the Star Award looks cheap or shoddy, or is disseminated without regard to the ultimate recipient, the Oscar’s

Though the antidilution cause of action is itself a failure, courts have adapted other areas of trademark law to do the regulatory work that antidilution law was originally intended to do. In the process, they have made all the more explicit the social-theoretical foundations on which antidilution protection is built. This is most apparent in the various ways in which courts have expanded the basic anticonfusion cause of action (which seeks to prevent consumer confusion as to the true source of the defendant's goods) to prevent dilutive, rather than substitutive, copying. As one Canadian trial court forthrightly averred, in such cases "the real issue is not lost sales but rather the loss of reputation which will flow"²¹³ from diluting conduct.

Consider, for example, the doctrine of post-sale confusion. This doctrine holds that even if consumers are not confused at the point of sale as to the true source of the goods that they are purchasing, other consumers may be confused as to the source of those goods after the sale. To take an example from recent Chinese case law, the buyer of knockoff Gucci shoes at the Shanghai No. 1 Yaohan Department Store is certainly not confused as to their true source, particularly since the shoes prominently bear the trademark "Senda" (a well-known Chinese shoe manufacturer) on the insole and are sold at a relatively moderate price from the "Senda" counter in the department store. Nevertheless, as the Chinese court explained:

[W]hile the consumers are actually wearing the shoes, by-standers are unable to see the 'Senda-woman' label covered by the feet; but [Gucci's] double-G interlock pattern on the upper cloth can be recognized clearly, which would lead to the mistaken belief by third parties of the actual brand of the products bought by purchasers. This situation would undoubtedly reduce the value of the double-G interlock pattern trademark and affect its commending function.²¹⁴

Like the Chinese court, courts in the United States²¹⁵ and around the world²¹⁶ have increasingly held that this form of confusion, even in the

distinctive quality as a coveted symbol of excellence, which cannot be purchased from the Academy at any price, is threatened.

Id.

²¹³ *Hermès Canada Inc. v. Park*, No. S046494, [2004] B.C.S.C. 1694 ¶ 44 (Dec. 17, 2004) (Can.), available at <http://www.courts.gov.bc.ca/jdb-txt/sc/04/16/2004bcsc1694.htm>.

²¹⁴ *Guccio Gucci S.P.A. v. Jiangsu Senda Group Co.*, (2007) Case 78 of Pu Min San (Zhi) Chu Zi, at *6 (People's Ct. of Shanghai Pudong New Dist., Apr. 7, 2008) (ChinaLawInfo), translated by Zhujun Zhang (on file with the Harvard Law School Library); see also Gene M. Grossman & Carl Shapiro, *Foreign Counterfeiting of Status Goods*, 103 Q.J. ECON. 79, 82 (1988) (discussing observers "who see[] the good being consumed and [are] duly (but mistakenly) impressed").

²¹⁵ See Mark McKenna & Mark A. Lemley, *Irrelevant Confusion* (Stanford Pub. L. Working Paper No. 1407793), available at <http://ssrn.com/abstract=1407793>.

²¹⁶ See Peter O'Byrne & Ben Allgrove, *Post-Sale Confusion*, 2 J. INTELL. PROP. L. & PRAC. 315, 316-20 (2007); Peter McAleese, *Italy: No More Confusion About Post-Sale Confusion*, INTA BULL., Dec. 15, 2008, at 9.

minds of those who would never purchase Gucci shoes, is actionable, if only because the brand's reputation for exclusiveness is damaged.²¹⁷ Contrary to traditional trademark doctrine, courts here claim that "[t]he likelihood of confusion test concerns not only potential purchasers but also the general public"²¹⁸ — or indeed the "viewing public."²¹⁹

The courts' reasoning in such cases is quite revealing. Courts justify their prohibition against copying on the grounds that rarity and distinction should be promoted and preserved in light of the social functions that they play. In *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*,²²⁰ for example, the Second Circuit enjoined the declaratory plaintiff from copying Levi's rear-pocket arcuate stitching pattern on the ground that Levi's "sales will be affected adversely by . . . buyers' ultimate realization that the pattern is no longer exclusive."²²¹ In *Gucci America, Inc. v. Dart, Inc.*,²²² in which the defendant retailer was enjoined from selling knockoff Gucci watches, the court similarly noted the probability of an adverse impact on the producer's sales, in that consumers "will be discouraged from acquiring a genuine Gucci because the items have become too commonplace and no longer possess the prestige and status associated with them."²²³ More impressively, in *Ferrari S.P.A. Esercizio v. Roberts*,²²⁴ the Sixth Circuit spoke generally of the need to preserve the reputation for rarity of *all* automobiles that are perceived as rare. The court noted that "Ferrari intentionally lim-

²¹⁷ See, e.g., 4 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 23:7, at 23-39 (4th ed. 2009) ("The damage to the senior user in such a case is that consumers could acquire the prestige value of the senior user's product by buying the copier's cheap imitation. Even though the knowledgeable buyer knew that it was getting an imitation, viewers would be confused."), cited in *I.P. Lund Trading ApS v. Kohler Co.*, 163 F.3d 27, 44 (1st Cir. 1998); *Adidas Am., Inc. v. Payless Shoesource, Inc.*, 529 F. Supp. 2d 1215, 1240 (D. Or. 2007); *Beacon Mut. Ins. Co. v. OneBeacon Ins. Group*, 290 F. Supp. 2d 241, 246 (D.R.I. 2003); *Sara Lee Corp. v. Am. Leather Prods., Inc.*, No. 97 C 4158, 1998 WL 433764, at *17 (N.D. Ill. July 29, 1998). For a discussion of European post-sale confusion doctrine, see McAleese, *supra* note 216, discussing post-sale confusion doctrine in Italy; O'Byrne & Allgrove, *supra* note 216; and Noam Shemtov, "Trade Mark Use" in *Europe: Revisiting Arsenal in the Light of Opel and Picasso*, 2 J. INTEL. PROP. L. & PRAC. 557 (2007).

²¹⁸ *Landscape Forms, Inc. v. Columbia Cascade Co.*, 113 F.3d 373, 382 (2d Cir. 1997).

²¹⁹ *Hermès Int'l v. Lederer de Paris Fifth Ave., Inc.*, 219 F.3d 104, 109 (2d Cir. 2000).

²²⁰ 799 F.2d 867 (2d Cir. 1986).

²²¹ *Id.* at 875-76 (emphasis omitted); see also *Frank Brunckhorst Co. v. G. Heileman Brewing Co.*, 875 F. Supp. 966, 985 (E.D.N.Y. 1994) (citing *Lois Sportswear*, 799 F.2d at 876); cf. *Levi Strauss & Co. v. Kimbyr Invs. Ltd.*, [1994] Fleet Street Reports [FSR] 335, 378-83 (H.C.) (N.Z.) (applying concept of post-sale confusion to find that defendant infringed plaintiff's protruding tab device applied to rear pocket of its jeans and other garments).

²²² 715 F. Supp. 566 (S.D.N.Y. 1989).

²²³ *Id.* at 567; see also *Cartier, Inc. v. Deziner Wholesale, L.L.C.*, No. 98 Civ. 4947 (RLC), 2000 WL 347171, at *6 (S.D.N.Y. Apr. 3, 2000) ("[I]t is also likely that these sophisticated, brand conscious consumers will lose interest in the Cartier name as they see the number of inferior products in the market bearing the Cartier name grow.")

²²⁴ 944 F.2d 1235 (6th Cir. 1991).

its production of its cars in order to create an image of exclusivity²²⁵ and “has gained a well-earned reputation for making uniquely designed automobiles of quality and rarity.”²²⁶ The court observed more generally that “[i]f the country is populated with hundreds, if not thousands, of replicas of rare, distinct, and unique vintage cars, obviously they are no longer unique.”²²⁷ (The dissent was left to point out that there was, at the time of the case, no antidilution cause of action available to the plaintiff, and that the majority had improperly and “expressly read[] such a cause of action into the [federal] statute.”²²⁸)

Other courts have spoken of the harm to consumers of relative goods caused by “a proliferation of borrowings.”²²⁹ In *Hermès International v. Lederer de Paris Fifth Avenue, Inc.*,²³⁰ for example, the Second Circuit reasoned that “the purchaser of an original [luxury good] is harmed by the widespread existence of knockoffs because the high value of originals, which derives in part from their scarcity, is lessened.”²³¹ Similarly, in *General Motors Corp. v. Keystone Automotive Industries*,²³² the Sixth Circuit enjoined the unauthorized manufacture of replacement front grills for GMC trucks in part because “the purchaser of an original may be harmed if the widespread existence of knockoffs decreases the original’s value by making the previously scarce commonplace.”²³³ Notably, in *Keystone*, as in *Lois Sportswear* above, the brand whose reputation for rarity was being preserved was not a traditional luxury or high-status brand. On the contrary, and consonant with the often unappreciated realities of the fashion process, both *Keystone*’s brand of pickup trucks and *Lois Sportswear*’s brand of denim jeans have their origins in and derive their mystique from, of all places, labor.

Trademark courts have also adapted the doctrine of “sponsorship confusion” to prevent dilutive copying of trademarks. In *Schieffelin & Co. v. Jack Co. of Boca*,²³⁴ for example, the defendant John Calderaio developed “Dom Poppingnon” bottled popcorn as a “burlesque of

²²⁵ *Id.* at 1237.

²²⁶ *Id.* at 1245 (quoting *Ferrari S.P.A. v. McBurnie Coachcraft Inc.*, 11 U.S.P.Q.2d (BNA) 1843, 1848 (S.D. Cal. 1989)).

²²⁷ *Id.* (quoting *McBurnie*, 11 U.S.P.Q.2d (BNA) at 1848).

²²⁸ *Id.* at 1251 (Kennedy, J., dissenting).

²²⁹ *Herman Miller, Inc. v. A. Studio S.R.L.*, No. 1:04-CV-781, 2006 WL 2456218, at *3 (W.D. Mich. Aug. 22, 2006) (quoting *AutoZone, Inc. v. Tandy Corp.*, 373 F.3d 786, 801 (6th Cir. 2004)); see also *Ill. High Sch. Ass’n v. GTE Vantage Inc.*, 99 F.3d 244, 247 (7th Cir. 1996) (noting that a “proliferation of borrowings” may be “so numerous as to deprive the mark” of its “distinctiveness and prestige”).

²³⁰ 219 F.3d 104 (2d Cir. 2000).

²³¹ *Id.* at 108.

²³² 453 F.3d 351 (6th Cir. 2006).

²³³ *Id.* at 358.

²³⁴ 850 F. Supp. 232 (S.D.N.Y. 1994).

sorts”²³⁵ on Dom Pérignon champagne, a product which, the court noted, is associated with “both scarcity and wealth”²³⁶ and which “continues . . . to enjoy an image of scarcity, despite its wide distribution in American commerce.”²³⁷ The court considered it relevant also to note that “Calderaio was employed as a valet parker at the Boca Raton Hotel & Club, where he apparently developed a distaste for the condescension of the wealthy patrons of that establishment.”²³⁸ Though Calderaio stated that he conceived Dom Poppingnon popcorn “for the purpose of casting ridicule upon the tastes and pretensions of Dom Pérignon purchasers,”²³⁹ this *shanzhai*²⁴⁰ defense was unsuccessful. The court found consumer confusion as to source on the basis that consumers would believe that the plaintiff had “sponsored or otherwise approved” defendant’s parody.²⁴¹ The *Schieffelin* court also considered the plaintiff’s claim of dilution by blurring, but in a typical example of the degree to which the search costs theory of dilution has crippled the cause of action, the court quickly found no diminution of the “mark’s product identification.”²⁴² Other courts that have considered comparable burlesques of luxury goods have similarly adopted a sponsorship confusion approach.²⁴³

Rather than resort to the rationale of preventing post-sale or sponsorship confusion, trademark courts will also enjoin a defendant’s dilutive copying on vaguely reasoned theories of common law misappro-

²³⁵ *Id.* at 237.

²³⁶ *Id.* at 236.

²³⁷ *Id.* at 237.

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ See Adam Smith, *Chinese Sham Glam: Innocuous Innovation or Mark-Owner Menace?*, WORLD TRADEMARK REV. DAILY, Feb. 24, 2009 (explaining that *shanzhai* are parody products “diametrically opposed to fashion and brands” and are “about people turning their noses up to the government and IP owners” (quoting George Chan, IP consultant at Rouse & Co.) and that “where there is *baoli* (outlandish, dishonest profit) there is *shanzhai*” (quoting Lucy Nichols, Nokia director of global brand protection)).

²⁴¹ *Schieffelin*, 850 F. Supp. at 242 (quoting Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd., 604 F.2d 200, 204–05 (2d Cir. 1979)). The *Schieffelin* court credited survey evidence in which ten percent of those surveyed believed that the plaintiff was the source of Dom Poppingnon popcorn and twenty-two percent believed that the defendant “required authorization” from the plaintiff to launch its product. *Id.* at 247.

²⁴² *Id.* at 251 (citing Sally Gee, Inc., v. Myra Hogan, Inc., 699 F.2d 621, 625 (2d Cir. 1983)).

²⁴³ See, e.g., Bd. of Supervisors of La. State Univ. v. Smack Apparel Co., 438 F. Supp. 2d 653, 660 (E.D. La. 2006) (finding the defendant’s novelty apparel items to be infringing); Grey v. Campbell Soup Co., 650 F. Supp. 1166, 1174–75 (C.D. Cal. 1986) (finding “Dogiva” and “Cativa” treats parodying Godiva chocolate to be infringing in part because the public was likely to be confused as to whether the defendant had Godiva’s permission to use those names); Gucci Shops, Inc. v. R.H. Macy & Co., 446 F. Supp. 838 (S.D.N.Y. 1977) (finding “Gucchi Goo” diaper bags to be infringing). But see, e.g., Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC, 507 F.3d 252, 268–69 (4th Cir. 2007) (finding “Chewy Vuitton” dog toy not to be infringing or diluting).

priation or, in Europe, of the taking of “unfair advantage.”²⁴⁴ To the extent that these theories make little effort to ground themselves in any notion of search costs, they represent the clearest expression of courts’ essentially normative commitment to policing the sumptuary code. An early and highly representative U.S. case in this regard involved the Atmos clock, a table clock that is wound solely by changes in atmospheric pressure.²⁴⁵ The manufacturer of the Atmos clock sued a competitor that produced an electric-powered simulation of the clock.²⁴⁶ Judge Jerome Frank was hardly an apologist for trademark law²⁴⁷ or for the “[n]on-economic snobbish desires of consumers (of the kind analyzed by Veblen) and the satisfaction of their desires engendered by ignorance.”²⁴⁸ He nevertheless enjoined the simulation:

[S]ome customers would buy plaintiff’s cheaper clock for the purpose of acquiring the prestige gained by displaying what many visitors at the customers’ homes would regard as a prestigious article. . . . Plaintiff’s intention thus to reap financial benefits from poaching on the reputation of the Atmos clock is of major importance.²⁴⁹

In a surprisingly persistent line of cases, all involving high-status goods, U.S. courts have since followed the reasoning of the Atmos clock case to hold that it is simply not fair for a person to acquire the prestige associated with a good — by using, for example, a product that “looks and sounds like the real thing”²⁵⁰ — without paying the customary price.²⁵¹

European courts have ruled similarly,²⁵² most significantly in the recent landmark European Court of Justice (ECJ) case *L’Oréal SA v.*

²⁴⁴ *Trade Marks Directive*, *supra* note 205, art. 5(2), at 29.

²⁴⁵ *Mastercrafters Clock & Radio Co. v. Vacheron & Constantin-Le Coultre Watches, Inc.*, 221 F.2d 464, 465 (2d Cir. 1955).

²⁴⁶ *Id.*

²⁴⁷ *See, e.g.*, *E. Wine Corp. v. Winslow-Warren, Ltd.*, 137 F.2d 955, 957 (2d Cir. 1943) (Frank, J.) (questioning the value of the “lawful monopolies” and “immunities from competition” created by trademark law).

²⁴⁸ *Standard Brands, Inc. v. Smidler*, 151 F.2d 34, 41 n.13 (2d Cir. 1945) (Frank, J., concurring); *see also id.* (“It is perhaps not inappropriate to ask whether snobbism and catering to ignorance are important social interests deserving governmental assistance.”).

²⁴⁹ *Mastercrafters*, 221 F.2d at 466.

²⁵⁰ *A.T. Cross Co. v. Jonathan Bradley Pens, Inc.*, 355 F. Supp. 365, 370 (S.D.N.Y. 1972).

²⁵¹ *See, e.g.*, *Cartier v. Symbolix, Inc.*, 454 F. Supp. 2d 175, 182 (S.D.N.Y. 2006); *Jack Schwartz Shoes, Inc. v. Skechers U.S.A., Inc.*, 233 F. Supp. 2d 512, 514–15 (S.D.N.Y. 2002); *Spectrum Vision Sys., Inc. v. Spectera, Inc.*, 35 F. Supp. 2d 797, 807 (D. Kan. 1998); *A.T. Cross Co.*, 355 F. Supp. at 370; *cf. Gucci Am., Inc. v. Daffy’s Inc.*, 354 F.3d 228, 235 (3d Cir. 2003) (“An underpinning of Gucci’s post-sale confusion argument is that Daffy’s customers are posing as true Gucci wearers, free-riding on Gucci exclusivity at a Daffy’s price.” (quoting *Gucci Am., Inc. v. Daffy’s Inc.*, No. 00-4463, slip op. at 11 (D.N.J. Nov. 16, 2001))).

²⁵² *See, e.g.*, *SA Cartier v. SA Raymond Weil*, Cour d’appel [CA] [regional court of appeal] Paris, 4eme ch., June 14, 2006, PIBD No. 837, III, 619 (finding that Raymond Weil slavishly copied Cartier’s famous tank watch, the design of which was in the public domain, for purposes of ap-

Bellure NV.²⁵³ There, the defendants produced and sold “downmarket’ imitations”²⁵⁴ of various L’Oréal perfumes in packaging similar to L’Oréal’s. The English courts below properly emphasized that the plaintiffs asserted no exclusive rights in the actual smells of their perfumes. Thus, as the chancery judge put it in paraphrasing the testimony of a witness, the possibility of “[c]havs hanging about outside McDonalds smelling of fine fragrances”²⁵⁵ was irrelevant — at least for the English courts — to the causes of action at issue. Instead, the case ultimately turned on the question of whether the defendants’ look-alike packaging violated the terms of section 5(2) of the European Community’s Trade Marks Directive,²⁵⁶ which prohibits the taking of “unfair advantage of . . . the distinctive character or the repute”²⁵⁷ of a trademark. The ECJ held that even if the defendants’ packaging did not cause any confusion with or dilution of L’Oréal’s marks, the defendants nevertheless took unfair advantage when they sought through their packaging to “benefit from the power of attraction, the reputation and the prestige” of L’Oréal’s marks “without paying any financial compensation.”²⁵⁸ Though the ECJ took great pains to explain that it was bound by the factual findings below that there was no confusion or dilution,²⁵⁹ its unfair advantage holding was essentially an antidilution holding by other means. If it did not seek directly to protect the “prestige” of L’Oréal’s marks, the ECJ nevertheless sought to protect L’Oréal’s incentives to produce marks with that characteristic. Thus, what the ECJ had taken away a year earlier in the antidilution case of *Intel v. CPM*,²⁶⁰ which established a nearly impossible evidentiary requirement for a showing of blurring,²⁶¹ it gave back under an unfair advantage theory in *L’Oréal v. Bellure*.

propriating the prestige of the watch); *International Annual Review*, 98 TRADEMARK REP. 309, 575–79 (2008) (discussing Italian case law enjoining infringing knockoffs of luxury merchandise).

²⁵³ Case C-487/07, 2009 ECJ EUR-Lex LEXIS 532 (June 18, 2009).

²⁵⁴ *Id.* ¶ 46.

²⁵⁵ *L’Oreal SA v. Bellure NV*, [2006] EWHC (Ch) 2355, [62] (Eng.); see also *L’Oreal SA v. Bellure NV*, [2007] EWCA (Civ) 968, [86] (Eng.) (“[Counsel] invited us to draw an analogy with cases where a well-known high prestige product was seen in insalubrious circumstances (the Burberry brand being associated with chavs was his example). That is miles from this case.”).

²⁵⁶ See *Trade Marks Directive*, *supra* note 205.

²⁵⁷ *Id.* art. 5(2), at 29.

²⁵⁸ Case C-487/07 ¶ 50.

²⁵⁹ *Id.* ¶ 33.

²⁶⁰ Case C-252/07, *Intel Corp. v. CPM United Kingdom Ltd.* (Nov. 27, 2008), http://curia.europa.eu/jcms/jcms/j_6 (enter “C-252/07” in “Case no” field and select “Search”).

²⁶¹ *Id.* ¶ 77 (“[P]roof that the use of the later mark is or would be detrimental to the distinctive character of the earlier mark requires evidence of a change in the economic behaviour of the average consumer of the goods or services for which the earlier mark was registered consequent on the use of the later mark, or a serious likelihood that such a change will occur in the future.”). Earlier in its judgment, the ECJ stated that “detriment to the distinctive character of the earlier mark” is “also referred to as ‘dilution,’ ‘whittling away’ or ‘blurring.’” *Id.* ¶ 29.

The irony of trademark antidilution law — that we are accomplishing the goals of Schechter’s original formulation in ways unanticipated, if not rejected by Schechter — continues in one other and final respect. In speaking of dilution by blurring, I have spoken so far of only one of the two modes of trademark dilution conventionally recognized in current trademark doctrine. The other is dilution by “tarnishment,” a mode of dilution that plaintiffs have traditionally invoked to address conduct that links their marks “to products of shoddy quality” or portrays their marks “in an unwholesome or unsavory context likely to evoke unflattering thoughts”²⁶² about their marks. Standard examples of the latter form of tarnishment include defendants’ use of marks in sexual,²⁶³ vulgar,²⁶⁴ or illicit contexts.²⁶⁵ Because such conduct does not affect the formal uniqueness of the targeted mark, Schechter himself never spoke of tarnishment as a form of dilution, and various trademark scholars,²⁶⁶ myself included,²⁶⁷ have questioned whether tarnishment is a form of dilution for the same reason. Yet with the Trademark Dilution Revision Act of 2006,²⁶⁸ the Lanham Act now explicitly provides relief for what it terms “dilution by tarnishment,”²⁶⁹ which it defines broadly as “association arising from the similarity between a mark or trade name and a famous mark that harms

²⁶² *Deere & Co. v. MTD Prods., Inc.*, 41 F.3d 39, 43 (2d Cir. 1994) (citing *Coca-Cola Co. v. Gemini Rising, Inc.*, 346 F. Supp. 1183, 1183 (E.D.N.Y. 1972)).

²⁶³ *See, e.g., Hasbro, Inc. v. Internet Entm’t Group, Ltd.*, No. C96-130WD, 1996 WL 84853, at *1 (W.D. Wash. Feb. 9, 1996) (finding that the domain name *candyland.com* for an internet pornography website tarnished the *Candyland* mark for a children’s board game); *Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*, 467 F. Supp. 366, 377 (S.D.N.Y. 1979) (finding that defendant’s use in X-rated movie of uniforms similar to those worn by the Dallas Cowboys Cheerleaders tarnished the cheerleaders’ distinctive uniforms), *aff’d* 604 F.2d 200, 204-05 (2d Cir. 1979).

²⁶⁴ *See, e.g., Eastman Kodak Co. v. Rakow*, 739 F. Supp. 116, 118 (W.D.N.Y. 1989) (finding comedian’s use of stage name *Kodak* in connection with comedy show that used crude language to be tarnishing of plaintiff’s trademark).

²⁶⁵ *See, e.g., PepsiCo, Inc. v. #1 Wholesale, LLC.*, No. 07-CV-367, 2007 WL 2142294, at *4 (N.D. Ga. July 20, 2007) (finding that defendant’s modification of PepsiCo bottles, cans, and food canisters to allow the surreptitious storage of materials such as illegal drugs tarnished PepsiCo’s trademarks); *Coca-Cola Co. v. Alma-Leo U.S.A., Inc.*, 719 F. Supp. 725, 728 (N.D. Ill. 1989) (finding that defendant’s sale of a Coca-Cola look-alike bottle containing white bubble gum powder resembling cocaine tarnished the plaintiff’s trademarks).

²⁶⁶ *See, e.g., Darling, supra* note 203, at 63 (“Dilution is the harm that Schechter described in his 1927 paper, while tarnishment is a harm that seems to have gotten mixed into the dilution theory because of a misunderstanding of the separate parts of a trade-mark and because of poor use of language.”); Robert N. Klieger, Student Article, *Trademark Dilution: The Whittling Away of the Rational Basis for Trademark Protection*, 58 U. PITT. L. REV. 789, 831 (1997) (“[T]arnishment cannot logically be classified as trademark dilution.”).

²⁶⁷ *See* Barton Beebe, *The Semiotic Analysis of Trademark Law*, 51 UCLA L. REV. 621, 695-98 (2004).

²⁶⁸ Pub. L. No. 109-312, 120 Stat. 1730 (codified in scattered sections of 15 U.S.C.).

²⁶⁹ 15 U.S.C. § 1125(c)(2)(C) (2006) (internal quotation marks omitted).

the reputation of the famous mark.”²⁷⁰ This revision brings the Lanham Act up to speed with the European Union’s Trade Marks Directive, whose antidilution section has defined tarnishing conduct since the Directive’s inception in 1988 as conduct that is “detrimental to . . . the repute of the trade mark.”²⁷¹

Latent within the concept of tarnishment, as within these statutory definitions, has always been an extraordinarily capacious notion of harm to the “reputation” or “repute” of the trademark, one that is now taking shape as the most effective means toward reaching the ultimate ends that Schechter sought — so that the stone Schechter ignored may very well become the chief cornerstone of the cause of action he envisioned.²⁷² In *L’Oréal v. Bellure*, for example, the ECJ defined tarnishment as occurring when the defendant uses the plaintiff’s trademark or a trademark similar to it in such a way that “the trade mark’s power of attraction is reduced.”²⁷³ The Supreme Court of Canada articulated a comparable standard in its 2006 opinion in *Veuve Clicquot Ponsardin v. Boutiques Cliquot Ltée*.²⁷⁴ There, the court addressed Canada’s statutory trademark “depreciation” cause of action, which prohibits one party from using a mark “in a manner that is likely to have the effect of depreciating the value of the goodwill attaching”²⁷⁵ to another party’s mark. In expanding upon the statutory language, the court opined that a trademark’s “value can be lowered in other ways [than disparagement], as by the lesser distinctiveness that results when a mark is bandied about by different users.”²⁷⁶ The Fourth Circuit, meanwhile, has recently stated that to establish tarnishment, the plaintiff merely “must show, in lieu of blurring, that [the defendant’s use of its mark] harms the reputation of the [plaintiff’s] mark.”²⁷⁷

On the basis of these statements, any uses of a trademark that reduce another mark’s “selling power,” lower the value of that mark’s goodwill, or harm its reputation are potentially actionable as tarnishing uses. Such uses include, of course, dilutive copying that tarnishes the mark’s reputation for uniqueness, regardless of whether that copying takes the form of “shoddy” copies, and regardless of whether that copying places the targeted mark in an “unwholesome or unsavory context.” And where the plaintiff lacks persuasive evidence — as it

²⁷⁰ *Id.*

²⁷¹ See *Trade Marks Directive*, *supra* note 205, art. 5(2), at 29.

²⁷² See J.M. Balkin, *Deconstructive Practice and Legal Theory*, 96 *YALE L.J.* 743, 759 (1987) (discussing the concept of the “dangerous supplement”).

²⁷³ Case C-487/07, *L’Oréal SA v. Bellure NV*, 2009 ECJ EUR-Lex LEXIS 532 ¶ 40 (June 18, 2009).

²⁷⁴ [2006] 1 S.C.R. 824 (Can.).

²⁷⁵ Canada Trade-marks Code, R.S.C., ch. T 13, § 22(1) (1985).

²⁷⁶ *Veuve Clicquot Ponsardin*, [2006] 1 S.C.R. at 858 ¶ 63.

²⁷⁷ *Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC*, 507 F.3d 252, 268 (4th Cir. 2007).

almost always seems to do — that the defendant’s mark has blurred the link between the plaintiff’s mark and its source, the plaintiff may nevertheless contend that the defendant’s mark tarnishes the reputation of the plaintiff’s mark as being a mark that is used by one, or a few, sources and no others. The irony here is that, on this logic, while tarnishing conduct (such as placing the mark in an “unsavory context”) does not necessarily dilute the uniqueness of the mark, the dilution of the uniqueness of the mark necessarily tarnishes it; and because tarnishment is now explicitly referenced in the U.S. statute as elsewhere, the form of protection that Schechter originally envisioned is now available, *mirabile dictu*, at the federal level. As with so much else in modern trademark law, if not in modern intellectual property law more generally, tarnishment doctrine is shifting from substance to form, from protecting and promoting the substantive meaning of the mark, to the extent that it has any, to protecting and promoting, more abstractly, the mark’s formal “differential distinctiveness.”²⁷⁸ Trademark law’s expanding role as a modern form of sumptuary law has arguably precipitated this shift.

3. *Copyright Law as Antidilution Law.* — Our conventional view of copyright law does not admit of the possibility of dilutive copying of copyrightable expression.²⁷⁹ On the contrary, it subscribes to all of the assumptions of the ideology of the copy described above: that copyrightable works are inexhaustible and nonrivalrous in consumption and that their utility, relative or otherwise, need not be protected once the works have been created. Set against these assumptions, the idea that the copying of a copyrighted work should be restricted in order to preserve the work’s utility would seem ridiculous. Indeed, it runs contrary to the whole point of copyright law, which is to “promote the Progress” by limiting copying in the near term so that we will enjoy more copying, as much as possible, in the long term.

Yet notwithstanding this conventional, progressive view of copyright law, the practice of copyright law shows that courts are in fact quite sensitive to the rivalrousness of copyrighted works and to the depletability, specifically, of their relative utility. Courts commonly use copyright law to protect the “uniqueness and originality”²⁸⁰ of

²⁷⁸ See Beebe, *supra* note 267, at 675–76.

²⁷⁹ But see Christina Bohannon, *Copyright Harm, Foreseeability, and Fair Use*, 85 WASH. U. L. REV. 969, 1022–27 (2007) (discussing some courts’ recognition of “copyright dilution,” *id.* at 1022).

²⁸⁰ *Dr. Pepper Co. v. Sambo’s Rests., Inc.*, 517 F. Supp. 1202, 1208 (N.D. Tex. 1981); see also *Autoskill Inc. v. Nat’l Educ. Support Sys., Inc.*, 994 F.2d 1476, 1498 (10th Cir. 1993) (affirming district court’s finding of a likelihood of irreparable harm in light of plaintiff’s claim that its copyrighted work “will suffer from a loss of uniqueness in the marketplace” as a result of defendant’s allegedly infringing conduct (quoting *Autoskill, Inc. v. Nat’l Educ. Support Sys. Inc.*, 793 F. Supp. 1557, 1572 (D.N.M. 1992)) (internal quotation marks omitted)); *Bestland v. Smith*, No.

plaintiffs' works from "overexposure,"²⁸¹ "market saturation,"²⁸² and tarnishment.²⁸³ For example, in *Engel v. Wild Oats, Inc.*,²⁸⁴ a case involving the reproduction on T-shirts of a photograph of Central Park, the court noted quite explicitly that "[t]he nature of plaintiff's copyright — ownership of a rarefied, artistic subject matter — is unusually susceptible to damage when reproduced on the rather less rarefied medium of a T-shirt or sweat shirt."²⁸⁵ As the Seventh Circuit's Beanie Babies cases²⁸⁶ suggest, the courts' primary concern in such cases is not to incentivize the further creation of absolute utility, but, in an almost retroactive manner, to preserve the relative utility of what has already been created. Ty, Inc., the manufacturer of Beanie Babies stuffed animals, engages in a marketing strategy that one Northern District of Illinois court characterized as the "shrewd business practice of creating a shortage in order to excite the market"²⁸⁷ and another characterized as "empty shelves — the deliberate creation of scarcity, which pumps up word-of-mouth demand to a frenzied level."²⁸⁸ In an effort to prevent the production of various knockoffs of its copyrighted stuffed animal designs, Ty urged the courts to preserve the perception that its designs are "unique"²⁸⁹ and thereby protect the "inherent value of Ty's copyrights themselves."²⁹⁰ The courts

06CV00466WYDPAC, 2006 WL 3218893, at *5 (D. Colo. Nov. 6, 2006) ("Irreparable harm may be established by showing that the moving party would 'suffer from a loss of uniqueness in the marketplace.'" (quoting *Autoskill Inc.*, 994 F.2d at 1498)); cf. *Mozart Co. v. Mercedes-Benz of N. Am., Inc.*, 833 F.2d 1342, 1346 (9th Cir. 1987) (identifying patent and copyright protection as "designed to protect the uniqueness of the product itself").

²⁸¹ *Brewer v. Hustler Magazine, Inc.*, 749 F.2d 527, 529 (9th Cir. 1984).

²⁸² *Ty, Inc. v. W. Highland Publ'g, Inc.*, No. 98 C 4091, 1998 WL 698922, at *16 (N.D. Ill. Oct. 5, 1998); see also *Castle Rock Entm't v. Carol Publ'g Group, Inc.*, 955 F. Supp. 260, 272 (S.D.N.Y. 1997) (giving weight to plaintiff's "artistic decision not to saturate [potential] markets with variations of their original").

²⁸³ See Bohannan, *supra* note 279, at 1026–27; see also *Metro-Goldwyn-Mayer, Inc. v. Am. Honda Motor Co.*, 900 F. Supp. 1287, 1300 (C.D. Cal. 1995) ("[I]t is likely that James Bond's association with a low-end Honda model will threaten its value in the eyes of future upscale licensees.").

²⁸⁴ 644 F. Supp. 1089 (S.D.N.Y. 1986).

²⁸⁵ *Id.* at 1092.

²⁸⁶ See, e.g., *Ty, Inc. v. Publ'ns Int'l Ltd.*, 292 F.3d 512 (7th Cir. 2002); *Ty, Inc. v. Le Clair*, 103 F. Supp. 2d 1047 (N.D. Ill. 2000); *W. Highland Publ'g*, 1998 WL 698922; *Ty, Inc. v. GMA Accessories, Inc.*, 959 F. Supp. 936 (N.D. Ill. 1997), *aff'd*, 132 F.3d 1167 (7th Cir. 1997).

²⁸⁷ *W. Highland Publ'g*, 1998 WL 698922, at *16 (citing *GMA Accessories*, 132 F.3d at 1171).

²⁸⁸ *GMA Accessories*, 959 F. Supp. at 943 (quoting Gary Samuels, *Mystique Marketing*, FORBES, Oct. 21, 1996, at 276, 276) (internal quotation mark omitted).

²⁸⁹ *Id.*

²⁹⁰ *Id.* (quoting Ty, Inc. Memorandum in Support of Preliminary Injunction at 8, *GMA Accessories*, 959 F. Supp. 936 (No. 96 C 8465); see also *GMA Accessories*, 132 F.3d at 1173 ("Ty wants to limit the distribution of Beanie Babies, and has succeeded in doing so, as shown by the existence of a secondary market in the Babies in which prices as high as \$2,200 for a Beanie Baby ('Peanuts the Elephant') have been reported.")).

obliged.²⁹¹ Here, remarkably, the substantial similarity inquiry was essentially an antidilution inquiry, in which the harm was not so much that consumers would buy the defendants' products rather than the plaintiff's, but that the plaintiff's products, in losing their distinctiveness in the marketplace, would also lose whatever utility they had to offer.²⁹²

This concern for the rarity of the plaintiff's work is apparent elsewhere in copyright doctrine. As traditionally construed, factor four of the statutorily prescribed test for copyright fair use instructs courts to consider, among other things, what impact the defendant's unauthorized use would have on the market for the plaintiff's work if that use were to become "widespread."²⁹³ Though courts have typically applied this slippery slope doctrine to prevent even small-scale substitution, they have also used it to address trademark-like concerns about a dilutive "proliferation of borrowings," particularly in cases involving works embodied in "limited editions."²⁹⁴ Similarly, in assessing damages in copyright infringement cases, courts have adopted antidilution reasoning with respect to the plaintiff's loss of goodwill and damage to its reputation caused by the "availability and prevalence"²⁹⁵ of copies of the plaintiff's work.²⁹⁶ For example, in *Harolds Stores, Inc. v. Dillard Department Stores, Inc.*,²⁹⁷ in which Dillard copied Harold's Stores' printed skirt designs, the Tenth Circuit admitted survey evidence showing the damage to Harold's Stores' reputation caused by its customers' realization that the printed skirt designs that "they thought were unique to Harold's" were in fact available elsewhere.²⁹⁸ Finally, as William Landes and Richard Posner suggest, the prohibition against unauthorized production of derivative works functions to prevent, among other things, potential congestion externalities associated with multiple competing derivatives of a preexisting work.²⁹⁹

Admittedly, the great majority of copyright cases continue to operate according to the conventional progressive view that copyright law does no more than prohibit the unauthorized substitutive copying of intangible forms of absolute utility in order to promote their creation.

²⁹¹ See *GMA Accessories*, 132 F.3d at 1173; *W. Highland Publ'g*, 1998 WL 698922, at *21; *GMA Accessories*, 959 F. Supp. at 945.

²⁹² See, e.g., *W. Highland Publ'g*, 1998 WL 698922, at *16.

²⁹³ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994) (quoting 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05(A)(4) (1993)).

²⁹⁴ *Richard Anderson Photography v. Brown*, No. 85-0373-R, 1990 WL 538929, at *2 (W.D. Va. Apr. 16, 1990); see also, e.g., *Gregerson v. Vilana Fin., Inc.*, 446 F. Supp. 2d 1053, 1058 (D. Minn. 2006); *W. Highland Publ'g*, 1998 WL 698922, at *16.

²⁹⁵ *Spinmaster, Ltd. v. Overbreak LLC*, 404 F. Supp. 2d 1097, 1111 (N.D. Ill. 2005).

²⁹⁶ See, e.g., *Couleur Int'l Ltd. v. Opulent Fabrics Inc.*, 330 F. Supp. 152, 154 (S.D.N.Y. 1971).

²⁹⁷ 82 F.3d 1533 (10th Cir. 1996).

²⁹⁸ *Id.* at 1547.

²⁹⁹ See LANDES & POSNER, *supra* note 71, at 226.

The copyright dilution case law remains in the minority. Yet its influence is growing. Consider the oft-noted expansion in the scope of copyright protection, and in particular in the scope of substantial similarity. Like the notion of post-sale confusion in trademark law, the “total concept and feel” test for substantial similarity is arguably little more than a means to expand the scope of infringement to include copying that, while perhaps not fully substitutive in nature, is nevertheless dilutive of the distinctive style or “aesthetic appeal”³⁰⁰ of the plaintiff’s work.³⁰¹ As in the rest of copyright antidilution law, such an approach ultimately turns progressive copyright law on its head. In an effort to preserve relative utility, courts end up limiting the further production of absolute utility.

4. *Design Protection Law as Antidilution Law.* — Antidilution thinking has also spread to three-dimensional design protection law, both the design patent law we currently have on the books,³⁰² which I address very briefly here, and the apparel design protection proposals being considered by Congress and likely at some point to become law,³⁰³ which I address at greater length. Though they are rarely recognized as such, both of these are essentially antidilution laws. Like their counterparts abroad,³⁰⁴ they explicitly limit the subject matter of their protection to product designs that are “attractive or distinctive in appearance,”³⁰⁵ and their primary purpose is to incentivize the creation of this distinctiveness and ensure that it is maintained. Indeed, they are probably the clearest examples we have of the “functional transformation” of intellectual property law into a body of law being used not simply to “promote the Progress,” but also, and in tension with that goal, to preserve our system of consumption-based differentiation in the face of copying technology that threatens to undermine it.

Consider, first, design patent law. Patent law commentary tends to focus exclusively on utility patent law, where, to be sure, the “patent

³⁰⁰ *Boyd's Collection, Ltd. v. Bearington Collection, Inc.*, 360 F. Supp. 2d 655, 663 (M.D. Pa. 2005) (quoting *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960)).

³⁰¹ See, e.g., *Boisson v. Banian, Ltd.*, 273 F.3d 262, 272 (2d Cir. 2001); *Dawson v. Hinshaw Music Inc.*, 905 F.2d 731, 734 (4th Cir. 1990); *Selle v. Gibb*, 741 F.2d 896, 904 (7th Cir. 1984) (“An important factor in analyzing the degree of similarity of two compositions is the uniqueness of the sections which are asserted to be similar.”).

³⁰² 35 U.S.C. § 171 (2006).

³⁰³ See *Design Piracy Prohibition Act*, H.R. 2196, 111th Cong. (2009). Similar versions of this bill were proposed as H.R. 2033, 110th Cong. (2007); S. 1957, 110th Cong. (2007); and H.R. 5055, 109th Cong. (2006).

³⁰⁴ See, e.g., *Designs Act*, 2003, § 15(1) (Austl.) (“A design is a *registrable design* if the design is new and distinctive when compared with the prior art base for the design as it existed before the priority date of the design.”); Parliament and Council Directive 98/71, *Legal Protection of Designs*, art. 3, 1998 O.J. (L 289) 28, 30 (EC) (“A design shall be protected by a design right to the extent that it is new and has individual character.”).

³⁰⁵ 17 U.S.C. § 1301(a)(1) (2006).

paradox³⁰⁶ and “patent portfolio races”³⁰⁷ have many characteristics of a zero-sum struggle, and where utility patents themselves serve as status symbols for inventors or firms in a variety of ways.³⁰⁸ Unsurprisingly, the fashion process operates in the utility patent world as much as it does anywhere else. Yet for all of our attention to utility patents, recent years have witnessed a surge in the annual number of registrations of design patents at the U.S. Patent and Trademark Office and other patent offices around the world, a run-up far outpacing the increase in registrations of utility patents.³⁰⁹ The reason for this becomes clear in design patent doctrine, which has much in common with trademark doctrine, so much so that cases have been remanded or reversed because the lower court confused the two areas’ tests for protectability (both of which arguably involve an analysis of distinctiveness)³¹⁰ or infringement (both of which involve an analysis of consumer confusion).³¹¹ Courts recognize that firms file for design patent protection “for the purpose of protecting the uniqueness of [their] designs”³¹² as well as to protect, more generally, the firm’s “reputation for innovation or uniqueness.”³¹³ Design patents have proved to be especially important in the high-technology consumer goods sector because such high-technology is not often clearly demonstrable except through the goods’ outer appearance, which is frequently the target

³⁰⁶ Bronwyn H. Hall & Rosemarie Ham Ziedonis, *The Patent Paradox Revisited: An Empirical Study of Patenting in the U.S. Semiconductor Industry, 1979–1995*, 32 RAND J. ECON. 101 (2001).

³⁰⁷ *Id.* at 101 (internal quotation marks omitted); see also Ann Bartow, *Separating Marketing Innovation from Actual Invention: A Proposal for a New, Improved, Lighter, and Better-Tasting Form of Patent Protection*, 4 J. SMALL & EMERGING BUS. L. 1, 8 (2000) (discussing “‘keeping up appearances’ patents”); Gideon Parchomovsky & R. Polk Wagner, *Patent Portfolios*, 154 U. PA. L. REV. 1 (2005) (discussing patent portfolios).

³⁰⁸ See Mark A. Lemley, Essay, *Rational Ignorance at the Patent Office*, 95 NW. U. L. REV. 1495, 1506 (2001) (“Established companies may patent out of inertia, to maintain a reputation as a market leader, or simply for the marquee value of selling a product with ‘patented technology.’”).

³⁰⁹ See, e.g., U.S. PATENT AND TRADEMARK OFFICE, PERFORMANCE AND ACCOUNTABILITY REPORT, FISCAL YEAR 2008, at 119 tbl.6 (2008) (showing a sixty-eight percent increase in design patent registrations as against an eight percent increase in utility patent registrations for the ten-year period 1999 to 2008).

³¹⁰ See, e.g., *In re Klein* by Klein, 987 F.2d 1569, 1574–75 (Fed. Cir. 1993) (finding that the trademark examiner “applied an erroneous standard of patentability which he referred to as ‘distinctiveness,’” *id.* at 1574, and reversing the Trademark Trial and Appeal Board’s affirmance of the examiner’s rejection of the design).

³¹¹ Cf. *Unette Corp. v. Unit Pack Co.*, 785 F.2d 1026, 1029 (Fed. Cir. 1986) (finding that it was harmless error for the district court to apply a “likelihood of confusion” test in addition to the Supreme Court’s test from *Gorham Co. v. White*, 81 U.S. (1 Wall.) 511 (1872)).

³¹² *Pac. Furniture Mfg. Co. v. Preview Furniture Corp.*, 626 F. Supp. 667, 670 (M.D.N.C. 1985).

³¹³ *Torspo Hockey Int’l, Inc. v. Kor Hockey Ltd.*, 491 F. Supp. 2d 871, 882 (D. Minn. 2007).

of copyists.³¹⁴ Design patents enable the designers of such products to convert the absolute utility that they have created into clearly demonstrable (and protectable) forms of relative utility, which may be the primary form of utility that high-technology consumers ultimately desire.³¹⁵

But by far the most striking example of the sumptuary turn in intellectual property law, and the one with which I conclude this section, comes to us in the form of antidilution controls on the reproduction of apparel designs, including designs of clothing, bags, belts, and eyeglass frames.³¹⁶ While the U.S. design patent system will protect the designs of such articles, provided that the designs meet the requirements of novelty and nonobviousness, its registration process is seen to be too slow to keep pace with the rapid changes in apparel fashion.³¹⁷ Apparel designers, who have long enjoyed *sui generis* protection elsewhere,³¹⁸ have thus repeatedly sought such protection in the United States.³¹⁹ There are a variety of explanations, some controversial, for why their efforts have so far failed.³²⁰ But what has recently added great urgency — and persuasive force — to their efforts is the emergence in the apparel manufacturing industry of exceptionally powerful copying practices of the kind described in section I.C.³²¹ As Professor Susan Scafidi testified to Congress, “high-quality digital photos of a runway look can be uploaded to the internet and sent to copyists anywhere in the world even before the show is finished, and knockoffs can be offered for sale within days — long before the original garments are scheduled to appear in stores.”³²² Of course, the apparel design indus-

³¹⁴ See, e.g., Joseph L. Flatley, *Keepin' It Real Fake, Part CCXXXIII: MacBook Air Loses Two Inches, Adds a Windows Key*, ENGADGET, Aug. 26, 2009, <http://www.engadget.com/2009/08/26/keepin-it-real-fake-part-ccxxxiii-macbook-air-loses-two-inches>.

³¹⁵ See James Conley, *Trademarks, Not Patents: The Real Competitive Advantage of the Apple iPod*, CORE77, http://www.core77.com/reactor/12.05_ipod_trademark.asp (last visited Jan. 9, 2010).

³¹⁶ See Design Piracy Prohibition Act, H.R. 2196, 111th Cong. § 2 (2009).

³¹⁷ See, e.g., *Hearing on H.R. 5055*, *supra* note 133, at 3 (statement of Rep. Howard L. Berman, Ranking Member, H. Subcomm. on Courts, the Internet, & Intellectual Property).

³¹⁸ See, e.g., Copyright, Designs and Patents Act, 1988, c. 48, § 213 (Eng.) (providing unregistered design protection); *id.* § 269 (providing registered design protection); Council Regulation 6/2002, Community Designs, 2002 O.J. (L 3/1) (EC); Law No. 94-361 of May 10, 1994, Journal Officiel de la République Française [J.O.] [Official Gazette of France], May 11, 1994, p. 6863; see also *Société Yves Saint Laurent Couture S.A. v. Société Louis Dreyfus Retail Mgmt. S.A.*, Tribunal de Commerce [Trib. Comm.] [commercial court] Paris, May 18, 1994, European Commercial Cases [ECC] 1994, 512 (Fr.).

³¹⁹ See generally David Goldenberg, *The Long and Winding Road: A History of the Fight Over Industrial Design Protection in the United States*, 45 J. COPYRIGHT SOC'Y U.S.A. 21 (1997).

³²⁰ See *id.*

³²¹ See *supra* section I.C, pp. 830–36.

³²² *Hearing on H.R. 5055*, *supra* note 133, at 82 (statement of Susan Scafidi, Visiting Prof. of Law, Fordham Law School).

try has complained for decades, if not centuries, about the production of knockoffs, but the difference now is that legitimate copiers no longer enjoy any significant period in which to exploit their first-mover advantage, and to the extent that they may once have enjoyed an effective monopoly over certain manufacturing practices or materials, advances in copying technology are eroding that advantage as well. Of all the media of distinction in the modern marketplace, apparel fashion is undoubtedly the most potent. It is also undoubtedly the most exposed to the threat of mimetic technology.

Placing itself squarely within the tradition of the incentives-based theory of intellectual property protection, the apparel design industry thus asserts that in light of the new copying practices arrayed against it, it will not be able to continue to innovate new designs unless those designs are guaranteed some form of legal protection. Unless designers can profit from their innovations, the industry asserts, the “Progress” of fashion will come to a halt. In an important recent article, Professors Kal Raustiala and Chris Sprigman argue that the industry has gotten this exactly wrong.³²³ They contend that “copying fails to deter innovation in the fashion industry because, counter-intuitively, copying is not very harmful to originators. . . . [C]opying functions as an important element of — and perhaps even a necessary predicate to — the apparel industry’s swift cycle of innovation.”³²⁴ The industry’s reaction to this argument has been mixed,³²⁵ but at least Raustiala and Sprigman have acceded to the industry’s initial framing of the debate. While Raustiala and Sprigman are certainly correct that copying causes the churning of apparel designs, it is far from clear to what extent this churning is evidence of “innovation” in a fashion process that is notoriously cyclical and *renovative*. Indeed, one could assert that the industry spins its wheels to the extent that it does because it lacks strong intellectual property protection.

The larger point is that it is crucial to set aside the canard that the apparel design industry pursues “Progress,” if by progress we mean the innovation of absolute utility, be it aesthetic or functional in form. For what the industry has long supplied is not so much absolute utility as relative utility, not so much beauty as distinction — and as generations of fashion critics have observed (including some quoted, to their credit, by Raustiala and Sprigman³²⁶), fashions are not distinctive because

³²³ See Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687 (2006).

³²⁴ *Id.* at 1691.

³²⁵ See Emili Vesilind, *The New Pirates*, L.A. TIMES, Nov. 11, 2007, at P6.

³²⁶ See, e.g., Raustiala & Sprigman, *supra* note 323, at 1726–27 (quoting Thorstein Veblen’s observation that new fashions are “intrinsically ugly” and produce “aesthetic nausea” that drives the fashion process (internal quotation marks omitted)).

they are beautiful; they are beautiful because they are distinctive.³²⁷ The purpose of the avant-garde fashion show, as of other forms of advertising, is to generate this distinction so that it may then be commodified in the form of high-margin and considerably less avant-garde merchandise, particularly handbags and perfume. The industry as a whole has been exceedingly successful in this enterprise of commercial persuasion, and not just with respect to consumers generally, but also with respect to those consumers who are also policymakers. Thus, the Copyright Office speaks before Congress of the importance of preventing third parties from “undercutting the market for a hot new fashion design.”³²⁸ Meanwhile, congressmen go to great lengths to portray themselves as fashionless everymen — “My wife just made me go see ‘The Devil Wears Prada.’ . . . That fully exhausts my knowledge of the fashion industry . . .”³²⁹ — who are nevertheless sympathetic to the industry, and one has invoked the Soviet Union: “[L]et’s be honest, [fashion is] art. Otherwise, we would all be wearing something that looks like the Russians wore during the Soviet period or worse.”³³⁰ A child of the *ancien régime*³³¹ but finally brought into its own by modern advertising, the apparel fashion industry perpetuates more effectively than any other our sumptuary code of consumption-based social distinction.³³² It is, in this sense, an intensely reactionary industry.

The proposed apparel design protection legislation is better understood, then, as sumptuary rather than progressive intellectual property

³²⁷ Cf. JEAN BAUDRILLARD, *SYMBOLIC EXCHANGE AND DEATH* 94 (Ian Hamilton Grant trans., 1993) (1976) (“In contradistinction to language, which *aims* at communication, fashion *plays* at it, turning it into the goal-less stake of a signification without a message. Hence its aesthetic pleasure, which has nothing to do with beauty or ugliness.”).

³²⁸ *Hearing on H.R. 5055, supra* note 133, at 210 (statement of the United States Copyright Office).

³²⁹ *Id.* at 190 (statement of Rep. Ric Keller, Member, H. Subcomm. on Courts, Internet, & Intellectual Property).

³³⁰ *Id.* at 187 (statement of Rep. Darrell Issa, Member, H. Subcomm. on Courts, Internet, & Intellectual Property).

³³¹ See DANIEL ROCHE, *THE CULTURE OF CLOTHING: DRESS AND FASHION IN THE ‘ANCIEN RÉGIME’* (Jean Birrell trans., Univ. of Cambridge Press 1997) (1989).

³³² At the hearings on H.R. 5055 and H.R. 2033, both supporters and opponents of apparel design protection cited apparel’s ability to express class distinction in support of their respective positions. *Compare Design Law — Are Special Provisions Needed To Protect Unique Industries?: Hearing on H.R. 2033 Before the Subcomm. on Courts, the Internet, & Intellectual Property of the H. Comm. on the Judiciary*, 110th Cong. 33 (2008) (statement of Steve Maiman, Proprietor, Stony Apparel) (“The availability of inexpensive but fashionable clothing allows every American to feel worthy, hip, and stylish. . . . But if this bill passes, we could see a future where only the wealthy will look up to date. This legislation threatens to split America into two classes of people: those with money who can buy copyrighted designs, and those who can’t afford them.”), *with Hearing on H.R. 5055, supra* note 133, at 10 (statement of Jeffrey Banks, Fashion Designer) (“The wealthy will still be able to buy the designs originating out of Europe and Japan, where protection exists. The rest of America will be left buying the cheap knockoffs from Europe. I urge you to pass this important legislation.”).

law. Unlike progressive intellectual property protections, its primary purpose is not to prevent substitutive copying. It is well recognized that high-end fashion designers are hardly losing a sale when a low-income purchaser buys an inexpensive knockoff of a \$2000 handbag, and to the extent that such designers tend, like Ty, deliberately to restrict the number of pieces that they produce, they are hardly losing a sale when a high-income purchaser removes herself from the waitlist for a product to buy a knockoff of it either. This is why the counterfeiting of relative goods is so often said to be a “victimless crime.”³³³ Rather, the primary purpose of apparel design protection is to prevent dilutive copying. The victims of such copying are all those who rely on the sumptuary code to differentiate their products, themselves, and the world around them, and whose production and consumption of relative utility is impaired by overcopying.³³⁴ This has proved to be a much more difficult harm to describe in the U.S. Congress, particularly when the legitimate victims may be cast as those who have the ability and willingness to pay \$2000 for an authentic handbag, and the illegitimate victims, rarely mentioned, are those who have already bought a fake.

The apparel design debate ultimately reveals a larger truth about industries engaged, as most now are, in the production of commodified forms of distinction. This is that such industries benefit from dilutive copying — indeed, they encourage it — but only if they can plan and control the process of dilution. In apparel design firms’ traditional business model, they themselves manage and profit from the staged dilution of their designs’ distinctiveness by gradually trickling down their haute couture designs — or perhaps more accurately, the brand built up by those designs — to various levels of ready-to-wear and

³³³ See Dana Thomas, *Terror’s Purse Strings*, N.Y. TIMES, Aug. 30, 2007, at A23 (“Most people think that buying an imitation handbag or wallet is harmless, a victimless crime.”); see also John Tagliabue, *Fakes Blot a Nation’s Good Names*, N.Y. TIMES, July 3, 1997, at D1 (reporting that the Italian public “tends to view counterfeiters as modern-day Robin Hoods”).

³³⁴ In the recent seminal case of *Review Australia Pty Ltd v. Innovative Lifestyle Investments Pty Ltd* (2008) 166 F.C.R. 358, the Federal Court of Australia explicitly recognized this aspect of apparel design protection. The court found that the defendants’ production and sale of knockoffs of the plaintiff’s dress designs did not constitute substitutive copying: “In the circumstances, I could not conclude that it was probable that a consumer who bought the [defendants’] dress would, if that dress had been unavailable, have bought the [plaintiff’s] dress instead.” *Id.* at 365. Rather, the harm entailed “dilution”:

If garments bearing a substantial similarity to those of the [plaintiff] started to appear in other outlets and under other brands, the consumer’s perception of the originality of the [plaintiff’s] designs would necessarily be weakened. In an extreme case, the consumer’s perception may be that the [plaintiff’s] garments were nothing very special at all . . . I could not, of course, find that the present was anything like an extreme case, but I am prepared to find, on the probabilities, that the market presence of the [defendants’] dress did bring about some minor dilution of the [plaintiff’s] reputation for originality.

Id. at 367.

merchandise. Formerly, such industries could rely on natural limits on dilution; technology was incapable of rapidly reproducing persuasive copies of their clothing designs or merchandise. But now this is no longer the case. Copying technology threatens to overwhelm the logic of the fashion process. As the apparel designer Nicole Miller has candidly put it, new copying practices “make[] the trends end too fast There’s so much copying that people throw away their clothes because they don’t have any value anymore. It ruins the whole thing.”³³⁵ Rapid copying threatens, more generally, to induce in consumers an ever more blasé reaction to the quickening procession of commodified distinctions presented to them, with the risk that they might abandon the zero-sum game altogether, that their “hip consumerism” might transform into anticonsumerism. The role of antidilution law, as much in trademark and copyright as in three-dimensional design law, is to prevent this “ruin” from occurring. Its role is not so much to prohibit dilution as to facilitate it in an orderly and profitable — and socially reactionary — manner. In this important sense, sumptuary intellectual property law is essentially continuous with the history of early modern sumptuary law, which never sought to eliminate luxury consumption, but rather sought to govern it and ensure that it performed its intended social function.³³⁶ Whether modern sumptuary intellectual property law will prove to be successful in performing this regulatory role is a question that I consider in Part III. First, however, I turn to a second mode of intellectual property protection that is also proving to be useful in countering the social implications of copying technology.

C. Intellectual Property Law as Authenticity Law

A common — and probably valid — criticism of Benjamin’s *Work of Art* essay is that it failed to recognize one important consequence of the emergence of mimetic technology: in producing ever more copies, “mechanical reproduction” only amplifies all the more the distinctive “aura” of those things that are perceived not as mechanically reproduced copies, but rather as authentic originals.³³⁷ Producers, in con-

³³⁵ Eric Wilson, *The Knockoff Won’t Be Knocked Off*, N.Y. TIMES, Sept. 9, 2007, at WK 5 (quoting apparel designer Nicole Miller). Hemphill and Suk explain the underlying logic: “If copying increases, and hence the fashion lifespan of the item falls, a consumer will recognize that fact and lower her willingness to pay.” Hemphill & Suk, *supra* note 38, at 1183.

³³⁶ See KILLERBY, *supra* note 2, at 91 (“Luxury performed many useful functions within the city and it was precisely because of its symbolic importance that legislators were concerned to ensure the strict regulation of its use.”).

³³⁷ SCHWARTZ, *supra* note 27, at 141 (“What withers in the age of mechanical reproduction is not the aura . . . of works of art but the assurance of our own liveliness. . . . Only in a culture of the copy do we assign such motive force to the Original.”). Benjamin did recognize that mechanical reproduction significantly contributed to the creation of the category of the authentic, *see* BENJAMIN, *supra* note 158, at 243 n.2, but in Part IV of his *Work of Art* essay, he still retains the

trast, have long recognized this and responded accordingly.³³⁸ Of course, most producers can promote their goods as being “original” in the sense that the goods originate from the same source as that which originally designed them or as being “authentic” in the sense that the goods are authorized copies. But one category of producers has been especially aggressive in asserting what has lately become an exceptionally distinctive form of authenticity: the authenticity of geographical place and historical time. European winemakers, for example, extol the mysterious “*terroir*”³³⁹ that expresses itself in their wines. Indigenous producers of traditional cultural expressions, such as Australian Aboriginal artists, insist that their work cannot be created or understood apart from the land and the history that gives rise to it.³⁴⁰ And comically, mined diamond producers now stress that organic diamonds are “billions of years in the making,”³⁴¹ and that “[a]dding to the mystery and aura of what make diamonds so sought-after” is the fact that “approximately 250 tons of ore must be mined and processed in order to produce a single, one carat, polished, gem-quality diamond.”³⁴² In what has become a central element of European agricultural policy across a wide range of goods, and an emerging element of international development policy as well, traditional producers seek to “defetishize”³⁴³ their goods by emphasizing the precise geographical, historical, and human circumstances of their goods’ manufacture. Through the commodification of what are essentially forms of pre- or anti-modernity,³⁴⁴ traditional producers seek to sell the distinction of *terroir*, history, and legend to a world that has otherwise been deterritorialized, dehistoricized, and disenchanting. In Marc Augé’s terms,

broad hope that mechanical reproduction will liberate the “total function of art” from ritual. *Id.* at 224.

³³⁸ See CHARLES LINDHOLM, *CULTURE AND AUTHENTICITY* 52–64 (2008) (discussing the “commodification of authenticity,” *id.* at 52).

³³⁹ See JAMES E. WILSON, *TERROIR: THE ROLE OF GEOLOGY, CLIMATE, AND CULTURE IN THE MAKING OF FRENCH WINES* 55 (1998) (“[*Terroir*] includes physical elements of the vineyard habitat — the vine, subsoil, siting, drainage, and microclimate. Beyond the measurable ecosystem, there is an additional dimension — the spiritual aspect that recognizes the joys, the heartbreaks, the pride, the sweat, and the frustrations of its history.”).

³⁴⁰ U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm’n on Prevention of Discrimination & Prot. of Minorities, *Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples*, ¶ 21, U.N. Doc. E/CN.4/Sub.2/1993/28 (July 28, 1993) (*prepared by Erica-Irene Daes*) (explaining that for indigenous peoples, “the ultimate source of knowledge and creativity is the land itself”).

³⁴¹ O’Connell, *supra* note 25 (quoting De Beers Group).

³⁴² *Id.* (quoting De Beers Group).

³⁴³ Rosemary J. Coombe, Steven Schnoor & Mohsen Ahmed, *Bearing Cultural Distinction: Informational Capitalism and New Expectations for Intellectual Property*, 40 U.C. DAVIS L. REV. 891, 892 (2007) (internal quotation marks omitted).

³⁴⁴ See Jeff Pratt, *Food Values: The Local and the Authentic*, 27 CRITIQUE OF ANTHROPOLOGY 285, 287 (2007).

they are selling “place” to a global population of consumers who otherwise know nothing but “non-places,”³⁴⁵ or in more American terms, they are selling Norman Rockwell to the world of Edward Hopper — and of *Dastar*.

The problem, however, is that mimetic technology can now persuasively — and legally — simulate the material characteristics of most geographically and historically authentic goods, with the result that these material characteristics no longer reliably signal authenticity. Having lost control over the production of material signals of authenticity, traditional producers have therefore turned to forms of intellectual property, such as geographical indications, to establish legal control over the production of *immaterial* signals of authenticity. Stated more essentially, for all of their talk of *terroir*, traditional producers are engaging in what has become a quintessential post-industrial strategy: they are calling upon intellectual property law to facilitate the production of immaterial scarcities that may perform the social function that material scarcities once performed.

In this section, I consider two examples of traditional producers’ efforts to bend intellectual property law toward their particular sumptuary ends. The first involves the protection of geographical indications (for example, Champagne or Burgundy), which identify the geographic origin of a good where “a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.”³⁴⁶ The second involves the protection of indigenous aesthetic and sacred expression (for example, Native American or Maori graphic expression), also known as “traditional cultural expressions” (TCEs). Both forms of intellectual property protection reject every aspect of the ideology of the copy that *Dastar* and the progressive side of intellectual property law espouse, and are now appealing to intellectual property law, at least in its role as authenticity law, to do the same.

1. *Geographical Indications Protection*. — The European wine industry is currently in a state of crisis.³⁴⁷ With the rise, most notably, of New World wines, Europe faces in the near future the very real possibility of becoming a net *importer* of wine.³⁴⁸ Among the many prob-

³⁴⁵ MARC AUGÉ, *NON-PLACES: INTRODUCTION TO AN ANTHROPOLOGY OF SUPERMODERNITY* 79 (John Howe trans., Verso Books 1995) (1992). See generally *id.* at 75–115.

³⁴⁶ Agreement on Trade-Related Aspects of Intellectual Property Rights art. 22.1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, art. 22.1, 108 Stat. 4809, 869 U.N.T.S. 299, [hereinafter TRIPS Agreement] available at http://www.wto.org/english/docs_e/legal_e/27-trips.pdf.

³⁴⁷ See Comm’n of the European Cmtys., *Communication from the Commission to the Council and the European Parliament, Towards a Sustainable European Wine Sector*, COM (2006) 319 final (June 22, 2006).

³⁴⁸ See *id.* at 4; see also Kym Anderson, *Wine’s New World*, FOREIGN POL’Y, May/June 2003, at 47, 47 (“Today, the barbarians are at our gates: Australia, New Zealand, the United States,

lems facing the industry, one may appear to be of relatively minor importance: the problem of the use by non-Europeans of traditional European terms to describe wines not originating in Europe (for example, Californian “champagne” or Australian “sparkling burgundy”). This practice has long been a source of frustration for European winemakers, who consider it to be something on the order of sacrilege for New World winemakers, now using New World techniques, to describe their “laboratory”³⁴⁹ wines with traditional European terms. European winemaking countries and the European Union have therefore aggressively sought to build into trade agreements various regimes of intellectual property protection that will end this practice. Thus, strangely, while U.S. trade negotiators seek intellectual property regimes that will further their country’s comparative advantages in such “Third Wave” economic sectors as information technology, biotechnology, and entertainment,³⁵⁰ European negotiators focus here on decidedly “First Wave” agricultural products. But the Europeans are making a bet, and probably a very good one. They are betting that *Dastar* is wrong. They are betting that in a culture of copies, consumers care about “the source of the Nile and all its tributaries” and will pay a premium for geographically and historically authentic goods, not because of their absolute utility, which copies yield equally well, but because of their unique form of relative utility, which, based as it is on spatio-temporal authenticity, simply cannot be copied.

(a) *TRIPS Article 23*. — A good example of European trade negotiators’ success in gaining special protection for geographical indications is found in the main geographical indications provisions of the World Trade Organization (WTO) Trade-Related Aspects of International Property Rights (TRIPS) Agreement: Articles 22 and 23.³⁵¹ The two Articles pursue very different approaches to the intellectual property subject matter that they protect.

Article 22 of TRIPS establishes a very conventional form of protection for designations of source. Typically, we protect a designation of source from unauthorized uses only if consumers actually perceive the designation to be distinctive of source and only if the unauthorized uses are shown to confuse consumers as to source or otherwise to dilute the distinctiveness of the designation of source. We thereby con-

Chile, Argentina, South Africa.” (quoting a 2001 French Ministry of Agriculture report) (internal quotation mark omitted).

³⁴⁹ *European Union Approves Wine Trade Deal, With Reservations*, WINE SPECTATOR ONLINE, Dec. 22, 2005, http://www.winespectator.com/webfeature/show/id/European-Union-Approves-Wine-Trade-Deal-With-Reservations_2874.

³⁵⁰ See Susan K. Sell, *Industry Strategies for Intellectual Property and Trade: The Quest for TRIPs, and Post-TRIPs Strategies*, 10 CARDOZO J. INT’L & COMP. L. 79 (2002).

³⁵¹ See TRIPS Agreement, *supra* note 346, arts. 22, 23.

form the form and extent of protection to the benefits that such protection yields, including the minimization of consumer search costs and the encouragement of consistent levels of product quality, and to the costs that such protection imposes, including the constriction of the public domain. In this tradition, Article 22.2(a) specifies that WTO members shall provide remedies to prevent “the use of any means in the designation or presentation of a good that indicates or suggests that the good in question originates in a geographical area other than the true place of origin *in a manner which misleads the public* as to the geographical origin of the good.”³⁵² This language allows WTO members to require a showing of consumer confusion as to source.³⁵³ Article 22 of TRIPS restates perfectly conventional and progressive intellectual property law.

But Article 23 of TRIPS, which applies exclusively to geographical indications for wines and spirits, is an altogether different matter. Its purpose is not to minimize consumer search costs or encourage consistent levels of product quality, and to the extent that it necessitated significant changes in national intellectual property and labeling laws around the world, it is far from conventional intellectual property law. Rather, its purpose is to help traditional producers of wines and spirits to promote the authenticity of their products by establishing an absolute prohibition, the violation of which occurs as a *per se* matter, against the use of traditional terms by any other producers of wines and spirits. Article 23 specifies that WTO members must provide remedies to prevent the use of geographical indications on wines and spirits not originating from the place indicated by the geographical indication “even where the true origin of the goods is indicated or the geographical indication is used in translation or accompanied by expressions such as ‘kind’, ‘type’, ‘style’, ‘imitation’ or the like.”³⁵⁴ The practical effect of Article 23 is that a California winemaker may not label her wine as, for example, “Sancerre-Style California White Wine” or “Tastes like Sancerre” even if the winemaker can show that its use of the term “Sancerre” does not confuse consumers as to the true geographical source of the wine or otherwise does not dilute the distinctiveness of the term “Sancerre.”³⁵⁵ This deliberate limitation on the kind of information that can be conveyed to consumers very likely increases their search costs at the same time that it enhances the “selling power” of the protected terms.

³⁵² *Id.* art. 22.2(a) (emphasis added).

³⁵³ See Justin Hughes, *Champagne, Feta, and Bourbon: The Spirited Debate About Geographical Indications*, 58 HASTINGS L.J. 299, 316–17 (2006).

³⁵⁴ TRIPS Agreement, *supra* note 346, art. 23.1.

³⁵⁵ See Kal Raustiala & Stephen R. Munzer, *The Global Struggle over Geographical Indications*, 18 EUR. J. INT'L L. 337, 362 (2007).

(b) *The U.S.-E.C. Wine Agreement of 2006*. — From the perspective of the public domain, freedom of commercial speech, and the goals of progressive intellectual property law, the terms of Article 23 are dismaying. But they actually appear quite reasonable compared to what followed. Article 23 represented an important win for European trade negotiators, but it had two fundamental limitations: first, its heightened level of protection applied only to wines and spirits, and second, a grandfather clause allowed nontraditional producers to continue to use traditional terms so long as they had done so for at least ten years or otherwise in good faith prior to 1994.³⁵⁶ To overcome this first limitation, European countries have used the current Doha Round of WTO negotiations to call for the extension of the terms of Article 23 to all geographical goods, but have met so far with no success.³⁵⁷ They have met with much more success, however, in their efforts, primarily bilateral in nature, to overcome the second limitation. In 2003, the European Commission issued what came to be known as its “clawback list” of forty-one terms — such as Chablis, Chianti, Cognac, Ouzo, Gorgonzola, and Roquefort — for which it would seek worldwide exclusive rights, regardless of whether these terms had become generic in meaning in the various countries in which they were used and regardless of whether the wine and spirit designations among them qualified for the grandfather provision of TRIPS.³⁵⁸ The culmination of the clawback strategy, at least with respect to wine and spirit designations, was the remarkable, if little noticed, U.S.-E.C. Wine Agreement of 2006.³⁵⁹

The core of this agreement consists of an exchange of trade rights for language rights. For its part, the European Union agreed, *inter alia*, to allow the sale within the common market of U.S. wines made through various nontraditional methods that European winemakers are themselves generally not allowed to use.³⁶⁰ In return, the United

³⁵⁶ TRIPS Agreement, *supra* note 346, art. 24.4.

³⁵⁷ See William New, *Collapse of WTO Talks Washes Away Hope for TRIPS Changes*, INTELL. PROP. WATCH, July 29, 2008, <http://www.ip-watch.org/weblog/index.php?p=1181>.

³⁵⁸ Press Release, European Comm'n, WTO Talks: EU Steps up Bid for Better Protection for Regional Quality Products (Aug. 28, 2003), *available at* <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/03/1178>.

³⁵⁹ Agreement Between the United States of America and the European Community on Trade in Wine, U.S.-E.C., Mar. 10, 2006, <http://www.ttb.gov/agreements/eu-wine-agreement.pdf> [hereinafter U.S.-E.C. Wine Agreement]. See generally Scott Danner, Note, *Not Confused? Don't Be Troubled: Meeting the First Amendment Attack on Protection of "Generic" Foreign Geographical Indications*, 30 CARDOZO L. REV. 2257 (2009) (providing background to the Agreement).

³⁶⁰ As the tortured, syntactically chaotic language of the agreement relating to this issue suggests, see U.S.-E.C. Wine Agreement, *supra* note 359, art. 4.1., the negotiations over the precise terms of this concession, particularly as relating to “new wine-making practices,” *id.* art. 5, were extremely fraught. See Brian Rose, Comment, *No More Whining About Geographical Indications: Assessing the 2005 Agreement Between the United States and the European Community on*

States agreed to “seek to change the legal status”³⁶¹ in the United States of various wine-related geographic indications that the Europeans either included in their clawback list or otherwise sought to control.³⁶² The United States also agreed to give European winemakers exclusive rights to use in the U.S. market an exhaustive list, amounting to fifty annexed pages, of other regional and traditional European winemaking terms.³⁶³ Importantly, as with Article 23, these rights, unlimited in term, impose an absolute prohibition on those who do not possess them: non-European winemakers may not use the listed terms in any way in the U.S. market even if their use does not confuse consumers as to the true source of the wine or otherwise dilute the distinctiveness of the terms.³⁶⁴ And as with Article 23, this prohibition may actually work to increase consumer search costs, particularly in light of the fact that the United States agreed to push its wine producers toward phasing out their usage of seventeen terms, such as “sherry” or “chablis,” that qualified for the grandfather provisions of the TRIPS Agreement and on which U.S. consumers had come to rely as describing goods originating as much in the United States as anywhere else.

This may appear to be a strange and possibly imbalanced bargain: the significant lowering of trade barriers in exchange for little more than property rights in various traditional expressions. But both sides knew that much more fundamental issues were at stake, which may explain why it took them two decades to reach agreement.³⁶⁵ With the U.S.-E.C. Wine Agreement, the battle lines have been drawn: New World technology versus Old World *terroir*, “mechanical reproduction” versus the “domain of tradition,” American copies versus European originals. Over time, the Americans will no doubt develop their own geographical and historical claims to authenticity while the Europeans will no doubt relent on their controls on their own winemaking practices (indeed, both processes have already begun³⁶⁶), but each side is

the Trade in Wine, 29 HOUS. J. INT’L L. 731, 756 (2007) (characterizing bilateral negotiations between the United States and the European Community over trade in wine as “marked by aggressive bargaining tactics and an unwillingness to find a middle ground”).

³⁶¹ See U.S.-E.C. Wine Agreement, *supra* note 359, art. 6.1. On how the United States has gone about seeking to change the legal status of these terms, see Danner, *supra* note 359, at 2265.

³⁶² The seventeen terms the legal status of which the United States agreed to change are: Burgundy, Chablis, Champagne, Chianti, Claret, Haut Sauterne, Hock, Madeira, Malaga, Marsala, Moselle, Port, Retsina, Rhine, Sauterne, Sherry, and Tokay. See U.S.-E.C. Wine Agreement, *supra* note 359, art. 6.1 & Annex II.

³⁶³ See *id.* Annex IV.

³⁶⁴ See *id.* art. 6.

³⁶⁵ See Rose, *supra* note 360, at 759.

³⁶⁶ See, e.g., Council Regulation 479/2008, On the Common Organisation of the Market in Wine, 2008 O.J. (L 148) 1 (EC); Robert C. Ulin, *Globalization and Alternative Localities*, 46 ANTHROPOLOGICA 153, 156–62 (2004) (describing efforts by Michigan winemakers to develop tradition).

nevertheless betting that its core competitive advantage will overcome the other's. Lost in the crossfire are the conventional goals of progressive intellectual property law with respect to designations of source.

2. *Traditional Cultural Expressions Protection.* — I conclude this section with a consideration of current and proposed forms of intellectual property protection for traditional cultural expressions (TCEs). It is appropriate to do so because TCEs protection represents the most ambitious — and reactionary — form of sumptuary intellectual property law that we have. In a strange microcosm of the larger processes that this Article seeks to identify, indigenous communities are attempting to preserve social stability by elevating their own sumptuary law with respect to their intellectual works to a global norm.

As the various international instruments and national laws dedicated to the protection of TCEs attest,³⁶⁷ TCEs possess in quintessential form the typical characteristics of the subject matter of modern sumptuary intellectual property law. First, TCEs are forms of difference, of exceptionalism. By definition, they are “characteristic” of the communities that have created them,³⁶⁸ to the extent that they are not distinctive of their originating communities, they do not qualify as TCEs.³⁶⁹ Second, the distinctiveness of TCEs has attracted a flood of dilutive copying.³⁷⁰ Modern consumer societies have come to venerate indigenous works as “icons of primordial integrity, of meaning unin-

³⁶⁷ See, e.g., UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage, Oct. 17, 2003, 2368 U.N.T.S. 35; African Intellectual Property Org., *Agreement Revising the Bangui Agreement of March 2, 1977, on the Creation of an African Intellectual Property Organization*, Annex VII, tit. I (February 24, 1999), available at http://www.oapi.wipo.net/doc/en/bangui_agreement.pdf; World Intellectual Property Org. [WIPO], Intergovernmental Comm. on Intellectual Property and Genetic Res., Traditional Knowledge and Folklore, *The Protection of Traditional Cultural Expressions/Expressions of Folklore: Revised Objectives and Principles*, WIPO/GRTKF/IC/9/4 (Jan. 9, 2006) [hereinafter *Revised Objectives and Principles*]; Secretariat of the Pacific Cmty., *Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture* (2002) [hereinafter *South Pacific Model Law*], available at http://www.wipo.int/export/sites/www/tk/en/laws/pdf/spc_framework.pdf; UNESCO & WIPO, *Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions* (1985) [hereinafter *Model Provisions*], available at http://www.wipo.int/export/sites/www/tk/en/laws/pdf/unesco_wipo.pdf; UNESCO & WIPO, *Tunis Model Law on Copyright for Developing Countries* (1976) [hereinafter *Tunis Model Law*]. For an overview of the history of the effort to develop international instruments for the protection of TCEs, see Noriko Aikawa, *An Historical Overview of the Preparation of the UNESCO International Convention for the Safeguarding of the Intangible Cultural Heritage*, 56 MUSEUM INT'L 137 (2004).

³⁶⁸ See, e.g., *Revised Objectives and Principles*, supra note 367, Annex at 13 (“[T]he term ‘characteristic’ is intended to convey notions of ‘authenticity’ or that the protected expressions are ‘genuine,’ ‘pertain to’ or [are] an ‘attribute of’ a particular people or community.”).

³⁶⁹ See, e.g., *Model Provisions*, supra note 367, ¶ 36 (“‘Characteristic elements’ of the traditional artistic heritage, of which the production must consist in order to qualify as a protected ‘expression of folklore,’ means in the given context that the element must be generally recognized as representing a distinct traditional heritage of a community.”).

³⁷⁰ See, e.g., *id.* ¶¶ 1–4.

flected by imitation.”³⁷¹ Our characteristic method of veneration, however, is to imitate these works and assimilate them to copies.³⁷² This has proved disastrous for TCEs, whose peculiar form of rivalrousness and exhaustibility makes them especially susceptible to dilution. As Michael Brown has written, indigenous communities typically view sacred knowledge in particular “as a limited good that cannot properly exist in several places at once. Religious knowledge that resides in inappropriate places may find its power diminished or dangerously distorted”³⁷³ Brown cites the example of the Zia Pueblo of the State of New Mexico, who continue to assert that the sacred power of their sun symbol is being diluted by the state’s use of it on the state flag, license plates, and in other profane contexts,³⁷⁴ which is “at least an affront to [the Zia’s] dignity, at worst a dangerous form of blasphemy capable of unleashing genuine misfortune.”³⁷⁵ Australian courts have been especially sensitive to the damage that unauthorized copying can inflict on TCEs themselves. In its seminal 1994 opinion in *Milpurrurru v. Indofurn Pty Ltd*,³⁷⁶ for example, the Australian Federal Court recognized that Aboriginal artists are obligated to take action against unauthorized appropriation in order “to preserve the dreaming.”³⁷⁷ The plaintiffs’ and the court’s concern, in other words, was dilutive copying, copying that would in this case not so much destroy the relative utility or “selling power” of the work as it would destroy or even pervert the work’s spiritual power, its “aura,” in some sense, its absolute utility.

Third and perhaps most tellingly, like modern forms of consumption-based distinction, TCEs are instruments of social ordering within their originating societies. Such societies tend deliberately to limit access to certain of their TCEs by members of their own societies in order to facilitate, among other things, the enforcement of social hierarchy and the production of social homeostasis.³⁷⁸ Again, Australian

³⁷¹ Michael F. Brown, *Can Culture Be Copyrighted?*, 39 CURRENT ANTHROPOLOGY 193, 202 (1998).

³⁷² See JANE E. ANDERSON, LAW, KNOWLEDGE, CULTURE: THE PRODUCTION OF INDIGENOUS KNOWLEDGE IN INTELLECTUAL PROPERTY LAW 101–05 (2009).

³⁷³ Brown, *supra* note 371, at 197.

³⁷⁴ *Id.*; see also Wendy Brown, *Pueblo Seeks Respect for Zia Symbol*, SANTA FE NEW MEXICAN, Oct. 31, 2007, at A1.

³⁷⁵ Brown, *supra* note 371, at 197.

³⁷⁶ (1994) 54 F.C.R. 240 (Austl.).

³⁷⁷ *Id.* at 246.

³⁷⁸ See, e.g., MICHAEL F. BROWN, WHO OWNS NATIVE CULTURE? 30 (2003) (“Within societies that lack significant economic stratification, the social ranking fostered by ritual secrecy may anchor existing patterns of leadership. Conversely, a breakdown of secrecy threatens traditional patterns of political and religious life.”); Sarah Harding, *Value, Obligation and Cultural Heritage*, 31 ARIZ. ST. L.J. 291, 314 (1999) (“[S]ecrecy is an integral part of the sacredness of certain objects,

courts have proved to be especially sensitive to this aspect of TCEs. As early as 1976, the Supreme Court of the Northern Territory in Australia justified its injunction of the sale of a scholarly book within that territory on the grounds that the book's "revelation of the [Pitjantjatjara people's] secrets to their women, children and uninitiated men may undermine the social and religious stability" of their "social system."³⁷⁹ International instruments for the protection of TCEs have also implicitly endorsed the stratifying function of secret/sacred TCEs. An example is found in the definition of TCEs given in *The Protection of Traditional Cultural Expressions/Expressions of Folklore: Revised Objectives and Principles*³⁸⁰ of the World Intellectual Property Organization Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore. The definition acknowledges the "right" of certain "individuals" to maintain, use, or develop TCEs "in accordance with [the] customary law and practices" of their society.³⁸¹

But for all of their similarity to the subject matter of modern sumptuary intellectual property law, most TCEs struggle to meet the originality and fixation requirements of conventional copyright law, and are too expansive and protean to be protectable under conventional trademark law. This has prompted the call for sui generis — and highly unconventional — forms of TCEs protection. The *Revised Objectives and Principles*, for example, imposes no requirement that TCEs be original or fixed, and provides that TCEs be given indefinite protection, so long as the community that originated the TCE continues to use it.³⁸² The commentary explains that this provision "embodies a trademark-like emphasis on current use."³⁸³ As for TCEs that have fallen into the public domain or are otherwise being used in some manner by parties other than their originating communities, the *Revised Objectives and Principles* provides for retroactive protection. Its "Transitional Measures" provisions specify that infringing acts that began before the *Revised Objectives and Principles* came into force "should be brought into conformity" with the text "within a reasonable

stories, songs or rituals, and as such, instrumental in maintaining a certain social structure within the cultural group.").

³⁷⁹ *Foster v. Mountford* (1976) 29 F.L.R. 233, 236 (Austl.); see also *Pitjantjatjara Council, Inc. v. Lowe* (1982) 30 Aboriginal L. Bull. 11 (Austl.) (enjoining display of photographic slides from the collection of Charles Mountford and ordering their transfer to the Pitjantjatjara Council).

³⁸⁰ See *Revised Objectives and Principles*, *supra* note 367.

³⁸¹ *Id.* Annex at 9.

³⁸² See *id.* art. 6; see also *South Pacific Model Law*, *supra* note 367, cl. 9 (providing that "[t]raditional cultural rights continue in force in perpetuity"); *Tunis Model Law*, *supra* note 367, § 6 (protecting "works of national folklore" "without limitation in time").

³⁸³ See *Revised Objectives and Principles*, *supra* note 367, Annex at 30.

period of time.”³⁸⁴ While the *Revised Objectives and Principles* does allow for the fair use of TCEs for such purposes as “non-commercial research or private study” or “use in the course of legal proceedings,”³⁸⁵ it allows such uses only provided that they “would not be offensive to the relevant community.”³⁸⁶ These extraordinary rights would be layered on top of any rights the TCE possessor may have under copyright, trademark, or other conventional forms of intellectual property protection.³⁸⁷

The reader may object that, like other instruments dedicated to TCEs protection, the *Revised Objectives and Principles* is little more than aspirational international law, and that it has very little chance of actually being transformed into some binding international instrument. This is probably true. But it does give some indication of what happens to the norms of conventional progressive intellectual property law when they are skewed toward the preservation of a “social system.” We need not rely on TCEs instruments, however, to provide us with this insight. For much of what the *Revised Objectives and Principles* proposes that we do to preserve indigenous social systems we are already doing to preserve our own social system, albeit in less explicit fashion. We saw above that we already provide trademark-like antidi-lution protection to forms of distinction, including trademarks, copy-rightable expression, and product designs, and at least in its trademark form, this protection is indefinite in term. We also saw above the recovery from the public domain of designations of source that U.S. consumers, for example, have long assumed to be generic, and the fair use of which is now severely constricted. And perhaps most strikingly, modern consumer society has come to rely on intellectual property law to control access to its most distinctive goods. The difference is that these intangible goods are not kept secret, but heavily advertised.

III. THE FAILURE OF INTELLECTUAL PROPERTY LAW AS SUMPTUARY LAW

I have argued so far that intellectual property law has come to function as sumptuary law, not because it provides a means to regulate which distinctive goods consumers may consume, as did early modern sumptuary law, but because, quite simply, it enables the producers of

³⁸⁴ *Id.* Annex at 39; see also *South Pacific Model Law*, *supra* note 367, cl. 3 (providing protection for “traditional knowledge and expressions of culture that: (a) were in existence before the commencement of this Act; or (b) are created on or after the commencement”).

³⁸⁵ *Revised Objectives and Principles*, *supra* note 367, Annex at 26.

³⁸⁶ *Id.* The *Model Provisions*, by comparison, offer broad exceptions for “purposes of education” and “creating an original work,” among others. See *Model Provisions*, *supra* note 367, § 4, ¶¶ 51, 53.

³⁸⁷ See *Revised Objectives and Principles*, *supra* note 367, Annex at 43.

distinctive goods to control their production. Intellectual property law has proved so far to be reasonably successful in fulfilling this aspect of its sumptuary role. The only legal problem that remains outstanding is one of enforcement. In this respect, previous forms of sumptuary law invariably failed. But sumptuary intellectual property law has been more successful. This is because we enforce sumptuary intellectual property law in the name of property rights and only indirectly, if even consciously, in an effort to preserve the stability of our consumption-based system of social distinction. Our enforcement efforts are essentially private in nature, as is modern sumptuary law itself.

I have further argued that the capacity of intellectual property law to serve as sumptuary law is helping to shift much of modern competitive consumption toward the consumption of distinctive intellectual properties. This is because other commodified forms of distinction, those unprotected by intellectual property law, are quickly overcopied, either through exact reproduction or persuasive imitation, with the result that their distinctiveness is quickly diluted. The same process arguably affects noncommodified forms of distinction and meaning as well. The protections that we seek to give to indigenous cultural expressions we do not give to our own. Our religious and political symbols, for example, may be freely used and their meanings freely diluted. As a result, many of our most powerful and unambiguous forms of social distinction, if not more broadly of lived meaning, come to us now as intellectual properties,³⁸⁸ including the “icons of primordial integrity” provided to us by premodern cultures.

Finally, I have argued that the theoretical coherence of intellectual property law itself has been severely compromised by the emergence of sumptuary intellectual property law, whose assumptions and purposes are very much at odds with those of conventional, progressive intellectual property law, and that this is beginning to have a practical effect on the capacity of mainstream intellectual property law to “promote the Progress.” Firms engaged in the production of goods that we would not generally understand to be socially distinctive are taking advantage of sumptuary intellectual property law doctrines to expand the scope of protection given to their goods.³⁸⁹ Particularly in the trademark context, protection given to prevent dilutive copying results in protection much wider in scope than that given to prevent substitutive copying — and than can be justified solely on efficiency grounds.³⁹⁰ Meanwhile, the outright grant of absolute rights in the use

³⁸⁸ See Katya Assaf, *The Dilution of Culture and the Law of Trademarks*, 49 IDEA 1 (2008).

³⁸⁹ See Robert G. Bone, *Enforcement Costs and Trademark Puzzles*, 90 VA. L. REV. 2099, 2100–01 (2004). See generally Glynn S. Lunney, Jr., *Trademark Monopolies*, 48 EMORY L.J. 367 (1999).

³⁹⁰ See Lunney, *supra* note 389, at 485–86.

of geographic terms, unqualified by actual consumer perception or norms of fair use, speaks for itself.

What remains to be considered, and what I consider tentatively in this Part, is whether intellectual property law, for all its apparent success so far, can ultimately succeed in preserving our modern system of commodity-based social distinction. I suggest here that it cannot. In fact, the emergence of sumptuary intellectual property law may only quicken the decadence and dissolution of this system. This may prove to be a fortunate failure, however. In failing, sumptuary intellectual property law may create the conditions for a different system of social distinction, one characterized more by the production of distinction than by its consumption and one in which intellectual property law would still play a crucial — and salutary — role.

A. The Futility of Sumptuary Intellectual Property Law

While we may be concerned with how sumptuary intellectual property law affects the purposes of progressive intellectual property law, we should also be concerned with how progressive intellectual property law affects the purposes of sumptuary intellectual property law. We should be concerned because of the effects of sumptuary intellectual property law on culture, of which intellectual property law is increasingly constitutive. It may be that the sumptuary turn in intellectual property law will impair the law's ability "to promote the Progress," but to what extent does the law's emphasis on progress affect the ability of sumptuary intellectual property law ultimately to stabilize the sumptuary order? If we accept that there is such a thing as sumptuary intellectual property law, and that we are stuck with it, then can we at least conclude that it does what it is intended to do?

From the perspective of those who would preserve the sumptuary code by means of intellectual property law, the answer is not an encouraging one. We saw above that one consistent characteristic of early modern sumptuary law was its repeated attempts to ban new fashions. It makes sense that a regime of sumptuary law should seek to do so. Controls on the consumption of distinctive goods may maintain the distinctiveness of those particular goods, but the controls will do little to stabilize the sumptuary order if consumers can simply move on to other distinctive goods in an effort to distinguish themselves over, with, or against others. The fundamental failing of intellectual property law in this regard is that it does not seek to prevent the innovation of new forms of distinction, nor does it have any means of doing so. On the contrary, in its progressive incarnation, it deliberately encourages such innovation by offering its protection to all qualifying goods.

As early modern framers of sumptuary law no doubt recognized,³⁹¹ such an open-ended system of sumptuary law may prevent the dilution of the rarity of existing goods, but it also promotes the dilution of the distinctiveness of rarity itself by encouraging the introduction into the sumptuary code of a multitude of new forms of rarity. Early modern framers proved to be unable to control the introduction of new fashions, but they could at least rely on material constraints on the introduction of new distinctive goods. We cannot rely on such constraints, however, largely because of intellectual property law. As more and more of our competitive consumption shifts to immaterial goods whose rarity is guaranteed, even promoted, by intellectual property protection, it floats free from any moorings in material bases for rarity. The raw materials available for the creation of distinctive goods have effectively become unlimited. Increasingly, the only significant limit that we face is provided by the limit in our ability to consume, or comprehend, the abundance of rarities that are offered to us.

The social and cultural implications of such a situation are profound. They are particularly apparent in a place where this situation has already fully obtained: virtual reality. As one observer of Second Life recounted, “[i]n Second Life, there’s no such thing as a diamond wedding ring. The problem . . . is that rare and precious stones as we know them can’t exist in Second Life. That’s because once purchased these items can be easily duplicated, undercutting the basis of their market value.”³⁹² It should be no surprise, then, that proprietors of virtual worlds like Second Life have begun to introduce intellectual property–like rules to enforce regimes of rarity,³⁹³ and that luxury goods manufacturers have turned to real-world intellectual property law in an attempt to stop the virtual counterfeiting of their goods as well.³⁹⁴ Yet these efforts appear so far to be no more effective than any other form of sumptuary law in stabilizing virtual regimes of competitive consumption. The problem here is not simply one of ineffective enforcement. More fundamentally, the problem is that in most virtual environments in the nature of Second Life, there are no constraints on the introduction of new forms of distinction. In such environments, where “[e]veryone . . . is a luxury consumer,”³⁹⁵ “status items

³⁹¹ See KILLERBY, *supra* note 2, at 15.

³⁹² Douglas MacMillan, *Big Spenders of Second Life*, BUS. WK., Apr. 16, 2007, http://www.businessweek.com/technology/content/apr2007/tc20070416_386810.htm.

³⁹³ See F. Gregory Lastowka & Dan Hunter, *The Laws of the Virtual Worlds*, 92 CAL. L. REV. 1, 29–37 (2004).

³⁹⁴ See Andrey Kotelnikov, *Trade Marks and Visual Replicas of Branded Merchandise in Virtual Worlds*, 12 INTELL. PROP. Q. 110 (2008).

³⁹⁵ MacMillan, *supra* note 392 (quoting Reuben Steiger, CEO of virtual world business) (internal quotation marks omitted).

become so commonplace that they may lose their social meaning.”³⁹⁶ The result is that only the most outrageous or intricately engineered forms of distinction confer status — and then are quickly copied.³⁹⁷

While it is commonplace to observe that virtual environments are becoming more and more like nonvirtual environments, the reverse is arguably true as well: in advanced consumer societies, the nonvirtual world is becoming more and more like the virtual world. The difference between these two forms of convergence, of course, is that the stakes associated with the latter form are considerably higher. Consider competition for hierarchical status. I noted above that hierarchical status-seeking tends to result in zero-sum outcomes, which appears to be the case in virtual reality as much as anywhere else. But as the production and consumption of immaterial status goods in the nonvirtual world intensifies under the auspices of intellectual property law, the costs to society of this zero-sum struggle are becoming very real. Resources better spent elsewhere, perhaps in the pursuit of absolute utility or “Progress,” are instead spent in pursuit of intangible and otherwise typically quite meaningless and useless forms of relative utility.³⁹⁸ By promoting the creation of intangible status goods and preserving them once created, intellectual property law in its combined sumptuary and progressive incarnations only fuels this process. It is little consolation that this appears now to be one of the deliberate purposes of the law.

But the implications of the open-endedness of sumptuary intellectual property law are possibly far more serious with respect to competition not for hierarchical status, but simply for distinction, for difference, for identity. I proposed above that as our system of consumption-based social distinction produces more and more commodified forms of distinction, the ability of individuals to comprehend these forms may reach a limit, one beyond which a seeming infinitude of such forms of distinction appears to blur into indistinction. Here, the consumption-based system of self-distinction breaks down; its language is no longer meaningful to the individual or to those who invest the individual with distinction. Admittedly, this is a highly speculative proposition. Yet we already see this process at work in virtual reality environments. Often missed in the overwhelming commercial and scholarly enthusiasm surrounding the emergence of massively multi-player online worlds, more sober accounts of such “Metaverse[s]”³⁹⁹ frequently note the degree to which their inhabitants adopt the sophis-

³⁹⁶ Albert C. Lin, *Virtual Consumption: A Second Life for Earth?*, 2008 BYU L. REV. 47, 95.

³⁹⁷ See, e.g., *id.* at 97.

³⁹⁸ See Frank, *supra* note 79.

³⁹⁹ NEAL STEPHENSON, SNOW CRASH 24 (2000).

ticated, disengaged pose of the “flâneur”⁴⁰⁰ as they endlessly wander looking for something or someone of meaningful interest.⁴⁰¹ We also see this process repeatedly identified in nineteenth- and early-twentieth-century urban studies as responsible for the blasé, coolly ironic stance of the modern urbanite. As Georg Simmel characterized it in *The Metropolis and Mental Life*, “the blasé attitude consists in the blunting of discrimination,” such that “the meaning and differing values of things, and thereby the things themselves, are experienced as insubstantial. They appear to the blasé person in an evenly flat and gray tone; no one object deserves preference over any other.”⁴⁰² For Simmel, the individual adopts this attitude in an effort to come to terms with the overwhelming power of what Simmel called “objective culture.”⁴⁰³ In more contemporary terms, she adopts it to come to terms with the “semiotic anarchy”⁴⁰⁴ of the “long tail,”⁴⁰⁵ the babble of competing forms of distinction that characterizes the modern global marketplace — and all those who populate it.

Sumptuary intellectual property law promises to intensify this general dilution of distinction and further to instill in consumers precisely the blasé “affectation of cold indifference”⁴⁰⁶ that Simmel described. Ironically, the primary objection to the view that consumption choices are a form of language is that it improperly assumes “the existence of a shared system of symbols.”⁴⁰⁷ The irony is that this lack of a shared system of symbols is now arguably making itself felt, as much in non-virtual reality as in virtual reality.⁴⁰⁸ As the economy shifts from an economy of commodities (from the Latin *commoditatis*, or conve-

⁴⁰⁰ See MAREN HARTMANN, TECHNOLOGIES AND UTOPIAS: THE CYBERFLANEUR AND THE EXPERIENCE OF “BEING ONLINE” (2004); Mike Featherstone, *The Flâneur, the City and Virtual Public Life*, 35 URB. STUD. 909, 919–923 (1998); see also LEV MANOVICH, THE LANGUAGE OF NEW MEDIA 274 (2001); Christa Erickson, *Networked Interventions: Debugging the Electronic Frontier*, in EMBODIED UTOPIAS: GENDER, SOCIAL CHANGE, AND THE MODERN METROPOLIS 225, 226 (Amy Bingaman et al. eds., 2002).

⁴⁰¹ See, e.g., LARRY RAY, GLOBALIZATION AND EVERYDAY LIFE 105 (2007) (“The Internet affords closeness without intimacy and the blasé attitude of detachment that for [Georg] Simmel epitomized life in the modern metropolis.”).

⁴⁰² GEORG SIMMEL, *The Metropolis and Mental Life*, in SIMMEL ON CULTURE, *supra* note 38, at 174, 178.

⁴⁰³ *Id.* at 184.

⁴⁰⁴ SCOTT SIMPKINS, LITERARY SEMIOTICS: A CRITICAL APPROACH 101 (2001).

⁴⁰⁵ See generally CHRIS ANDERSON, THE LONG TAIL: WHY THE FUTURE OF BUSINESS IS SELLING LESS OF MORE (2006).

⁴⁰⁶ RENÉ GIRARD, DECEIT, DESIRE, AND THE NOVEL: SELF AND OTHER IN LITERARY STRUCTURE 162 (Yvonne Freccero trans., Johns Hopkins Univ. Press Paperbacks ed. 1976) (1961).

⁴⁰⁷ Campbell, *supra* note 46, at 341.

⁴⁰⁸ See MAYNARD, *supra* note 47, at 88 (“[I]n our fragmented, postindustrial world, there is more likely to be an aggregation of disparate dress codes, even dialects, which are not commonly understood.”).

nience) to one of copies (from the Latin *copia*, or copious, abundant), dematerialized signs of rarity take on the characteristics of “floating signifiers”⁴⁰⁹ (for example, the Hello Kitty trademark in Japan⁴¹⁰) that refer to nothing other than their own relative distinction from other such signifiers. Untethered to any material rarity, and increasingly untethered to any semantic rarity either, intangible forms of distinction offer distinction without meaning, form without content — or, in semiotic terms, value without significance. This is most apparent in the global trademark system, populated as it is by globally famous “hypermarks”⁴¹¹ that are not so much designations of source as commodified simulations of such designations, simulations that are themselves the focus of consumption rather than the underlying product, if any, to which they are affixed. But this is arguably also a characteristic of much of modern consumer society, where for all of the intensity of its individual forms of distinction, which sumptuary intellectual property law protects and promotes, the distinction of distinction itself is diluted. This is a problem that advertisers have been struggling with for decades⁴¹² — and that was, as it happens, an overriding theme of the work of the late David Foster Wallace.⁴¹³

B. From Sumptuary to Philanthropic Intellectual Property Law

Though the long-term prospects for our system of consumption-based distinction are thus possibly quite grim indeed, there is no reason why this “hell of the Same” need be our permanent condition. If it is true that our mimetic practices threaten, in Nicole Miller’s words, to “ruin[] the whole thing,”⁴¹⁴ it is also true that other systems of distinction stand ready to succeed where our commodity-based system may fail. Indeed, one such alternative system of social distinction is already

⁴⁰⁹ See FREDERIC JAMESON, *Reification and Utopia in Mass Culture*, in SOCIAL TEXT (1979), reprinted in THE JAMESON READER 123, 130 (Michael Hardt & Kathi Weeks eds., 2000) (discussing how reproduction creates an “object world with an unreality and a free-floating absence of ‘the referent’”).

⁴¹⁰ See Brian J. McVeigh, *How Hello Kitty Commodifies the Cute, Cool and Camp: ‘Consumutopia’ versus ‘Control’ in Japan*, 5 J. MATERIAL CULTURE 225, 234–35 (2000) (discussing the “projectability” of the Hello Kitty image, whose “plainness characterizes her as a cryptic symbol waiting to be interpreted and filled in with meanings,” *id.* at 234), cited and discussed in ROB WALKER, *BUYING IN: THE SECRET DIALOGUE BETWEEN WHAT WE BUY AND WHO WE ARE* 17–18 (2008).

⁴¹¹ See Beebe, *supra* note 267, at 669.

⁴¹² See ROLAND MARCHAND, *ADVERTISING THE AMERICAN DREAM: MAKING WAY FOR MODERNITY, 1920–1940*, at 94–104 (1986).

⁴¹³ See, e.g., DAVID FOSTER WALLACE, *INFINITE JEST* (1996).

⁴¹⁴ Wilson, *supra* note 335 (quoting apparel designer Nicole Miller); see *supra* p. 868.

emerging, albeit in limited areas of post-industrial society.⁴¹⁵ This is the commons-based system of social distinction that underlies open source,⁴¹⁶ creative commons,⁴¹⁷ or “commons-based peer production”⁴¹⁸ models of technological and cultural innovation. In this system of social distinction, the individual achieves distinction not through her consumption of commodities but through her production of gifts.⁴¹⁹ She voluntarily gives to the commons both to fulfill her innate desire to engage in self-actualizing and altruistic⁴²⁰ work and to achieve the reputational gains that may flow from that work.⁴²¹ In what is truly a sign of the times, the core, defining characteristic of this emerging system of social distinction is its approach to, of all things, intellectual property protection. It emphatically rejects certain norms of intellectual property protection (exclusive use rights) at the same time that it emphatically embraces others (exclusive attribution rights).⁴²² It does so in pursuit, quite essentially, of the utopian promise of unalienated labor,⁴²³ of human flourishing through creative and self-actualizing production. If our intellectual property law policy-making is to be not just technologically but socially — and politically⁴²⁴ — progressive, our task going forward will be to encourage, to the extent that policymaking can, the growth and extension of the so-

⁴¹⁵ See YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* 119–22 (2006), available at http://www.benkler.org/Benkler_Wealth_Of_Networks.pdf.

⁴¹⁶ See Open Source Initiative, *The Open Source Definition*, <http://www.opensource.org/docs/osd> (last visited Jan. 9, 2010) (listing ten distribution terms that software must include to qualify as “open-source software”); see also CHRISTOPHER M. KELTY, *TWO BITS: THE CULTURAL SIGNIFICANCE OF FREE SOFTWARE* (2008).

⁴¹⁷ See Creative Commons, *About*, <http://creativecommons.org/about> (last visited Jan. 9, 2010).

⁴¹⁸ BENKLER, *supra* note 415, at 60 (internal quotation marks omitted).

⁴¹⁹ See *id.* at 116–22; Magnus Bergquist & Jan Ljungberg, *The Power of Gifts: Organizing Social Relationships in Open Source Communities*, 11 *INFO. SYS. J.* 305 (2001).

⁴²⁰ See CLAY SHIRKY, *HERE COMES EVERYBODY: THE POWER OF ORGANIZING WITHOUT ORGANIZATIONS* 133 (2008) (identifying one motivation for contributing to commons-based peer production as “the desire to do a good thing”).

⁴²¹ See Josh Lerner & Jean Tirole, *Some Simple Economics of Open Source*, 50 *J. INDUS. ECON.* 197 (2002) (emphasizing reputational gains as motivating programmers to contribute to open source projects). *But see* Maria Alessandra Rossi, *Decoding the Free/Open Source Software Puzzle: A Survey of Theoretical and Empirical Contributions*, in *THE ECONOMICS OF OPEN SOURCE SOFTWARE DEVELOPMENT* 15, 17–22 (Jürgen Bitzer & Philipp J.H. Schröder eds., 2006) (discussing empirical evidence casting doubt on Lerner & Tirole’s thesis).

⁴²² See, e.g., Creative Commons, *License Statistics*, http://wiki.creativecommons.org/License_statistics (last visited Jan. 9, 2010) (providing statistics on licensing terms chosen by Creative Commons licensors).

⁴²³ See JOHAN SÖDERBERG, *HACKING CAPITALISM: THE FREE AND OPEN SOURCE SOFTWARE MOVEMENT* 156–59 (2008).

⁴²⁴ On the political promise of the open source movement, see KELTY, *supra* note 416; and SÖDERBERG, *supra* note 423.

cial movements that both rely on and help to propagate this system of social distinction.

The primary challenge of intellectual property law in this regard will be to design intellectual property rules that will encourage the production of reputation but not its consumption. That is, our challenge will be to design rules that will facilitate attribution and thus the system of reputation-based distinction that is arguably one of the primary drivers of commons-based production, but that will not at the same time facilitate the commodification and consumption of attribution as a sign of social distinction. This is no simple task. The rules of attribution that currently seek to ensure that the commons-based producer receives credit for his contribution to the commons are the same rules that ensure that Louis Vuitton receives credit for any good that it produces and that thereby enable Louis Vuitton to control the scarcity of its goods. The crucial, if obvious, difference between these two forms of attribution, however, is that commons-based attribution is not susceptible in any significant way to dilution. Its distinctiveness is not based on its rarity and is not diluted by any loss of rarity. On the contrary, its distinctiveness is only enhanced by its propagation. This is because commons-based attributions do not generate their distinctiveness from the scarcity of the goods to which they are affixed — because they cannot, in that such goods are freely copyable. Rather, they generate their distinctiveness from the absolute utility of such goods.⁴²⁵ To be sure, the underlying absolute utility of a commons good may be superseded by some new form of absolute utility, and thus the reputational gains to the producer of the prior good may be diminished, but this is not dilution. This is rather exactly what attends the “Progress of Science and Useful Arts.”

The larger challenge of intellectual property law is thus not to overcome the problem of the zero-sum struggle for social distinction. Even in a utopia of total material and immaterial abundance, it is likely — and beneficial — that individuals will still seek out means to distinguish themselves. Nor is the challenge to eliminate all forms of relative consumption of intangible goods. This too is likely impossible. Rather, the larger challenge is to make the best of the laws of “social physics”⁴²⁶ that govern society in order not simply to further technological and creative progress over time, but also, and perhaps more

⁴²⁵ Of course, it may be fashionable in some circles to be a consumer of, for example, open-source software, but in those same circles, this mark of distinction is modest compared to that obtained by actually contributing to the production of that software. See ERIC S. RAYMOND, *THE CATHEDRAL AND THE BAZAAR*, 49–54 (rev. ed. 2001) (discussing “the social context of open source software,” *id.* at 49).

⁴²⁶ AUGUSTE COMTE, *Necessity and Opportuneness of This New Science*, in AUGUSTE COMTE AND POSITIVISM 195, 196 (Gertrud Lenzer ed., 1975).

importantly, to further human flourishing in the present. A number of intellectual property reforms might work, albeit modestly, toward this end. First, to moderate the appeal of relative goods, antidilution protection could be dismantled in its various forms across the full field of intellectual property law, including in Article 23 of TRIPS. Second, to facilitate the production of reputation but not its consumption, we could revise the outcome in *Dastar*. There the Supreme Court declined to hold that *Dastar* could avoid liability for both forward and reverse passing off by affixing a simple notice on its product to the effect that the product was based on a public domain work originally produced by Fox.⁴²⁷ Though the overall outcome in *Dastar* was undoubtedly progressive, the Court nevertheless missed the opportunity to establish a principle of crucial importance to the attribution system that underlies the commons-based model of innovation: that the exclusive right to claim attribution does not necessarily carry with it the exclusive right to control the uses of the good to which that attribution is affixed. Third and related, we could establish a more robust — and characteristically American — regime of moral rights, one that provides a powerful right of attribution but little if any right of integrity.⁴²⁸

I present these reform possibilities here only briefly and conditionally because there can be little hope that any of them will be implemented anytime soon. Nor does it necessarily matter if they are. Our copying technology will continue to advance regardless, and its social implications will continue to be felt. The material conditions that have produced the need for sumptuary intellectual property law are the same material conditions that will continue to overwhelm the law's ability to suppress their social consequences. And as this copying technology advances, it is likely that commons-based peer production will advance along with it and extend to areas of production beyond software, the sciences, and the arts. If it is appropriate through intellectual property policymaking to pursue a “utopian vision”⁴²⁹ of the “good life and the sort of society that would facilitate its widespread realization,”⁴³⁰ then it may also be appropriate in this instance to recognize, as commons-based producers seem already to have done, that technological conditions may be pursuing that utopian vision regardless of whether the law is.

⁴²⁷ See *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 36 (2003).

⁴²⁸ *But cf.* Greg R. Vetter, *The Collaborative Integrity of Open-Source Software*, 2004 UTAH L. REV. 563 (proposing an enhanced right of integrity for open-source software).

⁴²⁹ William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659, 1664 (1988).

⁴³⁰ *Id.* at 1744.

CONCLUSION: FIAT PROPERTY

“[M]oney,” Simmel wrote in his 1900 treatise *The Philosophy of Money*, “increasingly becomes nothing but money.”⁴³¹ This Article has ultimately sought to question the extent to which the same can be said of property: that property increasingly becomes nothing but property. In speaking of money and its “purely negative quality,”⁴³² Simmel asserted that “the intensification of intellectual, abstracting capacities characterizes our time, in which money more and more becomes a pure symbol, indifferent to its own intrinsic value.”⁴³³ Certainly, in contrast to Simmel’s assertions about money, many forms of property continue through their absolute characteristics to yield “intrinsic value.” Whether they be authorized copies of haute couture designs or unauthorized imitations of such designs, clothing quite obviously yields warmth. An authorized or imitation copy of a Ferrari design yields some form of movement. We are far from a general system of “fiat property” to match our general system of “fiat money.” Nevertheless, as this Article has sought to suggest, at least some forms of property — hypermarks are a good example — are now essentially fiat property. To the extent that they yield absolute utility, they do so as little more than a pretext in support of their differentiating role. In an intensification of a basic circularity long ago identified by Felix Cohen,⁴³⁴ they have no significant characteristic other than that they are property, that they are forms of exclusivity, of rarity, of difference. They are pure, abstract forms of relative utility, yielding nothing other than social differentiation. Intellectual property law is what has made them possible.

The emergence of fiat property, which is protected only because it is scarce, and scarce only because it is protected,⁴³⁵ predicts an emerging, though perhaps still distant, social role for intellectual property law. For all of its emphasis on “Progress,” intellectual property law is emerging as a means to preserve certain conditions of scarcity and rarity that “Progress” is increasingly overcoming, and thereby to preserve social structures based on those conditions. This is a strange role for

⁴³¹ GIANFRANCO POGGI, MONEY AND THE MODERN MIND: GEORG SIMMEL’S *PHILOSOPHY OF MONEY* 161 (1993) (quoting 6 GEORG SIMMEL, GEORG SIMMEL GESAMTAUSGABE 609 (David Frisby & Klaus Christian Köhnke eds., 1989)) (internal quotation marks omitted).

⁴³² GEORG SIMMEL, *THE PHILOSOPHY OF MONEY* 441 (David Frisby ed., Tom Bottomore & David Frisby trans., 2d enlarged ed. 1990).

⁴³³ POGGI, *supra* note 431, at 177 (quoting SIMMEL, *supra* note 431, at 171–72) (internal quotation marks omitted).

⁴³⁴ Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 815 (1935).

⁴³⁵ Cf. ROSEMARY J. COOMBE, *THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION, AND THE LAW* 71 (1998) (“Protected because it is valuable, [the mark] is valuable primarily because it is protected.”).

intellectual property law, which we have always understood to be a body of law dedicated to the pursuit, essentially, of *more*: more “Science,” more “useful Arts,” and ultimately more copies. This understanding has made sense because we have always assumed that what we are getting more of is absolute utility. Now, however, intellectual property law is called upon to make possible more signs of distinction, more rarities, more relative utility. This anticipates, if it does not already reveal, a bizarre and ultimately untenable condition in which the primary means by which we distinguish ourselves and others is through the consumption of a profusion of intangible scarcities of our own creation, and already we seem to be creating these scarcities in ever more abundance.