#CANCELLED: AN EXPLORATION OF INTELLECTUAL PROPERTY LAW AND THE NEW EXTRA-LEGAL SOCIAL NORMS AGAINST COPYCATTING AND CULTURAL (MIS-)APPROPRIATION IN FASHION DESIGN

By

ANNA BROWN

A dissertation submitted to the University of Birmingham for the degree of MASTER OF JURISPRUDENCE

School of Law
College of Arts and Law
University of Birmingham
August 2022

ABSTRACT

This dissertation explores the relationship between fashion design and global contemporary intellectual property legal systems. This exploration informs a comparison with the methodologies of two online intellectual property call-out platforms to understand why intellectual property self-help in fashion design has become so popular, and what this tells us about the relationship between fashion design and intellectual property law. This analysis unveils a cycle of tension that runs throughout this dissertation: fashion design and conventional intellectual property law share a complex relationship, and aggrieved designers and indigenous community groups who believe their designs have been infringed are exasperated at the slow and ineffective mechanisms of the law. Consequently, they turn to the informal enforcement mechanisms of the online, viral call-out platforms, who have come to prominence during the social media boom of the past decade. These call-out platforms can resolve issues quickly, inexpensively, and often with better results than the courtroom could offer. However, the methodologies of these platforms, and the online noise that surrounds them and the broader 'call-out' culture in which they sit, means that the call-outs often lack merit, are devoid of legal nuance and subject to intense criticism. As online audiences awaken to this, a shift back to the carefully constructed nuance of the law is beginning to happen. This dissertation establishes that it is likely that this cycle of tension between fashion design, intellectual property law and intellectual property self-help remedies is not new. However, due to their popularity, these call-out platforms are likely to continue in their current form for some time yet, with their weaknesses doubling as their strengths, and a new anti-copying discourse now in the mainstream. This dissertation concludes by suggesting that while this tension is unlikely to be resolved, there is an important role of intellectual property professionals to engage with the platforms to bring nuance to the debate and evoke positive change.

ACKNOWLEDGMENTS

I would like to thank my supervisor, Dr Chen Zhu, for his constant encouragement, sharing his expert knowledge, and for pushing me to think beyond my own limits. I am very lucky to have had his support during this research. I would also like to thank Professor Kate Bedford, for always offering me a fresh perspective and new angle to consider, and for her gentle words in moments of self-doubt. Thanks also to my family, Matthew and Agnes, for being my constant cheerleaders.

I would also like to thank the University of Birmingham. I started this research one month before the first Covid lockdown. As an anxious, mature student who'd been out of the system for many years, their approachability and support made me feel part of the community, for which I am very grateful.

This dissertation was proof-read and copy edited for conventions of language, spelling and grammar by Dr. Anne Galliot, a freelance professional proof-reader at Academic Angel. Any errors that remain are, of course, my own.

TABLE OF CONTENTS

TABLE OF FIGURES

INTRODUCTION

This dissertation explores the relationship between fashion design and global contemporary intellectual property legal systems, created to ensure that the ownership of original inventions and creations are protected, and how such systems operate in different nations; namely, France and the US. This investigation informs a comparison with the methodologies of two online, extra-legal, intellectual property call-out platforms to understand why intellectual property self-help has become so popular, and what this tells us about the relationship between fashion design and intellectual property law as the old and the new enforcement methods start to collide.

Exasperation with the slowness and relative ineffectiveness of the conventional legal system has led to a parallel development in social media where peer pressure is now used to "call-out" those who are perceived to infringe the intellectual property and hence ownership of creative fashion designs and innovations. In the past decade, fierce debates on intellectual property rights, particularly in the fashion industry, have found a new voice. Thanks to the rapid growth of social media platforms such as Instagram and online viral blogs, consumers can directly access the industry and its key players in a way that they never have before. Consequently, its consumers are no longer simply a passive by-product of the industry, but a global voice that is changing and shaping the sector. From challenging industry norms on underweight models, to the current discourse on the environmental impacts of the industry, the business of fashion is being held accountable for its practises in a way that is unprecedented, and the issue of intellectual property protection and 'copying' is at the very heart of much of the discourse. This new global voice arguably is leading to greater democratisation of the industry, with several key players - including the Instagram fashion-copying shaming account, Diet Prada[1] and the viral social media campaign, Give Credit[2] - leading the way in holding the industry accountable.

[1] Diet Prada is an Instagram account and fashion watchdog group. It was originally started as an informal way to call out similarities in fashion designs, however it has shifted in recent years to a more serious focus and now campaigns for more integrity, accountability and transparency within the fashion industry. *See* 'DIET PRADA', DIET PRADA, accessed 26 May 2020, https://www.dietprada.com.

[2] Give Credit is also an Instagram account with an education-focus, focusing on the prevalence of fashion brands replicating designs from cultural communities without recognition. It campaigns for fashion brands to "Give Credit" to the cultural communities that they draw inspiration from. *See* '#Givecredit. (@givecredit_) • Instagram Photos and Videos', accessed 22 November 2021, https://www.instagram.com/givecredit_/.

Tension between the formal and informal enforcement of intellectual property rights is prevalent across the creative arts and design, including in music as this dissertation will explore. This dissertation focuses on systems and platforms for ensuring intellectual property in fashion design; a billion-dollar industry that spans the weight of major multinationals as well as wide range of small traders and micro-enterprises. Diet Prada and Give Credit are used as case studies to develop this argument, alongside case law from the intellectual property legal system and exemplars of social media pressure points. Diet Prada and Give Credit were chosen as case studies because they have successfully infiltrated online and mainstream discourse. They use their combined reach of over 3 million followers to highlight perceived intellectual property injustices in the fashion industry through regular 'call-outs' that target both fast-fashion and luxury brands. These call-outs have captured the attention of the fashion industry, legal professionals, and the mainstream media. Notably, the people behind these platforms are insiders to the fashion and wider creative industries, but not experts in intellectual property law. This dissertation argues that, despite their lack of legal expertise, their call-outs are creating a new type of extra-legal social norm amongst aggrieved fashion designers, who are increasingly turning away from the formal mechanisms of the law and towards the shame-based enforcement that the call-out platforms offer.

Analysis of these two platforms alongside conventional methods of intellectual property enforcement addresses the following questions:

- Are there easily definable boundaries between original fashion designs and derivative "borrowed" themes?
- How and when should the cultural design expressions of indigenous peoples be protected from exploitation?
- Is there any evidence that creativity and innovation in the fashion design industries are being suppressed through social pressures and/or legislation that is not fit for purpose?
- What effects, if any, are the new pressures of social media channels having on the conventional legal system for intellectual property?

By addressing these questions through the methods mentioned above, an interesting picture begins to emerge. Findings show that conventional intellectual property law is slow and ineffective at protecting the less powerful designers within the global fashion industry – be they independent designers with limited budgets, or indigenous communities with little access to appropriate legal support systems. This has led to the rise of 'self-help' platforms such as Diet Prada and Give Credit. However, these platforms are operating outside of the formal limits of the law. Their methodologies can be questionable or even, at times, chaotic, due to the viral online environment in which they operate, and we begin to understand that their strengths also double as their weaknesses. This leads us to look back at formal intellectual property law with a more sympathetic eye, valuing it for its nuance, its carefully constructed deployment of expertise, and its relationship to other branches of law. Evidence of this cycle of tension runs throughout this dissertation as the two systems are analysed and compared. It raises one overarching question: can the gaps between conventional intellectual property systems and ethical fashion design practice ever be resolved? Although this dissertation takes steps to understand this tension, the inherent complexity in the relationship between fashion design and intellectual property law means that further work needs to be undertaken to fully resolve this question.

Scope and limits of the study

The primary focus of this dissertation is an enquiry into the relationship between formal intellectual property law, the fashion industry and the new extra-legal social norms that are rising to prominence to protect aggrieved designers who are unable or unwilling to access the formal mechanisms of the law. This is a complex matter, fraught with contextual issues: for instance, issues of racial inequality run through Diet Prada and Give Credit's selected call-outs; issues of gender-bias are associated with shame and online public shaming; and call-out culture's deep-rooted history within marginalised online communities is co-opted by a rapidly evolving wider online community. In 2018, Vats and Keller studied the intersections of race, colonialism and intellectual property law, drawing upon Critical Race Theory[3]. They argue that

[3] *See* Anjali Vats and Deidre Keller, 'Critical Race IP', *Cardozo Arts & Entertainment Law Journal* 36 (1 January 2018): 735.

the connection between race and intellectual property has evolved with the boom of the technology economy. Though intrinsic to the primary focus of this enquiry, and so referred to in the text, these issues merit a separate, substantial enquiry in the context of Diet Prada and Give Credit, and they are therefore considered outside the primary focus and word limit of this enquiry.

It is also important to note that this dissertation was written during the Covid-19 pandemic, which changed the world to some degree, and negatively impacted the fashion industry significantly and on many levels. Moreover, the fashion industry became a focus of negative discourses arising from the mobilisation of social media's collective conscience in light of the Black Lives Matter lockdown protests of 2020, and from the increasing focus on the environmental impacts of the industry. Individuals and businesses started to reflect on their relationship with fashion and its industries on an open scale unseen in pre-pandemic times. Consequently, Diet Prada, one of the case studies in this dissertation, started to shift its focus from calling-out alleged intellectual property infringement, to cover a wider remit, from broader problems with the fashion industry, to global politics. It continues to call-out alleged copying, but by venturing into the broader social justice landscape, it has been subject to increased criticism online and is attracting more attention that it ever did when it focused solely on alleged intellectual property infringement. Although it has still provided an excellent case study for this research, it is important to keep this shift in direction in mind and recognise that its change in agenda may impact the findings in this dissertation in the immediate and longer-term future[4].

[4] *See* 'Coronavirus: Why the Fashion Industry Faces an "Existential Crisis"', *BBC News*, 29 April 2020, sec. Entertainment & Arts, https://www.bbc.com/news/entertainment-arts-52394504, Fedora Abu, 'How Black Lives Matter Changed Fashion in 2020', accessed 6 December 2021, https://www.bbc.com/culture/article/20201215-the-power-of-black-resistance-dressing-and-identity and Serena Sandhu, 'Fast Fashion Is a Trend That Could Be on Its Way out as Shoppers Seek Sustainability after Covid Pandemic', accessed 6 December 2021, https://inews.co.uk/news/consumer/fast-fashion-trend-on-its-way-out-shoppers-seek-sustainability-covid-pandemic-1035952.

CURRENT THINKING ON FASHION DESIGN, THE LAW, SOCIAL NORMS AND THE EMERGENCE OF CALL-OUT CULTURE

Overview

For decades, the mainstream media have often painted fashion as something frivolous: something to be enjoyed but not to be taken too seriously – an attitude that is often reflected by those around us. Given that revenue from the global apparel industry was calculated at USD 1.4 trillion in 2020[5], and expected to surpass its pre-pandemic performance in 2022 despite the downturn and challenges of Covid-19[6], dismissing it as shallow is perhaps short-sighted. As James Laver, English fashion author and critic, once said, "clothes are never a frivolity: they always mean something"[7]. Indeed, their influence and significance spans social, political, cultural, economic and, increasingly, legal landscapes; and never more so than in the current climate, where the industry is under increasing pressure to address the issues within it. From the environmental impacts of fashion to using underweight models in shows, the fashion industry is under fire from all angles. Those with a vested interest in trying to change the industry for the better are increasingly turning to formal and informal methods of regulation to try and resolve these deep-rooted problems, which span not only intellectual property, but also human rights, climate change, discrimination, unfair business practices, and dangerous working conditions. Brewer noted that the relationship between the fashion industry and the law has been under-scrutinized by legal scholars, and it is only in recent years that the new field of 'fashion law' has developed[8]. He writes that scholars such as Professor Susan Scafidi[9] "have injected sartorial legal rigour into the study of fashion and the law"[10], whereas it was previously treated primarily as a subdivision of intellectual property.

[5] In 2021, the annual State of Fashion report published by McKinsey & Co., written in partnership with the Business of Fashion, noted that the industry saw a 90% drop in profits due to the Covid-19 pandemic. *See* 'The State of Fashion 2021 Report: Finding Promise in Perilous Times | BoF', The Business of Fashion and McKinsey & Company, accessed 7 February 2022, https://www.businessoffashion.com/reports/news-analysis/the-state-of-fashion-2021-industry-report-bof-mckinsey/.
[6] 'The State of Fashion 2022: Global Gains Mask Recovery Pains | BoF', The Business of Fashion and McKinsey & Company, accessed 7 February 2022, https://www.businessoffashion.com/reports/news-analysis/the-state-of-fashion-2022-industry-report-bof-mckinsey/.
[7] James Laver, *Modesty in Dress: An Inquiry Into the Fundamentals of Fashion* (Houghton Mifflin, 1969). Pg. 14
[8] Mark K. Brewer, 'Fashion Law: More than Wigs, Gowns, and Intellectual Property', *San Diego Law Review* 54, no. 4 (2017): 739–84.
[9] Professor Susan Scafidi is an American lawyer, and the founder of the Fashion Law Institute at Fordham University School of Law, New York.
[10] Brewer, 'Fashion Law'. Pg. 740

While it can be argued that intellectual property still dominates the discussion, and will indeed dominate this dissertation, the interconnected legal issues within the fashion industry are emerging as a complex area of the law and are filtering into mainstream discourse across both industries and the wider online communities around them.

It would be remiss not to address the use of the blanket term 'fashion industry' used in this dissertation to describe a vastly layered and complex industry, which harbours a range of differing business models and ways of working. The US Fashion Industry Association considers that its members, who make up the 'industry', span the entirely of the value chain, from brands to designers, and from manufacturers to academic institutions[11]. Within this value chain exists a myriad of differing types of fashion businesses[12]. Fast-fashion, defined as 'inexpensive clothing produced rapidly by mass-market retailers in response to the latest trends'[13] often takes the brunt of criticisms of the industry. The speed at which it is produced raises arguments about its environmental impact and poor working conditions, alongside its blatant disregard for intellectual property rights. Fast-fashion brands have been held loudly and publicly accountable for their questionable practices, from labour law violations to unfair employment practices, particularly following the Bangladesh factory disaster in 2013[14]. On the other hand, Andrew Winston wrote that luxury fashion has "not traditionally associated [itself] with concerns about environmental impacts, human rights, and wellness, even while those trends have been sweeping through the mainstream consumer products sector"[15]. Luxury goods have historically been linked to wealth, power and exclusivity, and are commonly considered to be consumer goods that not everyone can afford[16]. Although not completely immune to criticism,

[11] 'About the Fashion Industry - United States Fashion Industry Association', accessed 1 October 2021, https://www.usfashionindustry.com/about/about-the-fashion-industry.
[12] This dissertation will use the term 'the industry' to focus predominately on the independent designer, indigenous cultural designs, global fast-fashion brands and luxury fashion houses, while recognising that this term can be used in a much broader capacity.
[13] 'Fast Fashion | Definition of Fast Fashion by Oxford Dictionary on Lexico.com https://www.lexico.com/definition/fast_fashion.
[14] On 24 April 2013, the collapse of the Rana Plaza building in Dhaka, Bangladesh, which housed five garment factories, killed at least 1,132 people and injured more than 2,500. The disaster shone a light on the poor labour conditions faced by workers in the ready-made garment sector in Bangladesh.
[15] Andrew Winston, 'Luxury Brands Can No Longer Ignore Sustainability', accessed 7 October 2021, https://hbr.org/2016/02/luxury-brands-can-no-longer-ignore-sustainability.
[16] Alessandro Brun and Cecilia Castelli, 'The Nature of Luxury: A Consumer Perspective', ed. Alessandro Brun, *International Journal of Retail & Distribution Management* 41, no. 11/12 (1 January 2013): 823–47, https://doi.org/10.1108/IJRDM-01-2013-0006.

the luxury fashion industry has managed to separate itself from the harsher criticisms levelled at the fast-fashion industry, particularly around both sides of the industry's propensity to copy the designs of independent designers. This dissertation will show that such criticism is becoming more difficult to avoid in an increasingly inter-connected, online, global society.

Fashion and the law; a brief background

> "[Fashion law]: every point at which the law touches the life of a garment from the designer's dream to the consumer's closet." – Scafidi[17]

Although Brewer argues that fashion law is only just starting to receive the attention that it rightly deserves, the two fields share an intertwined history, with the law regulating and dictating how we have dressed for thousands of years in the form of sumptuary law[18]. Wilson, in her article 'Common Threads: A Reappraisal of Medieval European Sumptuary Law', wrote that it is hard to find a clear definition of sumptuary law, and that it is often defined in vague terms as the laws that regulate consumption or commodity[19]. In terms of fashion, this means regulating dress codes to reflect a position in society or social category. Examples of this include laws created during the Roman Empire regarding the type of togas that men and women were able to wear in ancient Rome to reflect their social hierarchy, or King George II passing a law which ensured that the Scottish kilt couldn't be worn by anyone who wasn't a member of the British military[20]. Wilson also notes the existence of legal scholarship which refers to sumptuary law and intellectual property law interchangeably, often classifying intellectual property law as a form of sumptuary law. Although sumptuary law is often thought of as a prohibitive form of regulation, it was successfully used by several countries to promote and encourage local business; the French, for example, used sumptuary law to ban lace from other countries, meaning that the economic value of local lace industries prospered[21]. Why and when exactly sumptuary laws

[17] Jamie Smith, 'Fashion (Law) Forward: An Interview with Professor Susan Scafidi | The Issue Spotter', accessed 8 October 2021, http://jlpp.org/blogzine/fashion-law-forward-an-interview-with-professor-susan-scafidi/.
[18] Alan Hunt, *Governance of the Consuming Passions: A History of Sumptuary Law* (Macmillan, 1996).
[19] Laurel Ann Wilson, 'Common Threads: A Reappraisal of Medieval European Sumptuary Law', *The Medieval Globe* 2, no. 2 (2017): 141–65, https://doi.org/10.17302/tmg.2-2.6.
[20] The Dress Act of 1746 was passed following the Jacobian Risings by King George II, however it was repealed in 1782.
[21] Giorgio Riello and Ulinka Rublack, eds., *The Right to Dress: Sumptuary Laws in a Global Perspective, c.1200–1800* (Cambridge: Cambridge University Press, 2019), https://doi.org/10.1017/9781108567541.

regulating clothing and fashion started to decline is hard to pinpoint, although it is widely considered that by the end of the 17th century, they were increasingly seen as passé and ineffective in Europe and across the Atlantic[22]. As they fell into decline, and industrialisation increased, a new type of law emerged in fashion: intellectual property.

The prominent view is that modern intellectual property law seeks to protect the intangible creations of human intellect, encouraging creativity, providing economic motivations, and incentivising creation. However, in 2010, legal scholar Beebe argued that modern intellectual property law is used to reinforce exclusivity, and therefore that it continues to replicate elements of sumptuary laws. In his article 'Intellectual Property Law and the Sumptuary Code', he suggests that sumptuary law has not, as many academics argue, disappeared, and that it remains alive and well in modern intellectual property law:

> […] 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 industrialisation and democratization, as is generally believed. Rather, it has taken on a new - though still quite eccentric - form: intellectual property law.[23]

Beebe's argument considers modern intellectual property law through two lenses: the progressive and the regressive. He acknowledges that intellectual property law can be, and is, progressive, and simultaneously recognises the sumptuary impulse in intellectual property law as regressive. Zhu concurs, noting that:

> Sumptuary law is like the fabled but clichéd Schrodinger's cat, which is perceived to be both 'dead' and 'alive' at the same time. It is 'dead' in the sense that it is no longer regarded as appropriate for liberal states to regulate private citizens' consumptive behaviour. On the other hand, sumptuary law is

[22] Donald Quataert, *Consumption Studies and the History of the Ottoman Empire, 1550-1922: An Introduction* (SUNY Press, 2000).
[23] Barton Beebe, 'Intellectual Property Law and the Sumptuary Code', *Harvard Law Review* 123, no. 4 (2010): 810–89. Pg. 813

still alive and kicking through its renewed life as a general law regulating appearance and imagery.[24]

Modern intellectual property law covers a wide range of creative outputs across varying sectors, from the sciences to the creative arts. With fashion design, however, it has formed a particularly complex relationship. Hemphill and Suk argue that the unique "social dynamic of innovation and continuity [in fashion] is most directly engaged by the laws of intellectual property"[25]; they consider whether fashion design differs so extensively from other types of creative arts that its survival depends on widespread copying. This argument isn't unique to Hemphill and Suk but it is one that Scafidi feels passionately against. Scafidi is openly critical of the US intellectual property system particularly, for falling behind other countries in the protection of fashion design. She has been instrumental in initiating reforms such as the Innovative Design Protection Act[26], by calling for the US to catch up with its European counterparts and explicitly protect fashion design within its legal frameworks. However, even where fashion design is explicitly covered by intellectual property law, designers continue to struggle with rampant copying in the industry, and with finding a satisfactory legal solution to the apparent infringement of their rights. Arguments on what is best for the industry vary wildly, with many arguing that stronger legal protection will not solve the problem of rampant copying and will instead block creativity and innovation in the industry. These differing points of view highlight just how complex the relationship between fashion design and intellectual property law remains.

Fashion design, the intellectual property negative space and the piracy paradox

The argument of the intellectual property 'negative space' can help us understand the complexity of the relationship between intellectual property law and fashion design. The term 'negative space' is commonly used in the art world: in its most

[24] Chen Wei Zhu, 'Adjudicating Sartorial Elegance from the Court – the Sumptuary Impulse in the Law of Modern Sports Sponsorship against Ambush Marketing', *Queen Mary Journal of Intellectual Property* 10, no. 1 (19 February 2020): 62–86, https://doi.org/10.4337/qmjip.2020.01.03. pg. 47

[25] C. Scott Hemphill and Jeannie Suk, 'The Law, Culture, and Economics of Fashion', *Stanford Law Review* 61, no. 5 (March 2009): 1147–99. Pg. 1150

[26] Innovative Design Protection Act (IDPA), S. 3523, 112th Cong. (2012)

simple terms, it refers to the area between and around a subject[27]. Art critics consider the negative space just as important as the 'positive' space of the object depicted. Raustiala and Sprigman describe intellectual property's 'negative space' as the areas in which creation and innovation thrive even in the absence of formal intellectual property protection[28]. This concept therefore covers a wide range of industries, from cookery to stand-up comedy to fashion design. Fashion design sits interestingly within Raustiala and Sprigman's argument that certain industries are capable of thriving when they sit outside the heartland of intellectual property protection; in Europe, fashion design is explicitly protected by intellectual property law, and even in the US it is afforded some limited protection through trademark and copyright, as well as patent and design rights, meaning that it no longer sits neatly within the space defined by Raustiala and Sprigman, hovering instead between the negative and the positive space. Rosenblatt[29] argues that although the boundaries of the intellectual property negative space can be unclear in comparison to art, their existence helps us gain a better understanding of intellectual property law. If, as Rosenblatt asks, intellectual property law is an incentive for creators to create, how can the thriving intellectual property negative space exist? She proposes two arguments; the incentives that intellectual property law creates are only important for some creators, and that while intellectual property protection is a motivator to be innovative and creative, it is not the only motivator[30].

Although Raustiala and Sprigman consider several creative industries to fall within the negative space, much of their work has focused on the complexity of fashion design in that space, where they raised the much-debated concept of the piracy paradox. This concept is based on the simple idea that a huge swathe of fashion consumers are encouraged to buy the latest trends as soon as they are released, and that they don't want to wait until they are past season. Coveted items are copied and become more accessible (in time and cost) to these consumers. Copying, in this case, enables more consumption, and supports the industry economy. As items go

[27] Bang Wong, 'Negative Space', *Nature Methods* 8, no. 1 (January 2011): 5–5, https://doi.org/10.1038/nmeth0111-5.
[28] Kal Raustiala and Christopher Sprigman, 'The Piracy Paradox: Innovation and Intellectual Property in Fashion Design', *Virginia Law Review* 92, no. 8 (2006): 1687–1777.
[29] Professor Elizabeth Rosenblatt teaches intellectual property law at the University of Tulsa. Her research focuses on intellectual property theory and intersections between intellectual property law and social justice.
[30] Elizabeth L. Rosenblatt, 'A Theory of IP's Negative Space', *Columbia Journal of Law & the Arts* 34, no. 3 (2011 2010): 317–66.

out of season immediately, fashion designers have to create and innovate more. Raustiala and Sprigman argue therefore that the fashion industry is an exception to the usual intellectual property theory that copying destroys innovation. They suggest stronger enforcement of intellectual property law has a negative impact on the industry, as it blocks creativity and innovation. In a 2009 follow up article, The Piracy Paradox Revisited, they explain:

> Fashion piracy may be parasitic on original designs, but it is a parasite that does not kill its host: though it may weaken individual designers it also, paradoxically, strengthens the industry and drives its evolution. In an industry that cannot look to continuous improvements in quality to drive demand, piracy substitutes for functional innovation. This is a very important point: piracy is the fashion industry's equivalent of the new feature on a cell phone. It is a force that encourages a consumer to discard a perfectly serviceable garment and purchase the new, new thing.[31]

The use of the parasite metaphor is one that has divided legal scholars with an interest in fashion and intellectual property. While the parasite might not be killing its host, according to Scafidi, this is only true if we consider the host to be the vast and widely successful fashion industry rather than the individual, new, fashion designer. She says:

> Individuals are the industry and it is a loss of human capital and a personal tragedy when designers are driven out of business because they are copied.[32]

Raustiala and Sprigman's concept of the piracy paradox anchors its argument in the economic value of the fashion industry rather than on the individuals that make up the industry. They argue that rampant copying in the industry keeps the trend cycle moving, inducing a rapid turnover and additional sales. This is driven by a consumer psychology that owning clothes that are 'on trend' confers a type of status on the

[31] Kal Raustiala and Christopher Sprigman, 'The Piracy Paradox Revisited', *Stanford Law Review* 61, no. 5 (2009 2008): 1201–26. Pg. 1209

[32] This quote is from Professor Susan Scafidi's statement in support of the Innovative Design Protection Act in front of Congress. *See* A Bill To Provide Protection for Fashion Design: Hearing on H.R. 5055 Before the H. Subcommittee on Courts, the Internet, & Intellectual Prop., 109th Cong. 187 (2006).

owner, the value of which decreases as more people share in the trend. This keeps the consumer wanting to buy more, to keep ahead of the trends, forcing the whole value chain of the industry to keep moving rapidly. From an economic perspective, the concept of the piracy paradox might make sense. However, for an industry increasingly concerned with improving its image, the economic arguments of this theory are losing their relevance. The consumer mindset is shifting as criticisms of the industry, its practices, and the apparent injustice of the rampant copying small designers fall victim to, reach mainstream discourse. That is not to say that the concept of the piracy paradox ceases to be relevant; rather, the economic argument that fuels its theory may need to be reconsidered as the industry faces growing democratisation.

Fashion design and the "visual ignorance" of intellectual property law

In addition to occupying a problematic place in intellectual property, fashion design is also affected by what legal scholars term the "visual ignorance" of modern copyright law[33]. Macmillan has written extensively on whether copyright law, one of the main mechanisms within intellectual property to protect fashion design, is ignorant with regard to the visual arts, and therefore unable to adequately protect them, even where they are explicitly protected:

> [L]ike other forms of creative output, works of visual art must fit somewhere within the definition of a copyright work. However, it is clear that the relevant law lacks any central concept of 'visual art'. In contrast to copyright's definition of other forms of creative output, the types of works of visual art protected by copyright law comprise a list. This list lumps together a variety of works, irrespective of critical differences, with some rather perplexing results. At the same time, one major form of visual art is hived off from the list and subject to different copyright treatment.[34]

[33] Originally referred to as the concept of "visual blindness", this dissertation will refer to the concept as "visual ignorance" to avoid the ableist nature of the term "visual blindness". *See* Jessica Ping-Wild, 'Ableist Language To Avoid And Acceptable Alternatives – "Blind" Edition -', *The Rolling Explorer* (blog), 31 August 2020, https://therollingexplorer.com/ableist-language-to-avoid-and-acceptable-alternatives-blind-edition/.

[34] Fiona Macmillan, 'Is Copyright Blind to the Visual?', *Visual Communication* 7, no. 1 (1 February 2008): 97–118, https://doi.org/10.1177/1470357207084868. Pg. 100

Macmillan argues that copyright law, even in countries who expressly offer copyright protection to the differing types of visual arts that exist, lacks a central concept of what visual art is. It is therefore ill-equipped to deal with modern developments in the field. She also notes that copyright law has failed at successfully striking a balance between protecting creativity and allowing it to be used in further creative works. Macmillan suggests that this is because modern notions of what copyright is and what it should protect are rooted, in part, into the rhetorical discourse of the Renaissance, where discussions on the protection of creative work focused on objects and material works of art. Translating this to modern copyright law, Macmillan contends, is inadequate to distinguish between the material and the immaterial: creative areas such as fashion design are treated in the same way as literary works when they are, in fact, quite different art forms. To quote Macmillan, "copyright law makes the simultaneous errors of treating the similar dissimilarly and the dissimilar similarly"[35]. Given fashion's unique position in the intellectual property negative space, coupled with the law's apparent inability to fully understand how intellectual property protections should be provided to this unique creative field, it is little surprise that affected parties seek relief outside the legal system. In recent years, there has been an increase in the number of creators and designers asserting extra-legal social norms to prevent or bring to attention the copying of their work, regardless of whether they were protected by the law or not. This is becoming a common phenomenon thanks to the rise of social media platforms.

Intellectual property and extra-legal social norms

The creation of extra-legal social norms to protect creators from unauthorised copying is not a new phenomenon. Intellectual property theory (in particular, the mainstream copyright theory), suggests that protecting creative works encourages creativity and innovation that can be disseminated for the enjoyment of wider society. However, legal scholars argue that, in many creative industries, creativity and innovation take place outside the confines of intellectual property law; despite lacking the law's encouragement to creativity and innovation, these industries are thriving. This is, in part, because creators in these industries have set up their own set of extra-legal social norms to regulate issues around permissible and non-permissible

[35] Macmillan. 'Is Copyright Blind to the Visual?' Pg. 101

activities of copying. These span industries that are explicitly excluded from legal protection, such as stand-up comedy, and those that do benefit from some legal protection, such as fashion design. It seems obvious why those that sit firmly within the negative space have developed their own social norms to regulate copying. An emerging field of literature also suggests that the complex legal landscape of intellectual property law is too daunting to navigate, even for small-medium creative businesses protected by the law, leading them to seek relief in extra-legal norms[36]. Such businesses are unlikely to have teams of expert lawyers, so many prefer to rely on norms asserting a negative copying discourse outside the confines of the legal frameworks regulating this area. Laws are generally defined as regulations that are codified, and sanctioned by government, whereas norms, which may or may not be codified, are adopted and enforced by communities[37]. Norms arise in both the absence and presence of formal law. The Stanford Encyclopedia suggests how differing disciplines within the social sciences study the concept of social norms:

> Social norms, the informal rules that govern behaviour in groups and societies, have been extensively studied in the social sciences. Anthropologists have described how social norms function in different cultures, sociologists have focused on their social functions and how they motivate people to act, and economists have explored how adherence to norms influences market behaviour. More recently, also legal scholars have touted social norms as efficient alternatives to legal rules, as they may internalize negative externalities and provide signalling mechanisms at little or no cost.[38]

Adler and Fromer considered this explanation of how legal scholars approach the study of social norms in their 2019 article ‘Taking Intellectual Property into Their Own Hands’[39]. They identified and examined an array of creative industries that are increasingly using extra-legal social norms to handle perceived infringement of

[36] *See*, for example: Amy Adler and Jeanne C. Fromer, ‘Taking Intellectual Property into Their Own Hands’, *California Law Review* 107, no. 5 (2019): 1455–1530.
[37]Chris Fuller, ‘Legal Anthropology,: Legal Pluralism and Legal Thought’, *Anthropology Today* 10, no. 3 (1994): 9–12, https://doi.org/10.2307/2783478.
[38] Cristina Bicchieri, Ryan Muldoon, and Alessandro Sontuoso, ‘Social Norms’, in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta, Winter 2018 (Metaphysics Research Lab, Stanford University, 2018), https://plato.stanford.edu/archives/win2018/entries/social-norms/.
[39] Adler and Fromer, ‘Taking Intellectual Property into Their Own Hands’.

intellectual property rights, including fashion design. They also widened their scope to consider the music and photographic industries. In their research into the new ways that we are seeing intellectual property self-help manifest online, they considered: intellectual property diss songs[40], the Suicide Girls taking back control of their image when their Instagram photos were reused as part of artist Richard Prince's exhibition without their permission[41], and Gucci's collaboration with artist Dapper Dan after he called them out for copying his designs and cultural appropriation[42]. They also use Diet Prada, a case study in this dissertation, as an example of intellectual property self-help. They concluded that this phenomenon is only likely to grow in popularity over the coming years, suggesting that aggrieved creators often accomplish the same, if not better, results from using extra-legal social norms to enforce their rights. They also note that legal scholarship neglects the study of extra-legal social norms in managing intellectual property rights in the creative industries. Much of the literature currently focuses on the creative communities that are neglected by formal intellectual property laws. However, in our increasingly inter-connected digital society, it is not just these neglected communities that use social norms to regulate their intellectual property. Adler and Fromer argue that even those creative industries that are protected by formal law are increasingly circumventing the legal system, and that as this phenomenon grows, we may begin to see this reflected in other areas of the law beyond intellectual property.

Extra-legal social norms are here to stay, and perhaps the main way in which they are rapidly growing is through a new, social media-based form of confrontation: shame-based call-outs. This growing use of extra-legal social norms to regulate behaviour is also creating a growing number of 'norm-entrepreneurs'[43]. This term describes a person who is interested in changing social norms; if successful in this pursuit, they lead 'norm bandwagons', and create 'norm cascades', which lead to substantial shifts in social norms and regulating behaviour. The case studies in this

[40] An intellectual property diss song is where a musician channels his frustration at having been copied into song lyrics. There are numerous examples of this throughout history, and Adler and Fromer consider many examples in their work.
[41] Adam Needham, 'Richard Prince v Suicide Girls in an Instagram Price War | Art and Design | The Guardian', accessed 26 November 2021, https://www.theguardian.com/artanddesign/2015/may/27/suicide-girls-richard-prince-copying-instagram.
[42] Rachel Tashjian, 'How Dapper Dan Became Gucci's Conscience | GQ', accessed 26 November 2021, https://www.gq.com/story/gucci-dapper-dan-statement.
[43] Cass R. Sunstein, 'Social Norms and Social Roles', *Columbia Law Review* 96, no. 4 (1996): 903–68, https://doi.org/10.2307/1123430.

dissertation focus on norm entrepreneurs: they change the discussion on the effect of copying in fashion design at a rapid pace, firmly cementing their place in the heart of modern-day call-out culture and becoming leaders in the discussion on the rampant copying that perpetuates fashion design. Whether this change is something that does more harm than good remains to be seen.

Call-out culture, cancel culture and online public shaming

Understanding what it means to 'call someone out' through online public-shaming will be a crucial theme in this dissertation. Call-out culture and cancel culture are relatively new forms of online public-shaming that have risen in prominence during the social media boom of the last decade. The two terms are often used interchangeably but carry an important distinction in meaning. This dissertation focuses on social media platforms who are 'calling-out' alleged intellectual property infringement online. Given the often synonymous use of the terms 'call-out' and 'cancel culture', it is important here to offer a distinction between the two. Cancel culture hit the headlines in the past few years and is now a phrase regularly seen in the mainstream media. Defined by Marriam-Webster dictionary as 'the practice or tendency of engaging in mass cancelling as a way of expressing disapproval and exerting social pressure'[44], cancel culture is under fire for what some view as its aggressive, social media mob-style of forcing accountability on people and organisations, promoting a sense of lawless justice and boycotting individuals and organisations. The term originates from Black Twitter[45], where Tweeters from a historically marginalised community used the term to critique systems of inequality, amplify the voices of marginalised groups and foster a culture of accountability. However, they did not target specific individuals or groups, rather the systems that perpetrated the harm. As online communities evolved and developed over the past decade, the term has become a source of increasing division; many believe that the alleged widespread use of 'cancelling' has deviated from its original purpose and is now used to police behaviour[46]. Cancel culture commentators suggest that some of

[44] 'Definition of Cancel Culture', accessed 15 October 2021, https://www.merriam-webster.com/dictionary/cancel+culture.
[45] Black Twitter is an internet community of Black users on Twitters who connect, engage and network on issues and dicussions of interest within the Black community. *See* Sarah Florini, Tweets, tweeps, and signifyin' communication and cultural performance on "black Twitter". Television & New Media (2014) 15: 223–237.
[46] Daniel Sailofsky, 'Masculinity, Cancel Culture and Woke Capitalism: Exploring Twitter Response to Brendan Leipsic's Leaked Conversation', *International Review for the Sociology of Sport*, 31 August 2021, 10126902211039768, https://doi.org/10.1177/10126902211039768.

its strongest opponents are those who "have historically been privileged in terms of gender, race and sexuality, and these privileged voices frame the accountability that they are now facing as exaggerated to minimise the severity of their behaviour and discredit marginalised voices".[47] Others propose that in a world with such huge power and wealth imbalances, it is one of the only ways to meaningfully invoke social change[48].

Call-out culture refers to a means of holding people or businesses accountable for their actions by way of calling them out through online public-shaming, but not advocating for their complete boycott or 'cancelling'. Although closely related to cancel culture, it tends to be seen more positively. There is a growing body of academic literature on this social media-based culture, but it is something that is still relatively unexplored outside of online discourse. In 2015, Asam Ahmad[49], a writer and community organiser, wrote on the emerging trend of online call-out culture, attempting to define it:

> […] the tendency among progressives, radicals, activists, and community organizers to publicly name instances or patterns of oppressive behaviour and language use by others. People can be called-out for statements and actions that are sexist, racist, ableist, and the list goes on. Because call-outs tend to be public, they can enable a particularly armchair and academic brand of activism: one in which the act of calling out is seen as an end in itself.

In his critical essay on this new phenomenon, he argued that a downside of call-out culture is that it can often feel performative rather than educational. People often forget what the purpose of a call-out should be and what it should accomplish: substantial, material changes in people's behaviour and community dynamics that are needed for the good of society. In a follow-up essay in 2017, Ahmad said:

[47] Sailofsky. Pg. 2
[48] Aja Romano, 'Why We Can't Stop Fighting about Cancel Culture', Vox, 30 December 2019, https://www.vox.com/culture/2019/12/30/20879720/what-is-cancel-culture-explained-history-debate.
[49] Asam Ahmad, 'A Note on Call-Out Culture', accessed 22 May 2020, https://briarpatchmagazine.com/articles/view/a-note-on-call-out-culture.

> […] sometimes the only way we can address harmful behaviours is by publicly naming them, in particular when there is a power imbalance between the people involved [...][50]

Call-out culture's power lies in its borderless, online environment and its consequences: when someone, individual or otherwise, is called-out they are subject to the judgement of the online communities, often being forced to change their behaviour as a result of the call-out. Monica Lewinsky, the self-described "patient zero" of online public shaming, turned anti-cyberbullying campaigner, said of this environment:

> […] online, technologically enhanced shaming is amplified, uncontained and permanently accessible. The echo of embarrassment used to extend only as far as your family, village, school or community. But now, it's the online community too […] And there are no perimeters around how many people can publicly observe you and put you in a public stockade. There is a very personal price to public humiliation, and the growth of the internet has jacked up that price.[51]

Many call-outs come from individuals who depend on their social media posts being noticed online and going viral. However, one of the most striking developments of call-out culture is the emergence of a group of online norm entrepreneurs: social-media accounts that exist purely to call-out individuals and brands. Diet Prada, which will be used as one of the case studies in this dissertation, is considered one of the main players in the development of the call-out phenomenon that we see today. Starting as a website that called-out alleged copying in the fashion industry, it has grown rapidly and now calls-out everything from alleged copying to racial discrimination, although it stills retains a strong focus on calling-out what it terms 'copycatting'. It is considered by some as one of the most toxic catalysts online for misinformation and misinformed opinion, and by others as a the most significant and positive change in stamping out plagiarism and changing fashion industry

[50] Asam Ahmed, 'When Calling Out Makes Sense – Briarpatch Magazine', accessed 23 November 2021, https://briarpatchmagazine.com/articles/view/when-calling-out-makes-sense.
[51] Monica Lewinsky, *The Price of Shame*, https://www.ted.com/talks/monica_lewinsky_the_price_of_shame.

approaches and strategies to copying[52]. Its model of calling-out perceived injustices has, ironically, been copied many times: Estée Laundry[53] follows the Diet Prada model and is described as the 'Instagram collective holding the beauty industry accountable', whereas The White Pube[54] calls-out unfair practices in the art world. The rise of online call-out culture has created a seismic shift in the fashion industry, as it has allowed once passive consumers to suddenly connect directly with the industry through online social media engagement. The rampant copying that exists in the industry has been at the forefront of much of these online discussions, creating what Gerrie defines as the 'Diet Prada effect'[55]. Gerrie, writing from the fashion industry perspective, argues that the development of media technologies and the democratisation they have instigated has created a 'call-out' culture in fashion. She also contends that the popularity of these critical platforms is born of a lack of authenticity within the fashion industry, which has led to a new type of critical discourse. Gerrie acknowledges that call-out culture, fashion design and intellectual property rights are at the heart of much of this discourse: fashion's relationship to the legal frameworks that regulate it cannot be ignored.

Call-out culture, fashion design, and intellectual property

Gerrie's argument that fashion audiences and consumers increasingly desire authenticity, transparency and honest cultural critique, from a fashion industry that was once so closed off to criticism, goes some way to explaining why the architects of call-out culture have found much of their material in the fashion industry. She says:

> Fashion and cultural production hold up a mirror to our society, that is why it is so important for those working within the commercial [fashion] industry to give credit where due [and] be inclusive and supportive of artisans […][56]

[52] *See* Eleonora Rosati, Professor of Intellectual Property Law at Stockholm University, quoted in 'Guess Accused of Stealing Handbag Design from Black-Owned Label', The Irish Times, accessed 15 October 2021, https://www.irishtimes.com/life-and-style/fashion/guess-accused-of-stealing-handbag-design-from-black-owned-label-1.4523880. Professor Rosati speaks positively about the impact that accounts such as Diet Prada could have on intellectual property infringement in fashion design.
[53] 'Estée Laundry (@esteelaundry), https://www.instagram.com/esteelaundry/.
[54] 'THE WHITE PUBE (@thewhitepube), https://www.instagram.com/thewhitepube/.
[55] Vanessa Gerrie, 'The Diet Prada Effect: "Call-out Culture" in the Contemporary Fashionscape', *Clothing Cultures* 6, no. 1 (1 March 2019): 97–113, https://doi.org/10.1386/cc_00006_1.
[56] Gerrie, 'The Diet Prada Effect: "Call-out Culture" in the Contemporary Fashionscape' Pg. 110

However, alongside this desire for authenticity and transparency comes a growing discourse on the potential damage that call-out culture can do, particularly when the call-outs fall within the realm of opinion, and do not come from a place of expert knowledge on the wider context in which they sit. This discourse is particularly pertinent to call-outs that focus on alleged intellectual property infringements by accounts such as Diet Prada: however well-intentioned, many of the call-out platforms are not intellectual property law experts. In 2019, journalist Vanessa Friedman, writing for the New York Times, addressed this, writing:

> Call-out culture has become one of the defining parts of our online life, whether it's identifying mass market brands producing clothes that look suspiciously similar to high-fashion runway looks, or high-fashion brands making clothes that seem closely akin to others. The result is a toxic and unregulated situation in which accusations fly fast and furious, often coming with little or no real consideration or attempt to wrestle with what original design really means.[57]

Julie Zerbo, lawyer and founder of the Fashion Law blog[58] speaks frequently on the danger of what she feels are 'unregulated' call-outs, particularly where they relate to complex, multi-layered areas of the law such as intellectual property[59]. Arguably, her blog was one of the first online platforms in the new social media era to call-out the fashion industry, when she ran a story about Chanel copying the bracelet designs of a small independent designer[60]. Zerbo frames her call-outs within the legal frameworks in which they are operating, explaining the law and why the call-out is merited. She is actively critical of platforms such as Diet Prada for their lack of legal nuance, transparency, and accountability. While many of Diet Prada's call-outs are arguably merited, it is clear that they do not understand the wider legal landscape, such as the regular practice and benefits of licensing patterns in fashion design.

---

[57] Vanessa Friedman, 'Gucci Makes a Shoe and Keen Gets the Last Laugh', *The New York Times*, 26 March 2019, sec. Fashion, https://www.nytimes.com/2019/03/26/fashion/keen-gucci-shoes-copy.html.

[58] 'The Fashion Law | A Trusted Daily Source for Fashion, Law, Business & Culture', accessed 17 October 2021, https://www.thefashionlaw.com/ Zerbo set up the blog in 2012, fuelled by a personal passion for fashion and intellectual property law, and concerned about the lack of active discourse on the subject.

[59] Recho Omondi, *S1 EP1: Who Killed The Fashion Critic? Feat Julie Zerbo & Emilia Petrarca*, 2018, https://open.spotify.com/episode/6xlozUcIIBYkBiRFgc7F37.

[60] Lisa Niven-Phillips, 'Chanel Crystal Bracelets - Pamela Love | British Vogue | British Vogue', accessed 17 October 2021, https://www.vogue.co.uk/article/chanel-crystal-bracelets-pamela-love.

They treat every type of copying as one and the same, and deserving of the same treatment, disseminating this view to their huge audience. Their lack of transparency and accountability is ironic in light of Gerrie's argument that consumers are desperately seeking more transparency from the industry, and the idea that call-out culture was born from a desire to create a greater culture of accountability[61]. If, as Adler and Fromer argue, the intellectual property self-help remedies that call-out culture promote are here to stay, it is important that the legal profession understands, and engages with, the effects that they will have long-term on the formal mechanisms of intellectual property enforcement. The profession should also consider how the legal industry can better support and educate consumers and fashion audiences to understand the issues that call-outs are bringing to light.

Intellectual property and cultural products

This dissertation focuses mainly on the intersection between call-out culture in fashion design and intellectual property law, but it will also consider how these call-outs are affecting our understanding of 'cultural intellectual property'. Many of the call-outs that have created the biggest shockwave are those that berate fashion houses for copying the traditional and cultural designs of indigenous communities, and showcase the difficulties that these groups specifically face in enforcing their legal rights. Frankel, in her contribution to the book 'Trademark Law and Theory', termed these traditional designs as 'cultural intellectual property'[62], saying:

> Indigenous peoples seek recognition of and control of their culture. For the most part, they do not seek to have their cultural intellectual property squeezed into or accommodated within another culture's intellectual property system.

Scafidi has also written about the relationship between cultural knowledge and designs, and the modern intellectual property system, mirroring Frankel's concern that motivations for sharing cultural knowledge sit uncomfortably with the motivations

[61] Jonah Engel Bromwich, 'We're All Drinking Diet Prada Now', *The New York Times*, 14 March 2019, sec. Fashion, https://www.nytimes.com/2019/03/14/fashion/diet-prada.html.
[62] *See* Susy Frankel's *Trademarks and Traditional Knowledge* in Graeme B. Dinwoodie and Mark D. Janis, *Trademark Law and Theory: A Handbook of Contemporary Research* (Edward Elgar, 2008). Pg. 441

of modern intellectual property law. In parallel, indigenous groups often struggle to meet the criteria for formal intellectual property protection to apply. She says:

> […] the movement of cultural products from subculture to public domain provokes both majority-minority struggles and fraternal conflict. Some cultural products can be freely shared with the public; others are devalued when appropriated by the majority culture […] Perhaps the most contentious internal issues of all involve orchestrating the general public's access to the cultural goods of a particular community and deciding who should benefit economically from their distribution. Despite the tremendous economic and social value of community-generated cultural products, the source communities have little control over them.[63]

Scafidi's remarks, articulated in 2001, well before the existence of online call-out culture, highlight the very specific concerns that indigenous groups face. Add to the mix the internet, the ability to share traditional designs much further and faster than ever before, and it becomes clear that the legal issues raised by call-outs platforms span both intellectual property law, and the laws (or absence of) that specifically protect cultural designs and traditional knowledge. The concept of 'cultural intellectual property', in the context of call-out platforms is an interesting one: if, as many suggest, call-out platforms are doing more harm than good in supporting the wider public's knowledge and understanding of intellectual property law, could it be argued that there is an important role for them in advocating for those marginalised groups whose designs are regularly copied by large fashion houses, but are unable to rely on formal intellectual property law?

Identifying the gap

Discourse on the long-term effects of call-out culture in relation to intellectual property rights, and the creative industries more generally, is growing. However, more attention should be given to how online, social media platforms calling-out alleged intellectual property infringement are changing our understanding of

[63] Susan Scafidi, 'Intellectual Property and Cultural Products', *Boston University Law Review* 81, no. 4 (2001): 793–842. Pg. 794

intellectual property, specifically in the fashion industry; and also what long-term effects this will have for lawyers and the legal academy working in the fashion field. Adler and Fromer addressed the new phenomenon of intellectual property self-help, using Diet Prada as one of a myriad of examples across the full spectrum of the arts, but did not focus their analysis specifically on the effect of intellectual property call-outs in fashion design, and the consequences of this new extra-legal norm for fashion designers, fashion lawyers and fashion law academics. Their research was also focused on the relationship between modern intellectual property systems and intellectual property self-help, which this dissertation will consider alongside legal mechanisms for protecting cultural knowledge and traditional designs.

This dissertation will seek to take some steps towards addressing this gap, by understanding how the call-out platforms are shaping the wider public's understanding of copying in fashion, and the laws that seek to regulate this, as well as where legal professionals and academics can add value to this discussion. This dissertation will also consider how the prevalence of the call-out platforms supports MacMillan's argument that copyright law is ignorant in relation to the visual, by considering whether these platforms are able to distinguish between 'visual borrowing' and 'real' infringement of intellectual property law; and what long-term consequences may arise if they are not. This dissertation will present two arguments: the first considers the relationship between modern intellectual property law and the new extra-legal norms created by online platforms; the second reflects on the legal mechanisms that seek to protect cultural knowledge and traditional design. Firstly, it will suggest that there is an important role for intellectual property lawyers focused on the fashion industry and fashion law academics to play in engaging with call-out platforms, the wider public and fashion industry stakeholders: to help them understand the fine balance between "visual borrowing" and "real", actionable, intellectual property infringement; and to try and resolve the undercurrent of tension that is dominating discussion in this area. Intellectual property law is failing to protect less powerful designers, causing them to turn to extra-legal norms to resolve their issues. These norms operate outside of formal law, meaning that their effectiveness varies, and their methodologies are questionable. In turn, this allows us to see the value in the carefully constructed nuance of the law. Secondly, this dissertation will argue that, given the distinction between the motivations of modern

intellectual property law and the sharing of traditional knowledge and design, call-outs platforms are raising an important issue within the framework of intellectual property infringement: an issue that cannot be resolved by the law and legal frameworks alone, but by increasing representation and diversity within the fashion industry.

TAKING CONTROL: ONLINE COPYING CALL-OUTS AND THE POWER OF SOCIAL MEDIA; A CASE STUDY

Debates on intellectual property rights, particularly in the fashion industry, have found a new platform and this new global voice is leading to greater democratisation of the industry, with several key players leading the way in holding the industry accountable; the Instagram fashion-copying shaming account Diet Prada, and the viral social media campaign Give Credit.

These online platforms will be analysed as case studies for two themes: their contribution to the new wave of critical discourse on intangible rights protection within the fashion industry; and their contribution to the creation of a new type of extra-legal norm: online intellectual property shaming[64]. As these already popular platforms grow in reach, their discourse on intellectual property and so-called infringements is reaching a new audience on a massive scale. However, intellectual property and fashion design have a complex relationship. Policy tells us that intellectual property is a positive force in protecting creative outputs, but fashion is a creative industry that relies on the constant recycling of ideas and trends. Consequently, it is important to consider what effect these platforms have on the relationship between the consumer, the fashion industry, and the legal and regulatory frameworks that govern this area, at a time where non-statutory forces are holding the industry to account – even in the absence of a recognisable legal infringement.

While there is a developing discourse on the effect of these platforms within the realm of fashion and fashion academia, and how it affects the fashion industry, there has been limited consideration given to the impact of these new extra-legal social norms on the legal profession and academy. Brewer argues that the growth of active online media is one of the key reasons why a new legal rigor has been injected into the study of fashion and the law in recent years[65]. He also notes, however, that the legal academy, and legal professionals, must be more responsive to the 'fast-paced, global and social media-influenced society in which we live[66]', and that a greater

[64] Adler and Fromer, 'Taking Intellectual Property into Their Own Hands'.
[65] Brewer also considers a growing body of academic and professional literature, the establishment of formal academic fashion law programs and increasing interest from the professional legal community as reasons for the growing interest in fashion law.
[66] Brewer, 'Fashion Law'. Pg. 783

awareness of legal issues underpinning the fashion industry and its stakeholders is needed to effectively invoke meaningful change:

> […] legal practice must respond to changing business environments, new social norms and expectations, and the interconnected, globalised world[67].

Gerrie considered the effect of these new cultural phenomena, specifically the Instagram account Diet Prada, on the contemporary fashion industry, and what this means for the future of the industry[68]. Her article argued that these new media platforms, and the consequent democratisation that has been initiated within the fashion industry, have created a new type of culture within fashion: 'call-out' culture. Whether the legal academy needs to be more responsive to internet call-outs, particularly those of 'copycatting[69]' or 'appropriating', will be deduced through the examination of these two Instagram platforms, who use their voice to call-out 'copycatting' and 'appropriation' in the industry. Given the significant reach and unique background of the Diet Prada Instagram account, it will be analysed for its unusual and inconsistent methodologies and style of call-outs. It will be compared with the Give Credit social media campaign, a successful online platform with similar methodologies to Diet Prada, but with a more modest reach, an educative approach, and a focus on calling-out the perceived theft of cultural intellectual property by fashion brands. Whatever their reach, both these platforms have positioned themselves as online watchdogs and created an upsurge of once passive consumers and other stakeholders calling fashion industry heavyweights to account on what they perceive to be violations of intellectual property rights.

This analysis will explore how the use of shame-based call-outs for perceived intellectual property violations sits with the concept of intellectual property negative space, which will in turn be further analysed. Fashion's place within the intellectual property negative space is complex; on the one hand, it could be argued that its subject matter in many jurisdictions falls within the heartland of traditional intellectual

[67] Brewer. Pg. 746

[68] Vanessa Gerrie, 'The Diet Prada Effect: "Call-out Culture" in the Contemporary Fashionscape', *Clothing Cultures* 6, no. 1 (1 March 2019): 97–113, https://doi.org/10.1386/cc_00006_1.

[69] The term 'copycatting' is frequently used by Diet Prada in their call-outs. Although they have not offered a definition of what they believe 'copycatting' to be, it appears to cover a myriad of intellectual property infringements and will be used from time-to-time in this dissertation to mirror their use of language.

property protections, namely trademarks and copyright. However, in the US fashion design struggles to be protected by copyright law, as clothing is deemed to be a useful, functional article, and therefore outside the scope of protection. Furthermore, cultural intellectual property and the traditional designs of indigenous communities sit uncomfortably within global intellectual property systems. Arguably, many modern intellectual property systems are not fit-for-purpose and do not fully protect cultural design expressions – these sit within the negative intellectual property space. Consequently, this new norm is playing out against an interesting legal backdrop. With it becoming increasingly difficult to ignore the popularity and accessibility of these online accounts, this chapter will start to consider whether law-makers and the legal academy should take into account how these online platforms interact with conventional intellectual property laws when considering new protections or changes to current protections. These accounts are heavily influencing the discussion on intellectual property protection in fashion design on a huge scale and they hold significant value in the critical debate surrounding this area of the law. If legal professionals and fashion insiders worked together to support consumers and individuals to get beyond the manifesto that everything that is similar is copied, a real and sustainable shift in the discussion around intangible rights protection in the fashion industry could ensure that a balance is found between protecting creative intellectual property and by consequence, creative livelihoods, and recognising that fashion is an industry built on the constant recycling of ideas and trends. This shift in the discussion raises a number of difficult questions; can the legal professionals and the social media-shamers build a successful intellectual property hybrid framework where the fashion industry operates in a necessary culture of openness yet interlinks with traditional legal protection, and those on the receiving end of the copying call-outs are able to respond to and defend themselves against the allegations of ‘copycatting’ so publicly levelled against them? How should the legal professions engage in this new type of shame-based call-out culture? The advantages and disadvantages of using these platforms will form the basis of a comparison with conventional intellectual property enforcement in Chapter 4, to better understand whether this new phenomenon can achieve the same, if not better, results for aggrieved designers and artisans, whilst allowing the parties on the receiving end of the call-outs the right to defend themselves.

DIET PRADA

Plagiarism, copycatting, piracy, theft and (mis)-appropriation are amongst the myriad terms that Diet Prada use in their copying call-outs. The use of particularly the word 'theft', most commonly associated with criminality, tells us that discussions on originality and ethics in fashion design and design-copying is an emotive subject for those in the creative industries, and the focus of much of the current critical discourse. Crouch argues that alongside the intellectual property rights that arise when someone creates something, creators are also managing a different type of property: emotional property. He defines this as "the emotional investment in or attachment to creations of the heart and mind"[70].

The distinction between intellectual property as a legal right and emotional property as something that sits closely alongside is an important one in the study of these online fashion watchdogs, because the emotional aspect is often what drives the platforms. Tony Liu, one half of Diet Prada, says:

> A part of the drive to keep doing this is to help out the brands that have been knocked off. Sure, they can send out a tweet or message, but they need somebody to elevate that. A lot of them don't have the money to litigate, so social-media shaming really helps because it catches on[71].

Tapping into the emotional side of the perceived intellectual property infringements that they call-out, in an industry "where almost all creation may be development"[72], has allowed Diet Prada to position itself as one of the most powerful voices in online fashion-copying call-outs, but also one of the most controversial. On the one hand, it has been credited with educating the public on the importance of respecting the creative work of others, and the cultural histories that often inspire designs. On the other hand, it is criticised for its heavy-handed, one-sided and biased approach in issuing call-outs that leave little scope for the 'accused' to defend themselves.

[70] Dennis Crouch, 'Managing the "Emotional Property" That Comes with Consumer Generated Intellectual Property (CGIP)?', Patently-O, accessed 26 November 2021, https://patentlyo.com/patent/2017/11/emotional-generated-intellectual.html.
[71] Divya Gursahani, 'Meet the Brains behind Diet Prada, Lindsey Schuyler and Tony Liu', Elle India, accessed 29 May 2020, https://elle.in/article/lindsey-schuyler-tony-liu-diet-prada/.
[72] Alice Janssens and Mariangela Lavanga, 'An Expensive, Confusing, and Ineffective Suit of Armor: Investigating Risks of Design Piracy and Perceptions of the Design Rights Available to Emerging Fashion Designers in the Digital Age', *Fashion Theory* 24, no. 2 (23 February 2020): 229–60, https://doi.org/10.1080/1362704X.2018.1515159.

Who are Diet Prada?

Diet Prada (former tagline: "ppl knocking each other off lol"[73]), is an Instagram account, founded in 2014 by two initially anonymous US-based freelance fashion designers, later outed as Tony Liu and Lindsey Schuyler[74]. Described as the fashion industry's 'most feared account'[75], its mission is simple: to 'air the fashion industry's dirty laundry'. The account initially aimed to highlight design piracy in the industry, using the simple method of juxtaposing images of two fashion designs and posting them online, to show the widespread copying of designs. It has since moved beyond copying, to calling out issues of racism, cultural appropriation, bad practice, and bigotry in the industry. As the first of its kind, the account garnered huge amounts of attention and grew at a meteoric rate; today it boasts 3 million followers. Asked why she started the site, founder Lindsey Schuyler said "copycatting is far from a victimless crime, especially for small designers. It can wreck their businesses." Co-founder Tony Liu added that Diet Prada is "helping out small companies that don't have financial resources to litigate"[76]. Dubbed "the fashion vigilantes", a title they have said they are happy to accept, Diet Prada has, ironically, seen its model reproduced across the creative industries[77]. The popularity of such accounts is that they act as the direct link between industry insider and consumer. Gerrie argues that this is central to their success:

> The fashion industry was hermetically-sealed within a hierarchical homogenous system and now through social media and call-out culture, access has really opened up and people are empowered to challenge these big businesses in a meaningful way.[78]

[73] Until very recently, this was Diet Prada's tagline. Their recent venture into calling-out the wider issues of the fashion industry has seen them change their tagline from "*ppl knocking each other off lol" to "fashion lol".* The archived website with the former tagline can be found at 'DIET PRADA', accessed 6 March 2022, http://web.archive.org/web/20180626174135/https://www.dietprada.com/.

[74] Julie Zerbo, 'Meet Tony Liu and Lindsey Schuyler: The Duo Behind Diet Prada', The Fashion Law, 19 October 2017, accessed 14 May 2020, https://www.thefashionlaw.com/meet-tony-liu-and-lindsey-schuyler-the-duo-behind-diet-prada/.

[75] Lauren Sherman, 'Diet Prada Unmasked', The Business of Fashion, 8 May 2018, https://www.businessoffashion.com/articles/professional/diet-prada-instagram-unmasked-tony-liu-lindsey-schuyler. BOF

[76] Hannah Marriott, 'Diet Prada: The Instagram Account That Airs the Fashion Industry's Dirty Laundry', *The Guardian*, 22 May 2018, sec. Fashion, accessed 14 May 2020, https://www.theguardian.com/fashion/2018/may/22/diet-prada-the-instagram-account-that-airs-the-fashion-industrys-dirty-laundry.

[77] *See* The White Pube and Estée Laundry, as mentioned in Chapter 2.

[78] Gerrie is quoted in an interview with Marc Richardson. *See* Marc Richardson, 'Has the Proliferation of Watchdog Accounts Bred a "Good Samaritan" Culture in Fashion?', Fashionista, accessed 14 May 2020, https://fashionista.com/2019/12/fashion-industry-watchdogs-good-samaritans.

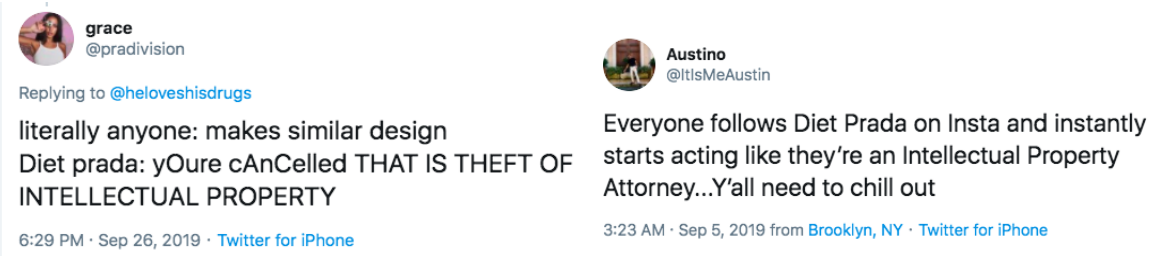
Diet Prada's ability to strike fear amongst fashion industry heavyweights is impressive, and a testament to how desperate consumers and other industry stakeholders are to have a critical voice in an industry that was once so closed to criticism. Their informal tone, sarcastic quips, clever photo selection, lack of legalese and uninhibited directness of language, have all been credited as the reason for Diet Prada's success and its large following. Although they market themselves as the "online authority on who's ripping off who", Gerrie points out that Diet Prada's copycat call-outs "sit within the realm of informed opinion"[79], and not within the ethics of legal frameworks regulating intellectual property rights. Gerrie is not alone in this argument, with many critics of Diet Prada believing that, as the founders lack legal backgrounds, they are playing a dangerous game: the 'education' of their followers on the legal issues surrounding copycatting creates a knock-on effect of fear within creative fashion communities. Law student Klatskin, in the Columbia Law Journal student blog, describes Diet Prada as a self-proclaimed judge in the "court of public opinion", and goes on to say:

> Shrouded in pseudo-intellectualism, the account has millions of followers convinced they're catching a bandit who is flouting IP laws. Often, however, there is little legal merit to the clickbait "scandal" that a Diet Prada post alleges[80].

As we will see in the examples below, Diet Prada's call-outs tread a fine line between encouraging discussion, debate and change, and encouraging boycotts, and followers to withdraw their support of the brands entirely, arguably stopping progress altogether.

[79] Gerrie, 'The Diet Prada Effect'. Pg. 99.
[80] Lillian Klatskin, 'Diet Prada and the Court of Public Opinion | The Columbia Journal of Law & the Arts', (student-edited online blog) accessed 24 May 2021, https://journals.library.columbia.edu/index.php/lawandarts/announcement/view/362.

Figure 1: Tweets referencing Diet Prada and their effect on how we view intellectual property[81]



The Diet Prada methodology

> "The web is a place for digital cavemen, and people like Diet Prada act like the cavemen of critics, articulating their basic thoughts in pictures and rather basic words." - Angelo Flaccavento in Arena Homme Magazine[82]

Diet Prada's methodology in calling-out copycatting, despite its social media prominence, is inconsistent, unpredictable and controversial. It is the subject of much discussion within the fashion industry, and increasingly in the legal professions too. Although there is a broad feeling amongst intellectual property lawyers that platforms like Diet Prada are "generally not a bad thing"[83] in the debate on copying, Zerbo states that many of the 'copies' that Diet Prada features are not actually copies, "legally and otherwise[84]".

The image

Diet Prada's call-outs use a simple method of juxtaposing two images side-by-side: the original item and the alleged copy or appropriated design. This method is deceptively simple as careful consideration is given to the model wearing the items; the pose, angles, lighting, and background setting are also clearly considered, making the apparent copying all the more shocking to the audience (see Figure 2).

---

[81] grace, '@heloveshisdrugs Literally Anyone: Makes Similar Design Diet Prada: YOure CAnCelled THAT IS THEFT OF INTELLECTUAL PROPERTY', Tweet, *@pradivision* (blog), 26 September 2019, https://twitter.com/pradivision/status/1177273993562415106. and 30 About To Take Me Out, 'Everyone Follows Diet Prada on Insta and Instantly Starts Acting like They're an Intellectual Property Attorney...Y'all Need to Chill out', Tweet, *@ItIsMeAustin* (blog), 5 September 2019, https://twitter.com/ItIsMeAustin/status/1169435960431521794.

[82] Jordan Anderson, 'Diet Prada: Investigative Influencers or Influential Investigators?', nss magazine, accessed 28 May 2020, https://www.nssmag.com/en/article/17924.

[83] Douglas Hand, a partner at American law firm Hand Baldachin & Associates (HBA) in an interview for The Fashion Law, Russia http://fashion-law.ru/post/legal-consulting-in-the-field-of-fashion-the-usa-and-italy

[84] Julie Zerbo, 'Hey Fashion, Not Everything That Is Similar Is "Copied"', The Fashion Law, 24 May 2017, https://www.thefashionlaw.com/hey-fashion-not-everything-that-is-similar-is-copied/.

Coupled with an emotive caption, it is hard not to look at the post and feel a strong sense of injustice.

Figure *2*: Diet Prada's call-out of Missguided[85]

Diet Prada's Liu and Schuyler credit their almost encyclopaedic knowledge of the fashion industry and brand collections with their ability to present the images in such a format:

> Tony and I met through work. We would be going over the runways, always talking about fashion and where our love for it came from. As we clicked through the shows, we'd spot copies and say, "Oh, that's so Prada," or "That's so Galliano," and "Who are they really kidding?" We would pull up references and place them side by side, and it was just like, "Oh my God, I can't!" So, we started making collages and texting them to our friends.[86]

[85] Diet Prada ™ (@diet_prada) Posted on Instagram • Jul 3, 2020 at 2:04am UTC', Instagram, accessed 22 November 2021, https://www.instagram.com/p/CCKZlTeHVgv/.
[86] Gursahani, 'Meet the Brains behind Diet Prada, Lindsey Schuyler and Tony Liu'.

The language

Diet Prada's use of language is arguably what sets it apart from other online platforms committed to changing the discourse on fashion copycats. Their use of juxtaposed, carefully selected images is clever, but their language is key to taking their message direct to the audience that they rely on for effecting change: the consumer. There is rarely, if ever, a mention of trademarks or copyright in their call-outs. In 2017, whilst still operating anonymously, they commented on their language, calling it 'dry', 'sarcastic' and 'witty', saying:

> We're not being mean – we just want to point out where designers have done wrong […] Nothing about our tone is formulaic; it's just how we naturally speak […] Other sites may speak the same content but not the same language, and at the end of the day, it's about how you connect with people. We've been surprised to find such an audience[87].

One of the posts that gathered significant traction was their call-out of French brand Jacquemus in 2018 (see Figure 3). Whilst the substance of the call-out was weighted with issues of intellectual property infringements, it was the language they used that garnered the most attention. They called out the brand for not only directly copying the designs of a small, Mexican brand, Olmos & Flores, but also for using local artisan techniques from the country to create the design. It is clear from both the image and the text included at Figure 3 that there was a critical discussion to be had around both, but it was Diet Prada's tone and language that incited the most debate.

[87] Amelia Diamond, 'Diet Prada: The Instagram Account Calling Out Fashion Copy-Cats', Man Repeller, 20 December 2017, https://www.manrepeller.com/2017/12/diet-prada-instagram.html.

Figure *3*: Diet Prada's call-out of Jacquemus[88]

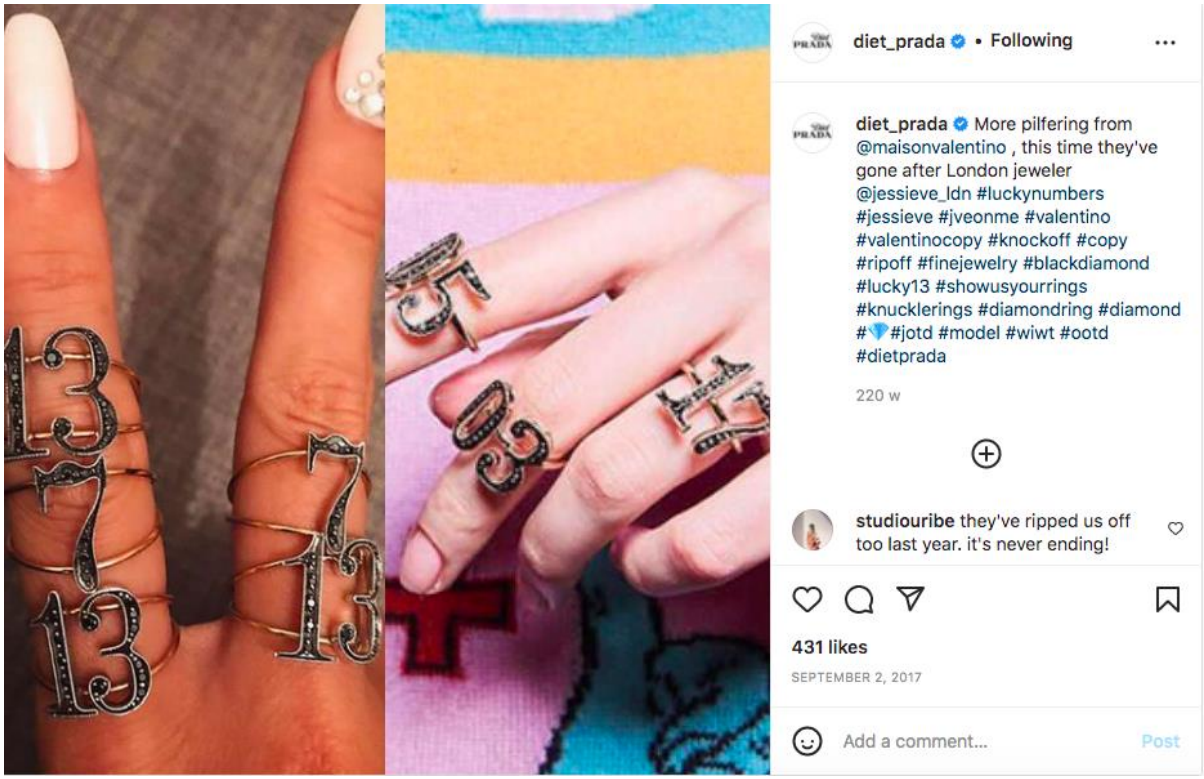
The cutting closing statement in their caption ("when you're the industry's current darling, you can try....but, you can't always have it all lol") led to accusations of bullying. Jacquemus responded to this call-out with a statement, in which he accused Diet Prada of being 'fake news'; in turn, Phillip Picardi of Teen Vogue responded in favour of Diet Prada, saying "our industry needs to do better than this […] our creatives must be held accountable."[89] Following the call-out, Jacquemus deleted the image of their hat from their Instagram account. This could be deemed something of a very small success for Diet Prada; however, their tone and language in the original post changes the debate to one of bullying and fake news, instead of copyright infringement and appropriation of cultural intellectual property. Picardi's latter point about holding creatives accountable for injustices in the industry goes some way towards bringing the conversation back to it, but arguably the point is

[88] 'Diet Prada ™ on Instagram: "So...That @jacquemus Hat on Bella That Went Viral Actually Belongs to Mexican Brand @olmosyflores . More Specifically, the Hat Was Created…"', Instagram, accessed 22 November 2021, https://www.instagram.com/p/BknQy5xHBa0/.

[89] The statements were made via Instagram stories, and widely shared via social media. Although the original story is now unavailable, copies can be accessed at https://www.harpersbazaar.com.au/fashion/jacquemus-diet-prada-fight-16857. Picardi's statement in full reads: "Fashion designers who use Trumpian language (i.e. "fake news") and tactics to discredit the media for criticising them and/or calling things out that they do not like are playing into dangerous rhetoric that fosters hatred, and yes, violence towards journalists for telling the truth […] When you compound this language with the fact that most of these designers rarely speak out on actual injustices in the world for fear of alienating customers, or considering taking a stance on civil rights and equality "not a brand priority," one begins to questions not just their words, but their character. Our industry needs to do better than this. And our creatives must be held accountable."

missed. Although the success of their Jacquemus call-out is questionable, Diet Prada are credited with helping smaller brands finally be heard, and their intellectual property recognised, in a way that the legal profession has failed to do so far. In 2017, Diet Prada starts a campaign to support independent jewellery designer, Jessie VE, who is fighting a losing battle against luxury Italian fashion house, Valentino. Jessie Evans, founder of Jessie VE, accuses Valentino of copying her ring designs (see Figure 4). After a lengthy battle, involving lawyers, yet having little to no success, Valentino eventually withdraw their rings from sale after Diet Prada becomes involved and rallies their followers to call-out the brand.

Figure *4*: Diet Prada's call-out of Valentino of behalf of Jessie VE[90]



In 2017, Evans says, in an interview with The Financial Times[91]:

[90] 'Diet Prada ™ on Instagram: "More Pilfering from @maisonvalentino , This Time They've Gone after London Jeweler @jessieve_ldn #luckynumbers #jessieve #jveonme…"', accessed 22 November 2021, https://www.instagram.com/p/BYioA9CFZC_/?hl=en-gb.
[91] Lou Stoppard, 'Diet Prada — Fashion's Most Powerful Critic', 27 December 2017, https://www.ft.com/content/777edf64-c94a-11e7-8536-d321d0d897a3.

> My brand is just over two years old and in that time I've had to send at least 10 cease and desist letters […] Before Diet Prada I spent a lot of money instructing lawyers to handle the theft of my intellectual property. I felt that I didn't have a lot of power against big companies — I fought a lot of cases very privately and felt quite deflated because it feels relentless — especially as finances aren't endless for a small business. It wasn't until Diet Prada that I realised the power of social media, and how angry it makes consumers when companies copy independent designer's work. Since then I've called out numerous cases through my social media and received a much more prompt response and apology from brands that have copied my work.

The narrative

Although the founders of Diet Prada argue that they have simply built 'a vessel for other people's narratives'[92], they face criticism for creating their own false narratives. Their portrayal of intellectual property and its associated rights may be partially correct, but it is also fraught with bias and a lack of fact-checking. In a YouTube video posted in March 2020, Ayo Ojo, aka The Fashion Archive, suggests that Diet Prada is promoting false narratives, using their February 2020 call-out of US-designer Virgil Abloh's brand Off-White as an example (see Figure 5)[93]. Ojo asserts that, whilst he is supportive of Diet Prada generally, and of their goal to bring a critical discourse to the industry specifically, their Off-White post "didn't make too much sense":

> Now the issue with Diet Prada is, because it is so big, and they have such a big fan-base, what normally happens with big platforms like that is that if they have any misinformation, or they badly report something, or if there isn't a lot of basis to what they're saying but they say it anyway, they're going to have a big audience of people who share the same narrative […] They run with those

[92] Erika Houle, SSENSE, 'Diet Prada After Dark', ssense, 5 February 2018, https://www.ssense.com/en-us/editorial/fashion/diet-prada-after-dark.

[93] Virgil Abloh's brand Off-White was selected as a case study for this dissertation in March 2020. Sadly, on 28th November 2021, Abloh passed away following a private battle with cancer. Careful consideration was given as to whether it was appropriate to continue to include this case study, given that some of the call-outs blur the line between the individual and the brand. It was decided that it is important to retain the case study, as it is one of the most prominent examples of alleged bias from Diet Prada.

> opinions and with those ideas […] Things like this can be very detrimental to the industry as it detracts from people thinking for themselves, it stops them from thinking "yes I said this, but go and do your own research […] (sic)[94]

Figure 5: Diet Prada's call-out of Off-White[95]

Ojo's criticism that Diet Prada's information can be inaccurate is shared by many of their critics. Zerbo summarises these concerns by asking: 'who's watching the watchdog?". She adds:

> I have concerns in terms of the transparency of their methods– about who's holding them accountable, and I really think this is a function of the fact that they do have such a broad reach.[96]

[94] Ayo Ojo, *Is Diet Prada Promoting False Narratives? (Off-White / Virgil Abloh Discussion)*, accessed 11 June 2020, https://www.youtube.com/watch?v=VbDqyqqGAiM.
[95] 'Diet Prada ™ on Instagram: "@off____white Puts a Hoodie on a @givenchyofficial Spring 2020 Couture Gown for Its FW2020 Ready-to-Wear Collection Lol. • #offwhite…"', accessed 22 November 2021, https://www.instagram.com/p/B9Hog9On34y/?hl=en.
[96] Sterling Roberts, 'What to Know about Fashion Industry Watchdog Diet Prada', accessed 11 June 2020, http://coulture.org/what-to-know-about-fashion-industry-watchdog-diet-prada/.

In his video, Ojo considers whether Diet Prada understand the nature of trend forecasting, fashion archiving, and what truly constitutes an infringement of intellectual property rights. He notes that the shape of the Off-White dress is very different to the Givenchy one, and that Givenchy are not the first or the last to make a voluminous dress that looks like a wedding dress: fashion archives are full of them. Ojo's thoughts on what constitutes copying mirror the argument, put forward by Hemphill and Suk in 2009, that "derivation, inspiration, and borrowing are valuable and central to fashion and innovation."[97] This raises an important question in the digital age, and in the context of new online platforms introducing a mass audience to snippets of intellectual property law: how do you define copying in an industry where almost every creation is the development of something that has come before? Hemphill and Suk stress the importance of an awareness between "close copying on one hand and participation in common trends on the other"[98]. It is worth noting that they make this observation in 2009, before platforms such as Diet Prada come to prominence; their argument maintains its relevance in this new context. Ojo's remark that the dresses in Figure 5 look like wedding dresses is pertinent, and addressed by Hemphill and Suk: how do you define copying as opposed to participation in a trend, when the item in question, such as a wedding dress, will always be 'in fashion'? Fashion design relies on its ability to build on the past, evolving and developing previous ideas and trends. Consequently, it can be very difficult to determine originality in fashion design. Diet Prada's call-outs on fashion design create an unhelpful narrative around what constitutes intellectual property infringement by way of close copying, and what does not.

Ojo's final explanation as to why he thinks Diet Prada's call-out of Off-White "didn't make sense" reflects that of many of their critics: they may be biased[99]. Since their 'outing' in 2017, Liu and Schulyer have been criticised for bias in their methods; for instance, they are accused of exonerating brands such as Gucci and Prada. Liu and Schuyler have acknowledged these criticisms, saying that accusing brands of copying "can be completely subjective and definitely not immune to personal bias at

[97] Hemphill and Suk, 'The Law, Culture, and Economics of Fashion'. Pg. 1180
[98] Hemphill and Suk. Pg. 1153
[99] Accusations of bias have followed Diet Prada since they began, and it is something that they have acknowledged themselves, however their many critics are always keen to point out the hypocrisy of their own personal and political bias when their account often calls-out individuals and businesses for bias.

times"[100]. For many, however, it was no surprise when they appeared in the front row of Prada's show and took over Gucci's Instagram account in 2017: suddenly these brands' pardoning at the hands of Diet Prada seems to make sense. Prada do not even appear to mind that the platform has appropriated their name; Adler and Fromer point out that this irony seems to be lost on the 'unironically sanctimonious' duo[101].

Ojo argues that Diet Prada are biased against Off-White: their CEO, Virgil Abloh, is targeted by Diet Prada more than once through the medium of both Instagram call-outs and negative comments in interviews. Ojo suggests that brands other than Off-White, who never seem to end up on the dreaded Diet Prada call-out list, act in similar or worse ways. He uses the example of KAPITAL[102], a family-run Japanese company hailed as 'a highly coveted, globally influential fashion brand,'[103] known for their denim and bandana-print shirts and jackets. KAPITAL's garments apparently copy that of Loewe, Jean-Paul Gaultier, and Visvim. Ojo wonders why KAPITAL has never been called out by Diet Prada, suggesting that their methodology is inconsistent. Schulyer responds to this argument indirectly in 2018:

> I don't want to tell people what to do or how to live their lives but to help develop that critical eye. I want to be able to love the fashion industry more purely. The more I learn about it, I think, 'Well this needs to change.' It needs to change so that I can keep loving it[104]

The submissions

So strong and influential is Diet Prada's following that they have been nicknamed 'Dieters'. They are arguably the key to the success of the platform: the 'Good Samaritans' that take on the responsibility of holding brands and individuals in the

[100] Jonah Engel Bromwich, 'We're All Drinking Diet Prada Now', *The New York Times*, 14 March 2019, sec. Fashion, https://www.nytimes.com/2019/03/14/fashion/diet-prada.html.
[101] Adler and Fromer, 'Taking Intellectual Property into Their Own Hands'. Pg 1480
[102] 'KAPITAL', accessed 11 June 2020, https://www.kapital.jp/.
[103] Noah Johnson, 'A Rare Visit to Japan's Denim Paradise', GQ, accessed 31 May 2020, https://www.gq.com/story/kapital-denim-is-a-japanese-paradise.
[104] Jonathan Sawyer, 'Meet the Duo Behind Diet Prada in New Tell-All Interview', Highsnobiety, 8 May 2018, https://www.highsnobiety.com/p/diet-prada-identity-bof-interview/.

fashion industry to account. They are also responsible for some of the call-outs on the page, which encourages them to submit instances of alleged copycatting; the main contributors are nicknamed "Star Dieters."[105] Using the community of 'Dieters' to find copied designs has worked well for Diet Prada, strengthening its voice as the most feared critic of the industry. However, this method raises issues. Inviting submissions from its 3 million followers – most, it is fair to assume, neither intellectual property experts nor fashion industry insiders – suggests that many of its featured copycatting are arguably without merit. Figure 6 is an example of where the Diet Prada methodology shows its weakness: many followers recognise that styling two models in a plain polo-neck and coat could hardly be considered copycatting.

Figure 6: Diet Prada's call-out of Ami Paris[106]

[105] Imogen Clyde-Smith, 'Diet Prada And The Age Of Copycat Culture | FIB', accessed 11 June 2020, https://fashionindustrybroadcast.com/2018/08/02/diet-prada-and-the-age-of-copycat-culture/.
[106] 'Diet Prada ™ on Instagram: "We All Miss Phoebe...Even @amiparis Lol. • #celine #phoebephilo #pfw #parisfashionweek #rtw #ami #amiparis #turtleneck #knitwear #tailoring…"', accessed 22 November 2021, https://www.instagram.com/p/BrqPQ-ZF_mE/c/17943602290251900/.

Their own definition of "intellectual property"

Diet Prada have taken it upon themselves to define intellectual property infringement in their own terms, so that as far as they are concerned, their call-outs are merited:

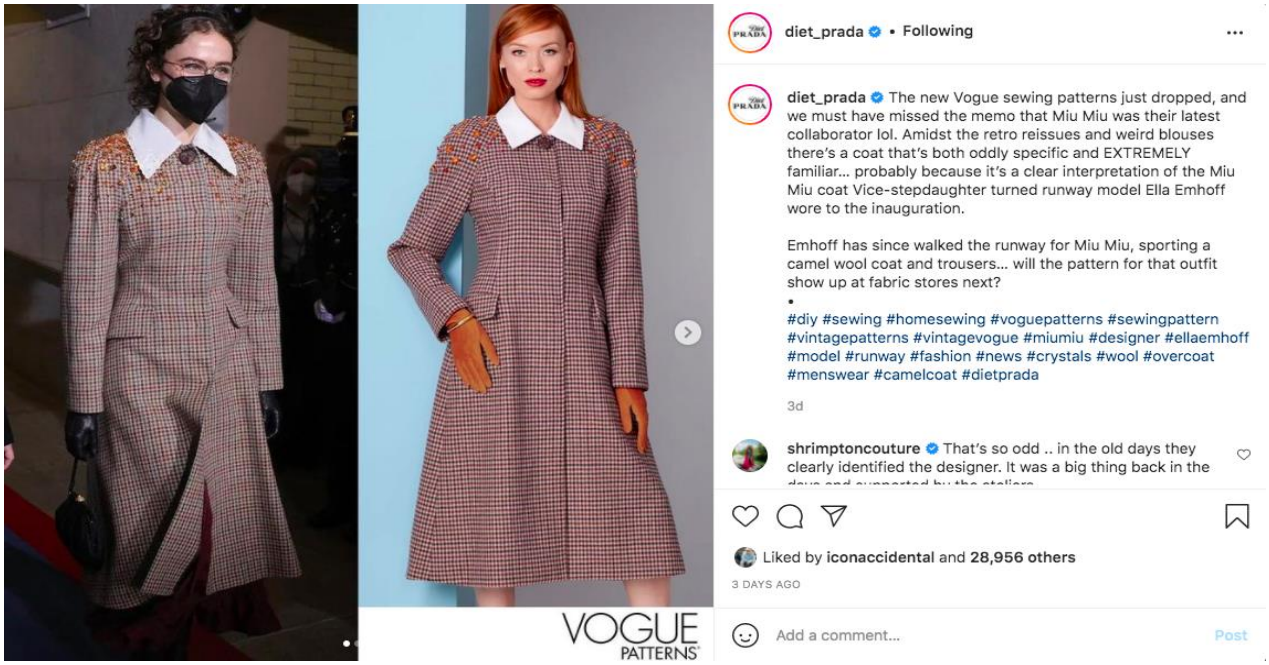
> When it's from a place of love (and credited) it's inspiration. If you're trying to keep the reference quiet and cash in on someone else's proven success, then you're into theft territory.[107]

Diet Prada's approach reveals a contradiction; on the one hand they are over-critical of those they believe infringe someone else's intellectual property rights, and on the other hand, under-critical of intellectual property laws and case law that shape our understanding of what is and is not a copy, as well as the defences available to those accused of 'copycatting'. Despite their unconventional methodologies and their lack of insight into the laws that govern copying within fashion, they have a very real commercial impact and the power to cause significant financial losses and negative press for a brand that they call-out[108], even if the alleged copying has no legal standing. A post from October 2021, shown in Figure 7 below, shows a call-out with, arguably, no legal standing; however, at the time of writing it has received strong engagement from followers, many commenting and offering their support. Misunderstanding the legal landscape, where the licensing of patterns has been a standard process for many years in the fashion industry, Diet Prada presents this as a black and white case of copycatting.

[107] Max Grobe, 'Diet Prada's IG Account Calls Out Copycat Culture in Fashion', Highsnobiety, 24 October 2017, https://www.highsnobiety.com/p/diet-prada-copy-fashion/.

[108] Diet Prada are currently involved defamation lawsuit which has been brought against them by Dolce and Gabbana. Although the call-out concerned was not about copycatting in this case, Dolce and Gabbana allege that Diet Prada should be held accountable for their lost revenue following the call-out and are demanding that damages in the amount of €3 million for Dolce & Gabbana and €1 million for Stefano Gabbana. The Fashion Law Institute, based at Fordham Law School, is coordinating Diet Prada's defence. Further information can be found at: https://www.businessoffashion.com/articles/luxury/dolce-gabbana-sues-diet-prada-for-defamation

Figure 7: Diet Prada calling-out the licensing of a Miu Miu pattern, shared by Vogue[109]

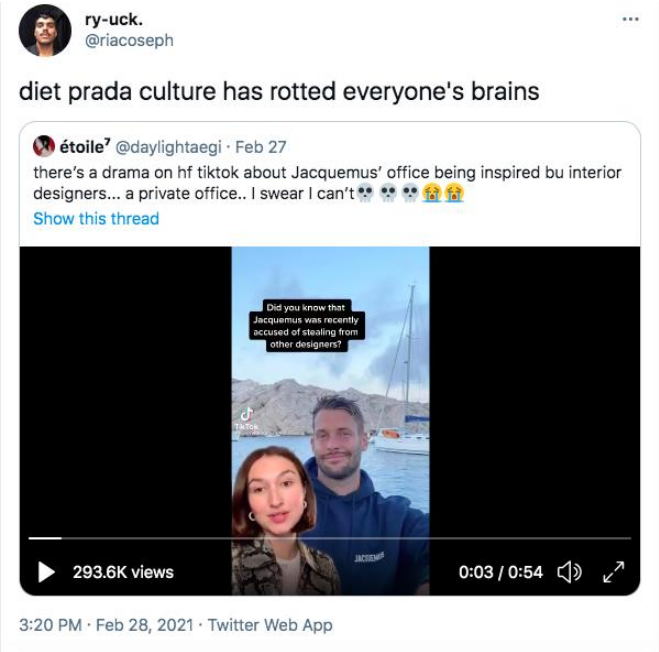


Diet Prada tap into a distinct set of emotions and sense of unfairness that stir their followers into acting as the jury to their self-proclaimed judge. Despite branding themselves as online "social justice warriors[110]", they do not appear to have considered if it is socially responsible to push their definition and narrative of intellectual property protection in fashion, on a platform with millions of highly-engaged followers, where the brands they shame have little power to respond and defend their designs in a measured way. This is particularly insidious when the call-outs are so emotionally charged, often resulting in financial or reputational harm to the alleged infringer. As one Twitter user puts it, their place within call-out culture and their narrative on copycatting have become so extreme that they have "rotted everyone's brains":

[109] 'Diet Prada ™ on Instagram: The New Vogue Sewing Patterns Just Dropped, and We Must Have Missed the Memo That Miu Miu Was Their Latest Collaborator Lol. Amidst the Retro Reissues and Weird Blouses There's a Coat That's Both Oddly Specific and EXTREMELY Familiar…', accessed 30 May 2022, https://www.instagram.com/diet_prada/.

[110] Social justice warrior is a pejorative term for people who hold socially progressive views. In recent years, with the rise of call-out/cancel culture, the term has become increasingly controversial and has shifted from having mostly positive connotation, to a negative one.

Figure 8: A Tweet reflecting some of the criticism levelled towards “Diet Prada Culture" [111]



Bringing a discussion about copying to such a large public following has the potential to open up a nuanced conversation on fashion design protection. However, within the bounds of Diet Prada’s own definition of intellectual property, it seems instead that their goal in shaming copycatters is not to equip their followers with practical knowledge about intellectual property rights, but to enforce a new, extra-legal, norm that requires fashion designers to cite their inspiration. This comes across as a non-negotiable, hardline, global ‘fair use’ doctrine of their own, which sits outside the complexities and unpredictability of intellectual property law: if designers cite or reference all their inspiration in the creation of a design, then it is not copy; if they do not, then it is copy. Arguably, this might not rebalance the industry in the way Diet Prada seem to think it will. It is unlikely to be welcomed by intellectual property lawyers, given its lack of legal nuance, or by fashion brands, who will have to justify each of their designs. As seen in the previous literature on the piracy paradox theory, this could also stifle innovation and creativity in the industry. It would not put an end to copying: it would simply allow larger, richer high-end brands to continue copying smaller brands as long as they cite their inspiration.

[111] ry-uck., ‘Diet Prada Culture Has Rotted Everyone’s Brains’, Tweet, *@riacoseph* (blog), 28 February 2021, https://twitter.com/riacoseph/status/1366045660345163777.

This new norm of online intellectual property shaming, created in part by Diet Prada, seems, for now at least, is here to stay. Therefore, the question remains whether the wider 'Diet Prada effect' has a positive outcome for aggrieved creators and designers. The second case study below, Give Credit, will consider the impact of other online platforms who call-out and shame brands in a less polarising manner than Diet Prada.

GIVE CREDIT

The Give Credit Instagram account takes a different approach to Diet Prada, keeping its remit simple and focused on calling-out what they perceive to be the plagiarism of traditional designs of local artisan communities across the world by large fashion brands. They call for stronger laws, frameworks and regulations to protect traditional design expressions from such abuses. Their focus on cultural design expression brings some legal nuance to the debate on copying in the fashion industry, something that Diet Prada lacks. As mentioned above, cultural designs fall within a complex area of modern intellectual property law: not fully within its negative space, but not in its heartland either. Whilst modern intellectual property regimes offer some protection for traditional cultural designs, its remedies sit within a web of intellectual property, cultural identity and tradition; consequently, it is often shoe-horned into modern systems where it sits awkwardly. Give Credit's goal is to shine a light on some of the challenges that indigenous communities face in protecting their designs. They campaign for recognition, credit, remuneration and better legal protection. They share many similarities with Diet Prada, such as the use of Instagram as their main platform, or the use of juxtaposed images. However, Give Credit's educational mission and reform-focused goals are sometimes lost in the online noise and criticism surrounding the Diet Prada model of call-outs, and call-out culture more broadly.

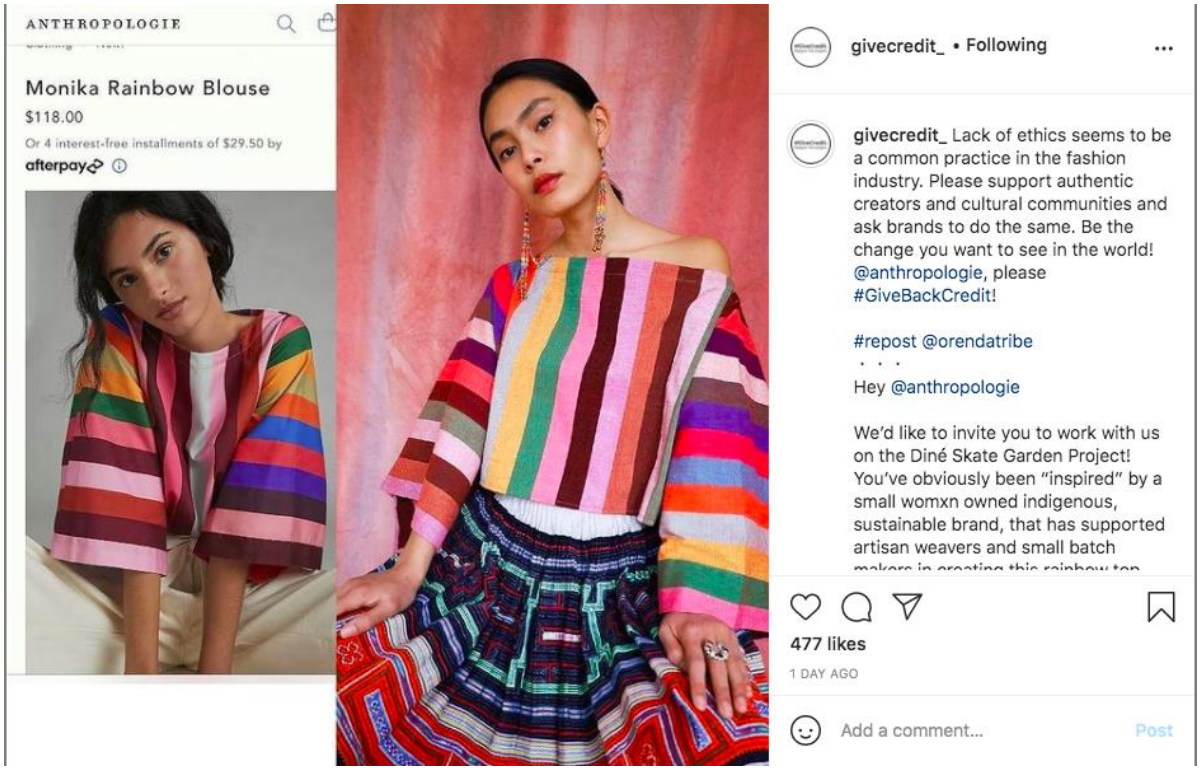
What is the Give Credit social media campaign?

Boasting a modest Instagram following of just over 6,000 followers, Give Credit asks "members of the fashion and design industry to #GiveCredit to the cultural communities they draw inspiration from"[112]. Diet Prada has also taken up the cause

[112] *See* Give Credit's Instagram biography #Givecredit. (@givecredit_) • Instagram Photos and Videos', accessed 22 November 2021, https://www.instagram.com/givecredit_/.

of calling-out cultural appropriation and perceived plagiarism of the intricate designs of indigenous cultures within the fashion industry. However, Give Credit adopts a more low-key, campaign approach, by asking fashion designers to clearly acknowledge the creators and indigenous communities that inspire the styles seen on designer catwalks. They use similar tactics to Diet Prada, uploading photos of the original designs alongside the version from the fashion brands who have copied them, showcasing their striking similarities:

Figure 9: Give Credit's call-out of Anthropologie[113]



However, Give Credit opts for a more educational approach on the apparent widespread theft of cultural intellectual property in fashion circles. They run conferences and webinars, share reading recommendations on the issues they feature, and encourage their readers to use their hashtag (#givecredit) and offer solutions to properly credit and recognise cultural intellectual property. They are also committed to sharing the work of other campaign groups who raise awareness of cultural copycatting. They offer up their platform for 'take overs' to affected communities, so they can share their own stories of the meaning and heritage of designs found in their traditional costumes and crafts. Give Credit is the brainchild of Andreea Tanasecu,[114] who was inspired when she noticed that major fashion labels frequently copied the traditional designs of her native country, Romania. Tanasecu's work on the Give Credit platform has been described as "a second wave of call-out culture[115]", with a goal to get people talking, raise awareness, and give a voice to

[113] '#Givecredit. (@givecredit_) on Instagram "Lack of Ethics Seems to Be a Common Practice in the Fashion Industry. Please Support Authentic Creators and Cultural Communities and Ask Brands to Do the Same." • Instagram Photos and Videos', accessed 27 February 2022, https://www.instagram.com/p/CL0-6eAJhMP/.
[114] 'Andreea Tănăsescu at the Feraru Conferences: Adorning the World with a Romanian Blouse', accessed 11 February 2021, https://www.icr.ro/pagini/andreea-tanasescu-at-the-feraru-conferences-adorning-the-world-with-a-romanian-blouse.
[115] 'Has The Proliferation Of Watchdog Accounts Bred A "Good Samaritan" Culture In Fashion?', *MR Magazine* (blog), 2 January 2020, https://mr-mag.com/has-the-proliferation-of-watchdog-accounts-bred-a-good-samaritan-culture-in-fashion/.

those traditional artisans who have, until now, been excluded from the debate on cultural appropriation and the so-called copycatting of their designs.

Embroidery of the Otomi People (Mexico)

Give Credit's work gained significant traction in 2019, when American fashion label, Carolina Herrera, was called out by Mexico's Minister of Culture, Alejandra Frausto, for appropriating the indigenous embroidery and motifs of the Otomi people. Give Credit pointed out that Carolina Herrera was certainly not the first, nor the last, to take strong inspiration from the Otomi people, sharing a number of posts shaming fashion brands – from the United Colours of Benetton to Cavalera (see Figure 10).

Figure 10: Give Credit's call-out of Cavalera[116]

Their posts are accompanied by captions explaining who the Otomi people are and calling for transparency in the design supply chain, in order to protect the intellectual

[116] '#Givecredit. (@givecredit_) @cavalera, Please #givecredit to the Artisans of Tenango de Doria. Respect Their Art, Culture and History. Learn from Them. It Took Hundreds of Years to Create These Amazing Designs.• Instagram Photos and Videos', accessed 27 February 2022, https://www.instagram.com/p/B36N7xAJTPc/.

property of indigenous groups and communities. They suggest that designers strongly need a framework to operate in, which encourages co-creation and collaboration but appropriately compensates the original artisans. Wes Gordon, Creative Director at Carolina Herrera, responded to the call-out by saying that whilst the collection did indeed have an "undeniable Mexican presence", the collection did not plagiarise the work of the Otomi people, it simply "highlight[ed] the importance of this magnificent cultural heritage"[117]. Give Credit's call-out prompted Cary Somers, founder of fashion activism movement Fashion Revolution, to share her view on the issues raised. Although Somers made it clear that Fashion Revolution is not a movement that singles out brands for their behaviour, because they "don't see this as an effective method of generating system-wide change", she felt it necessary to respond to Give Credit, given the apparent increase in cultural design theft within the industry. She said:

> Fashion has been a globalised industry for several centuries […] and throughout that time the true cost of economic development has far too frequently been born by indigenous peoples whose natural resources, skills, knowledge, and designs have been exploited to bring wealth to a few[118].

Somers suggests a solution to ensure that the intellectual property of indigenous groups used by fashion brands is both protected and fairly rewarded, echoing the demands of the Give Credit campaign:

> We now have the Nagoya Protocol[119] relating to the fair and equitable sharing of benefits relating to traditional knowledge of biological resources, although this should be implemented far more extensively by fashion brands. When will we see a similar protocol around the wider intellectual property of indigenous groups to

[117] 'Carolina Herrera's Creative Director Refutes Accusations of Cultural Appropriation', FashionNetwork.com, accessed 6 December 2021, https://ww.fashionnetwork.com/news/Carolina-herrera-s-creative-director-refutes-accusations-of-cultural-appropriation,1109153.html.
[118] '#GiveCredit: The Cultural Appropriation of Otomi Embroidery', Fashion Revolution, 17 June 2019, https://www.fashionrevolution.org/givecredit-the-cultural-appropriation-of-otomi-embroidery/.
[119] The Nagoya Protocol was introduced in 2014 and aims to ensure that owners of genetic resources receive a "fair share" of any benefits that arise from research that is carried out with those resources. It has been signed by over 50 countries including the UK and France, but the US is not currently a signatory. *See* The Nagoya Protocol – Nagoya Protocol Convention on Biological Diversity www.cbd.int

help not just to separate inspiration from appropriation, but to give designers and brands a framework within which to operate […]?

Romanian Embroidery

Between 2017 and 2019 alone, Give Credit called-out Christian Dior, Tony Burch[120], Sézane and Valentino (amongst others) for appropriating embroidered designs of the Romanian people.

Figure 11: A series of call-outs against the uncredited use of Romanian embroidery as featured on Give Credit's platform[121]

The photographic call-outs are accompanied by informative text. Some introduce the Romanian artisans, others offer further information on the history of the embroidery, and some reiterate the plea for a new framework where original artisans are fairly recognised and compensated for their intellectual property:

> Brands should @givecredit_ and share their benefits with the traditional communities. Co-creation is the right design process. Ask for permission, involve artisans, collectors or ethnographers. Help the community to protect its heritage. Inspire creativity. Create jobs. Say thank you. Respect people and their culture.[122]

[120] In March 2021, Give Credit described Tony Burch on Instagram as "*the champion of plagiarism*", one of their strongest call-outs so far, and using language usually reserved for Diet Prada. See '#Givecredit. (@givecredit_) "Tory Burch, the Champion of Plagiarism!" • Instagram Photos and Videos', accessed 27 February 2022, https://www.instagram.com/p/CM5VnRkphgz/.
[121] *See*, as an example in this series, '#Givecredit. (@givecredit_) "Ultimately, Brands of All Kinds May Learn to Lead with the Process, Rather than the Finished Product; to Credit Upfront the Communities That Inspired Them as Collaborators, Just like the Celebrities, Artists and Designers They Work with, so Everyone Profits." • Instagram Photos and Videos', accessed 27 February 2022, https://www.instagram.com/p/B2bKDeQIVXf/.
[122] '#Givecredit. on Instagram: "#Repost @lablouseroumaine ・・・ Brands Should @givecredit_ and Share Their Benefits with the Traditional Communities. Co-Creation Is The…"', accessed 27 February 2022, https://www.instagram.com/p/B49nLwbHaBk/.

The #GiveCredit Effect: change in action

2018 and 2019 were significant years in the debate on cultural (mis)-appropriation and copying in fashion design. While it had been rumbling for many years, Dior's alleged copying of the Romanian Bihor embroidery (as seen above at Figure 11), in the same year that they cast white actress Jennifer Lawrence to be the face of their so-called Mexican-inspired 2019 Cruise collection, added to Mexico calling-out Carolina Herrera's apparent copying of the Otomi embroidery, makes headlines across the world. Give Credit provides a platform to amplify the discussion, sharing images, showing other instances in which brands have appropriated the same designs, and suggesting further reading on the subject of cultural copying. They call for the creation of stronger legal frameworks to protect original artisans. Their work adds a new dimension to the discussion on culturally responsible fashion design, which is becoming a global social and cultural movement asking for a more culturally responsible fashion industry.

Dior (finally) shines the spotlight on Moroccan artisans

Give Credit's call-out of Dior discussed above was apparently noted at the luxury fashion house. In 2019, whilst publicising its upcoming 2020 Cruise Collection, Dior decide to spotlight the work and creativity of the Moroccan artisans enlisted by the brand in the creation of the new collection, in an effort to bring "authentic cultural appreciation to the collection"[123]. Having been the target of a backlash on social media after being called-out for copying Romanian embroidery designs, Dior arguably wish to avoid any further call-outs and keep attention firmly on their designs. In a quote they share to contextualise their show's opening look, a Moroccan inspired twist on the iconic Dior opera coat, they said:

> This veritable work of art is based on six specially-made handwoven and hand-painted panels made by the Moroccan craftswomen of @Sumano.co. The association aims to perpetuate and promote endangered women's craft traditions in Morocco's mountainous Anti-Atlas region, helping sustain rural

[123] Sarah Ramirez, 'Dior Spotlights Artisans' Involvement in Cruise Collection', *Luxury Daily* (blog), 7 May 2019, https://www.luxurydaily.com/dior-spotlights-artisans-involvement-in-cruise-collection/.

> villages through the creation of employment and the reinvestment of profits in local communities […][124]

Whilst it might only be considered a small step in the right direction, the team behind Give Credit welcomes Dior's acknowledgment of their inspiration by sharing the statement on their Instagram page and uses the opportunity to again call for better laws and global regulations to protect indigenous clothing and textile designs from "being pirated by major global fashion brands[125]". This once again highlights the tension running through this study, pointing to the question: will better laws really hold those powerful actors who are copying indigenous designs without so much as credit to account, or is the intellectual property system so broken that it can only be fixed from inside the industry through greater representation and dialogue?

A potential new law in Mexico to protect cultural intellectual property

When Give Credit share their call-out of numerous brands apparent copying of the Otomi embroidery in 2019, in response to the Mexico Minister of Culture calling-out Carolina Herrera, they open the door to a nuanced and thoughtful discussion on the international laws, frameworks and regulations (or lack thereof), that protect the intellectual property of indigenous groups. Some dismiss these call-outs as trial by social media[126], and regard all platforms issuing them as one and the same, despite the differences highlighted in these case studies. Anaya, a fashion and culture specialist, argues that call-outs detract from the real issues at hand:

> […] The cultural appropriation debate would be a worthy tug of ideas except for the megaphone of social media and a climate in which a culture of swift and shrill judgements, followed by public shaming, are the preferred mode of critique. Add to the mix righteous, self-appointed arbiters quick to call out the slightest perceived transgression before an eager chorus of passionate digital

[124] Juliette Owen-Jones, 'Rural Moroccan Women Contribute to the Dior's Cruise 2020 Show', accessed 22 November 2021, https://www.moroccoworldnews.com/2019/05/272388/rural-moroccan-women-dior-show.
[125] Mark A. Bonta, 'New Attitudes, and Maybe a New Law, Are Changing Cultural Appropriation in Fashion Design', *The Daylighter* (blog), 20 November 2019, https://newsdaylighter.com/cultural-appropriation-in-fashion-design-spurs-a-new-law-and-new-attitudes/.
[126] Vanessa Friedman, 'Dior and the Line Between Cultural Appreciation and Cultural Appropriation - The New York Times', accessed 14 January 2021, https://www.nytimes.com/2019/04/30/fashion/dior-cruise-marrakech.html.

> commenters, and what could have been a constructive dialogue quickly devolves into a toxic free-for-all that some have leveraged to their own advantage, stoking animosity to drive social media engagement[127].

However, when the Mexican government announces in May 2019 that it wants to introduce a new piece of legislation to protect the cultural intellectual property of its artisans and the country's cultural heritage[128], it becomes hard to ignore that these call-out platforms have played a part in bringing these issues into mainstream fashion discourse, highlighting the power imbalance between the powerful fashion brands and indigenous communities, who often fall outside of traditional intellectual property protections (see Chapter 4). Mexico's intention to establish a new law was covered by newspapers, magazines and blogs, on both the fashion and the legal side of the debate, across the world.

A role for intellectual property law to curb the theft of cultural expressions

Monica Bota-Moisin, a lawyer, academic and founder of the Cultural Intellectual Property Rights Initiative, is a specialist in cultural intellectual property in fashion[129]. She has written extensively about how legal structures can better support traditional cultural expressions to build sustainable collaborations between traditional creative communities and fashion designers. Alongside designing business models for collaborations between artisans and designers, the legal agreements that recognise both traditional intellectual property rights, and the cultural intellectual property rights that Give Credit frequently mention on their platform, she advocates for a new system of protection for traditional textile designs. She notes the increased risk of copying and misappropriation in an increasingly fast-moving fashion industry. She also advocates for giving due compensation to the original artisans, and her arguments are mirrored by experts at the World Intellectual Property Organisation (WIPO):

---

[127] Suleman Anaya, 'Op-Ed | A Manifesto for Mindful Cross-Cultural Borrowing', The Business of Fashion, 31 October 2019, https://www.businessoffashion.com/opinions/news-analysis/op-ed-a-manifesto-for-mindful-cross-cultural-borrowing.

[128] Secretaría de Cultura, 'Pueblos y comunidades serán los titulares del derecho para el uso y aprovechamiento de sus elementos culturales', gob.mx, accessed 25 January 2021, http://www.gob.mx/cultura/prensa/pueblos-y-comunidades-seran-los-titulares-del-derecho-para-el-uso-y-aprovechamiento-de-sus-elementos-culturales?idiom=es.

[129] Monica Bota Moisin is a lawyer for Cultural Intellectual Property (CIP) in fashion as well as founder of the Cultural Intellectual Property Rights Initiative (CIPRI). *See* 'Library | Cultural Sustainability Consultancy - Cultural IP', Cultural IP Rights, accessed 26 October 2021, https://www.culturalintellectualproperty.com/library.

> Traditional Cultural Expressions [should not be] shoe-horned into the conventional intellectual property system. The conventional intellectual property system evolved within Western Europe in the late 19th century and was not designed explicitly with indigenous creations in mind.[130]

Brigitte Vézina, an intellectual property and cultural heritage law consultant[131], writing for WIPO Magazine in 2019, echoes Bota-Moisin's calls for a better system to protect holders of cultural intellectual property, saying:

> Many instances of cultural appropriation can be explained, at least in part, by the fact that copying is so pervasive in the global fashion industry. While fashion design is marked by an astonishing level of creativity, imitation remains a major driver of the conceptualization process. […] With new trends quickly trickling down from high-fashion to fast-fashion, designers tend to embrace a multicultural vision and resort to exploring an increasingly diverse range of cultural influences to come up with a stream of fresh and novel styles. This is nothing new[132].

Vézina goes on to say that the fast-moving pace of the modern fashion industry, and an increase in demand from consumers for designs with an "ethnic flair", are leading designers to use cultural expressions in ways that are not only culturally insensitive, but socially and economically harmful too. She explains that, because cultural expressions exist within a complex area of law and policy, as well as a complex area of fashion design, demanding a complete stop to the practice is not a useful or realistic solution. Instead, she suggests that a thorough examination of how intellectual property law can be improved is needed, so that the law becomes better

[130] As quoted by Wend Wendland, Director of Traditional Knowledge Division at WIPO, during an interview with Michelle Stefano for Folklife Today. *See* Michelle Stefano, 'Folklife at the International Level: Traditional Cultural Expressions as Intellectual Property | Folklife Today', webpage, 10 July 2017, //blogs.loc.gov/folklife/2017/07/folklife-at-the-international-level-traditional-cultural-expressions-as-intellectual-property/.

[131] Brigitte Vézina is a CIGI fellow and an expert on intellectual property protection of traditional cultural expressions and issues around cultural appropriation. *See* 'Brigitte Vézina', Centre for International Governance Innovation, accessed 22 November 2021, https://www.cigionline.org/people/brigitte-vezina/.

[132] Brigitte Vézina, 'Curbing Cultural Appropriation in the Fashion Industry', WIPO Magazine, no. 213 (2019): 24. The article is drawn from the paper *Curbing Cultural Appropriation in the Fashion Industry,* written by Brigitte Vézina and published by the Centre for International Governance Innovation in April 2019.

positioned to respond to the needs of groups who hold traditional cultural expressions, specifically in terms of how their culture is represented by fashion designers. She notes that the United Nations Declaration on the Rights of Indigenous Peoples (Article 31)[133], which affords indigenous people the right to legally exercise effective control over the cultural expressions that they create, could act as a good starting point to reshape the international intellectual property landscape. The WIPO Intergovernmental Committee has produced several draft articles in their fight for a new legal instrument that both protects indigenous people and their cultural expressions, whilst allowing them to remain accessible in the public domain. They suggest for instance to extend moral rights to traditional cultural expressions. Vézina concludes by offering advice to those on both sides of the debate, fashion designers and traditional artisans. She suggests that designers, in the absence of a new legal framework, uphold four principles to avoid stepping outside the boundaries of appropriate cultural appreciation into misuse and misappropriation: understanding, respect, acknowledgement and engagement. Moreover, she encourages traditional artisans to use tools produced by WIPO[134] to understand their intellectual property rights within their country, acknowledging however that there is often a mismatch between many intellectual property laws and protecting traditional cultural expression.

Give (Back) Credit to the Heritage Communities: a Creative Europe cultural co-operation project

In 2020, Tanasecu's work advocating for giving back credit to heritage communities, and for a change to the legal frameworks that should protect these designs, was selected for funding by the European Commission's Education, Audiovisual and Culture Executive Agency. Tanasecu, in collaboration with the University of the Creative Arts, launched the project in October 2020[135], stating it aims: to "reset the

[133] The Declaration provides for the protection of the distinct identity and cultural integrity of indigenous peoples. This includes the right to maintain, control and develop their cultural heritage and traditional knowledge, as per Article 31. *See* United Nations, *The United Nations Declaration on the Rights of Indigenous Peoples: A Manual for National Rights Institutions* (New York, N.Y: United Nations, 2013).

[134] Vézina suggests that traditional artisans use the following comprehensive document created by WIPO to understand their intellectual property position: World Intellectual Property Organization (WIPO) (2017) *Protect and Promote Your Culture: A Practical Guide to Intellectual Property for Indigenous Peoples and Local Communities*. WIPO: Geneva.

[135] 'Giving (Back) the Credit to the Heritage Communities | Creative Europe Desk UK, accessed 12 February 2021, https://www.creativeeuropeuk.eu/funded-projects/giving-back-credit-heritage-communities.

place of the traditional crafts within the new trend for a more sustainable fashion industry, while promoting and preserving the specificity and skills of the craftsmen". The project focuses on the issues that arise from cultural (mis)-appropriation practices within fashion design and makes recommendations for legal frameworks and business models for the industry. Its overarching goal is to start "a rich and targeted communication campaign [which] will promote the project towards a wide international audience". The first initiative was launched in April 2021 by offering free masterclasses to fashion design and fashion business students at the University of the Creative Arts. The two masterclasses, entitled "The Fashion System and Heritage Communities" and "The Legal Framework", include perspectives from both the fashion industry and the law:

> We understand that the prevalence of culturally appropriated products in today's fashion industry is in part due to the deterioration of the creative process, but also the limited protections which legally and financially favour the designer over the heritage community. The importance of restoring control and recognition to makers of heritage products is imperative to preserve this endangered knowledge, and promote an alternative to the destructive transactional relationships in the present fashion system. The masterclasses aim to explore best-practice for the fashion industry, and ensure the next generation of professionals have the awareness needed on this subject.[136]

Comparing the above to Diet Prada's methodology, it seems that there are real opportunities to use social media call-outs to educate and advocate for meaningful change. However, it cannot be denied that Diet Prada's significantly larger platform and unique, polarising style is overshadowing the more positive results of Give Credit's work. To those on the outside looking in, within the wider and increasingly criticised context of call-out culture, it is easy to consider the two platforms as one and the same, despite their differing methodologies and goals. Notwithstanding their differences in approach and reach, the call-outs methods that they use are, directly and indirectly, affecting the public's understanding of intellectual property. This will become increasingly hard to ignore as intellectual property theory evolves. It could

[136] The announcement was made on Monday 26th April 2021, via Give (Back) Credit's Facebook page. *See* 'Give Back Credit', accessed 6 December 2021, https://www.facebook.com/givebackcredit.org/.

be argued that although these call-out platforms position themselves as activists in a debate about copycatting, indigenous rights and corporate misbehaviour in fashion design, they are also, perhaps unknowingly, positioning themselves as authorities on intellectual property. This authority can be better described as that of extra-legal, self-appointed "expert witnesses", comparable to those used in copyright litigation.

Diet Prada and Give Credit: self-appointed "expert witnesses"?

Expert witnesses have long been used in the intellectual property courtroom to establish whether something has been copied, but the methodologies or, to mirror the language of copyright litigation coined by Bellido, 'forensic technologies', that these experts use are subject to debate. Bellido studies the subject of the expert witness in copyright litigation in depth, writing significantly on their use in cases where music and fabric designs have allegedly been copied. His work considers how these experts have shaped our understanding of copyright law in the courtroom and offered some stability in an often uncertain and unpredictable area[137]. In 2016, Bellido writes about expert witness Guy Protheroe, a composer and conductor. Despite being new to copyright litigation when he was recruited to his first case, Protheroe goes on to serve as an expert witness for over thirty years and is widely regarded as a stabilising force within music copyright litigation[138]. In his work, Bellido considers the importance of an expert witness' consistency and analyses the development of methodologies or 'forensic technologies' used over the years to establish whether a piece of music has been copied. He says:

> [The] insistence of solicitors firms on repeatedly using the same experts, such as Protheroe, in music copyright litigation converted them into the medium through which the inherent instability of a copyright controversy became momentarily stabilised. Forensic musicologists and the practices they developed operated as contingent stabilising factors in the uncertain event of a copyright dispute both within and outside the courtroom.[139]

[137] Jose Bellido, 'Looking Right: The Art of Visual Literacy in British Copyright Litigation', *Law, Culture and the Humanities* 10, no. 1 (February 2014): 66–87, https://doi.org/10.1177/1743872111416325 *and* Jose Bellido, 'Forensic Technologies in Music Copyright', *Social & Legal Studies* 25, no. 4 (August 2016): 441–59, https://doi.org/10.1177/0964663916628621 .
[138] Protheroe has worked on numerous cases, including but not limited to: EMI Music Publishing Ltd v Papathanasiou [1993], Sawkins v Hyperion Records [2005], Norman v Times Newspapers Limited [2001] and Hadley v Kemp [1999]
[139] Jose Bellido, 'Forensic Technologies in Music Copyright', *Social & Legal Studies* 25, no. 4 (August 2016): 441–59, https://doi.org/10.1177/0964663916628621. pg. 451

Bellido also considers the importance of considering how the alleged copyright infringement is perceived by different groups of people: namely by lawyers, the expert witness (and other experts on the subject matter), and lay people. Each group will look at the alleged copying through a different lens, drawing different conclusions. He poses a crucial question, pertinent here in the context of Diet Prada and Give Credit: what has the impact of these forensic technologies been on our understanding and the development of copyright law, given the complex relationship between legal expertise and the creative practices that often end up the subject matter of intellectual property litigation? Reframing this question in the context of Diet Prada and Give Credit and the new extra-legal norm that they are creating reveals that their methodologies and call-outs may be affecting our understanding of intellectual property. Other than Protheroe, Bellido also writes about Victor Herbert, a fashion designer and the expert witness in one of most relevant cases in design copying: Designers Guild Ltd v. Russell Williams (Textiles) Ltd[140]. A self-described expert in 'visual literacy'[141], Herbert's skills are frequently called upon for his experience in art, fashion and design, but also for his experience in the courtroom. Bellido's in-depth analysis of Herbert's methods in establishing whether a design was or was not copied shows just how rigorous he was, in stark contrast to the methodologies used by Diet Prada and Give Credit:

> [Herbert's] meticulousness helped him to find crucial marks such as dates, rubbings and other traces that could highlight similarities between the works or that could debilitate the argument of the defence […] However, his forensic creativity did not end with the visit to the defendant's office. Herbert frequently requested enhanced versions of photographs, acetates and prints in reverse negatives to perceive and isolate lines and contours in a more pronounced manner […] It was as if his simultaneous expertise on clothing construction and textile design was complemented by thorough forensic techniques. These

[140] *Designers Guild Ltd v. Russell Williams (Textiles) Ltd* (2001) FSR 113, 2001

[141] "*The plaintiff's expert Mr. Herbert described his expertise as 'the art of visual literacy.' This seems to me to be right*" in Designers Guild Ltd v. Russell Williams (Textiles) Ltd [2001] per Lord Hoffmann as referenced in: Jose Bellido, 'Looking Right: The Art of Visual Literacy in British Copyright Litigation', *Law, Culture and the Humanities* 10, no. 1 (1 February 2014): 66–87, https://doi.org/10.1177/1743872111416325

techniques helped him to visualize distinctive visual effects and the different ways they could be infringed.[142]

Comparing and contrasting the methodologies of online call-out platforms with those of expert witnesses used in the courtroom highlights that online platforms lack the rigour to clearly establish intellectual property infringements in a manner that would have legal validity. From the analysis of our two case studies, it seems that platforms such as Diet Prada and Give Credit are 'policing' something that sits outside of formal intellectual property legalities. Yet, the effect they are having on the discussion on intellectual property rights protection in fashion design cannot be ignored. Their combined reach and approaches are reaching audiences far and wide, and small and independent designers call on them when they think their work has been copied. Arguably, it is only a matter of time before their widespread reach starts to blur the lines of what sits in and out of intellectual property litigation. Whilst Give Credit are advocating for wider legal reforms on protecting traditional knowledge and cultural design expressions, they are, like Diet Prada, using shame-based call-outs to advocate for designers to cite and reference their inspiration in the creation of new fashion designs. By deciding through their own methodologies what they believe is or isn't copied, and by positioning themselves as unqualified but fashion-savvy experts on what is and isn't copied, they are pressing for this new norm to be enforced. Despite the increasing criticism and scrutiny of these platforms, they are still the first port of call for many aggrieved creators[143]. This is understandable: one call-out from Diet Prada can see almost instantaneous results in the form of monetary damages, or an alleged copy being taken off the market, with the cost being carried by the alleged infringer who has little scope to offer a defence. As Adler and Fromer argue:

[142] Bellido, 'Looking Right', pg. 78-79

[143] In March 2021, small independent black-owned fashion brand 'We Are KIN' called on Diet Prada to call-out 'We Wore What' – a brand created by the influencer Danielle Bernstein. Bernstein contacted We Are KIN requesting a dress from their collection, to share with her 2million+ followers. Several months later, an almost identical version of the same dress appeared on We Wore What's website. We Are KIN called on Diet Prada for a call-out; they obliged and the call-out was liked by 125,000 people within 3 days and reshared widely. At the time of writing, it is unknown what the outcome was and whether We Are KIN were able to seek any relief as a consequence of the call-out. The call-out can be seen at: https://www.instagram.com/p/CM-HR6_nKEf (accessed 27 February 2022).

> […] the advantages of self-help over law are so significant that a lawyer may be remiss not to advise a client whose work has been copied to consider self-help rather than litigation.[144]

To better understand why these platforms are growing in popularity and are replicating across the wider creative industries, the next chapter will discuss the conventional routes for intellectual property enforcement, and the remedies available under these laws for aggrieved creators.

[144] Adler and Fromer, 'Taking Intellectual Property into Their Own Hands'. Pg. 1510

CONVENTIONAL INTELLECTUAL PROPERTY LAW PROTECTIONS FOR FASHION DESIGN; A COMPARATIVE PERSPECTIVE

Although the online platforms analysed in Chapter 3 have slightly different goals, which are executed in different ways, and vary in their reach, they share a common theme: using social media platforms, internet call-outs, hashtags and online followers to shame people and brands that they believe violate fashion design intellectual property and misuse the creations of others. There appears to be no geographical limit to their call-outs, with fashion houses across the globe ending up on their platforms. We have seen that fashion design can sit in an intellectual property 'negative space'. However, as will be considered in this chapter, some jurisdictions protect fashion design more strongly than others. Within European intellectual property frameworks, fashion and its creations fall within the heartland of copyright protection. It is also supported more widely by trademark protection and even, in some cases, within patent and design rights protection. On the other hand, although the US excludes fashion design from its copyright protection framework, other forms of intellectual property rights have been used with some degree of success to protects elements of fashion design. If intellectual property frameworks can successfully protect fashion design, then what are the main reasons for using these types of call-outs over enforcing conventional intellectual property rights in the courts?

To answer this question, this chapter will consider the conventional methods of intellectual property rights enforcement, and the remedies available for enforcing such rights through the traditional mechanisms in two key jurisdictions, the US and France. It will seek to understand whether the new call-out culture within the contemporary fashion landscape can provide a similar level of protection as the formal methods of enforcement. The US and France have been chosen as the two comparative jurisdictions because they are both major players in the fashion industry yet consider fashion design very differently in their intellectual property frameworks. Intellectual property protection in France is at the core of most fashion business models, with an EU directive providing three years of protection for fashion design rights, alongside additional protections within the national laws. The 'home of *haute*

couture' enjoys some of the most extensive and longstanding rights in connection with fashion design[145], and the protection of fashion design in the country is a core part of not just its legal regime, but also its cultural identity. The US, where the economic and artistic significance of the fashion industry is also well-recognised, is by contrast home to a unique discussion on the protection of fashion design. Currently, the US legal framework does not afford copyright protection to fashion designs because it classifies clothing as a 'useful article' rather than an artistic creation[146]. In opposition with the French government, who are actively working to strengthen intellectual property protections for fashion and harmonise their national laws with EU measures that protect intellectual property[147], US counterparts are engaged in an ongoing debate as to whether increased copyright protections would help or harm the industry. A recent congressional proposal to extend the scope of US copyright by introducing the Innovative Design Protection Act[148] divided opinions; while the debate rumbles on, the US continues to lag in protecting fashion design.

France and the US also differ in their civil and common law traditions, as well as in the dominant theories that underpin their intellectual property laws: romanticism is the dominant theory in France, while the US is guided by utilitarianism[149]. The common law system in the US is flexible and able to adapt to varying conditions and differing situations with relative ease[150], yet it is sceptical to the idea of moral rights. By comparison, the French system has fully embraced the concept of moral rights in intellectual property law, but operates with more rigidity, and is often seen to be incapable of providing practical solutions to arising problems as a consequence. Despite the wide difference in intellectual property protection, what becomes clear in this comparative analysis is that protection, particularly copyright and trademark, can

[145] Julie Zerbo, 'France: Legal Protections for Fashion', *The Fashion Law* (blog), accessed 23 November 2021, https://www.thefashionlaw.com/resource-center/france-legal-protections-for-fashion/.
[146] 17 U.S.C. §102.
[147] In 2014, French academics, lawyers, industry and government representatives came together in Paris to address the specifics of IP protection and enforcement in fashion design at the conference: *"Les Propriétés Intellectuelles à la Mode"*, held by the French *"Institut de Recherche en Propriété Intellectuelle"* (Paris Ile-de-France Chamber of Commerce and Industry).
[148] *See* Why the Innovative Design Protection Act Is a Good Thing, accessed 8 October 2020, https://blog.jipel.law.nyu.edu/2019/01/why-the-innovative-design-protection-act-is-a-good-thing/.
[149] Utilitarianism emphasises incentives such as monetary compensation to motivate innovative behaviour, whereas romanticism views creativity as self-motivated behaviour that is typically motivated by other rewards. See Janet L. Kottke and Steven Mellor, 'Intrinsic Motivation and Self-Determination in Human Behavior (Book)', *Personnel Psychology* 39, no. 3 (September 1986): 672–75 *and* Andrew S. Winston and Joanne E. Baker, 'Behavior Analytic Studies of Creativity: A Critical Review', *The Behavior Analyst* 8, no. 2 (1985): 191–205.
[150] *Funk v. United States* : 290 US 371 (1933)

be difficult to enforce on both sides of the Atlantic. French designers are relying increasingly on EU design rights for protection, while design patents are being increasingly used in the US to protect fashion products, "particularly among more established brands with deep pockets"[151]. This may explain to some degree why intellectual property online call-outs are growing in popularity: they can achieve and replicate the same, if not better and quicker, results than conventional enforcement methods, without the need for expensive court cases that rake over the intricacies of the different types of intellectual property rights that may or may not have been violated. Diet Prada's all-encompassing term of 'copycatting' removes this complexity, a perhaps deliberate choice on their part.

Copyright

France has a strong and broad author-oriented system of copyright protection, known as *droit d'auteur* (rights of the author). It protects "any original work of the mind"[152], and is laid out in Book I of the French *Code de la propriété intellectuelle* (CPI). Original works of the mind are protected under Article L.112- 1, which includes consideration of those that "reflect the personality of their author". In addition, Article L.112-2[153] specifically and expressly lists "the creations of the seasonal industries of dress and articles of fashion" as a protectable work of the mind. France is also subject to EU directives that govern the field of copyright, however for the purpose of comparison, this chapter will focus predominately on France's national copyright legislation.[154]

The US does not explicitly protect fashion design in its copyright laws: fashion designs are not afforded copyright protection in their own right, because clothing is deemed a useful article. The US Copyright Office defines a useful article as "an object having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information[155]". Examples include clothing,

[151] Interview with Julie Zerbo, founder of The Fashion Law blog as quoted in 'The Role of IP Rights in the Fashion Business: A US Perspective', accessed 9 April 2020, https://www.wipo.int/wipo_magazine/en/2018/04/article_0006.html.
[152] *See* Art. L112-1 of the CPI
[153] *See* Article L.122-2 of the CPI for a non-exhaustive list of works that are protected.
[154] In 2019, the EU approved Directive 2019/790, which aims to modernise copyright and bring it up-to-date with the digital age, with these changes being incorporated by French national laws. The changes focus on encouraging better compensation from electronic platforms for authors, artists and journalists, and enable the author of the copyright to negotiable better payment where their copyright is used online by giants such as Google or Facebook, or where their work is exploited by a distributor.
[155] 17 U.S.C. § 101.

furniture, machinery, dinnerware, and lighting fixtures. Consequently, whilst US copyright law does not actively prohibit the protection of garments, it does not provide the fashion designer with rights to the garment as a whole. S.101 of the US Copyright Act 1976 states that useful articles can only gain copyright protection if they can be "identified separately from, and are capable of existing independently of, the utilitarian aspects of the article." This means that fashion designers wanting to protect their designs in the US cannot be granted a monopoly right for their useful article, but may be able to protect elements of their designs if they can separate the creative from the functional, the former being subject to protection. The US Supreme Court, in the key 2017 case Star Athletica v. Varsity Brands[156], establishes a two-stage separability test to offer clarity on the protectability of creative elements in useful articles: the aesthetic elements of clothing can be copyrighted if they stand on their own as a work of art, and qualify as copyrightable as a visual medium. Fashion designers have welcomed this development in the fight against copyright theft in the US, as it seemingly overturns the idea that fashion designs in the US could not be protected by copyright. However, intellectual property scholars are more sceptical. They note that the wording in this new test is ambiguous and relies "too heavily on plain text in an area begging for descriptive language"[157]. It offers little clarity on how it would be effectively enforced and remains confusing.

Authorship

Both the US and France are signatories to the Berne Convention[158], which states that copyright protection "shall operate for the benefit of the author and his successors in title[159]". Both jurisdictions have similar definitions of "author", with France considering the author to be the original creator of any type of protected work and the US considering the initial owner to be the author, unless that work is a "work

[156] *Star Athletica, LLC v. Varsity Brands, Inc.*, 580 U.S. (2017)
[157] Leading Case: 137 S. Ct. 1002, 'Star Athletica, L.L.C. v. Varsity Brands, Inc.', accessed 23 November 2021, https://harvardlawreview.org/2017/11/star-athletica-l-l-c-v-varsity-brands-inc/.
[158] The Berne Convention covers the protection of works and the rights of their authors. It provides creators with the means to control how their works are used and on what terms. *See* https://www.wipo.int/treaties/en/ip/berne/
[159] Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886 (1886, U.N.T.S 828 221), completed at Paris on May 4 1896, revised at Berlin on November 13 1908, completed at Berne on March 20 1914, revised at Rome on June 2, 1928, revised at Brussels on June 26 1948, and revised at Stockholm on July 14 1967 (with Protocol regarding developing countries).

made for hire."[160] The Berne Convention allows signatories to decide for themselves whether a work must be fixed in order to enjoy copyright protection[161]. The US requires that works must be "fixed in a tangible medium of expression" to obtain copyright protection[162], but not France. Both jurisdictions require that the work is original in order to be granted protection.

Copyright protection in France grants both economic intellectual property right (*droits patrimoniaux*) and moral rights (*droits moraux*) to the owner of the work. The economic intellectual property rights of the author are twofold: representation right and reproduction right. If the work is represented or reproduced without the authority of the owner, then an infringement of their rights has taken place. These rights can be claimed to the work throughout the life of the author, and for 70 years following their death, although they can be transferred partly or wholly. This mirrors the US copyright protection duration, which also lasts for 70 years after the death of an author. After the end of the 70-year period, the work becomes public domain and can be used freely. The author's moral rights[163] to the work can be found in Art. L121-1 of the CPI, which states that they have the right to "the respect of their name, their status as author, and their work". The moral right to the work cannot be transferred, unlike the intellectual property right, and must be respected even after the work enters the public domain. Upon the death of the author, the moral right passes to their family or other heir.

The French copyright requirement that the work must reflect the author's personality is significant in the comparative context of this chapter. In France's civil law system, the *droit moral* (moral right) to the work is firmly embedded within the *droit d'auteur* (author's right) which is in distinct comparison to the common law focus on the

[160] As per the Copyright Act (1976) "work made for hire" means that the employer or commissioning party is the owner of the work. *See* 17 U.S.C. § 101

[161] *See* Art. 2, s2 of the Berne Convention: "It shall be a matter for legislation in the countries of the Union to prescribe that works in general or any specified categories of works shall not be protected unless they have been fixed in some material form."

[162] Tyler T. Ochoa, 'Copyright, Derivative Works and Fixation: Is Galoob a Mirage, or Does the Form (Gen) of the Alleged Derivative Work Matter Symposium Review: The Digital Challenge to Copyright Law', *Santa Clara Computer & High Technology Law Journal* 20, no. 4 (2004 2003): 991–1044.Ochoa.

[163] The CPI recognises 5 moral rights: the right to present (*droit de divulgation*); the right to paternity (*droit de paternité)*; the right to integrity (*droit au respect de l'intégrité de l'oeuvre)* and; the right of withdrawal (*droit de retrait et de repentir*).

economic value of copyright.[164] The US copyright system is founded on a predominately economic philosophy, where financial rewards take precedence over creativity; by contrast, French law protects the author's intellectual and moral interests too[165]. This is supported by French legal academics, who argue that "Anglo-Saxon copyright laws […] pay more particular attention to the exploitation of the work, pushing man into the background[166]". Although the US does not traditionally recognise moral rights within its copyright laws, that is not to say that they are completely non-existent. The US states are increasingly recognising moral rights[167] and since 1990, moral rights have been recognised for works of visual art[168]. It is worth noting that the English-language 'moral right' differs from the French *droit moral*: whilst the translation is literal, they are recognised in comparative copyright literature as '*faux amis';* words that seem to equate across languages but in fact refer to different things[169]. The French *droit moral* refers simply to the author's non-economic rights, whereas the English-language term considers the ethical implication of the rights, almost dissociating it from the 'legal' right.

"Fair Use" in copyright protection

Historically, copyright law has tried to find a balance between protecting the rights of the creators of the intellectual property and the need of the wider public to be able to access that creation. It has simultaneously built a layer of legal protection around certain works that qualify for protection, whilst ensuring that these layers can be penetrated so that the works can be accessed, their optimal use is not jeopardised, and they can be disseminated to the public for their benefit[170]. This balance sits uncomfortably with the new extra-legal norms created by call-out platforms. In order

[164] Cyrill P. Rigamonti, 'The Conceptual Transformation of Moral Rights', *The American Journal of Comparative Law* 55, no. 1 (2007): 67–122.
[165] Russell J. DaSilva, 'Droit Moral and the Amoral Copyright: A Comparison of Artists' Rights in France and the United States Part I', *Bulletin of the Copyright Society of the U.S.A.* 28, no. 1 (1981 1980): 1–58.
[166] Xavier Linant De Bellefonds, Droits D'auteur et Droits Voisins 454 (2002) as quoted in Jean-Luc Piotraut, 'An Author's Rights-Based Copyright Law: The Fairness and Morality of French and American Law Compared', *Cardozo Arts & Entertainment Law Journal* 24, no. 2 (2007 2006): 549–616. Pg. 552
[167] *See* as an example, The California Art Preservation Act (1979) codified at California Civil Code §987 and New York Artists Authorship Rights Act (1984). Both Acts provide legal protection for visual artists' moral rights.
[168] The US recognised explicit protection of moral rights through an amendment to the U.S. Copyright Act in the Visual Artists Rights Act (1990), (17 U.S.C. § 106A) although the scope of the Act is narrow compared to other countries.
[169] Stina Teilmann-Lock, 'False Friends and Moral Rights/ Faux Amis et Droits Moraux', *Revue Internationale du Droit d'Auteur* 224, no. juillet (2010): 3–47.
[170] Marshall Leaffer, 'The Uncertain Future of Fair Use in a Global Information Marketplace', *Ohio State Law Journal* 62 (2001): 849.

to create flexibility around these legal rights, copyright law includes exceptions to third-party use of the work in question in some cases; the most relevant for the purposes of this discussion is the “fair use” exception. This exception allows reproduction of the original work without permission, where this reproduction would not undermine the value of the original work: for example where the work is used in a news report, as part of a parody, or in the classroom. The international obligation to recognise the concept of fair use is set out in Article 10 (1) of the Berne Convention, to which both the US and France are signatories. Unlike other aspects of the Berne Convention, legal scholars from both civil and common law argue that it is a mandatory obligation[171]. Article 10 (1) states:

> It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries[172].

Aplin and Bently, who write extensively on the global, mandatory fair use limitation laid out in the Berne Convention, argue that the limitation applies to all works, not just literary or dramatic works, suggesting that it extends to fashion design:

> This is inferred from the absence of any such limitation in the words of Article 10(1) which refers to quotation from a work […] Nor is the ordinary meaning of the term quotation limited to quotation from literature: it is common to speak of quotation of art, music, and film. […] The fact that the freedom includes the freedom to make quotations not just from texts, but also from music, art work and films has important implications for our understanding of the breadth of the term quotation. In particular, conventions associated with literary

[171] *See* Tanya Aplin and Lionel Bently, Whatever Became of Global, Mandatory, Fair Use? A Case Study in Dysfunctional Pluralism, in *Is Intellectual Property Pluralism Functional?*, by Susy Frankel (Edward Elgar Publishing, 2019), 8–36, https://doi.org/10.4337/9781788977999.00008. who reference the following scholars in their work: International Copyright: Principles, Law, Practice (Oxford: OUP, 2001) 303; Daniel J Gervais, Making Copyright Whole: A Principled Approach to Copyright Exceptions and Limitations (2008) U Ottawa L & Tech J 1, 9 and 20; and Sam Ricketson & Jane C Ginsburg, The Berne Convention and Beyond, (Oxford: OUP, 2006), 788U9, [13.42].

[172] Article 10(3) adds that: “[w]here use is made of works in accordance with the preceding paragraphs of this Article, mention shall be made of the source, and of the name of the author if it appears thereon.“

> quotation, such as the use of quotation marks, cannot be elevated into conditions for the existence of quotation within the Article 10(1) exemption, because to do so would exclude much that is ordinarily called quotation in art, music or film from any possibility of exemption.[173]

At national level in the US, the broad and flexible fair use doctrine is a significant part of the copyright landscape. It is enshrined in statutory law, and the Supreme Court reaffirms its importance in significant cases[174]. Fair use in US copyright law is applied liberally as a defence to copyright infringement, where its use encapsulates a broader remit than Article 10 (1) of the Berne Convention, in distinct contrast to the French system. In 2015, the US Court of Appeal (9th Circuit)[175] takes the concept of fair use one step further, asserting that fair use is more than just a defence to copyright infringement, it is an express, authorised right that copyright holders must consider before issuing a cease and desist or takedown notification. In determining whether the use of the work is considered "fair use", the US courts consider four factors: the purpose and character of the use, the nature of the copyrighted work, the amount and substantiality of what has been taken from the copyrighted work; and the effect of the use upon the potential market for the copyrighted work.[176] France takes a different approach to the doctrine of fair use within their copyright laws. There is no doctrine of fair use or an equivalent norm in France, but their system of copyright law accomplishes similar results to the fair use doctrine. Article L.122-5 of the CPI lists exceptions to copyright protection, which include the right for the work to be used in parody, press reviews and citations, only where the original author is clearly credited. France's list of exceptions is more limited and less flexible than the US's application of fair use. Yet, arguably, similar results are reached in both countries. Critics on both sides of the Atlantic describe fair use as vague, unpredictable and indeterminate; yet this is arguably deliberate in copyright law and designed to protect creativity and fair competition[177]. Leaffer remarks, back in 2001,

[173] Tanya Aplin and Lionel Bently, Whatever Became of Global, Mandatory, Fair Use? A Case Study in Dysfunctional Pluralism , in *Is Intellectual Property Pluralism Functional?* edited by Susy Frankel, 2019, pg.6-7 https://www.elgaronline.com/view/edcoll/9781788977982/9781788977982.xml.

[174] The doctrine has been enshrined in statutory law, see 17 U.S.C § 107 (2012), and reaffirmed in several major cases including *Campbell vs. Acuff-Rose Music, Inc* 510 U.S. 569 (1994)

[175] *Lenz v. Universal Music Corp.*, 801 F.3d 1126 (9th Cir. 2015)

[176] Neil Weinstock Netanel, 'Making Sense of Fair Use', *Lewis & Clark Law Review* 15, no. 3 (2011): 715–72.

[177] Adler and Fromer, 'Taking Intellectual Property into Their Own Hands'.

that even lawyers well versed in copyright law struggle to issue guidance on the subject[178], an argument that remains relevant twenty years later. Aplin and Bently suggest that even legal scholars must be confused about fair use, as they continue to debate whether it is 'permissible', despite the mandatory obligation in the Berne Convention. Within this confusion, we begin to understand why platforms like Diet Prada and Give Credit are policing, be it intentionally or unintentionally, their own extra-legal, "fair use" doctrine, where crediting inspiration or "quoting" becomes a non-negotiable norm. As one American lawyer puts it: "fair use [in America] simply means the right to hire a lawyer"[179] . This might explain in part why the new norms on crediting and citing sources and inspiration that Diet Prada and Give Credit are advocating for and creating, are gaining such traction. Arguing fair use under the current legal regimes is an expensive pursuit for both parties, and far harder for the less powerful, less wealthy party. Although it understandable how an extra-legal norm is developing, these platforms' clumsy 'policing' of their interpretation of fair use may begin to impact our understanding and development of copyright law inside and outside of the courtroom: the line, between fashion designs being genuinely copied and those being 'borrowed' and considered fair use, becomes increasingly blurred.

"Substantial" similarity in copyright infringement cases

The blurred line between borrowing and infringements comes under further scrutiny when we consider the concept of 'substantial similarity' in copyright litigation. Substantial similarity, a predominately common-law approach rooted in the theory of utilitarianism[180], is a doctrine used to establish whether a defendant has infringed copyright, and despite its predominance in common law systems, exists in both French and US law. In both jurisdictions, it is often criticised for its inconsistent application by the Courts, its subjectivity and for its complexity: a complexity that rivals that of the fair use doctrine. Substantial similarity was broadly defined in the US by Justice Jon O'Newman as "the threshold for determining that the degree of similarity suffices to demonstrate actionable infringement exists […] after the fact of

[178] Marshall Leaffer, 'The Uncertain Future of Fair Use in a Global Information Marketplace'.
[179] Lawrence Lessig, *Free Culture: The Nature and Future of Creativity* (Penguin Publishing Group, 2004) as quoted in Adler an Fromer, '*Taking Intellectual Property into Their Own Hands'.* Pg. 1522
[180] Shyamkrishna Balganesh, 'The Normativity of Copying in Copyright Law', *Duke Law Journal* 62, no. 2 (2012): 203–84.

copying has been established."[181] Some US Courts, however, have interpreted the term slightly differently, referring to it as the defining level of similarity that is needed to prove that copying is present in the first place. In France, the infamous *La Bicyclette bleue* case reinforced the unpredictability of the doctrine. In 1992, French author Régine Deforges, accused of plagiarising the work of American author Margaret Mitchell after admitting that the first 70 pages of her novel were directly inspired by Mitchell's novel, wins her case in front of the *Cour de cassation* (the French equivalent of the Supreme Court). Even with the admission of direct inspiration, the similarities between the two books were insubstantial[182]. Despite the existence of several tests to establish substantial similarity, judges and legal scholars continue to view the doctrine from opposing viewpoints. As Lim articulates, "the result is a patchwork of rhetoric resting on confusing generalisations that ultimately translate into "I'll know it when I see it" determinations"[183], and a system that relies on the expert witnesses discussed in Chapter 3. The inconsistent and subjective application of the substantial similarity doctrine presents yet another stumbling block for aggrieved fashion designers wishing to enforce their rights through the formal mechanisms of copyright law. Diet Prada becomes involved (albeit indirectly) with debates around the 'substantial similarity' doctrine during a 2020 call-out of the brand We Wore What[184], when they support indie brand The Great Eros in a copyright infringement battle. The two brands are arguing over the use of a nude female silhouette in their designs. We Wore What sends a cease-and-desist letter first, then files a copyright lawsuit, swiftly followed by a counter-lawsuit from The Great Eros. The substantial similarity doctrine is used as the basis of their arguments. Diet Prada posts relentless call-outs of We Wore What, and come out in support of The Great Eros.[185] Ultimately the case is shut down, and there is no legal resolution for either party. Nonetheless, Diet Prada's support of The Great Eros and

[181] *See* Ringgold v. Black Entertainment Television, Inc. (126 F.3d 70 (2nd Cir., 1997).
[182] Court of Cassation [Cour de Cassation], Civil Chamber, Régine Desforges and Editions Ramsay vs. Trust Company Bank and Consorts Mitchell, Appeal No. 90-15.760, 4 February 1992.
[183] Daryl Lim, 'Substantial Similarity's Silent Death', *Pepperdine Law Review* (2021): 73.Pg.717
[184] We Wore What has been featured on Diet Prada's page more than once, as mentioned in Chapter 3, with each of the call-outs gaining significant traction. *See* 'Diet Prada ™ on Instagram: "Danielle Bernstein Aka @weworewhat Has Been Pretty Quiet since Recovering from COVID, but It Seems She's Been Busy with Some Other Tasks……"', accessed 3 May 2022, https://www.instagram.com/p/CGa6mjineJl/?hl=en.
[185] CV Collection LLC v. WEWOREWHAT LLC et al *1:21-cv-01623 (SDNY). See* Isabella Caito, 'If Copyright Law Won't Protect Small Fashion Brands against Copying, Social Media Will – Just Ask Influencer Danielle Bernstein', (student blog), accessed 3 May 2022, https://blog.jipel.law.nyu.edu/2021/04/if-copyright-law-wont-protect-small-fashion-brands-against-copying-social-media-will-just-ask-influencer-danielle-bernstein/.

repeated call-outs of We Wore What lead to a deluge of support for the small indie brand and increased traffic to their page. Although the legal doctrine may have failed them, this bought the issue of substantial similarity into the mainstream, allowing us to further understand why online call-outs are often preferable to navigating the complexities of an inconsistent intellectual property legal system.

Blurring the lines between 'borrowing' and 'copyright infringement'; a lesson from the music industry?

Diet Prada and Give Credit's call-outs, at first glance, appear to conflate what is legitimate inspiration or borrowing (and therefore considered fair use) and what is unauthorised copying. Consequently, their call-outs seem to be advocating for stronger regulations and frameworks on what can be termed for the purposes of this discussion as "visual borrowing". The concept of visual borrowing sits outside formal intellectual property legalities, supporting MacMillan's argument[186], although perhaps not in the way she intended, that intellectual property law is ignorant to the "visual". Visual borrowing is a term derived for the purpose of this dissertation, using the terminology of American musicologist Peter Burkholder, who coined the phrase "musical borrowing"[187]. Burkholder's work focuses on the phenomenon of legitimate "musical borrowing", a practice as old as music itself, which sits separately from music copyright infringement[188]. He argues that all music draws upon the repetition of notes, scales and other elements, so that every piece of music borrows from earlier pieces; this argument is supported by Lim.[189] If we apply this concept to fashion design, all new designs build, draw upon, and recycle designs and trends that have come before, to create something new; but they "borrow", not copy, plagiarise, or steal, to quote language used by call-out websites. The term visual borrowing is formed of the coupling of this concept with expert witness Herbert's definition of his own expertise in establishing what is copied in the fields of art,

[186] Macmillan, 'Is Copyright Blind to the Visual?'
[187] Leaffer, 'The Uncertain Future of Fair Use in a Global Information Marketplace'.
[188] In March 2022, popular singer and composer Ed Sheeran, defending himself during a copyright claim in the High Court, hit the headlines when he sang snippets of various songs including Nina Simone's 'Feeling Good' and Blackstreet's 'No Diggity' To the Court to demonstrate how certain melodies are commonplace in musical composition. See Mark Savage, 'Ed Sheeran Sings Nina Simone during Shape of You Copyright Case', *BBC News*, 8 March 2022, sec. Entertainment & Arts, https://www.bbc.com/news/entertainment-arts-60661895.
[189] J. Peter Burkholder, 'Musical Borrowing or Curious Coincidence?: Testing the Evidence', *Journal of Musicology* 35, no. 2 (1 April 2018): 223–66, https://doi.org/10.1525/jm.2018.35.2.223.

fashion, and design as “visual literacy”. Arguably, visual literacy is needed in order to understand visual borrowing: if you are not visually literate, you cannot make the distinction between borrowing and copying or plagiarising.

In recent years, the line between “musical borrowing” and real copyright infringement has become blurred and courts have come down hard on musicians who “borrow” music, in both the EU and the US[190]. This is significant in the context of these fashion copying call-outs and how we understand what their effect on the legal landscape might be; as their reach and impact continues to grow. Whilst the music industry might not be under the same type of pressure from online platforms such as Diet Prada, there is significant online noise surrounding musical borrowing and copyright infringement, and what is and isn’t ‘fair use’, which may have infiltrated into the courtroom. However, in early 2022, Ed Sheeran, accused of copying music from grime artist Sami Chokri, wins his copyright case in the High Court (UK). Judge Zacaroli, in his judgement, remarked that although there were "similarities between the one-bar phrase" the two songs in question, “such similarities are only a starting point for a possible infringement" of copyright.[191] This tentatively suggests that the blurred line, in the music industry at least, may slowly be shifting back into focus, although it is too early to understand whether this case will reverse the previous trend.

France’s copyright battle against a master fast-fashion “copycatter”

The French courts heard two significant cases against fast-fashion giant and notorious copycatter Zara in the past decade, confirming France’s reputation as a country that, within its fashion houses at least, does not buy into the piracy paradox hypothesis when it comes to fashion design. The legal reality, however, shows that there is a high threshold to reach to protect fashion designs by copyright. Bruno, a Parisian clothing designer, sued Zara France back in 2012[192], arguing that one of the Spanish fast-fashion chain’s blouses copies elements from one of her 2008 dresses,

[190] *See* Court of Justice of the European Union, Infopaq International A/S v Danske Dagblades Forening (Case C-5/08) (16 July 2009) *and* Williams v. Gaye, No. 15-56880 (9th Cir. 2018)
[191] Sheeran & Ors v Chokri & Ors [2022] EWHC 827 (Ch) (06 April 2022). The full judgement can be found at https://www.judiciary.uk/wp-content/uploads/2022/04/Sheeran-v-Chokri-judgment-060422.pdf
[192] Court of Appeal [Cour d’appel] Paris, Vanessa Bruno v. Zara France (Fr.), Decision No. 2011/09133. 17 October 2012

infringing her copyright. The *Cour d'appel* disagreed, concluding that as the elements in question have appeared in the fashion press long before 2008, the originality of her article could not be proved, and was therefore not protected by copyright. A year after Bruno's disappointment, French fashion house Céline[193] takes on Zara France once again, accusing them of copying a shirt design. A similar verdict is delivered: the shirt's design is commonplace, and originality cannot be proven. These verdicts that there was no infringement of copyright, show that France is not the fashion design intellectual property haven it is reputed to be: proving originality in France is no easier than in other jurisdictions, because of its approach to defining originality.

Failed attempts to strengthen fashion design protection in the US: the IDPA

To further the US copyright protection towards fashion design, the Innovative Design Protection Act (IDPA), sometimes referred to as the 'Fashion Bill', is introduced to US Congress in 2006. Its goal is to amend the current US Copyright Act to include fashion design. However, it has failed to be passed into law, and so it seems there is still little appetite amongst law-makers to protect the industry from fashion design copyright infringements[194]. This fuels platforms such as Diet Prada to continue their fight against copying in the industry. Supporters of the proposed reforms believe that fashion designs are a form of artistic expression, which deserves to be treated equally to other subjects protectable under copyright, like music and literature. This sustains MacMillan's argument that the current law is ignorant when it comes to supporting the more visual arts. With stronger protections, designers would be motivated to create new work beyond financial motivation, and the implementation of the IDPA would bring the US in line with European fashion powerhouse countries, such as France. Critics of the proposed changes rely on the piracy paradox argument, arguing that copying promotes innovation in the fashion industry, as well as on the fact that increased protection would increase costs for designers and consumers: hiring lawyers for infringement claims is expensive for designers, and critics believe these costs would be reflected in the clothing they produce, thereby

[193] Court of Appeal [Cour d'appel] Paris, Céline v. Zara France (Fr.) Decision no. 2012/04542. 27 February 2013

[194] The IDPA was last introduced to US Congress 2012. It gained Senate approval, but did not gain approval in the House of Representatives.

pushing up the costs for consumers and supressing the lucrative fast-fashion industry.

Trademark

Atkinson et al argue in their 2018 article, 'A Comparative Study of Fashion and IP: Trademarks in Europe and Australia'[195], that although it may seem that copyright and design registration are the central intellectual property mechanisms that protect the appearance of fashion garments, fashion houses are increasingly turning to trademark rights to protect their designs. Since the adoption of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) by the World Trade Organisation (WTO) in 1994[196], the distinction between product and trademark has blurred: the most distinct visual features of a garment, whether it be a pattern, a colour or a shape, can now be protected through trademark registration, and renewed indefinitely. Well-known examples include the Burberry check[197], the Louis Vuitton pattern[198] and the Louboutin red sole[199]. Where copyright laws might fail to protect a garment, trademark is offering protection to the distinguishing features that consumers know and love.

French trademark law is compiled in Book VII of the *Code de la propriété intellectuelle* (CPI) and is predominantly governed by Law 1991-7. Law 1991-7 codifies the EU's council directive related to trademarks (89/104/EEC) into French law, but it only covers trademarks registered after 1991[200]. In addition to its codified legislation relating to trademarks, France is also signatory of several international

[195] Violet Atkinson et al., 'A Comparative Study of Fashion and IP: Trade Marks in Europe and Australia', *Journal of Intellectual Property Law & Practice* 13, no. 3 (1 March 2018): 194–211, https://doi.org/10.1093/jiplp/jpx190.
[196] The Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS) (1869 U.N.T.S. 299). The entire agreement can be found at: 'WTO | Intellectual Property (TRIPS) - Agreement Text', accessed 27 February 2022, https://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm.
[197] Burberry Limited Trademark No. 000377580 (Europe).
[198] Louis Vuitton Paris Trademark No. 3675908 (France), No 9844127 (EU trademark)
[199] Louboutin Trademark No. 008845539 (EU trademark) No.113869370 (France)
[200] EU trademark law can be found in EU Regulations Nos. 2017/1001, 2015/2424, 204/2009 and 2868/95, as well as Directive No. 2015/2436. All trademarks registered before 1991 are governed by the French Law of 31/12/1964

agreements governing trademarks, which can be applied by the French courts[201]. Fashion designers in France wishing to benefit from trademark protection can file three types of trademark: a national trademark, a community trademark, or an international trademark[202]. Under Article L. 711-1 of the CPI, for a trademark to be successfully registered in France it must be distinctive, clear and precise; not deceptive; and it must not harm any third-party rights[203]. In 2019, France amends Article L. 711-1 to implement the EU's Trademark Directive (2015) into national law, removing the requirement that a sign must be capable of being graphically represented in order to be registered as a trademark. Article L. 711-2[204] indicates which signs cannot be validly registered and, if they are registered, are liable to be declared void. These include, but are not limited to: a sign which cannot constitute a trademark within the meaning of Article L. 711-1; a mark devoid of any distinctive character; a sign consisting exclusively of the shape or another characteristic imposed by the very nature of the product, necessary to obtain a technical result or which gives this product substantial value; and a trademark excluded from registration in application of Article 6 bis of the Paris Convention[205].

In 2019, France also makes several changes to articles L. 713-1 - L. 713-6 of the CPI, which outline the rights granted once a trademark is successfully registered under French law, to modernise and strengthen their protection mechanisms. Under Article L. 713-2, it is now prohibited, except with the authorisation of the trademark

[201] France is signatory to the TRIPS agreement (1994), a legal agreement between all the member nations of the WTO. The TRIPS agreement sets minimum levels of intellectual property protection that members are obliged to comply with, and includes within it a minimum standard for trademark protection. France is also a signatory to the Paris Convention for the Protection of Industrial Property (1883), one of the first intellectual property treaties, the Madrid Agreement (1891), which implements the Madrid System, the primary international system for registering trademarks in multiple jurisdiction; the Nice Agreement (1957), which establishes a classification of goods and services for the purposes of registering trademarks; and the Singapore Treaty (2006), which has created an international framework for administrative trademark registration procedures.

[202] A national trademark is filed in and limited to France only, a community trademark protects the mark in every EU member state, and an international trademark covers the territories of the Madrid System. To benefit from protection, all national trademarks must be registered with the French intellectual property office, the *Institut national de la propriété industrielle* (INPI), community trademarks with the European Union Intellectual Property Office (EUIPO), and international trademarks through the international Madrid System, designating France as the territory.

[203] In addition to these national laws, similar conditions can be found in Article 7 of EU Regulation No. 2017/1001.

[204] A full list of signs that can't be registered under French trademark law can be found in Article L. 711-2 of the French CPI.

[205] Margaret Dowie-Whybrow, 'Paris Convention for the Protection of Industrial Property', in *Core Statutes on Intellectual Property*, by Margaret Dowie-Whybrow (London: Macmillan Education UK, 2013), 516–43, https://doi.org/10.1007/978-1-137-35471-6_5. Article 6 bis 1 of the Paris Convention for the Protection of Industrial Property dated March 20, 1983 is as follows: *"The countries of the Union undertake, ex officio if their legislation so permits, or at the request of an interested party, to refuse or to cancel the registration, and to prohibit the use, of a trademark which constitutes a reproduction, an imitation, or a translation, liable to create confusion, of a mark considered by the competent authority of the country of registration or use to be well known in that country as being already the mark of a person entitled to the benefits of this Convention and used for identical or similar goods. These provisions shall also apply when the essential part of the mark constitutes a reproduction of any such well-known mark or an imitation liable to create confusion therewith."*

holder, to use, in the course of trade for goods or services, a sign identical to the mark, if it is used for goods or services identical to those for which the mark is registered; or a sign similar to those for which the mark is registered, if there is, in the mind of the public, a likelihood of confusion, including the risk of association of the sign with the mark. The modification of this article and the introduction of the concept of use of the trademark is significant. Before these modifications, only the act of filing a trademark application was a trademark infringement, whereas now the article states that the use of the sign in practice can also be regarded as an act of infringement. A further change to French trademark law in 2019 includes an extension to the list of possible prior rights on which an opposition may be based. Previously, an opposition could only be based on a single prior right. In practice, this meant that multiple oppositions needed to be invoked where it was necessary to invoke more than one prior right. Now, an opposition can be based on an extended list of prior rights, including: prior trademarks in force in France, prior French trademarks having a reputation in France, and trademarks filed without authorisation in a member country of the Paris Convention for the Protection of Industrial Property[206]. Finally, the new administrative invalidity procedure becomes adjudicated by the French trademark office rather than the French courts. The new procedure, which came into practice in April 2020, and is set out in articles L. 716-1 to L. 713-3-1 of the CPI, is considered a small revolution for French trademark practitioners. These recent changes to trademark laws, in a country already reputed to have the strongest intellectual property rights in the world, could arguably paint France as a utopia for fashion designers and fashion houses seeking intellectual property protection. But has this been the reality for designers seeking to rely on trademark protection in the 'home of *haute couture*'? Whilst it is too early to understand the full effect of the laws that came into practice in April 2020, analysis of older cases, notably the case of French designer Christian Louboutin (considered below), uncovers a mixed reality: it reveals stumbling-blocks to be overcome at all stages of the trademark process, before these rights can be relied upon for protection.

Across the Atlantic, a two-tiered trademark system is operating in the US: the federal system and the state system. Trademark protection in the US is considered flexible

[206] See Articles L711-3 and L711-4 of the CPI for a full list all of the relative grounds for refusal and invalidity of a trademark

and broad, in direct contrast to its EU counterparts, reflecting the common law system in which it operates. A federally registered trademark, recorded with the United States Patent and Trademark Office[207], provides protection in every state in the US. It is governed by the Lanham Act[208], which is the federal statute governing trademark law used in or affecting interstate commerce, whereas state registration only protects the trademark in the state where it is registered. Subject matter eligible for trademark protection is defined in the Lanham Act as "any word, name, symbol, or device, or any combination thereof used by a person", with the purpose of a trademark defined as "to identify and distinguish […] goods, including a unique product, from those manufactured and sold by others and to indicate the source of the goods, even if that source is unknown." The distinctiveness of a mark will depend on which category it falls within, determined by the relationship between the mark and the underlying product. The courts have established five categories: (i) generic, (ii) descriptive, (iii) suggestive, (iv) arbitrary, or (v) fanciful[209]. The categories, nicknamed the "Abercrombie classifications", are important: the requirements needed and the degree of legal protection given to a particular trademark will vary depending on its category. The levels of protection available works on a sliding scale: marks categorised as arbitrary or fanciful are considered inherently distinctive and capable of identifying an underlying product, and are given a high degree of protection. Generic marks, on the other hand, are unable to be protected as trademarks. The Lanham Act also states that a purported trademark may not be utilitarian or aesthetically functional.

Louboutin's iconic red soles and his trademark war in the US and France

French designer Christian Louboutin, known for his design of the iconic black stiletto with a red sole, has been seeking trademark protection for his red soles for years, with varying degrees success, evidencing the complexity and uncertainty of global intellectual property laws for a designer. An active litigant[210], he argues that the red

[207] USPTO Office of Public Affairs (OPA), 'United States Patent and Trademark Office', Text, accessed 16 October 2020, https://www.uspto.gov/.
[208] The Lanham Act is the federal statute governing trademark law, including registration, maintenance, and protection of trademarks used in or affecting interstate commerce (15 U.S.C. §§ 1051 to 1127)
[209] The list of trademark distinctiveness was established in *Abercrombie & Fitch Co. v. Hunting World* 537 F.2d 4 (2nd Cir. 1976)
[210] Louboutin registered his first trademark in France in 2000.

soles are the part of the design that make shoes recognisable as “Louboutins”, and that in itself deserves legal protection. In 2012, Louboutin wins a battle against Yves Saint Laurent, with the United States federal appeals court granting him trademark protection for his red soles[211]. However, he struggles in his home country. In the same year that he gained success in the US, Louboutin fails to convince the *Cour de cassation* that a trademark could be identified in red soles, in a case against fast-fashion giant and notorious “copycatter,” Zara[212]. The trademark is cancelled for its lack of distinctiveness: it is deemed too vague and filed with no Pantone colour reference in the trademark. The court also rules that the sole of a shoe cannot be trademarked, as the shape of a sole is “imposed by nature” and therefore not distinctive to a particular owner. Louboutin was ordered to pay the litigation costs of Zara France, as per Article 700 of the French *Code de Procedure Civile*. This decision is made in the same year that the Paris *Cour d’appel* rules the iconic Burberry tartan distinctive[213]. Louboutin later files a new trademark, which includes a sketch of the shoe, including a dotted line showing the area concerned along with a Pantone reference.

Louboutin has also battled with EU courts to protect his red sole, where they ultimately ruled in his favour. In 2018, when Louboutin sues Dutch fashion house Van Haren for infringing his trademark[214], the Dutch courts ask the EU for clarification on the applicability of the prohibition in Article 3(1)(e)(iii) of Directive 2008/95, which states that signs:

> […] which consist exclusively of…the shape which gives substantial value to the goods shall not be registered or if registered shall be liable to be declared invalid.

The CJEU rules that as the trademark specifically states that the protection is for the position where the red colour is applied on the shoe, the mark in question is not

[211] Christian Louboutin S.A. v. Yves Saint Laurent America Inc., No. 11-3303 (2d Cir. 2012).
[212] Court of Cassation [Cour de Cassation], Commercial Chamber, Christian Louboutin v. Zara France, Decision No. 11/20724, 30 May 2012
[213] Paris Court of Appeal 14 December 2012 n 12/05245. Although this was enforced by the French courts it is worth noting that the EU courts can be more severe than the French ones with features such as the tartan check. At EU level, tartan check trademarks have been cancelled for their lack of distinctiveness whereas the Burberry check was held distinctive by the Paris Cour d’appel.
[214] Court of Justice of the European Union, Louboutin v Van Haren Schoenen BV (Case C-163/16 June 12, 2018)

related to a specific shape. They add that the definition of shape in everyday language does not mean a colour applied to a sole, and that the importance of everyday language and understanding of the word shape must be considered here[215]. Lawyers remark that if Louboutin had filed his case following the replacement of EU Directive 2008/95 by Directive 2015/2436 in 2019, the decision of the CJEU might have been quite different[216]. The new directive expands the above wording to state that signs:

> […] which consist exclusively of...the shape, **or another characteristic**, which gives substantial value to the goods cannot be registered or, if registered, they are liable to be declared invalid.

In the same year that the EU courts rule in his favour, Louboutin also sees success in France when the *Cour d'appel* rules that his newly registered trademark is valid[217]. The fashion brand, Kesslord Paris, bringing a case against Louboutin, claims that the graphic representation of the trademark is not clear and precise, as per Article L.711-1 of the CPI, and lacks distinctiveness. In response, the court says:

> The trademark consists of the colour red (Pantone 18.1663TP) applied to the sole of a shoe as shown (the outline of the shoe is therefore not part of the trademark but serves to show the positioning of the trademark).

The court also rules against Kesslord's argument that the trademark is invalid because it concerns a shape imposed by nature, noting that the red colour's specific location and position on the shoe, i.e. the sole, makes it distinctive and therefore valid.

Louboutin's long-winded battle to protect his iconic red soles, both in France and the US, goes some way towards demonstrating why online call-outs are increasingly

[215] Muscat Mizzi Advocates-Timothy Spiteri, 'A Comprehensive Analysis of the CJEU's Louboutin Ruling', Lexology, 19 June 2018, https://www.lexology.com/library/detail.aspx?g=8809c1fd-320f-4ce0-b768-111ace23f651.
[216] Ciara Cullen, 'Christian Louboutins Red Sole Walks All over the Trade Mark Directive Shape Exclusion', RPC, accessed 11 December 2020, https://www.rpc.co.uk/perspectives/ip/christian-louboutins-red-sole-walks-all-over-the-trade-mark-directive-shape-exclusion/
[217] Court of Appeal [Cour d'appel] Paris, SAS Kesslord Paris v. SAS Christian Louboutin [2018] Fr. Decision n°17/07124, 15 May 2018.

used to replace rights enforcement through the formal mechanisms of intellectual property law. Louboutin, both as an individual and a business, can access teams of the best lawyers; yet he still struggles to protect his globally renowned and iconic red sole, and continues to this day[218]. By comparison, one online call-out could arguably have settled the issue quickly, publicly, and cheaply, forcing a brand like Kesslord to react for fear of the call-out's consequences. It is clear why smaller brands often take a chance on a call-out.

Protecting cultural knowledge and cultural design expressions

As discussed in the previous chapter, many of Diet Prada and Give Credit's call-outs focus on shaming brands for copying without credits the designs of indigenous groups and communities across the globe. These call-outs have gained traction online, and are credited with influencing thought on the distinction between cultural appreciation and appropriation, and on the point at which using designs without permission becomes excluding communities from sharing the benefits gained from usage of their designs. Across global intellectual property regimes, it is broadly acknowledged that there is a 'mismatch' between the need to protect traditional cultural knowledge and expressions, and an intellectual property system designed to protect and reward the new, seemingly excluding older cultural expressions[219]. With much of the modern intellectual property system unfit to protect cultural expressions[220], some countries are taking steps to create specific laws that protect cultural knowledge and its particular characteristics, while others are adapting their existing intellectual property laws, although there are many countries who are still not making any attempt to protect cultural expressions. Moreover, the cultural values of many of the indigenous groups and communities whose designs are used without their permission clash with the value that is placed on traditional intellectual property: where intellectual property law seeks to reward and protect the creative outputs of individuals, indigenous groups and communities value community creation and

[218] In April 2022, Louboutin lost a battle in the Japanese courts to protect his red sole, on the grounds that "Louboutin lacks robust rights in the red sole trademark in Japan". *See* Julie Zerbo, 'Louboutin Handed a Loss in Red Sole Trademark Lawsuit in Japan', The Fashion Law, accessed 13 April 2022, https://www.thefashionlaw.com/louboutin-handed-a-loss-in-red-sole-trademark-lawsuit-in-japan/.

[219] World Intellectual Property Organization (WIPO) (2017) *Protect and Promote Your Culture: A Practical Guide to Intellectual Property for Indigenous Peoples and Local Communities*. WIPO: Geneva

[220] WIPO give the example that the preservation, conservation and safeguarding of traditional knowledge and cultural expressions are not covered by intellectual property protection.

ownership[221]. The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore[222] exists to develop international legal instruments and agreements for the protection of traditional knowledge and cultural expressions and provides training to affected groups on how to understand their existing intellectual property rights. Steps are clearly being made in the right direction, but it will take time to bridge the disconnection between protecting cultural knowledge and modern intellectual property laws. This is arguably allowing fashion houses and brands to continue to overstep the mark from inspiration to appropriation, fuelling Diet Prada and Give Credit's call-outs on this particular type of alleged copying.

The US Indian Arts and Crafts Act (1990)

US intellectual property law offers no specific protection for cultural expressions or traditional knowledge, so Native Americans wishing protect their cultural expressions are increasingly reliant on the Indian Arts and Craft Act (1990) rather than on traditional intellectual property protections. The Act, which serves to prohibit misrepresentation in marketing Native American Indian arts and craft products in the US, prevents brands from selling items that suggest they are produced by a particular Indian tribe. The Navajo Nation, who are famed for their weaving, have been selling goods under the name 'Navajo' for over 150 years. They hold over eighty registered trademarks, the first registered in 1943. In 2011, they garner significant media attention when they take legal action against Urban Outfitters, as the brand starts selling goods labelled as 'Navajo' or 'Navaho'. [223] Following a cease-and-desist letter, Urban Outfitters remove the goods from sale, but on learning that the brand has made more than $500m from the 'Navajo' products, the Navajo Nation launches legal action for trademark violations and violation of the Indian Arts and Crafts Act[224]. This is not the first time the tribe takes legal action: they have

[221] Suzanne Milchan, 'Whose Rights Are These Anyway? A Rethinking of Our Society's Intellectual Property Laws in Order to Better Protect Native American Religious Property', *American Indian Law Review* 28, no. 1 (2003): 157–72, https://doi.org/10.2307/20171717.
[222] *See* World Intellectual Property Organization (WIPO) 'Traditional Knowledge and Intellectual Property – Background Brief', WIPO: Geneva, accessed 26 October 2021, https://www.wipo.int/pressroom/en/briefs/tk_ip.html.
[223] Navajo Nation v. Urban Outfitters, Inc., 918 F. Supp. 2d 1245, 1249 (D.N.M. 2013).
[224] There were a total of six claims put forward in the case: trademark infringement, trademark dilution, unfair competition, false advertising, commercial practices law violations, and violation of the Indian Arts and Crafts Act.

successfully cancelled a ‘Navaho’ trademark registered by a French company operating in the US the year before. In this case, the District Court for the District of New Mexico dismisses the tribe’s claim. Despite the evidence put forward, it rules that "conclusory allegations of nationwide recognition are insufficient to show that "Navajo" is a household name.” The case, both before and after legal proceedings, attracts attention and controversy; it concludes with the brand agreeing to settle for an undisclosed amount[225]. The timing of this case overlaps with the creation of the Diet Prada account,[226] but the controversy it attracts started as soon as the products were put on sale, long before the Instagram platform exists. This shows that the frustration and emotion that online-shaming accounts tap into already had momentum: aggrieved parties were simply given a platform to amplify their voice. Kathryn Moynihan, writing after the decision in this case, highlights the problems faced by indigenous groups in protecting their intellectual property, saying:

> It is unrealistic to expect Native Americans to successfully frame their concerns in a Western intellectual property framework that largely discounts them […] This theory seems especially true when even the largest tribe in the United States is told that they cannot meet the statute's standard of “fame”. The Navajo have been weaving blankets and selling them throughout the country for centuries. Today, they are sold at prestigious auction houses and hang in some of America's finest museums. If a district court can hold that juries would likely find the Tempur-Pedic mark[227], which was thirteen-years-old at the time, to be famous, one is forced to wonder why the centuries old, nationally recognized Navajo textiles are not. With such a result, is it is difficult to look at trademark […] law and not view it as stacked against Native Americans.[228]

In April 2020, Give Credit draws attention to a new case involving the Indian Arts and Crafts Act in one of its call-outs. Sealaska Heritage Institute are taking legal action

[225] ‘Urban Outfitters Settles with Navajo Nation after Illegally Using Tribe’s Name’, the Guardian, 19 November 2016, http://www.theguardian.com/us-news/2016/nov/18/urban-outfitters-navajo-nation-settlement.
[226] Diet Prada was created in 2014. Urban Outfitters started selling the products in question in 2009, and the settlement was agreed in 2016.
[227] Tempur-Pedic is a manufacturer of mattresses and pillows in the US.
[228] Kathryn Moynihan, ‘How Navajo Nation v. Urban Outfitters Illustrates the Failure of Intellectual Property Law to Protect Native American Cultural Property Notes’, *Rutgers Race & the Law Review* 19, no. 1 (2018): [i]-76.

against US brand MyTheresa, and its parent company Neiman Marcus[229], for selling a sweater for $2,500 that "that not only hijacks a copyright protected pattern from a native Alaskan woman, but also co-opts the name of a "specific, defined, and famous style of weaving and pattern" that is associated with Native American groups, namely, the Tlingit, Haida, and Tsimshian, thereby, violating a number of federal and state laws. Zerbo comments that cases such as this are still relatively unique: claims of appropriation have no basis in copyright law as there is no individual ownership involved[230]. Moreover, there are currently no global laws or legal rights that protect traditional clothing designs, so the communities involved are often forced to rely on the Indian Arts and Craft Act. The Sealaska Heritage Institute filed several claims including copyright infringement and violation of the Indian Arts and Craft Act, but announced in March 2021 that Neiman Marcus (and an additional 11 defendants) had agreed to a settlement outside of court for an undisclosed sum[231].

France's stance on moral rights and cultural design expressions

Copying and the misappropriation of traditional cultural design expressions affect communities in two ways: the economic injustice of not being credited and not receiving a share from benefits; and the cultural and social injustice of the designs being inconsiderately misused, losing their traditional essence and meaning[232]. The concept of moral rights within copyright legislation seems to address these concerns. For example, indigenous groups who have seen their cultural knowledge used without their permission have talked about their desire to be properly recognised and credited in the reinterpretations of their designs. They have successfully asserted their moral rights in cases where they have not been acknowledged – the right to attribution (in French copyright law, *the droit de paternité*). In 2015, French fashion designer Isabel Marant produces an embroidered dress with a striking resemblance

[229] *Sealaska Heritage Institute, Inc., v. Neiman Marcus Group LTD, LLC, Neiman Marcus Group, LLC, Neiman Marcus Group, Inc., and MyTheresa.com, GmbH, 1:20-cv-00002 (D. Alaska).*

[230] Julie Zerbo, 'This $2,500 Sweater Being Sold by MyTheresa, Neiman Marcus Violates the Indian Arts & Crafts Act, Per New Lawsuit', The Fashion Law (blog), 23 April 2020, https://www.thefashionlaw.com/mytheresa-neiman-marcus-are-being-sued-for-sell-a-sweater-that-allegedly-violates-indian-arts-crafts-act/.

[231] In August 2020, the Sealaska Heritage Insitute broadened the scope of its complaint, filing an amendment to include an Italian brand, Alanui and New Guards Group, the parent company of Farfetched.

[232] Brigitte Vézina, 'Ensuring Respect for Indigenous Cultures: A Moral Rights Approach', Centre for International Governance Innovation, 29 May 2020, https://www.cigionline.org/publications/ensuring-respect-indigenous-cultures-moral-rights-approach/.

to the traditional designs of the Mexcian Mixe community[233]. The dress retails for an amount significantly higher than its authentic version, the brand has not asked permission for the design to be used, and it has not credited the community as an inspiration for the design. In an ironic turn of events, Isabel Marant is sued by another fashion brand in the Paris district court, Antik Batik, who have produced a very similar dress and claim that they own the copyright for this design. Marant's defence is surprising: she submits evidence that the designs do, in fact, come from the Mixe community, and that she is not the author of the copyright in question. Marant removes the dress from sale at the request of the Mixe community, and the court settles the second matter, ruling that Antik Batik cannot claim property rights on the design either[234]. France's position on moral rights – that last in perpetuity – should, in theory at least, place the country in a strong position to address the concerns of indigenous groups who feel that fashion brands are using their cultural designs in a way that is disrespectful and inconsiderate. The reality, however, is that the concept of moral rights within copyright law is not fit for protecting traditional cultural expressions: moral rights only apply to designs that meet the aforementioned criteria for copyright, including the requirement that the works be original. Given the nature of the traditional design expressions that are replicated by fashion brands (and then found on the pages of Diet Prada and Give Credit), proving their originality is challenging, given that the skills and craftmanship used to create the designs is passed down from generation to generation. Taking into consideration France's narrowly defined approach to originality, the reality is that many cultural expressions remain unprotected under French copyright law and its associated moral rights.

The EU position: Extending GI Protection in the EU to non-agricultural products, including textiles and handcrafted goods

In March 2021, the European Commission starts a public consultation for the revision of the EU Geographical Indications scheme; a scheme that currently

[233] Vézina, 'Curbing Cultural Appropriation in the Fashion Industry'.
[234] District Court of Paris [Tribunal de Grande Instance de Paris], Antik Batik Sasu v. IM Production SAS (Fr.) Decision No. 15/03456, 3 December 2015

extends to agricultural products[235]. The revisions aim to build a more sustainable system and to address changing climate conditions, empower local producers, ensure protection for non-agricultural products, and prevent cybersquatting. Amongst the non-agricultural products proposed for addition to the scheme are textiles and handcrafted goods: the geographical indication will include a thorough description of how the product is produced, including its traditional processes, and will prevent third parties from using the indication if they cannot meet the same standards. These revisions would contribute to the protection of cultural design expressions and other traditional knowledge. Indigenous communities face challenging difficulties in enforcing traditional intellectual property protections when they believe their designs have been copied without permission by fashion brands. Even if some countries have adapted their laws to protect cultural design expressions, it is hard to ensure that these are not infringed in other countries. This points to the need to look beyond traditional intellectual property laws in protecting cultural expressions. While the EU's intention to revise and extend the Geographical Indications scheme to textiles and handicrafts will not stop the copying of designs altogether, it will stop the sale of products that do not meet the standards attached to the indication. It might even prevent some fashion brands copying some designs in the first place.

Expanding the Nagoya Protocol

The Nagoya Protocol, as briefly mentioned in Chapter 3, is potentially significant in the protection of traditional cultural designs. A landmark treaty in the fight to protect traditional knowledge, it ensures the fair and equitable sharing of benefits arising from the use of biological and genetic resources with local communities and indigenous groups. As the majority of these resources are held within the traditional knowledge of indigenous people, the Protocol ensures that they can only be taken with the express permission of their custodian communities. The Protocol is credited with starting to rebalance the economic injustice and exploitation which has left some

[235] A geographical indication is a name or sign used on certain products, which corresponds to a specific geographical location or origin. It acts as validation that the product possesses certain qualities, or enjoys a certain reputation, due to its geographical origin, and prevents third party use if the product does not meet the standards associated with the indication. *See* 'EUIPO - Public Consultation Now Open: EU Geographical Indications', accessed 23 April 2021, https://euipo.europa.eu/ohimportal/en/news/-/action/view/8485399.

of the world's poorest countries stripped of their genetic and biological resources by corporate multi-nationals[236]. Campaign group the Fashion Revolution advocate for an extension of the Nagoya Protocol to offer the protection of traditional knowledge beyond biological and genetic resources to cultural intellectual property[237]. Whilst there are currently no specific plans to change the Protocol to that effect, it continues to develop as "a vehicle for sustained positive change and transformation in the post-2020 era, for both biodiversity and people"[238], so its extension is not out of the question in the future.

The issues discussed in this chapter are complex, both in conventional intellectual property enforcement and in the protection of traditional cultural expressions. The intricacies of the legal, political, and social frameworks they sit in shed some light on why aggrieved creators prefer to use an online call-out by platforms like Diet Prada or Give Credit to navigating their way through the complexities of the law. The comparative simplicity of these platforms' shame-based methodologies can result in similar remedies in the form of monetary damages, attribution or injunction, actioned within days of the call-out, and without having to pay lawyers. However, their methods fail to address the balance that conventional enforcement frameworks have developed over the year, protecting the rightsholder, the alleged infringer, as well as the public. The following chapter will analyse what the use of shame in these call-outs means for this delicate balance.

[236] *See,* for example, when the Kenyan Salt Lakes were mined for extremophiles, which were later sold to Procter & Gamble : Marc Lacey, 'Washday Miracle? Kenya Wants Profit Share - The New York Times', accessed 28 April 2022, https://www.nytimes.com/2006/02/21/world/africa/21iht-lake.html.
[237] 'Fanzine 04: Fashion Craft Revolution by Fashion Revolution - Issuu', accessed 28 April 2022, https://issuu.com/fashionrevolution/docs/issue_fanzine04_fashioncraftrevolution_240x170_sin.
[238] 'The Nagoya Protocol Brings Fairness, Equity, and Sustainability to the New Global Agenda for Biodiversity', Convention on Biological Diversity, accessed 28 April 2022, https://www.cbd.int/article/abs-we-all-need-campaign.

SHAME, SHAMING AND INTELLECTUAL PROPERTY

> "The power of shame is that it can be used by the weak against the strong" – Jennifer Jacquet[239]

Diet Prada and Give Credit have cleverly capitalised on the use of shame and shaming in their online call-outs, although to varying degrees, relying on its effects to mobilise their followers into action. Public shaming is not a new thing; it is a universal human behaviour that has been deep-rooted in society for centuries. As an example, long before the internet existed, shaming and boycotting campaigns against big brands such a Nestlé were commonplace[240]. The rise of the internet and social media platforms has shifted public shaming online, broadening its reach to the global online stage, creating a cultural shift in how we hold those with power accountable for their actions. There are few studies considering the use of shame in the context of intellectual property law. Rosenblatt's is one, that focuses on those areas of creativity that fall in the intellectual property's negative space, or where the application of the law has been uncertain or inconsistent[241]. Rosenblatt argues that lawmakers should pay attention to shame-based enforcement of intellectual property rights to ensure that formal intellectual property enforcement mechanisms add value beyond what shame-based enforcement offers. Although her research pre-dates the existence of Diet Prada and Give Credit, this chapter focuses on how Rosenblatt's findings can shed light on the online shaming of brands for perceived intellectual property violations and will also consider wider studies on the use of shame and shaming in call-out culture. Understanding the use of shame, and the shaming of brands for 'copycatting' is crucial in revealing what Diet Prada, Give Credit and other similar platforms have tapped into to create the new type of backlash, subsequent critical discourse, new set of extra-legal norms, and the new understanding of intellectual property rights that are developing online. As seen in previous chapters, although these platforms' copying call-outs often lack legal merit, the consequences

[239] Zöe Corbyn, 'Jennifer Jacquet: "The Power of Shame Is That It Can Be Used by the Weak against the Strong"', the Guardian, 6 March 2015, http://www.theguardian.com/books/2015/mar/06/is-shame-necessary-review.
[240] Jill Krasny, 'Every Parent Should Know the Scandalous History Of Infant Formula', Business Insider, accessed 5 July 2022, https://www.businessinsider.com/nestles-infant-formula-scandal-2012-6.
[241] Elizabeth L. Rosenblatt, 'Fear and Loathing: Shame, Shaming, and Intellectual Property', *DePaul Law Review* 63, no. 1 (2014 2013): 1–48.

of their call-outs can be significant for brands, who often have little opportunity to defend themselves, unlike in traditional law courts. In the court of public opinion, the brands' response to call-outs is a sensitive subject, and one that few have managed to master. To understand how the use of shame and shaming is driving the popularity of Diet Prada and Give Credit, it is important to first consider what these terms mean, how they are used in online social media call-outs, and what relationship they have with formal intellectual property law.

Shame and shaming defined

Although these terms are often used interchangeably, they are subtly different: shame is defined in the Cambridge Dictionary as
"an uncomfortable **feeling** of guilt or of being ashamed because of your own or someone else's bad behaviour" [242]; whereas shaming is defined as
"the **act** of publicly criticising and drawing attention to someone, especially on the internet"[243]. Shame is defined in the context of feelings and emotions, whereas shaming is explained as an external act and includes a specific mention of the internet, which indicates just how prevalent and pervasive online shaming has become. What is important about both terms, is that they infer real possibilities for shaping societal behaviours and social controls. Jacquet argues that although the process of shaming companies or powerful individuals into being better is a relatively weak instrument for invoking meaningful social change, it is often the best thing available[244]. She explains that using shame and shaming to tackle societal issues can harbour positive results, namely because they are tools that we all have at our disposal; consequently, a collective use of shame can turn weak voices into one strong voice advocating for change. Jacquet also acknowledges challenges and criticisms associated with the use of shame and shaming to shape behaviours. She notes that it can be difficult territory to navigate, that it comes with liabilities, and that it has the potential to undermine rights and dignity: it might be effective as a tool for shaping behaviour, but it can be a risky one, with ugly results if used unwisely.

[242] 'SHAME | Meaning in the Cambridge English Dictionary', accessed 5 December 2021, https://dictionary.cambridge.org/dictionary/english/shame.
[243] 'Shaming'| Meaning in the Cambridge English Dictionary', accessed 5 December 2021, https://dictionary.cambridge.org/dictionary/english/shaming.
[244] Jennifer Jacquet, *Is Shame Necessary?: New Uses for an Old Tool* (Penguin UK, 2015).

Shame is a painful emotion. It is usually accompanied by other uncomfortable feelings of guilt, humiliation, and embarrassment[245], although Jacquet argues that these other feelings are often more easily forgotten than shame, which is more persistent. To avoid these uncomfortable feelings, we as humans comply with social norms and acceptable day-to-day conduct, which differ from country-to-country and culture-to-culture. We feel shame only infrequently but constantly anticipate it: this is where its power lies[246]. Research in the field of criminal law and deterrence theory argues that although shame and the law often go together, shame can often be a far more powerful force in shaping behaviour than formal law[247]. Rosenblatt argues this is because shame derives its power from community identity, and the internalised values that we derive from those communities: whether that be chefs abstaining from stealing the recipes of other chefs; people and organisations paying their correct taxes; or criminals refusing to inform on other criminals, even if there are legal benefits for doing so.

Where the definition and use of shame focuses on internalised values and feelings, the act of shaming plays on external, public perception of the community in which norms have developed. Shaming typically happens in response to a behaviour that goes against legal, moral or normative boundaries. The act of shaming requires a community to perform it, and the 'shamer' relies on their community, however small or large that community may be, to endorse the shaming. This could be by being vocally critical or disapproving, shunning the 'shamed', or more drastically by boycotting and ruining the reputation of the 'shamed'. Whilst shame and shaming relate to human experience, research suggests that they are also powerful behaviour-shapers for organisations and corporations, despite the inability of these structures to experience shame in the same way that humans do[248]. While a large business might not feel guilt or embarrassment in the painful way that we do as human beings, they can still feel the effects of public shaming: the individuals that

[245] Thomas J. Scheff, 'Shame in Self and Society', *Symbolic Interaction* 26, no. 2 (2003): 239–62, https://doi.org/10.1525/si.2003.26.2.239.
[246] Thomas Scheff, 'Goffman on Emotions: The Pride-Shame System', *Symbolic Interaction* 37, no. 1 (2014): 108–21, https://doi.org/10.1002/symb.86.
[247] Richard J. Arneson, 'Shame, Stigma and Disgust in the Decent Society', *The Journal of Ethics* 11, no. 1 (2007): 31–63.
[248] Richard P. Bagozzi, Leslie E. Sekerka, and Francesco Sguera, 'Understanding the Consequences of Pride and Shame: How Self-Evaluations Guide Moral Decision Making in Business', *Journal of Business Research* 84 (1 March 2018): 271–84, https://doi.org/10.1016/j.jbusres.2017.11.036.Bagozzi, Sekerka, and Sguera.

make up that business and shape its direction will certainly not be immune to feeling shame; and crucially, few businesses are immune to the reputational risk (and by consequence, financial risk) that comes from being publicly shamed. As Jacquet articulates:

> Companies like Google or SeaWorld don't experience guilt, but it's much easier to argue that they do in some sense experience shame — because they change their behaviour in the face of public disapproval, and they defend their reputation[249].

This is key in understanding Diet Prada's and Give Credit's influence on fashion brands. Whilst the brands they target might not feel shame in a human sense, they are reliant on consumers and their custom for profits and market share. Therefore, they may well feel something that replicates shame if they are called-out on a mass scale. If they betray the value of those consumers, many of whom are likely to be followers of Diet Prada or Give Credit, or will have seen one of their call-outs go viral, they face a potentially significant reputational risk: if their community of consumers agree that the called-out copying is 'morally wrong', they may well take action to shun or boycott the brand.

To further understand the role that shame and shaming play in copying call-outs it is necessary to look more closely at the role of shame in wider call-out culture, and then consider their relationship to intellectual property law and extra-legal norms. This chapter will explore whether the use of intellectual property shame and shaming may, in the long term, actually have the opposite effect to what Diet Prada and Give Credit are hoping to achieve: will constant shaming, which some critics argue borders on bullying in the case of Diet Prada, with little legal merit and the inability to distinguish between 'visual borrowing' and actual infringement, eventually make the alleged copying less 'shameworthy'?

[249] James Devitt, 'Is Shame Too Mean or a Tool for Change? - Our World', accessed 4 June 2021, https://ourworld.unu.edu/en/is-shame-too-mean-or-a-tool-for-change.

Public shaming and the rise of call-out and cancel culture

In the wave of online call-out and cancel culture that exists today, the Diet Prada model of call-outs has created a seismic shift in how alleged copycatting by fashion designers is seen by consumers, displacing the power from big brands with big budgets, and putting it back into the hand of the consumer. But their place in online call-out culture extends beyond copycatting call-outs: the Diet Prada model is heralded as being revolutionary in holding those with power, in and outside of the fashion industry, to account. The core of their method is the use of public shaming to garner attention on issues that are often overlooked by mainstream media.

Public shaming, arguably the heart of modern-day call-out and cancel culture, is far from a new phenomenon when it comes to maintaining social control. Experts in evolution credit shame as one of the reasons humanity thrived: in tribal societies, doing something shameful, and by consequence being shamed and feeling shame, often led to exclusion from the tribe; this could be life-threatening, so it was avoided at all costs[250]. However, the benefits of shaming in the new digital world we inhabit are hotly debated: is it an effective way to hold those with power accountable, or does it simply encourage punishment without an opportunity for defence or redemption?[251] Wilson describes online shaming as 'mob justice', and argues that watching it play out is ruining our mental health: online shaming dehumanises us and strips away context from our understanding, so we become unable to accommodate redemption in shaming[252]. The 'mob justice' aspect Wilson highlights – more sympathetically referred to by other scholars as 'citizen-led shaming[253]' – is crucial in enacting public shaming to call someone, or something, out. Scibona, writing in the New York Times, asserts that 'we are undergoing an industrial revolution in shame' and credits new technologies for this[254]. He argues that the new, fast-paced, online media culture in which we are living taps into a sense of collective outrage when we

[250] Daniel Sznycer et al., 'Cross-Cultural Invariances in the Architecture of Shame', *Proceedings of the National Academy of Sciences* 115, no. 39 (25 September 2018): 9702–7, https://doi.org/10.1073/pnas.1805016115.
[251] Nicole Dudenhoefer, 'Is Cancel Culture Effective? How Public Shaming Has Changed', Pegasus Magazine, accessed 26 May 2021, https://www.ucf.edu/pegasus/is-cancel-culture-effective/.
[252] Kimberley Wilson, *How to Build a Healthy Brain: Reduce Stress, Anxiety and Depression and Future-Proof Your Brain*, Hodder & Stoughton, 2020
[253] Daniel Trottier, 'Coming to Terms with Shame: Exploring Mediated Visibility against Transgressions', *Surveillance and Society* 16, no. 2 (1 January 2018): 170–82, https://doi.org/10.24908/ss.v16i2.6811.
[254] Salvatore Scibona, 'Opinion | The Industrial Revolution of Shame', *The New York Times*, 9 March 2019, sec. Opinion, https://www.nytimes.com/2019/03/09/opinion/sunday/internet-shaming.html.

see something online that seems unjust: to ignore it makes us feel as though we are playing a part in that injustice, so we feel compelled to engage and rage, rather than just look away. Although he does not specifically refer to the Diet Prada model, what he describes here clearly reflects the effects of the call-outs analysed in Chapter 3. Whatever the legal position of an aggrieved designer, as a viewer it is hard to look away and do nothing when a small fashion designer appears on your Instagram feed via a viral call-out, devasted that their design has been replicated and mass produced, and unable to even make contact with the company, let alone take legal action against them. This apparent injustice feeds the collective outrage that Scibona describes, fuelling the popularity of call-out platforms.

Academics have also explored whether individuals and organisations feel shame differently in our new online, interconnected world, and how this emotion has changed since the days of fighting for survival as part of a tribe. The rise of social media and digital technologies makes shame it more visible, as it now has a global audience, rather than just a small, local community one. Consequently, it has an increased capacity to be used towards social control: in the case of Diet Prada and similar platforms, controlling everyone from the fashion brands to the consumer reading the call-outs[255]. Studies have shown that when consumers are faced with an ethically questionable situation, for instance that their favourite brand seems to be taking advantage of a small designer or has a questionable supply chain, emotion becomes the key driver in their decision-making process, rather than rational thought. How they act in response is driven by feelings of shame or guilt or embarrassment, as being part of something unethical challenge their moral values[256]. Although Diet Prada's and Give Credit's online call-outs intend to shame the copycatter, the consumer is also made to feel shame, whether intentionally or not. Supporting the fashion house or brand that committed the alleged copycatting puts the consumer in an ethically questionable situation, which gives rise to a sense of shame and responsibility, leading consumers to support the call-out. Placing consumers in this position of responsibility assumes that they are educated on the

[255] Claude-Helene Mayer, Elisabeth Vanderheiden, and Paul Wong, eds., *Shame 4.0: Investigating an Emotion in Digital Worlds and the Fourth Industrial Revolution* (Springer International Publishing, 2021), https://doi.org/10.1007/978-3-030-59527-2.

[256] Denni Arli, Cheryl Leo, and Fandy Tjiptono, 'Investigating the Impact of Guilt and Shame Proneness on Consumer Ethics: A Cross National Study', *International Journal of Consumer Studies* 40, no. 1 (2016): 2–13, https://doi.org/10.1111/ijcs.12183.

issues at hand, in this case whether there has been an intellectual property violation, and have the knowledge needed to know and do better. Consumers are, often inadvertently, put in a position where they feel they have power over ‘big business' and may conclude that they should be more discerning with the fashion designers they choose to support. There is something quite surreptitious happening here: the call-outs fall short of a call to action, and yet they rely on their audience taking action. Consequently, the platforms choose to occupy a position of influence but not leadership, where arguably they have the power without the responsibility. If a wave of consumers decides to boycott that shamed fashion house then this has the potential to really negatively impact the financial health of a business.

Lewis finds that a common reaction to being publicly shamed is to attempt to hide one’s feeling of shame with anger, or to counterattack the credibility of the shamer so the trust of their community[257]. Brands shamed by the online call-out platforms do follow this pattern: for example, Jacquemus lashes out and calls Diet Prada ‘fake news’; or Dolce and Gabbana sues them for defamation (see Chapter 3). Despite criticism of Diet Prada and similar platforms for their bullying tactics, they wield, for the time being at least, significant power and reach. Therefore, how fashion houses respond to copying call-outs is important: avoiding anger is key in bringing the consumer back on board. In what may be the ‘golden age’ of call-outs, many brands have been forced to change their practices after seeing their profits plummet, to avoid being ‘cancelled’ completely. Lingerie brand Victoria’s Secrets is in financial difficulty after they refused to embrace more diversity in their infamous fashion shows; it is currently rebranding to include larger sizes in their collections, in the hope of winning consumers back. Beauty company L’Oréal has recently rehired transgender black activist Munroe Bergdorf, after firing her for tweets about racial inequality and white supremacy. L'Oréal felt that Bergdorf's comments were "at odds" with its mission to support "diversity and tolerance towards all people irrespective of their race, background, gender and religion." This rehiring followed a backlash from consumers, who began to boycott the brand after Bergdorf was let go,

[257] Helen Block Lewis, *Shame and Guilt in Neurosis* (International Universities Press, 1971).

swamping their social media accounts with criticism about their hypocritical statements on diversity[258].

Shame, shaming and the law

The use of shame and shaming is intrinsically associated with formal law; the law, in theory at least, reflects the values of society, so breaking the law is considered shameful[259]. It is this simple link that makes the law an effective form of social control, driving behaviour even in cases where one's personal morals conflict with formal law. In recent years, academics have drawn attention to a new trend of 'shaming sentences', where judges in criminal cases deliver an 'alternative' sentence as punishment for breaking the law: instead of serving a jail sentence, the defendant is given a 'shaming sentence'[260]. In the words of Rosenblatt, 'in most contexts, shame and shaming reinforce formal law'[261], yet she specifies that "while shame and shaming reinforce formal intellectual property law in some ways, they may actually do even more to work against it."[262] Her rationale is crucial in understanding whether the call-out platforms' shame-based model and the power that they wield might be time-limited. Will the platforms' audiences eventually lose sympathy with the shamers who offer little opportunity for their alleged offenders to defend themselves? Or does the Diet Prada model of intellectual property call-outs reframe Rosenblatt's arguments, made before this new phenomena existed?

Rosenblatt's perspective

Rosenblatt argues that many of us consider copying through our own internalised values, which stem from the norms created by the communities that we are part of:

---

[258] *See* 'Munroe Bergdorf: Model Rejoins L'Oreal after Racism Row', *BBC News*, 9 June 2020, sec. Entertainment & Arts, https://www.bbc.com/news/entertainment-arts-52984555. *and* 'The Victoria's Secret "Woke" Rebrand Is Only Skin Deep | Priya Elan', the Guardian, 24 February 2020, http://www.theguardian.com/commentisfree/2020/feb/24/victorias-secret-woke-lingerie-diversity.

[259] Tom R. Tyler, *Why People Obey the Law* (Princeton University Press, 2006).

[260] *See* Michael White, 'Are We Right to Use Shame as an Instrument of Criminal Justice Policy?', the Guardian, 2 December 2008, http://www.theguardian.com/politics/blog/2008/dec/02/community-payback-vests. White's examples include people in the UK sentenced to community service as punishment who have been required to wear what is deemed the 'vest of shame' with the words 'community payback' written across the back. *See also* Dustyn Coontz, Beyond First Blush: The Utility of Shame as a Master Emotion in Criminal Sentencing, Michigan State Law Review. 415, 443, 2015. Coontz details several shaming sentences handed down by judges in the US, including a man required to wear a chicken suit, a woman required to wear a sign in which she referred to herself as an 'idiot', and a man required to wear a sign in which he apologised to the police officers that he attacked.

[261] Rosenblatt, 'Fear and Loathing'. Pg. 18

[262] Rosenblatt. pg. 18

most people would feel shame if they were to copy someone else's work within their communities. This extends to copying something that is protected by formal intellectual property law, as well as items that might fall within the intellectual property negative space, which she terms "doctrinal no man's land"[263]. This is because we have internalised anti-copying norms that exist in the communities around us, even in cases where formal law would allow the copying to happen. In academia, scholars cite other scholars when quoting their work so as not to be seen to claim someone else's idea as their own; tattoo artists' code prevents them from copying the original work of another artist; and well-known chefs have their 'gentleman's agreement' not to copy each other's recipes: their conscience tells them this is wrong, regardless of what the law may say. Those 'community anti-copying' norms are created outside the confines of formal law, and the use of shame and shaming ensure that they are complied with. Global intellectual property laws differ in how explicitly they protect fashion design, so fashion design protection can be uncertain and inconsistent; it is staggered on the edge of the negative space, surrounded by a set of norms around copying, pitting small designers against big brands, playing on the David vs. Goliath narrative. For instance, Diet Prada and Give Credit concern themselves predominately with small designers and indigenous communities 'copycatted' by large brands and fashion houses, and seem increasingly less concerned with whether fast-fashion giant Zara copies the latest Chanel tweed jacket. In doing so, the call-out accounts tap into the complex set of emotions around shame and shaming, as well as intellectual and emotional property, and what we consider to be morally acceptable. As a result, their followers become largely unconcerned about what the law says about the alleged copycatting, and more concerned with the power imbalance between the 'copycatted' and the 'copycatter'. Diet Prada and Give Credit's call-outs work in such a way that the alleged infringer, and by consequence the consumers who support the alleged infringer, are made to feel shame about using their position of power to harm a small business. This dynamic has initiated a new conversation on the ethics of copying, beyond the formal regulations of the law that governs it.

[263] *See* Elizabeth L Rosenblatt, 'A Theory of IP's Negative Space', Columbia Journal of Law & the Arts, Vol. 34, No. 3, 2011

Rosenblatt considers the use of shame in those creative communities that fall somewhat within, or fully within, the heartland of intellectual property protection. She says:

> While internal shame prevents copying, external shaming encourages it. More accurately, external shaming discourages intellectual property owners from aggressively enforcing their rights. When copyright, patent, or trademark owners send cease-and-desist letters, the Internet makes it easy to shame the intellectual property owners by accusing them of bullying or being trolls. In so doing, shamers create a public conversation that transforms intellectual property owners into "bad guys" simply for enforcing their own rights. This discourse uses the language of shaming to shape the reaction of the shamed entity and to build public opinion.[264]

In this context, Rosenblatt is referring again to this David vs. Goliath battle that has pitted small designers and the big fashion brands, but she reverses the scenario from the Diet Prada and Give Credit call-outs. Here, Rosenblatt is referring to instances where small designers (or other creatives) have received cease-and-desist letters from large brands and fashion houses, and those small creatives have gone on to share the letters within their communities, with their communities denouncing the intellectual property owner as a bully for enforcing their rights. She discusses the website Chilling Effects, a joint-project website set up by several high-profile US university law schools, which collected and analysed cease-and-desist letters from large, powerful brands to smaller businesses, and then published them with a summary of the recipient's legal rights[265]. The website was founded in 2001, nine years before Instagram was created and thirteen years before the existence of Diet Prada; it functions as an early day intellectual property shaming platform, although created outside of the currently defined call-out and cancel culture. Like Instagram call-out accounts, the website invites submissions from the public. It is founded by a group of activists who feel aggrieved by what they believed were immoral practices in and around intellectual property rights enforcement: in this case, they believe that

[264] Rosenblatt, 'Fear and Loathing'. Pg. 25

[265] *See* 'Chilling Effects Clearinghouse', accessed 9 July 2021, https://chnm.gmu.edu/digitalhistory/links/cached/chapter7/link7.62.ChillingEffects.html. *See also* Evan Osnos, 'Chilling Effects', The New Yorker, accessed 9 July 2021, https://www.newyorker.com/news/evan-osnos/chilling-effects.

that the unregulated private practice of sending bullying cease-and-desist letters is increasing and is damaging free speech. Much like Diet Prada and Give Credit, their goal is to stir up public opinion on good and bad behaviour with regards to intellectual property, by shaming big companies and encouraging the public to side with small businesses, even if they are the alleged infringer. Although this example reverses the Diet Prada and Give Credit narrative by shaming the 'copycatted' (in this example, the big business) rather than the 'copycatter' (here, the small business), the message is similar: both are concerned with the power imbalance between big and small businesses in matters of intellectual property; both believe that shaming draws attention to the bad behaviour; and both use what can be described as, in the context of Diet Prada specifically, bullying behaviour to publicly call-out this perceived imbalance of power. This encourages both the 'shamed' target and the wider public to believe that the behaviour is wrong, and generates discussion about formal intellectual property laws, its strengths, and its weaknesses. It also highlights how unpredictable the use of shaming is in trying to shape behaviours around intellectual property, and how fickle the discourse can be: it can be easily shaped depending on who it is doing the shaming, their point of view, and how powerful their voice is.

In the face of increasing criticism about their content, Chilling Effects removes itself from Google searches in 2015, when its modus operandi was described as 'repugnant' by US not-for-profit the Copyright Alliance. As their audience begin to realise the flaws in their methodologies, there is every possibility that call-out practices will go full circle, with the audience eventually turning its back on the shamer. Indeed, Diet Prada is facing increasing criticism online for its bullying tone, lack of kindness, lack of factual information, and lack of legal nuance in its call-outs[266]; it may suffer a similar fate as Chilling Effects as followers increasingly feel sympathy for bullied alleged infringers. There is no guarantee that the public and shamed brands will accept extra-legal community norms, internalise their values on what is acceptable in terms of copying, and change their behaviour in the long term. Similarly, whether it is Chilling Effects calling-out big brands for their allegedly unfair

[266] 'Call-out Culture Could Do with a Little More Kindness | Buro 24/7 Singapore', accessed 12 July 2021, https://www.buro247.sg/fashion/insiders/call-out-cancel-culture-diet-prada-public-shaming-game-changer-in-fashion-could-do-with-more-kindness.html.

cease-and-desist letters, or Diet Prada and Give Credit shaming big brands for copying the designs of small designers or a remote Mexican tribe, there is no guarantee that their call-out tactics will not cause the public to one day turn on them. In fact, this seems likely to occur, if the call-out platform is unable to distinguish between shaming to invoke meaningful change, and plain and simple bullying.

Benefits and drawbacks of using shame in place of formal intellectual property mechanisms

For the time-being at least, the Diet Prada call-outs model is here to stay. They are still the first port of call for many aggrieved fashion designers who wake up to see virtual copies of their designs on the online social media pages of a big brand with an even bigger budget. As discussed in the previous chapter, there are obvious advantages and disadvantages to using shame-based enforcement in lieu of formal intellectual property laws. Call-out platforms have a huge combined following, reach, and links to the industry; call-outs are virtually cost-free; they are quick; and they offer similar remedies to that of formal law, without the need to explore the legal nuances intellectual property rights. Much like formal channels enforcing intellectual property rights, shame-based call-outs can also be unpredictable and inconsistent: like many things that play out online, gaining traction to be effective is often based on luck; and there is no guarantee that a call-out will obtain the result sought by an intellectual property holder. Additionally, independent designers have reported that they find the scale of the traffic call-outs direct to their social media accounts so vast that the whole process quickly becomes overwhelming and stressful[267]. Beyond these positive and negative elements, there are less obvious benefits and drawbacks of using shame-based enforcement over formal intellectual property law, which can reveal how formal intellectual property law can add value to the discussion beyond what shame-based enforcement offers.

Adler and Fromer argue that one of the benefits of shame-based enforcement of intellectual property rights over formal law is what they term ‘the cool factor’. They explain:

[267] In March 2021, Ngoni Chikwenengere, owner of ‘We are KIN’ reported via Instagram having to turn off her comments on her brand’s social media account, after Diet Prada called-out ‘We Wore What’ for copying her designs.

> [Intellectual property] self-help can build a creator's reputation for being cool, while litigation and the stodgy associations of law can do the opposite […] self-help can enhance a brand's image, whereas resorting to the law can make a cutting-edge creator look uptight […] For rightsholders in the intellectual property context, self-help has thus far proven to be one way of preserving, and even earning, a cool reputation.[268]

Fashion is generally considered to be a 'cool' industry: still viewed as somewhat exclusive and closed-off, pushing boundaries through its designs; and where reputations matter. Many designers supported by call-out accounts find remedy for their infringed intellectual property rights, but also a drive of traffic to their brand and plenty of free publicity. Adler and Fromer point out that designers with a significant online presence, or wanting to build a presence, find the "cool" factor an attractive advantage. This argument is reflected by Liu in his book *The Laws of Cool: Knowledge Work and the Culture of Information*. Although Liu's work pre-dates the online call-out culture boom and the rise of the Instagram platforms, his arguments are relevant to this phenomenon. He writes:

> Cool is the techno-informatic vanishing point of contemporary aesthetics, psychology, morality, politics, spirituality and everything. No more beauty, sublimity, tragedy, grace or evil: only cool and not cool.[269]

Liu argues that the cool/ uncool rhetoric will dominate what was then an emerging online media landscape, and that what is considered 'cool' will become increasingly valuable with the proliferation of the internet. He successfully predicts the importance of 'coolness' in online interactions, and Adler and Fromer's 'cool' factor argument reinforces his hypothesis. Adler and Fromer also argue that the lack of legal nuance and sense of lawlessness created by shame-based call-outs can be attractive to many in the creative industries: by using shame-based call-outs, the party asserting their claim to intellectual property avoids the Chilling Effects trap seen above, where they could be labelled as an intellectual property bully. Instead, by using a third party such as Diet Prada or Give Credit to make a call-out, they ensure that disapproval of

[268] Adler and Fromer, 'Taking Intellectual Property into Their Own Hands'. Pg. 1510
[269] Alan Liu, *The Laws of Cool: Knowledge Work and the Culture of Information* pg.3 (Chicago, US: University of Chicago Press, 2004) pg. 11

the call-out is levelled at the call-out platform, rather than at the designer: their reputation stays intact, while the call-out platform and alleged infringer receive the worst of the criticism.

Using call-out platforms has benefits beyond individuals and small businesses: there is a wider benefit to the fashion industry as a whole, highlighting here an argument that deserves further investigation beyond the scope of this dissertation. One of the most prominent issues facing the fashion industry currently is its environmental impact: the throwaway culture it has created, the consequential impact on under-paid garment workers (both in the UK and overseas), and their associated wider societal and cultural implications.[270] These issues are so entrenched within the industry that it is difficult to imagine how or where to start rebalancing and rebuilding to make it socially, culturally, and environmentally fairer and more sustainable. Arguably, Diet Prada and Give Credit's insistence that copying within fashion design be taken more seriously could hold one of the keys to slowing the industry down while it reassesses its practices and rebuilds a fairer system. Debatably, within the fast-fashion side of the industry at least, hindering the copying of designs so quickly by stronger enforcement of intellectual property law could slow down the speed at which fashion trend cycles move. This could go some way towards addressing the unsustainability of the industry in its current form, and it is anticipated that this argument will be explored further in the future.

The popularity of shame-based call-outs clearly derives from the advantages it affords designers who perceive intellectual property violations. However, from the analysis of the Diet Prada and Give Credit platforms in Chapters 3 and 4, and the exploration of the wider call-out and cancel culture that they inhabit, two clear drawbacks stand out, which may limit the long-term success of these platforms. First, as criticism of call-out and cancel culture increases, the public is tiring of the humiliation brought by public shaming on social media, particularly where the shamed is given no space to defend themselves or incurs further scrutiny and

[270] Allegations of worker exploitation in the fashion industry are not limited to overseas garment workers. In recent years, the BooHoo group, which owns a number of well-known brands, has come under fire for how little they pay their workers in the UK. *See* David Dawkins, 'Allegations Of Worker Exploitation Strike A Blow To The Fortune Of Boohoo Fashion Line's Founder', Forbes, accessed 6 September 2021, https://www.forbes.com/sites/daviddawkins/2020/07/09/allegations-of-worker-exploitation-strike-a-blow-to-the-fortune-of-boohoo-fashion-lines-founder/.

humiliation. This is apparent even where the shamed person or organisation has undoubtedly done wrong. In addition, using a call-out rather than a formal legal route means that both the alleged infringer and the aggrieved designer are given no protection from the legal structures that call-outs seek to circumvent. Some brands turn back to the law (albeit not intellectual property law) after being called-out, filing a defamation lawsuit in a bid to regain some control of the narrative: as noted in the previous chapter, Dolce and Gabbana are currently suing Diet Prada for defamation. What is starting to clearly emerge, is the impact on our collective mental health as followers begin to tire of the perpetual cycle of bullying that these call-outs can create[271]. Without buy-in from their audiences, the impact of shame-based intellectual property call-outs becomes questionable: they are, arguably, only effective if the ripple effect of audience participation spreads their message far and wide. What happens to intellectual property infringements in fashion design if 'tired' audiences fail to participate in call-outs?

The Diet Prada effect and the piracy paradox

Adler and Fromer argue that there are two types of self-help remedies on the rise when creatives feel that their intellectual property has been infringed: either shaming the infringer through platforms such as Diet Prada (the focus of this dissertation), or what they term ‘retaking the copy’:

> Retaking the copy occurs when an intellectual property creator or owner similarly believes a third party has improperly copied his or her work, but in contrast to shaming, the creator or owner responds by retaking the supposedly improper copy into a new work of art.[272]

They argue that whilst both types of self-help come with their own set of pros and cons for creators and alleged infringers, one of the clear advantages of ‘retaking the copy’ over intellectual property shaming is in its contribution to creativity. 'Retaking

[271] Professor Loretta J. Ross of Smith University writes and lectures extensively on the subject of call-out culture and the effect on our mental health. She advocates for a ‘detox’ of call-out culture, where we begin to call-in rather than call-out, something that she believes is done with love and respect rather than judgement, and will allow the positive effects of call-out culture to continue whilst negating some of its negative effects. *See* Jessica Bennett, ‘What If Instead of Calling People Out, We Called Them In? - The New York Times’, accessed 5 December 2021, https://www.nytimes.com/2020/11/19/style/loretta-ross-smith-college-cancel-culture.html.

[272] Adler and Fromer, ‘Taking Intellectual Property into Their Own Hands’. Pg. 1459

the copy' offers space for new creative work to be produced, whereas intellectual property shaming has the opposite effect. Adler and Fromer note that the lack of legal nuance, and the black and white definition of copying employed by call-out platforms leads to the stifling of creativity rather its encouragement. Their argument that intellectual property shaming will harm creativity in the long-term corroborates Raustiala and Sprigman's piracy paradox hypothesis. The piracy paradox implies that copying doesn't kill creativity and innovation in the fashion industry, it actually promotes it; and that weak intellectual property protections within this field are a key reason for the global economic success of the industry.[273] Although the piracy paradox argument was made several years before Diet Prada came into existence, it supports Adler and Fromer's study. Scafidi is openly critical of the piracy paradox hypothesis and argues that it is outdated; she says in 2007

> The designers who suffer from copying are the little guys – those whose designs are copied, while their trademarks are not […] They have invested time, money, and talent – R&D to any other industry – in realizing their visions, only to have their work stolen, often by huge companies. You would recognize many of the names of the corporate copyists; I doubt that most readers would ever have heard of the startup designers.[274]

Scafidi stresses that the piracy paradox hypothesis is based on a fashion industry that existed before the internet did, a criticism that may well be valid in 2007 when social media platforms were still in the early days of development. However, Adler and Fromer argue that the uncompromising style of online intellectual property call-outs is creating something akin to the piracy paradox. Given that Diet Prada's model of shaming people and fashion brands online is central to today's internet society, it is hard to argue that Adler and Fromer's arguments that the effect of the "negative cycles of feuds, shaming, and lawlessness[275]" that online intellectual property shaming creates should be dismissed as outdated. Raustiala and Sprigman focus the piracy paradox theory on the economic benefits of copycatting to the fashion industry: more copying means more clothing being produced to beat the cycle of

[273] Raustiala and Sprigman, 'The Piracy Paradox: Innovation and Intellectual Property in Fashion Design',
[274] Professor Susan Scafidi quoted in Matt Linderman, 'Is the Piracy Paradox Missing the Point?', Signal v. Noise by Basecamp, accessed 27 August 2021, https://signalvnoise.com/posts/696-is-the-piracy-paradox-missing-the-point.
[275] Adler and Fromer, 'Taking Intellectual Property into Their Own Hands'. Pg. 1527

copying. However, Adler and Fromer consider the benefits of copycatting in a different light, bringing it back to the individuals involved, and considering its wider benefit to society. They say:

> […] infringement can be an incentive for creativity rather than an obstacle to creativity. Sometimes this new creativity emerges not just from the creator whose work is copied, but from the copyist as well, as a dialogue between them over the initial infringement stimulates further new work […] Perhaps if shaming takes on a more negative tinge or retaking the copy continues to be well-received, creators will be persuaded that retaking the copy is a better response to appropriation than shaming.[276]

They also warn, however, that despite seeing being able to see the positives in both styles of self-help methods for remedying intellectual property infringement, both should come with a warning: over-policing intellectual property rights, in whatever format, will likely negatively affect creativity and commerce in the wider fashion industry. What does this mean for the likes of Diet Prada and their millions of well-meaning followers, who feel enraged when yet another small designer shares online that their designs have been reproduced on a mass scale by another fast-fashion giant? Copycatting call-outs generate human emotion that can hardly be denied. Not to feel pangs of unfairness at the power imbalance across this powerful and important industry seems impossible, even while one wills the intellectual property law system to improve so it can bring justice to a situation that, on the surface, seems desperately unfair. With call-outs platforms engineering a new system of protection that addresses this power imbalance, the question is now whether the law can address injustices in an increasingly problematic industry, or whether the new social norms created by call-out platforms will prevail, forcing intellectual property lawyers to engage with these platforms in a way they have not so far.

Whilst Diet Prada have not been explicit about their desire to change the intellectual property legal landscape, they have become part of this discussion as a result of their runaway success and ability to go viral. On the other hand, Give Credit regularly call for change to the system as part of their call-outs. They advocate for a reform to

[276] Adler and Fromer. Pg. 1505

current intellectual property law systems, to include cultural and traditional knowledge; they campaign for policy change; and they run workshops to educate the public on the issues at hand. However, Noto La Diega warns that it is the deep-rooter power imbalance that is so prevalent in all areas of the fashion industry that needs to be reformed, rather than the law; until that happens, social norms will continue to prevail. He says:

> If the law, including intellectual property law, is not a primary concern for industry players, potential reforms risk being useless, if not accompanied by broader interventions that address said [power] imbalance.[277]

Through interviews with fashion stakeholders, he discovers that power inequality is the most pervasive concern for those within fashion, across the wide spectrum of their roles and responsibilities. He reports that many feel uncomfortable enforcing the law to address these imbalances, preferring to opt for extra-legal social norms as their preferred form of regulation. This is reflected throughout our analysis of Diet Prada and Give Credit's call-outs, and pertinent in light of discussions on cultural intellectual property. Noto La Diega explores alternative forms of law that might address power imbalance, from contract to competition law, but ultimately concludes that real change will rely on intellectual property lawyers: they must engage with fashion's extra-legal social norms, to create a multidisciplinary dialogue that captures the intricacies of the industry and the nuance of the law; and they must address how the power imbalances of the fashion industry continue to generate norms that circumvent the traditional enforcement of intellectual property law, rather than focus on reforming the current laws that govern the industry. Arguably, this is an enormous undertaking for lawyers who would struggle to infiltrate the 'hermetically-sealed' fashion industry, let alone understand its power imbalances. That is not to say that intellectual property lawyers should ignore new extra-legal social norms that online intellectual property shaming platforms are creating. In fact, as Adler and Fromer considered, it could be remiss not to advise clients that they may get a quicker and better result via call-out platforms than through formal channels. Lawyers might not

[277] Guido Noto La Diega, 'Can the Law Fix the Problems of Fashion? An Empirical Study on Social Norms and Power Imbalance in the Fashion Industry', *Journal of Intellectual Property Law & Practice* 14, no. 1 (1 January 2019): 18–24, https://doi.org/10.1093/jiplp/jpy097. Pg. 18

be able to realign the power imbalance in the industry, which is at the heart of this debate, even if not explicitly stated by online platforms, but there is a critical role for intellectual property lawyers to engage with the new intellectual property dialogue, and with the new extra-legal social norms that have evolved from the rise of online fashion-shaming accounts.

CONCLUSION

This dissertation aims to take steps towards addressing some of the complex issues that arise from the relationship between fashion design, the wider industry, conventional intellectual property legal systems, and new extra-legal social norms developing from online call-out platforms. This research identifies several themes; some merit further exploration beyond the scope of this dissertation. It reveals that conventional intellectual property systems, cultural intellectual property, and fashion design share a difficult association for several reasons: lack of clarity in the conventional global intellectual property legal system about how and when fashion design is protected; a disconnect in the relationship between indigenous cultural property and contemporary fashion design; and a new social media landscape encouraging a form of bullying in which half-informed judgments enable a majority to shame a minority, yet also empowers individuals to challenge multinationals in a new way. Each of the challenges within this complex relationship may be contributing to the suppressing of continuous innovation in fashion design, through often clumsy attempts by online platforms to impose intellectual property rights outside the carefully constructed nuance of the law. These attempts reveal a tension difficult to resolve, given the vicious cycle that appears to have developed. First, intellectual property law is ineffective at protecting those with less power (be it financial, societal or otherwise). Consequently, those lacking means increasingly invoke their rights according to extra-legal norms, which both yields mixed results and generates critical noise about the online landscape where these norms are generated. Finally, the unpredictability and criticism of online platforms cause complainants to turn back to the law, perhaps viewing its carefully constructed nuance more sympathetically. Then the cycle begins again. This returns us to the key question: how do you manage a system in which overly stringent systems may inhibit innovation, whereas loose or ineffective systems that may stimulate copying lead to an increase in extra-legal norms and their own set of issues?

Call-out platforms are accused of promoting an under-informed narrative on intellectual property, of public shaming, and of cyber-bullying, despite their differing methodologies analysed as part of this research. However, they remain popular, and

are likely to continue calling-out alleged copying in the same format for the foreseeable future. Therefore, it is argued that there is an important role for intellectual property lawyers and legal academics to play in engaging with the new set of norms they create, and in shaping the narrative on ‘copycatting’ in a way that brings about positive change.

Online platforms are also credited for bringing the issue of cultural appropriation in the fashion industry into mainstream discourse; they repeatedly highlight that indigenous communities routinely see their traditional designs replicated by large fashion brands, without so much as a credit. This has sparked debate on the disconnect between modern intellectual property law and the designs of indigenous communities and raised questions whether intellectual property law should better protect such designs, given the origins of traditional designs and the motivations of their creators. Given the complex web of legal, cultural, political, social, and economic issues surrounding the issue of cultural design infringement, it seems that traditional designs could only be partially protected by the introduction of further laws or the reform of existing ones. Instead, this dissertation argues that increased diversity and minority representation within the fashion industry, alongside education from the legal professions on the matter, could foster a better understanding of the complex issues between modern and cultural intellectual property, and allow call-out platforms to continue their work in this area in a way that genuinely supports the communities they advocate for.

This study reveals that the strengths of online platforms are also their weaknesses. In call-out culture (as in fashion design) everything is about perception. Consequently, recasting negative perceptions and reframing criticisms could be useful in using online platforms to effect positive change. Most notably, the online call-out platforms could be used to raise a stronger awareness of conventional and cultural intellectual property rights in fashion; which in turn could convince an industry under increasing criticism for moving too fast, producing too much, and exploiting too many, to finally slow down.

BIBLIOGRAPHY

Statute

France. *Loi n° 92-597 du 1 juillet 1992 relative au Code de la propriété intellectuelle* 1992. https://www.legifrance.gouv.fr/loda/id/JORFTEXT000000357475/

France. *Loi n° 91-7 du 4 janvier 1991 relative aux marques de fabrique, de commerce ou de service* 1991. https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000000533878

Text And Annex Of The Nagoya Protocol On Access To Genetic Resources And The Fair And Equitable Sharing Of Benefits Arising From Their Utilization To The Convention On Biological Diversity. 2015. Ebook. 1st edition. Montreal: United Nations. https://www.cbd.int/abs/text/default.shtml.

The Berne Convention for the Protection of Literary and Artistic Works 1886. https://treaties.un.org/doc/Publication/UNTS/Volume%20828/volume-828-I-11850-English.pdf

The Innovative Design Protection Act (IDPA), 112th Cong. 2012. S. 3523. https://www.congress.gov/bill/112th-congress/senate-bill/3523?q=S.3523+

The Madrid Agreement 1891. https://treaties.un.org/doc/Publication/UNTS/Volume%20828/volume-828-I-11852-English.pdf

The New York Artists Authorship Rights Act 1984.

The Paris Convention for the Protection of Industrial Property 1883. https://treaties.un.org/doc/Publication/UNTS/Volume%20828/volume-828-I-11851-English.pdf

The California Art Preservation Act, California Civil Code 1979, §987.

United States of America. *The Copyright Act*, *17 U.S.C*. 1976. https://www.copyright.gov/title17/

United States of America. *The Visual Artists Rights Act*, *17 U.S.C*. 1990, § 106A. https://www.law.cornell.edu/uscode/text/17/106A

United States of America. *The Lanham (Trademark) Act*, *15 U.S.C.* 1946. https://www.law.cornell.edu/uscode/text/15

World Trade Organisation. *The Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS)* 1869. https://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm

Case Law

Abercrombie & Fitch Co. v. Hunting World [1976] U.S. 537 F.2d 4, 1976 2nd Cir. 1976.

Campbell vs. Acuff-Rose Music, Inc. [1994] 510 U.S. 569. 1994.

Christian Louboutin S.A. v. Yves Saint Laurent America, Inc. [2012] U.S. 696 F 3d 206 No. 11-3303-cv, 2nd Cir. 2012.

Court of Appeal [Cour d'appel] Paris, Céline v. Zara France [2013] Fr. Decision no. 2012/04542, 27 February 2013.

Court of Appeal [Cour d'appel] Paris, SAS Kesslord Paris v. SAS Christian Louboutin [2018] Fr. Decision n°17/07124, 15 May 2018.

Court of Appeal [Cour d'appel] Paris, Vanessa Bruno v. Zara France [2012] Fr. Decision No. 2011/09133, 17 October 2012.

Court of Cassation [Cour de Cassation], Commercial Chamber, Christian Louboutin v. Zara France [2012] Fr. Decision No. 11/20724, 30 May 2012.

Court of Cassation [Cour de Cassation], Civil Chamber, Régine Desforges and Editions Ramsay vs. Trust Company Bank and Consorts Mitchell, Appeal No. 90-15.760, 4 February 1992.

Court of Justice of the European Union, Infopaq International A/S v Danske Dagblades Forening [2009] E.U. Case C-5/08, 16 July 2009.

Court of Justice of the European Union, Louboutin v Van Haren Schoenen BV [2018] E.U. Case C-163/16, 12 June 2018.

CV Collection LLC v. WEWOREWHAT LLC et al [2021] SDNY 1:21-cv-01623, 2021.

Designers Guild Ltd v. Russell Williams (Textiles) Ltd [2001] U.K. FSR 113, 2001.

District Court of Paris [Tribunal de Grande Instance de Paris], Antik Batik Sasu v. IM Production SAS [2015] Fr. Decision No. 15/03456, 3 December 2015.

Funk v. United States [1933] U.S. 290 US 371, 1933.

Lenz v. Universal Music Corp. [2015] U.S. 801 F.3d 1126, 2015 9th Cir, 2015.

Navajo Nation v. Urban Outfitters, Inc. [2013] U.S. 918 F. D.N.M. Supp. 2d 1245, 1249, 2013.

Nirvana LLC v. Marc Jacobs International, LLC, et al [ongoing] C.D.Cal 2:18-cv-10743.

Ringgold v. Black Entertainment Television, Inc. [1997] 126 F.3d 70, 1997 2nd Cir.

Sealaska Heritage Institute, Inc. v. Marcus Group, LLC, Neiman Marcus Group, Inc. and MyTheresa.com, GmbH [2020] D. Alaska 1:20-cv-00002, 2020.

Sheeran & Ors v Chokri & Ors [2022] EWHC 827 (Ch), 06 April 2022.

Star Athletica, LLC v. Varsity Brands, Inc. [2017] U.S. 580 U.S., 2017.

Whimsicality, Inc. v. Rubie s Costumes Co., Inc. [1989] E.D.N.Y. 721 F. Supp. 1566, 1989.

Williams v. Gaye [2018] U.S. No. 15-56880, 2018 9th Cir.

Books and Articles

Adler, Amy and Fromer, Jeanne C. “Taking Intellectual Property into Their Own Hands.” *California Law Review* 107, no. 5 (2019): 1455–1530.

Aplin, Tanya and Bently, Lionel. “Whatever Became of Global, Mandatory, Fair Use? A Case Study in Dysfunctional Pluralism.” In *Is Intellectual Property Pluralism Functional?* Edited by Susie Frankel, 8–36. Cheltenham: Edward Elgar Publishing, 2019. https://doi.org/10.4337/9781788977999.00008

Appel, Gil, Libai, Barak and Muller, Eitan. “On the Monetary Impact of Fashion Design Piracy”, *International Journal of Research in Marketing* 35, no. 4. (December 2018): 591–610. https://doi.org/10.1016/j.ijresmar.2018.08.003.

Archibugi, Daniele and Filippetti, Andrea “The Globalisation of Intellectual Property Rights: Four Learned Lessons and Four Theses: The Globalisation of IPRs”. *Global Policy* 1, no. 2 (May 2010): 137–49. https://doi.org/10.1111/j.1758-5899.2010.00019.x.

Arli, Denni, Leo, Cheryl and Tjiptono, Fandy. “Investigating the Impact of Guilt and Shame Proneness on Consumer Ethics: A Cross National Study.” *International Journal of Consumer Studies* 40, no. 1 (2016): 2–13. https://doi.org/10.1111/ijcs.12183.

Arneson, Richard J. “Shame, Stigma and Disgust in the Decent Society.” *The Journal of Ethics* 11, no. 1 (2007): 31–63.

Atkinson, Violet et al. “A Comparative Study of Fashion and IP: Trademarks in Europe and Australia.” *Journal of Intellectual Property Law & Practice* 13, no. 3. (March 2018): 194–211. https://doi.org/10.1093/jiplp/jpx190.

Atkinson, Violet et al. “Comparative Study of Fashion and IP: Copyright and Designs in France, Europe and Australia.” *Journal of Intellectual Property Law & Practice* 11, no. 7 (July 2016): 516–32. https://doi.org/10.1093/jiplp/jpw056.

Bagozzi, Richard P., Sekerka, Leslie E., and Sguera, Francesco. “Understanding the Consequences of Pride and Shame: How Self-Evaluations Guide Moral Decision Making in Business.” *Journal of Business Research* 84 (March 2018): 271–84. https://doi.org/10.1016/j.jbusres.2017.11.036.

Balganesh, Shyamkrishna. “The Normativity of Copying in Copyright Law.” *Duke Law Journal* 62, no. 2 (2012): 203–84.

Barraclough, Emma. “Understand Europe’s Trademark Trends.” *Managing Intellectual Property,* 5 May 2015. https://www.proquest.com/docview/1686341155/citation/81312C64F46940FFPQ/1

Beebe, Barton. “Intellectual Property Law and the Sumptuary Code.” *Harvard Law Review* 123, no. 4 (2010): 810–89.

Bellido, Jose. “Forensic Technologies in Music Copyright.” *Social & Legal Studies* 25, no. 4 (August 2016): 441–59. https://doi.org/10.1177/0964663916628621.

Bellido, Jose, “Looking Right: The Art of Visual Literacy in British Copyright Litigation.” *Law, Culture and the Humanities* 10, no. 1 (February 2014): 66–87. https://doi.org/10.1177/1743872111416325.

Bicchieri, Cristina, Muldoon, Ryan and Sontuoso, Alessandro. “Social Norms.” In *The Stanford Encyclopaedia of Philosophy*, edited by Zalta, Edward N. Winter 2018. Metaphysics Research Lab: Stanford University, 2018. https://plato.stanford.edu/archives/win2018/entries/social-norms/.

Brewer, Mark K. “Fashion Law: More than Wigs, Gowns, and Intellectual Property.” *San Diego Law Review* 54, no. 4 (2017): 739–84.

Brun, Alessandro and Castelli, Cecilia. “The Nature of Luxury: A Consumer Perspective.” In *International Journal of Retail & Distribution Management* 41, edited by Alessandro Brun, no. 11/12 (1 January 2013): 823–47. https://doi.org/10.1108/IJRDM-01-2013-0006.

Burbidge, Rosie. *European Fashion Law: A Practical Guide from Start-up to Global Success.* Elgar Practical Guides. Cheltenham: Edward Elgar Publishing, 2019. https://doi.org/10.4337/9781788113014.

Burkholder, J. Peter “Musical Borrowing or Curious Coincidence? Testing the Evidence”, *Journal of Musicology* 35, no. 2 (1 April 2018): 223–66, https://doi.org/10.1525/jm.2018.35.2.223.

Burkholder, J. Peter. “The Uses of Existing Music: Musical Borrowing as a Field.” *Notes* 50, no. 3 (1994): 851–70. https://doi.org/10.2307/898531.

Coombe, Rosemary J. *Cultural Life of Intellectual Properties: Authorship, Appropriation, and the Law*. Duke University Press, 1998.

Coontz, Dustyn. “Beyond First Blush: The Utility of Shame as a Master Emotion in Criminal Sentencing.” *Michigan State Law Review 415*, (2015): 415-43. http://dx.doi.org/10.17613/w95t-a343

Crouch, Dennis. “Managing the “emotional Property” That Comes with Consumer Generated Intellectual Property (CGIP)?” *Patently-O*, accessed 26 November 2021. https://patentlyo.com/patent/2017/11/emotional-generated-intellectual.html.

DaSilva, Russell J. “Droit Moral and the Amoral Copyright: A Comparison of Artists’ Rights in France and the United States Part I.” *Bulletin of the Copyright Society of the U.S.A.* 28, no. 1 (1981 1980): 1–58.

De La Salle University and Velasco, Joseph Ching. “You Are Cancelled: Virtual Collective Consciousness and the Emergence of Cancel Culture as Ideological Purging.” *Rupkatha Journal on Interdisciplinary Studies in Humanities* 12, no. 5 (17 October 2020). https://doi.org/10.21659/rupkatha.v12n5.rioc1s21n2.

Derclaye, Estelle. “Are Fashion Designers Better Protected in Continental Europe than in the United Kingdom? A Comparative Analysis of the Recent Case Law in France, Italy and the United Kingdom.” *The Journal of World Intellectual Property* 13, no. 3 (2010): 315–65. https://doi.org/10.1111/j.1747-1796.2009.00389.x.

Derclaye, Estelle. “French Supreme Court Rules Fashion Shows Protected by Copyright - What about the UK?” *Journal of Intellectual Property Law & Practice* 3, no. 5 (20 February 2008): 286–87. https://doi.org/10.1093/jiplp/jpn045.

Diesner, Kristy. “Useful Article or Creative Design: Varsity Brands, Inc. v. Star Athletica, LLC.” *Intellectual Property Law* 27 (2019): 25.

Dinwoodie, Graeme B. and Janis, Mark D. *Trademark Law and Theory: A Handbook of Contemporary Research.* Cheltenham: Edward Elgar, 2008.

Donoian, James and Wallach, Margarita. “Fast Fashion and IP Regulation: Will Fast Fashion Kill the Golden Goose?” *Lexology*, accessed 6 March 2020.

https://www.lexology.com/library/detail.aspx?g=2b1efd99-6f50-486f-aec2-fa9569bc9102.

Dowie-Whybrow, Margaret. “Paris Convention for the Protection of Industrial Property.” In *Core Statutes on Intellectual Property*, 516–43. London: Macmillan Education UK, 2013.

Elrod, Cassandra. “The Domino Effect: How Inadequate Intellectual Property Rights in the Fashion Industry Affect Global Sustainability Notes.” *Indiana Journal of Global Legal Studies* 24, no. 2 (2017): 575–96.

English, Penny. “Book Review: The Cultural Life of Intellectual Properties: Authorship Appropriation and the Law.” *Social & Legal Studies* 9, no. 3 (1 September 2000): 462–64. https://doi.org/10.1177/096466390000900312.

Florini, Sarah. “Tweets, tweeps, and signifyin’: Communication and Cultural Performance on ‘Black Twitter’.” *Television & New Media* (2014) 15: 223–237.

Frankel, Susy. *Is Intellectual Property Pluralism Functional?* Monograph Book, 2019. https://www.elgaronline.com/view/edcoll/9781788977982/9781788977982.xml.

Fuller, Chris. “Legal Anthropology, Legal Pluralism and Legal Thought.” *Anthropology Today* 10, no. 3 (1994): 9–12. https://doi.org/10.2307/2783478.

Gerrie, Vanessa. “The Diet Prada Effect: ‘Call-out Culture’ in the Contemporary Fashionscape.” *Clothing Cultures* 6, no. 1 (1 March 2019): 97–113. https://doi.org/10.1386/cc_00006_1.

Greffe, Pierre and Greffe, François. Traité des dessins et des modèles, 6e éd.” *Revue internationale de droit comparé* 53, no. 3 (2001): 757–58.

Hemphill, C. Scott and Suk, Jeannie. “The Law, Culture, and Economics of Fashion.” *Stanford Law Review* 61, no. 5 (March 2009): 1147–99.

Hunt, Alan. *Governance of the Consuming Passions: A History of Sumptuary Law.* London: Macmillan, 1996.

Jacquet, Jennifer. *Is Shame Necessary? New Uses for an Old Tool.* London: Penguin UK, 2015.

Janssens, Alice and Lavanga, Mariangela. “An Expensive, Confusing, and Ineffective Suit of Armor: Investigating Risks of Design Piracy and Perceptions of the Design Rights Available to Emerging Fashion Designers in the Digital Age.” *Fashion Theory* 24, no. 2 (23 February 2020): 229–60. https://doi.org/10.1080/1362704X.2018.1515159.

Katyal, Sonia K. “Cosmopolitanism and the Transnational Trademark.” In *The Luxury Economy and Intellectual Property*, edited by Sun, Haochen, Beebe, Barton and Sunder, Madhavi, 309–38. Oxford: Oxford University Press, 2015. https://doi.org/10.1093/acprof:oso/9780199335701.003.0015.

Klatskin, Lillian. “Diet Prada and the Court of Public Opinion.” *The Columbia Journal of Law & the Arts,* accessed 24 May 2021. https://journals.library.columbia.edu/index.php/lawandarts/announcement/view/362.

Kottke, Janet L. and Mellor, Steven. “Intrinsic Motivation and Self-Determination in Human Behavior” *Personnel Psychology* 39, no. 3 (September 1986): 672–75.

Krapp, Peter. “The Cultural Life of Intellectual Properties: Authorship, Appropriation, and the Law (Review).” *Cultural Critique* 58, no. 1 (2004): 198–201. https://doi.org/10.1353/cul.2004.0025.

Laver, James. *Modesty in Dress: An Inquiry Into the Fundamentals of Fashion.* Boston: Houghton Mifflin, 1969.

Leaffer, Marshall. “The Uncertain Future of Fair Use in a Global Information Marketplace.” *Ohio State Law Journal* 62 (2001): 849.

Lessig, Lawrence. *Free Culture: The Nature and Future of Creativity.* New York: Penguin Publishing Group, 2004.

Lewis, Helen Block. *Shame and Guilt in Neurosis.* New York: International Universities Press, 1971.

Lim, Daryl. “Substantial Similarity’s Silent Death.” *Pepperdine Law Review* 48 (2021): 73.

Liu, Alan. *The Laws of Cool: Knowledge Work and the Culture of Information.* Chicago: University of Chicago Press, 2004. http://ebookcentral.proquest.com/lib/bham/detail.action?docID=616046.

Lury, Celia. *Cultural Rights: Technology, Legality and Personality.* S.L.: Routledge, 2002.

Macmillan, Fiona. “Is Copyright Blind to the Visual?” *Visual Communication* 7, no. 1 (1 February 2008): 97–118. https://doi.org/10.1177/1470357207084868.

Mayer, Claude-Helene, Vanderheiden, Elisabeth and Wong, Paul, eds. *Shame 4.0: Investigating an Emotion in Digital Worlds and the Fourth Industrial Revolution.* New York: Springer International Publishing, 2021. https://doi.org/10.1007/978-3-030-59527-2.

Micheletti, Michele and Stolle, Dietlind. “Mobilizing Consumers to Take Responsibility for Global Social Justice.” *The Annals of the American Academy of Political and Social Science* 611, no. 1 (1 May 2007): 157–75. https://doi.org/10.1177/0002716206298712.

Milchan, Suzanne, “Whose Rights Are These Anyway? A Rethinking of Our Society’s Intellectual Property Laws in Order to Better Protect Native American Religious Property.” *American Indian Law Review* 28, no. 1 (2003): 157–72. https://doi.org/10.2307/20171717.

Mingaleva, Zhanna and Mirskikh, Irina. “Psychological Aspects of Intellectual Property Protection.” *Procedia—Social and Behavioral Sciences* 190 (May 2015): 220–26. https://doi.org/10.1016/j.sbspro.2015.04.938.

Mitchell, Vincent-Wayne and Kearney, Íde. “A Critique of Legal Measures of Brand Confusion.” *Journal of Product & Brand Management* 11, no. 6 (November 2002): 357–79. https://doi.org/10.1108/10610420210445497.

Moynihan, Kathryn, “How Navajo Nation v. Urban Outfitters Illustrates the Failure of Intellectual Property Law to Protect Native American Cultural Property Notes.” *Rutgers Race & the Law Review* 19, no. 1 (2018): [i]-76.

Nadler, Janice. “Expressive Law, Social Norms, and Social Groups.” *Law & Social Inquiry* 42, no. 1 (ed 2017): 60–75. https://doi.org/10.1111/lsi.12279.

Noto La Diega, Guido. “Can the Law Fix the Problems of Fashion? An Empirical Study on Social Norms and Power Imbalance in the Fashion Industry.” *Journal of Intellectual Property Law & Practice* 14, no. 1 (1 January 2019): 18–24. https://doi.org/10.1093/jiplp/jpy097.

O’Hear, Anthony. “Guilt and Shame as Moral Concepts.” *Proceedings of the Aristotelian Society* 77 (1976): 73–86.

Ochoa, Tyler T. “Copyright, Derivative Works and Fixation: Is Galoob a Mirage, or Does the Form(Gen) of the Alleged Derivative Work Matter?” (Symposium Review: The Digital Challenge to Copyright Law.) *Santa Clara Computer & High Technology Law Journal* 20, no. 4 (2004 2003): 991–1044.

Oliar, Dotan and Sprigman, Christopher. “There’s No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy.” *Virginia Law Review* 94, no. 8 (2008): 1787–1867.

Piotraut, Jean-Luc. “An Author’s Rights-Based Copyright Law: The Fairness and Morality of French and American Law Compared.” *Cardozo Arts & Entertainment Law Journal* 24, no. 2 (2007 2006): 549–616.

Ponte, Lucille M. “Echoes of the Sumptuary Impulse: Considering the Threads of Social Identity, Economic Protectionism, and Public Morality in the Proposed Design Piracy Prohibition Act.” *Vanderbilt Journal of Entertainment and Technology Law* 12, no. 1 (2010 2009): 45–92.

Pozzo, Barbara. “Fashion between Inspiration and Appropriation.” *Laws* 9, no. 1 (12 February 2020): 5. https://doi.org/10.3390/laws9010005.

Quataert, Donald. *Consumption Studies and the History of the Ottoman Empire, 1550-1922: An Introduction*. Albany: SUNY Press, 2000.

Raustiala, Kal and Sprigman, Christopher. “The Piracy Paradox Revisited.” *Stanford Law Review* 61, no. 5 (2009 2008): 1201–26.

Raustiala, Kal and Sprigman, Christopher. “The Piracy Paradox: Innovation and Intellectual Property in Fashion Design.” *Virginia Law Review* 92, no. 8 (2006): 1687–1777.

Reiter Copeland, Lauren and Zhao, Li. “Instagram and Theory of Reasoned Action: US Consumers Influence of Peers Online and Purchase Intention.” *International Journal of Fashion Design, Technology and Education*, 24 June 2020, 1–15. https://doi.org/10.1080/17543266.2020.1783374.

Riello, Giorgio and Rublack, Ulinka, eds. *The Right to Dress: Sumptuary Laws in a Global Perspective, c.1200–1800.* Cambridge: Cambridge University Press, 2019. https://doi.org/10.1017/9781108567541.

Rigamonti, Cyrill P. “The Conceptual Transformation of Moral Rights.” *The American Journal of Comparative Law* 55, no. 1 (2007): 67–122.

Ronson, Jon. *So You’ve Been Publicly Shamed.* New York: Riverhead Books, 2015.

Rosenblatt, Elizabeth L. “A Theory of IP”s Negative Space.” *Columbia Journal of Law & the Arts* 34, no. 3 (2011 2010): 317–66.

Rosenblatt, Elizabeth L. “Fear and Loathing: Shame, Shaming, and Intellectual Property.” *DePaul Law Review* 63, no. 1 (2014 2013): 1–48.

Sailofsky, Daniel. “Masculinity, Cancel Culture and Woke Capitalism: Exploring Twitter Response to Brendan Leipsic’s Leaked Conversation.” *International Review for the Sociology of Sport*, 31 August 2021, 734-757. https://doi.org/10.1177/10126902211039768 .

Scafidi, Susan. “Intellectual Property and Cultural Products.” *Boston University Law Review* 81, no. 4 (2001): 793–842.

Scheff, Thomas J. “Goffman on Emotions: The Pride-Shame System.” *Symbolic Interaction* 37, no. 1 (2014): 108–21. https://doi.org/10.1002/symb.86.

Scheff, Thomas J. “Shame in Self and Society.” *Symbolic Interaction* 26, no. 2 (2003): 239–62. https://doi.org/10.1525/si.2003.26.2.239.

Schwarzkopf, Stefan. “The Consumer as ‘Voter,’ ‘Judge,’ and ‘Jury’: Historical Origins and Political Consequences of a Marketing Myth.” *Journal of Macromarketing* 31, no. 1 (March 2011): 8–18. https://doi.org/10.1177/0276146710378168.

Sunstein, Cass R. “Social Norms and Social Roles.” *Columbia Law Review* 96, no. 4 (1996): 903–68, https://doi.org/10.2307/1123430.

Svensson, Måns, and Larsson, Stefan. “Social Norms and Intellectual Property: Online Norms and the European Legal Development.” *Research report in Sociology of Law*, Vol.1 (2009): Lund University. https://portal.research.lu.se/ws/files/3705982/1515776.pdf.

Sznycer, Daniel, et al. “Cross-Cultural Invariances in the Architecture of Shame.” *Proceedings of the National Academy of Sciences* 115, no. 39 (25 September 2018): 9702–7. https://doi.org/10.1073/pnas.1805016115.

Tehranian, John. *Infringement Nation: Copyright Reform and The Law/ Norm Gap.* Oxford: Oxford University Press, 2011. https://doi.org/10.1093/acprof:oso/9780199733170.001.0001.

Teilmann-Lock, Stina. “False Friends and moral rights/ Faux Amis et Droits Moraux.” *Revue Internationale du Droit d’Auteur* 224, no. juillet (2010): 3–47.

Trottier, Daniel. “Coming to Terms with Shame: Exploring Mediated Visibility against Transgressions.” *Surveillance and Society* 16, no. 2 (1 January 2018): 170–82. https://doi.org/10.24908/ss.v16i2.6811.

Tushnet, Rebecca. “Stolen Valor and Stolen Luxury.” In *The Luxury Economy and Intellectual Property*, edited by Haochen Sun, Barton Beebe, and Madhavi Sunder, 121–44. Oxford: Oxford University Press, 2015. https://doi.org/10.1093/acprof:oso/9780199335701.003.0007.

Tyler, Tom R. *Why People Obey the Law.* Princeton: Princeton University Press, 2006.

Vassenaix-Paxton, Anne-Sylvie and Dobrzensky, Jan. “At Least the Lace Was French.” *Lexology*, accessed 23 August 2020. https://www.lexology.com/library/detail.aspx?g=f40c81c7-3001-48cd-bbf1-11603ad5c31f.

Vats, Anjali, and Keller, Deidre. “Critical Race IP.” *Cardozo Arts & Entertainment Law Journal* 36 (1 January 2018): 735.

Vézina, Brigitte. “Curbing Cultural Appropriation in the Fashion Industry.” *Centre for International Governance Innovation Papers Series* no. 213 (3 April 2019). https://www.cigionline.org/publications/curbing-cultural-appropriation-fashion-industry/.

Vézina, Brigitte. “Ensuring Respect for Indigenous Cultures: A Moral Rights Approach.” *Centre for International Governance Innovation Papers Series* no.243 (29 May 2020). https://www.cigionline.org/publications/ensuring-respect-indigenous-cultures-moral-rights-approach/.

Weinstock Netanel, Neil. “Making Sense of Fair Use.”, *Lewis & Clark Law Review* 15, no. 3 (2011): 715–72.

Wilson, Kimberley. *How to Build a Healthy Brain: Reduce Stress, Anxiety and Depression and Future-Proof Your Brain.* London: Hodder & Stoughton, 2020.

Wilson, Laurel Ann. “Common Threads: A Reappraisal of Medieval European Sumptuary Law.” *The Medieval Globe* 2, no. 2 (2017): 141–65. https://doi.org/10.17302/tmg.2-2.6.

Winston, Andrew S. and Baker, Joanne E. “Behavior Analytic Studies of Creativity: A Critical Review.” *The Behavior Analyst* 8, no. 2 (1985): 191–205.

Wong, Bang. “Negative Space.” *Nature Methods* 8, no. 1 (January 2011): 5–5. https://doi.org/10.1038/nmeth0111-5.

Wong, Tedmond. “To Copy or Not to Copy, That Is the Question: The Game Theory Approach to Protecting Fashion Designs.” *University of Pennsylvania Law Review* 160 (n.d.): 55.

World Intellectual Property Organization. *World Intellectual Property Report 2017 Intangible Capital in Global Value Chains.* Geneva: World Intellectual Property Organization, 2017. http://public.eblib.com/choice/PublicFullRecord.aspx?p=5982419.

Zhu, Chen Wei. “Adjudicating Sartorial Elegance from the Court – the Sumptuary Impulse in the Law of Modern Sports Sponsorship against Ambush Marketing.” *Queen Mary Journal of Intellectual Property* 10, no. 1 (19 February 2020): 62–86. https://doi.org/10.4337/qmjip.2020.01.03.

Zhu, Chen Wei. “The Personality Nexus: Moral Rights in Music Law and Policy.” In *The Oxford Handbook of Music Law and Policy*, edited by Sean M O’Connor. Published online: 9 July 2020. https://doi.org/10.1093/oxfordhb/9780190872243.013.29.

Business of Fashion: The State of Fashion Reports

Imran, Ahmed and Achim, Berg. “The State of Fashion 2022: Global Gains Mask Recovery Pains.” *The Business of Fashion*, 2022. Accessed 7 February 2022. https://www.businessoffashion.com/reports/news-analysis/the-state-of-fashion-2022-industry-report-bof-mckinsey/

Imran, Ahmed and Achim, Berg. “The State of Fashion 2021 Report: Finding Promise in Perilous Times.” *The Business of Fashion*, 2021. Accessed 7 February 2022. https://www.businessoffashion.com/reports/news-analysis/the-state-of-fashion-2021-industry-report-bof-mckinsey/.

Imran, Ahmed and Achim, Berg. “The State of Fashion 2020 Report: In Troubled Times, Fortune Favours the Bold.” *The Business of Fashion*, 2020. Accessed 2 March 2022. https://www.businessoffashion.com/reports/news-analysis/the-state-of-fashion-2020-bof-mckinsey-report-release-download/.

Imran, Ahmed and Achim, Berg. “The State of Fashion 2019: An ‘Urgent Awakening’ for the Industry.” *The Business of Fashion*, 2019 . Accessed 2 March 2022. https://www.businessoffashion.com/reports/luxury/the-state-of-fashion-2019/.

Social Media Platforms

Diet Prada ™ (@diet_prada), Instagram Photos and Videos. https://www.instagram.com/diet_prada/.

#Givecredit. (@givecredit_). Instagram Photos and Videos. https://www.instagram.com/givecredit_/.

Online Commentary

Abu, Fedora. “How Black Lives Matter Changed Fashion in 2020.” *BBC,* 15 December 2020. https://www.bbc.com/culture/article/20201215-the-power-of-black-resistance-dressing-and-identity.

Ahmad, Asam.“A Note on Call-Out Culture.” *Briar Patch Magazine*, 2 March 2015. https://briarpatchmagazine.com/articles/view/a-note-on-call-out-culture.

Ahmed, Asam. “When Calling Out Makes Sense.” *Briar Patch magazine*, 29 August 2017. https://briarpatchmagazine.com/articles/view/when-calling-out-makes-sense.

Anaya, Suleman. “Op-Ed | A Manifesto for Mindful Cross-Cultural Borrowing.” *The Business of Fashion*, 31 October 2019. https://www.businessoffashion.com/opinions/news-analysis/op-ed-a-manifesto-for-mindful-cross-cultural-borrowing.

Anderson, Jordan. “Diet Prada: Investigative Influencers or Influential Investigators?” *NSS magazine*, 9 March 2019. https://www.nssmag.com/en/article/17924.

Atkinson, Nathalie. “Can Fashion’s Watchdogs Still Be Effective If They’re Not Anonymous?” *The Globe and Mail*, 29 March 2019. https://www.theglobeandmail.com/life/style/article-can-fashions-watchdogs-still-be-effective-if-theyre-not-anonymous/.

Bauernfreund, Gabriel. “Cancel Culture and Shame: An Inextricable Relationship?” The Flea Journal, 14 August 2020. https://fleajournal.com/summer-2020/awaiting-final-title-cancel-culture.

Bennett, Jessica. “What If Instead of Calling People Out, We Called Them In?” *The New York Times*, 19 November 2020. https://www.nytimes.com/2020/11/19/style/loretta-ross-smith-college-cancel-culture.html.

Blakley, Johanna. Does Copying In Fashion Keep It Fresh?” *NPR.org*, 27 June 2014. https://www.npr.org/2014/06/27/322910181/does-copying-in-fashion-keep-it-fresh.

Bonta, Mark A. “New Attitudes, and Maybe a New Law, Are Changing Cultural Appropriation in Fashion Design.” *The Daylighter*, 20 November 2019. https://newsdaylighter.com/cultural-appropriation-in-fashion-design-spurs-a-new-law-and-new-attitudes/.

Boța-Moisin, Monica. “Cultural Fashion: Transform the Fashion Industry From Villain to Hero.” *TEDxTUM*, 2017, accessed 26 October 2021. https://www.tedxtum.com/watch/monica-bota-moisin/.

Bromwich, Jonah Engel. “We’re All Drinking Diet Prada Now.” *The New York Times*, 14 March 2019. https://www.nytimes.com/2019/03/14/fashion/diet-prada.html.

Brown, Rivkah. “How Call-out Culture Can Make Brands More Authentic.” *Canvas8*, 30 May 2019. https://www.canvas8.com/content/2019/05/30/call-out-culture.html.

Bumpus, Jessica. “A Dynasty of Self-Appointed Fashion Police—From Joan Rivers to Diet Prada.” *Refinery29*, 25 September 2018. https://www.refinery29.com/en-gb/fashion-police-diet-prada.

Caito Isabella. “If Copyright Law Won’t Protect Small Fashion Brands against Copying, Social Media Will–Just Ask Influencer Danielle Bernstein.” *The Blog*, 26 April 2021. Student blog, accessed 3 May 2022. https://blog.jipel.law.nyu.edu/2021/04/if-copyright-law-wont-protect-small-fashion-brands-against-copying-social-media-will-just-ask-influencer-danielle-bernstein/.

Caramanica, Jon. “It’s Got a Great Beat, and You Can File a Lawsuit to It.” *The New York Times*, 6 January 2020., https://www.nytimes.com/2020/01/06/arts/music/pop-music-songs-lawsuits.html.

Clyde-Smith, Imogen. “Diet Prada And The Age Of Copycat Culture.” *Fashion Industry Broadcast*, 2 August 2018. https://fashionindustrybroadcast.com/2018/08/02/diet-prada-and-the-age-of-copycat-culture/.

Collard, Case and Ross, Lexie. “#RippedOff: New Wave of Call-Out Culture in the Fashion Industry.” *TheTM©A* (blog), 11 July 2018. https://thetmca.com/rippedoff-new-wave-of-call-out-culture-in-the-fashion-industry/.

Corbyn, Zöe. “Jennifer Jacquet: ‘The Power of Shame Is That It Can Be Used by the Weak against the Strong’”, review of *Is Shame Necessary?* by Jennifer Jacquet. *The Guardian*, 6 March 2015. http://www.theguardian.com/books/2015/mar/06/is-shame-necessary-review.

Cullen, Ciara. “Christian Louboutins Red Sole Walks All over the Trade Mark Directive Shape Exclusion.” *RPC*, 3 July 2018. Accessed 11 December 2020. https://www.rpc.co.uk/perspectives/ip/christian-louboutins-red-sole-walks-all-over-the-trade-mark-directive-shape-exclusion/.

Dawkins, David. “Allegations Of Worker Exploitation Strike A Blow To The Fortune Of Boohoo Fashion Line’s Founder.” *Forbes*, 9 July 2020. https://www.forbes.com/sites/daviddawkins/2020/07/09/allegations-of-worker-exploitation-strike-a-blow-to-the-fortune-of-boohoo-fashion-lines-founder/.

Devitt, James. “Is Shame Too Mean or a Tool for Change?” *Our World*, 17 June 2015. Accessed 4 June 2021. https://ourworld.unu.edu/en/is-shame-too-mean-or-a-tool-for-change.

Diamond, Amelia. “Diet Prada: The Instagram Account Calling Out Fashion Copy-Cats.” *Man Repeller*, 20 December 2017. https://www.manrepeller.com/2017/12/diet-prada-instagram.html.

Dudenhoefer, Nicole. “Is Cancel Culture Effective? How Public Shaming Has Changed.” *Pegasus—The Magazine of the University of Central Florida*, Fall 2020. Accessed 26 May 2021. https://www.ucf.edu/pegasus/is-cancel-culture-effective/.

Elan, Priya. “The Victoria’s Secret “Woke” Rebrand Is Only Skin Deep.” *The Guardian*, 24 February 2020. http://www.theguardian.com/commentisfree/2020/feb/24/victorias-secret-woke-lingerie-diversity.

Frank, Julia. “Who Is @diet_prada? The Copyright Crusaders Everyone in Fashion Is Following on Instagram.” *Vogue Australia*, 22 December 2017. https://www.vogue.com.au/fashion/news/who-is-dietprada-the-copyright-crusaders-everyone-in-fashion-is-following-on-instagram/news-story/6a2dd68d0971ed01aaaaaf10c6783040.

Friedman, Vanessa. “Dior and the Line Between Cultural Appreciation and Cultural Appropriation.” *The New York Times*, 30 April 2019. https://www.nytimes.com/2019/04/30/fashion/dior-cruise-marrakech.html.

Friedman, Vanessa. “Gucci Makes a Shoe and Keen Gets the Last Laugh.” *The New York Times*, 26 March 2019. https://www.nytimes.com/2019/03/26/fashion/keen-gucci-shoes-copy.html.

Gauberti, Annabelle. “Snapshot: Intellectual Property for Fashion Goods in France.” *Lexology*, 8 April 2020. Accessed 6 August 2020. https://www.lexology.com/library/detail.aspx?g=16730216-8f29-4e5c-8488-07117df4341d.

Grobe, Max. “Diet Prada’s IG Account Calls Out Copycat Culture in Fashion.” *Highsnobiety*, 24 October 2017. https://www.highsnobiety.com/p/diet-prada-copy-fashion/.

Gursahani, Divya. “Meet the Brains behind Diet Prada, Lindsey Schuyler and Tony Liu.” *Elle India*, accessed 29 May 2020, https://elle.in/article/lindsey-schuyler-tony-liu-diet-prada/.

Harvey-Crawford, Mary. “Diet Prada: Fashion Exposed.” *Palatinate Online* (blog), 20 November 2019. https://www.palatinate.org.uk/diet-prada-fashion-exposed/.

Hope-Allwood, Emma. “Diet Prada: In Fashion, #MeToo Is Just Getting Started.” *Dazed*, 17 December 2019. https://www.dazeddigital.com/fashion/article/47150/1/diet-prada-interview-fashion-industry-controversies-scandals-2010s.

Houle, Erika. “Diet Prada After Dark: Behind the Seams with Fashion’s Most Famed and Feared Meme-Makers.” *SSENSE*, 5 February 2018. https://www.ssense.com/en-us/editorial/fashion/diet-prada-after-dark.

Kilcooley-O’Hallora, Scarlett. “Today In History—July 26…2007.” *British Vogue*, 20 July 2012. https://www.vogue.co.uk/article/chloe-forced-topshop-to-destroy-1000-pairs-of-yellow-dungarees.

Lacey, Marc. “Washday Miracle? Kenya Wants Profit Share.” *The New York Times*, 21 February 2006. https://www.nytimes.com/2006/02/21/world/africa/21iht-lake.html.

Larsson, Naomi. “Inspiration or Plagiarism? Mexicans Seek Reparations for French Designer’s Look-Alike Blouse,” *The Guardian*, 17 June 2015. https://www.theguardian.com/global-development-professionals-network/2015/jun/17/mexican-mixe-blouse-isabel-marant.

Lewinsky, Monica. *The Price of Shame*. *TED*, 2015. Accessed on 22 May 2022. https://www.ted.com/talks/monica_lewinsky_the_price_of_shame.

Linderman, Matt. “Is the Piracy Paradox Missing the Point?” Signal v. Noise by Basecamp, 12 November 2007. https://signalvnoise.com/posts/696-is-the-piracy-paradox-missing-the-point.

Marriott, Hannah. “Diet Prada: The Instagram Account That Airs the Fashion Industry’s Dirty Laundry.” *The Guardian*, 22 May 2018. https://www.theguardian.com/fashion/2018/may/22/diet-prada-the-instagram-account-that-airs-the-fashion-industrys-dirty-laundry.

Martinkus, Charlotte. “Toxicity of Cancel Culture in the #MeToo Movement.” *Medium* (blog), 5 June 2020. https://medium.com/@n10478094/toxicity-of-cancel-culture-in-the-metoo-movement-331088946b33.

McGregor, Kirsty. “The Imitation Game: Fashion’s Intellectual Property Crisis.” Drapers, 4 February 2019. https://www.drapersonline.com/retail/the-imitation-game-fashions-intellectual-property-crisis/7033992.article.

McIntosh, Steven “Coronavirus: Why the Fashion Industry Faces an ‘Existential Crisis.’” *BBC News*, 29 April 2020. https://www.bbc.com/news/entertainment-arts-52394504.

Morelli, Laura. “The Louboutin Saga in France: A New Victory.” *Kluwer Trademark Blog*, 31 August 2018. http://trademarkblog.kluweriplaw.com/2018/08/31/louboutin-saga-france-new-victory/.

Morrisby, Kathryn. “Diet Prada: Calling out Luxury Fashion’s Failings.” Canvas8, 15 July 2018. https://www.canvas8.com/content/2018/07/16/diet-prada.html?error=loginRequired.

Nabrotzki, Stefanie “Germany: Aesthetic Effect Of (Fashion) Design Alone May Not Account For Copyright Protection.” *Mondaq*, 23 October 2019. https://www.mondaq.com/germany/copyright/856354/aesthetic-effect-of-fashion-design-alone-may-not-account-for-copyright-protection.

Needham, Adam “Richard Prince v Suicide Girls in an Instagram Price War.” *The Guardian*, 27 May 2015. https://www.theguardian.com/artanddesign/2015/may/27/suicide-girls-richard-prince-copying-instagram.

Nila, Allysha. “It’s Not Just An Instagram Account, It’s Diet Prada.” *A Magazine Singapore*, 26 August 2019. https://read-a.com/its-not-just-an-instagram-account-its-diet-prada/.

Niven-Phillips, Lisa. “Chanel Crystal Bracelets - Pamela Love.” *British Vogue*, 14 March 2012. https://www.vogue.co.uk/article/chanel-crystal-bracelets-pamela-love.

Ojo, Ay. “Is Diet Prada Promoting False Narratives? (Off-White / Virgil Abloh Discussion).” YouTube. Accessed 11 June 2020, https://www.youtube.com/watch?v=VbDqyqqGAiM.

Omondi, Recho. “*S1 EP1: Who Killed The Fashion Critic? Feat. Julie Zerbo & Emilia Petrarca*.” Spotify, 2018. https://open.spotify.com/episode/6xlozUcIIBYkBiRFgc7F37.

Osnos, Evan. “Chilling Effects.” *The New Yorker*, 29 March 2010. https://www.newyorker.com/news/evan-osnos/chilling-effects.

Owen-Jones, Juliette. “Rural Moroccan Women Contribute to the Dior’s Cruise 2020 Show.” *Morocco World News*, 06 May 2019. https://www.moroccoworldnews.com/2019/05/272388/rural-moroccan-women-dior-show.

Paton, Elizabeth. “Can Christian Louboutin Trademark Red Soles? An E.U. Court Says No.” *The New York Times*, 6 February 2018. https://www.nytimes.com/2018/02/06/business/christian-louboutin-shoes-red-trademark.html.

Ramirez, Sarah “Dior Spotlights Artisans’ Involvement in Cruise Collection.” *Luxury Daily* (blog), 7 May 2019. https://www.luxurydaily.com/dior-spotlights-artisans-involvement-in-cruise-collection/.

Raustiala, Kal and Sprigman, Christopher. “Why Imitation Is the Sincerest Form of Fashion.” *The New York Times*, 13 August 2010. https://www.nytimes.com/2010/08/13/opinion/13raustiala.html?auth=login-facebook.

Richardson, Marc. “Has the Proliferation of Watchdog Accounts Bred a ‘Good Samaritan’ Culture in Fashion?” *Fashionista*, 30 December 2019. https://fashionista.com/2019/12/fashion-industry-watchdogs-good-samaritans.

Roberts, Sterling. “What to Know about Fashion Industry Watchdog Diet Prada.” Coulture, 24 February 2020. http://coulture.org/what-to-know-about-fashion-industry-watchdog-diet-prada/.

Romano, Aja. “Why We Can’t Stop Fighting about Cancel Culture.” *Vox*, 30 December 2019. https://www.vox.com/culture/2019/12/30/20879720/what-is-cancel-culture-explained-history-debate.

Rueb, Emily S, and Bryson Taylor, Derrick. “Obama on Call-Out Culture: ‘That’s Not Activism.’” *The New York Times*, 31 October 2019. https://www.nytimes.com/2019/10/31/us/politics/obama-woke-cancel-culture.html.

Sandhu, Serena. “Fast Fashion Is a Trend That Could Be on Its Way out as Shoppers Seek Sustainability after Covid Pandemic.” *Inews*, 19 June 2021. https://inews.co.uk/news/consumer/fast-fashion-trend-on-its-way-out-shoppers-seek-sustainability-covid-pandemic-1035952.

Sawyer, Jonathan. “Meet the Duo Behind Diet Prada in New Tell-All Interview.” *Highsnobiety*, 8 May 2018. https://www.highsnobiety.com/p/diet-prada-identity-bof-interview/.

Scibona, Salvatore. “The Industrial Revolution of Shame.” *The New York Times*, 9 March 2019. https://www.nytimes.com/2019/03/09/opinion/sunday/internet-shaming.html.

Scicluna, Julien. “Protecting and Enforcing Design Rights: France.” *World Trademark Review*, 11 December 2017. https://www.worldtrademarkreview.com/portfolio-management/protecting-and-enforcing-design-rights-france.

Secretaría de Cultura. “Pueblos y comunidades serán los titulares del derecho para el uso y aprovechamiento de sus elementos culturales.” *Govierno de Mexico*, 18 May 2019. http://www.gob.mx/cultura/prensa/pueblos-y-comunidades-seran-los-titulares-del-derecho-para-el-uso-y-aprovechamiento-de-sus-elementos-culturales?idiom=es.

Sherman, Lauren. “Diet Prada Unmasked.” *The Business of Fashion*, 8 May 2018. https://www.businessoffashion.com/articles/professional/diet-prada-instagram-unmasked-tony-liu-lindsey-schuyler.

Sherman, Lauren and Strugatz, Rachel. “Diet Prada, Estée Laundry and the Rise of Watchdog Culture: Harmful or Helpful?” *The Business of Fashion,* 24 January 2019.

https://www.businessoffashion.com/articles/professional/diet-prada-estee-laundry-and-the-rise-of-watchdog-culture-harmful-or-helpful.

Siers, Lucy. “Fashion and Intellectual Property Law: How Will Brexit Damage the British Fashion Industry?” *Fashion Roundtable*, 13 September 2018. https://www.fashionroundtable.co.uk/news/2018/9/13/fashion-and-intellectual-property-law-how-will-brexit-damage-the-british-fashion-industry-by-lucy-siers.

Smith, Jamie. “Fashion (Law) Forward: An Interview with Professor Susan Scafidi.” *The Issue Spotter*, 23 November 2020. http://jlpp.org/blogzine/fashion-law-forward-an-interview-with-professor-susan-scafidi/.

Solá-Santiago, Frances. “Fast Fashion Brands May Soon Be Unable To Plagiarize Indigenous Communities In Mexico.” *Remezcla* (blog), 15 August 2018. https://remezcla.com/culture/mexican-organization-plans-stop-fast-fashion-brands-copying-indigenous-designs/.

Spiteri, Timothy. “A Comprehensive Analysis of the CJEU”s Louboutin Ruling.” *Lexology*. 19 June 2018. https://www.lexology.com/library/detail.aspx?g=8809c1fd-320f-4ce0-b768-111ace23f651.

Stefano, Michelle. “Folklife at the International Level: Traditional Cultural Expressions as Intellectual Property.” *Folklife Today:* America Folklife Center & Veterans History Project blog, 10 July 2017. https://blogs.loc.gov/folklife/2017/07/folklife-at-the-international-level-traditional-cultural-expressions-as-intellectual-property/.

Stoppard, Lou. “Diet Prada — Fashion’s Most Powerful Critic.” *Financial* Times, 27 December 2017. https://www.ft.com/content/777edf64-c94a-11e7-8536-d321d0d897a3.

Szklarski, Cassandra. “Study Calls for Tougher Laws Against Cultural Appropriation in Fashion.” *Centre for International Governance Innovation*, 5 April 2019. https://www.cigionline.org/articles/study-calls-tougher-laws-against-cultural-appropriation-fashion.

Tashjian, Rachel. “How Dapper Dan Became Gucci’s Conscience.” *GQ*, 11 February 2019. https://www.gq.com/story/gucci-dapper-dan-statement.

Tashjian, Rachel. “In Fashion, Who Will Cancel the Cancelers?” *GQ*, 1 July 2020. https://www.gq.com/story/diet-prada-kanye.

Van Gompel, Stef. “Opinion of the Advocate General of the ECJ in the Painer Case (1): Applicable Exceptions and Limitations.” *Kluwer Copyright Blog*, 3 May 2011. http://copyrightblog.kluweriplaw.com/2011/05/03/opinion-of-the-advocate-general-of-the-ecj-in-the-kampusch-case-1-applicable-exceptions-and-limitations/.

Vesilind, Emili. “Diet Prada Is an Instagram Feed That Calls Out Copycat Designs.” *JCK*, 22 December 2017. https://www.jckonline.com/editorial-article/diet-prada-copycat-designs/.

Voltolini, Magda. “French Fashion Industry Eyes Ways To Better Use IP Rights For Protection.” *Intellectual Property Watch*, 15 December 2014. https://www.ip-watch.org/2014/12/15/french-fashion-industry-eyes-ways-to-better-use-ip-rights-for-protection/.

Webb, Bella. “Fashion Finstas or Worthwhile Watchdogs?” *1 Granary* (blog), 2 October 2019. https://1granary.com/t/fashion-journalism/fashion-finstas-or-worthwhile-watchdogs/.

White, Michael. “Are We Right to Use Shame as an Instrument of Criminal Justice Policy?” *The Guardian*, 2 December 2008. http://www.theguardian.com/politics/blog/2008/dec/02/community-payback-vests.

Winston, Andrew. “Luxury Brands Can No Longer Ignore Sustainability”, *Harvard Business* Review, 8 February 2016. https://hbr.org/2016/02/luxury-brands-can-no-longer-ignore-sustainability.

Young, Sarah. “Carolina Herrera Accused of Cultural Appropriation by Mexican Government.” *The Independent*, 13 June 2019. https://www.independent.co.uk/life-style/fashion/carolina-herrera-mexico-government-cultural-appropriation-twitter-reaction-a8956861.html.

Zerbo, Julie. “France: Legal Protections for Fashion.” *The Fashion Law*, accessed 23 August 2020. https://www.thefashionlaw.com/learn/france-legal-protections-for-fashion/.

Zerbo, Julie. “Hey Fashion, Not Everything That Is Similar Is “Copied.” *The Fashion Law*, 24 May 2017. https://www.thefashionlaw.com/hey-fashion-not-everything-that-is-similar-is-copied/.

Zerbo, Julie. “Meet Tony Liu and Lindsey Schuyler: The Duo Behind Diet Prada.” *The Fashion Law*, 19 October 2017. https://www.thefashionlaw.com/meet-tony-liu-and-lindsey-schuyler-the-duo-behind-diet-prada/.

Zerbo, Julie. “Cases of Interest: Christian Louboutin v. Yves Saint Laurent.” The Fashion Law, accessed 13 August 2020. https://www.thefashionlaw.com/learn/cases-of-interest-christian-louboutin-v-yves-saint-laurent/.

Zerbo, Julie. “This $2,500 Sweater Being Sold by MyTheresa, Neiman Marcus Violates the Indian Arts & Crafts Act, Per New Lawsuit.” *The Fashion Law*, 23 April 2020. https://www.thefashionlaw.com/mytheresa-neiman-marcus-are-being-sued-for-sell-a-sweater-that-allegedly-violates-indian-arts-crafts-act/.

Zerbo, Julie. “Louboutin Handed a Loss in Red Sole Trademark Lawsuit in Japan.” The Fashion Law, 13 April 2022, https://www.thefashionlaw.com/louboutin-handed-a-loss-in-red-sole-trademark-lawsuit-in-japan/.

Further Commentary

“Diet Prada” and the Need to Protect Novice Designers.” *Student Independent News, 17 February 2019.* Accessed 5 June 2020, http://www.sin.ie/2019/02/17/diet-prada-and-the-need-to-protect-novice-designers/.

“8 Times ‘Diet Prada’ Exposed Some Of Fashion’s Biggest Stars.” *The Cut*, 28 March 2019. https://www.beinthecut.com/8-times-diet-prada-exposed-fashions-biggest-stars/.

“Andreea Tănăsescu at the Feraru Conferences: Adorning the World with a Romanian Blouse.” Accessed 11 February 2021, https://www.icr.ro/pagini/andreea-tanasescu-at-the-feraru-conferences-adorning-the-world-with-a-romanian-blouse.

“Call-out Culture Could Do with a Little More Kindness.” *Buro 24/7 Singapore*, accessed 12 July 2021. https://www.buro247.sg/fashion/insiders/call-out-cancel-culture-diet-prada-public-shaming-game-changer-in-fashion-could-do-with-more-kindness.html.

“Chilling Effects Clearinghouse.” Accessed 9 July 2021. https://chnm.gmu.edu/digitalhistory/links/cached/chapter7/link7.62.ChillingEffects.html.

“Fanzine 04: Fashion Craft Revolution by Fashion Revolution.” *Issuu*, accessed 28 April 2022. https://issuu.com/fashionrevolution/docs/issue_fanzine04_fashioncraftrevolution_240x170_sin.

“Giving (Back) the Credit to the Heritage Communities.” *Creative Europe Desk UK*, accessed 12 February 2021. https://www.creativeeuropeuk.eu/funded-projects/giving-back-credit-heritage-communities.

“Guess Accused of Stealing Handbag Design from Black-Owned Label.” *The Irish Times*, 30 March 2021. https://www.irishtimes.com/life-and-style/fashion/guess-accused-of-stealing-handbag-design-from-black-owned-label-1.4523880.

“Mexico Called Out Carolina Herrera for Cultural Appropriation. Call the U.N.?” *Fordham Law* (blog), 15 June 2019. https://news.law.fordham.edu/blog/2019/06/14/mexico-called-out-carolina-herrera-for-cultural-appropriation-call-the-u-n/.

Pearson-Jones, Bridie. “Missguided Is Accused of Hypocrisy for ‘supporting BLM While Stealing Swimsuit from Black Designer.’” *Daily Mail Online*”, 5 August 2020. https://www.dailymail.co.uk/femail/article-8595933/Missguided-accused-hypocrisy-supporting-BLM-stealing-swimsuit-black-designer.html.

“Munroe Bergdorf: Model Rejoins L’Oreal after Racism Row.” *BBC News*, 9 June 2020. https://www.bbc.com/news/entertainment-arts-52984555.

“Op-Ed: Piracy Doesn’t Destroy the Incentive to Create, It Increases It. *The Business of Fashion*, 14 March 2016. https://www.businessoffashion.com/community/voices/discussions/what-is-the-real-cost-of-copycats/op-ed-piracy-doesnt-destroy-the-incentive-to-create-it-increases-it.

“Opinion: The Consumer Bite Back – How the Social Media Callout Culture Benefits Both Consumer and Brand.” *Global Cosmetics News*, 1 November 2019. https://www.globalcosmeticsnews.com/the-consumer-bite-back-how-the-social-media-call-out-culture-benefits-both-consumer-and-brand/.

“Sustainability and IP: A Match Made in Heaven?” *The In-House Lawyer*, 15 March 2016. http://www.inhouselawyer.co.uk/legal-briefing/sustainability-and-ip-a-match-made-in-heaven/.

“The Nagoya Protocol Brings Fairness, Equity, and Sustainability to the New Global Agenda for Biodiversity.*” Convention on Biological Diversity*, accessed 28 April 2022. https://www.cbd.int/article/abs-we-all-need-campaign.