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Creation, Destruction, and the Future of Fashion

Susan Scafidi

Fordham University School of Law, scafidi@law.fordham.edu

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Creation, Destruction, and the Future of Fashion

Cover Page Footnote

Founder and Director, Fashion Law Institute, a nonprofit organization headquartered at Fordham University School of Law and the world's first academic center dedicated to the law and business of fashion. Thanks to the Fordham Intellectual Property, Media & Entertainment Law Journal Editor-in-Chief Hanna Feldman and the journal staff for their ongoing commitment to this project; the contributing authors; Dean's Fellows Allision Furnari and Gloria Kim; and my esteemed colleague, Fashion Law Institute Associate Director Jeff Trexler.

Creation, Destruction, and the Future of Fashion

Susan Scafidi*

*A fashion is merely a form of ugliness so absolutely unbearable that we must alter it every six months!*¹

As the bankruptcies of Barneys, Forever 21, and other fashion brands and retailers have reminded us over the past year, the process of creative destruction described by Joseph Schumpeter² is as relevant to fashion as it is to other industries. In Schumpeter's view, surviving the systemic changes wrought by a new business environment requires more than incidental adjustments grounded in familiar concepts, norms, and rules.³ We must instead “come to grips with the real problems involved”⁴—creative destruction calls for a “creative response,” one that is as committed to discovering the potential complications arising from new technology as it is to looking for new opportunities.⁵

The pieces in this, the second annual fashion issue of the *Fordham Intellectual Property, Media, and Entertainment Law Journal*, explore perhaps the most fundamental challenge now

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¹ Oscar Wilde, *The Philosophy of Dress*, N.Y. TRIB., Apr. 19, 1885, reprinted in JOHN COOPER, *OSCAR WILDE ON DRESS* (2013).

² JOSEPH SCHUMPETER, *CAPITALISM, SOCIALISM, AND DEMOCRACY* 81–86 (Routledge 2003) (1943).

³ See Joseph Schumpeter, *The Creative Response in Economic History*, 7 J. ECON. HIST. 149, 150–51 (1947).

⁴ *Id.* at 159.

⁵ *Id.* at 150.

facing the industry from the emergence of the digital age: the tension between freedom and responsibility. The invention of generative algorithms, e-commerce, the digitized supply chain, and of course, social media, has liberated us from the economic, technological, and cultural restrictions that once made fashion the province of the elite few. Today, anyone can launch a fashion brand, just as we all have access to information about the latest trends and communications platforms that enable us to share our brand analyses. At the same time, we also are developing a heightened awareness of the problematic aspects of running a fashion business, including new difficulties whose solutions are far from clear.

Ariele Elia's Note on *Fashion's Destruction of Unsold Goods*⁶ provides a telling case in point in the environmental context. For decades, the disposal of excess stock and seized counterfeits was uncontroversial—so much so, Elia observes, that the U.S. Congress created a financial incentive for companies to destroy unsold merchandise: a customs duty refund for any goods destroyed. However, in 2018, the intersection of online news, social media, and publicly accessible databases containing companies' government filings turned routine disclosures of product disposal into an international scandal. As a result, not only are fashion houses under intense public pressure to find other ways to deal with products they cannot sell, but activists' calls for government to do something about fashion waste could also make the destruction of unsold merchandise illegal.⁷

On a superficial level, this dilemma seems easy to solve. After all, who could object to companies' being forced to donate or recycle product that might otherwise end up in a landfill? However, as Elia notes, these solutions give rise to new problems, from the technological and economic limitations of circular fashion to the destructive impact of donated goods on local fashion businesses in

⁶ Ariele Elia, *Fashion's Destruction of Unsold Goods: Responsible Solutions for an Environmentally Conscious Future*, 30 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 539 (2020).

⁷ See, e.g., Don-Alvin Adegeest, *France to Introduce Anti-Waste Law to Promote Circular Economy*, *FASHION UNITED* (Oct. 4, 2019), <https://fashionunited.com/news/fashion/france-to-introduce-anti-waste-law-to-promote-circular-economy/2019100430265> [<https://perma.cc/3Y73-H7NM>].

developing areas. What brands can do with unsold goods is clear, but what they should do, less so.

Joyce Boland-DeVito⁸ examines a similar tension between freedom—in this case, freedom of speech—and social responsibility in *Fashion(ing) a Political Statement: A Review of the Legal & Social Issues that Arise from Banned Political Clothing and Other Controversial Fashion Items in Light of the United States Supreme Court's Decision in Minnesota Voters Alliance v. Mansky*. As Boland-DeVito indicates, the Supreme Court's free-speech jurisprudence in fashion-related cases reflects the classical liberal ideal; so long as expressive adornment does not incite physical violence, the law limits government's authority to bind the wearer. The viral dissemination of ethical critiques in today's networked environment, however, has given rise to a secularized Augustinian philosophy of freedom.⁹ From this perspective, freedom of speech means the freedom to communicate truth and justice; laws that allow the free expression of bias and insensitivity actually enslave us as a society to injustice, which means that we are not free at all. Once again the solution might seem simple—in the immortal words of Nick Lowe, (what's so funny 'bout) peace, love, and understanding?¹⁰ As it turns out, quite a bit, especially in a diverse social-media-driven society increasingly rife with disagreements as to what these concepts mean.

This tension between freedom and responsibility even touches intellectual property, which, by protecting the expressions of the mind, speaks to the essence of our creative spirit. An algorithm that creates fashion designs and matches people to the clothing that best suits who they are is a descendant of the mechanical Jacquard loom, the punchcard-operated forerunner of the Information Age invented in the early days of the Industrial Revolution. From one angle, algorithmic design and data processing fulfill the retro-futuristic dreams

⁸ Joyce Boland-DeVito, *Fashion(ing) a Political Statement: A Review of the Legal & Social Issues that Arise from Banned Political Clothing and Other Controversial Fashion Items in Light of the United States Supreme Court's Decision in Minnesota Voters Alliance v. Mansky*, 30 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 493 (2020).

⁹ See 2 AUGUSTINE, THE CITY OF GOD bk. XXII, ch. 30, at 542 (Marcus Dods trans., T&T Clark 1871).

¹⁰ BRINSLEY SCHWARZ, *(What's So Funny 'Bout) Peace, Love, and Understanding*, on THE NEW FAVOURITES OF . . . BRINSLEY SCHWARZ (United Artists Records 1974).

of twentieth-century socialists and capitalists alike, as high-tech alienation of labor from workers promises to make possible an era in which we are all free to live lives of leisure thanks to work done by machines.

When viewed from another perspective, however, algorithmic design has the potential to deliver far less benign results, since twentieth-century formulations of legal doctrine that at present keep copyright from applying to algorithmic designs also nullify what might otherwise be the rights of the designers, programmers, companies, and consumers who each make contributions to this creative enterprise. As the Note by Caen Dennis¹¹ argues, adapting copyright to the algorithmic age requires more than a rote interpretation of statutes, regulations, and precedent; instead, society must address the full complexity of our present state and our future aspirations.

Beyond the realm of fashion, the two other Articles in this issue—Max Stul Oppenheimer¹² on the concept and ownership of fame and Michael Karanicolas¹³ challenge to the current system of trademark enforcement in the context of domain names—similarly invoke the contemporary themes of creation and destruction, freedom and responsibility that have the power to rewrite societal structures.

Two hundred years ago, the tragic choices¹⁴ created by the mechanization of the fashion industry helped shape intellectual and social transformations whose legacies we still encounter today, from the existential struggle between socialism and corporate capitalism, to slavery's end, the New Deal economy, globalized trade, and gender equality. The moral scope of such Information Age concerns

¹¹ Caen A. Dennis, *AI-Generated Fashion Designs: Who or What Owns the Goods?*, 30 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 593 (2020).

¹² Max Stul Oppenheimer, *Fame: Ownership Implications of Intellectual Property and Agency Law*, 30 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 447 (2020).

¹³ Michael Karanicolas, *The New Cybersquatters: The Evolution of Trademark Enforcement in the Domain Name Space*, 30 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 399 (2020).

¹⁴ See generally GUIDO CALABRESI & PHILIP BOBBIT, *TRAGIC CHOICES* (1978) (developing a theory of the role of moral values and economics in the trade-offs inherent in the ongoing development of a society).

as waste management, free speech, and intellectual property protection may at first glance seem less epic than those of the Industrial Revolution, but it is easy to lose sight of the fact that in the early days of mechanization the issues at stake seemed no bigger than inventing faster ways to strip seeds from cotton and weave fabric on a loom. The questions discussed in the pieces in this special issue are part of a seismic cultural shift whose full scope we do not yet comprehend; finding creative solutions is essential, lest our defining values be destroyed.