The Use of Intellectual Property Laws and Social Norms by Independent Fashion Designers in Montreal and Toronto: An Empirical Study

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Abstract

Intellectual property law theory is premised on a utilitarian justification granting limited time monopolies for encouraging creation, innovation and its dissemination to society. However, in the last several decades, scholars have been mounting empirical evidence to show that in some industries, creativity and innovation exist outside the contours of intellectual property law and thrive despite their lack of reliance on the laws. Instead, what they uncovered is that creators in these industries follow norms that mitigate issues surrounding some kinds of copying.

Intellectual property protection for fashion design in Canada is fragmented across a complex legal landscape that entails several different laws, unique in scope, eligibility requirements and rights. This complex framework is not unique to the fashion design industry but is similar for design industries generally. Navigating through these laws can be daunting and thus inaccessible for the some segments of the design industry that are small to medium sized enterprises (SMEs) that have limited resources to expend on legal advice and registration.

Using grounded theory methodology and qualitative and quantitative methods, this research explored the use of intellectual property law and social norms by the independent fashion design segment in Montreal and in Toronto and the contours of copying and the public domain.

What the empirical research reveals is that independent fashion designers do not use the law to protect their designs and instead, use mechanisms that centre on the *negative* copying norm. Negative copying is copying that is negatively perceived. It is not necessarily legally infringing or economically harmful, although it can be both. Further, it can apply to subject matter that is not the subject matter of intellectual property law. This norm against negative copying is supported by extra-legal prevention and enforcement mechanisms that have been developed by individuals within the segment in order to mitigate the issue of copying.

The empirical research also reveals that in addition to the economic incentives to create, there are also a number of non-economic incentives such as identity and reputational interests that drive creativity and help reinforce the norm against negative copying.

Using grounded theory enabled me to draw on literature from a number of disciplines in order to help contextualize these findings and approach the analysis from the perspective of intellectual property theory, policy and law, social norms (sociology and psychology) as well as economic geography, and design.

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From the bottom of my heart thank you ☺
*

Dedication

I would like to dedicate this thesis to my parents, Azam and Mehdi, to my sister Bita and to my soulmates Niiku and Niia.

I am so grateful for your love, support, encouragement, inspiration and guidance throughout this journey. Your unwavering belief in me is why I am here.

…and to TamTam who was by my side the entire time.

PART I: CONTEXT OF RESEARCH

1 CHAPTER ONE - Introduction to the Research

In the past several decades there has been a growing interest in the study of social norms and law, and more recently the way in which they operate within creative industries.[1] Empirical research conducted within creative communities[2] has provided us with evidence to suggest that social norms within those communities are present both where intellectual property law applies[3] and where it does not.[4] In fact, in some communities where law could apply to the subject matter,

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[1] This research focuses on Western legal concepts of intellectual property, property, social norms and copying, see e.g., Emmanuelle Fauchart & Eric von Hippel, "Norms-Based Intellectual Property Systems: The Case of French Chefs" (2008) 19:2 Organization Science 187; Dotan Oliar & Christopher Sprigman, "There's No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy" (2008) 94:8 Va L Rev 1787; Jacob Loshin, "Secrets Revealed: How Magicians Protect Intellectual Property Without Law" in Christine A Corcos, ed, *Law and Magic: A Collection of Essays* (Durham: North Carolina Press, 2010) Ch 8; David Fagundes, "Talk Derby to Me: Intellectual Property Norms Governing Roller Derby Pseudonyms" (2012) 90 Tex L Rev 1093; Aaron Perzanowski, "Tattoos & IP Norms" (2013) 98 Minn Law Rev at 511; Eden Sarid, "Don't Be a Drag, Just Be a Queen – How Drag Queens Protect their Intellectual Property Without Law" (2014) 10:1 FIU L Rev 133; Stefan Bechtold, "The Fashion of TV Show Formats" (2013) Mich St L Rev 451; Kate Darling, "IP Without IP? A Study of the Online Adult Entertainment Industry" (2014) 17 Stan Tech L Rev 709; Kate Darling and Aaron Perzanowski, *Creativity without Law: Challenging the Assumptions of Intellectual Property* (New York, New York University Press, 2017).

[2] Creative communities are not just communities whose output are protected by intellectual property laws, but are those that produce a form of innovative or cultural or innovative output (tangible or intangible). The term 'segment' and 'communities' will be used interchangeably to refer to the independent fashion designers as a group of individuals that engage in the activity of fashion design or creative aspects of fashion design. This is narrower than the economic cluster, which is broader than just the individuals in the segment, see *infra* note 10.

[3] Elizabeth L Rosenblatt, "A Theory of IP's Negative Space" (2010-2011) 34:3 Colum J L & Arts 317 at 330 [Rosenblatt, "Negative Space"] "IP forbearance," a term coined by Rosenblatt, identifies the circumstance under which intellectual property is available but not used by creators. The Canadian fashion design framework falls into this category since legal protection exists yet there has been relatively no legal activity within the segment interviewed. Until now, a study has not been conducted to determine whether the available intellectual property framework is being used within this industry; In another article, Rosenblatt explains that unlike the origin of the term "negative space" in art, negative space as it relates to intellectual does not exclude everything that is not protected by intellectual property, otherwise what is commonly referred to as the public domain. Instead she argues that "[i]t includes only those areas of creation and innovation that actually *benefit* – or at least do not seem to suffer – from the lack of intellectual property protection" Elizabeth L Rosenblatt, "Intellectual Property's Negative Space: Beyond the Utilitarian" (2013) 40 Fla St U L Rev 441 at 447 [Rosenblatt, "Beyond the Utilitarian"] [citation omitted][emphasis in original].

[4] Rosenblatt, "Negative Space", *supra* note 3 at 325; Note that there are different kinds of norms that exists throughout creative industries such as "Litigation-Avoidance Customs" and "Formalized Trade Practice and Agreements" see Jennifer E Rothman, "The Questionable Use of Custom in Intellectual Property" (2007) 93 Va Law Rev 1899.

the use of norms outweighs the use of laws.[5] It is within this paradigm that this dissertation is situated.

The Canadian intellectual property landscape for fashion design is complex in that there are several mechanisms for protection, each with different eligibility requirements, rights and limitations; the framework includes copyright, trademark and industrial design for distinct yet overlapping features.[6] In Canada, an article of fashion design may be classified simultaneously as an *artistic work*, a *useful article*, or a *mark*, for the purpose of intellectual property protection.[7] Whether and how these mechanisms are used, and whether and how effective they are within an industry that has been described by some as a 'paradox'[8] due to its high creativity in spite of its lack of use of intellectual property law remains a relatively unstudied area in Canada. Since the available framework for fashion design is complex and understudied and litigation has been sparse, this study aims to consolidate existing recorded data but also to extract new data about the industry through qualitative interviews with independent fashion designers from the two cities with the largest concentration of fashion designers in Canada: Montreal and Toronto.[9] Not

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[5] For example in the case of comedians, see Oliar & Sprigman, *supra* note 1; in the case of magicians see Locshin, *supra* note 1; in the case of tattoo artists, see Perzanowski, *supra* note 1.

[6] The Canadian framework is similar to the US framework, which has a number of different elements of fashion design that can be protected. However the major difference is the provision in the Canadian *Copyright Act* that could provide overlapping copyright and industrial design protection for useful articles, see *Copyright Act*, RSC 1985, c C-42, s 64.

[7] *Ibid,* s 2 [artistic work], although the work is a "useful article" it is considered to be an "artistic work", see generally Daniel J Gervais & Elizabeth F Judge, *Intellectual Property: The Law in Canada*, 2nd ed (Toronto: Carswell, 2011) at 1152; *Industrial Design Act*, RSC 1985 c I-9; *Trade-marks Act*, RSC 1985, c T-13.

[8] See generally, Kal Raustiala & Christopher Sprigman, "The Piracy Paradox: Innovation and Intellectual Property in Fashion Design" (2008) 92:8 Va L Rev 1687 at 1689-1691 [Raustiala & Sprigman, "Piracy Paradox"], generally speaking, authors argue that low intellectual property protection – and copying – can account for the creative success in the fashion industry, which is considered to be a paradox because intellectual property theory generally points to the correlation between high intellectual property rights and innovation and creativity. The fashion industry, along with a number of other creative industries, or industries with creative aspects demonstrate that the expansive intellectual property rights rhetoric does not resonate with creative output in all industries.

[9] A comprehensive overview and description of the fashion industry and the particular segment of "independent" designers that the participants belong to is discussed in Chapter 2. Independent designers are defined as those who are not employed by a major retailer and undertake all of the design and management decisions in-house. Independent designers often create and produce their collections on a much smaller scale and have more local

only are these two cities the centres of fashion design in Canada, but they are also the two largest fashion clusters.[10] These cities are also significant because they have very different cultures, histories, and regional policy frameworks, which have helped shape their respective industries and communities.

The purpose of this dissertation is to offer empirical evidence concerning the use of intellectual property laws, and to identify norms and other mechanisms employed by independent fashion designers to deal with design copying.[11] Specifically, the focus areas that this dissertation examines are the use of copyright, trademark and industrial design[12] and normative systems such as social norms, by fashion designers to protect against or to prevent copying; to understand the relationship between the laws and norms; to determine how copying is approached, and to understand the role of the public domain within the industry. Generally,

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elements (e.g., local producers, manufacturers etc.) than others. Further, not including their retail outlets, they are small and medium sized businesses operating out of Toronto or Montreal.

[10] As I will discuss in greater detail below, the concept of economic clusters stem from the field of economic geography to explain the success and competitive advantage that some industries have benefitted from because they are able to take advantage of complementary production, services, associations, institutions, businesses and opportunities which are within close geographic proximity. It is also conducive to knowledge sharing between individuals within those clusters, which for the most part may contribute to understanding the relationship between individuals and how norms spread. For the purpose of this paper, when referring to a fashion cluster, I mean that the segment of independent fashion designers, and their broader community including design schools, associations, manufacturers and retailers are geographically proximate. While this is not a study on clusters, it is sufficient to point out that the Montreal and Toronto independent design segment is to some degree clustered around these city centres. See, generally Michael E Porter, *The Competitive Advantage of Nations*, (New York: The Free Press, 1990) [Porter, *Advantage of Nations*]; see Michael E Porter, "The Competitive Advantage of Nations" (1990) 68:2 Harvard Business Review 73 at 73 [Porter, "Competitive Advantage"]; see also Charlie Karlsson, "Clusters, Networks and Creativity" in David Emanuel Andersson, Åke E Andersson & Charlotta Mellander, eds, *Handbook of Creative Cities* (Cheltenham: Edward Elgar, 2011) ch 5 [Karlsson, "Clusters, Networks and Creativity"], Karlsson discusses the importance of the role of networks and clusters in creativity.

[11] B. Courtney Doagoo, *Fashioning a Norm and Designing the Law: An empirical study investigating the relationship between intellectual property laws and norms relied on by fashion designers in Montreal and Toronto* (PhD Thesis Proposal, University of Ottawa, 2014) [unpublished].

[12] An exhaustive analysis of patent protection for textiles will not be included in my research, although a discussion on patents and fashion is included in Chapter 4. It is important to note that patents play an important role in innovation in the area of textiles and technologies, yet patent protection is inaccessible to many of the small and medium sized firms due to the lack of resources. In general "small and medium size enterprises that generally do not have the resources to protect themselves", see Canada, Sector Council Program, *Pressing Ahead: Canada's Transforming Apparel Industry 2011 Labour Market Information Study*, by Milstein & Co Consulting, (Montreal: Apparel Human Resources Council, 2011) at 71, online: Apparel Connexion <http://www.apparelconnexion.com/_Library/Labor_Market_Information_Study/AHRC_LMU_Study_Report_Final_ENG_HRSDC_Version.pdf> [*Pressing Ahead*].

what the findings reveal is that intellectual property law is ineffective for designers and is not used to protect against copying that is negatively perceived.[13] This kind of copying is distinct from copying that is necessarily legally infringing or economically harmful, although both can be present. Copying that is negatively perceived is broader and includes non-economic harms such as harm to reputation and to creative identity. Further, the norm against *negative* copying is supported by a number of prevention and enforcement mechanisms.

The qualitative data also provokes the consideration of a broader contextual assessment of the participant responses that cannot be isolated from the circumstances under which they arise. For example, the participants all reside within major Canadian cities,[14] they are all small business owners and also responsible for the creative aspect of their business,[15] and do not use intellectual property law to protect their designs. Using an interdisciplinary approach, this dissertation combines research on design, fashion, social norms, economic geography and intellectual property law to contextualize the participant responses. While the focus of inquiry remains the study of intellectual property and norms, the broader scope of the research helps contextualize the findings discussed in Chapter 6.

This holistic approach was made possible by the methodology used to conduct the qualitative interviews and quantitative research, which allowed the data to set the parameters of the research. I used constructivist grounded theory methodology to interview the participants and analyze the data. Developed from within the fields of science and social science, the purpose of grounded theory is to permit for a "systemic" approach to conducting qualitative empirical

[13] Copying that is negatively perceived, that is *negative copying* is copying that is not necessarily unlawful or economically harmful, but can be. A full discussion of negative copying (or copying that is negatively perceived) as opposed to copying generally will be discussed in further detail in Chapter 6.
[14] Meaning that within their respective jurisdictions, they were subject to the same policies and law that were deployed in their provinces and cities as well as federally. They also had access to the same resources, suppliers and a number of other factors that might play a role in decisions that they made.
[15] For example, as will be seen in Chapter 2 there are a number of business limitations that this particular segment of designer may face which might affect their design decisions i.e., the creative output.

research.[16] In tandem with grounded theory, I employed a bottom-up approach derived from socio-legal studies, a theoretical framework that is complementary to grounded theory research since it is possible for both to derive their findings from the ground up.[17] The purpose of anchoring this study in empirical research was to be able to identify the structures that exist within the industry from the lived experiences of independent Canadian fashion designers. Because the study predominantly focuses on social norms, it necessarily takes into consideration the context and characteristics of the community in which the norms are developed.

The motivation for this research was sparked by informal discussions with designers that revealed intricate interactions within this community. One such discussion revealed a puzzling reaction from a designer who stated that they would prefer to forgo pursuing legal recourses or going public about an alleged incident of copying due to the fear of retribution from others within the fashion community. When asked whether they would launch a claim, the designer said "absolutely not", even though the designer perceived that they were copied. In another situation, this time made public, a well-known designer who was accused of copying, resolved the dispute out of court, and apologized publicly.[18] These examples demonstrate that social norms are not straightforward, that they are created in the particular history and context of a community, and

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16 Antony Bryant & Kathy Charmaz, "Grounded Theory in Historical Perspective: An Epistemological Account" in Antony Bryant & Kathy Charmaz, eds, *The Sage Handbook of Grounded Theory* (London: Sage Publications, 2007) 31 at 33.

17 Reza Banakar, *Normativity in Legal Sociology: Methodological Reflections on Law and Regulation in Late Modernity* (Switzerland: Springer International Publishing, 2015) at 51 [Banakar, *Legal Sociology*] Banakar suggests that it is possible to look at socio-legal research is either from the top-down or from the bottom up and can produce grounded theory.

18 Nathalie Atkinson, "How This Jacket Got Jacked" *National Post* (6 June 2008), online: <http://www.nationalpost.com/opinion/columnists/story.html?id=dcf3d458-57f4-4004-95af-afec1732390f> [Atkinson, "Jacket"]; David Graham, "Fashion Icon Pays Up in Copycat Spat: A Struggling Toronto Fashion Label is Getting an Undisclosed Financial Settlement from Fashion Icon Diane von Furstenberg" *Toronto Star* (13 May 2009), online: <https://www.thestar.com/life/fashion_style/2009/05/13/fashion_icon_pays_up_in_copycat_spat.html > [Graham, "Copycat Spat"]; Note that an analysis of the claim is discussed in Chapter 5 under the section on sanctions; *Business Wire,* "Diane von Furstenberg Studio Settles with Mercy of Canada" (11 June 2009), online: <http://www.businesswire.com/news/home/20090611005733/en/Diane-von-Furstenberg-Studio-Settles-Mercy-Canada#.UzycC8ew2mE>.

that in some cases, like in the present research, social norms may play a more important role within that community than the law.

In my dissertation, I set out to ground the participant findings in a discussion of industry, policy, norms and law. I suggest that despite the lack of design policy at the national level, the legal framework for design protection is quite extensive. Yet coupled with the dynamic characteristics of the fashion industry, the legal framework for design protection has not been conducive to the particular independent fashion design segment that was interviewed for this study.[19]

Instead, a number of elements such as geo-spatial proximity, lack of design policy and patchwork of laws have helped to shape the industry and have contributed to the development of the norm against *negative* copying. In order to maintain the norm, a number of self-regulation and enforcement mechanisms have also emerged. These interview findings suggest that some attitudes, principles, concepts and mechanisms can parallel and at the same time diverge from intellectual property law concepts, and that they emerge based on specificities of the industry. Based on the findings, it is clear that the use of intellectual property law has not played a role in innovation and creativity within the particular independent fashion design segment in Toronto and Montreal.

To this end, this introductory chapter will begin by grounding the research around a comprehensive discussion of norms. This first part will define and explain norms substantively for the purpose of the proceeding chapters, as it is the focus of inquiry within this study. This

[19] Chapter 2 will detail the characteristics of the fashion industry and of the particular segment that was interviewed for this study; what I mean by not conducive, as will be seen in Chapter 5, is that it is largely inaccessible and ineffective for their needs of designers within this segment. Instead, government intervention intervenes not in the form of intellectual property law, but in form of regional (provincial and municipal) policies, in part because of the geo-spatial proximity, cultural and economic importance of the industry. However, as will be seen in Chapter 3, support seems to appear much more deliberatly and extensive in Montreal than in Toronto.

will be followed by a literature review on intellectual property theory, law and literature on the various aspects of social norms related to the study of intellectual property law and creative communities. The final substantive part of this chapter will provide a detailed methodology of the research including a description of the methods, data collection and analysis used to ground the research.

1.1 Research Framework: Norms

In this section I will review literature on norms, first by describing their attributes, their characteristics, how and why they form. Next, I will tease out the difference between norms and the law, as a precursor to the discussion on the use of intellectual property and norms within creative communities below.

1.1.1 Defining Norms

Various disciplines approach the study of norms in different ways:

> Social norms, the customary rules that govern behavior 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 behavior. More recently, also legal scholars have touted social norms as efficient alternatives to legal rules, as they may internalize negative externalities and provide signaling mechanisms at little or no cost.[20]

Despite the vast literature on norms, it has been suggested that a consensus regarding their defining characteristics across disciplines has been somewhat elusive.[21] This disjuncture can be

[20] Cristina Bicchieri & Ryan Muldoon, "Social Norms" in Edward N Zalta, ed, *The Stanford Encyclopedia of Philosophy* (Spring 2011 Edition) online: <http://plato.stanford.edu/archives/spr2011/entries/social-norms/> [citations omitted].

[21] Jack P Gibbs, "The Problem of Definition and Classification" (1965) 70:5 American Journal of Sociology 586 at 586, Gibbs describes that sociological literature on norms did not have a generic definition, there was not a classification system to describe different types of norms (a typology), and that there was not a way to distinguish the central aspects of norms from their "contingent" aspects; There is, scholars continue to analyze norms in an attempt to scientifically define it, see e.g., Måns Svensson, "Norms in Law and Society: Towards a Definition of the Socio-legal Concept of Norms" in Matthias Baier, ed, *Social and Legal Norms: Towards a Socio-legal Understanding of Normativity* (London: Ashgate, 2013) 39 at 39.

attributed to the fact that different disciplines define norms differently[22] and that different types of norms exist.[23]

Generally speaking, social norms are psychological phenomena that illustrate the patterns of human social behaviour, defined by a set of known rules that are not codified by or enforced by the state.[24] To exist, social norms require that a set of behaviours are followed, are expected to be followed and are enforced by community members.[25] Sanctions in response to the violation of

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[22] *Ibid*, Svensson suggests that due to the multidisciplinary nature of norms research, there are a number of defining attributes but none that provides a centralized approach that connect the disciplines that research norms.

[23] Jon Elster, "Social Norms and Economic Theory" (1989) 3:4 Journal of Economic Perspectives 99 at 99 [Elster, "Economic Theory"], As Elster observes, there are social norms, which differ other kinds of norms, e.g., moral norms and legal norms. For example, the difference between social norms and legal norms are that social norms are enforced by the community and not out of self-interest whereas legal norms are enforced by "specialists who do so out of self interest" – otherwise, that's what they are tasked to do. For Elster, social norms include things like "norms against behavior 'contrary to nature'" the examples he provides are incest or cannibalism, or norms of reciprocity and cooperation; Jon Elster, "Fairness and Norms" (2006) 73:2 Social Research 365 [Elster, "Fairness"], Elster suggests that moral norms may include expectations "to share equally", "to keep promises", "to tell the truth or at least not to lie" while social norms include expectations of "etiquette", "the proper or improper use of money" and "professional norms of soldiers, lawyers and doctors" and "norms against smoking in the presence of nonsmokers" at 371; Svensson, in discussing the difference between social and legal norms, suggests that the main difference is in the way that their "essential attributes" are the same, but their "accidental attributes" are context specific, meaning that they can change from one society to the next, see Svensson, *supra* note 21 at 43.

[24] Émile Durkheim referred to examples of "social facts" as "types of behaviour and thinking external to the individual, but they are endued with a compelling and coercive power by virtue of which, whether he wishes it or not, they impose themselves upon him", see Émile Durkheim, *The Rules of Sociological Method*, Steven Lukes, ed (New York: The Free Press, 1982) at 51; Robert B Cialdini & Melanie R Trost "Social Influence: Social Norms, Conformity, and Compliance" in Daniel T Gilbert, Susan T Fiske & Gardner Lindzey, eds, *The Handbook of Social Psychology*, vol 2, 4th ed (New York, Oxford University Press: 1998) 151, Cialdini and Trost define social norms as "rules and standards that are understood by members of a group, and that guide and/or constrain social behavior without the force of laws. These norms emerge out of interaction with other; they may or may not be stated explicitly, and any sanction for deviating from them come from social networks, not the legal system" at 152; Effective norms are formed in the presence of i) a clear understanding of the behaviour that individuals within the community are supposed to follow (understanding what that moral obligation is) and ii) the certainty that those who violate them will me sanctioned, Robert Cooter, "Normative Failure Theory of Law" (1997) 82:5 Cornell L Rev 947 at 972.

[25] Scholars from various disciplines have accepted variations of the three elements as the common characteristics of norms, see Elster, "Economic Theory" *supra* note 23, "for norms to be *social*, they must be shared by other people and partly sustained by their approval or disapproval" at 99; In describing social norms, Jack Gibbs found three common attributes of norms to include i) collective evaluations, ii) collective expectations and iii) reactions to behaviour. He defines *collective evaluations* as the "shared belief that persons *ought* or *ought not* to act in a certain way," meaning that the general consensus has to be more than a mere indifference regarding a particular behaviour because it stems from the basis of shared values. *Collective expectations* are defined as the predicted behaviour of the people involved in the norm. Reactions to the behaviour for Gibbs differs for laws, rules and norms in that the former finds reaction in at least one individual, while the latter the reaction is shared, see Gibbs, *supra* note 21 at 589-591 [emphasis in original]; In attempting to create a scientific definition of norms, Svensson distilled three attributes that exist in both social and legal norms: two are "ontological" and one is "behavioural", specifically 1) imperatives, or what "ought" to be, 2) social facts, or what can scientifically and empirically be studied, and 3) the

social norms include repercussions such as loss of respect, public shaming, and being outcast or shunned from the community.[26] The sanctioning community does not have to consist of a large number of individuals and if the would-be violator internalized the norm, the external sanctions would not even be necessary.[27]

Daniel Feldman highlights four circumstances in which social norms can develop: i) a top down model i.e., when norms are created by management or supervisors, ii) a precedent in the form of an historical event, such as an example where a designer was accused of copying in the media by their peers and subsequently went out of business, iii) an initial pattern or reaction, (an example Feldman provides is reverting to the same seat in a room at a meeting or a classroom) and iv) precedent setting situations such as in the case of professional schools that teach ethical conduct, or roles which are adhered to by students and teachers.[28] Notably, all of the situations that he illustrates include interactions between members of the community either through knowledge sharing practices or by proximity and physical interaction. These will be discussed in greater detail below.

While most norm-based literature centres on characterising or defining norms, (i.e., the requirement that a known rule is followed by a community, and enforced via sanctions) it is also

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beliefs, or understanding what the expected behaviours are, see Svensson, *supra* note 21 at 46-48; Fauchart and von Hippel describe norms as "pervasive and powerful structural characteristics of groups that summarize and simplify group influence processes" see Fauchart & von Hippel, *supra* note 1 at 188.

[26] There are a number of sanctions possible; the most common are guilt and shame, see Richard A Posner & Eric Rasmusen, "Creating and Enforcing Norms, with Special Reference to Sanctions" (1999) 19 International Review of Law and Economics 369 at 371; Melvin A Eisenberg, "Corporate Law and Social Norms" (1999) 99 Colum L Rev 1253, Eisenberg suggests that "[i]n deciding whether to adhere to an internalized nonmoral norm, an actor may weigh the pain of shame, the pleasure of conformity, and the external costs and benefits may explain adherence by others. Or, internal and external costs and benefits may figure for some actors some of the time. Having said that, however, it seems likely that most actors who have internalized an obligational norm will usually apply the norm reflexively, as a natural expression of their moral and social character, rather than calculatingly, on the basis of a cost-benefit analysis" at 1260.

[27] Elster, "Economic Theory" *supra* note 23 at 103-104; Internalizing the norm and feeling internal shame can be more effective and powerful than public shaming, see Elizabeth L Rosenblatt, "Fear and Loathing: Shame, Shaming, and Intellectual Property" (2013) 63 DePaul L Rev 1 at 13 [Rosenblatt, "Fear and Loathing"].

[28] Daniel C Feldman, "The Development and Enforcement of Group Norms" (1984) 9:1 Academy of Management Review 47 at 50-52.

important to understand why norms develop in the first place.[29] Norms have been explained as a "cluster of expectations" that community members adhere to and expect from other community members.[30] It can be concluded as some scholars have, that norms stem from a conditional choice that an individual makes – although seemingly followed out of compliance in a mechanical manner – based on a degree of rationality, or based on his or her "preferences and expectations" to comply with the norms of a community.[31] There is also a strong internal moral obligation component to the adherence to social norms,[32] which can be stronger than an individual's inclination to adhere to laws in fear of punishment.[33] Thus social norms must necessarily have some "significance" to the individual as a part of the community or group in order to have any value, meaning, or staying power.[34] Feldman distilled four motivations, otherwise the reasons "*why"* norms are followed: i) for the facilitation of group survival, ii) simplification of behaviour, iii) avoidance of embarrassment or conflict with other members of a group, and iv) expression of central values of identity and distinction of the group.[35] These

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[29] *Ibid* at 47.
[30] Cristina Bicchieri, "Norms of Cooperation" (1990) 100:4 Ethics 838 at 840.
[31] *Ibid* at 841- 842, for example Bicchieri suggests that "[a] norm is there because everyone expects everyone else to conform, and everyone knows he is expected to conform, too, but expectations alone cannot motivate a choice. If my compliance is grounded on the expectation of almost universal compliance, it must be that I prefer to comply with the norm on condition that almost everyone else complies, too" at 841; see Elster, "Economic Theory", *supra* note 23 at 104-105, Elster argues that complying to norms "to some extent" entail a degree of self-interest although he believes that there must exist a greater explanation.
[32] Cooter, *supra* note 24 at 953-954. Cooter suggests that these may be moral rules to which the individual is committed to personally.
[33] *Ibid* at 953.
[34] Feldman, *supra* note 28 at 47.
[35] *Ibid* at 48-49; Ellickson also observed that norms develop in close-knit communities to facilitate interactions (both sustaining the group and for informal control). Procedural norms, for example, work to help individuals from the close-knit community avoid disputes or to resolve them. Reputation is a powerful reason why community members would follow norms, and can be regulated in the form of word-of-mouth that encourages the flow of information within that group, see Robert C Ellickson, *Order without Law: How Neighbors Settle Disputes* (Cambridge: Harvard University Press, 1991) ch 13 [Ellickson, *Order without Law*]; Esteem applies to the last two categories of Feldman's categorization, and will be discussed in greater detail in Chapter 6; see also Richard H McAdams, "The Origin, Development, and Regulation of Norms" (1997) 96 Mich L Rev 338; Research on intellectual norms within creative communities suggest that group and identity distinction are extremely important motivating factors that contribute to both norm development and enforcement, see e.g., Fagundes, *supra* note 1 at 1142-1143; Perzanowski *supra* note 1 at 552, 564, Perzanowski discusses the importance of identity among tattooers

motivations indicate that there is a strong utilitarian component of benefitting the entire community but also benefitting the individual within the context of their community. As Richard McAdams suggests, "the initial force behind norm creation is the design individuals have for respect or prestige, that is, for the relative esteem of others."[36] Withholding esteem creates the effect of a sanction that would give rise to norm adherence. Specifically, he stated that

> [i]f many people agree that a behavior deserves disapproval, if there is an inherent risk the behavior will be detected, and if this agreement and risk are well-known, then the pattern of disapproval itself creates costs to the behavior. When sufficiently large, these costs produce a norm against the behavior.[37]

Examples of these reasons will be discussed in greater detail in Chapter 6.

Several reasons have been offered to describe why violators might break social norms. First, as Eric Posner suggests, individuals may break from norms because the benefits outweigh the consequences of breaking the norm.[38] Second, he suggests that the violator may be of a higher social status, and therefore does not feel affected by the sanctions (and others may not step up to shame them).[39] Finally, he suggests that it is possible that an individual violates the norm simply because it has changed unbeknownst to them or the group they belong to follows a different set of norms.[40]

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explaining that group and individual identity play an important – like other creative communities, are identity constitutive; Sarid, *supra* note 1, Sarid observes that "[m]ost queens indicated that their drag persona expresses aspects of their of their personality or sexuality that are not expressed in their everyday lives" at 145.

[36] McAdams, *supra* note 35 at 342.

[37] *Ibid* at 355.

[38] Eric A Posner, *Law and Social Norms* (Cambridge: Harvard University Press, 2000) at 27 [Posner, *Social Norms*].

[39] *Ibid* at 28.

[40] *Ibid* at 28-29.

1.1.2 The Distinction Between Norms and Laws

The distinction between laws and norms has not always been clear. However, it is generally agreed that laws are codified, enforced, and sanctioned by the government, whereas social norms, whether codified or not, are adopted, enforced, and sanctioned by the community.[41]

Norms may exist either in the presence or in the absence of law within the communities that have created them.[42] As Cotterell suggests, "some long-established intellectual traditions of [sociology of law] … insist that law is to be understood *pluralistically*", a combination of state (e.g., governmental) and private (e.g., corporations, associations and families) legal systems.[43] Some have observed that "[l]egal pluralism, if it is to be used as a master concept for characterizing the relation between state law and alternative normative orders, has to be deployed so that it does not inherently rely on judicial premises that are constitutive only of state law and therefore distort the understanding of those other, non-state orders."[44] Examples of the relationship between law and norms can be seen in non-smoking norms,[45] littering or picking up

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[41] See Sally Engle Merry, "Legal Pluralism" (1988) 22:5 Law & Soc'y Rev 869, under a broad net, normative rules have been classified by Sally Engle Merry as a part of 'legal systems' which are conceptually separate from legal rules (judicial decisions, statutory laws or written codes). She suggests that these can be institutions (e.g., corporate or educational institution), or "[o]ther normative order are informal systems in which the processes of establishing rules, securing compliance to these rules, and punishing [the] rulebreakers" that is achieved without law at 870-871; Fuller, specifically referring to Merry, suggests that the "focus on relation between state and normative orders, […] potentially narrows to a single, legal dimension something that is far more complexly constituted" see Chris Fuller, "Legal Anthropology: Legal Pluralism and Legal Thought" (1994) 10:3 Anthropology Today 9 at 10.

[42] McAdams, *supra* note 35 at 347 McAdams suggests that norms are important to legal analysis because "(1) sometimes norms control individual behavior to the exclusion of law, (2) sometimes norms and law together influence behavior, and (3) sometimes norms and law influence each other" at 347 [citation omitted]; Norms may exist concurrently with laws (i.e., overlap) or exist independently of them, for example, as Posner and Rasmusen observe, although there are laws against stealing and lying, there are also social norms, Posner & Rasmusen, *supra* note 26 at 369.

[43] Roger Cotterrell, "Sociology of Law and Law" in David Scott Clark, ed, *Sage Encyclopedia of Law and Society: American and Global Perspectives*, vol 3 (Los Angeles: Sage Publications, 2007) 1413 at 1414 [emphasis in original].

[44] Fuller, *supra* note 41 at 10.

[45] See e.g., Lawrence Lessig, "The Regulation of Social Meaning" (1995) 62 U Chi L Rev 943; see generally Saul Levmore, "Norms as Supplements" (2000) 86 Va L Rev 1989.

after one's own dog,[46] examples of marriage contracts[47] which are regulated by commitment norms,[48] norms of parental obligation,[49] and the list goes on.

The attempt to draw a bright line between laws and norms has been the subject of much debate. It has been argued that the highly contentious definition of 'non-legal' rules both confuses and blurs the distinction between formal law and norms.[50] For example, it has been observed that it is difficult to formulate an absolute test to distinguish norms from the law, other than to "measure it against our intuitions about the essential characteristics of state law, *sans* the state."[51] To contribute to this distinction, Freeman and Napier suggest that

> Custom consists of social norms, and social norms are sanctioned. Behaviour in accord with these norms is rewarded; that at variance with it is regarded as deviant and is often responded to punitively. Social control encompasses these rewards and punishments. These sanctions may be very effective. Yet, as Hoebel notes, 'their simple effectiveness does not make law of them'. The law, he argues, 'consists of social norms, *plus*'. Hoebel distinguishes law from general social norms in three ways: with law there is legitimate use of physical coercion, the invocation of authority, and an element of regularity or consistency. Law therefore shares a number of characteristics with custom. Both consist of social norms. They have an element of regularity in common: 'that which is normally done (the *is*) and that which is expected to be done (the *ought*)'.[52]

Yet, the attributes of norms and laws are very much the same,

> The legal norm, therefore, is merely one of the rules of conduct, of the same nature as all other rules of conduct. For reasons readily understood, the prevailing school of juristic science does not stress this fact, but, for practical reasons, emphasizes the antithesis between law and other norms, especially the ethical norms, in order to urge the judge at every turn as impressively as possible that he must render his decision solely according to law and never according to other rules.[53]

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[46] See Cass R Sunstein, "On the Expressive Function of Law" (1996) 144 U Pa L Rev 2021 at 2032.
[47] See Elizabeth S Scott, "Social Norms and the Legal Regulation of Marriage" (2000) 86 Va L Rev 1901.
[48] *Ibid* at 1908.
[49] *Ibid* at 1912.
[50] Brian Z Tamanaha, "The Folly of the 'Social Scientific' Concept of Legal Pluralism" (1993) 20 JL & Soc'y 192 at 193-194.
[51] *Ibid* at 200-201 [emphasis in original].
[52] Michael Freeman & David Napier, "Introduction" in Michael Freeman & David Napier, eds, *Law and Anthropology: Current Legal Issues*, vol 12 (Oxford: Oxford University Press, 2009) 1 at 5-6 [citation omitted][emphasis in original].
[53] Eugen Ehrlich, *Fundamental Principles of the Sociology of Law*, 4th printing (New Jersey: Transaction Publishers, 2002) at 39 as quoted in Svensson, *supra* note 21 at 43.

As Ellickson suggests, "[m]uch of the glue of a society" owes its structure to the enforcement of social norms and not necessarily the law.[54] In the presence of effective norms, it has been held that legal intervention is unnecessary.[55] As Robert Cooter explains, "[l]egal scholars . . . have underestimated the importance of social norms until empirical research proved that inchoate social norms often control behavior in spite of the law."[56] It has also been advanced that that norms can even be more optimal and effective than laws:

> Formal law may strengthen norms against appropriation—perhaps by helping to create or reinforce agreement within the creative community that appropriation of a particular creative product is unethical or immoral. But it is also possible that effective norms sometimes thrive in the absence of formal law, and may even depend on that absence.[57]

Examples of norms that exist outside the bound of laws include tipping, a practice not required by law or contract (that may vary based on jurisdiction or culture),[58] or the early development of governing relations in virtual worlds.[59] Thus, successful lawmaking does not solely rely on the legal system and codified rules, but also "depends on the way nonlegal systems already address that collective action problem and the extent to which legal intervention would interfere with

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54 See Robert C Ellickson, "Law and Economics Discovers Social Norms" (1998) 27 J Legal Studies 537 at 540.
55 Cooter, *supra* note 24 at 947-948.
56 *Ibid* at 949.
57 Oliar & Sprigman, *supra* note 1 at 1835; For example, in Stewart Macaulay's 1963 empirical study on the use of contracts amongst businessmen, he observed that in the case of businessman, "…contract and contract law are often thought unnecessary because there are many effective non-legal sanctions. Two norms are widely accepted. (1) Commitments are to be honoured in almost all situations; one does not welsh on a deal. (2) One ought to produce a good product and stand behind it." at 63, see Stewart Macaulay, "Non-Contractual Relations in Business: A Preliminary Study" (1963) 28:1 American Sociological Review 55; As Posner suggests, "[i]f people can be made to act properly because of social norms, rather than because of fear of legal sanction, then the desired behavior can be obtained at less cost. Judges, lawyers, courthouses, and the rest of the apparatus of the legal system are expensive. If people conformed to desirable social norms, then these costs could be avoided" see Eric A Posner, "Law and Social Norms: The Case of Tax Compliance" (2000) 86 Va L Rev 1781 at 1791, as cited in Daniel J Gervais, "The Price of Social Norms: Towards a Liability Regime for File-Sharing" (2003) 12:1 J of Intell Prop Law 39 at 48.
58 Levmore, *supra* note 45 at 1990-1997.
59 Julian Dibbell, *My Tiny Life* (New York: Holt Publishing, 1999) ch 1, an interesting grassroots emergence of norms was experienced in online virtual worlds in the absence of 'legal' intervention. When LamdaMOO and Second Life were first launched, the program architects did not foresee their online world transcending brick and mortar legal issues. Instead, there was a strong community backlash, which led to players forming norms to regulate disputes in arenas of violence, intellectual property and property law; see generally, Phillip Stoup, "The Development and Failure of Social Norms in Second Life" (2008) 58 Duke L J 311, Stoup suggests that the development of these norms were in response to fulfill the main objectives of that community including i) "creator empowerment," ii) "respect," and, iii) "entrepreneurship" at 325-327.

those nonlegal systems."[60]

A contributing contention blurring the distinction between law and norm may be attributed to the fact that some laws are created from a bottom-up model;[61] this occurs in the case where efficient social norms are codified.[62] In other instances, laws may be created based on adjudication,[63] which are also inclusive of the norms that persist within their society because adjudicators have to "face a concrete example as they develop law."[64] As Levit explains,

> The process of norm creation begins with the informal, day-to-day experiences and concerns of practitioners who, in grappling with the technicalities of their trade, seek standardization and harmonization as a means to anchor and promote their business. The group then translates these practices into organic norms, which, in turn, govern such practices . . . at a certain point, the norms escape the group's confines, seep into more formal legal systems, and become hard 'law'.[65]

Further, bottom-up law models tend to take dominant practices and different socio-legal contexts into consideration:[66] "[o]nly when the new social norms have gained significant public support, would the second stage, a legislative reform, be launched."[67]

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[60] Posner, *Social Norms*, *supra* note 38 at 4.

[61] Rothman, *supra* note 4, Rothman argues that especially in the case of intellectual property, case law relies heavily on internalized norms to practice litigation avoidance and also to use as a quantum for the courts to determine whether or not certain actions were comparable to the norms within the industry e.g., in the case of clearing rights at 1902-1907.

[62] Cooter, *supra* note 24 at 947-948 (author gives the example of Lord Mansfield's modernization of commercial law by determining what the best practices were in that community or the development of the Uniform Commercial Code by Professor Karl Llewellyn).

[63] Jeffrey J Rachlinski, "Bottom-Up Versus Top-Down Lawmaking" (2006) Cornell Law School Research Paper No 05-025 at 1-2.

[64] *Ibid* at 4.

[65] Janet Koven Levit, "Bottom-up Lawmaking Through a Pluralist Lens: The ICC Banking Commission and the Transnational Regulation of Letters of Credit" (2008) 57 Emory L J 1148 at 1155, Levit discusses this in the context of *bottom-up transnational lawmaking*.

[66] It is important to note that although this may be the general rule, scholars should be careful to not dispel the role of legislators as a source of norms, see Janet Koven Levit, "A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments" (2005) 30 Yale J Int'l L 125 at 131.

[67] Niva Elkin-Koren, "What Contracts Cannot Do: The Limits of Private Ordering in Facilitating a Creative Commons" (2005) 74:2 Fordham L Rev 375 at 392, referring to Lawrence Lessig on the Creative Commons. Further, Elkin-Korin argues that if the Creative Commons movement as an alternative convention to dividing copyright, gains a solid foothold, then it could "subsequently change the meaning of the property rule though through social norms" at 395.

Laws can also follow a top-down model, where principles are imposed, 'intended' to harmonize norms and law, without always taking into account how laws will affect the people and practices of those societies or communities. This is especially true in the context of some international laws such as international intellectual property law.[68] It has been argued that contemporary international intellectual property law traditionally follows a top-down, rather than a bottom-up approach.[69] In this context, laws are created without considering existing norms and thereby may not reflect the optimal model for the protection of creative output.[70] Some have even argued that an approach involving a country's specific developmental needs should be

[68] See Laurence R Helfer, "Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking" (2004) 29 Yale J Int'l L 1, TRIPS has strong support from several highly developed countries such as the United States and European Union whose economic and development climate and agenda are very different than the other signatories, yet these policies can trickle down, at 2-4; Peter K Yu, "A Tale of Two Development Agendas" (2009) 35 Ohio NU L Rev 465 at 468-470, Yu notes that much intellectual property development was made without the voices of less developed or colonialized countries "…virtually all of these standards were developed without much of the participation of less developed countries. Through colonial acts, the standards were transplanted directly from the metropolitan states to the colonial territories, even though these territories had not signed the international conventions" [citations omitted]; Michael Geist, "The Case for Flexibility in Implementing the WIPO Internet Treaties: An Examination of the Anti-Circumvention Requirements" in Michael Geist, ed, *From "Radical Extremism" to "Balanced Copyright": Canadian Copyright and the Digital Agenda* (Toronto: Irwin Law, 2010) ch 8.

[69] Margaret Chon, "A Rough Guide to Global Intellectual Property Pluralism" in Rochelle C Dreyfuss, Diane L Zimmerman & Harry First, eds, *Working Within the Boundaries of Intellectual Property: Innovation Policy for the Knowledge Society* (Oxford: Oxford University Press, 2010) ch 14, however Chon argues intellectual property is beginning to shift and must take into consideration the emergence of "normative actors" who are responsible for non-state norm creation (such as ICANN), "normative directions" a shift from the top-down to decentralized ordering, and "normative domains" which are centered on issues of "trade and" relative to intellectual property (i.e., environment, labour and other domains).

[70] Robert P Merges, "From Medieval Guilds to Open Source Software: Informal Norms, Appropriability Institutions, and Innovation" (Paper delivered at the Conference on the Legal History of Intellectual Property, University of Wisconsin, Institute for Legal Studies, 13 November 2004) [Merges, "Informal Norms"] Merges describes guilds as 'bottom-up' institutions where norms-based groups "developed their own governance rules" as opposed to some "formal intellectual property rights", which takes on a 'top-down' approach at 3.0); For a discussion on a linking intellectual property law to distributive justice using a 'from below' approach, see Maggie Chon, "Intellectual Property 'From Below' Copyright and Capability for Education" (2007) 40 UC Davis 803 at 805 [Chon, "From Below"]; Margaret Chon, "Copyright and Capability for Education: An Approach from Below" in Tzen Wong & Graham Dutfield, eds, *Intellectual Property and Human Development: Current Trends and Future Scenarios* (Cambridge: Cambridge University Press, 2011) 218 at 218; Rachlinski, *supra* note 63 at 1-2, for example Rachklinski suggests that there are different objectives to top-down law (legislative) making that may not take into consideration the same factors that adjudication does, which takes into account what is happening on the ground; see generally, Joseph E Stiglitz, "How Intellectual Property Reinforces Inequality" *New York Times* (14 July 2013), online: <http://opinionator.blogs.nytimes.com/2013/07/14/how-intellectual-property-reinforces-inequality/>.

taken into consideration when contemplating restrictive international intellectual property obligations.[71]

Although many continue to grapple with the difficult task of distinguishing law and norms, scholars have indicated that there exists a gap in norms-based legal research, one that that is currently being remedied by a proliferation of scholarly-based research, particularly in the area of intellectual property.[72]

1.1.3 Intellectual Property Law and Norms

Creative industries may be regulated either through laws, norms or through a mixture of both.[73] For example, copyright law regulates only certain categories of creativity. As detailed in the statute, copyright protection in Canada explicitly refers to four categories that are illustrated by a number of examples: eleven types of artistic works, four types of literary work, six types of dramatic work, and three types of musical work.[74] Copyright law's subject matter also includes the catchall provision of "every original literary, dramatic, musical and artistic work," which encompasses

> …every original production in the literary, scientific or artistic domain, whatever may be the mode or form of its expression, such as compilations, books, pamphlets and other writings, lectures, dramatic or dramatico-musical works, musical works, translations, illustrations, sketches and plastic works relative to geography, topography, architecture or science.[75]

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[71] Chon "From Below", *supra* note 70, Chon suggests that "there are strong efforts by the copyright content industries in developed countries to expand digital rights. One such example of such an effort is found in the WIPO Revised Draft Basic Proposal for the WIPO Treaty on the Protection of Broadcasting Organizations. Furthermore, WCT signatories are enacting technological protection measures required by article 11, such as the arguably draconian U.S. Digital Millennium Copyright Act. These multilateral efforts have generated bilateral offspring. For developing countries, any additional ratcheting up of protections in the digital environment "arguably constitute a dead weight loss on already fragile economies" and should be viewed skeptically under a substantive equality paradigm" at 841 quoting Ruth L Okediji, "Africa and the Global Intellectual Property System: Beyond the Agency Model, 12 Afr Yb Int'l L 207 at 243.

[72] See generally, Ellickson "Law and Economics", *supra* note 54 at 542-543; Specfic examples in the area of intellectual property include those mentioned in the Introduction, see the examples of intellectual property law and norms in *supra* note 1.

[73] Please note that the first paragraph of this section was initially written for an article to be published – but this author withdrew from that article.

[74] *Copyright Act*, *supra* note 6, s 2 [definitions].

[75] *Ibid*, s 2 [every original literary, dramatic, musical and artistic work]

Notwithstanding existing statutory protection for a particular subject matter, norms may emerge to regulate creative industries if the laws fall short.[76] Norms may arise throughout communities organically or from within an informal structure;[77] an example of the latter, traditionally used by creative communities to regulate trade, is the 'guild.' Prior to the use of intellectual property law proper, trade skills were passed down from "master to apprentice," from generation to generation,[78] and tradesmen relied on guild protection and support to regulate the "control of valuable knowledge."[79] As Catherine Fisk suggests, "[t]he secrecy of recipes and techniques that passed from generation to generation enable a family or a firm to gain a reputation and to retain exclusive control of production."[80] Guilds would also participate in restricting competition within their industries by preventing non-members from sharing the benefits.[81]

Guilds are informal institutions that use social norms to govern various aspects of trade within industries and provide benefits of cooperation and support from peers.[82] There are three

[76] Examples given above include the subject matter of this study (see Chapter 5), and subject matter important and proprietary to chefs, tattoo artists and stand-up comedians – these studies will be discussed in the following subsection. I distinguish the needs of creators from the utilitarian theory of copyright law since the norms govern behaviour within the community and for the individual within that community but not necessarily for the social benefit outside of that community.

[77] As mentioned above in Feldman's categorization of how norms develop, they may do so in top-down interactions (i.e., between supervisors and employees) or through organic interactions and situations between individuals within a community), see Feldman, *supra* note 28.

[78] See generally, Catherine L Fisk, "Working Knowledge: Trade Secrets, Restrictive Covenants in Employment, and the Rise of Corporate Intellectual Property, 1800-1920" (2001) 52 Hastings L J 441 at 451-453 [Fisk, "Working Knowledge"], Fisk held that the "master to apprentice" relationship "explicitly incorporated a duty of confidence. The guilds shored up this restriction by prohibiting the dissemination of knowledge outside the guild" at 452.

[79] Susan Sell & Christopher May, "Moments in Law: Contestation and Settlement in the History of Intellectual Property Law" (2001) 8:3 Review of International Political Economy 467 at 475.

[80] Fisk, "Working Knowledge," *supra* note 78 at 451.

[81] This was the case of the 1930s Fashion Originator's Guild in the United States, which was developed to protect its member against fashion design copying, see C Scott Hemphill & Jeannie Suk, "The Fashion Originators' Guild of America: Self-help at the Edge of IP and Antitrust" in Rochelle Cooper Dreyfuss & Jane C Ginsburg, eds, *Intellectual Property at the Edge: The Contested Contours of IP* (Cambridge: Cambridge University Press, 2014) ch 7 [Hemphill & Suk, "Fashion Originators"].

[82] Merges, "Informal Norms", *supra* note 70, Merges does argue that there was either family or workshop "specific information, kept from the generic pool of knowledge passed on to all apprentices" at 3.1.2.

main characteristics that Robert Merges identifies with guild structures: first, there is a clear notion of membership, and second, those members share norms.[83] Third, Merges observes that there exists a "proprietariness" of the skills or information of the trade.[84]

Like norms, guilds may emerge in the presence of law.[85] Merges suggests that contemporary guild-like organizations emerged in some creative industries due to the "overlapping and blocking intellectual property rights,"[86] and restrictions on the "free exchange" of information resulting from existing intellectual property rights.[87] Guilds continue to exist today to help regulate some industries, and it has been suggested stemming from the experience with guilds, "under the right circumstances unions can support innovation by creative private intellectual property rights systems to address structural problems in labour markets . . ."[88] An example provided by Catherine Fisk is the script registry within screen writing industry that continues to operate because it grants a private regime of intellectual property authorship for all of the members. It also regulates the screen credit regime, which is one of the "few forms of intellectual property in the modern economy that is designed by workers for workers and without the involvement of the corporations that control most intellectual property policy."[89]

Studies on intellectual property law and norms have also shown that different creative communities seek to control elements of creation that may or may not fit in with intellectual property law. For example, as Elizabeth Rosenblatt suggests,

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[83] *Ibid* at para 1 [introduction].
[84] *Ibid*.
[85] *Ibid* at para 4.1.
[86] See Merges, "Informal Norms", *supra* note 70, at 4.1; Blocking patents occur when the development of a technology or industry relies on the access to the pioneering patent. As a result, if access to the patent its not granted, then the it would hinder or block the advancement of those technologies or industry until they expired, see generally Robert Merges, "Intellectual Property Rights and the Bargaining Breakdown: The Case of Blocking Patents" (1994) 62 Tenn L Rev 75.
[87] Merges, "Informal Norms", *supra* note 70 at para 4.1.
[88] Catherine L Fisk, "The Role of Private Intellectual Property Rights in Markets for Labor and Ideas: Screen Credit and the Writers Guild of America, 1938-2000" (2011) 32:2 Berkeley J Emp & Lab L 215 at 216.
[89] *Ibid* at 245.

> …norms may make it possible for creators to function without intellectual property protection, or encourage creators to opt out of intellectual property ownership or enforcement, or both. Some mimic intellectual property, like the trademark-style norms of roller derby; others surpass the restrictions of traditional intellectual property, like the norms of stand-up comedy, which discourage copying of ideas as well as expressions. Some encourage sharing and collaboration, like the conventions of the open source community; others focus on attribution, like those governing the creative commons and academic science communities. Still others discourage creators from pursuing infringers, like the "culture of hospitality" in the realm of creative cuisine or the culture of sportsmanship.[90]

This is quite revealing because it demonstrates that different communities value different elements of creation (e.g., ideas, names and identity), and not just what is capable of being legally protected by intellectual property law. In some cases, the enforcement of these elements is stricter than the protection afforded by intellectual property law.

As Arti Kaur Rai observes, norms and intellectual property laws can operate "synergistically, antagonistically, or independently."[91] For example, in her study on the ways in which laws and norms interact in the field of scientific research,[92] Arti Rai demonstrates that strengthening laws in one area of innovation resulted in a complete reshaping of the normative behaviour within a scientific community.[93] Rai suggests that the shift towards stronger legal protection of scientific research resulted in a change to "the social meaning of a decision by a research or academic institution to apply for a patent."[94] This was held to be a wide departure from the traditions and norms that researchers previously followed.[95]

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[90] Rosenblatt, "Negative Space" *supra* note 3 at 339.
[91] Arti Kaur Rai, "Regulating Scientific Research: Intellectual Property Rights and the Norms of Science" (1999) 94:1 Nw U L Rev 77 at 78 [citation omitted].
[92] *Ibid* at 80.
[93] *Ibid* at 109-110.
[94] *Ibid*.
[95] *Ibid*; this shift in protection is similar to the argument brought up by Hemphill and Suk who argue that the strong reliance on trademark law in fashion has caused a change in patterns of innovation within the fashion industry.

Within the context of the current study, for independent fashion designers, intellectual property-based norms have formed organically rather than through a guild or associations.[96] Furthermore, the norm and mechanisms that exist do so independently of the legal framework for fashion design protection, and protect subject matter not protected by intellectual property law, as will be discussed in Chapter 6.

1.2 Literature Review

Due to the interdisciplinary nature of this research project, this literature review is presented in two main themes. The first theme is a review of empirical and non-empirical research that has been undertaken in the intellectual property law and norm literature. The second theme focuses on cluster theory and proximity, which provides context about the economic, social and cultural circumstances under which the norm and mechanisms have developed.

1.2.1 Intellectual Property Law and Norms in Creative Industries

There has been much debate about the role of intellectual property law in creative industries. Some industries rely heavily on copyright (e.g., music, literary, software), while others industries do not (e.g., culinary, magical arts). It has been argued that lawmakers and creators deliberately create the 'negative space' within these low-IP industries because "exclusivity is 'not worth it'."[97] In fact, what these industries have in common is that in the absence of intellectual property law, innovation and creativity have flourished.[98] Rosenblatt suggests that at least one of several "conditions" must be present in order for negative space to exist:

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[96] Currently, in the two jurisdictions that are the subject of this study, Montreal and Toronto, there are no fashion guilds *per se*, although there are several provincial and national associations for components of the industry (i.e., textile or design). There is a fashion association in Montreal established in 2010 but a similar initiative does not exist in Toronto. The Toronto Fashion Incubator may be the closest organization to a guild but members explicitly mentioned that there was no such association that acted like a guild or association.

[97] Rosenblatt, "Negative Space" *supra* note 3 at 340 [citation omitted].

[98] *Ibid* at 319; In the introduction of their book, Raustiala and Sprigman ask "[w]hat happens when restrictions on copying are not a part of the picture?" and maintain that "[c]reativity remains surprisingly vibrant" within these

> (1) when creation is driven by rewards not reliant on exclusivity; (2) when exclusivity would harm further creation; (3) when there is high public or creator interest in free access without harm to creativity; and (4) when creators prefer to reinvest scarce resources in further creation than in protection or enforcement of intellectual property, i.e., when there is a higher cost of protecting or enforcing exclusivity than benefit to pursuing infringers.[99]

There are a number of creative industries that do not benefit from intellectual property law either because it is not applicable to the subject matter or because it not accessible to those creators. An example that demonstrates the inapplicability of subject matter in a creative industry is that of French chefs. In that study, researchers Emmanuelle Fauchart and Eric von Hippel uncovered that "*norms-based* intellectual property […] systems exist today and are an important complement to or substitute for law-based [intellectual property] systems."[100] They reveal that strong norms exist against copying the recipes of other French chefs, despite the fact that intellectual property laws extend imperfectly to this subject matter (e.g., while recipes are not eligible for protection, images of and write ups about those recipes are).[101] Further, there were strong proprietary ties to recipes, and expectations of confidentiality and attribution.[102] There were also a number of sanctions developed and enforced by the community members such as negative gossip spread by the community and the resultant loss of reputation of the norm-violating chef within that community.[103]

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industries, see Kal Raustiala & Christopher Sprigman, *The Knockoff Economy: How Imitation Sparks Innovation* (New York: Oxford University Press, 2012) at 7 [Raustiala & Sprigman, *Knockoff Economy*].

[99] Rosenblatt, "Negative Space" *supra* note 3 at 342.

[100] Fauchart & von Hippel, *supra* note 1 at 187 (Abstract).

[101] *Ibid* at 193, note that although this study mentions the term 'grounded field research' on a few occasions, there is no explanation of grounded research, and grounded theory as a methodology (whether classic or constructivist) is not mentioned. The study does not go into details about methodology except to mention the methods used (both qualitative and quantitative), "[i]t is not honorable for chefs to exactly copy recipes developed by other chefs" at 192-193.

[102] *Ibid*, "a chef who asks for and is given proprietary information by a colleague will not pass that information on to others without permission," at 193.

[103] *Ibid* at 194, Interestingly, chefs who are copied do not have to directly intervene because the community recognizes the appropriation and acts on his or her behalf.

In a similar study conducted on magicians,[104] Jacob Loshin observed that although the theft of magic tricks was considered to be "regrettable," it was not necessarily "devastating" to the originator of the trick because magicians considered the trick itself to be only one part of the performance of the act.[105] In Loshin's study, he identified different norms, such as the expectation of attribution for the creators of the tricks, norms that govern the way new ideas are used by other magicians, and norms that govern trade secrets of magicians to avoid disclosures to the public.[106] Further, these norms are enforced by comprehensive and well-established codes of ethics within the communities and organizations,[107] unlike the findings uncovered by Fauchart and von Hippel where the norms or expectations were not formally codified.

Thus, despite of the fact that intellectual property law might otherwise not apply to the particular subject matter, norms emerge to facilitate relationships and to establish boundaries around undesirable activities and behaviours. In contrast to creative communities where intellectual property laws minimally protect subject matter or do not exist, there are a number of communities where intellectual property is available but not used by creators.

In their study on comedians, Dotan Oliar and Christopher Sprigman observe that the community relies heavily on self-regulating norms,[108] and that norms actually substitute the use of copyright law where it is available.[109] They found that laws were not relied on because of

[104] Loshin, *supra* note 1. There are several elements that can retain copyright protection (e.g., the script, video recordings of the performance etc.) but that copyright does not extend to the live performance itself, nor does it apply to the method used to conduct the trick.
[105] *Ibid* at 128. As will be seen, this is a similar sentiment expressed by designers, with respect to garment design, see Chapter 5.
[106] *Ibid* at 136-137.
[107] *Ibid* (the author draws heavily from his own experience as a "member of the magic community," but reveals that the magic community follows "rules [that] are codified in various codes of ethics" at 137-138 n 71). Note that an industry that follows codified ethics unlike social norms *per se* are self-regulated, and closer to a legal framework. However, this legal framework may be a bottom-up model where the social norms have been codified. This example is unlike the case in fashion where self-regulating ethics do not exist.
[108] Oliar & Sprigman, *supra* note 1 at 1798 (they argue that as a literary work, jokes enjoy protection under copyright law even though there have been very few lawsuits).
[109] *Ibid* at 1790.

practical (registration, fees, and litigation costs), and *doctrinal* (idea/expression, fixation, and independent creation) barriers.[110] The authors found that joke theft was thought to be a major "taboo" within that community.[111] Appropriation of jokes is sanctioned by the individual affected by the theft, as well as by their peers in various ways, including shunning and badmouthing the violator in the community, which could restrict any future success.[112]

In the case of tattoo artists, copyright protection has generally not been used between tattoo artists even though it is available to them except where have been used in external contexts such as fashion, video games or movies.[113] In his research Aaron Perzanowski discovered that there were five general norms that prevailed in this industry. The first, second, and third had to do with an acknowledgement between the artist and his client about the autonomy in the "custom designs and their subsequent display and use" and the reuse of custom designs whether they or another artist created it for the client.[114] The fourth and fifth had to do with the understanding that there are images that can freely be used such as those that are pre-designed and any images outside of the industry.[115] Similar to all of the other empirical studies, the sanctions identified in relation to copying range from friendly communication to negative gossip.

In addition to the traditional research on norms that conclude that copying is not acceptable, studies within this field have started to take note of the social and cultural factors that have contributed to the development of norms within the particular communities. Some of these

[110] *Ibid* at 1799-1805.
[111] *Ibid* at 1812.
[112] *Ibid* at 1813-1816, the authors identified three steps in the enforcement process of the norms identified, namely, detecting the violation, instituting recourse, and enforcing the norms.
[113] In the case of video games, see *Solid Oak Sketches LLC v 2K Games Inc* 16-cv-00724 (SDNY Feb 1 2016); In the case of Mike Tyson in "The Hangover" movie, *S Victor Whitmill v Warner Bros Entertainment Inc*, 11-cv-00752 (ED Mo April 28 2011) Perzanowski, *supra* note 1 at 530; However, Perzanowski also observes that "[t]attooers share a disdain for authority and a history of harsh legal regulation that renders them generally hostile to the legal system" at 515.
[114] *Ibid*.
[115] *Ibid*.

studies have taken note of communities where identity plays an important part of the individual and group, such as the study of roller derby girls.[116] David Fagundes stated that the "identity-constitutive character" of the derby community is defined by members that derive an intrinsic benefit from expressing themselves as a part of or connected to the community.[117] Another factor is the closeness or proximity of the community, which will be discussed in some detail below.

These studies demonstrate that norms exist to protect a variety of subject matter and that they can operate both in the presence of and in the absence of law. This suggests that while in the former scenario, norms are followed and enforced in the place of law because some form of self-regulation is required (i.e., where copying is not an accepted practice), in the latter scenario, the reliance on law simply does not reflect the accepted norm and practices of those industries for to a variety of reasons.

This distinction is relevant because the Canadian independent fashion designers interviewed do not access laws to protect their designs despite the fact that they exist.[118] This dissertation contributes to the study of intellectual property law and norms in creative communities by providing insight into the way that the independent fashion design segment operates within the legal framework for design.

Unlike the preceding non-exhaustive studies conducted on different communities,[119] there has not yet been a comparable study conducted on the use of intellectual property law and norms and the fashion industry.[120] Nonetheless, there are several studies that are quite relevant to this

[116] Fagundes, *supra* note 1 at 1098. As David Fagundes observes, protection for names are not permitted under federal trademark protection *per se*, but they can be protected as stage names, yet there a central name registry has been created to protect these names.
[117] *Ibid*; Subsequent studies have also considered this as a factor to the particular norms that have developed within their communities, see e.g., Perzanowski, *supra* note 1 at 552; Sarid, *supra* note 1 at 145-146.
[118] Although some fashion designers may use trademark law for other business related purposes.
[119] *Supra* note 1.
[120] There are some studies based on the fashion and intellectual property law, although they do not break down the norms based on empirical methods, the first, by Christopher Sprigman and Kal Raustiala highlights the relationship

inquiry; for example, to determine the legal consciousness of emerging fashion designers with relation to design copying in the fashion industry,[121] and research on the intellectual property norms within the online community of knitters and artists.[122] However, research in relation to intellectual property-related norms in the fashion industry in Canada and empirical research on

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between innovation and copying in the American fashion industry (i.e., how copying spurs innovation) based on theoretical, doctrinal and some empirical analysis. Although several interviews are conducted in their original and response paper, the paper does not seem to be based on a formal methodology, see Kal Raustiala & Christopher Jon Sprigman, "The Piracy Paradox Revisited" (2009) 61 Stan L Rev 1201 [Raustiala & Sprigman, "Paradox Revisited"] the authors observe that "there is still much we do not know about how law, norms, markets, and creativity interact in the apparel business" at 1204; Neil Wilkof "'Freedom to Copy' and the Fashion Industry" *The IPKat* (22 August 2010), online: The IPKat <http://ipkitten.blogspot.ca/2010/08/freedom-to-copy-and-fashion-industry.html>; see generally Raustiala & Sprigman, *Knockoff Economy*, *supra* note 98 note that the authors do not mention a methodology and the only reference to empirical research pertaining to fashion are on pages 45-47 which refer to statistical data from the US Bureau of Labor Statistics that they gathered to evaluate the price of women's dresses from 1998 to 2010, this is the only mention of "data" or empirical study concerning statistics conducted, there are a few reference made to interviews but they were secondary sources – there were no citations that made references to interviews conducted in the endnotes; see Scott Hemphill and Jeannie Suk conducted an economics and cultural analysis on the fashion industry in response to the Raustiala and Sprigman. They too incorporated analysis based on existing doctrinal, secondary data as well as some qualitative interviews, see C Scott Hemphill & Jeannie Suk, "The Law, Culture, and Economics of Fashion" (2008-2009) 61 Stan L Rev 1147 at 1159-1160 [Hemphill & Suk, "Economics of Fashion"] in the first footnote, authors mention "[s]pecial thanks to the several dozen stakeholders—in fashion houses, government agencies, industry associations, and law firms—for interviews from which we gained valuable insights on fashion design and the fashion industry" at 1147. The authors do not however clearly specify a methodology, methods or theory employed to collect and analyze the data – it seems that the interviews were mainly to gather information on the workings of the fashion industry.

[121] Isabelle Dubois, *Design Copying and the Construction of Legality in the Fashion Industry - A Study of Emerging Fashion Designers' Legal Consciousness* (Master Thesis, Cand Soc Management of Creative Business Processes, Copenhagen Business School, 2013) [unpublished] Dubois' study aims to "establish 'how the legal consciousness of fashion designers manifest itself in relation to intellectual property law' and 'how their awareness of the existing and perceived legal and quasi-legal framework impacts on their attitudes and behaviours.' In other words, this study seeks to uncover how the concept of legality is experienced by emerging fashion designers and how it shapes their understandings of design copying" at 4. In the first interview round she explored "IP law's role (broadly conceived) in the lives of emerging fashion designers" to look for "perceptions of law and construction of legal reality" while her follow up interview focused on those responses from a legal conscioucness perspective, at 33. She conducted the research with a view to determine how her respondents had *constructed meaning* of the legal system and not their knowledge of it, at 32. Notably, while some of her empirical findings were similar to the ones from this thesis (as they are in similar segments of the same industry), the methodology, sample, questions, inquiry, theoretical framework and framework of analysis of the two studies are different.

[122] Kirsty Robertson, "No One Would Murder for a Pattern: Crafting IP in Online Knitting Communities" in Laura J Murray, S Tina Piper & Kirsty Robertson, eds, *Putting Intellectual Property In Its Place: Rights Discourses, Creative Labor, and the Everyday* (New York: Oxford University Press, 2014) ch 3 [Robertson, "Crafting IP"] Robertson study drew from 152 surveys from the online knitting community (both commercial and non commercial). In her research, the partcipants were asked about "online presence, their understanding of how ntellectual property protections work in their online and real life communities, and for their opinions about the presence of discussions or debates over IP" at 43. What she uncovered was that "…crafters are often vigorously involved in defining the parameters of exchange in their community, and they do so though resource to the rhetoric of IP, whether or not IP law actually matches the norms being asserted" at 42; Kirsty Robertson, "The Art of the Copy: Labour, Originality, and Value in the Contemporary Art Market" in Murray, Piper & Robertson, *supra* note 122 at ch 8 [Robertson, "Art Market"]; Laura J Murray, "Cultural Labor in a Small City: Motivations, Rewards, and Social Dynamics" in Murray, Piper & Robertson, *supra* note 122 at ch 7 [Murray, "Cultural Labor"].

creative communities in general in Canada to examine the use of laws and norms is thin.[123] Intellectual property law for fashion design has only recently become an area of interest in Canada and is greatly underdeveloped.[124] Instead, the focus of literature, also underdeveloped, has been on Canada's much-maligned industrial design law and policy,[125] although there have been peripheral references made on the topic of fashion design.[126] These studies however are not empirical in nature.

In 2015, an internal quantitative empirical study regarding the use of Canadian industrial design registration was undertaken by the Canadian Intellectual Property Office (CIPO) in order to determine to what degree and how registration is used domestically and by other countries over a fifteen-year span.[127] It is considered by CIPO to be "a first step towards serious empirical

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[123] Note that neither of the studies related to fashion or crafting focused on a geo-spatially proximate group, see Dubois, *supra* note 121 at 37, Dubois interviewed eleven emerging fashion designers, whose country of residence included Belgium, Germany, The Netherlands, Norway, Poland, and the United Kingdom; Robertson, "Crafting IP", *supra* note 122 at 43, Robertson conducted interviews with 152 participants from online crafting from websites and communities; Robertson, "Art Market", *supra* note 122; However, there have been studies conducted on other creative or innovative communities, see Murray, "Cultural Labor", *supra* note 122, this research was conducted on artists in Kingston, Ontario.

[124] There has been a traditional reluctance for legal scholarship to stray past the boundaries of its discipline, see, Teresa Scassa, et al "Intellectual Property for the 21st Century: Interdisciplinary Approaches" in B Courtney Doagoo, Mistrale Goudreau, Madelaine Saginur & Teresa Scassa, eds, *Intellectual Property for the 21st Century: Interdisciplinary Approaches* (Toronto: Irwin Law, 2014) [Introduction].

[125] Although there have been several academic articles discussing industrial design and laws concerning design, none have focused on industrial design in the context of the fashion industry *per se,* see e.g., Amy Muhlstein & Margaret Ann Wilkinson, "Whither Industrial Design" (2000) 14 Intell Prop J 1; Myra J Tawfik, "When Intellectual Property Rights Converge - Tracing the Contours and Mapping the Fault Lines 'Case by Case' and 'Law by Law'" in Ysolde Gendreau, ed, *An Emerging Intellectual Property Paradigm: Perspectives from Canada* (London: Edward Elgar, 2008) ch 11.

[126] See David Vaver, *Intellectual Property Law: Copyright, Patents, Trade-marks*, 2d ed (Toronto: Irwin Law, 2011) at 84, 86, 89; see e.g., Ashlee Froese, "Fashioning Protection For Canada's Most Fabulous: Architecting Intellectual Property Protection for the Fashion Industry" (2013) 29:1 CIPR 181; Canadian Fashion Law, online: <http://canadafashionlaw.blogspot.ca/> Ashlee Froese, Editor; Osgoode Hall Law School Intellectual Property Law & Technology, online: IPilogue <http://www.iposgoode.ca/>; There has also been a conference focusing on fashion law in Montreal (ALAI, 2011), see ALAI "Events: Protecting Fashionable Intangibles" *Association Litteraire & Artistique Internationale* (9 September 2011), online: ALAI <www.alai.ca/index.php?l=en&s=5>; Further, in the last several years, Canadian law firms are beginning to develop an interest in fashion law as a practice area; see Cassels Brock & Blackwell LLP, online: <http://www.casselsbrock.com/practiceareas/fashion>.

[127] See generally Canada, Canadian Intellectual Property Office, *Industrial Design Activities in Canada (2000-2015)*, (Ottawa: CIPO, 2015) [unpublished] [CIPO, *Industrial Design Activities in Canada*].

research on industrial design registration in Canada."[128] To this effect, the authors prefaced the study with an acknowledgement that there is a lack of literature on industrial design

> Studies in Europe and the US have demonstrated that industrial design as a factor of innovation and competitiveness is worthy of research effort. However, a review of literature on industrial design reveals that research on this subject is lacking in Canada, especially at the empirical level. One of the key reasons cited for the limited research projects on industrial design in Canada is data constraints (Gertler and Vinodrai 2004) – the lack of reliable data reduces all analysis to qualitative postulations with very little formality and rigour, thereby narrowing the gap between policies and speculations.[129]

While the use of laws is not an indicator of growth or economic contribution of the design industries in Canada, a broader empirical study focused on design industries would greatly contribute to understanding the relationship between these industries, policies affecting design, and the use of laws. This study fills in major gaps in the literature on the fashion industry and intellectual property norms, and contributes to empirically to research focusing on design driven industries.[130]

1.2.2 Intellectual Property Norms and Economic Geography: Fashion Clusters in Toronto and Montreal

While at the initial stage of research, this study did not consider the existence of creative economic clusters that form the Montreal and Toronto fashion clusters, it became apparent throughout the interviews and subsequent research that the development of the fashion industry as well as the emergence of norms and behaviours, relied to some degree on the geospatial proximity and the dynamics between the actors within these industries. This is also apparent in

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[128] *Ibid* at 3.
[129] *Ibid*.
[130] Beyond the scope of this thesis, yet important to acknowledge, is that there is another field of literature that helps explain the lack of use and accessibility of intellectual property protection for design-based industries rooted in gender and feminist critique, see e.g., Ann Bartow, "Fair Use and the Fairer Sex: Gender, Feminism, and Copyright Law" (2006) 14:3 Am UJ Gender Soc Pol'y & L 551; Rebecca Tushnet, "My Fair Ladies: Sex, Gender, and Fair Use in Copyright" (2007) 15:2 Am UJ Gender Soc Pol'y & L 273; Shelley Wright, "A Feminist Exploration of the Legal Protection of Art" (1994) 7 CJWL 59; B. Courtney Doagoo, "Feminist Anthropology and Copyright: Gauging the Application and Limitations of Oppositions Models" in Doagoo, Goudreau, Saginur & Scassa, *supra* note 124, ch 8.

the findings in a broader sense, as the interaction sometimes stretched beyond the segment of designers themselves and included other actors in the broader fashion cluster as discussed in Chapter 6. As such, it is important to acknowledge that the independent fashion design segment is situated within a broader geographic cluster within the two cities. Notably, this research was not designed to evaluate the effectiveness, impact or significance of economic clusters or agglomeration, nor was it designed to look for a causal relationship between the interactions of the individuals within the clusters. Instead, the purpose of including this section in the literature review is to furnish context regarding the environment that constitutes the fashion design segment in Montreal and in Toronto, and otherwise explain the circumstances from where the interactions developed.

Even though much of the existing research on clusters stems from the premise that innovation is heightened when geographic proximity between businesses is present, there is still not a consensus about what necessarily constitutes an economic cluster.[131] For the purpose of this study, when referring to the fashion clusters, the author is broadly referring to the concept of geographic proximity or concentration of companies discussed within Michael Porter's model.[132] In this context, clusters can be defined as

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131 Stuart A Rosenfeld, "Bringing Business Clusters Into The Mainstream Of Economic Development", (1997) 5:1 European Planning Studies 1 at 8; Constantine Campaniaris et al, "The Applicability of Cluster Theory to Canada's Small and Medium-Sized Apparel Companies" (2011) 15:1 Journal of Fashion Marketing and Management 8 at 15 [Campaniaris et al, "Cluster Theory"].

132 Porter, *Advantage of Nations*, *supra* note 10 at 77-80. Within Porter's model, there are four determinants that assist in explaining the conditions that successful national industries are created in. These four determinants within his "diamond" model include *factor conditions*, *demand conditions*, *related and supporting industries*, *firm strategy, structure, and rivalrly*. The concept of clusters is explained in the *related and supporting industries* factor and demonstrated in the example of the Italian footwear cluster that describes "how a group of close-by, supporting industries creates ecompetitive advantage in a range of interconnected industries that are all internationally competitive" While the fashion clusters in Canada are not internationally or nationally competitive in the same way as the Italian footwear example, the segment and broader cluster does demonstrate elements of being geographically proximate; Notably, in addition to economic competitive advantages of clusters, there is clearly a relationship between creativity, networks and clusters, see e.g., Karlsson, "Clusters, Networks and Creativity" *supra* note 10 ch 5.

> …a geographic concentration of related companies, organizations, and institutions in a particular field that can be present in a region, state, or nation. Clusters arise because they raise a company's productivity, which is influences by local assets and the presence of like firms, institutions, and infrastructure that surround it.[133]

Porter's seminal article *The Competitive Advantage of Nations* discusses the way in which successful innovative industries tend to develop within in geographic clusters.[134]

> Competitive industries are not scattered helter-skelter throughout the economy but are usually linked together through vertical (buyer-seller) or horizontal (common customers, technology, channels) relationships. Nor are clusters usually scattered physically; they tend to be concentrated geographically. One competitive industry helps to create another in a mutually reinforcing process.[135]

Some of the defining characteristics of clusters include the fact that they are predominantly comprised of small to medium sized enterprises (SMEs), that the SMEs are located within a close geographical proximity of one another, and that they work together within an industry or economic activity.

> As traditionally defined, clusters are 'naturally' occurring, geographically compact agglomerations of firms, generally small and medium sized, co-operating directly or otherwise drawing on common resources in one or several closely related areas of economic activity.[136]

There are two relationships within the independent fashion design clusters, both relevant to the two cities in this study albeit on a very small scale, and not to the extent that they provide a competitive advantage; these are vertical and horizontal relationships.[137] The vertical supply-chain relationship consists of a number of core complementary businesses that link with one

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[133] Institute for Strategy & Competitiveness, "What are Clusters?" Harvard Business School, online: <http://www.isc.hbs.edu/competitiveness-economic-development/frameworks-and-key-concepts/Pages/clusters.aspx>.

[134] Porter, "Competitive Advantage", *supra* note 10 at 83-84, an example of a strong and successful economic cluster provided by Porter is the Italian textile cluster that includes fashion, clothing scarves and complementary products. Unlike Italy, in Canada, due to trade agreements that will be discussed in Chapter 3, federal government policies have made it difficult for the various fashion related industries to flourish and complement one another.

[135] *Ibid* at 83.

[136] Charles F Sabel, "Globalisation, New Public Services, Local Democracy: What's the Connection?" in Sylvain Giguere, ed, *Local Governance and the Drivers of Growth: Local Economic and Employment Development* (Paris: OECD Publishing, 2005) 111 at 118.

[137] Porter, *Advantage of Nations*, *supra* note 10 at 73, 149.

another for different services or products required in the supply chain.[138] Although it has been acknowledged that fashion designers are extremely "individualistic" in their approach,[139] fashion design and production are not insular endeavours, as they require interaction with a number of different industry actors along the supply chain.[140] The majority of the small to medium-sized fashion enterprises are not completely vertically integrated, meaning that they do not have the capacity to perform everything in-house and therefore sometimes rely on the complementary skill sets of other businesses in order to facilitate the operations of their enterprises.[141]

The core businesses in this scenario include fabric mills and agents, suppliers of hardware, cutters, technical and local manufactures. There are also a number of general services that are available to the industry (e.g., graphic designers) and those who are integral to media and research (e.g., newspapers, blogs, academic journals, universities).[142] As well, there are national and regional associations and organizations aimed at supporting the industry.[143]

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138 Nicos Komninos, *Intelligent Cities and Globalisation of Innovation Networks* (New York: Routledge, 2008) at 57.

139 Diane-Gabrielle Tremblay, "Partnerships and Industrial Clusters: The Case of the Fashion Cluster Development in Montreal" in Peter Karl Kresl, ed, *Cities and Partnerships for Sustainable Urban Development* (Cheltenham: Edward Elgar Publishing, 2015) 203 at 214 [Tremblay, "Industrial Clusters"]; Campaniaris et al, "Cluster Theory", *supra* note 131 at 22.

140 While a majority of designers conducted design related activities within their studios, a number of them would then outsource to sewers, cutters, makers, and to other companies within the supply chain.

141 Canada, Industry Canada, *A Canadian Approach to the Apparel Global Value Chain*, by Milstein & Co Consulting, Catalogue No lu44-62/2008 (Ottawa: Industry Canada, 2008) at 5-6 [*Global Value Chain*].

142 As the Organisation for Economic Co-operation and Development (OECD) suggests, In addition to proximity, some of the "drivers" required for cluster formation can include specialized labour, suppliers, low transaction costs, access to information (this can occur via associations or incubators), see OECD, "Networks, Partnerships, Clusters and Intellectual Property Rights: Opportunities and Challenges for Innovative SMEs in a Global Economy" 2nd OECD Conference of Ministers Responsible for Small and Medium-Sized Enterprises (SMEs) Istanbul Turkey June 3-5 2004 at 31.

143 See e.g., Canadian Apparel Federation, online: <http://www.apparel.ca/>; National Apparel Bureau, online: <http://www.nabq.com/Site/Home.aspx>; Apparel Connexion (formerly known as the Apparel Human Resources Council), online: <http://www.apparelconnexion.com/about.html>; Mode Montreal, online: <http://www.modemontreal.tv/en/pages/about-montreal-fashion-bureau>; Toronto Fashion Incubator, online: <http://www.fashionincubator.com/about/index.shtml>.

Horizontal relationships,[144] although scarce, are also present within the Montreal and Toronto fashion industries,[145] which is relevant to describing the way in which the various players within the industry interact. Horizontal relationship occurs between organizations that work together for the purpose of a "common objective"[146] or "commonalities in consumer demand."[147] An example of this type of relationship in the fashion industry might occur where there is collaboration between two fashion design firms or when a fashion retailer and designer work together on a capsule collection.[148] There are a number of scenarios where this can occur, including where both the firms are after the same or similar clientele but are joining forces to attract existing and new client bases;[149] or where there is otherwise no connection, and one party is using the other to break into a new market;[150] or where a higher-end designer would otherwise

[144] Porter, *Advantage of Nations*, *supra* note 10 at 443.
[145] See generally, Constantine Campaniaris, et al, "Evidence-based Development of a Strategy for Canadian Apparel SMEs" (2015) 19:3 Journal of Fashion Marketing and Management: An International Journal 299 at 302, 311, the authors found that there was little evidence of factors needed to support horizontal clustering in the Canadian apparel industry.
[146] Komninos, *supra* note 138 at 57.
[147] Porter, *Advantage of Nations*, *supra* note 10 at 443.
[148] A capsule collection can be described as collaboration between two entities – it can be between designers or a retailer and a designer or an artist and a designer – there are many variations. A contemporary example of a successful capsule collection is the partnership between H&M and other designers such as Stella McCartney, Donatella Versace, and Maison Martin Margiela as well as celebrities such as Madonna and Beyoncé. These collections are limited and only offered for a short period of time, see H&M "Campaigns and Designer Collaborations" online: <http://about.hm.com/en/About/facts-about-hm/fashion-for-all/collections/collaborations.html> [H&M Collaborations]; A Canadian capsule collection example is when Danier Leather partnered up with Canadian designers, see Danier Leather, "Danier's Debuts Fall/Winter 2011" (18 May 2011), online: Danier <http://danier.mwnewsroom.com/Investor-Relations/MediaPressReleases/in/DANIER%E2%80%99S-DEBUTS-FALL-WINTER-2011>.
[149] Two designers within the same segment and after the same target market may also collaborate, which is a little more rare but still occur, see The Canadian Press, "Smythe and Beaufille to Release Blazer Collaboration" Global News (27 November 2014), online: <http://globalnews.ca/news/1696197/smythe-and-beaufille-to-release-blazer-collaboration/> Both Smythe and Beaufille are independent Toronto based fashion designers who target a similar demographic.
[150] An example of this in Canada occurred where American discount store Target partnered up with Roots Canada, an iconic Canadian clothing company to come up with an exclusive limited line for Target. In this scenario Target was taking advantage of Roots status and marketing as a Canadian brand to break into the market, see Lauren La Rose, "As Canadian Debut Nears, Target Announces Partnership with Roots" *The Globe and Mail* (25 January 2013), online: <http://www.theglobeandmail.com/globe-investor/as-canadian-debut-nears-target-announces-partnership-with-roots/article7853035/>.

be inaccessible and both the retailer and the designer would mutually benefit because they are disparate markets.[151]

Clusters can emerge naturally without any external support or intervention by government or agencies, but they can also be formed intentionally.[152] In both Toronto and Montreal, the geographic clusters have historically developed in the city, and for the most part developed naturally.[153] There has been much written about the creation and benefits of economic clusters, at the same time studies have shown that not all firms involved in clusters are "highly connected in (local) knowledge networks," [154] nor are all of them financially successful "despite the fact that they share the same values, norms and other institutions."[155] However, the link

[151] This occurs in the common capsule collections about where high-end designers collaborate with mass fashion firms. Some commentators argue that many of the capsule collections that are "high-low" collaborations such as the H&M x luxury designers, are commercial and marketing decisions rather than creative ones, because it would be near impossible to actually translate many of the high end designs that normally retail in the thousands into versions that retail for under $100, see Nathalie Atkinson, "Nathalie Atkinson: Fashion Collaborations Are Often An Act Of Commerce, Not Creativity" The Globe and Mail (20 October 2015), online: <http://www.theglobeandmail.com/life/fashion-and-beauty/nathalie-atkinson-fashion-collaborations-are-often-an-act-of-commerce-not-creativity/article26871498/>.

[152] As Atherton and Johnston suggest often times when the state intervenes to create an intentional cluster without the framework of a bottom-up approach, otherwise from the point of view of the firms, this policy fails. They find that, "[c]lusters form when groups of businesses start to collaborate and through co-operation develop ties and interdependencies that enable them to operate with greater economies of scale and scope" and therefore much a the cluster revolves around "trust" and "mutual understanding" see Andrew Atherton & Andrew Johnston, "Cluster Formation from the 'Bottom-Up': A Process Perspective" in Charlie Karlsson, ed, *Handbook of Research on Cluster Theory* (Cheltenham: Edward Elgar, 2008) 93 at 94; *Ibid*, In addition to the importance of geographic proximity which covered in Porter's thesis, commentators have suggested that clusters can also form because of "relational proximity", which refers to the "closeness of firms" at 95-96.

[153] Galvin observes that the geospatial characteristics of the Toronto Fashion Cluster began to develop in the early 1900s, predominatly comprised of immigrants. While there have been attempts to enhance the naturally occurring geographic cluster in Toronto, policy, action and funding have been inconsistent by all levels of government, see Patrick James Galvin, *Local Government and Cluster-Related Innovation Policy: Two Industry Clusters in the City of Toronto* (PhD Thesis, University of Exeter, Department of Politics, 2011) [unpublished] at 253-256 [Open Research Exeter]; There have been also been attempts to create intentional clusters as a policy response to strengthening the industries, mostly in Montreal, see Chapter 3; Campaniaris et al, argue that there are questions and recommends that further research is to be conducted in order to ascertain whether Porter's cluster theory applies to the Canada apparel industry (considering Canada as a whole), see Campaniaris et al, "Cluster Theory", *supra* note 131 at 23-24.

[154] Koen Frenken & Ron Boschma, "Geographic Clustering in Evolutionary Economic Geography" in Charlie Karlsson, Martin Andersson and Therese Norman, *eds*, *Handbook of Research Methods and Applications In Economic Geography* (Cheltenham: Edward Elgar, 2015) 291 at 295 [citations omitted].

[155] *Ibid*. The authors suggest that there are other forms of proximity other than geography, i.e., "cognitive, social and institutional, that make other firms interact and collaborate [citation omitted].

between proximity and knowledge sharing does exist and remains an important aspect of clusters and norm development, because it can be a structure of sharing, learning norms, values and expectations.[156] As many commentators have observed, knowledge sharing is much more efficient between individuals and firms that are closed or located within geo-spatial proximity of one another.[157] Notably, in the case of the two design communities interviewed, what also became apparent was that knowledge sharing was tacit[158] and not necessarily explicit when it

[156] James S Coleman, "Social Capital in the Creation of Human Capital" (1988) 94 American Journal of Sociology, Supplement: Organizations and Institutions: Sociological and Economic Approaches to the Analysis of Social Structure S95, Coleman identifies norms as social capital, and argues that the type of social structure which is most conducive to the development of effective norms are closed ones, stating that "[n]orms arise as attempts to limit negative external effects or encourage positive ones. But, in many social structures where these conditions exist, norms do not come into existence. The reason is what can be described as lack of closure of the social structure" at S105; Roel Rutten & Dessy Irawati, "Clusters, Learning, and Regional Development: Theory and Cases" in João JM Ferreira et al, eds, *Cooperation, Clusters, and Knowledge Transfer: Universities and Firms Towards Regional Competitiveness* (New York: Springer, 2013) 127 at 132. The authors argue that there are two extreme debates concerning norms and proximity. First there is one school of thought that "tacit communication can only be effectively communicated in face-to-face interactions…" while on the other hand, there is a school of thought that argues, that "digital means of communication are now so advanced that all knowledge can be exchanged between all people, regardless of their geographical location. Having stated this, the authors do find that "it becomes clear that there is a role for spatial proximity between network partners with regard to knowledge creation and learning and that social context in the form of norms and values plays an important part in this role. However, it would be a mistake to see norms and values (social context) as characteristics of a region"at 132.

[157] See Coleman, *supra* note 156 S107 S108, Coleman discusses the 'closure' of the wholesale diamond market in New York city and other close communities; Ellickson, *Order without Law*, *supra* note 35, following his inductive observations of Shasta County norms Ellickson hypothesized that "members of a close-knit group develop and maintain norms whose content serves to maximize the aggregate welfare that members obtain in their workaday affairs with one another" at 167; Atherton & Johnston, *supra* note 152 at 97-100. The authors argue that "[s]hared cultural values and norms are crucial to the development of trust" and that once this trust is established, the geo-spatial proximity might not play as huge a role as before as it is replaced by relational proximity; Karlsson, "Clusters, Networks and Creativity", *supra* note 10, Karlsson observes that "…shared knowledge and idea base enables artists in clusters to continuously combine and recombine similar and non-similar knowledge and ideas to create new ideas and new artistic expressions. This stimulates artistic specialization within the cluster and results in the development of localized capabilities that are available to the artists in the cluster" at 96 [citation omitted]; Fagundes, *supra* note 1 at 1131-1133, Fagundes argues that a 'legal centralist theory of norm emergence' to explain a name registry used by derby girls to protect their names, akin to non-legal trademark protection, falls short. Instead he looks to non-legal centralist theory based on Ellickson's thesis on close-knit communities and the emergence of norms through knowledge sharing; Sarid, *supra* note 1, similarly, in his study on the intellectual labour of drag queens in Israel, Sarid concluded that one of the most important social markers of the drag queen community studied was the fact that they were a "small cluster, a 'close-knit group'" at 147.

[158] Polanyi provides a widely cited account of how knowledge is transferred without being "put into words", specifically, he theorized that "*we know more than we can tell*" and provided an example of being able to recognize someone but not being able to fully explain how it was possible to recognize the face. These are not explicit knowledge transfers but tacit ones, see Michael Polanyi, *The Tacit Dimension* (Chicago: University of Chicago Press, original 1966, new foreword 2009) at 4 as cited in Meric S Gertler, "Tacit Knowledge and the Economic Geography of Context, or The Undefinable Tacitness of Being (There)" (2003) 3 Journal of Economic Geography 75 at 77.

came to the development of norms.[159] Tacit knowledge sharing occurs when there is experiential learning or where there is spatially proximate group.[160] This is often associated with the creative component of the fashion design industries.[161]

As Roel Rutten and Dessy Irawati observe, norms and values are not only contingent on proximity *per se* but have also to so with social and economic relations between individuals.[162]

> Norms and values are connected to places because the individuals in the relations are largely spatially sticky. Most human beings are connected to the places where they live, work, and have their friends and relatives, that is, to the place they call home. Consequently, social interaction (inclusive knowledge creation and learning) is also spatially sticky.[163]

An example of this can be seen in Oliar and Sprigman's study on comedians where proximity was not a requirement for the development of norms. Comedians are an "intermediate-knit' group", who may, in many circumstances, never meet one another because of the fact that they travel for work and do not necessarily interact in a static community.[164] Importantly, while proximity is not required for norms to develop, proximity might account for the differences in the interactions between comedians who are not geographically proximate and the segment of independent fashion designers, who are in fact concentrated within these two cities.[165] As Ellickson suggested when he qualified his hypothesis about emergence of welfare-maximizing

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[159] *Ibid* at 77-78. Gertler explains that tacit knowledge "exists in the background of our consciousness" and because it is difficult to communicate, that it is learned not through communication but through experience instead. In the case of the fashion segment interviewed for this study, codes, or explicity rules do not exist.
[160] *Ibid*.
[161] Weller observes that fashion knowledge is cultural and tacit "since fashion is understood as embedded in places where complex, socially constructed and largely tacit (cultural) knowledges accumulate, it is increasing associated with cosmopolitanism and urban regeneration", see Sally Weller, "Fashion as Viscous Knowledge: Fashion's Role in Shaping Trans-National Garment Production" (2007) 7:1 J Econ Geogr 39 at 42.
[162] Rutten & Irawati, *supra* note 156 at 133.
[163] *Ibid* at 132.
[164] Oliar & Sprigman, *supra* note 1 at 1794; As cited in Oliar & Sprigman, Strahilevitz defines "intermediate-knit groups" as those where "(1) a member is not alone, but is proximate to or can be observed by companions with whom he anticipates having repeat interactions, and (2) information pertinent to informal social control flows easily between him and his companions but does not flow easily between him and strangers who are members of the intermediate-knit group", see Lior Jacob Strahilevitz, "Social Norms From Close-Knit Groups to Loose-Knit Groups" (2003) 70 University of Chicago Law Review 359 at 360.
[165] Oliar & Sprigman, *supra* note 1 at 1794.

norms close-knit groups, "an informal-control system may not be effective if the social conditions within a group do not provide members with information about norms and violations and also the power and enforcement opportunities needed to establish norms."[166]

This dissertation contributes to research concerning the development of norms within creative clusters (either intentional or not). The participants did not always self-identify as a close-knit group in the traditional sense, although most of the designers in each and both cities are well aware of one another and in some cases referred to one another as friends. The nexus between norm development and clusters in this research is that many of the participants implicitly and explicitly suggested that their interactions were related to some degree to the fact that they were a 'small' community of designers either within their cities or even in reference to multiple cities within Canada. Several of the responses even suggest a correlation between the emphasis on reputation and identity within the community and interaction between the community members. Therefore, this study can be distinguished from others conducted on creative communities that might focus on the creative activity and norms uncoupled from the geo-physical location and culture in which the interactions developed.[167] This is important because different norms might emerge between spatially proximate communities and those that are more spread out.

1.3 Theoretical Framework and Methodology

Traditional justifications for intellectual property law are predicated on incentive-based theories (economic or moral) that have rarely been empirically tested until recently in studies such as the ones discussed in this chapter. The focus of this research, like those studies reviewed in the

[166] Ellickson, *Order Without Law*, *supra* note 35, Ellickson defines close-knit groups as groups where "informal power is broadly distributed among group members and the information pertinent to formal control circulates easily among them" at 177-178.
[167] Notably, geo-physical proximity may play a different role than in online communities for example, where there is more involvement from members of a community.

literature, is to determine the actual use of intellectual property laws within a creative industry. In the absence of their use, it seeks to uncover the norms or mechanisms that have been used instead to regulate interactions within this segment.

This research was conducted using grounded theory methodology to gather, analyze and hypothesize data.[168] Grounded theory requires that all data and subsequent theory be derived from the bottom-up, meaning that a researcher is not to enter the research with any preconceived notions, including a theoretical framework in mind.[169] It is for this reason that I am using socio-legal theories to help contextualize the findings that I derived from the grounded theory approach.[170] The theoretical framework in this thesis was derived from the grounded theory analysis and explains the information that was collected from within these communities.

The next section will therefore elaborate on intellectual property theory in order to position the research, its purpose, and to contextualize the theoretical framework and methodology used to undertake this study. Further, the quantitative and qualitative methods for gathering empirical evidence will be discussed to provide details about the process used to collect, code, and analyze the data.

1.3.1 Grounding Theory in Evidence

Intellectual property law is considered to be a negative right that prevents the use of intellectual works without the authorization of the owner. As Lionel Bently and Brad Sherman observe, the existence of intellectual property law is commonly justified either by "ethical or moral

[168] Banakar, *Legal Sociology, supra* note 17 at 51, As mentioned in the Introduction, Banakar suggests that the use of grounded theory methodology can effectively be used for bottom up research in socio-legal research and norms. Banakar provides several studies on norms and social interaction, specifically that of Stewart Macaulay's study on the contractual practices of businessman where he uncovered their inherent reluctance to enter into legal or contractual relationships, see above Macaulay, *supra* note 57.

[169] The research takes the form of inductive rather than deductive inquiry, see Kathy Charmaz, *Constructing Grounded Theory*, 2nd ed (London: Sage, 2014) at 310-311 [Charmaz, *Constructing Grounded Theory*, 2nd].

[170] *Ibid*, for example Charmaz states that the theoretical framework emerges from the analysis and "locates the specific argument that you make."

arguments" or by "instrumental justifications" founded on the benefits it is supposed to yield.[171] Examples of the former include the Lockean labour[172] and Hegelian personality theory;[173] and the latter, the utilitarian theory.[174] The Lockean labour theory is based on the premise that individuals have property rights in what they create due to the labour they have expended on it.[175] The Hegelian personality theory justifies rights to property based on the transfer of an individual's personality, expression or will in the work they created.[176] The theory most commonly relied upon in Canada and the United States to justify intellectual property rights is

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[171] Lionel Bently & Brad Sherman, *Intellectual Property Law*, 4th ed (Oxford: Oxford University Press, 2014) at 5.

[172] John Locke, *Two Treatises of Government* (London: Printed for Thomas Tegg, et al, 1823) "Of Property". The Lockean theory is also used in support of the instrumentalist justifications, see for example Justin Hughes, "The Philosophy of Intellectual Property" (1988) 77 Geo LJ 287 at 298-310, Hughes discusses the various interpretation of Locke's Labour Theory, stating that "[o]ne interpretation is that society rewards labor with property purely on the instrumental grounds that we must provide rewards to get labor" at 296.

[173] GWF Hegel, Hegel's Philosophy of Right, Translated with Notes by TM Knox (Oxford: Oxford University Press, 1967) at 41-45.

[174] William Fisher, "Theories of Intellectual Property" in Stephen R Munzer, ed, *New Essays in the Legal and Political Theory of Property* (Cambridge: Cambridge University Press, 2001) 168 at 169; For example in reference to copyright law, the degree to which these theories dominate in different jurisdictions depends largely on the policies and levels of development within those countries, see e.g., Paul Goldstein, "Copyright" (1992) 55:2 Law & Contemp Probs 79. He asks, "What is copyright? A policymaker in the United States will tell you that copyright is an instrument of consumer welfare, stimulating the production of the widest possible array of literary and artistic works at the lowest possible price. Ask the question of a practitioner on the European continent, and he will tell you that copyright is at best a watered-down version of author's right-that grand civil law tradition that places the author, not the consumer, at the center of protection. A low protectionist will tell you that copyright is a monopoly that undesirably drives up the price of goods in the marketplace. A high protectionist will tell you that copyright is a property right-no more, no less-and one without which we would have very few creative works in the marketplace" at 79-80.

[175] Locke, *supra* note 172, Of Property 115-119. The general premise of the Lockean labour theory is that every person has property in his or her own "person." As a result, labour expended belongs to the person him or herself and once labour is expended onto goods from the commons (the commons is open for everyone to use), subject to the two provisos, an individual should only take what they will use, and that there will be enough for everyone, then individuals are free to appropriate these goods; see Hughes, *supra* note 172 Hughes argues that "…Locke does not explore the notion of labor and the desert it creates. His theory is largely a justification by negation: under his two conditions there are no good reasons for not granting property rights in possessions" at 298.

[176] Hegel, *supra* note 173; Hughes, *supra* note 172, Hughes suggests that one of the issues with applying the personality justification is to what degree is the "personality stake" enough to make a claim – "The question is: Does more personality warrant more property protection?" at 339; One of the most important synthesis of personality theory or personhood theory is articulated by Margaret Jane Radin, who in distinguishing fungible property rights from personal property rights suggests that, "[a] general justification of property entitlements in terms of their relationship to personhood could hold that the rights that come within the general justification form a continuum from fungible to personal. It then might hold that those rights near one end of the continuum – fungible property rights – can be overridden in some cases in which those near the other – personal property rights – cannot be." Further, she suggests that this causes a hierarchy of rights, answering Hughes question above, that more personhood equates to stronger entitlement rights, see Margaret Jane Radin, *Reinterpreting Property* (Chicago: The University of Chicago Press, 1993) at 53.

the utilitarian theory,[177] which justifies granting monopoly-like rights as an incentive to create and to support the dissemination of creative works to the benefit of society.[178] These justifications have been applied to various categories of intellectual property law across the board including copyright, patent, trademark and trade secret law.[179]

In the United States the purpose of intellectual property rights is grounded in a utilitarian principle and enunciated in the constitution.[180] In Canada, the constitution merely assigns legislative authority over patents and copyrights to the federal government.[181] This has left it open for Canadian courts to articulate justifications for intellectual property law.[182] For copyright law, the Supreme Court of Canada has articulated its purpose as "a balance between promoting

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[177] Jeremy Bentham, *Introduction to the Principles of Morals and Legislation*, vol 1 (London: W Pickering, Lincoln's-Inn Fields; and E Wilson, Royal Exchange, 1823) ch 1; As Fisher suggests, the utilitarian theory is the most popular of the theories and is used to balance the rights of the creators by providing an incentive, and the public, in order to enjoy the dissemination of those works, see Fisher, *supra* note 174 at 169.

[178] Peter S Menell, "Intellectual Property: General Theories" in Boudewijn Bouckaert & Gerrit de Geest, eds, *Encyclopedia of Law & Economics: Volume II* (Cheltenham: Edward Elgar, 2000) 129 at 130; The purpose and theoretical justification for providing intellectual property protection in Canada has been to incentivize innovation in order for it to be shared with the public, see Vaver, *supra* note 126, Vaver argues that utilitarian justification is the strongest for intellectual property protection, yet he questions whether they are more effective ways, "[i]f the allocation of these property rights is simply a means to an end – to make the fruits of creativity and research available to users – one must ask if the means is the most effective way to the end" he argues that if the rights have the effect of restricting access more than creating them, then alternative means to these rights might be more effective at 17 [citation omitted].

[179] Samuel E Trosow, "The Illusive Search for Justification Theories: Copyright, Commodification and Capital" 16 Can J L & Jurisprudence 217, while these theories have been used to justify intellectual property law, commentators argue that the balance of interests that the utilitarian theory offers in the case of copyright protection does not address important issues "… it accepts the contradiction between promoting innovation and ensuring access as an underlying premise, seeking mostly to ameliorate the tension. Second, the 'balancing' approach implicitly accepts a pluralistic framework of policy analysis without adequately considering differential power relationships that constitute the creation and dissemination of knowledge through the flow of information resources" at 230; Rosemary J Coombe, *The Cultural Life of Intellectual Properties: Authorship, Appropriation, and the Law* (Durham: Duke University Press, 1998) Coombe observes that not only are Western philosophies primarily offered to justify intellectual property rights but also that the incentive theory for property rights often promoted by scholars does not consider "*what* is 'owned' or *how* rights of possession are exercised for far too long" thereby ignoring the real outcome of "expanding" intellectual property rights at 7 [emphasis in original].

[180] US Const, art I, § 8, "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries"

[181] *Constitution Act*, *1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985 Appendix II, No 5, ss 91, 92 [*Constitution Act*] the Canadian constitution delineates jurisdiction for copyright and patent subject matter to be handled by the federal government.

[182] See, Teresa Scassa, "Interests in the Balance" in Michael Geist, ed, *In The Public Interest: The Future Of Canadian Copyright Law* (Toronto: Irwin Law, 2005) 41 at 64-65 [Scassa, "Interests in the Balance"].

the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator…."[183] For patent law, the Supreme Court of Canada has maintained that it is a "bargain" between the inventor and the government from which s/he receives a limited time monopoly in order to share the invention with the public, so that in the future, once the monopoly is over, the public can build on it.[184]

In the last few decades, scholars have started to question whether intellectual property laws actually fulfill these goals, i.e., incentivising creativity and innovation and promoting dissemination.[185] Further, critics query whether intellectual property laws are actually necessary in all fields of creativity and innovation since there are a number of innovative industries that thrive without the use of intellectual property law, and creators who create despite its absence.[186] Scholars have started testing the utilitarian thesis of intellectual property law by conducting empirical research, which has shown that some creative communities effectively regulate behaviour through norms, and in many of them, intellectual property law is not used even where

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183 See *Théberge v Galerie d'Art du Petit Champlain inc*, 2002 SCC 34 at para 30 [*Théberge*]; *CCH Canadian Limited v Law Society of Upper Canada*, 2004 SCC 13 at para 23 [*CCH Canadian*]. It is important to note that neither the *Copyright Act* nor the *Industrial Design Act* have written in their preamble what the purpose of their legislation is. It has therefore largely been the task of the Supreme Court of Canada to fill in the gap.

184 *Apotex Inc v Wellcome Foundation Ltd*, 2002 SCC 77 at paras 37 [*Apotex Inc*]; *Teva Canada Ltd v Pfizer Canada Inc*, 2012 SCC 60 at para 32 [*Teva Canada*].

185 Jessica Silbey, *The Eureka Myth: Creators, Innovators, and Everyday Intellectual Property* (Stanford: Stanford Law Books, 2014) [Silbey, *Eureka Myth*] based on fifty qualitative interviews with creators, innovators, lawyers and related professionals, she sought to answer "how intellectual property law in the United States promotes science and art." She concludes that "[i]ncentives to create and innovate exist independently of the market-protecting mechanisms of intellectual property. In fact, IP rights function as strategic business tools, attribution mechanisms, signs, sticks, and land mines – uses that are far afield from the risk-reducing device it was intended to be in the United States" at 5, 276; Oliar & Sprigman, *supra* note 1, the authors suggest that although intellectual property law has benefits for those who use it, it also comes at a price. The costs may act as barriers, i.e., "limitations imposed on other people's ability to copy, use, and build upon intellectual property that they encounter" at 1831; Rosenblatt, "Beyond the Utilitarian", *supra* note 3 at 445-446, Rosenblatt suggests that empirical evidence suggests that the "American public is largely unconcerned with the incentive function of IP law." There have not been comparable studies to demonstrate this in Canada.

186 Raustiala & Sprigman, *Knockoff Economy*, *supra* note 98 at 7, Raustiala and Sprigman study industries that do not use intellectual property (whether it is available or not) such as "arts, fashion, databases" and found that "even though others can freely copy in these industries, creativity remains surprisingly vibrant" and in some cases the lack of intellectual property use actually "spurs creativity" rather hinders it.

it exists.[187] Their research has demonstrated that intellectual property law in some sectors is not effective, accessible or even a consideration for motivating or incentivizing creation in some sectors.[188]

The emergence of evidenced-based intellectual property research has not only been making waves within the academic community, but has also been acknowledged by governments. An example of this is the Hargreaves Report ("the Report"), an independent study commissioned by the United Kingdom Intellectual Property Office that emphasized the need for empirical or evidence-based research in order to determine whether intellectual property laws in the United Kingdom were in fact serving their legislative objective, which is "to promote innovation and growth in the UK economy."[189]

Of interest to this thesis is that the Report specifically took issue with design laws, as they were found to be archaic and did not serve the needs of the various industries that could benefit from them.[190] In Canada, scholars have acknowledged that the current intellectual property law framework for design, which originated from British legislation, has not been modeled to serve the needs of Canadian innovation or industry.[191] Although the legislative framework in Canada provides several legal options for the protection of fashion design through industrial design, copyright, trademark, and confidential information laws, until now, there has

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[187] *Supra* note 1; They will be discussed in the section below.
[188] See e.g., Silbey, *Eureka Myth*, *supra* note 185.
[189] Ian Hargreaves, "Digital Opportunity: A Review of Intellectual Property and Growth" *United Kingdom Intellectual Property Office* (May 2011) at 8, online: UK Intellectual Property Office <http://www.ipo.gov.uk/ipreview.htm> [*Hargreaves Report*], Hargreaves recommended that the intellectual property law should be "driven by objective evidence" at 8.
[190] *Ibid* at 64-66.
[191] See e.g., Muhlstein & Wilkinson, *supra* note 125 at 23; Vaver, *supra* note 126 at 89; Tawfik, *supra* note 125, 267 at 270-271; Although the *Copyright Act* was also imported from the 1911 UK Copyright Act (*Copyright Act, 1911 (UK)* 1 & 2 Geo V c 46 [1911 Act]) and enacted in Canada in 1924, there have been several major phases of amendments to help modernize it and differentiate it from copyright legislation in different jurisdictions. There is however, pressure from the US and international treaties have resulted in legislative amendments to the *Copyright Act*, that had not originated in Canada.

been relatively little research or evidence to determine whether or how these laws have actually served to promote innovation and creativity or studies analyzing the impact of intellectual property laws and policies on design in Canada.[192]

For example, in 2011, the United Kingdom's intellectual property office commissioned several studies on design, and in one, authors Elif Bascavusoglu-Moreau and Bruce Tether observed that there was an "*associated* performance difference between firms with and without registered designs. This is very different from saying that these differences are *caused* by holding registered designs."[193] They found that companies that registered designs were "symptomatic" of certain behaviours, e.g., strategies and approaches, meaning that any associated impact was not necessarily because of the registration of a design.[194] For example, firms that register designs may have registered other kinds of intellectual property rights that correlate to higher revenues.[195] Another explanation of this impact could relate to the possibility that those firms who registered designs could merely "be better at managing design, innovation or the business as a whole."[196]

The majority of academic literature on intellectual property law for fashion design in North America originates from the United States and focuses primarily on the theoretical debate about whether copyright law should be expanded to encompass fashion design protection and if

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[192] Like Hargreaves, Canadian legal scholars and practitioners have been calling for "a high-level, independent, evidence-based review of Canada's current IP framework", see House of Commons, Standing Committee on Industry, Science and Technology, "Evidence, Jeremy de Beer, 41st Parl, 1st Sess, No 031 (15 May 2012) at 0905, online: <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=5585922&Language=E&Mode=1&Parl=41&Ses=1#T0905> the Standing Committee published the "Report of the Standing Committee on Industry, Science and Technology" (Chair David Sweet); see Barry Sookman, "Law and Innovation: Is Intellectual Property a Path to Progress" (13 April 2014) Barry Sookman (blog) online: <http://www.barrysookman.com/2014/04/13/law-and-innovation-is-intellectual-property-a-path-to-progress/>.

[193] UK Intellectual Property Office, Elif Bascavusoglu-Moreau & Bruce S Tether "Design Economics, Chapter Two: Registered Designs & Business Performance – Exploring the Link" in *Design Economics* (21 September 2011) at 1, online: <https://www.gov.uk/government/publications/the-economics-of-design-rights>.

[194] *Ibid*.

[195] *Ibid*.

[196] *Ibid*.

so, whether it will hinder or help innovation in the fashion industry.[197] Currently, in the United States, *sui generis* protection for fashion design does not exist; rather, similar to Canada, it is possible to protect fashion across several intellectual property law regimes. Designers can either rely on design patents, trademarks and trade dress, or copyright law to protect distinct elements.[198] To date, there have been four Bills proposed in the US Senate to enact a provision granting three-year protection for fashion design within their copyright legislation. The last Bill was introduced in the Senate in fall 2012 and placed on the Senate Legislative Calendar that year. There has been no new movement since the writing of this dissertation.[199]

As a result of the advocacy for stronger protection from some designers, academics and politicians, there has been a relatively generous amount of legal scholarship and debate that have both criticized and praised this move.[200] The argument in support of enhanced fashion design protection is that the current American legislative scheme skews innovation and causes economic harm to less-established small and medium-sized design firms.[201] In contrast, opponents of

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[197] *Infra*, note 199, 200.

[198] Studies have not been conducted, like the present one, to determine whether designers make use of any of these laws. The only indication is a review of case law to determine what laws are used.

[199] US, Bill HR 2033, *Design Piracy Prohibition Act*, 110th Cong, (2007-2008); US, Bill HR 2196, *Design Piracy Prohibition Act*, 111th Cong, (2009-2010); US, Bill HR 2511, *Innovative Design Protection and Piracy Prevention Act*, 112th Cong, (2011-2012); US, Bill S 3523, *Innovative Design Protection Act of 2012*, 112th Cong, (2011-2012) [*IDPA*]; A summary of actions can be seen on Congress.gov, online: <https://www.congress.gov/bill/112th-congress/senate-bill/3523/all-actions>.

[200] The above Bills were all introduced by Senator Charles E Schumer and supported by the Council of Fashion Designers of America, see LJ Jackson "Some Designers Say Their Work Deserves Copyright Protection; Others Say It Would Harm the Industry" American Bar Association Journal (1 July 2011), online: <http://www.abajournal.com/magazine/article/the_genuine_article>; Jeannie Suk, "Testimony on HR 2511, The Innovative Design Protection and Piracy Prevention Act" (15 July 2011) [Suk, "Testimony"]; Christopher Sprigman, Testimony on HR 5055, To Amend title 17, United States Code, to Provide Protection for Fashion Design (27 July 2006) [Sprigman, "Testimony"].

[201] See Hemphill & Suk, "Economics of Fashion", *supra* note 120 at 1175-1180; see also Suk, "Testimony", *supra* note 200 at 4-5.

protection believe that there has been little empirical evidence to demonstrate that fashion design needs copyright-type protection in order to thrive either creatively or financially.[202]

Rather than focus on the harms of copying as briefly discussed in Chapter 6, this research suggests that the fashion industry is a highly innovative, creative and fast-paced industry, despite the fact that it is an industry that is also highly susceptible to copying. What it also suggests is that contrary to the justifications offered by classic intellectual property theory, within the segment of independent fashion designers interviewed, intellectual property law has not actually been used as an incentive to create or to disseminate works within the independent fashion design segment interviewed for this research. Instead the absence of intellectual property rights, norms and mechanisms have developed to navigate issues such as copying and to mediate relationships between designers within the industry.

1.3.2 Theoretical Framework: Social Scientific Research and the Bottom-Up Approach

The theoretical framework that fits best with this study is socio-legal studies or social scientific research of law, which encompasses a number of disciplines.[203] The common thread between

[202] The reasons for opposing copyright protection for fashion were summarized by Christopher Sprigman in his 2011 testimony to the Committee on the Judiciary Subcommittee on Courts, Intellectual Property, and the Internet. These included the fact that the industry has been "both creative and profitable without any IP rules protecting its original designs", otherwise it has not been harmed, see Sprigman, "Testimony" *supra* note 200 at 1; In the EU protection for fashion has not prevented copiers from copying, there are relatively little to no lawsuits or registered designs. Raustiala and Sprigman suggest that in the US the beneficiaries of such laws will be lawyers, not fashion designers since it would provoke lengthy litigation in this field, see Kal Raustiala and Christopher Sprigman, "Comments Submitted to the Committee of the Judiciary, US House of Representatives Re: Innovative Design Protection and Piracy Prevention Act" Submitted to the Committee on the Judiciary, US House of Representatives, Subcommittee on Intellectual Property, Competition and the Internet (13 July 2011) at 9.

[203] Brian Z Tamanaha, *Realistic Socio-Legal Theory: Pragmatism and a Social Theory or Law* (Oxford: Oxford Scholarship, 1997) In his introduction Tamanaha observes that "[t]he label socio-legal studies has gradually become a general term encompassing a group of disciplines that applies a social scientific perspective to the study of law, including the sociology of law, legal anthropology, legal history, psychology and the law, political science studies of courts, and science-oriented comparativists" at 2; However Banakar discusses four divisions of socio-legal research i) sociology of law, ii) law and society studies, iii) sociological jurisprudence, and iv) socio-legal studies and legal policy research. This is useful because the current study combines a several of these conceptually different categories stemming from the United States, the United Kingdom and Europe, specifically sociology of law and law and society, see Banakar, *Legal Sociology*, *supra* note 17 at 38-50. Within these divisions he sees law and society as permitting a truly interdisciplinary theoretical approach with social sciences. However he holds that because

these disciplines is that they are all derived from a "social" perspective in that they "fall within the scope of sociological inquiry."[204] The bottom-up approach which is the one that I employ in this thesis using grounded theory methodology, "cuts across disciplinary divisions" of socio-legal theories as defined by Reza Banakar, and in doing so avoids splitting hairs among those various categories,[205] which have conceptual and theoretical differences in their influences[206] and approaches.[207]

While differences exist within the various divisions of socio-legal theories, law and sociology have much in common and can work together to provide a richer general perspective on law. As Roger Cotterrell suggests,

> …despite their radical differences in method and outlook law and sociology share a fundamentally similar basic subject matter. Law is a practical craft of systematic control of social relations and institutions. Sociology is the scientific enterprise that seeks systematic knowledge of them.[208]

While social scientific research of law provides an opportunity for a fruitful understanding of the legal and normative frameworks, the relevance of socio-legal theories to this study i.e., sociology of law or law and society provide an interesting dimension to understanding the use laws and norms within a given community.

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psychology and economics have developed their own independent fields i.e., "law and economics" or "law and psychology," at 45.

[204] *Ibid* at 21.

[205] *Ibid* at ch 3. An alternative way of approaching socio-legal studies is through the bottom-up approach. Socio-legal research will be discussed and referred to in this dissertation through sociology of law and law and society research, using this approach. At their baseline, they are studies that intersection at sociology and law.

[206] *Ibid* at 42. For example, Banakar suggests that sociological studies of law are "informed by theoretical concerns and objectives of mainstream sociology" whereas studies in law and society are influenced by a broader spectrum of social science disciplines.

[207] *Ibid* at 41-43. Notably, Banakar qualifies that the differences between social scientific studies are not "sharp" and that that they do not take into account a number of all claims, possibilities in research and in a schools of research i.e., this would be based on a British and not Scandinavian model, as the distinctions between the categories would not be as strong or pronounced in the latter.

[208] Roger Cotterrell, *The Sociology of Law: An Introduction*, 2nd ed (Oxford: Oxford University Press, 1992) at 5 [Cotterrell, *Sociology of Law*].

As Banakar observes, the underpinning of sociology of law can be traced to earlier scholars' attempts to grapple with the "'gap' between the law and the intentions of legislature or policy-makers, on the one hand, and the social norms of organization and the outcome of legal regulations, on the other."[209] Therefore, it promotes an understanding of the real or practical application of law not only from the perspective of individuals who use it but also those who do not use it. In other words, it seeks to uncover and understand patterns and information related to the way in which humans behave within society.[210] As Matthais Baier observes, "one key question in sociology of law is how social order is upheld in the absence of law or despite the law"[211] meaning that it permits for an inquiry, like the focus of this thesis, to understand the unwritten rules that regulate interactions within a particular industry or community. Sociology of law therefore provides a natural framework to examine the relationship between laws and norms[212] and invites the use of grounded theory or bottom-up inquiry, empirical methods and interdisciplinary research to do so.[213]

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[209] Reza Banakar, "Sociology of Law" (2011) Sociopedia 1 at 2, Banakar states that this "gap" was studied based on the consideration of "the concept of law" i.e., how law is understood; "understanding of how society was constituted and reproduced"; "how law and society were related together" and the best "methods of enquiry" to use in order to study the "macro processes, structural relationships and social systems" at 2.

[210] John R Sutton, *Law/Society: Origins, Interactions, and Change* (Thousand Oaks: Pine Forge Press, 2001) at 8-9 [citation omitted].

[211] Matthias Baier, "Introduction" in Matthias Baier, *supra* note 21, 1. Baier states that "[a]ll discussions of law ans social norms pre-suppose that these two concepts can be defined – something that some research contests. As mentioned earlier, for analytical reasons we believe that law and social norms can be separated, but that they are both part of the overall concept of societal norms" at 6.

[212] Within the field of sociology, Durkheim defined social norms as social facts, stating that "[a] social fact is any way of acting, whether fixed or not, capable of exerting over the individual an external constraint" see Durkheim, *supra* note 24 at 59; As will be defined in greater detail below, norms are an integral part of society and smaller communities. However norms cannot alone explain the social interactions that exist within a given community. These can also include social associations, such as those defined by Eugen Ehrlich "A social association is a plurality of human beings who, in their relations with one another, recognize certain rules of conduct as binding, and, generally at least, actually regulate their conduct according to them […] These rules are social facts, the resultants of the forces that are operative in society, and can no more be considered separate and apart from society, in which they are operative, than the motion of the waves can be computed without considering the element in which they move. As to form and content, they are norms, abstract commands and prohibitions, concerning the social life within the association and directed to the members of the association" see Ehrlich, *supra* note 53 at 39; Cotterrell, *Sociology of Law, supra* note 208 at 5, notes that norms, otherwise rules that guide the behaviour of individuals in society exist both in sociology and law; Håkan Hydén & Måns Svensson, "The Concept of Norms in

Law and society, another division of social scientific research, originating from sociological jurisprudence, casts an even wider net than sociology of law, in that it allows for the infusion of different disciplines in social sciences such as politics, economics and psychology, rather than theories just in sociology.[214] Law and society provides a framework for understanding the relationship between legal and non-legal "social phenomena"[215] and generally refers to the scientific study of law, subject matter that Freidman refers to as "a loose, wriggling, changing subject matter, shot through and through with normative ideas."[216]

Although there are differences between sociology of law and law and society, using the bottom-up approach, which is the foundation of this dissertation, can focus on "how law is deployed and experienced by various groups within a given social or cultural space and what 'law,' understood broadly to include "living law" and "the law," i.e., state law, means to them."[217] In addition to this inquiry, this approach also helps contextualize the way in which

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Sociology of Law" (2008) 53 Scandinavian Studies in Law 15, the authors assert that "the concept of norms is crucial when trying to understand the relationships between law and society and that the concept of norms is as central to [sociology of law] as for example the concept of attitudes is central to Social psychology" at 17.

[213] Cotterrell, *Sociology of Law, supra* note 208, Cotterrell, referring to C Wright Mills, states that "a sociological perspective on law does not require that law should somehow be subsumed as part of academic sociology's territory but that it should be viewed with a 'sociological imagination'." This "imagination constantly seeks to interpret detailed knowledge of law in a wider social context, consistently looks for the relations between legal development and wider social changes, tries to understand law as interacting in complex ways with the social environment it purports to regulate, and tries always to approach these matters systematically with a constant sensitivity to the need for specific empirical data and rigorous theoretical explanation" at 6; NS Timasheff, "What is 'Sociology of Law'?" (1937) 43:2 American Journal of Sociology 225, Timasheff cites HU Kantorowicz as defining sociology of law to be "an investigation of social life in its relation to law, especially the investigation of correlations between law and other social domains – economics, politics, techniques, art, religion, etc" at 228 [citation omitted]; As John Sutton suggests "the sociology of law is an intellectual project in which empirical data are used to describe and explain the behavior of legal actors" notably empirical data refers to "information received through the senses" notably within his definition of 'legal actors' he includes businesses, see, Sutton, s*upra* note 210 at 15; Authors Hydén and Svensson argue that Sociology of Law emanates from two distinct fields of study, that is the social sciences and sociology which permits it to be grounded in empirical research, and legal sciences, see Hydén & Svensson, *supra* note 212 at 16.

[214] Banakar, *Legal Sociology*, *supra* note 17 at 45. One significant example of studies in law and societies provided by Banakar, which relates directly to this thesis, is the Ellickson's *Order Without Law*, *supra* note 35, Ellickson uncovered the normative (and extra-contractual) relationships between individuals within a community to deal with a number of issues.

[215] Lawrence M Friedman, "The Law and Society Movement" (1986) 38:3 Stan L Rev 763 at 763.

[216] *Ibid* at 766.

[217] Banakar, *Legal Sociology*, *supra* note 17 at 51 [citation omitted].

social norms operate within these communities as it too stems from a sociological and scientific inquiry. Therefore by deliberately selecting the umbrella of social scientific research of law as the theoretical framework rather than selecting one or another of the specific sub-disciplines allows me to use the concepts fluidly and creates a useful connection to explain the findings based on psychology, economic geography and social norms inquiries.

There are some examples of bottom-up studies investigating the intersection of intellectual property laws, norms, and social interactions in various Canadian creative industries - including arts, crafts, journalistic communities and independent music labels.[218] The purpose of these investigations is to understand whether and the way that creators manifest property rights in what they create and to determine what role intellectual property played if any within these creative communities. In conducting their research, Tina Piper, Laura Murray, and Kirsty Robertson argue that "seeking a full understanding of what IP law is, statutes and cases are the last thing we should look at, not the first"[219] to fully understand the role of intellectual property within these creative industries. Aligned with the objectives of emerging empirical studies conducted in creative industries – including this one – their research uses a bottom-up approach and seeks to gather information from the perspectives of artists and artisans, craftspeople and journalists. In implementing this approach, they found that contrary to the utilitarian justifications discussed above, within these communities intellectual property law is not often

[218] Laura J Murray, S Tina Piper & Kirsty Robertson, eds, *Putting Intellectual Property In Its Place: Rights Discourses, Creative Labor, and the Everyday* (New York: Oxford University Press, 2014) Aligned with the objectives found in emerging studies conducted in intellectual property laws and norms, their research focused provided a bottom-up approach. Tina Piper conducted a similar research in the independent Montreal music scene in order to determine the use of intellectual property, in this case copyright law. Piper's interview findings reveal that policy deployment in the form of grants to independent music labels held more importance than copyright. Note that the study was published in the Canadian Journal of Law and Society, see Tina Piper, "Putting Copyright In Its Place" (2014) 29 Can J L & Soc 345.

[219] See Murray, Piper & Robertson, *supra* note 122 at 2.

used on the ground to incentivize creativity. Instead it is used it sometimes emerges "more as rhetoric than as rule."[220] Specifically, the authors demonstrate that the

> …effects attributed to IP statute and case law are often, in fact, results of cultural, professional, economic, and ideological circumstances in which IP law is invoked or imagined occasionally, opportunistically, or instrumentally…[221]

Similarly, in this dissertation, I look to understand the role and use of laws within the independent fashion design segment in two Canadian cities, with the aim of uncovering the norms and mechanisms using a bottom-up approach. The purpose of this research is to explain the way that law is experienced and manifested at the ground level if at all, and to inquire about the extra-legal or social norms that are used instead. As will be seen in much of the literature in this chapter, there is insight to be gained from listening to and learning from creators themselves.

1.3.3 Methodology: Grounded Theory

As mentioned above, I designed this research using a grounded theory methodology in order to gather, analyze, contextualize and discuss the empirical findings, which is congruent with theoretical framework discussed above. Grounded theory emerged as a methodology created by sociologists that allows researchers to "create theoretical categories from the data and then analyze relationships between key categories. In short, the researcher constructs theory from the data" as she or he engages in the research.[222] This is quite conducive to conducting research using the bottom-up approach[223] because rather than provide a hypothesis at the outset and determine later whether it can be supported by or tested against the empirical data, the hypothesis is created using empirical evidence – in other words, from the ground up. In addition to allowing a means to incorporate bottom-up research, it neatly opens the possibility to integrate a number

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[220] *Ibid*.
[221] *Ibid* at 1.
[222] Kathy Charmaz, "'Discovering' Chronic Illness: Using Grounded Theory" (1990) 30:11 Soc Sci Med 1161 at 1162 [Charmaz, "Discovering"].
[223] Banakar, *Legal Sociology*, *supra* note 17 at 51.

of disciplines, precisely because there are no preconceived notions or hypotheses. This theory permits me to approach the research in a flexible, rather than formalistic way.[224]

A branch of grounded theory, otherwise called the constructivist approach, was used to conduct this research. This approach acknowledges the subjectivity of the researcher and recognizes that there is a "subjective interrelationship between the researcher and the participant…"[225] I used the constructivist approach, rather than the classic form of grounded theory founded by Strauss and Glaser, because the latter uses a positivist and objectivist approach to gathering data which fails to take into account the role of the researcher in the context of how the data was collected: "[o]bjectivist grounded theory resides in the positivist tradition and thus attends to data as real in and of themselves and does not attend to the processes of their production."[226]

The first step in conducting the research is to collect data qualitatively, followed by answering "foundational questions", and, finally by developing the theory on which the research and its questions are based.[227] Grounded theorists,

> …use their emerging theoretical categories to shape the *data collection* while in the field as well as to structure the analytic processes of coding, memo-making, integrating and writing the developing theory. The 'groundedness' of this approach fundamentally results from these researchers' commitment to analyze what they actually observe in the field or in the data. [228]

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224 Kathy Charmaz & Richard G Mitchell, "Grounded Theory in Ethnography" in Paul Atkinson et al, eds, *Handbook of Ethnography* (London: Sage Publication, 2001) 160 at 160.

225 Jane Mills, Ann Bonner & Karen Francis, "The Development of Constructivist Grounded Theory" (2006) 5:1 International Journal of Qualitative Methods 1, notably the authors state that grounded theory "seeks to construct theory about issues of importance in peoples' lives" at 2 [citation omitted]; Kathy Charmaz, *Constructing Grounded Theory: A Practical Guide through Qualitative Analysis* (London: Sage Publication, 2006) at 180 [Charmaz, *Practical Guide*], (her approach "explicitly assumes that any theoretical rendering offers an *interpretive* portrayal of the studied world, not an exact picture of it" at 10 [citation omitted][emphasis in original]).

226 Charmaz, *Practical Guide, supra* note 225 at 131.

227 Charmaz & Mitchell, *supra* note 224 at 163.

228 Charmaz, "Discovering" *supra* note 222 at 1162 [emphasis in original].

Grounded theory seeks to generalize or abstract theories from the collected data.[229] During the course of my research I gathered empirical evidence and developed "*emergent* analytic goals and foci instead of pursuing a priori goals and foci."[230] This means than rather than determining the shape of the thesis from the outset, grounded theory permitted me to theorize and hypothesize based on the information that was revealed during the participant interviews and subsequent research, rather than approaching the interviews as a way to test an hypothesis.

As mentioned above, the four focus areas of this research are: 1) the reliance on statutory law (copyright, trademark and industrial design) or normative systems (social norms) by fashion designers to protect against or prevent copying,[231] 2) the relationship between the laws and norms within the fashion industry, 3) the attitude toward copying, and finally 4) the role of the public domain within the industry, as the diffusion of trends rely highly on the availability of elements that are open for all to use.

1.3.3.1 Empirical Methods of Data Collection and Analysis: Qualitative and Quantitative

The next section will review the primary and secondary methods I used to collect data for my four focus areas. In the first part I will discuss the method of primary data collection, analysis for the qualitative participant interviews; in the second part, I will discuss data collection for the quantitative portion of the analysis.

1.3.3.1.1 Qualitative Data: Intensive Interviews[232]

[229] Charmaz, *Constructing Grounded Theory*, 2nd, *supra* note 169 at 87-89.
[230] Charmaz, *Practical Guide, supra* note 225 at 180.
[231] Questions within this focus area include asking whether there are any norms or rules that are followed by the community to protect against or to prevent copying.
[232] Charmaz, *Practical Guide*, *supra* note 225 at 25-26, Charmaz uses this term to describe the extensive interviews conducted by participants.

1.3.3.1.1.1 Participant Interviews

The data collected for the research was obtained by conducting qualitative interviews with the participants. In depth, face-to-face interviews,[233] using semi-structured, open-ended questions[234] were conducted with independent fashion designers from design firms in Montreal and Toronto. Face-to-face interviews, as opposed to phone interviews, were conducted where possible to allow the respondents to provide responses in an open manner, which permitted for richer data than simply answering "yes" or "no". This method also allowed me to ask for clarification and to provide different scenarios to which the participant usually responded with an explanation and also to observe the participant in their chosen interview space, which was often their place of business. In this way, some participants would refer to spaces, garments and elements in their business that I would otherwise not be able to see or access had all of the interviews been conducted over the phone.

True to grounded theory, the initial interview questions for each of the four focus areas were broad with the consideration that the sequence of questions would be shaped largely by the participant's response since I was anticipating that their experiences and therefore responses would be different.[235] This encouraged "unanticipated statements and stories to emerge."[236]

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[233] H Russell Bernard, *Research Methods in Anthropology: Qualitative and Quantitative Approaches*, 5th ed (Lanham: AltaMira Press, 2011) Although conventionally a question and answer style interview was (where the interviewees all hear the same question was held to be reliable, Bernard suggests that conversational style interviews "produces more accurate data, especially when respondents really need to get clarifications on unclear concepts" at 190.

[234] *Ibid* at 199.

[235] See Appendix A, "Questions." There are four focus areas and corresponding questions for each of those areas. In the first two interviews, I started with a discussion about the use of intellectual property law, however I changed the sequence of the questions because I noted that this might frame the participant's responses within what they understood as right and wrong, or legal and illegal. Following the first two interviews, I began with a different focus area i.e., what copying means to them.

[236] Charmaz, *Practical Guide*, *supra* note 225 at 26.

During the course of each interview I engaged with the participant to elicit greater details and clarification.[237]

Interviews were conducted at twenty firms based in Montreal and in Toronto, with a total of twenty-six participants.[238] In some cases there were two participants per firm, and in other cases, where there was a partnership, only one of the partners was interviewed. A maximum allotted time of two hours was initially requested. On average, the interviews lasted roughly between one to two hours (and in a few cases, longer) depending on the respondents' answers and time constraints. On occasion, interviews where more than one participant was present, took more than two hours. The interviews were conducted in the city in which the participant lived and conducted business (i.e., studio, workshop, stores). Due to timing and scheduling difficulties one interview was conducted via telephone.

1.3.3.1.1.2 Sampling

The combination of three sampling methods was used for the purpose of gathering data based on the various phases of my research. I initially used convenience sampling based on accessibility.[239] I was interested in finding participants that had encountered situations of design appropriation. However, I quickly learned that this would prove difficult unless the individual

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[237] *Ibid.*

[238] The initial number of estimated participants i.e., between 10-15 per city was merely a guideline, but because of the difficulty involved in accessing more participants, I aimed for roughly that amount see Janice M Morse, "Sampling in Grounded Theory" in Bryant & Charmaz, eds, *Handbook of Grounded Theory*, *supra* note 16, 229 at 231; It is recommended that twenty to thirty participants be used as a sample size for grounded theory research, see John W Creswell, *Qualitative Inquiry and Research Design: Choosing Among Five Approaches*, 3rd ed (London: Sage Publication, 2013) at 157; Phyllis Noerager Stern, "On Solid Ground: Essential Properties for Growing Grounded Theory" in Bryant & Charmaz, eds, *Handbook of Grounded Theory*, *supra* note 12, 114 "20-30 interviews and/or hours of observation adequate to reach saturation" in the context of grounded theory research at 117; see also Carol A Bailey, *A Guide to Field Research*, 2nd ed (Thousand Oaks, CA: Pine Forge Press, 2007) at 64, Bailey suggests that although there is "no easy answer" she finds that 20 participants is a good start for field research; Empirical research on IP and informal norms is one of two streams of research that have been , see Jessica Silbey, "Harvesting Intellectual Property: Inspired Beginnings and 'Work-Makes-Work,' Two Stages in the Creative Processes of Artists and Innovators" (2011) Notre Dame L Rev 2091 at 2098, ins usen a similar research, Silbey conducted interviews on thirty participants.

[239] Morse, *supra* note 238, 229 at 235, this is what Morse refers to as "convenience sampling" – finding participants who would be suitable for the interviews.

had actually made their incident public. There was also the issue of availability – some designers were simply too busy to engage in the interviews due to their dual roles as business owners and creators. Once I had moved to the second sampling method – snowball sampling, [240] I engaged with informants from both Montreal and Toronto in order to make contact with potential participants. This form of sampling is often used for qualitative research where the participants are identified through referrals.[241] These informants provided me with the initial contact information of the participants based on pre-approved methods of contact, which were to ask the participant whether they would agree to be contacted by me prior to making the initial contact.

The justification for using this method, aside from the ease with which the majority of referees agreed to participate, was to help lead me directly to participants that had either directly experienced the specific situations that I was researching and who are willing to discuss their experiences, or who were aware of situations that had occurred via their colleagues.[242] I was referred to a number of participants by my informants at which time I proceeded to conduct snowball sampling based on those initial interviews. While snowball sampling, many of the leads ended up unavailable, and in January 2015, in order to complete my intended number of interviews, I was forced to modify my research ethics application to allow for direct calls to possible participants. I also used theoretical sampling as a complement to snowball sampling when new ideas emerge from the data. [243] This involved "seeking pertinent data to develop [the] emerging theory."[244] The information that I collected from the participants was used to determine whether they had knowledge of intellectual property laws that are applicable to their industry,

[240] Snowball sampling has been defined as a kind of purposeful sampling or chain sampling.
[241] Bernard, *supra* note 233, at 147-148. Snowball sampling works by meeting individuals from the population and asking for them to list or refer potential participants.
[242] An 'excellent candidate' for a grounded theory research is "one who has been through, or observed, the experience under investigation" and they should be willing to share these experiences, see Morse, *supra* note 238, 229 at 231.
[243] Charmaz, *Practical Guide*, *supra* note 225 at 96.
[244] *Ibid* at 96.

whether they have used these laws by way of registration or enforcement and the role of copying and the public domain.[245]

It is important to acknowledge that the outcome of this study is affected in part by the sampling method used due to the geographic proximity and location of the business segment (i.e. independent fashion designers) and the relationship between the interviewees since I was referred to them by their colleagues or by the same informant. For this reason it is important to acknowledge that a different sampling method, and different sample within these two cities could have led to a different range of results. While the possibility of a different outcome does not invalidate the findings of this research project, it should be kept in mind that the findings are the result of the particular sample interviewed. As will be demonstrated in Chapter 6, many of the findings have similarities with norms and intellectual property law studies conducted in different creative communities.

1.3.3.1.1.3 Method of Data Analysis

All of the interviews were conducted using a digital recorder and pre-scripted preliminary questions.[246] Examples were often provided for the participants where the questions required further explanation. I also had a pad and pencil in order to write notes or memos while the interview was taking place. Once the interviews were conducted, I proceeded to transcribe them personally rather than to use assistance or to use software. The reason for this was to re-live the interviews and to remember to add key changes in intonation, points that varied in the tone and demeanour of the participant and to really familiarize myself with the data.[247] I found it

[245] Note that the interviews were predominantly conducted use non-legal, lay language to convey and the concepts and information to the participants as they were not well versed in intellectual property law and technical terms. The purpose of this was to prevent alienating participants and to enable more accurate responses. However, where a legal term was used, it was explained to the participant, e.g., the public domain.
[246] Charmaz, *Practical Guide*, *supra* note 225 at 30-31.
[247] *Ibid* (the researcher should be familiar with the data earlier on in the process).

important to engage in transcribing the interviews because much of the information was also in the tone of the responses in addition to the verbal responses themselves. In order to do this, I transcribed the interviews the first time for their data and the second time for any indications of change of tone, noises (e.g., tapping on the table) or other indices.

Coding qualitative data consists of labeling the data in various categories and accounts in order to begin sorting and linking them together.[248] Coding "shapes an analytic frame from which you build the analysis"[249] Rather than using word-by-word or line-by-line coding, I engaged in question-by-question[250] and incident-by-incident coding.[251] Due to the way that the questions were sequenced, and the nature of the data sought, it was difficult to fully engage in line-by-line coding in a comparative manner.

Charmaz suggests that coding from full interview transcriptions rather than from memos taken during data collection may be a much better source of data because it provides in-depth information and allows the researcher to return to the information as new ideas arise.[252] What was interesting in the initial coding was that despite the questions that were posed to the participants, which were pre-scripted, the categories and themes emerged from different segments of each interview. For example, while not directly asking whether or not the participant related to being an artist, but rather whether they used art or utility in their designs, at various points throughout various interviews, some participants likened their work to having a

[248] *Ibid* at 45; Melanie Birks & Jane Mills, *Grounded Theory: A Practical Guide*, 2nd ed (London: Sage, 2015) at 88-89, codes are used to build categories which are used to build the conceptual framework. There are several layers of coding, including initial, intermediate and advanced which help at various levels of the theory and analysis; Charmaz breaks these three levels into initial, focused and theoretical coding, see Charmaz, *Constructing Grounded Theory*, 2nd, *supra* note 169 at ch 5 & 6.
[249] Charmaz, *Practical Guide*, *supra* note 225 at 45.
[250] *Ibid* at 50, coding line-by-line is very useful and is conducted where each line of the transcribed data is coded and categorized.
[251] *Ibid* at 53, coding incident-by-incident is conducted by comparing incidents.
[252] *Ibid* at 70.

component of artistic output.[253] This also occurred when discussing personality and aesthetic, another question which was not explicitly asked but which emerged at various points in the interview process with a number of designers. Once I completed the initial coding process, I then engaged in re-coding to look for emerging categories, and then grouped them into categories and themes.

1.3.3.1.1.4 Confidentiality and Anonymity

The participants were offered complete anonymity and confidentiality of their responses with the knowledge that any quotes used from the interviews would be pre-approved by them and not used without their permission.[254] The reason for promising this level of confidentiality to the participants was from my prior knowledge that the design communities were incredibly 'small' in both cities and that anonymity would allow the participants to share information knowing that they were able to veto, end or cancel the interview at any time.

Further, during initial contact and in some cases prior to the beginning of the interviews and to the partcipants signing the consent forms, some of the participants asked for assurance of anonymity. For this reason I took the time to read the consent forms to them to outline that their excerpts would not be quoted without their permission and that they had the right to withdraw at any time, even after the interview was concluded.

Prior to incorporating the quotes within the body of this text, the respondents were given an opportunity to read the excerpts of their quotes and approve them. The excerpts used in this dissertation were emailed to the respondents in a password-protected document and approved via email. All but two of the participant firms responded affirmatively to the email request to use quotes. Both of the participants were subsequently contacted; one stated that they did not have

[253] (Participant, Interview July 31 2014, at 9-10); (Participant, Interview October 23 2014 at 16).
[254] The promise to uphold anonymity was guaranteed in the consent form. The participants had the opportunity to review the quotes being used prior to having them published.

the time to review the quotes and the other said that they would follow up but never did; this lack of response was treated as a lack of consent to use the quotes, and as a result the quotes were not used. However, at no time did they ask to be withdrawn from the study ether by telephone or by email.

In addition to the right to review the quotes, any identifying information was removed and replaced with "[redacted]." Further, the quotes have been mildly edited for grammar; any changes are superficial and have no substantive impact on the content of the quotes. This was done to prevent their identities as Montreal or Toronto participants being revealed, and therefore pauses and other nuances were removed from the quotes.

1.3.3.1.2 Quantitative Data

To support the first focus area of the study, i.e., determining if designers used intellectual property law, I reviewed the existing registration databases for intellectual property laws, namely, copyright, industrial design and trademarks databases of CIPO. Databases for unregistered rights, which include unregistered copyright, trade secrets, and common law passing off do not exist and were therefore not included.

The general parameters of my research were to collect information on all applications recorded and available on the CIPO database for a twenty-year period from January 1, 1995 to January 1, 2015[255] based on the relevant categorical classifications in each database.[256] I

[255] At the proposal phase, I intended only to include registrations between January 1, 2005 and January 1, 2010, however, once I began to record the data that was available on the database, I realized that the timeframe was too short to be able to collect any valuable information from the registrations. I then decided to broaden my search to include the twenty year range which would provide me with data both before the major shift in textile sector in 2005, when quotas were removed, and a short period after they were completely eliminated to see whether there would be any change in pace for registrations. On January 1, 2005 based on the World Trade Agreement on Textiles and Clothing, Canada removed all import quotas which otherwise acted as tariff-based duty on foreign, low cost clothing and textile imports. At this juncture, the Canadian clothing and apparel landscape changed from one that was home-based, to one that was based in major retail. The current framework is relatively the same, in that the elimination of quotas has not since changed, see Canadian Apparel Federation, *supra* note 139, *International Trade: Trade Agreements*, online: <http://www.apparel.ca/trade_agreements.html>.

primarily used the electronic databases available on the CIPO websites. A description of how the data was collected will be provided for each database.

1.3.3.1.2.1 Copyright

I immediately encountered two issues when attempting to record copyright registrations for fashion design (note that textile designs were not included in this search). The first issue I encountered was that because copyright protection subsists without formalities, registration is not required and a search of registrations would therefore not provide complete, and therefore accurate data on the number of copyright protected works. The second issue has to do with the registration database itself. The copyright database is not as easily searchable by category of work (e.g., artistic, musical, literary) in the way that the trademark and industrial design databases are. In the case of the trademark registration, marks are searchable based on the categories of the Vienna Code,[257] while industrial designs are searchable based on its own classification code.[258] The copyright database can be searched based on "category" but these categories are not subdivided. Instead, there are four categories of works (i.e., artistic, musical, dramatic and literary), and neighbouring rights (i.e., sound recording or performances). It is possible to search by title as well, however it is not helpful because it includes the keywords under all categories. For example, when I used the keyword "dress" the system retrieved a wide array of works such as "'Picnic' dress rehearsal for University Players" but did not provide

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[256] For example, under trademark law, I searched for marks and distinguishing guises based on the Vienna classification code of wares. When I searched for industrial design registrants I will use the classification code 006 for clothing and apparel since designers cannot register their articles under any other category. More details are provided below.

[257] The Vienna Classification is an international classification system that was established initially in 1973 for the purpose of facilitating registration and search of trademarks, especially at the international level. The classification system is a hierarchical numeric system that corresponds with the categories and sub-categories of figurative elements, see WIPO, *About the Vienna Classification*, online: <http://www.wipo.int/classifications/vienna/en/preface.html>.

[258] Canadian Industrial Design Classification Standard, see CIPO, *Industrial Design Office Practices*, (21 March 2013) at 5.1, online: <https://www.ic.gc.ca/eic/site/cipointernet-internetopic.nsf/eng/wr00260.html#n5.1>.

additional information other than the fact that the work was categorized as "artistic."[259] Therefore there is no information provided in the findings section of this thesis about copyright registrations.

1.3.3.1.2.2 Trademark

The CIPO trademark database is searchable by a number of categories and classification systems. Trademarks can be searched using the Vienna Classification system which classifies the works under the figurative elements of the mark itself,[260] and the Nice Classification system, which classifies the work based on the category of goods or services for which the mark was registered.[261] The search for the total number of designs and distinguishing guises was conducted by keying in numeric codes based on the Vienna Classification code 9.3 Clothing and the Nice Classification code 25. The search yielded results that were cross referenced between the two classifications systems pulling figurative elements of marks related to clothing and related to the classification of goods. The findings are summarized and discussed in Chapter 5.

1.3.3.1.2.3 Industrial Design

The industrial design online database is structured based on a classification system and includes all applications, whether registered or not, currently active or in the public domain. Apparel is classified under code 006 and is subdivided into a number of different types of apparel such as "garments", "headwear", and "footwear". For the purpose of this study, the data collection focused on the category of "garments", which is numerically classified as 006-03, subdivided into six categories, including i) dresses, skirts, slips and nightgowns 006-03-01, ii) aprons, 006-

[259] See e.g., "'Picnic' dress rehearsal for University Players" (artistic), Douglas J MacLellan, Can Copyright No 1975153 (25 February 2010) registered.
[260] WIPO, *Vienna Agreement Establishing an International Classification of the Figurative Elements of Marks*, 1863 UNTS 317 (in force 9 August 1985), online: <http://www.wipo.int/treaties/en/classification/vienna/>.
[261] WIPO, *Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks* (as amended on September 28 1979), online: <http://www.wipo.int/wipolex/en/details.jsp?id=12617>.

03-02 iii) blouses, shirts and sweaters 006-03-03, iv) slacks and trousers for men, women and children 006-03-04, v) jackets, coats, vests and capes 006-03-05, and vi) pyjamas 006-03-06. I only selected categories 006-03-01, 006-03-03, 006-03-04 and 006-03-05 because they are the most relevant to the type of garments created by the partcipants interviewed for this study. The results are displayed in a chart, which indicates the total number of registrations, the total number of Canadian registrations, and the number of registrations that were cross referenced to other categories. These findings are summarized Chapter 5.

1.3.3.2 Primary and Secondary Data Sources

In addition to the empirical research conducted using qualitative and quantitative methods, I have used primary data sources that include legislative instruments such as laws, bills and regulations. Case law was examined in order to collect additional information on the first focus area because it would reveal whether designers who have been involved in litigation registered their designs or not, and to determine what laws they relied upon e.g., the industrial design and copyright overlap as opposed to industrial design law. This is important because it provided insight into situations where intellectual property rights were not only relied upon but also enforced.

Secondary data sources include doctrine, books, essays and journal and newspaper articles. In addition to these sources, I have included reports, including governmental and non-governmental blogs and websites.

1.3.3.3 Limitations

There were several genuine limitations that arose during the course of the research, particularly related to the interviews. The first limitation was the fact that in their dual role of designers and small and medium size enterprises, a number of participants had allowed only a limited amount of time to allocate to the interviews and answer all of the questions, as many of them were in the

midst of preparing for their next collections. Due to the time constraints, not all of the questions were asked of each of the participants and in some cases, participants did not go into detail in their responses.

Another limitation mentioned above, was the challenge in gathering participants to be interviewed. My initial sampling technique involved referrals, which were provided to me by informants and then participants. Although the informants and participants had obliged in a majority of instances, several of the potential participants, although they had previously agreed to be contacted by me, did not respond to my follow-up emails. This challenge was remedied with a modification made to my ethics application, requesting to directly be involved in contacting participants. Following the adjustment, I was able to email or call the participants directly rather than rely on referrals.

As well, although the interviewees were guaranteed full anonymity and confidentiality, a number of participants withheld information pertaining to the names of previous employers, colleagues, or others, whom they had used to provide examples for their responses. I was prepared for this aspect due to my conversation with a designer prior to writing my proposal about the uniqueness of the industry and the possibility that they could face sanctions if certain information was made public. Therefore, if the participant did not disclose or stated, 'I worked for a company' or a 'designer I know' rather than naming them, I did not push them for greater detail than was offered in an effort to keep the participant at ease and continuing to participate.

This aspect is also apparent in the write up and analysis phase. I intentionally presented the findings in a way that would not reveal the identity of the participants. For example, some examples of experiences or situations provided by the participants have been omitted so as to not reveal their identities. I did not conduct a comparison of variables between the two cities based

on the fact that specific individuals may have been identified due to the small sample (and geographical proximity). As a result I did not conduct a detailed comparison between the responses from Montreal and those from Toronto, and instead opted to address these differences in the literature on economic clusters and on policy. Where I have made comparisons, they are not specific to or identify a particular participant or group of participants.

1.4 Chapter Roadmap

The dissertation is divided into seven chapters including this one. For the purpose of contextualizing the characteristics of the independent fashion design industry in Montreal and in Toronto, which is the environment in which the participants interviewed for this study live, work and design, Chapter 2 will begin by providing an overview of the economic, social and cultural significance of the fashion industry, in Canada and particularly in Montreal and Toronto. The second part of the chapter will illustrate the various aspects of the fashion industry. These elements include the segment, design and development process, fashion production cycles and the particular elements that are unique to this particular industry. Here, I explain both business and design considerations that are unique to the independent fashion design segment in this particular segment, and that implicate decisions regarding the design, production and marketing of a collection. This chapter provides context both about the legal framework and the participant interviews.

In Chapter 3, I demonstrate that the lack of clear policy on design at the national level has resulted in design legislation that is disjointed and ambiguous. Nevertheless, despite the fact that a national policy does not exist for design, it is possible to protect it under several discrete yet overlapping legislative frameworks. In the same chapter, I demonstrate that policies concerning the fashion industry have historically been deployed in apparel and textile-manufacturing sector

where design is classified as value added activity to support manufacturing. Finally, the significance of the fashion design clusters, as distinct from the garment manufacturing sector, have been recognized by the regional levels of government and has therefore received varied support from local associations, provincial and municipal governments. The purpose of this chapter is to highlight policies that have had varying effects on the independent design community and have played a role in defining the Canadian industry through different levels of government.

Chapter 4 provides a detailed framework for all of the possible means of protection of fashion design, under copyright, industrial design, trademark, trade secret and patent law, a framework that is quite complex. This chapter follows a doctrinal approach as it points out the eligibility requirements, rights and enforcement as well as outline all of the strengths and limitations of the legislative framework as it relates to the unique characteristics of the Canadian independent fashion design industry. In this chapter, I review case law and use examples to explain the applicability of law to fashion. This provides a foundation for drawing parallels in the analysis of the findings in the chapter that follows.

Chapter 5 is comprised of several sections and presents both qualitative and quantitative data sets obtained from a survey of registered designs on the Canadian Intellectual Property Organization (CIPO) database. It begins with a breakdown of registrations for elements of fashion design located on the database and then discusses why the segment does not register their designs. Chapter 6 considers the participant's perspective on copying and the public domain. It then navigates the negative copying norm by providing the elements of the norm, and the various prevention and enforcement mechanisms developed by participants. In conclusion, the final

chapter synthesizes the findings, impact and contribution of this research in the context of empirical legal research and theory and as it relates to policy amendments.

2 CHAPTER TWO - Canadian Fashion Industry: Significance and Profile

This chapter has two main objectives. The first is to provide an overview of the economic, social and cultural significance of the fashion and apparel industry in Canada. It will put into perspective the various sectors that are affected by fashion's economic contribution and also explain the cultural and social benefits that have helped shape the creation of identity in Montreal and Toronto fashion clusters. This section will provide the foundation for Chapter 3, which explains the policies that have contributed to the structure of the industry within these two cities.

The second objective is to construct a narrative of the segment being interviewed with the intention of situating the participants and their segment within the broader industry (i.e., the difference between fast or mass fashion retailers and independent designers). This narrative will explain the market segment, design and development process, market and production cycles that play a role in the design decisions made by participants on a daily basis. These elements provide important insight that contribute to understanding the development of norms within the two design communities instead of the use of intellectual property laws.

2.1 Canadian Fashion and Apparel Industry: Economic, Cultural, and Social Significance

2.1.1 Economic Significance: The Numbers

The fashion and apparel sector plays an important role in the Canadian economy, despite the fact that its structure has dramatically changed over the past few decades due to international trade and development policies.[262] The apparel and textile[263] sectors are comprised of a number of

[262] Chapter 3 provides a comprehensive discussion about the policies that have helped shape the fashion industry in Canada.

different and broad interconnected activities such as design,[264] as well as different channels of production, including manufacture, wholesale, and retail, which also make up the vertical supply chain.[265]

There is relatively little information about the economic contribution of the *design* segment of the industry. Since the fashion and apparel industry is not counted as a "core copyright" industry,[266] and is instead regarded as one that is divided into design and manufacture, statistics on the design activity alone are not counted but are often lumped in with apparel and textile production or with specialized design industries.[267] The lack of data is exacerbated by the fact that there is a void in empirical research concerning industrial design in Canada generally.[268] Despite this it has been reported that there has been a shift towards

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[263] While textiles play a great role in the industry, they are not the focus of this study and will not be discussed here. Where it is included in the statistics, it will be made explicit.

[264] Creative activities in relation to design include, "photography, creative direction, production, stylists, casting directors, fashion consultants, hair and make-up artists" British Fashion Council "The Value of the UK Fashion Industry" prepared by Oxford Economics (Oxford: Oxford Economics, 2010) at 21, Table 2.1 ["UK Fashion Industry"].

[265] See *Global Value Chain*, *supra* note 141 at 2.

[266] WIPO, *Guide on Surveying the Economic Contribution of the Copyright Industries: 2015 Revised Edition*, Publication No 893 E (2015) at 60, online: <www.wipo.int/edocs/pubdocs/en/copyright/893/wipo_pub_893.pdf>. Notably, the Report states that fashion would be considered under textiles at 188 fn 87. This study focuses on fashion design and does not include textiles. The textile industry is distinct. The participants interviewed for this paper are not from the textile industry.

[267] In a 2004 study undertaken to measure the economic contribution of copyright-based industries in Canada by an independent firm for WIPO. The firm observed that it was "not apparent how all these items substantively relate to copyright" they further stated that "they are noted for completeness in describing the WIPO approach." And concluded that while the contribution of these non-core industries "may be sizable in total" that "the available data is considerably less precise than for core CB industries. Certain non-core industry data is available (most notably architecture, engineering and survey, as well as telecommunications and general retailing and wholesale). However, these constitute only a portion of the total non-core industries described in the WIPO guidelines. Perhaps more importantly, there is no obvious way to determine the relevant percentages attributable to the non-core industries. Consequently, there is no satisfactory means of estimating the GDP (or employment) of non-core industries based on available NAICS data" see, WIPO *The Economic Contribution of Copyright-Based Industries in Canada*, prepared by Wall Communications for Canadian Heritage, Publication No 624e (2004) at 18, online: WIPO <http://www.wipo.int/export/sites/www/copyright/en/performance/pdf/econ_contribution_cr_ca.pdf>; For example, it has been indicated that of the provinces surveyed in 2012, Ontario and Quebec have seen the most revenue growth in the Canadian 'other' specialized design sector, at 51.9% and 19.1% respectively, which includes fashion design, The categories here include "clothing, shoes, textiles and jewellery, theatrical set design, costume design, and the design of floats," see Statistics Canada, "Service Bulletin: Specialized Design Services" Catalogue No 63-251-x (Ottawa: Statistics Canada, 2012) at 1.

[268] CIPO, *Industrial Design Activities in Canada*, *supra* note 127 at 3.

enhanced capabilities in areas like design and marketing among new graduates entering the industry.[269]

Canada's fashion and apparel industry was once predominantly manufacturing intensive, but has shifted towards service and value added products, which includes design.[270] In 2008 the apparel industry was reportedly the nineteenth largest manufacturing sector,[271] and in 2004, the sixth largest manufacturing employer in Canada.[272] In 2014, the apparel-manufacturing sector in Canada was comprised of 1483 establishments[273] employing roughly 19,500 individuals[274] and accounted for $5,537.9 million dollars in total revenues.[275] Further, this sector has been quite active in export markets, predominantly to the United States.[276]

The retail sector also plays a prominent role in the apparel industry. In 2014, the retail segment grew several points from the previous year to roughly $26-27 billion dollars in annual

[269] See *Pressing Ahead, supra* note 12 at 94, this is mirrored in training of entry-level personnel is that they lack training in production and "prefer to limit themselves to the design and marketing aspects of the business" at 115.
[270] *Ibid* at 18; For example, sales in manufacturing for clothing alone has steadily declined from 2,818.3 in 2011 to 2389.8 in 2015 (in $ millions), see Statistics Canada, "Manufacturing Sales, By Subsector" (last modified September 16 2016) CANSIM table 304-0014, online: <http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/manuf11-eng.htm>.
[271] *Global Value Chain*, *supra* note 141 at 2.
[272] Canada, Apparel Human Resources Council, *The Canadian Apparel Industry: The Shape of the Future*, prepared by Richter Consulting for Apparel Human Resources Council Sector Council Program (2004), online: Apparel Connexion <http://www.apparelconnexion.com/_Library/Labor_Market_Information_Study/2004_-_Labour_Market_Information_Study.pdf> [*Shape of the Future*] at 2.
[273] See Innovation, Science and Economic Development Canada, Consumer Products, *Apparel Industry Profile 2010-2014*, online: <https://www.ic.gc.ca/eic/site/026.nsf/eng/h_00070.htm> [*Apparel Industry Profile 2010-2014*].
[274] *Ibid*, this number is an estimate provided by Statistics Canada (compare this to 2013 at 26,200); the NAIC 315 2008 numbers were under 33,000 employees, see *Pressing Ahead*, *supra* note 12 at 31.
[275] MarketLine Industry Profile, "Apparel & Non-Apparel Manufacturing in Canada: October 2015" Reference Code 0070-2705 (October 2015), online: <www.marketline.com> the definition for "[a]pparel covers all clothing except leather, footwear and knitted items" at 7.
[276] This amount has decreased over the years, for example the US used to account for 94% of exports in 2000, but this number fell to 85% in 2009, see The Conference Board of Canada, "Canada's Textiles and Apparel Industry: Industry Profile Spring 2010" Publication No 10-246, (April 30 2010) at 2 [*Industry Profile Spring 2010*]; in 2014 the number has dropped to 79.5%, see *Apparel Industry Profile 2010-2014*, *supra* note 273.

sales revenues.[277] Of this amount, just over 51% was attributed to women's wear followed by menswear at 30.2%, and the remainder was children's wear.[278]

The Canadian landscape for fashion and apparel has been referred to as 'fragmented', but is nonetheless most heavily concentrated in Quebec and Ontario.[279] Comprised overwhelmingly of small to medium sized firms (SMEs),[280] roughly 67% of the textiles and apparel sector is comprised of businesses that employ less than ten employees, while 81% have fewer than twenty employees.[281] In 2009, the total number of employees in the industry was 73,000 (including manufacturing, retailing, and wholesaling).[282]

2.1.1.1 At a Glance: Montreal and Toronto[283]

In 2004, the Design Industry Advisory Committee reported that Montreal had the world's sixth largest general design workforce in North America;[284] in 2009, a fashion industry overview

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[277] Canadian Apparel Insights, "2013 Canadian Retail Apparel Market in Review" Trendex North America (April 2014), online: <http://www.apparel.ca/_Library/images/Canadian_Newsletter_-_April_2014.pdf>; MarketLine Industry Profile, "Apparel Retail in Canada: May 2015" Reference Code 0070-2005 (May 2015) online: <www.marketline.com >. This study shows that between 2010 and 2014, there were low levels of growth, expect for in 2014 where the market demonstrated a moderate rate of growth. The study finds that in 2014, the "apparel retail industry had total revenues of $26.1bn" at 7.

[278] *Ibid*.

[279] The Conference Board of Canada, "Canada's Textiles and Apparel Industry: Industry Profile Spring 2015" (May 21 2015) Publication No 7062 [*Industry Profile Spring 2015*]. This study recognizes the fact that the there has been a shift from manufacturing to niche products created by SMEs. Further, it finds that "some segments of the industry remain concentrated. For example, 15 per cent of firms in the fabric mills segment have more than 100 workers" at 1.

[280] The definition of SMEs in Canada: a business establishment with between 1-499 paid employees, see Industry Canada, "SME Research and Statistics: Key Small Business Statistics" (Ottawa: Industry Canada, 2013), online: <http://www.ic.gc.ca/eic/site/061.nsf/eng/02803.html>.

[281] *Industry Profile Spring 2015, supra* note 279 at 1 [Industry Concentration Table]; In fact, the most recent Industry Canada research in this area confirms that the majority of Canada's apparel manufacturing sector is comprised of SMEs, see *Apparel Industry Profile 2010-2014*, *supra* note 273; *Shape of the Future*, *supra* note 272 at 51, using 2001 census data, the report states that 87% of the apparel industry workforce is concentrated in SMEs with under 50 employees.

[282] *Pressing Ahead*, *supra* note 12 at 27, this number includes a broader range of activities than just "traditional clothing and accessory manufacturing" and includes the NAIC codes 315 (clothing and accessories manufacturing), 41411 (clothing and accessories wholesaling), 3162 (footwear manufacturing), 41412 (footwear wholesaling), 314 (textile products), 448 (stores that develop "at least" some of their own products) at 23-24.

[283] Due to the lack of updated raw data as well as the fact that the fashion industry is comprised of a number of distinct activities (i.e., manufacturing, design, retail) it is difficult to obtain accurate statistics that reflect the overall industry and specialized sub-disciplines. For example, fashion design is often lumped in together with other design activities. Therefore, many of these numbers are derived from studies that were undertaken in different years and different sources.

report indicated that there were 50,000 people employed specifically in the fashion manufacturing, distribution, and retail sectors in Montreal.[285] In 2011, there were roughly 8,320 employed in apparel manufacturing in Montreal, of the estimated 14,500 individuals in all of Quebec.[286] Reportedly, Quebec's market for apparel production increased from 55% to 60% from 2010 to 2014.[287]

Toronto houses the "third largest design workforce in North America."[288] Of the 28,000 designers living in Ontario (which include fashion designers), 75% of them live in Toronto.[289] Because fashion designers are categorized as "specialized designs services" alongside graphic designers and other subdisciplines it is hard to gauge exactly how many there are.[290] In 2004, it was reported that the Toronto fashion cluster was comprised of 50,000 individuals – and although at that time over half of that number pertained to fashion and apparel manufacturing,[291]

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[284] Arlene Gould, "Design Matters: Final Report" Design Industry Advisory Committee (Toronto: DIAC, 2004) at 10-11.

[285] Ville de Montreal, "Fashion and Apparel in Montréal" *Ville de Montreal* (2009), online: < http://ville.montreal.qc.ca/pls/portal/docs/PAGE/MODE_FR/MEDIA/DOCUMENTS/FICHE%20SECTORIELLE%20MODE_2009AN.PDF > at 2 [*Apparel in Montréal 2009*]; Quebec, "Montréal's new fashion strategy" Quebec (March 19 2009) online: <http://www.international.gouv.qc.ca/en/mexico/actualites/6358?pReturnUrl=%2Fen%2Fmexico%2Factualites%3Frp%3D10301%26noLang%3D2%26year%3D-1%26sec%3D-1%26idRegr%3D-1%26page%3D13>.

[286] Ville de Montréal, *Profil Sectoriel: Fabrication de Vêtements (scian 315)*, Agglomération de Montréal (October 2013) at 9.

[287] See *Apparel Industry Profile 2010-2014*, *supra* note 273, the updated report states that Quebec makes up 60% of the value of Canada's apparel production. However, there were no statistics available for Ontario.

[288] Gould, *supra* note 284 at 2; City of Toronto, Toronto Economic Development, "Key Industry Sectors: Fashion/Apparel" online: <http://www1.toronto.ca/wps/portal/contentonly?vgnextoid=2436c1b5c62ca310VgnVCM10000071d60f89RCRD&vgnextchannel=401132d0b6d1e310VgnVCM10000071d60f89RCRD> [*Key Industry Sector*s].

[289] *Ibid*.

[290] Nonetheless, in 2014, a survey indicated that there were 14,080 total individuals employed under NAICS 5414 *specialized design services* which include interior and industrial design, graphic and other design including clothing, which is categorized under 54149, see City of Toronto, "Toronto CMA 2014 Industry Profiles" City of Toronto, at i144, online: <http://www1.toronto.ca/wps/portal/contentonly?vgnextoid=ef1d3c6d9c8ba310VgnVCM10000071d60f89RCRD> ["Toronto CMA 2014"].

[291] City of Toronto, Toronto Economic Development, "Fashion/Apparel Sector Profile Report" *City of Toronto*, (2004-2005) online: City of Toronto <http://www1.toronto.ca/static_files/economic_development_and_culture/docs/Sectors_Reports/TOREcoDevFashion27838.pdf> at 2 [*Sector Profile Report*].

the number in manufacturing has declined dramatically.[292] A 2014 study conducted on the Central Metropolitan Area of Toronto indicated that the total number of individuals employed in clothing manufacture ring had dropped to under 6000.[293] Despite this, the total export dollars of clothing manufactured in Toronto increased to $1 billion in 2015, an increase of 23.27% from 2014.[294]

2.1.2 Cultural and Social Significance

United Nations Educational, Scientific and Cultural Organization (UNESCO) defines "cultural activities, goods and services" as those which

> …at the time they are considered as a specific attribute, use or purpose, embody or convey cultural expressions, irrespective of the commercial value they may have. Cultural activities may be an end in themselves, or they may contribute to the production of cultural goods and services.[295]

Fashion design, like visual and performing arts, architecture and music has the capability of conveying cultural expression and also greatly contributes to the production of other goods, services and forms of culture such as music, film and art.[296] Indeed, UNESCO has specifically acknowledged and recognized that fashion and designs are both culturally and socially significant, stating that

> [s]ince 1995 UNESCO has been involved in promoting design and fashion as an art of living and an important cultural industry. Furthermore, the work being done by stylists

[292] The study was conducted on Clothing Manufacturers NAICS 315 based on a sample representation of 2800 households, and does not include manufacturing for textile and textile mills. If textile mills (NAICS 313-314), totaling 3500 employees were added to this number then it would equate to 9,500 employees for manufacturing in total, see City of Toronto, "Toronto CMA 2014" *supra* note 290.
[293] *Ibid*. Total employment for clothing manufacturing NAICS 315 was at 5680 individuals.
[294] City of Toronto, "Economic Dashboard – Annual Summary, 2015" City of Toronto (February 17 2016), online: < http://www1.toronto.ca/City%20Of%20Toronto/Economic%20Development%20&%20Culture/Business%20Pages/Filming%20in%20Toronto/Info%20for%20residents/backgroundfile-90508.pdf >.
[295] UNESCO, *Convention on the Protection and Promotion of the Diversity of Cultural Expression* 2005 (October 20 2005) in force 18 March 2007, in UNESCO, Records of the General Conference, 33rd session, Paris, 3-21 October 2005, (2 vols, 2005), vol I at 83, art 4.
[296] Not only is it a cultural industry in of itself, but also contributes to a number of cultural industries such as film, music, theatre, magazines, and the arts in general.

> and designers continually exploiting tradition and local materials is an undeniable source of social development.[297]

As Diana Crane and Laura Bovone suggest, there are a number of way in which fashion can be studied as material culture in sociology, which includes "'meaning-making processes'", the "cultural production in which symbolic values are attributed to material culture through collective activities", the attribution of symbolic values, and the way in which these attributions are responded to by those who use or consume it.[298] Indeed as Joanna Entwhistle explains, "[o]ne way to think of fashion is as a *culture industry*. Fashion is the product of a complex set of interactions between various agents set in temporal and spatial relations to one another – between design houses, fabric and clothing manufacturers and retailers and the fashion buying public."[299]

As Malcolm Barnard illustrates, fashion serves a number of cultural functions including communication, individual expression, status and social roles and rituals.[300] Fashion has an inherent symbolic and communicative function, allowing the expression of identity (i.e., class and status) for those who wear it.[301] Fashion provides individuals with the means to actively express their social identities, which Fred Davis suggests includes "any aspect of self about which individuals can through symbolic means communicate with others, in the instance of dress through predominantly nondiscursive visual, tactile, and olfactory symbols, however imprecise,

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[297] UNESCO, "Cultural Diversity: Common Heritage, Plural Identities" prepared by Milagros del Corral, prepared by Monique Couratier, Michèle Garzon (October 31 2001) at 33, online: UNESCO <http://unesdoc.unesco.org/images/0012/001271/127161e.pdf>.

[298] Diane Crane & Laura Bovone, "Approaches to Material Culture: The Sociology of Fashion and Clothing" (2006) 34 Poetics 319 at 321-324.

[299] Joanne Entwistle, *The Fashioned Body: Fashion, Dress & Modern Social Theory*, 2nd ed (Cambridge: Polity Press, 2015) at 197 [emphasis in original].

[300] Malcolm Barnard, *Fashion as Communication*, 2nd ed (New York: Routledge, 2002) ch 2.

[301] As Diana Crane observes, clothes were very much an indicator a number of factors including class, gender and geographic indication. Fashion allows individuals to construct and express their identity in many forms through preindustrial to present times, see Diana Crane, *Fashion and Its Social Agendas: Class, Gender, and Identity in Clothing* (Chicago: University of Chicago Press, 2000) at 3-5.

and elusive." [302]

Importantly, while fashion design enables consumers to engage in such communicative functions of identity,[303] fashion designers themselves, as will be demonstrated in Chapter 6, also embody these traits of symbolism and identity as creators of their collections, brands and overall aesthetic. Fashion performs a number of communicative roles, and as Johanna Gibson observes, "[a]rguably fashion provides one of the clearest performances of one's personal identity in a public space, performing (quite literally) a cultural as well as historical development in the relationship between public and private."[304] It could be said that this statement applies both to the creator of the design and the individual who wears the design equally.

Not only does fashion convey and communicate individual identity, but it is also connected with 'place.' As Frédéric Godart suggests, "[g]eography plays a crucial role in the fashion industry. For example, clothes are readily associated with specific countries and cities, …"[305] This is quite strongly demonstrated in what is referred to as 'fashion capitals,' which traditionally included cities such as London, Paris and Milan and New York, but has grown to include more over the past several years.[306] In a study conducted by Oxford Economics for the British Fashion Council, it was revealed that the intangible benefits of the British fashion

[302] Fred Davis, *Fashion, Culture and Identity* (Chicago: University of Chicago Press, 1992) at 16.
[303] Craig J Thompson & Diana L Haytko, "Speaking of Fashion: Consumers' Uses of Fashion Discourses and the Appropriation of Countervailing Cultural Meanings" (1997) 24 Journal of Consumer Research 15, the authors suggest that individuals "develop a personal identity through a contrast between their perceived fashion orientation and that of others in their social setting" at 21.
[304] Johanna Gibson, "Looks Familiar: Fashion, Design and Diverse Identities in the Digital" in Irene Calboli & Srividhya Ragavan, eds, *Diversity in Intellectual Property Law: Identities, Interests, and Intersections* (Cambridge: Cambridge University Press, 2015) 384 at 389.
[305] Frédéric Godart, "The Power Structure of the Fashion Industry: Fashion Capitals, Globalization and Creativity" (2014) 1:1 International Journal of Fashion Studies 39 at 39 [abstract]; Crane, *supra* note 301, Crane provides an account of the influences of designers based on the geographical markets they originated from – she states that "[w]hile students in French design schools produced clothes showing the influence of leading desginers, the work of British design students was more likely to be influenced by working class street culture" at 160.
[306] Frédéric Godart, *Unveiling Fashion: Business, Culture, and Identity in the Most Glamorous Industry* (New York: Palgrave Macmillan, 2012) at 55-57.

industry has had positive impacts in a number of ways including enhancing the country's image and brand equity, promoting it as a shopping capital, and boosting tourism.[307]

Even though 'Canada' has traditionally not been associated with a strong fashion 'identity' or labeled as a fashion capital, more and more, the Canadian fashion industry has been garnering recognition and notoriety both domestically and internationally.[308] There is also a higher recognition of goods made in Canada, as noted by a study stating that Canadian manufacturing companies have been concentrating on producing "premium apparel for niche audiences. This specialty apparel has attracted Canadian consumers interested in high-quality good with the 'Made in Canada' label, and garnered increased attention in export markets. […] demand for Canada's specialty apparel goods has increased…"[309]

However, Canada, as a country has not yet established itself as a fashion purveyor. An articulation of Canada's soft fashion identity is demonstrated in Julia Pine's curator statement for

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[307] "UK Fashion Industry", *supra* note 264 at 13-14.

[308] A number of events such as the takeover of fashion week by IMF, which is the same company that produces fashion week in New York and London; the recent Canadian Arts and Fashion Awards (CAFA), which this year drew the likes of international supermodels, Hollywood actresses and also the Prime Minister's wife, Sophie Trudeau; the expansion of Canadian based brands outside of Canada, see Angelyn Francis, "Sophie Grégoire Trudeau's Outfit at the 2016 CAFA Gala was as Canadian as it Gets" Huffington Post (18 April 2016) online: <http://www.huffingtonpost.ca/2016/04/16/sophie-gregoire-trudeau-cafa-2016_n_9708560.html>; Lauren La Rose, "Fresh Off a Successful Paris Showcase, Greta Constantine Looks to Future as Label Marks 10th Anniversary" *National Post* (15 March 2016), online: <http://news.nationalpost.com/life/style/fresh-off-of-a-successful-paris-showcase-greta-constantine-looks-to-future-as-label-marks-10th-anniversary> ; Marie Saint Pierre, *Miami Boutique Opening Party*, (16 November 2015) online: <https://www.mariesaintpierre.com/ca_en/news-ca/miami-boutique-opening-party/>; Emily Farra, "Fall 2016 Ready-to-wear: Beaufille" Vogue (17 February 2016), online: < http://www.vogue.com/fashion-shows/fall-2016-ready-to-wear/beaufille> discussing the line's first New York fashion week; media frenzy when Kate Middleton, Duchess of Cambridge wore a Smythe blazer on her visit to Canada in 2011, see Deirdre Kelly, "Kate Middleton Among the Fans of This Business-Savvy Fashion Designer" *The Globe and Mail* (26 January 2016) online: <http://www.theglobeandmail.com/report-on-business/careers/business-education/kate-middleton-among-the-fans-of-this-business-savvy-fashion-designer/article28393437/> ; David Graham, "Montreal's Rad Hourani First Canadian Invited to Present Collection of Haute Couture in Paris" *Toronto Star* (18 January 2013), online: <https://www.thestar.com/life/2013/01/18/montreals_rad_hourani_first_canadian_invited_to_present_collection_of_haute_couture_in_paris.html>.

[309] IBISWorld, "Worn out: Import Penetration Will Cause Industry Operators to Shift Toward High-End Goods" prepared by Max Oston, Women's & Girls' Apparel Manufacturing in Canada Report No 31523CA (October 2015) at 5.

the exhibition, *Dress + Identity in Contemporary Canadian Art*, for the McMichael Canadian Art Collection, which states that,

> Clothing has always been of primary importance in a country where donning appropriate apparel is imperative for surviving the harsh climate. … Today, while Canada is by no means an international centre of fashion, clothing nevertheless holds a pre-eminent position in the history, art, and popular culture of the nation's varied demographic.[310]

Nevertheless, while an overarching Canadian clothing identity might not have traditionally been strong,[311] identity has been emerging from regional areas of Canada, specifically Toronto and Montreal, underlining the economic, cultural and social dialogue and impact of fashion design in these two cities. [312]

Design and fashion design are an inherent part of Quebec's cultural and economic policy. As Leslie and Rantisi suggest, "[s]ince the 1950s, culture and design have been used by successive governments to assert Québec nationalism and construct Montréal as an 'international city'." [313] Further, as they observe, design was identified as a major economic strategy following

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[310] However Pine further notes that "[d]espite the importance of dress in the Canadian imaginary, however, fashion historian Alexandra Palmer notes in her 2004 book *Fashion: A Canadian Perspective*, that Canada has no national costume other than crude caricatures of Aboriginal dress, or lumberjack and Mountie attire. Indeed, this vast country's population is far too diverse to be represented by one particular ensemble or uniform." Julia Pine, "Fashionality" *McMichael Canadian Art Collection* (last accessed 30 May 2016), online: <http://www.mcmichael.com/exhibitions/fashionality/curatorial-statement.cfm>.

[311] The lack of national design identity in Canada, for the fashion and design sectors generally has been an ongoing ailment both nationally and internationally, see Alexandra Palmer, "Introduction" in Alexandra Palmer, ed, *Fashion: A Canadian Perspective* (Toronto: University of Toronto Press, 2004) 3 at 3.

[312] While at the provincial level, it has not necessarily been included in Ontario's cultural policy, in a consultation recently deployed by Ontario's Ministry of Culture, fashion was clearly considered by the participants of the consultation as a part of culture, see Ontario, Ministry of Tourism, Culture and Sport, "Culture Talks: A Summary of What We Heard from Ontarians" (22 April 2016), online: <https://files.ontario.ca/mtcs_culture_talks_summary_en_20160427.pdf> [Ontario, "Culture Talks"]; Nigel Hunt, "Fashion Industry Seeks Access to Cultural Funding in Ontario" *CBC News* (2 December 2015), online: <http://www.cbc.ca/news/arts/fashion-art-petition-1.3347140>; some funding for fashion design has been provided under the ArtReach program which is a mixed initiative between the various levels of government (federal, provincial and municipal) and funding organizations, under the Ontario Arts Council, see Ontario Arts Council, "Collaborations," online: <http://www.arts.on.ca/page2702.aspx>.

[313] See Deborah Leslie & Norma Rantisi, "Fostering a Culture of Design: Insights from Montreal" in Andy C Pratt & Paul Jeffcutt, eds, *Creativity, Innovation and the Cultural Economy* (New York: Routledge, 2009) 181 at 185-187 [Leslie & Rantisis, "Culture of Design"]; As Deborah Leslie and Norma Rantisi observe, cultural promotion was "central mandate" of Quebec's cultural policy deployed in the 1990s following a major economic shifts over the decades to help develop and promote Quebec culture and identity, Deborah Leslie & Norma M Rantisi, "Governing

a report[314] published by a federal committee that was set up to study Montreal's economy in the mid-eighties.[315] Culturally and socially, Montreal has embedded design, including fashion design in its identity.

In Ontario, recent consultations conducted by the province revealed that participants considered both design and fashion design as a part of the meaning of culture.[316] In Toronto more specifically, design has been identified as key economic contributor[317] but has historically been regarded as distinct from cultural industries.

Socially and culturally, fashion plays an important role for individuals, groups and for cities. Fashion design has the potential to make important contributions in the Montreal and Toronto fashion clusters both directly and indirectly. The policies that have enabled these cities to harness these capabilities will be discussed in greater detail in the following chapter. The next section will consider the ground level characteristics of the independent design sector.

2.2 Defining Design

In order to clearly understand the design discipline for the purpose of academic inquiry, as well as for creating a universal platform to discuss policy and legislation, it is important to first define

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the Design Economy in Montréal, Canada" (2006) 41:3 Urban Affairs Review 309 at 312 [citations omitted] [Leslie & Rantisi, "Design Economy"].

[314] Canada, **"**Report of the Consultative Committee to the Ministerial Committee on the Development of the Montreal Region" prepared by Robert René de Cotret & Laurent Picard (Ottawa: Minister of Supply and Servies Canada, 1986).

[315] Leslie & Rantisi, "Design Economy", *supra* note 313, the authors note that during, in the mid-eighties a federal committee was set up to study the Montreal economy, design was identified in the report as one of the eight key strategic economic sectors, at 318-319; A Commissioner of Design was appointed in 1991 and ran a number of initiatives aimed at integrating design into Montreal's fabric, and since, Montreal's design mandate has only broadened and strengthened, see Leslie & Rantisis, "Culture of Design", *supra* note 313, 181 at 185; As will be discussed in the following chapter, Montreal's designated as a UNESCO City of Design was a part of this their design-centric mandante and the city continues to integrate design into all aspects of cultural life, see Creative Cities Network, UNESCO, online: <http://www.unesco.org/new/en/culture/themes/creativity/creative-cities-network/design/>.

[316] Ontario, "Culture Talks" *supra* note 312.

[317] *Key Industry Sectors*, *supra* note 288.

it formally and on a scientific level.[318] While defining 'design' was not prompted by the interviews, I felt it was necessary for the discussion of the law and policy. The nature of design is such that it has contributed to the fragmented policies and legal framework, which it why it is important to explain.

In the various descriptions provided below, design is clearly a multifaceted endeavour, comprised of a number of dimensions and spread across a number of sub-disciplines.[319] In some cases, design is associated with an end product, while in others it is associated with a process. Many argue that at its core, design exists to fulfill a function or purpose, i.e., to problem solve.

Articulating a universal definition of design will illustrate its multifaceted characteristics and the considerations that need to be considered when discussing or developing a design policy.[320] In Canada, design has been integrated into some aspects of cultural and innovation policy; while legal protection for design spans across different legal regimes.[321] This is important because while the intellectual process used by designers might be the same across many design disciplines – albeit the skill, techniques, materials and limitations may be different based on the industry – it is the physical manifestation of the output that defines the policies and laws that

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318 Danielle Bushore, *Evaluating Design: Creating a Qualitative Value Measurement Tool to Encourage a Design Policy in Canada*, (MA Thesis, Carleton University, School of Industrial Design, 2012) at 2 [Library and Archives Canada, Published Heritage Branch], in her findings Bushore suggests that a universal understanding of design from a "business and government perspective" would allow design to be measured for the purpose of "understanding design as a strategic tool and main contributor to innovation" at 171; Paul Ralph & Yair Wand, "A Proposal for a Formal Definition of the Design Concept" in Kalle Lyytinen et al., eds, *Design Requirements Engineering: A Ten-Year Perspective* (Germany: Springer-Verlag, 2009) 103 at 103-104.

319 *Ibid*; For example, Beatrice D'Ippolito, conducts a literature review and structures them based on the available literature as A) Design as a process/product; B) Design as a management concern, C) Design as a creative industry, see Beatrice D'Ippolito, "An Exploratory Review of the Design Literature: Gaps and Avenues for Future Research" (2012) Manchester Business School Working Paper No 628 at 5.

320 Bushore, *supra* note 318 at 33-57, Bushore argues that "value" is a primary consideration for policy evaluation and that for design policy in particular, these values can include economic, experience, cultural, happiness, aesthetic and environmental.

321 For a discussion on design, cultural and innovative policy, see Chapter 3; For an in-depth analysis on the legal framework see Chapter 4; Architecture as one form of design is protected under copyright law notwithstanding the number of copies made, as are textiles; while apparel is subject to a threshold and protectable by industrial design law.

apply to it. This section will consider the multifaceted ways in which 'design' has been defined within different sub-disciplines, by legislators, by academics and by design professionals for the purpose of providing context for the following two chapters.

2.2.1.1 A Formal Definition of Design

As Jacques Giard observes, in the 1990s, the industrial design industry community perceived the goal of design as an end product and not a process,

> Instead of seeing design as a verb, many industrial designers tended to discuss design as a noun. In other words: in their view the goal of design was a product, not a process; design was perceived as reactive, not proactive; and design was used as a tactic, not as a strategy.[322]

However design in of itself is much broader than just industrial design, it includes of sub-disciplines that comprise it including architecture, graphic or communications, landscape, fashion, interior, industrial and others.[323]

As Morris Asimow observes, design (in the context of engineering design) can either be a product or a service, the core purpose of which is to fulfill a human need,

> Engineering design is a purposeful activity directed toward the goal of fulfilling human needs, particularly those which can be met by the technology factors of our culture. The satisfaction of these needs is not peculiar to engineering design; it is common to much of human activity.
> […]
> A designer does not usually produce the goods or services which immediately satisfy a consumer's needs. Rather, he produces the model which is used as a template for replicating the particular good or service as many times as is required. A design may be of a pattern on wall paper or of a garment in the world of fashion. […][324]

Similar to this point, Linda Lewis, founding and former president of the Design

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[322] See e.g., Jacques Giard, "Canadian Design and the National Agenda: Towards the Year 2005" (1996) 7(3) Design Management Journal 27 at 29 [Giard, "Canadian Design"].
[323] *Ibid*, quoting, Canada, Human Resources Development Canada, Design Sector Steering Committee, *Shaping Canada's Future By Design: Architecture, Industrial Design, Communications Design, Interior Design, Landscape Architecture*, Report PSR-104-11-96E prepared by Price Waterhouse (1996) [*Future by Design*] at 28.
[324] Morris Asimow, *Introduction to Design* (Englewood Cliffs, NJ: Prentice Hall, 1962) at 1.

Exchange[325] in Toronto, argues that designs generally are not just "things" but are rather, "services - such as interior design for department stores and hotels, industrial design, clothing design, computer and animation systems - that are used worldwide."[326]

In practice, prior to 2015, the International Council for Industrial Designers defined "design" to be an activity of important cultural and economic exchange,

> … *whose aim is to establish the multi-faceted qualities of objects, processes, services and their systems in whole life cycles*. Therefore, design is the central factor of innovative humanisation of technologies and the crucial factor of cultural and economic exchange.[327]

Design has also been defined in terms of its experiential value, as the city of Montreal articulated in their application to the UNESCO creative cities competition,

> [...] defined in its broader sense, including *all the creative disciplines* that shape and have the power of *qualifying and enriching our living environment*: landscape architecture, urban design, architecture, interior design, industrial design, graphic design, *and fashion design* …[328]

In all of these descriptions above, several attributes are present in design: function (to solve a problem or to fulfill a need), form (aesthetic component), and also an experiential characteristic.[329] Indeed, in her thesis on Canadian design policy, Danielle Bushore observes that,

> [w]hen designers design, people who use their spaces and products *experience design*, and therefore place value on different aspects of it. The design industry serves many

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[325] Design Exchange, online: <http://www.dx.org/>.

[326] Diane Jermyn, "Designing a National Policy" *Globe and Mail* (13 May 2010), online: <http://www.theglobeandmail.com/report-on-business/small-business/sb-managing/designing-a-national-policy/article4318941/> (quoted from an interview with Linda Lewis, then president of the Design Exchange).

[327] International Council of Societies of Industrial Design, "Definition of Design" online: <http://www.icsid.org/about/about/articles31.htm> [emphasis added]; however this definition was changed following the ICSID General Assembly in October 2015 to "Industrial Design is a strategic problem-solving process that drives innovation, builds business success, and leads to a better quality of life through innovative products, systems, services, and experiences. Industrial Design bridges the gap between what is and what's possible. It is a trans-disciplinary profession that harnesses creativity to resolve problems and co-create solutions with the intent of making a product, system, service, experience or a business, better. At its heart, Industrial Design provides a more optimistic way of looking at the future by reframing problems as opportunities. It links innovation, technology, research, business, and customers to provide new value and competitive advantage across economic, social, and environmental spheres." See International Council of Societies of Industrial Design "Definition of Industrial Design" online: <http://www.icsid.org/about/definition/>.

[328] Bureau du Design Montreal, "Montreal Ville UNESCO de Design | UNESCO City of Design" (April 2006) at 4 online: <http://www.mtlunescodesign.com/docs/projects/UNESCO_candidature_Mtl_ang.pdf> [emphasis added].

[329] Ingrid Loschek, *When Clothes Becomes Fashion: Design and Innovative Systems* (Oxford: Berg, 2009) at 173.

> purposes, fulfills needs, and *solves a wide range of problems*, from *aesthetics to complex functionality*.[330]

This is a very telling statement about the tangible and intangible attributes that are present in design, as demonstrated by the definition of design provided in the *Conceptual Framework of Culture Statistics* created by Statistics Canada,

> Design is a creative activity that transforms objects, environments, and services. Design is also a product in itself, in that it is an input into many other final products, including those produced by the live performance, publishing, broadcasting, film, and sound recording industries. The [Canadian Framework for Cultural Studies] includes graphic, interior, industrial, jewellery, fashion, website, and other specialty design services. [331]

Notwithstanding the fact that all of these descriptions contain similar attributes, what is not present is a formal definition that can be applied holistically to the design discipline.[332]

In response to the numerous definitions of design, Paul Ralph and Yair Wand sought to create one that could be universally applied to all sub-disciplines of design even though it was created for use in the context of information systems.[333] Their model takes many elements into consideration including the process, classification of the outputs (classifications described below), and the goals of the designer. In order to create this definition, Ralph and Wand amassed

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[330] Bushore, *supra* note 318 at 2 [emphasis added].

[331] Statistics Canada, *Conceptual Framework for Culture Statistics 2011*, Catalogue no 87-542-X-No 001 at 43, online: online: <http://www.statcan.gc.ca/pub/87-542-x/2011001/section/s6-eng.htm> [*Cultural Statistics*].

[332] Ralph & Wand, *supra* note 318 at 125; Prior to defining design for the purpose of this research, it is important to first conceptually separate two themes present in many of the descriptions above: design has both internal and external components. Internal components refer to the inputs used by the designer to produce the design, whether it is a system, product, artwork, or policy, whatever the goal may be. External components refer to how design is consumed externally or experientially i.e., how society enjoys, interpret, or consume design. This distinction is present in any type of intellectual endeavour, for example, a writer may author and publish a book, yet no one might purchase her book or even see their manuscript, and it would not therefore impact any lives, yet it still is a literary work and receives protection. This is an important aspect, because many definitions of design discussed here consider the extrinsic value or external outputs of design (as per above i.e., enriching lives, experiencing design), as is apparent in the requirement for industrial design's original shape or configuration *visible to the eye* and the registration requirement. For copyright to subsist the only requisite is that is an original expression; This might help alleviate some important and legitimate observations that a universal definition of design has not yet been able to encapsulate the "differing motivation underpinning a design project (from purely artistic to purely engineering, problem-solving) and the types of knowledge design can rely on (e.g., rational and calculative knowledge for engineering designers; subjective and expressive knowledge for graphic designers)" D'Ippolito, *supra* note 319 at 2.

[333] Note that Ralph and Wand's background is computer software design and the framework for design they propose in their paper (and in this one) was meant to be formal one for the *science of design* although they did create it for their field. This author finds that it intuitively applies to other disciplines including fashion design, Ralph & Wand, *supra* note 318 *supra* note 104.

various definitions of design by conducting a literature review on "design", they distilled the main elements present in all of them and tested these elements against various subject matter.[334] From this, they devised a definition of design containing these seven attributes, defining

> …design activity as a *process*, executed by an *agent*, for the purpose of generating a *specification* of an object based on: the *environment* in which the object will exist, the *goals* ascribed to the object, the desired structural and behavioral properties of the object (*requirements*), a given set of component types (*primitives*), and *constraints* that limit the acceptable solutions.[335]

They further introduce six non-exhaustive classes of design objects,[336] which could theoretically cover a vast array of subject matter, thus making this definition quite compatible for scientific inquiry in many disciplines. Each would require very different specifications, tools and skills to create.[337]

- Physical artifacts[338]
- Processes
- Symbolic systems
- Symbolic scripts
- Laws, Rules and Policies[339]
- Human activity systems[340]

For the purpose of this paper, the universal definition of design provided by Ralph and Wand will be used to help explore and evaluate the sub-discipline of fashion design.[341]

2.2.1.2 Fashion Design: A Sub-Discipline of Design

This section will evaluate fashion design using the factors outlined in Ralph and Wand's framework for defining design described above. Fashion design has as its subject or *agent*, the

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[334] *Ibid*.
[335] *Ibid* at 125 [emphasis in original], note that these and supporting elements are italizied throughout this section.
[336] *Ibid* at 109.
[337] *Ibid* at 110.
[338] *Ibid* at 109 Examples Ralph & Wand include are physical objects comprised of *single-component* and multi-component objects – in this case they compare a boomerang to a house.
[339] *Ibid*. Such as legislation or statutes.
[340] *Ibid*. Examples Ralph & Wand include are artistic productions (e.g., operas or theatres), schools and hospitals.
[341] Notably and importantly, this is not the only definition that may universally describe design, but it is the one that will be used to describe design in the context of this thesis. This is different than the term 'fashion design', which necessarily points to the outcome of a physical artifact (fashionable apparel) manifested by an agent (fasion designer).

fashion designer, who creates a design object or physical artefacts (e.g., for the purpose of this study garments[342] or accessories[343]) with *components*,[344] using "structural properties" or *specifications*. *Constraints* identified in the area of fashion design are the limitations identified in the next part of this chapter, which can include finances, limitation of the human body, styles, supplies, trends and the composition of a collection.[345] Notably, concern about intellectual property law was not considered to be a constraint. Designers use *requirements*, which do not have to be formal but can include the expectation that "the design object […] possess certain properties or exhibit certain behaviors."[346] Ralph and Wand observe that there are two requirements, the first is *structural* and the second is *behavioral*.[347] While the former looks at whether together, the components work or match, the latter considers the "desired responses" from its environment.[348] In the case of independent fashion designers, the structural requirement is that the work is wearable and fulfills other structural requirements (e.g., utility, versatility, quality), whereas the behavioural requirements are that the aesthetic and brand is appealing to their clientele and that they feel good wearing it (e.g., aesthetic). Now what will be further discussed in Chapter 6 is that a part of the aesthetic challenge is to manifest the identity of the designer in some aspects of their creations.

The *environment* in which the designers create is unique because it is both commercial and aesthetic in that fashion design is appealing to a specific segment and demographic; the

[342] Garments include all types of clothing, including shirts, pants, dresses, skirts, jackets, made from all kinds of material etc.
[343] Accessories include handbags, and scarves etc. For the purpose of this study, jewellry is not covered under accessories. Jewellery has been excluded from this study because it is a different industry, with different business models, production and product cycles. For the same reason, shoes have been excluded from this category.
[344] Ralph & Wand, *supra* note 318 at 106. The authors also call components primitives (e.g., materials etc).
[345] The composition of a collection may dictate the design decisions because they are creating a series, or compilation consisting of pieces that could complement one another for the purpose of maximizing their market. This would, for example require the inclusion of basic pieces in addition to printed ones, tops and bottoms as opposed to just tops.
[346] Ralph & Wand, *supra* note 318 at 107.
[347] *Ibid* at 125.
[348] *Ibid*.

broader environment can be seen as the segment of society or individuals who value fashionable attire. Rik Wenting suggests that in the context of fashion design "[t]he aesthetic component reflects the designer's ability to understand and incorporate symbolic knowledge from its environment into a commercial product."[349] Importantly, the *goals* or intended outcomes of fashion designers can be very different. For example, some designers might have purely abstract goals, while others have very specific ones, e.g., creating a specific aesthetic or brand, function or particular movement of a fabric. As Ralph and Wand suggest, goals and environment are intertwined because goals are "the intended impact of the actions in the domain on the external environment."[350] Based on this brief survey, Ralph and Wand's universal definition of design can be applied to fashion design and will be used to frame the proceeding discussion on design and fashion design.

2.2.1.3 The Legal Significance of Design Goals

Having defined fashion design as a process and classified its output as a physical artefact, there are two themes particular to fashion design that highlight the issues that have been confronted when considering the conceptual and practical protection of design in the intellectual property legal framework.

The first theme has to do with the *requirement* component of the definition of design, which includes combining and simultaneously separating the *structural* and *behavioral requirements*. Conceptually separating the aesthetic component of a design from the design substrate itself, otherwise in its role as a useful article - namely one that has a utilitarian function, although these two requirements work together, has had the practical effect of separating them in

[349] Rik Wenting, *The Evolution of a Creative Industry* (PhD Thesis, Faculty of Geosciences, Utrecht University 2008) at 56-57.
[350] Ralph & Wand, *supra* note 318 at 124 [citation omitted]. Examples they provide include explaining that goals behind enacting a criminal code might be to "provide a legal framework for dealing with crimes" or a physical artifact might be to "provide an office space for a business" at 111.

terms of policy and law. For example, while *artistic* works are normally seen to fit within the domain of culture and copyright, *useful* articles, in other words objects with a utilitarian function are usually categorized in the domain of industry, innovation or manufacture.[351] There are also legal consequences that will be discussed in Chapter 4.

The second theme is the classification of fashion design output as a physical artefact rather than a human activity system. Because a physical artefact is produced, mass-produced or manufactured, different policies or laws can apply to it depending on the industry or sub-discipline under which it is categorized. For example, works of architecture are artistic works and can be protected by copyright law regardless of how many times they are reproduced. On the other hand protection for garments is fragmented. This framework will be discussed in greater detail in Chapter 4.

As will be seen, these themes will be revisited throughout the study when reviewing design's legislative history, policies, and throughout the legal chapter. Because these two aspects – *requirement* and *classification* - apply to the definition of design applied above, it is useful to describe the nuances in this section.

2.2.1.3.1 Requirements: Art/Form/Utility

Is the aesthetic or artistic component of design a more important aspect than the utilitarian one or vice-versa or are they equally important? That is, what aspect of design should be considered to determine the policies and laws that should apply?

One may argue that the degree to which one of these two attributes plays a more prominent role is based on the intent or *goal* of the designer. Indeed, several of the independent fashion designers interviewed self-identified as 'artists' throughout the interviews or suggested that their creative process incorporates art to some extent, alongside the utilitarian or functional

[351] See Chapter 3.

considerations for their design.[352] Yet, those participants who were specifically asked about whether their design process was dictated by art or utility often stated that both were equally important, that it is the marriage of form and function.[353] Examples of their responses include,

> I love being an artist – if I can say – but I always do things that are wearable. There is always something about comfort, fit, flattering lines, or the softness of fabric that I feel are super important, but it has to be a very desirable piece. That is my challenge.[354]

> I think in fashion it's both [art and utility]. The creativity part of course is the beginning, but then you have to go through the technical process, which include the steps that are dictated by the industry. So you have to create a sample, you have to do the grading, you have to do the marking, you have to cut, and you have to press. But I think it's both, [Courtney: it's both] and different steps. Creativity is the beginning and the second part is more [Courtney: the technical] technical….[355]

> …my struggle constantly actually to this very day – balancing the function – the pragmatic to the abstract, because I live thinking they are both necessary.[356]

Although design is fundamentally purpose-driven, [357] its purpose does not need to be the practical utility of that item. As Ingrid Loschek points out,

> [t]he design object is not produced contingently, like an artwork for example, but for a specific purpose, that is it is intended to satisfy complex needs and demands. In this way, the design object appears purpose oriented, although the purpose does not necessarily have to be a practical use.[358]

To demonstrate this point, Loschek assesses the functionality of a vase, stating that it "can be designed and valued more as a formal aesthetic object than for its function" in which case, she observes, that "function and emotion are united."[359] This means that the function for that

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[352] (Participant, Interview July 24 2014, at 6); (Participant, Interview July 31 2014, at 10, 21); (Participant, Interview October 23 2014, at 16); (Participant, Interview November 21 2014, at 8-9).
[353] (Participant, Interview March 9 2015, at 11); (Participant, Interview October 17 2014, at 8); (Participant, Interview August 28 2014, at 16).
[354] (Participant, Interview August 4 2014, at 6).
[355] (Participant, Interview July 25 2014, at 8).
[356] (Participant, Interview March 4 2015, at 12).
[357] Douglas MacLeod, et al, "Design as an Instrument of Public Policy in Singapore and South Korea" Asia Pacific Foundation of Canada (Vancouver: Asia Pacific Foundation of Canada, 2007) at 6-7; Loschek, *supra* note 329 at 173.
[358] *Ibid*.
[359] *Ibid*. For example, one participant mentioned that the aesthetic purpose of their collection was simultaneously the functional purpose i.e., the point of the collection, see (Participant, Interview March 4 2015, at 12).

particular design (the vase) is in fact in its purpose as an aesthetic object, notwithstanding that it is also a container for cut flowers. And she suggests that in a similar way, fashion design is "defined by means of its own nature."[360] For example one participant mentioned that the purpose of the piece was what would determine the degree of functionality and aesthetic they would apply in creating it.[361]

However, tipping in favour of functionality, several of the participants also underscored the importance of the practical utilitarian aspect of fashion design. For example, one participant stated

> …for me, clothes are to wear and to be worn, not to stay in the closet like a museum piece – that's another type of work. I love a lot of designers that create more artistic pieces, and they're so nice and they're amazing and I love their work but it is just another thing. For me they are two different things …[362]

These responses demonstrate that the degree to which the aesthetic and function components are incorporated into the creation of design are equally important, but that they are also relevant to the purpose i.e., goals and intent of its creator.

The works of two Montreal-based designers, Denis Gagnon and Ying Gao effectively demonstrate this.[363] Denis Gagnon and Ying Gao have both shown their works at the Montreal Museum of Fine Arts in Montreal. Where Gagnon's designs are intended to be worn, and therefore are utilitarian in the traditional sense of fashion design, Gao's intent for her designs is different. A post on the blog Suites Culturelles, encapsulates the bridge between the utilitarian, arts and aesthetic components of Gagnon's works,

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[360] Loschek, *supra* note 173.
[361] (Participant, Interview July 8 2014, at 29).
[362] (Participant, Interview October 22 2014, at 8).
[363] Sincere thank you to Michele Beaudoin, PhD for providing me with this example, this example was used in Michele Beaudoin & B Courtney Doagoo, "The Line Between Art and Design: A Critique on the Legal and Conceptual Definitions of Art" (Presentation delivered at Osgoode Forum, York University Osgoode Hall Law School 11 May 2013) [unpublished].

> Bringing the city into the materials of the clothes, and then exhibiting the clothes back in the city (at various cultural and industrial levels) makes this collection culturally significant. The next level of integration is allowing people to purchase these (or similar) clothes and wear them in their everyday lives, thereby becoming the living bridges between a designer's artistic vision of fashion and the urban materiality reflected in the design. By wearing Denis Gagnon, one symbolically wears Montréal. This ability to capture, market, and sell this type of identity construction is what makes Denis Gagnon a successful brand.[364]

One the other hand, Ying Gao's designs were not created with the same intent. Her artist statement reads,

> Ying Gao questions our assumptions about clothing by combining urban design, architecture and media design. She explores the construction of the garment, taking her inspiration from the transformations of the social and urban environment. Recognized worldwide, her designs are frequently shown in museums and galleries. Design is the medium, situated in the technological rather than in the textile realm: sensory technologies allow garments to become more playful and interactive.[365]

These works of design therefore far exceed a strictly utilitarian function in the practical sense of clothing i.e., for warmth, protection etc.; they also convey a function of aesthetic or art evident in their social and cultural qualities. This is significant because these two characteristics of design are not diametrically opposed but work in tandem to a varying degree although the goal or intent may be different. As will be suggested in this dissertation, art, aesthetic, utility, and industry have been interesting points of attachment for design laws and for policies concerning design.

2.2.1.3.2 Classification: Physical Objects

As mentioned above, fashion design culminates into a physical object, yet at the same time it can create an aesthetic that can be articulated via different *classes* (or outputs) of design. As it relates to the physical form, its 'production' or making is a requirement. As Galvin notes, the design and manufacturing aspects of the fashion industry are isolated yet "highly

[364] Kat Sark "Denis Gagnon – Fashion in Museum and on the Street" (17 November 2010) Suites Culturelles (blog), online: <https://suitesculturelles.wordpress.com/2010/11/17/denis-gagnon-fashion-in-museums/>.
[365] Ying Gao, *Profile*, online: <http://yinggao.ca/eng/info/profile/>.

interwoven" elements.[366] So, although design is a separate and specific activity and process, it cannot be completely detached from the fact that the particular demographic interviewed for this study is comprised of SMEs, who sell physical artefacts and therefore the factors that dictate the outcome of their design process are highly interrelated with market-based decisions including production, marketing and other considerations. This is not true for all classifications of design, as some designers create pieces strictly for design purposes and are not concerned with manufacturing *per se*.

This division between creation and manufacture has resulted in the policies and laws that have affected this segment. For example, the World Intellectual Property Organization classifies the textile and apparel industries as "partial copyright industries" which is why both intellectual property *and* apparel and textile policies apply to it and also why they might be statistically counted under the latter.[367]

At the same time, even though the majority of fashion design activities result in the creation of physical objects, not all output or classes of design falls under this category. As will be discussed in Chapter 6, the participant's design activities extend beyond the physical object i.e., the garment itself, and are applied to a broad range of aspects related to their businesses. Design is integrated into decisions concerning the layout and storefront displays, styling and merchandising, and also to the overarching aesthetic and brand which can be expressed through advertising and marketing. In reality, design and production of physical artefact e.g., in a garment or accessory, is but a single dimension of their business and fashion design decisions.

[366] Galvin, s*upra* note 153 at 139.
[367] WIPO, *Guide on Surveying*, *supra* note 266 at 60 + 187 fn 87.

2.2.1.4 "Design" Versus "Fashion Design": Throughout the Dissertation

Throughout this dissertation, it is important to keep in mind that although fashion design is the focus of this thesis, it exists as a sub-discipline of design and will be analyzed interchangeably under the broad heading of design in the proceeding chapters. This is significant because when conducting the review of design policy at the national level in Chapter 3, I do not engage in a discussion of fashion design policy *per se*, but a broader design policy, simply because the sub-discipline of fashion design does not exist under any framework for innovation or cultural policy. Where it does exist is in the context of its relationship to the apparel and textile industries at the federal level, provincial and regional levels. Similarly, in Chapter 4, while the analysis is based on fashion design subject matter in the context of intellectual property laws, the analysis could apply to a range of broader industrial design categories, however, the specific examples are grounded in fashion design artefacts.

2.3 Fashion Design: Characteristics

The fashion industry is characterized and driven by creativity, identity and diverse business models. It is an industry also notoriously characterized by its reliance on trend behaviour, product cycle and heavy brand recognition.[368] This section outlines the characteristics of the fashion industry as they relate to the study participants in the Montreal and Toronto design communities, giving shape to the components that contribute to the outcome of findings of the study. The following key features will be discussed: market segment, design and development, product life and production cycles.

[368] See Jennifer Craik, *Fashion: The Key Concepts* (Oxford: Berg, 2009) ch 6.

2.3.1 Market Segment

The participants are independent fashion designers, who could be categorized as luxury and mid-range ready–to-wear fashion segment in Canada. This section will distinguish them from different segments within the industry such as haute couture, luxury brands, and fast fashion. The business segment sets the parameters for a number of factors that will be discussed for the remainder of the chapter including the limitations and design decisions.

In the past few decades, technology and international trade have changed the course of the fashion industry, both globally and in Canada. In a report prepared for the World Trade Organization on the impact of trade liberalization, Hildegunn Kyvik Nordås identifies two groupings that best illustrate the range of the fashion design industry: *high quality fashion* and *manufacturing*.[369] Nordås does not elaborate on the minute details of each category, but rather provides a broad framework, which will be used here to map out three general business models often referred to in the fashion industry.

The first grouping identified by Nordås, the *high quality fashion* market, hinges primarily on a number of activities including *design*.[370] Firms that engage in this grouping are heavily situated within developed countries, often in clusters, and their "competitive advantage . . . is related to the ability to produce designs that capture tastes and preference, and even better – influence such tastes and preferences – in addition to cost effectiveness."[371] He also notes that that this segment is characterized by modern technology.

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[369] WTO, *The Global Textile and Clothing Industry Post the Agreement on Textiles and Clothing*, Discussion Paper 5, prepared by Hildegunn Kyvik Nordås (2004), online: World Trade Organization <http://www.wto.org/english/res_e/booksp_e/discussion_papers5_e.pdf>. Kyvik states that activities include "modern technology, relatively well-paid workers and designers and a high degree of flexibility" at 3.
[370] *Ibid*.
[371] *Ibid*.

Nordås's second grouping is described as a market where discount retail chains produce low to "lower-quality and/or standard products" that do not rely heavily on design but rather on *mass production.*[372] This category accounts for a high degree of imports made from developing to developed countries.[373] Retailers also play a prominent role in this market, creating their own private label goods for importing.[374]

Between these two different groupings, there is a range of business models. [375] Not all are categorized as *high quality fashion*, nor do all follow the *manufacturing* model. This section will discuss three of the main business models that are most often referred to when describing these varying degrees of design: haute couture, ready-to-wear and fast fashion.

The first business model is Haute Couture. *High quality fashion* is distinguished from the designation of Haute Couture, which is often mis-credited with being the sole creative arm of fashion design.[376] As Ingrid Loschek suggests, it is "…characterised by processing at the highest level of craftsmanship and genuine, tasteful materials."[377] Haute Couture is a tightly protected designation granted by the French Ministry of Industry and governed by the *Chambre Syndicale de la Haute Couture* (CSHC) in France.[378]

One may be invited to become an official member of CSHC; once a member, the designation is granted, and only those fashion houses or designers that have this status bestowed

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[372] *Ibid*.
[373] *Ibid.*
[374] *Ibid*.
[375] In addition to the three main business models mentioned in the text, Ingrid Loschek provides several additional fashion industry business models which include custom tailoring, luxury ready-made fashion, and ready-made fashion, although she notes that these structures have become complex, see Loschek, *supra* note 329 at 177.
[376] High quality fashion can apply to haute couture as well as the ready-to-wear independent design segment.
[377] Loschek, *supra* note 329 at 171.
[378] The *Chambre Syndicale de la Haute Couture* [CSHC] is a trade association in France, alongside several others such as *Chambre Syndicale du Prêt-à-Porter des Couturiers et des Créateurs de Mode* and *Chambre Syndicale de la Mode Masculine*, see Mode à Paris: Fédération Française de la Couture, du Prêt-à-Porter des Couturiers et des Créateurs de Mode, *Federation*, online: <http://www.modeaparis.com/2/federation/> [Mode à Paris].

are able to legally use it.[379] The eligibility criteria are stringent and are listed in article 4 of the *Règlement Intérieur De La Commission De Contrôle Et De Classement "Couture Creation."*[380] These include the requirement that the creation of the garment design is exclusively undertaken by the designer him or herself;[381] it also requires that the designs are created in their own ateliers which employ a minimum of twenty personnel who collaborate in the creation and development of the collections using the knowledge and techniques consistent with the standards of the profession.[382] Further they must engage in the production of two shows per year, showcasing twenty-five pieces comprised of day and evening wear made in the quality and with the standard equivalent to those destined for clients.[383] These requirements are actively policed and if not fulfilled may cause membership to be cancelled.[384]

The excerpt below illustrates the extent to which designers invest and devote resources to each piece; it is not feasible for the vast majority of designers to reasonably commit to fulfilling these criteria as a business model.

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[379] It is not clear whether the French Ministry would enforce it's use outside of France but based on the prominence of this syndicate, chances are that designers would not use it at the risk of looking negative in front of their peers; "Haute Couture is a legally protected and controlled label that can only be used by the fashion houses which have been granted the designation by the French Ministry of Industry. The group of companies that enjoy the Haute Couture label is reviewed annually" Mode à Paris, *supra* note 378, "Historical Background and Composition", online: <http://www.modeaparis.com/2/federation/>; Although it is not a trade or certification mark in Canada, as defined in the *Trade-marks Act*, *supra* note 7, s 2 [definitions], it well known within the industry and respected. Traditionally, the CSHC included members from France and Europe, however this has since expanded to include countries around the world.

[380] France, *Reglement interieur de la Commission de Controle et de Classement* "*Couture-Creation*" 12 January 1945, F 12/1 0505, Archives Nationales, Paris.

[381] *Ibid*, art 4(2).

[382] *Ibid*.

[383] *Ibid*, art 4(4).

[384] In addition to policing these requirements, the CSHC also plays an active role in protecting the intellectual property rights. For example, in order to register to receive a media pass, the head of a media organization must apply for accreditation. The website states that "[t]he accreditation system has been used by the Federation for several decades. Its aim is to facilitate both the work and access of all of the professionals who take part in fashion shows and to ensure compliance with the intellectual property rights of the fashion houses and the various participants in the shows. […]They are private events reserved in priority for professionals who report on them within the time limits fixed in the accreditation application and respect the design houses' intellectual property rights. Only those holding an invitation from the houses may attend the shows. The design houses have given the Federation authority for overseeing compliance with the accreditation system" see, Mode à Paris, "Accreditation" online: <http://www.modeaparis.com/2/accreditation/>.

> These artisans take hundreds of hours to construct each couture piece; an exquisitely embroidered and feathered gown from Chanel's latest couture collection took a team of 200 around 2,000 total hours to make. The atelier staff, known as "petites mains," are highly skilled. They painstakingly pleat, drape and transform delicate fabrics into astonishingly detailed eveningwear and daywear.[385]

To date, there has only been one Canadian designer, Rad Hourani, invited to join CSHC in 2013 following his first couture show.[386] The CSHC and a few other fashion trade associations reside under the general umbrella of the *Fédération Française de la Couture, du Prêt-à-Porter des Couturiers et des Créateurs de Mode*.[387]

There also was once an association established for couturiers in Canada, notably, this is not the same designation, nor did it have the same requirements as the CSHC. The Association of Canadian Couturiers (ACC) was established in 1958 with the purpose to "create a national voice for Canadian fashion design" at roughly the same time as the *National Industrial Design Council* (NIDC).[388] Alexandra Palmer observes that the ACC was a private and not public sector endeavour and did not as a result receive any financial or other type of support to promote Canadian couturier designs.[389] Eventually, in 1968 the Association was disbanded because the ready-to-wear segment flooded the Canadian market.[390] Haute Couture can certainly be grouped as *high quality fashion* but is not the only segment under this category.

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[385] Lisa Wang, "Fashion Means Business: Haute Couture" *Business of Fashion* (22 April 2013), online: <http://www.businessoffashion.com/articles/opinion/fashion-means-business-haute-couture>.
[386] Derek Lall, "Rad Hourani becomes the first Canadian member of the Chambre Syndicale de la Haute Couture" *Fashion Magazine* (16 January 2013), online: <http://www.fashionmagazine.com/fashion/2013/01/16/rad-hourani-becomes-the-first-canadian-a-member-of-the-chambre-syndicale-de-la-haute-couture/>.
[387] Mode à Paris, *supra* note 378.
[388] Alexandra Palmer, "The Association of Canadian Couturiers" in Alexandra Palmer, *supra* note 311, 90 at 90 [Palmer, "Canadian Couturiers"]; The *National Industrial Design Council* was a federally mandated design initiative which will be discussed in further detail in Chapter 3.
[389] Palmer, "Canadian Couturiers", *supra* note 311, 90 at 105, Palmer observes that unlike the industrial design initiative, the ACC did not receive government support, financial or otherwise.
[390] Gérald Baril, *Dicomode: dictionnaire de la mode au Québec de 1900 à nos jours* (Montreal: Les Éditions Fides, 2004) at 11.

As Tim Jackson explains, one small but relevant distinction should be made between fashion and luxury goods. Although there is a strong association between luxury and fashion, they are not synonymous, as he suggests, "[t]he linkages arise, for many people these days, through their increased awareness of brands that have been revived or repositioned in the luxury brand sector."[391] This association he argues has to do with the exclusivity and heritage of haute couture, which is "inextricably linked" to luxury because of the exclusivity and niche elite status of the target market haute couture traditionally catered to.[392] Further he explains that "luxury brands have employed high-profile fashion designers to boost the allure of their products at a time in history when more consumer have been able to afford to buy luxury products."[393]

The next business model, prêt-à-porter or ready-to-wear was a movement whose objective was to democratize high quality designer fashion by making it available to the masses.[394] As Loschek suggests "[n]either haute couture nor prêt-à-porter fashion should be defined a priori as applied art. Haute couture represents the highest form of craftsmanship, in the sense of the artisan, […] prêt-à-porter signifies an industrialised version of haute couture, a 'ready-to-wear haute couture'."[395] Prior to this movement, high quality fashion was "made-to-

[391] Tim Jackson, "A Contemporary Analysis of Global Brands" in Margaret Bruce, Christopher M Moore & Grete Birtwistle, eds, *International Retail Marketing: A Case Study Approach* (Oxford: Elsevier, 2004) 155 at 155 [Jackson, "Global Brands"].
[392] *Ibid* at 157.
[393] *Ibid*.
[394] Ready-to-wear was popularized by design label Chloe's founder Gaby Aghion, see Thomas Adamson, "Chloe, Paris Fashion Week 2012: Clare Waight Kellernew Blends English Ease, French Sophistication" *The Huffington Post* (3 May 2012), online: <http://www.huffingtonpost.ca/2012/03/05/chloe-paris-fashion-week-2012_n_1321842.html>; Gilles Lipovetsky, *The Empire of Fashion: Dressing Modern Democracy*, translated by Catherine Porter (New Jersey: Princeton University Press, 1994) at 94-95; Sharon Elise Cline, *Feminite a la Francaise: Femininity, Social Change and French National Identity 1945-1972* (PhD Thesis, University of Wisconsin-Madison, Department of History, 2008) Cline cites a 1951 Paris Match article written by André Lacaze-Walter Carone who deemed the ready-to-wear movement a "democratization of couture" fashion at 172.
[395] Loschek, *supra* note 329 at 171 [citation omitted], she holds that despite the fact that haute couture could be luxurious, it is not an art.

measure," and was available only to a small segment of the industry.[396] There is a range of ready-to-wear segments available at different price points (e.g., low to mid-range, and luxury), and in terms of scale (small, medium or larger sized businesses), which take into consideration a number of factors including the quality of fabric, finishing and production. There are additional characteristics that can be attributed to the ready-to-wear models, particular to the segment interviewed for this research. For example, similar to the couturier's ateliers, ready-to-wear studios are often comprised of a small group of individuals who work closely together[397] and in some cases, the designer works alone and outsource to local cutters or machinists. As observed by Gavin Waddell, designers in this category often times work in urban centres.[398] In the case of Montreal and Toronto designers, proximity contributes to the development of the fashion design clusters. Depending on the business model, ready-to-wear can be created at the high quality fashion level or closer to the mass production level.

The final broad business model and the one most synonymous with the second overarching grouping, *mass production*, is the 'fast fashion' model. The fast fashion model took off in the 1980s due to trade liberalization and globalization, and has continued to alter the landscape of the industry.[399] As Nebahat Tokatli suggests, rather than focus on design development to the extent that haute couture and designer ready-to-wear does, fast fashion retailers are "inspired by the most attractive and promising trends spotted at fashion shows and

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[396] Lipovetsky, *supra* note 394 at 93; Notably, in the current market there is a growing demand for customization or made to measure – an example of mass customization can be seen in online retailers like Nike or Adidas which allow consumers to customize the details including the colour combinations of their shoes. This new made-to-order model is an expanding market, as described in an interview with Jocelyn Bellemare, Professor at UQAM in the Department of Management and Technology, see MODEMontréal, "Custom-fit for all: Understanding mass customization" *Mode Montreal* (November 18 2015), online: <http://www.modemontreal.tv/en/news/custom-fit-all-understanding-mass-customization>.

[397] Gavin Waddell, *How Fashion Works: Couture, Ready-to-Wear and Mass Production* (Oxford: Blackwell Science, 2004) at 40-41.

[398] *Ibid*.

[399] See generally, Nebahat Tokatli, "Global Sourcing: Insights From The Global Clothing Industry – The Case Of Zara, A Fast Fashion Retailer" (2008) 8 Journal of Economic Geography 21 [Tokatli, "Global Sourcing"].

by cues taken from mainstream consumers."[400] Fast fashion retailers are known to copy the works of other designers, to manufacture them immediately with little to no changes and to send them to market within a relatively short time frame.[401]

Some fast fashion firms have been notorious for copying the designs of other designers, including other retailers, independent designers and even luxury brands. A relatively interesting example is the lawsuit filed by Swedish retailer H&M, against Forever 21, a fast fashion retailer infamous for being sued by a number of designers for copying.[402] The subject of this lawsuit is the virtual knockoff of a tote bag with images of palm trees in the background with the words "Beach Please" written across the front of the bag.[403]

Indeed, a few of the participants mentioned that at the start of their careers or as interns, they were employed at retailers that either wholly or partially followed the fast fashion business model and experienced the practices of this business model first hand:

> …like the owner bringing in a garment he bought […] "we're just going to do this" and you're like an assistant designer or technical designer or sketch or pattern maker and you're like "just like that? You don't want to change something?" "No it's working I know they're selling." [404]

> I used to work for a company where we travelled to […] – to the main cities that were popular for trend [Courtney: development] development, […]. We bought samples, and brought them back with us, and with the samples we developed the collections.[405]

This model, as opposed to one that is design focused, prioritizes "highly responsive" channels of

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[400] *Ibid* at 22-23 [citation omitted].
[401] *Ibid*; Devangshu Dutta, "Retail @ the Speed of Fashion Part II" at 108 (August 2003) *Third Eyesight*, online: <thirdeyesight.in/articles/ImagesFashion_Zara_Part_II.pdf>; It is not uncommon for fast fashion retailers to attempt to duplicate the garment as closely as possible (Participant, Interview August 4 2014, at 2); Low cost copies overseas production has been identified as a harm to the Canadian industries, yet, they have also been identified as an opportunity for businesses who have differentiated themselves with high value added products, see *Industry Profile Spring 2010*, *supra* note 276 at 1.
[402] *H&M Hennes & Mauritz AB v Forever 21 Inc*, Docket 1:15-cv-05678, 2015 WL 4450008 (SDNY 2015) (Trial Pleading), H&M filed a complaint for copyright, trade dress infringement and unfair competition.
[403] Julie Zerbo "H&M is Suing Forever 21 for Copying" (28 September 2015) *The Fashion Law* (blog), online: <http://www.thefashionlaw.com/archive/hm-is-suing-forever-21-for-copying>.
[404] (Participant, Interview July 24 2014, at 1).
[405] (Participant, Interview July 25 2014, at 2).

communication, speedy creation and development, small batches for the purpose of quick turnover, supply chain and information systems.[406]

As mentioned at the beginning of this section, this study is based on interviews from a broad range of participants who self-identify as being creative and fall within the range of ready-to-wear high quality fashion. The participants are mostly but not always formally trained; their product position is situated between mid-range to higher end and even luxury market fashion and accessories for men and women in Canada. A large number of the designers interviewed not only design, but also produce their collections in Canada, a local and vital movement for supporting the entire supply-chain.[407] This approach is particularly important and is seen as an opportunity for differentiating and associating these as premium products.[408]

One of the most significant features of the segment interviewed is that they are both the designer or creative director and also an SME.[409] The majority of the participants are responsible for all aspects of the business including product design, development, production and business management or share responsibilities with a co-owner or partner.[410] This also means that the product design decisions are to some degree inseparable from the business decisions that are made by the SMEs.

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[406] Tokatli, "Global Sourcing", *supra* note 399 at 30, Tokatli suggests that one of the reasons for the change in cycle can be attributed to technology, media and consumerism. Specifically, he cites media such as music videos and websites as the primary trend setting mediums; Dutta, *supra* note 401 at 108.

[407] See generally, Deborah Leslie, Shauna Brail & Mia Hunt, "Crafting an Antidote to Fast Fashion: The Case of Toronto's Independent Fashion Design Sector" (2014) 45:2 Growth and Change 222.

[408] Canada Conference Board, "Canada's Textiles and Apparel Industry: Industrial Profile Spring 2014" (June 2 2014) at 2; In an interview, local producer/manufacturer Kathy Cheng stated, "There's a niche in the marketplace for brands looking for locally made due to a number of reasons. One of them being quality but also the flexibility, the quick turnaround, the proximity, the cultural understanding", see April Fong, "How Focusing on 'Made in Canada' Paid Off for Kathy Cheng's family Business" *Financial Post* (May 1 2015), online: <http://business.financialpost.com/entrepreneur/how-focusing-on-made-in-canada-paid-off-for-kathy-chengs-family-business>; but note that there are some issues with use of the 'made in Canada' tag, see Tanya Talaga, "Made in Canada: Our National Garment Industry Faces Huge Challenges" *Toronto Star* (25 October 2013), online: <https://www.thestar.com/news/world/clothesonyourback/2013/10/25/made_in_canada_our_national_garment_industry_faces_huge_challenges.html>.

[409] All of the participants interviewed for the thesis fall can be defined under this category.

[410] See Introduction, Methodology Section.

2.3.2 Design and Development Considerations

There are a number of steps that a designer SME has to undertake in order to develop, manufacture and sell their garment. These phases that can be broken down in the supply value chain: 'design, manufacturing, marketing, selling, distributing and servicing' as articulated by Richter Consulting in a study for the Apparel Human Resources Council.[411] These can be further grouped into three major categories that define this process: product design and development, manufacturing, and retail.[412] The first – product design and development – is the focus of this study.

Product design and development includes a number of important features, such as market research, fabric selection and inspection, pattern creation and making.[413] As a stand-alone activity, design is considered to be an important future core capability, third to marketing and sales respectively within the industry.[414] Practically, product design can be organized into two different steps. The first step and focus of this research is creative and design, where market research, fabric selection and general planning take place.[415] Participants were asked about what inspired them and about their creative processes and how they used trends and other sources to create their designs. The second step has more to do with the technical aspects: translating step

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411 *Shape of the Future*, *supra* note 272 at 39; The product development and design cycle can further be subdivided into six stages, including i) assessing opportunity, ii) strategizing, iii) conceptualizing, iv) developing and v) implementing, and vi) launching; See also Industry Canada, *State of Design: The Canadian Report 2010* (Ottawa: Industry Canada, 2010) online: Industry Canada <https://www.ic.gc.ca/eic/site/dsib-dsib.nsf/vwapj/oq00015_eng.pdf/$file/oq00015_eng.pdf > at 1 fig 1 [State of Design].

412 *Ibid* at 1.

413 *Shape of the Future*, *supra* note 272 at 52-54.

414 *Pressing Ahead*, *supra* note 12 at 62, the report states that based on the 2007 AHRC Strategic Planning Report, companies were restructuring by focusing on certain services – the study shows that as per percentage of participants, 82% focused on marketing, 77% on sales, and 63% on design, while only 20% were focusing on manufacturing.

415 Myrna B Garner & Sandra J Keiser, *Beyond Design: The Synergy of Apparel Product Development* (New York: Fairchild Publications, 2003), within the design step include a number of different elements such as "…line, color, texture, pattern, silhouette, and shape" at 179-183.

one into a practical design.[416] Sometimes, these processes are merged and undertaken by the designers themselves, or their employees and other times they are outsourced to local individuals or businesses.

2.3.2.1 Market Research and Fabric Selection

In the first step, participants who engage in market research mentioned looking at their environment, social and sometimes fashion trends online (Facebook, Pinterest, Instagram, fashion bloggers) and other media outlets. Some designers referred to traditional media such as pattern books (from vintage to contemporary), film and in some cases vintage fashion design itself.[417]

Although a number of the participants stated that they avoided trends, a few participants mentioned that they collected images from different sources to inspire their designs.[418] Other times, they were introspective, inspired by their own collections or for the purpose of improving current designs that have been successful.[419] Only a very small number of individuals mentioned that at some point they had access to forecasting data but did not necessarily use it.[420]

Customer feedback was also cited as an important source of influence or inspiration in market research. Feedback from customers can range from suggestions about a certain fit,[421] material or minor adjustments to the style (e.g., versatile length of a garment)[422] to consumer requests for alternative materials,[423] ethically made products and lower prices.[424] Although the

[416] In this step, creating a sample garment includes elements such as creating a pattern, draping, making a prototype, and perfecting the fit, see Garner & Keiser, *supra* note 415 at 183-186.
[417] See e.g., (Participant, Interview July 9 2014, at 17, 21); (Participant, Interview October 17 2014, at 6); (Participant, Interview October 23 2014, at 6).
[418] See e.g., (Participant, Interview November 21 2014, 6-7); (Participant, Interview October 13 2014, at 8).
[419] See e.g., (Participant, Interview October 23 2014, at 4).
[420] See e.g., (Participant, Interview August 4 2014, at 5); (Participant, Interview October 14 2014, at 6).
[421] See e.g., (Participant, Interview February 13 2015, at 8).
[422] See e.g., (Participant, Interview July 30 2014, at 11).
[423] See e.g., (Participant, Interview March 6 2015, at 5).

latter two were not explicitly cited in the interviews, these influences are typical in the product design phase.[425]

During the creative process, while some participants started out by reflecting on ideas that they had accumulated online or sketching them on paper or pinning them together onto a mood board, other participants initiated their creative process by meeting with suppliers to select and sample fabrics.[426] Fabric plays a key role, because it is not merely a one-dimensional aspect of the visual aesthetic, but it is also used to achieve certain goals such as a particular movement or texture. For many participants, selecting and working with fabrics was an important aspect of the design process: [427]

> … we start with the fabric sourcing because that's the first thing we see. I used to do the opposite before: I used to create first and never find the fabric that fit my design so now I'm looking into the fabric first and what exists – so I know what I can do with it.[428]
>
> …so how we come about the styles is mostly playing with fabric and doing what the fabric wants…[429]

In all of these activities it is evident that the majority of designers looked outward to inspiration in creating their works. Notably, none of the participants mentioned intellectual property considerations in their creative process, even though in some cases they admitted to being inspired by other forms of cultural production including fashion.

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[424] *Global Value Chain*, *supra* note 141 at 5; Note that certification marks can and are legally used to denote certain standards such as character or quality, working conditions, area or persons who produced the goods. This will further be discussed in Chapter 4. This is unlike designation of Haute Couture, which is not a certification mark in Canada, but could be if registered. Although they might not directly work to prevent copying works, they do prevent works that do not meet these requirements, use the certification to distinguish themselves.
[425] See generally State of Design, *supra* note 411 at 3.
[426] See e.g., Generally, participant interviews.
[427] Fabric selection is typically the first step of the design process for some designers. Concepts, ideas and designs are then developed, see (Participant, Interview October 17 2014, at 7).
[428] (Participant, Interview October 22 2014, at 5).
[429] (Participant, Interview October 13 2014, at 8).

2.3.2.2 The Role of Trends:[430] Forecasting

Unlike other segments in the fashion industry, the participants in this segment do not fully rely on the use of forecasted trends although the influence of trends is inevitable. Having said this, the participants were not unanimous in their reaction towards trends. Many of the participants interviewed admitted to being cognizant of trends[431] and sometimes influenced by them directly or indirectly because of capability of trends to permeate through social and other media, runways as well as though consumer feedback.[432] And although some participants did consider trends or were aware of them, there was a general reluctance among a few participants to follow trends as a business strategy in the same way that fast fashion retailers do.[433]

This is an important factor for several reasons. First, because as will be discussed in Chapter 5, a majority of designers consider their individual design aesthetic and style to be quite personal and unique. Following these trends closely, as opposed to developing one's own style or aesthetic would on some level contradict this because it would mean that the aesthetic and style could fluctuate every season with each trend.[434] How some participants mitigate this by remaining true to their aesthetic, that is by incorporating some elements of trends, e.g., in a

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[430] See e.g., Tim Jackson, "The Process of Trend Development Leading to a Fashion Season" in Tony Hines & Margaret Bruce, eds, *Fashion Marketing: Contemporary Issues*, 2nd ed, (Oxford: Elsevier, 2007) 168, Trends can be represented in a number of ways, as Jackson suggests, there are several attributes present in a garment that may "reflect a very strong fashion trend in its own right: colour, fabric, print, silhouette, styling detail, trim" at 170 [Jackson, "Process of Trend Development"].

[431] For example, one participant noted that they do not intentionally avoid trends; instead they do their own research, see (Participant, Interview October 13 2014, at 8).

[432] (Participant, Interview February 13 2015, at 4); (Participant, Interview October 17 2014, at 2).

[433] See e.g., (Participant, Interview March 9 2015, at 2).

[434] It is important to note that it is possible to reinterpret different trends that are available and still keep one's own aesthetic. As one participant mentioned, it is possible to give a room full of designers the same fabric and each of them will come up with their own interpretation of a garment - however, at the same time, following trends closely may result in the dilution of their aesthetic because it is so fluid. This might be the opposite strategy for fast fashion retailers who care about mass selling trends.

colour, or a particular garment style that was re-introduced that year, e.g., culottes or an oversized sweater and making it in their own way.[435]

Second, it is important because the type of clothing that the designers within this segment create are intended to be practical and not lose their relevance to the consumer (in aesthetic and in quality) after several months primarily because of the higher price points commonly charged in this market.[436]

> …I don't really know, 'trend' is not a word that I like to use – I hate trends. So I don't follow trends at all and I want to avoid them. So to me, a trend is like an enemy.[437]

> …trends are also very important depending on your demographic I think […] trends for young young girls, that is something that's important to them but for the clients that we sell to, they need designs to be classic that can work with stuff that they already have.[438]

Instead, participants mentioned that they conducted their own market research online rather than relying on the data provided by trend forecasting companies.[439]

Inspiration is not limited to trends in fashion forecasting, in fact, there were a number of different sources of inspiration identified by the participant: social trends, trends in environment and global trends. Some define trends more practically (e.g., what's trending on social media), others more conceptually (e.g., looking for emerging patterns in the world, social or cultural trends).[440]

Notwithstanding the participant's mixed attitude towards trend forecasting, forecasting companies play a key role in the development and dissemination of trends and are often relied

[435] (Participant, Interview February 13 2015, at 4, 9) For example, designs have to be marketable; (Participant, Interview July 31 2014, at 15) participant stated that even if there was a movement toward a particular piece or trend, they would make it in their own way because it would otherwise be out of place in relation to the collection and to the customer who will be able to tell.
[436] The price points might be slightly higher than in the mass fashion market (due to local manufacturing as opposed to overseas manufacturing and economies of scale), a consumer may not be willing to spend the same amount of money on a item if they know that they not wear it after a couple of months due to how fashionable or trendy it is.
[437] (Participant, Interview October 22 2014, at 3).
[438] (Participant, Interview August 28 2014, 14).
[439] (Participant, Interview October 13 2014, at 8).
[440] See e.g., (Participant, Interview March 9 2015, at 2); (Participant, Interview March 4 2015, at 5).

upon for guiding many fashion and consumer sectors.[441] An example of the influence that trend forecasting wields within certain segments of consumer products can be demonstrated by colour forecasting. As Tim Jackson observes,

> Colour is the attribute that is agreed upon earliest in the trend development process, some 18–20 months prior to a season. During these early stages emphasis is on the context and qualities of colour such as 'a cool colour palette' or 'chalky textures' indicating a range of tones and shades within a particular colour. Typically colours become more specific the closer they are to a particular season.[442]

Colour forecasting,[443] – a subset of trend forecasting – is a process that takes into consideration a multitude of factors such as social, economic and environmental events, that are evaluated and result in a colour palette or story which is then offered to buyers, merchandisers, and in this case designers, to help guide the direction of their future seasons. Colour is one of the most important considerations, and therefore one of the first factors considered when creating consumer products.[444] Not all of the decision-making is conducted in a top-down fashion, in fact, because consumers are the ultimate decision makers, much of the information comes from the bottom up and stems from consumers in the decision-making process.[445]

However, for designers, as per the Devil Wears Prada's "cerulean blue" scene,[446] forecasted data (colour in this case) shapes and trickles down to the slightest details produced in

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[441] Jackson, "Process of Trend Development", *supra* note 430, 168 at 175.
[442] *Ibid* at 171.
[443] See generally, Tracy Diane & Tom Cassidy, *Colour Forecasting* (Oxford: Blackwell Publishing, 2005) [Introduction].
[444] Garner & Keiser, *supra* note 415 at 105; Jackson, "Process of Trend Development", *supra* note 430 at 171, Jackson states that colour is what customers tend to respond to first, for reasons including its "social and cultural semiotic associations"; Tracy Diane Cassidy, "Personal Colour Analysis, Consumer Colour Preferences and Colour Forecasting for the Fashion and Textile Industries" (2007) 1:1 Colour: Design & Creativity 1 at 1-2.
[445] See generally, Diane & Cassidy, *supra* note 443, [Introduction]; Ellie Krupnick, "What that Famous 'Devil Wears Prada' Scene Actually Gets Wrong" *Huffington Post* (24 January 2014)(video & article), online: <http://www.huffingtonpost.com/2014/01/24/devil-wears-prada-scene-famous_n_4659819.html> (Stella Bugbee: "What has always irritated me about that clip is that the fashion designer who showed it in 2012 probably stole it from some kid they saw on the street who was very stylish. Trends don't trickle down, in theory... they come from the street and they come from subcultures, music cultures").
[446] Aline Brosh McKenna, *The Devil Wears Prada*, (2006) Screenplay by Peter Hedges, IMDB, online: <http://www.imdb.com/title/tt0458352/quotes>. In this scene, insight into the fashion industry is provided as to

fabrics made available to designers in Canada and around the world. A few participants acknowledged the influence of trends in the overall picture of what they do:

> …we use the same fabric or we use the same colour range because that's the new colour trend or colour palette that the suppliers show us. So I'm like 'oh yeah that would be nice' but then I might not be the only one who picks that colour because that's what they show all of the designers - so of course we end up being a part of a trend that I didn't even know existed.[447]

Thus even unintentionally, forecasted trends have a tendency to appear in aspects of a collection whether they are in the form of colour, print, texture or other element.

As will be discussed next, the product design and development phase forces designers to take many issues into consideration before they complete a collection. While some steps in this phase serve as points of inspiration, others may serve as limitations in the creative and development process.

2.3.2.3 Design Considerations: Limitations

In addition to primary inputs, e.g., market research, including customer feedback and selecting fabrics that affect product design and development, there are several factors that may work to limit the scope of design and can otherwise be considered as restrictions in the design process.[448] As mentioned above, this is primarily because the participants interviewed play the dual role of designer and SME, and for this reason, product design and development are connected to the production and eventual retail of the design and are therefore paramount considerations. These elements include the functionality of the garment, the suppliers and materials i.e., hardware or fabrics available, trends, classic styles, the collection and market finances, and time.

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demonstrate that the decisions made in the fashion industry is deliberate and controlled, such that there are many decisions made in a hierarchical fashion, representing billions of dollars, by the time a particular coloured sweater ends up in a bargain bin.

[447] (Participant, Interview October 22 2014, at 5).

[448] See Chapter 1, when defining design, one of the factors includes working with the constraints that may limit the outcome of the design.

2.3.2.3.1 Functionality

The very fact that fashion design is worn confines it to the limitations of the body. There are generally sleeves, a waist, a collar, a torso and pant legs. Although there are a number of ways in which these elements of the garment can be expressed, 'the body' as explained by some participants, is a primary consideration (and limitation) during creation.[449] Having said that, creativity goes further than the sleeves, pant legs and collar: designers also take into account the way in which the garment fits on different body types, and how different fabrics and cuts allow the garment to flow with the movement of the body. Some designers spend countless hours trying to achieve and perfect these movements. In this case functionality also takes on the meaning of the aesthetic or form.[450]

2.3.2.3.2 Suppliers and Materials

Suppliers are also a hugely important element that bridge design and production. One of the main and most important limitations cited by the participants is the availability and assortment of the available fabrics. There are a handful of companies within Canada that cater to the needs of SMEs who tend to initially order smaller quantities, which are suitable for sampling before they commit to a larger order.[451] This may severely limit the options of the designer in relation to the product design and production because they have fewer resources (e.g., colour, texture, weight) to select from. Fabric selection and availability are important factors, which the study will return to when discussing the copying and prevention mechanisms, in Chapter 6.

2.3.2.3.3 Trends

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[449] (Participant, Interview October 13 2014, at 2); (Participant, Interview October 17 2014, 6); (Participant, Interview August 28 2014, at 10-11).

[450] Loschek, *supra* note 329 at 173; see Raustiala & Sprigman, "Piracy Paradox", *supra* note 8, as Sprigman and Raustiala observe "the expressive elements in most garments are not "bolted on" in the manner of an appliqué, but are instilled into the form of the garment itself—in the "cut" of a sleeve, the shape of a pant leg, and the myriad design variations that give rise to the variety of fashions for both men and women" at 1700.

[451] See e.g., (Participant, Interview July 25 2014, at 4); see generally, (Participant, Interview October 22 2014, at 5).

As mentioned above, trends may have a number of influences on a collection or even a business model. Designers within this segment seem to not fully want to follow forecasted trends, but as SMEs it is an important to consider trends in general. If customers are necessarily looking for a certain colour or certain length cardigan, and the designer has not taken some element of trends into consideration, then that particular market will find alternative designers who may be able to accommodate their demand.[452]

2.3.2.3.4 Style Categories

Classic styles or silhouettes may also work to limit designs to a certain degree. Trench coats, A-line skirts, caftans, and maxi length skirts are examples of styles that have to conform to a certain measurements or aesthetic or else they no longer belong to that category. An example of this is demonstrated in the case of classic brogue style shoes. Although there are a number of variations that can be incorporated make them look a slightly different, too much variation and it would no longer conform to the classic brogue style. Similarly a maxi or midi dress would not fit into maxi or midi categories if the length ranges too much outside of what is deemed to be the range for that category. There are a number of different variations of maxi length garments, but the length must reflect the category.

2.3.2.3.5 Continuity, Balance, Collections and Market

The collection strategy or group line development is another important consideration developing a collection.[453] As will be discussed below, some designers coordinate and strategize their line, meaning that they have to create a range of goods in order to appeal to buyers, distributors and consumers. For this reason, designers (including some but not all of the participants) sometimes

[452] See e.g., (Participant, Interview February 13 2015, at 4).
[453] Keiser & Garner, *supra* note 415 at 234.

include a variation of pieces including basics and classics within their collections.[454] They may also have a similar print, colour or theme throughout the collection to allow consumers a breadth of options in mixing and matching pieces.

Decisions regarding the collection also have to do with the market segment and the product market that the designer is attempting to target. If the focus of a designer's market segment is businesswear, then a sequinned floor length gown would most likely not be appealing to distributors or to customers who associate the designer with that particular segment. For example, one would not expect to find a tailored tuxedo at the Gap.

Further, some designers tend to not want to stray from previous collections so that there is continuity in the line, which allows for their clients to build on to their existing wardrobe with items they had bought from previous collections.[455]

2.3.2.3.6 Finances

Finally, unlike big fashion houses and major retailers with a different pool of resources, the Canadian independent design segment is one that is limited by its resources and market.[456] Although a number of participants have cited sales abroad (especially the United States), for a number of designers, Canada remains an important market.[457]

The participants interviewed for this study are not only responsible for all aspects of the business, but often personally invest in their own businesses. Therefore, the funds available for development and production are understandably limited. For example, one participant stated that they would love to incorporate ornate beading details onto their garments but that it was simply

[454] *Ibid* at 235-236; (Participant, Interview August 28 2014, at 16-17).
[455] (Participant, Interview October 14 2014, at 6).
[456] Statistics Canada, Canadian Economic Observer, "Trade Liberalization and the Canadian Clothing Market" by Diane Wyman, (Ottawa: Statistics Canada, December 2006) Catalogue No 11-010-XIB, online: Statistics Canada <http://www.statcan.gc.ca/pub/11-010-x/01206/9545-eng.htm> [Wyman, "Trade Liberalization"], prior to the 1960s and before restructuring because of trade liberalization, Canadians would predominantly wear Canadian made clothing.
[457] See *Apparel Industry Profile 2010-2014*, *supra* note 273.

not financially feasible to include such details due to the amount of labour and specialized skill set required to complete such a task.[458] Understandably, the mixture of responsibilities SMEs take on includes design, production and business considerations that play a considerable role in the design development phase.

2.3.2.3.7 Time

Time is also an important limitation. As will be discussed in detail below, the industry has changed immensely to accommodate the proliferation of retailers who are able to offer new pieces and collections on weekly or monthly basis. This limitation is an important one because it has impact on the marketing, branding, and the ability for the designer to remain competitive with other designers who are able to consistently offer new selections to their clientele. SMEs have to focus on producing a number of pieces based on their resources and collection cycles.

2.3.3 Product Life Cycle

The fashion industry is often singled out as being unique due to some defining markers including "*short life cycles*," "*high volatility,*" "*low predictability*" *and* "*high impulse purchasing*."[459] This section examines the design life cycle and the categories of products that are produced, which are integral to understanding the design process. It also explains the factors that might affect designer's decision to design certain kinds of garments based on business considerations or not expend resources for registering or enforcing protection for their designs.

There has been breadth of interesting research on fashion theory conducted to describe the fashion cycle and how trends disseminate.[460] Raustiala and Sprigman suggest that there are

[458] (Participant, Interview August 4 2014, at 7).

[459] Martin Christopher, Robert Lowson and Helen Peck, "Creating Agile Supply Chains in the Fashion Industry" (2004) 32:8 International Journal of Retail & Distribution Management 367 at 367.

[460] See e.g., Georg Simmel, "Fashion" (1904) 10 International Quarterly 130, Simmel suggests that "[f]ashion is the imitation of a given example and satisfies the demand for social adaptation; […] At the same time it satisfies in no less degree the need of differentiation, the tendency towards dissimilarity, the desire for change and contrast . . . . the

two particular mechanisms that help drive the industry. The first mechanism they identify is "induced obsolescence," where fashion is considered to be a positional good that begins with an elite group and becomes, once the trend is diffused to the masses, an 'everyday' product. At this point, the authors theorize that innovation is spurred because of the need for new "status seeking" products rather than to merely keep individuals warm.[461] The second mechanism they identify is "anchoring," "exhausts the status conferring value" of the clothing in order to drive consumers to new trend, which is communicated through the plethora of similar copies, thus anchoring the trend.[462] Like a trademark, the trend is signalled to the consumer in a way that reduces transaction costs (consumers would not have to waste time and money purchasing items that are not in fashion because the trends are everywhere).[463]

Rather than expanding into fashion theory at this juncture, the diffusion pattern of fashion or trends that will be referred to in this study will be that of Garner and Keiser who have distilled the cycle into six stages.[464] These include the "introduction" phase, where innovators adopt the fashion element (e.g., style, colour, pattern, cut or other element), who can afford the piece and also have the eye to pick up on the element from the runway shows.[465] The next phase is referred to as "growth." In this phase, the fashion trickles down to fashion leaders (individuals whom

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fashions of the upper stratum of society are never identical with those of the lower; in fact, they are abandoned by the former as soon as the latter prepares to appropriate them" at 133; see generally Herbert Blumer, "Fashion: From Class Differentiation to Collective Selection" (1969) 10:3 The Sociological Quarterly 275; see generally Wolfgang Pesendorfer, "Design Innovation and Fashion Cycles, (1995) 85 Am Econ Rev 771, Pesendorfer suggests that "[t]he purpose of fashion is to facilitate differentiation of 'types' in the process of social interaction. The demand for new designs is derived from the desire of agents to interact with the 'right' peop1e. At the same time, fashion is accompanied by a process of continuous innovation, in which new designs are developed at sometimes large cost only to be replaced by other designs. With the arrival of every new design, previous fashions become obsolete" at 772.

[461] Raustiala & Sprigman, "Paradox Revisited", *supra* note 120 at 1207.

[462] *Ibid*.

[463] See Raustiala & Sprigman, "Piracy Paradox", *supra* note 8 at 1728-1729.

[464] Garner & Keiser, *supra* note 415 at 95.

[465] *Ibid*.

people look up to for fashion) who purchase these goods at more affordable prices.[466] In the next phase – "acceleration" – the element has made it to the mass market, meaning that all segments of the market sell some type or form or variation of it, which is then followed by the "saturation" phase.[467] In the "decline" phase, the element can still be worn but individuals will no longer purchase it (most likely it will no longer be available for sale), followed by "obsolescence" when the piece becomes out-dated and no longer appealing.[468]

Various categories of design pass through these stages at different rates. For example, some garment designs such as 'basics,' rarely change over time and therefore take a very long time to pass through the stages.[469] Basics, which include t-shirts, khakis, women's hosiery and jeans, are known for their longevity and extended life cycle, as compared to trendier fashion items, such as those employing seasonal prints or trendy silhouettes.[470] They play an important role in retail, as they are considered to be the 'bread and butter' of the industry.[471] They may remain unchanged, for example, a white t-shirt, or return each season with minor variations, or blue boot cut jeans.[472] As mentioned above, some of the participants interviewed include basics in their collections as a strategy for the purpose of complementing some of their stronger pieces. This way, if an individual was interested in purchasing a fashion forward or patterned top, they could match it with a basic black pant from the same designer rather than mixing and matching it with the offerings of another designer.

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[466] *Ibid*.
[467] *Ibid.*
[468] *Ibid.*
[469] Quebec, Communauté Métropolitaine de Montréal, *Textiles and Clothing Cluster: Fabric and Products Clothing and Fashion*, (Quebec, Publication du Quebec, 2004) at 40 [*Textiles and Clothing*]; Keiser & Garner, *supra* note 415 at 233-234.
[470] *Ibid*.
[471] Gini Stephens Frings, *Fashion: From Concept to Consumer*, 8th ed (Upper Saddle River, New Jersey: Pearson Education Inc, 2005) at 173.
[472] *Textiles and Clothing*, *supra* note 469 at 40, there is a broader distinctions made between basics and fashion products as the two main categories of design, as described in this report – in this study, the author has further divided this.

Classic or "timeless" pieces like basics can also enjoy a longer life cycle.[473] They are similar to basics but the two categories serve different functions. Unlike basics, there is a higher design element present in the design of classic style garments, and, although disputably fashionable, they are not considered to be trend driven products. It can be argued that in terms of style, there is a range of classic or timeless pieces, some teetering closer to the basic side while others are more fashion forward side. Trend-driven mass fashion retailers such as Forever 21 are typically associated with clothes that are hyper-trendy, lower quality and have a limited lifespan.[474] These retailers are at the opposite spectrum of high end or luxury items that are considered to be classics and therefore positioned to be longer-term investment pieces. An example of the potential longevity of a classic garment, provided by Gini Stephen Frings is the iconic Chanel suit from the 1950s that could still be worn decades later because it is simple and remains relevant.[475]

The majority of participants insisted that they avoided producing trend-driven clothing and instead preferred to focus on classics or "timeless" pieces that their clientele would be able to wear throughout the years.[476] For example, one participant observed that in relation to their collection, "…the price point is a lot higher, so people are investing in pieces as opposed to an overall '[…] look'."[477]

There are certain characteristics that are associated with a business model based on timeless or classic pieces, as indicated by a study conducted on the Toronto independent fashion

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[473] Frings, *supra* note 471 at 53.

[474] Annamma Joy, et al, "Fast Fashion, Sustainability, and the Ethical Appeal of Luxury Brands" (2012) 16:3 Fashion Theory 273, the authors make reference to the 'ten washes' reference used by fast fashion brands to describe the lifespan of the article of clothing due to "poor quality materials and manufacturing" at 283-284.

[475] Frings, *supra* note 471 at 53.

[476] (Participant, Interview July 31 2014, at 5); (Participant, Interview August 28 2014, at 14).

[477] *Ibid*.

designers by Deborah Leslie, Shauna Brail and Mia Hunt.[478] The authors observed that this business model fosters slower purchasing patterns/habits by consumers,[479] while simultaneously giving designers an appearance of exclusivity because their works are created in smaller batches and are therefore limited.[480] One participant, stated that they put a lot of time and effort into creating a single design that focuses on the aesthetic and quality which in return equates to fewer pieces in a collection because they want their customers to benefit from a long lasting product, unlike fast fashion retailers.[481] On the other hand the participant said that this is the opposite of most of the retail industry who drive down their cost and time in order to benefit from unethical price points.[482] An example of the controversy regarding the ethics of the fashion industry was shared by Li Edelkoort, trend forcaster, who during a presentation asked, "[h]ow is it possible that a garment is cheaper than a sandwich? How can a product that needs to be sewn, grown, harvested, […], spun, knitted, cut and stitched, finished, printed, labeled, packaged and transported, cost a couple of Euros? It's impossible."[483]

As mentioned above, trend-driven fashion design (highly trend-driven fashion often associated with the fast fashion business model) is recognized for its tendency to become obsolete much faster and is associated with the mass-market phase of the cycle. Companies that focus on trends as a primary business model, tend to wait to usurp designs and ideas rather than to invest in originating or creating them. They wait until styles are released by innovators within the industry and mass-produce them with slight variations to capture the market share. Therefore,

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[478] See generally Leslie, Brail & Hunt, *supra* note 407.
[479] *Ibid* at 230-231.
[480] *Ibid* at 229-236. This is also the result of higher price points for the production of goods that are made in Canada.
[481] (Participant, Interview March 9 2015, at 8-9).
[482] *Ibid* at 9.
[483] Li Edelkoort, "Anti-fashion: A Manifesto for the Next Decade" *Business of Fashion* (February 9 2017), at 7:54-8:17 mins (video), online: <https://www.businessoffashion.com/articles/voices-video/video-li-edelkoort-reads-her-anti-fashion-manifesto>. What Edelkoort was discussing was the fact that it is possible to buy an evening dress for 10£ and the overall ethical concerns of the current state of manufacturing for inexpensive clothing.

by the time the styles have trickled down the stages to mass market and saturation, there can be a multitude of variations of the same trend offered in all levels of retailers.

2.3.4 Production Cycle

What is particularly unique to the fashion design industry is the rapid rate at which designers are forced to create and produce to in order to remain competitive.[484] The production cycle does play a role in the decisions made by firms to invest in registering their design: the speed at which the industry moves and the sheer volume of output makes it difficult and inefficient for designers to allocate resources to registration, since by the time registration would take place, many would have moved on to the next collection.[485] In this section, I will discuss the general production cycle and the changes that designers are experiencing because of market shifts and demand.

In the past couple of decades and largely due to the proliferation of fast fashion,[486] there have been a number of shifts in the fashion production cycle. Traditional fashion cycles used to require designers to provide lead times of up to nine months in advance for manufacturing orders.[487] The traditional model is divided into a biannual grouping; fall and winter were often shown together, followed by the spring summer collection grouping. Fashion shows are a direct

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[484] Excerpts from an interview with Cathy Horyn designer Raf Simons, then Creative Director of Dior reflects the speed at which the fashion industry moves "'When you do six shows a year, there's not enough time for the whole process,' he explains. 'Technically, yes — the people who make the samples, do the stitching, they can do it. But you have no incubation time for ideas, and incubation time is very important. When you try an idea, you look at it and think, Hmm, let's put it away for a week and think about it later. But that's never possible when you have only one team working on all the collections.' […] 'But I have no problem with the continuous creative process,' he says. 'Because it's the reason I'm in this world. It's always happening. I just did a show yesterday. Just now, while waiting in the car, I sent four or five ideas to myself by text message, so I don't forget them. They are always coming.' see Cathy Horyn, "BoF Exclusive | Raf Simons Speaks to Cathy Horyn on the Speed of Fashion" *Business of Fashion* (6 November 2015), online: <http://www.businessoffashion.com/articles/bof-exclusive/bof-exclusive-raf-simons-i-dont-want-to-do-collections-where-im-not-thinking>; Maya Singer, "The Year in Fashion: In The Wake of Fall's Designer Exits, It's Time to Start Thinking Small" *Vogue* (2 December 2015), online: < http://www.vogue.com/13373926/the-answer-to-designer-burnout-thinking-small/>; Compare this with Angelo Flaccavento, "Giambattista Valli: 'I'm the Only One Who Decides'" *Business of Fashion* (13 November 2015), online: <http://www.businessoffashion.com/articles/people/giambattista-valli-im-the-only-one-who-decides>.

[485] See Chapter 5.

[486] As will be discussed below, based on the removal of the trade quotas for textile and clothing, Canada has experienced a flood of fast fashion retail options.

[487] Christopher, Lowson & Peck, *supra* note 459 at 369; *Shape of the Future*, *supra* note 272 at 43.

reflection of this, where buyers and press are invited to view future collections often a full season or two prior to the public release date in retail stores. An example of this model is illustrated by traditional fashion show schedules. Toronto's now defunct biannual fashion week (held spring and fall) previously known as World MasterCard Fashion Week Toronto, many labels including Pink Tartan,[488] Mackage,[489] and Melissa Nepton[490] showcased their 2015 FW collections in March 2015.

In the last decade, contemporary production cycles have emerged in order to deal with the growing influence of technology (online shopping), social media[491] and fast fashion retail competition, such as Zara [492] who "…transform […] trends into products that can be put on the market almost immediately, freeing themselves and the consumers from the 'seasonal collection trap,' and in the process changing the conditions surrounding production."[493] It has been reported that Zara takes roughly thirty days from "identifying a new trend to delivering a finish product", whereas their competitors take closer to several months to a year to do the same thing.[494]

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[488] Karen von Hahn, "Toronto Fashion Week: Pink Tartan Rises Above the Clouds" *Toronto Star* (24 March 2015), online: <http://www.thestar.com/life/fashion_style/2015/03/24/kim-newport-mimran-takes-pink-tartan-to-a-new-level.html>.

[489] Odessa Paloma Parker, "Poppy Brights To Deep Jewel Tones About At Day 3 Of Fashion Week In Toronto" *The Globe and Mail* (26 March 2015), online: <http://www.theglobeandmail.com/life/fashion-and-beauty/fashion/poppy-brights-to-deep-jewel-tones-abound-at-day-3-of-fashion-week-in-toronto/article23631490/>.

[490] Lauren La Rose, "Toronto Fashion Week: Melissa Nepton Marks Milestone With 'Romantic Warrior' Line" *Toronto Star* (25 March 2015), online: <http://www.thestar.com/life/fashion_style/2015/03/25/toronto-fashion-week-melissa-nepton-marks-milestone-with-romantic-warrior-line.html>.

[491] Kate Abnett, "Do Fashion Trends Still Exist?" *Business of Fashion* (9 January 2015), online: <http://www.businessoffashion.com/articles/intelligence/fashion-trends-still-exist>.

[492] *Shape of the Future*, *supra* note 272, the study states that this particular "strategy pursued by ZARA that has been able to reduce design-to-delivery from up to nine months for store like the GAP, to 10 to 15 days while not owning a manufacture base of its own" at 43; Suzy Hansen, "How Zara Grew into the World's Largest Fashion Retailer" *New York Times* (9 November 2012), online: <http://www.nytimes.com/2012/11/11/magazine/how-zara-grew-into-the-worlds-largest-fashion-retailer.html> Authors notes that because of fast fashion, specifically the Zara business model, the bi-annual fashion trend has transitioned to designers having to create, produce and release 3-4 collections a year. Notably, Zara ships clothing to their stores twice per week keeping both traditional retailers and fast fashion retailers on their toes.

[493] Tokatli, "Global Sourcing", *supra* note 399 at 23 [citation omitted].

[494] WIPO Magazine, "IP and Business: Intellectual Property in the Fashion Industry" *WIPO* (May 2005), online: <WIPO http://www.wipo.int/wipo_magazine/en/2005/03/article_0009.html>.

SMEs designers have now started to shorten the "design-to-sale" cycle by adopting this "feed" or "buy now, wear now" model.[495] Rather than having to wait for the traditional biannual spring/summer, fall/winter collections, new pieces can be produced and on shelves ready for sale on a weekly or monthly basis.[496] Clothes are both designed and produced "in season,"[497] in smaller quantities, are therefore not overstocked, allowing them to be sold at regular prices.[498] This provides designers with the opportunity to gauge customer interests and focus on demand within the season, and compels customers to return to stores on a more consistent basis and pay full price for the 'have-now' garments instead of waiting for the items to go on sale since more likely than not, they will have sold out.[499]

An outlier of the traditional production cycle is clothing made specifically for "user occasions." [500] As Jackson explains, clothing made in this category often takes into consideration special occasions, which may be seasonal in nature, such cocktail dresses close to the holidays, or resort lines which cater to those who escape to warmer climates in the winter.[501] As he suggests, they might take into account changes in consumer behaviour, such as the transition of formal business attire to business-casual in the last several decades.[502] Although the participants did not use the term "user occasions" to describe the latter example, they did mention the

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495 Lauren Sherman, "From Fashion Cycle to Fashion Feed" *Business of Fashion* (9 March 2015), online: <http://www.businessoffashion.com/2015/03/fashion-cycle-fashion-feed.html> [Sherman, "Fashion Cycle"] for example, this article features designer Yael Aflalo who releases a limited collections of 15 new styles each Monday, which she herself produces, and creates.
496 *Ibid*.
497 Lauren Sherman, "Is 'Buy Now, Wear Now' Really the Future of Fashion?" (5 August 2015) *Fashionista* (blog), online: <http://fashionista.com/2013/08/buy-now-wear-now> In this article, author uses Tamara Mellon as an example who will show her clothes and make them available to her clients in season rather than showing a full season or two ahead; Sherman, "Fashion Cycle", *supra* note 495.
498 *Ibid*.
499 Joy, et al, *supra* note 474, this model has typically been used by fast fashion retailers who offer clothing for immediate consumption. "Fast fashion exploits this segment, offering of-the-moment design and the immediate gratification of continually evolving temporary identities— a postmodern phenomenon" at 276 [citation omitted].
500 Jackson, "Process of Trend Development", *supra* note 430, 168 at 172.
501 *Ibid*.
502 *Ibid*.

importance of taking into account customer feedback into their design process. Examples that were mentioned included the length and versatility of the garment.[503]

Notably many of the participants interviewed for this study continue to use the traditional model, showing and releasing their collections biannually, while only a small number of participants identified their business model as one that releases works on a consistent monthly or biweekly basis.

2.4 Conclusion

The fashion industry is economically, socially and culturally important. The Canadian fashion industry has shifted from one that was purely industrial, embedded in manufacturing to one that is steadily gaining identity and reputation for quality and niche products and design segments in Montreal and in Toronto. While the direct benefits are measured economically, the cultural and social benefits have an intangible nature and may contribute to city branding and resonate through number of peripheral industries. These are important considerations that will be seen in the following chapter, as they relate to the policies that have been deployed at the regional levels to support the industries.

There are a number of different business models, products and cycles that exist within the fashion industry. The particular characteristics surveyed in this chapter describe the parameters of the independent fashion design industry segment interviewed for this study and demonstrate that many of them share similar experiences because their design and business decisions are intertwined. What is particularly interesting are the limitations such as financial, trends, collections and suppliers that designers have to evaluate when considering product design for the reason that there is already so many options that are removed from the infinite pool of choices

[503] (Participant, Interview February 13 2015, at 5).

that are possible with unlimited resources and in different markets. What it also demonstrates is the cost-benefit analysis that designers may consider if faced with the decision of protecting or enforcing the protection of their design. Further, these elements factor into the protection and enforcement mechanisms that are discussed in Chapters 5 and 6. This framework will put into context some of the findings concerning the design decisions and relationships between the designers themselves and members of the clusters that they work with.

PART II: POLICIES AND LEGAL FRAMEWORK

3 CHAPTER THREE - Policies: Design and Fashion Design

The fashion design industry in Canada is as complex as it is unique, creative and persistent. Given its economic, cultural and social contribution, it is especially insightful to trace the way that federal, provincial and municipal policies have supported this industry. As will be demonstrated below, design[504] has not actively or comprehensively been incorporated under an existing national cultural or innovation policy[505] despite the fact that an important cultural and innovation policy tool, i.e., intellectual property law, protects design extensively.[506] Instead, design and more specifically fashion design appears to be affected by a number of different policies across the various levels and departments of government.[507]

The purpose of this chapter is not a critique but to provide background information based on two distinct policy landscapes. The first is a descriptive framework that can be used to contextualize the current state of Canadian policies that frame the fragmented nature of

[504] Notably, and as mentioned in the Introduction, design activity produces a number of different objects including human activity systems, laws, rules and policies as well as physical artefacts, see Ralph & Wand, *supra* note 318 at 109; Also discussed in the Introduction, design policy is central to the discussion on fashion design, which is a sub-discipline of design activity. To help navigate this chapter, the discussion will be divided into a discussion on design policy, which relates to federal policy on design, cultural and innovative policies. Fashion design policy will be reviewed in the discussion on textile and apparel, provincial and municipal policies; *Future by Design*, *supra* note 323 Price Waterhouse and analyzed what they classified as three sub-sectors of design, "design of the built environment, industrial design and communications design" which spanned five major design disciplines including architecture, landscape architecture, graphic design, interior design, and industrial design at 22.

[505] Bushore suggests "Canada has overlooked design policy as a key contributor to business and economic stability at a time of uncertainty, as a symbolic source for culture at a time when it exists as a multicultural nation, and as a source of value at a time in history when values are changing" see Bushore, *supra* note 318 at 2; Even in the few circumstances where design activity has been acknowledged within an existing national policy, it has been classified as a 'high value-added' activity associated with the specific manufacturing sectors to which it is related, in other words always synonymous with industrial design activity.

[506] The extensive design legislative framework is discussed in the following chapter.

[507] An example that illustrates the subject matter approach to design as MacLeod *et al* have noted, is the fact that architecture, a form of design was at the time of writing their article under the auspices of Canadian Heritage, while the other policies relating to product design stem from Industry Canada, see MacLeod, et al, *supra* note 357 at 16. The authors remark that while in some countries a multidisciplinary approach is employed for design, for instance in Singapore, in Canada the approach is fragmented based on the end product or service it produces.

intellectual property law to design subject matter. This can explain why the law is perceived as inaccessible to designers, an issue that will be further explored in Chapter 5.

The second investigates policies related to fashion design industry specifically, at the national, provincial and municipal levels. The latter provides a foundation for understanding the geographical, economic and creative characteristics of the fashion design industry within the comparator jurisdictions, Montreal and Toronto. The proximity or formation of the independent fashion design segments in Montreal and in Toronto within their respective cities arguably contributes to the way that designers interact with one another. It further sheds light on the conditions that may influence the way that the participants interact with one another, otherwise contributing to the attitudes and norms that have developed within these particular creative communities.[508] For example, as will be seen in Chapter 6, participants seem to prefer to handle incidents of copying directly rather than going public in the case that it is another local designer who has allegedly copied them. It is most likely for the same reason that a number of participants have gone public if it is a major retailer not within geographical proximity.[509]

While the first half of this chapter describes federal culture and innovation policies that have the capability of directly influencing intellectual property protection for *design*; the latter half of this chapter will examine federal, provincial and municipal policies and programs that have affected to the development of the *fashion design* industry, that do not influence intellectual

[508] Karlsson, "Clusters, Networks and Creativity" *supra* note 10, Karlsson observes that "buzz" is a contributing factor to the knowledge sharing that occurs within creative communities, stating that in the context of artists, "'…[b]uzz' refers to information and communication ecology generated by face-to-face interaction by the co-presence and co-location in the cluster of artists and of other people interacting with the artistic community such as customers, critics, dealers, tourists, policy makers and so on. […] Participation in the 'buzz' requires personal investments in links with other persons in the cluster, leading to network formation and the creation of communities of practice" at 97.
[509] See Chapter 6.

property laws.[510] Because design activity is one aspect of the broader value chain, influenced by the business decisions and limitations that affect independent designers, situating the place of design in federal, provincial and municipal policy is important in understanding the market conditions under which the particular segment exists and the challenges they face.[511]

3.1 Defining a Design Policy

This study is centered on uncovering the use of laws and norms within the independent fashion design sectors of Montreal and Toronto. However, as mentioned above, it is important to acknowledge that intellectual property law is a single policy tool alongside a number of others such as education, funding, public-private initiatives, investment and other means of support.[512]

A cohesive design policy[513] is a desirable, sound and forward thinking approach to

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[510] Between the 1980s and 2000s, the apparel and textiles industries were significantly restructured due to the trade liberalization policies that had dominated the manufacturing landscape during that time, the effects of which are still being felt. The shifting landscape of the apparel and textiles industry, coupled with a lack of regard for the fashion design sub-discipline has resulted in the major transformation of the industry and mobilization by provincial and municipal governments to help sustain support for fashion design at the regional level; James Moultrie & Finbarr Livesey, *International Design Scoreboard: Initial Indicators of International Design Capabilities* (Cambridge: University of Cambridge, 2009) at 33 [Moultrie & Livesey, *Design Scoreboard*] Moultrie & Livesey suggest that despite the presence of a national innovation strategy, design is barely mentioned. They further suggest that because of the lack of a national policy, "it is difficult to compile a single value for national investment in design promotion and support"yet they recognize the Quebec government as a source of support for the design sector; see Bushore, *supra* note 318 at 2.

[511] For example while discussing Allen Scott's perspective on public policy concerning economic activity and agglomeration, Crewe states that "[i]n particular, the argument is made that strategic, sectoral intervention by progressive local authorities can considerably enhance the competitive advantage of industrial agglomerations, and can secure those critical external economies which may be by-passed or neglected under pure market conditions" see Louis Crewe, "Material Culture: Embedded Firms, Organizational Networks and the Local Economic Development of a Fashion Quarter" (1996) 30 Reg Studies 257 at 259; An example demonstrating the effect of policies that affect the outcome of an industry is the case of Paris's slow entry into the ready-to-wear market due to the Chambre Syndicale's policies at one point, prohibiting haute couturiers from engaging in ready-to-wear markets. This caused a decline in the Paris fashion market, whereas other fashion capitals such as London and Milan capitalized on the ready-to-wear market much earlier, facilitated by institutions see Rik Wenting & Koen Frenken, "Firm Entry and Institutional Lock-In: An Organizational Ecology Analysis of the Global Fashion Design Industry" (2011) 20:4 Industrial and Corporate Change 1031 at 1040.

[512] Thomas A Birkland, *An Introduction To The Policy Process: Theories, Concepts, and Models Of Public Policy Making*, 3rd ed (Ipswich, MA: M E Sharpe Inc, 2011) at 9-10; Laura J Murray & Samuel Trosow, *Canadian Copyright: A Citizen's Guide*, 2d ed (Toronto: Between the Lines, 2013), as Laura Murray and Samuel Trosow observe in the case of copyright law, it has "too prominent a role as the solution to cultural policy when in fact, it functions best as one policy tool among others" at xvi. Laws that overcompensate for the lack of clear policy can be ineffective to the overall picture.

[513] Either as a standalone policy or as a component of an innovation, cultural, or creative economy policy.

developing a competitive economy.[514] It has been made clear that recognition of national design policy is important for "national competitiveness."[515] However, as will be discussed below, design has not been a focus in Canada.

As Linda Lewis, former president of the Design Exchange suggests,

> "Unlike most nations in the world who promote their country's designs and designers, Canada doesn't have a design policy," […] "Other countries like Italy, Korea and Japan have major governmental organizations that go around the globe advertising the products of their design industries or their businesses that invest in design. That's not true in Canada. We're it."[516]

Similarly, Danielle Bushore observes that

> Design creates beautiful spaces, places and objects; manifests ideas through different thought processes and attitudes; offers personality, perception, and identity to everyday life; and exists at every stage of human creation from ideation to engineering and manufacturing to marketing, yet it does not have a place in politics.[517]

In his thesis which includes a study on the Toronto fashion industry cluster, Patrick Galvin observes that although the role of fashion design is integral to the apparel and textile industry "the reality is that the fashion design part of this equation, along with design in general, has been a woefully neglected part of Canadian economic and cultural policy by all levels of

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[514] Studies indicate that design increases revenue, growth and competitiveness. For example in Canada, a study was conducted on design in relation to the manufacturing industries, it showed that between 1999-2007 "…product design service industry has outperformed the Canadian economy by 60% in terms of revenue", however note that this study only considered manufacturing industries, see State of Design, *supra* note 411 at 12; in the UK, it was reported that design exports made 7.3% of all exports, "[w]orkers with a design element were 41% more productive than average" and that design industries grew at a rate that was higher than other industries at 3-4, see Design Council "The Design Economy: The Value of Design to the UK: Executive Summary" Design Council (October 2015), online: <http://www.designcouncil.org.uk/sites/default/files/asset/document/The%20Design%20Economy%20executive%20summary_0.pdf>; For example, in Denmark, a study conducted to determine the "economic effects of employing design," it was noted that there was an "above-average growth in gross revenue" of 22 %, and that there is a positive correlation between design and employment, see Denmark, National Agency for Enterprise and Housing "The Economic Effects of Design" (September 2003) at 4, online: See Platform <http://www.seeplatform.eu/images/the_economic_effects_of_designn.pdf>.

[515] Moultrie & Livesey, *Design Scoreboard*, *supra* note 510 at 14; see generally the design initiative being undertaken in Europe to promote design innovation across the economy, European Commission, Growth, Internal Market, Industry, Entrepreneurship and SMEs, *Design for Innovation*, online: EC <http://ec.europa.eu/growth/industry/innovation/policy/design/index_en.htm>.

[516] Jermyn, *supra* note 326, quoted from an interview with Linda Lewis, then president of the Design Exchange (quoting Linda Lewis, then president of the Design Exchange).

[517] Bushore, *supra* note 318 at 2.

government."[518] Indeed, a study conducted in 2010 revealed that Canada ranked 23rd among 50 countries for design competitiveness.[519]

In the context of the fashion and apparel industries, design remains a distinct activity, separate from the rest of the apparel and textile manufacturing industries. As Diane-Gabrielle Tremblay observes, "designers see themselves as something apart from the garment industry," and from the textile industry as well.[520] Notwithstanding this sentiment, fashion design is an ancillary, otherwise a secondary consideration to the industry and the finished product to which it is connected, e.g., apparel and textiles. Indeed, as has been illustrated in Chapter 2, design should not be seen as only an end product.[521] However in both policy and law, design is treated by subject matter or industry. A possible outcome of this approach is that legal protection for design sub-disciplines, such as fashion, architecture, graphic design and furniture spans across three regimes of law including copyright, industrial design and trademark law, resulting in overlapping protection in some cases, and in other cases, protecting different elements or none at all.[522] For designers, this piecemeal policy and legal framework presents a challenge concerning the relevance of laws to them, which might explain why for example, the *Industrial Design Act* is

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[518] See Galvin, *supra* note 153 at 139; As previously mentioned in Chapter 3, there have been a number of evidence-based studies conducted on the benefit of design activities for growth and the economy that would justify Canada taking a similar approach. This is not to argue that Canada should consider implementing a *sui generis* design law, but rather consider the benefits of conducting a comprehensive study on the design-driven contribution to the economy in Canada.

[519] Canada also ranked 9th out of 50 in growth competitiveness, yet the design competitiveness ranking was 23rd of 50, see DESIGNIUM, "Global Design Watch 2010" (2011) at 20 Table 3.3., online: SEE Project <seeproject.org/docs/Global%20Design%20Watch%20-%202010.pdf>.

[520] Tremblay, "Industrial Clusters", *supra* note 139, 203 at 210.

[521] Giard, "Canadian Design" *supra* note 322 at 29; As will be discussed in Chapter 5, design is applied to an end product "useful article", and it is the design that receives protection, see *Copyright Act*, *supra* note 6, s 64.

[522] Canada, Bill C-31, *An Act to implement certain provisions of the budget tabled in Parliament on February 11, 2014 and other measures*, 2nd Sess, 41st Parl, 2014, (assented to 19 June 2014) 2014 c 20 cl 319(5) [Bill C-31]; the previous *Trade-marks Act*, *supra* note 7, s 2 [marks; distinguishing guise]; *Industrial Design Act*, *supra* note 7, s 2 [design]; *Copyright Act*, *supra* note 6, s 2 [artistic works], s 64 [designs]; Admittedly, this fragmented approach (policy and law) is not unique to designers, however industries that are considered to be core copyright industries such as music, traditional artists works, are more straightforwardly protected by a single cultural policy and copyright law.

generally not used, or when it is, it is used by a number of large corporations who invest in protection as a business strategy.[523]

We cannot look at the emergence and use of norms and laws in a vacuum, devoid of context, and in this case without reviewing the policies deployed by the various levels of government that have helped shape the industry. This first segment will explore the locus of design in the context of the culture and innovation policies, to illustrate the relationship between the policies that are related to creativity, design and intellectual property law in Canada.

3.2 The Interplay Between Policy, Design and Intellectual Property Law

Policymakers often advance that intellectual property law plays an integral role in incentivizing creativity and innovation, even though it is only one of many policy instruments.[524] As noted in the Introduction, emerging research has challenged this notion and demonstrates that intellectual property law does not play that role for all kinds of creative and innovative industries.

On one hand, design policy is scarce at the national level, while on the other, provincial and municipal policies[525] have played a stronger role in the development of some design-based industries in Canada. Save Canada's national design policy -- described in detail below -- which was terminated shortly after it was deployed, the federal policies being reviewed in this section are only peripherally and not directly related to design.

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[523] For example, in the 2015 study conducted on the use of the *Industrial Design Act*, registration between 2000-2014, Nike International Limited reportedly held the most registrations at 1769, while Proctor and Gamble had 1490 registrations, see CIPO, *Industrial Design Activities in Canada*, *supra* note 127 at 9.

[524] Canadian Heritage, "The Arts and Canada's Cultural Policy", prepared by Joseph Jackson and René Lemieux, Current Issue Review 93-3E (Ottawa: Parliamentary Research Branch, 1999), online: <http://www.parl.gc.ca/content/lop/researchpublications/933-e.htm> [Jackson & Lemieux] the authors state that "Though the Act is administered by the Minister of Industry, the Minister of Canadian Heritage assists in developing policies and revising the Act from the point of view of creators, artists and other cultural producers. In this sense the *Copyright Act* forms an integral part of cultural policy in the arts sector"; see e.g., Canadian Heritage, "Copyright Policy Branch", online: < http://canada.pch.gc.ca/eng/1454690928362 > "The Copyright Policy Branch of the Department of Canadian Heritage is responsible, through its policy-making activities, for ensuring that Canada's copyright policy framework, a cornerstone of cultural policy, supports creativity, innovation and access to cultural works"; in the case of genome science and technology, see Sookman, *supra* note 192.

[525] As will be see in the second part of this chapter.

3.2.1 Legislative Authority: Design, Culture, and Innovation

Sections 91 and 92 of Canada's *Constitution Act*[526] divide legislative authority between federal and provincial levels of government.[527] Areas of legislative authority such as copyright,[528] patent of invention and discovery, [529] and the regulation of trade and commerce,[530] belong to the federal government. Property and civil rights,[531] licenses for shops, saloons, taverns and auctioneers for the purpose of raising revenues for provincial, local or municipal purposes,[532] and direct taxation within the province for the purpose of raising revenues for the province,[533] are the legislative authority of the provincial government. These powers permit the federal and provincial levels of government to create policies, which include the power to enact and administer laws and regulations to govern these areas. It is also possible for both levels of governments to have legislative authority over the same areas, such as in the case of immigration and agriculture.[534] However, design, unlike copyright and patent law is not explicitly assigned to either federal or provincial authorities.[535]

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[526] *Constitution Act*, *supra* note 181.
[527] *Ibid*, s 91.
[528] *Ibid*, s 91(23).
[529] *Ibid*, s 91(22).
[530] *Ibid*, s 91(2).
[531] *Ibid*, s 92(13).
[532] *Ibid*, s 92(9).
[533] *Ibid*, s 92(2).
[534] *Ibid*, s 95. Unlike other areas where both the federal and provincial governments may have shared authority out of omission from the *Constitution Act*, section 95 explicitly recognizes that provinces may legislate in the area of immigration and agriculture, "as long and as far only as it is not repugnant to any Act of the Parliament of Canada"; Whether legislation is repugnant or not, is settled in court, see Parliamentary Information and Research Service, Law and Government Division "Immigration: Constitutional Issues", by prepared by Margaret Young, Catalogue No BP-273E (Ottawa: Parliamentary Research Branch, 1991), online: <http://www.lop.parl.gc.ca/content/lop/researchpublications/bp273-e.htm>.
[535] Trademark law is also not assigned to a particular legislative authority but is considered but appears to be governed under federal legislative authority under "trade and commerce," see *Attorney-General for Ontario v Attorney-General for Canada*, [1937] AC 405 at 417 as cited in Teresa Scassa, *Canadian Trademark Law*, 2d ed (Toronto: Lexis Nexis, 2015) at 16 [Scassa, *Trademark Law*, 2d]; Teresa Scassa, "The Challenge of Trademark Law in Canada's Federal and Bijural System" in Ysolde Gendreau, ed, *An Emerging Intellectual Property Paradigm: Perspectives from Canada* (Cheltenham: Edward Elgar Publishing, 2008) 3 at 4-5; It is suggested that legislative authority for the *Industrial Design Act* should emanate from federal legislative authority because it either stems from the federal authority arising from copyright, or from trade and commerce, see Stuart C McCormack, "Introduction"

Similarly, 'culture' is not present in the constitutional division of powers meaning that both the federal or provincial levels of government, may and do enact laws in the cultural domain.[536] In *Kitkatla Band v British Columbia (Minister of Small Business, Tourism and Culture)*[537] the Supreme Court of Canada held that,

> [51] The Constitution of Canada does not include an express grant of power with respect to "culture" as such. Most constitutional litigation on cultural issues has arisen in the context of language and education rights. However, provinces are also concerned with broader and more diverse cultural problems and interests. In addition, the federal government affects cultural activity in this country through the exercise of its broad powers over communications and through the establishment of federally funded cultural institutions. Consequently, particular cultural issues must be analysed in their context, in relation to the relevant sources of legislative power.[538]

Therefore, the federal government administers cultural policy at the national level, while the provinces are able to create cultural policy, enact and administer laws at the local level.[539] As John Foote explains, federal power to regulate culture is broad as it relates to copyright, tax and trade laws, as well as treaties, whereas the provincial governments regulate culture based on the robust scope of section 92(13)[540] of the *Constitution*, responsible for property and civil rights.[541] Importantly, the provincial government cannot regulate copyright law.[542]

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in Stuart C McCormack, ed, *Intellectual Property Law of Canada*, 2nd ed (Huntington, NY: Juris Publishing Inc, 2010) 1 at 23-24 [McCormack "Introduction"].

536 Cultural policy at the federal level is undertaken by the Department of Canadian Heritage, see *Department of Canadian Heritage Act*, SC 1995, c11, s 4(2)(j) "the formulation of cultural policy, including the formulation of cultural policy as it relates to foreign investment and copyright"; In Ontario, the responsible body for culture is the Ministry of Tourism, Culture and Sport, see Ontario Ministry of Tourism, Culture and Sport, online: <http://www.mtc.gov.on.ca/en/home.shtml>; Patrick J Monahan, "Culture and the Canadian Constitution" (1993) 31:4 Osgoode Hall Law Journal 809 at 819; Like culture, innovation is similarly shared across federal and provincial jurisdictions, who are both considered to be "important players", see Canada, *Innovation Canada: A Call to Action: Review of Federal Support to Research and Development – Expert Panel Report*, Catalogue No lu4-149/2011E-PDF (Ottawa: Public Works and Government Services Canada, 2011) (Chair Tom Jenkins), online: <http://rd-review.ca/eic/site/033.nsf/eng/00304.html> [*Innovation Canada*].

537 *Kitkatla Band v British Columbia (Minister of Small Business, Tourism and Culture)* [2002] 2 SCR 146.

538 *Ibid* at para 51, as cited in A Foote, "Country Profile: Canada" in Council of Europe/ERICarts, eds, *Compendium of Cultural Policies and Trends in Europe*, 12th ed (2011) at CA-57, online: <http://www.culturalpolicies.net>.

539 *Ontario Heritage Act*, RSO 1990 c O-18, online: Ontario <http://www.ontario.ca/laws/statute/90o18>; *Public Libraries Act*, RSO 1990 c P-44, online: Ontario <http://www.ontario.ca/laws/statute/90p44>; Ontario, Ministry of Tourism, Culture and Sport, online: <http://www.mtc.gov.on.ca/en/culture/culture.shtml>.

540 *Constitution Act*, *supra* note 181, s 92(13).

As discussed above, design is an interesting and multifaceted discipline, and is comprised of a number of sub-disciplines that span from landscape design, and architecture to graphic, industrial and fashion design. It also has a number of characteristics that make it simultaneously cultural, innovative and industrial and can therefore be incorporated into a number of policies in different areas and levels of government. The three policies that will be reviewed below – design, cultural, and innovation – all stem from both federal and provincial legislative authority.[543]

3.2.2 Federal Policies Related to Design

3.2.2.1 Design Policy

Notwithstanding the fact that law relating to the registration of industrial design was first enacted in Canada in 1861,[544] design policy only became a government initiative in the late 1940s. In this

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[541] Foote, *supra* note 538 at CA-57; Monahan, *supra* note 536, Monahan citing the Special Joint Committee of the Senate and the House of Commons, *A Renewed Canada* (Co-chairs: Hon G Beaudoin & D Dobbie) (Ottawa: Supply and Services Canada, 28 February 1992) at 75-80, stating that "[t]he Committee used the term 'affirmed' since it was of the view that 'under the Constitution, the provinces have the primary legislative role with respect to general cultural matters.' While noting that culture is not an enumerated head of power, the Committee stated that 'cultural activities have a direct relationship to provincial jurisdiction over education, property and civil rights, and matters of a local or private nature in the province.' Thus, entrenching a provincial role in relation to culture would merely be making explicit what is already implicit." at 838 [citation omitted].

[542] *Constitution Act*, *supra* note 181, s 91(23); Monahan, *supra* note 536 at 835.

[543] The review of design, cultural and innovation policies in the first part of this chapter is predominantly from the perspective of federal jurisdiction due to the fact that it is also the level of government, which has legislative authority over intellectual property laws that support these policies i.e., copyright, trademark, and industrial design laws. The reason for focusing on these policies rather on trade and commerce policies is because they are most often related to creativity and innovation, which is in turn connected to the focus areas that I sought to uncover within the participant interviews.

[544] Canada's first industrial design legislation, *An Act to Amend the Act Respecting Trade Marks and to Provide for Registration of Designs An Act to Amend the Act Respecting Trade Marks, and to Provide for Registration of Designs* (1861) 24 Vict C 21 [Trademark and Design 1861], was modeled after the British *Act to consolidate and amend the Laws relating to the Copyright of Designs for the ornamenting of Articles of Manufacture of 1842,* the origins of which can be traced back to British policies and laws created for the narrow and specific subject matter, which eventually evolved to incorporate new design subject matter. There were 13 categories in total, encompassing subject matter such as "metal or mixed woods", "wood", "glass", "earthware", "Paperhangings", "Carpets", "Shawls, if the design be applied solely by printing, or by any other process by which colours are or may hereafter be produced upon tissue or textile", "Shawls" that were not included in the previous category, "Yarn, Thread, or Warp…", "woven fabrics, composed of Linen, Cotton, Wool, Silk, or Hair, or two or more of such materials…" and several other classes that included woven fabrics and lace, which were all protected for various terms; UKIPO, "The Development of Design Law – Past and Future: From History to Policy", by Alexander Carter-Silk & Michelle Lewiston, (24 July 2012), online: <https://www.gov.uk/government/publications/the-development-of-design-law-

sense, and un-intuitively, legislation for the protection of design preceded design policy. In his thesis outlining the creation and the initiatives of the now defunct *National Industrial Design Council* (NIDC),[545] John Bruce Collins observes that design policy was actually at one point a mandated federal government initiative that led to the creation of the NIDC in 1948.[546] It was motivated by the interest of Canadian artists and policy makers, who saw the potential in the intersection of art and industry during a time of economic rebuilding following World War II.[547]

The NIDC was renamed the National Design Council in 1961 following the enactment of the first legislative tool dedicated to drive design policy,[548] roughly a century after industrial design laws were first introduced in Canada. The *National Design Council Act* also expanded the scope of the Council to include additional broader categories of design.[549] What is interesting about the way that design was promoted during in the earlier years of the NIDC is that it was connected directly with the arts, and the NIDC was even considered to be an extension of the National Gallery of Canada.[550] Other initiatives undertaken by the Council were related to education and the creation of private-public relationships to promote design.[551]

The NIDC was short lived: it disbanded in the mid-eighties and the *National Design Council Act* was repealed in 1988. Some suggest that this was because the Council's mandate

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past-and-future>; *Copyright Act*, 1921 RSC c 24, s 46, repealed [*Copyright Act* 1921]; Muhlstein & Wilkinson, *supra* note 125 at 8-9.

545 John Bruce Collins, *Design for Use, Design for the Millions: Proposals and Options of the National Industrial Design Council 1948-1960,* (MA Thesis, Institute of Canadian Studies, Carleton University, 1986) (National Library of Canada).

546 *Ibid* at iii.

547 *Ibid* 11-16.

548 *National Design Council Act*, RS 1985, c N-6, Act repealed, RS c 1 (4th Supp) s 47, 04/02/88.

549 *Ibid*, s 10; MacLeod et al, *supra* note 357 at 24.

550 Collins, *supra* note 545 at 39, Collins observes that the NIDC became a "sub-committee" of the National Gallery Board of Trustees under the "Industrial Design Division"; Loren R Lerner & Mary F Williamson, *Art and Architecture in Canada: A Bibliography and Guide to the Literature to 1981*, vol 1 (Toronto: Toronto University Press, 1991) at 297.

551 *National Design Council Act*, *supra* note 548, s 10.

had been slowly taken over by a number of different organizations resulting in its erosion.[552] Others suggest that there was a "general indifference" on the part of the government to design activity at that time.[553] Since the disbanding of the NIDC, efforts surrounding design policy have not resulted in a stand-alone governmental initiative, or been mandated in existing policy.

Not surprisingly, in the absence of a consistent design policy, the *Industrial Design Act* has for the most part remained in its original 1861 form.[554] Those laws were derived from Britain's earlier policies related to textiles.[555] The context of British design laws have also been quite fragmented but have evolved there as a response to the particular needs of British industries.[556] As Brad Sherman and Lionel Bently observe,

> As with much intellectual property legislation, these [design] statutes can be seen as particular responses to changes in the environment in which the law operated. More specifically, they can be seen as attempts to modernise the law, to bring it into line with the cultural and technological changes which had occurred over the previous fifty years: with changes in technology which enhanced methods both of production and of copying; with developments of new industries and new types of cloth (such as the printing of silks

[552] Collins, *supra* note 545 at 111; Bushore, *supra* note 318 at 17.
[553] MacLeod et al, *supra* note 357 at 24.
[554] Prior to the recent amendment made to the *Industrial Design Act*, "the *Industrial Design Act's* provisions stand virtually unchanged since their enactment in 1868", see Stuart C McCormack, "Industrial Design Law" in Stuart C McCormack, *supra* note 535, 383 at 389.
[555] Textile manufacturers and designers in southern Britain had begun to petition to the government for action against "parasite firms" in the northern regions who were copying textile design and patterns, reproducing low-grade "…cheaper imitations, usually of inferior quality, thus undercutting the market", see David Greysmith, "Patterns, Piracy and Protection in the Textile Printing Industry 1787-1850" (1983) 14:2 Textile History 165 at 165-166; Rights were first granted by the enactment of the *An Act for encouragement of the Arts of Designing and Printing Linens, Cottons, Calicos and Muslins by vesting the properties thereof in the Designers, Printers and Proprietors for a limited time, 1787 (UK)*, 27 Geo III c 38 [1787 *Printers Act*] a legislative evolution of a prior protective policy that outright banned the importation or use of foreign calico textiles in Britain, see, Lara Kriegel, "Culture and the Copy: Calico, Capitalism, and Design Copyright in Early Victorian Britain" (2004) 43:2 Journal of British Studies 233 at 236-238, Kriegel observes that from the 1700s Parliament enacted a number of protectionist acts to prevent the import of textiles from the Indian subcontinent in an effort to prevent the saturation of the domestic silk and woolen trades markets, despite the fact that much of the market consisted of replicas of Indian designs.
[556] Johanna Gibson, *The Logic of Innovation: Intellectual Property, and What the User Found There* (Surrey: Ashgate Publishing Limited, 2014), As Johanna Gibson explains, "the law then became directly deployed in the quest to improve the design aesthetic of British industry" 122; At the turn of the nineteenth century, a survey of design laws was conducted as a response to the Industrial Revolution resulting in the creation of more inclusive and uniform laws, as well as a broader scope of subject matter. Up to that point, as Alexander Carter-Silk & Michelle Lewiston observe, "the law had responded in a haphazard manner to problems experienced in certain industries," see Carter-Silk & Lewiston, *supra* note 546 at 27.

> and woollens); and with shifts in consumer demand.[557]

However, the same was not true for design legislation in Canada, [558] which was enacted outside the purview of a Canadian design policy. To this effect, the Isley Report,[559] a review conducted on all areas of intellectual property law i.e., copyright, trademark, patent and industrial design in 1958, introduced its findings on industrial design law starting with a rather scathing sentiment,

> With regard to our present Act (Industrial Design and Union Label Act, R.S.C. 1952, c. 150) it would be a waste of time to discuss its provisions in detail. For if Canada is to have industrial design protection at all it is clear that a completely new act must be substituted for it. Mr. Justice MacLean, late President of the Exchequer Court, said of it: "The scope of this part of the Trade Marks and Designs Act is difficult of definite ascertainment or construction. It is a piece of legislation that seems flimsy and incomplete, ill adapted for its intended purposes, and is in serious need of amendment"...[560]

Notwithstanding the call for change, there have still been no significant amendments made to the *Industrial Design Act*.[561] The most recent amendments to the *Act* were slated to bring Canada up to date with its international obligations, which focus on procedural rather than on substantive elements of the law.[562]

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[557] Brad Sherman & Lionel Bently, *The Making of Modern Intellectual Property Law: The British Experience, 1760-1911*, (Cambridge: Cambridge University Press, 1999) at 63 [Sherman & Bently, *Modern Intellectual Property*] at 65. Sherman and Bently also note that the legistation took into consideration the fact that some practices i.e., printing linens, had become obsolete.

[558] Muhlstein & Wilkinson, *supra* note 125, the result is legislation which is not conducive the current design sector in Canada. As stated, by Muhlstein and Wilkinson "The narrow definition of design in the legislation, together with the difficulties in interpreting the definition of design and related terms; in establishing criteria for originality; in coping with the subjective element in establishing infringement and in applying legislation from an earlier age to modern designs, all indicate that industrial designs are neither protected comprehensively, nor with any great certainty of enforcement under the current *Industrial Design Act*" at 23.

[559] Canada, *Royal Commission on Patents, Copyright and Trade Marks and Industrial Designs: Report on Industrial Design*, (Ottawa: Queen's Printer and Controller of Stationary, 1958) by (Chair J L Isley) at 8-9 [Isley Report].

[560] *Ibid* at 8 [citation omitted].

[561] *Ibid* at 8-9; Muhlstein & Wilkinson, *supra* note 125 at 23, 56-57; Tawfik, *supra* 125, 267 at 271; See generally, Robert E Mitchell, "Protection of Industrial Designs in Canada" (1989) 19:1 U Balt L Rev 403 at 403 [citation omitted].

[562] Canada, Bill C-43, *Economic Action Plan 2014 Act, No 2, 2nd Sess, 41st Parl, 2014 (assented to 16 December 2014).* Canada joined the Hague System for the International Registration of Industrial Design, in order to permit applicants to apply for protection to a number of different countries with a single application, see CIPO,

Furthermore, the 1988 amendment referred to in this paper regarding changes to the treatment of design under the *Copyright* and *Industrial Design Acts* made changes to the copyright and not industrial design law, still maintaining a distinction, yet simultaneously creating an overlap between mass-produced versus non mass-produced items as discussed in greater detail in Chapter 4.[563]

As Myra Tawfik observes, Canada's adoption of British design laws has resulted in an unforeseen connection or overlap between the subject matter,

> [t]o the extent that there was any attempt to understand their relationship, it was in terms of recognizing that each form [of intellectual property law] addressed one aspect of human creativity - in other words, at a high level of abstraction. As the actual mechanics of each body of intellectual property law became crystallized in the latter half of the nineteenth century each category of intellectual property right became defined by its structure and form. The prevailing assumption was that the different legal treatment was rationally connected to the different subject matter and that each of these laws served fundamentally different policy purposes.[564]

This issue presently exists and epitomizes the fragmented framework that exists today.

3.2.2.2 Cultural and Creative [Economy] Policy

This section will explore design in the context of current Canadian cultural policy and also in the context of a broadly envisioned version of cultural policy, referred to as 'creative economy.' Whereas the first offers a 'traditional' view of culture, the latter is importantly linked to including design in a broader policy framework.

3.2.2.2.1 Cultural Policy

Cultural policy primarily supports different genres of culture, art, heritage, art institutions and related industries in Canada. Much of Canada's cultural policy framework leading up to the

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"Amendments to the Industrial Design Act: Questions and Answers" online: <http://www.ic.gc.ca/eic/site/cipointernet-internetopic.nsf/eng/wr03891.html>.

[563] Industrial design subject matter did not change, instead copyright subject matter expanded to include designs with a limitation of 50 copies, in order to allow for some elements of design to also receive copyright protection where there could have been an overlap, see Chapter 4.

[564] Tawfik, *supra* note 125, 267 at 268-269.

present time was shaped by the recommendations pursuant to a number of research initiatives commissioned by the government for the purpose of identifying and supporting Canadian culture and heritage.[565]

The first major evaluation of Canada's cultural policy following World War II was conducted in 1951, headed by the Right Honourable Vincent Massey (Massey Commission)[566] whose focus was to assess the "needs and desires of the citizen in relation to science, literature, art, music, drama, films, broadcasting."[567] It resulted in a number of recommendations that were the impetus for a number of follow up studies in various emerging sectors including broadcasting and print.[568]

In its comprehensive final report, the Massey Commission stated that Canada's cultural institutions, movements and activities "suffered in common from a lack of nourishment."[569] The recommendations made by the Massey Commission were responsible for the creation of the Canada Council for the Arts in 1957 and other a number of other arts and broadcasting related endeavours.[570] In the few decades following the Commission and after additional studies were conducted, there were expansions in different areas and increased government spending to support various initiatives such as the film industry and the enactment of the *Status of the Artists*

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565 See generally Canada, Library of Parliament, "Background Paper: Federal Government Policy on Arts and Culture" prepared by Michael Dewing, Publication No 2008-41-E (Ottawa: Library of Parliament, 2013) [Library of Parliament, "Background Paper"].

566 Canada, *Royal Commission on National development in the Arts, Letters & Sciences: 1949-1951*, (Ottawa: Edmond Cloutier, Printer to the King's Most Excellent Majesty, 1951) (Chair Vincent Massey), online: Library and Archives Canada <https://www.collectionscanada.gc.ca/massey/h5-400-e.html#content> [Massey Commission]; Library of Parliament, "Background Paper" *supra* note 565 at 1-2 Prior to the Massey Commission, there had only been several initiatives from the late 1800s onward. These initiatives included the creation of the National Gallery of Canada, the Canadian Broadcasting Corporation and the National Film Board.

567 Massey Commission, *supra* note 566 at 3.

568 Library of Parliament, "Background Paper" *supra* note 565 at 1.

569 Massey Commission, *supra* note 566 at 272.

570 Library of Parliament, "Background Paper" *supra* note 565 at 2.

Act.[571]

The House of Commons Standing Committee on Canadian Heritage conducted the second major evaluation of cultural policy in 1999.[572] The outcome of that study entitled *A Sense of Place, A Sense of Being*,[573] resulted in forty-three recommendations that focused on fostering continued government support for cultural policy. The study, conducted over two years, was based on hundreds of submissions, consultations and interviews.[574] The Committee recognized that defining "culture" was a challenging task, acknowledging that there was no one-size-fits-all approach:[575]

> When Canadians speak of culture they are speaking about much more than the visual, performing or literary arts. They often refer to cultural institutions such as galleries, museums, libraries, archives, concert halls and theatres. Some talk about the importance of Canadian content regulations in broadcasting; while for others the links between culture and heritage are inseparable. For them, the experiences of Canadians in the past continue to inform present circumstances. Still others talk of the business of culture, and trading in the international marketplace for cultural goods and services. Some talk about the importance of nurturing new forms of artistic expression to reflect the ever-changing nature of Canadian society.[576]

The Committee adopted UNESCO's definition of culture as "ways of living together," a broader and open vision of culture.[577] However, despite the inclusive approach to defining culture and despite including the design workforce in the statistical framework, which opened the door to the possibility of including design as an area of possible expansion and support, only specific sub-

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[571] *Status of the Artist Act,* SC 1992 c 33.

[572] Canada, Standing Committee on Canadian Heritage, *A Sense of Place – A Sense of Being: The Evolving Role of the Federal Government in Support of Culture in Canada* (June 1999) (Chair Clifford Lincoln), online: <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=1031610&Language=E&Mode=1&Parl=36&Ses=1> [*Sense of Place*].

[573] *Ibid*.

[574] *Ibid* [Chapter One: Introduction].

[575] Foote, *supra* note 538 at CA-5, author observes that there is no consensus regarding the national definition of culture in Canada.

[576] *Sense of Place*, *supra* note 572, [Chapter One: Introduction].

[577] Canadian Commission for UNESCO, *A Working Definition of Culture for the Canadian Commission for UNESCO,* 1977 at 6, as quoted in *Sense of Place*, *supra* note 572 at Ch 1; note that UNESCO *Universal Declaration on Cultural Diversity* (November 2001) states that "…culture should be regarded as the set of distinctive spiritual, material, intellectual and emotional features of society or a social group, and that it encompasses, in addition to art and literature, lifestyles, *ways of living together*, value systems, traditions and beliefs…*"* [emphasis added].

disciplines were acknowledged (i.e., web design, design in the context of theatre).[578]

This study was followed up by a report by the federal government in October of the same year, entitled *The Arts and Canada's Cultural Policy*,[579] where cultural policy was reviewed as it related to the arts,

> Cultural policy is the expression of a government's willingness to adopt and implement a set of coherent principles, objectives and means to protect and foster its country's cultural expression. *The arts are the very foundation of this expression*."[580]

In light of the fact that arts have been underscored as the central focus of cultural policy, the arts have received considerable support in the form of financing, infrastructure and law, including amendments to the *Copyright Act* over the years.[581]

Since *A Sense of Place, A Sense of Being*, it seems that the focus of funding and support has been on the development of the art industries. A chronology outlining support of arts and cultural industries was listed in the 2015 *Economic Action Plan* from the years 2009-2015.[582] This list includes contributions to infrastructure for maintenance and repair of arts institutions,[583] facilitating support for major exhibitions,[584] the creation of a Periodical Fund as well as a number of other projects.[585] In the previous year, the government's *Economic Action Plan 2014*[586]

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[578] *Sense of Place*, *supra* note 572, In the first recommendation (Chapter 1) the Report called for additional initiatives acknowledging that designers, alongside other creators were self employed; under Chapter 3, Training initiatives, designers were mentioned in the context of National Theatre School; in the same chapter, under the tenth and eleventh recommendations, training on web design was an initiative under new media.
[579] Jackson & Lemieux, *supra* note 524.
[580] *Ibid* [emphasis added].
[581] See generally, Foote, *supra* note *supra* note 538 at CA 3, CA 18.
[582] Canada, Ministry of Finance, *Economic Action Plan 2015: Strong Leadership, A Balanced-Budget, Low-Tax Plan for Jobs, Growth and Security*, Catalogue No F1-23/3E-PDF (Ottawa: Ministry of Finance, 2015) at 301, online: Action Plan <http://actionplan.gc.ca/en/blog/economic-action-plan-2015> [Action Plan 2015].
[583] National Arts Centre, online: <http://nac-cna.ca/en/>; Massey Hall, online: <http://www.masseyhall.com/>.
[584] Travelling Exhibitions Indemnification Program, Canadian Heritage, <http://www.pch.gc.ca/eng/1268250082235>.
[585] Canada Periodical Fund, online: Canadian Heritage <http://www.pch.gc.ca/eng/1268240166828>.
[586] Canada, Ministry of Finance, *Economic Action Plan 2014: The Road To Balance: Creating Jobs and Opportunities*, (Ottawa: Ministry of Finance, 2014) at 216, online: Action Plan <http://actionplan.gc.ca/en/blog/economic-action-plan-2014> [Action Plan 2014] Notably, in Action Plan 2015, *supra* note 582 there was mention of design in relation to the commitment to renew the Harbourfront Centre ("Harbourfront Centre's Artist-in-Residence post-graduate program, which provides creative and business training

earmarked over $100 million dollars in funding in 2015-2016 for "core cultural programs" under the umbrella of the Canada Council for the Arts, Canada Cultural Investment Fund, Canada Cultural Spaces Fund, and Fathers of Confederation Buildings Trust.[587] Recognition of design was not specifically targeted by any of these programs. When Canadian Heritage was contacted for this study to find out if design was included as a mandate for any of the programs included in the funding, it responded that

> Budget 2014 included ongoing funding arts funding amounting to $104.9 million for arts programs at the Department of Canadian Heritage and the Canada Council for the Arts.
>
> None of the arts programs delivered by Canadian Heritage has a mandate or objectives associated with supporting design.
>
> The resources for the Canada Council for the Arts in the announcement ($25 million of the $104.9) are not identified with a specific program. Therefore, it is not possible to attribute those resources to a particular artistic discipline or associated program without making further inquiries with the Canada Council directly. [588]

Therefore, although design and fashion design have been considered to be culturally significant as discussed in Chapter 2, there has not been any federal spending directly earmarked for these creative industries within the context of cultural policy. Instead, funding distribution depends on the type of programs mandated by the agencies that are tasked with distributing those funds.

In addition to financial support of cultural industries, laws such as copyright have been used as a policy tool to help enhance cultural policy. There have been a number of amendments made to the *Copyright Act* over the last few decades that were enacted for the purpose of regulating and supporting cultural industries, in light of technological advancement and the need to adhere to international norms and agreements.[589] These include the expansion of user rights in

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to assist emerging designers and craftspeople in establishing professional careers" at 305).
[587] Action Plan 2014, *supra* note 586 at 216.
[588] (Email, Department of Canadian Heritage, April 22 2015) [unpublished].
[589] *The Copyright Treaty,* 20 December 1996, 36 ILM 65 (entered into force 2 March 2002) [WCT]; *The Performance and Phonograms Treaty*, 20 December 1996, 36 ILM 76 (entered into force 20 March 2002) [WPPT].

fair dealing in 2012 to include parody and satire,[590] the addition of technological protection measures,[591] recognizing photographers as the first owner of their works,[592] and most recently, the term extension of performer rights.[593]

As commentators suggest, design has not wholly been accepted within the scope of cultural policy. For example, Tara Vinodrai observes that design has been overlooked: "…Canadian cultural policies have not focused on design in its various guises, instead focusing on other forms of artistic and cultural expression."[594] Deborah Leslie and Norma Rantisi suggest that cultural industries have long been "marginalized, because, from an economic point of view they are seen as derivative, not as a true source of value. Similarly from an arts perspective, industries such as design are viewed as 'commercial' and lacking in integrity."[595] However, as they point out, to be able to be able to commercialize any cultural production, there is a need for "aesthetic and commercial resources", not just one or the other.[596]

> Economic activities, for example production or distribution, are critical insofar as they support the commercialization of an artist's vision. For design fields such as fashion or product design, technical and commercial considerations are more dominant in the initial phases of innovation.[597]

However, it is possible that the government does not see the need to address design outside the borders of existing framework. On the other hand, the reluctance might very well be because the possible classes of design outcomes, as described in Chapter 1, not only span across a number of disciplines and industries, but also a number of forms as well, which would make it difficult to

[590] *Copyright Act*, *supra* note 6, s 29.
[591] *Ibid,* s 29.21.
[592] *Ibid*, s 10(1) as repealed by the *Copyright Modernization Act*, SC 2012, c 20, s 6.
[593] *Ibid,* s 41.
[594] Tara Vinodrai, "Understanding Canada's Evolving Design Economy" in Andersson, Andersson & Mellander, eds, *Handbook of Creative Cities*, *supra* note 10, 146 at 153 [Vinodrai, "Evolving Design Economy"].
[595] Leslie & Rantisi, "Design Economy" *supra* note 313 at 312 [citations omitted].
[596] *Ibid*.
[597] *Ibid*.

address under a single policy. Because there has not been an official position about the direction of deign policy in Canada, it is difficult to say.

Although design has not explicitly been represented in cultural policy, it has been included in research conducted on cultural industries more broadly. For example, currently, in Canada, "design" is categorized as an *Ancillary Sub-Domain* under the *Classification Guide for the Canadian Framework for Culture Statistics*:

> The recognition of ancillary products is important in order to measure the creative artistic activity related to the design of products whose purpose is not essentially 'cultural'. Conceptually, these products are in scope for culture, from creation up to and including the parts of production that relate to their design. Any activities that relate to the manufacturing, construction or production of the final product or its dissemination to the public are not in scope for culture. [598]

This is significant because it acknowledges that design output, and not the process of its manufacture, is cultural. In 1999, the Cultural Industries Sectoral Advisory Group on International Trade did recognize design as a part of the cultural sector, alongside architecture, photography and advertising. It was however classified as an associated profession rather than a core profession.[599]

3.2.2.2.2 Creative Economy Policy

'Creative industries' was a term first used by the Creative Industries Task Force appointed by the Prime Minister of the United Kingdom, in their 1998 mapping document describing a new

[598] *Conceptual Framework*, *supra* note 331 at 33; Furthermore, in a study conducted on cultural occupations, "design" was notably mentioned alongside "visual arts" Statistics Canada, *Creative Input: The Role of Culture Occupations in the Economy During the 1990s*, prepared by Michael Schimpf, Catalogue no 810595-M-No 064 (Minister of Industry, Ottawa: 2008) at 12, Table 1.

[599] Canada, Foreign Affairs, Trade and Development, "New Strategies for Culture and Trade: Canadian Culture in a Global World" by the Cultural Industries Sectoral Advisory Group on International Trade, (Ottawa: FATD, 1999) online: <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/ip-pi/canculture.aspx?lang=en>. Note that the document categorized design under "associated professions" alongside architecture and photography and did not elaborate on what design categories were included.

approach to measuring and developing the output of cultural industries.[600] The impetus of this policy was to encourage creators to innovate by capitalizing on "activities which have their origin in individual creativity, skill and talent and which have a potential for wealth and job creation through the generation and exploitation of intellectual property."[601] This caught the attention of a number of policymakers and scholars around the world, since cultural policies in a number of jurisdictions encompassed a narrower view of culture and cultural institutions.[602] As Andy Pratt observes, "[o]utput, export and employment measures gave what had been regarded as the 'arts' some credibility in an era of downward pressure on policy funds and a results driven mode of government in the UK."[603] One difference between cultural and creative industries is the way in which economists and analysts are able to measure them.[604] Since the UK's recognition of creative industries, literature and research in this area have been proliferating.[605]

As defined by the UNESCO, 'cultural industries' are considered to be those under the traditional purview of the arts, which include "printing, publishing and multimedia, audiovisual,

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600 Cultural Policies "United Kingdom: Specific Policy Issues and Recent Debates" in Compendium: Cultural Policies and Trends in Europe, (15 April 2011), online: Cultural Policies <http://www.culturalpolicies.net/web/unitedkingdom.php?aid=423> [Compendium, Europe].

601 *Ibid*.

602 Department of Culture, Media and Sport, *Creative Industries Mapping Document*, (London: DCMS, 1998), online: <https://www.gov.uk/government/publications/creative-industries-mapping-documents-2001> notably, the sectors that were mapped included advertising, antiques, architecture, crafts, design, fashion, film, leisure software, music, performing arts, publishing, software, TV and radio; at the time of the 1998 study, there was relatively little research conducted in the area of cultural industries, let alone creative industries, Andy C Pratt, "Creative Cities: The Cultural Industries and the Creative Class" (2008) 90:2 Geografiska Annaler: Series B Human Geography 107 at 113.

603 *Ibid*.

604 Hendrik van der Pol, "Key Role of Cultural and Creative Industries in the Economy" in *Statistics, Knowledge and Policy 2007: Measuring and Fostering the Progress of Societies* (Paris: Organisation for Economic Co-operation and Development, 2007) 343. Specifically, van der Pol suggests that, "Cultural industries relate to the creation, production and commercialisation of the products of human creativity, which are copied and reproduced by industrial processes and worldwide mass distribution. They are often protected by national and international copyright laws. They usually cover printing, publishing and multimedia, audiovisual, phonographic and cinematographic productions, crafts and design. Creative industries encompass a broader range of activities than cultural industries including architecture, advertising, visual and performing arts" at 344.

605 See generally, Richard Florida, *The Rise of the Creative Class: And How It's Transforming Work, Leisure, Community and Everyday Life* (New York: Basic Books, 2002); Ann Markusen, "Urban Development and the Politics of a Creative Class: Evidence from a Study of Artists" (2006) 38 Environment and Planning 1921.

phonographic, cinematographic productions as well as crafts and designs."[606] These industries are normally protected by copyright law and are generally at the core of cultural policy.[607]

'Creative industries' are a much broader category than cultural industries but also encompass them. Another way to explain the creative industries is that they

> ... are by definition involved in the process of *new* value creation, because their business opportunities and value-added derives from the very existence of novelty and innovation in other sectors – to which they provide various innovation services – many of which are business-to-business, rather than direct to consumer markets.[608]

As Jason Potts further explains, creative industries "solve problems" and provide "creative innovation services" unlike other service industries.[609] More precisely, "[t]he creative industries are those in which the product or service contains a substantial element of artistic or creative endeavour and include activities such as architecture and advertising."[610] Some have argued that design is at the forefront of the creative economy discourse.[611] Indeed, as Gertler and Vinodrai observe, the importance of creative industries, including design, is being acknowledged not just in of itself but as a way to "enhance the innovative capacity of other industries…"[612] As Mirjam Gollmitzer and Catherine Murray suggest, the shift is now on "the productive role of meaning

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606 UNESCO, The Global Alliance for Cultural Diversity, "Understanding Creative Industries: Cultural Statistics for Public-Policy Making" (February 2006), at 3 online: UNESCO <http://portal.unesco.org/culture/en/ev.php-URL_ID=29947&URL_DO=DO_TOPIC&URL_SECTION=-465.html> [UNESCO, "Understanding Creative Industries"].

607 *Ibid*.

608 Jason Potts, "Introduction: Creative Industries & Innovation Policy" (2009) 11 Innovation: Management, Policy & Practice 138 at 142 [emphasis in original] [citation omitted].

609 *Ibid*.

610 UNESCO, "Understanding Creative Industries", *supra* note 606; Pratt, *supra* note 602 at 113, Pratt argues that politically, creative industries are associated with 'new labour' while cultural industries are 'old labour' and carry with them the connotations of exclusion and association with 'high culture'.

611 Florida, *supra* note 605, Florida defines the main attributes of the Creative Class, as those who "engage in work whose function is to 'create meaningful new forms'" at 68-69; Similarly, Vinodrai argues that designers are the "key animateurs of the creative economy and for this reason, it is instructive to critically examine the structure and dynamics of the design workforce and the institutional conditions that support design activity" and that their multidisciplinary importance at the "intersection of art, business and technology" has garnered attention from the private and the public sector, see Vinodrai, "Evolving Design Economy", *supra* note 594 146 at 150-151.

612 Meric S Gertler & Tara Vinodrai, "Capturing Design: Lessons from the United Kingdom and Canada", in Anthony Arundel, Alessandra Colecchia & Fred Gault, eds, *Science, Technology and Innovation Indicators in a Changing World: Responding to Policy Needs*, (Paris: Organisation For Economic Co-Operation And Development, 2007) 65 at 66-67.

and design of products and services instead of products themselves in the generation of sustainable economic growth."[613] To this end, they argue that 'creative industries' represent the shift from manufacturing economies to post-industrial or service economies.[614]

Unlike Canada, a late adopter of the "creative economy as a generator of economic growth" at the federal level,[615] a number of countries have progressed from traditional definitions of 'culture' as a part of their cultural policy into the broader scope of creative industries. As a result design, as well as fashion design have been directly incorporated into their creative economy policies, including the United Kingdom, Australia[616] and countries throughout the European Union.[617] For example, the UK government's Trade and Investment Ministry highlighted the role of design as front-and-centre relevance to their creative industry policy:

> Despite their individual specialisms, all of the UK's creative sub-sectors, from advertising, animation and architecture to music, film and publishing, are interlinked and join together to make an immensely powerful team.
>
> Running through them all is design, something that is particularly close to my heart and which is the key engine room of the UK's creative industries.[618]

This example is illustrative of the UK government's commitment to include design within their policies on creative economies, and its effect on evidenced-based legislative review. Importantly,

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[613] Mirjam Gollmitzer & Catherine Murray, "From Economy to Ecology: A Policy Framework for Creative Labour" (2008) Canadian Conference of the Arts, at 10, online: <ccarts.ca/wp-content/.../01/CREATIVEECONOMYentiredocument.pdf >.
[614] *Ibid*.
[615] *Ibid* at 9.
[616] Austl, Commonwealth, *Creative Australia: National Cultural Policy* (Commonwealth of Australia, 2013) online: <http://creativeaustralia.arts.gov.au/assets/Creative-Australia-PDF.pdf> (Australia's original cultural policy was initiated in 1994 and then revived again in 2013, see Moira Coombs, "Creative Australia: National Cultural Policy 2013" FlagPost (2 April 2013), online: <http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/FlagPost/2013/April/Creative_Australia__National_Cultural_Policy_2013>).
[617] See e.g., European Commission, *Culture: Supporting Europe's Cultural and Creative Sectors*, online: <http://ec.europa.eu/culture/policy/cultural-creative-industries/index_en.htm>.
[618] UK, Trade and Investment, *Creative Nation: A Guide to the UK's World Leading Creative Industries*, Reference No URN UKTI/14/644 (London: Her Majesty's Stationary Office, 2014), online: Gov.uk Trade and Investment <https://www.gov.uk/government/publications/creative-nation-a-guide-to-the-uks-world-leading-creative-industries>.

the United Kingdom explicitly includes fashion design as a part of their creative industries.[619] Design laws have also been a focus of the UK government in the last decade; a vast consultation was undertaken as a response to the Hargreaves Report which identified the need to review design laws to make them coherent and relevant to the actual needs of design industries.[620]

Stronger design policy initiatives and design legislation also exists in the European Union.[621] As a result of the variances between national design laws across the European Community (EC),[622] the Directive was implemented to standardize and facilitate trade within the EC by introducing both a registered and unregistered right.[623] This protection, which allows for designers to rely on unregistered design protection for a shorter period of time, appears to be a balance between countries that required registration for design law protection and those that did not require registration for design protection under copyright law.[624]

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[619] *Ibid* at 22-23.

[620] *Hargreaves Report, supra* note 189 at 65-67.

[621] The European Community members enjoy a harmonized design right (both registered and unregistered). In Europe, there are currently two design protection regimes, which include a registered and unregistered design right). EC, *Commission Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the legal protection of designs*, [1998] OJ, L 289/28 [*Design Directive*]; EC, Commission Regulation (EC) No 2245/2002 of 21 October 2002 implementing Council Regulation (EC) 6/2002, [2002] OJ, L 341/28 [*Design Regulation*]; The UK enjoys both European Community rights as well as national legislation, *Registered Designs Act*, 1949, (UK) c 88, (consolidated version, incorporating Regulatory Reform Order 2006, effective Oct 1, 2006) [UK RDR]; *Copyright Designs and Patents Act*, 1988, (UK) c 48, s 213(1) ff [UK UDR].

[622] In addition to the Community Design Rights (Directive and Regulations) countries have national protection. For example, Italy has industrial property rights, which include "designs and models" as well as copyright law which extends to design, see Legislative Decree No 30 Of 10 February 2005 *Industrial Property Code*; copyright legislation in France explicitly extends to fashion design, see *Code de la Propriété Intellectuelle*, Article L 112-2; in the UK designers may rely on either the national registered or unregistered design rights, see UK UDR, *supra* note 621; UK RDR, *supra* note 621.

[623] EC, *Opinion on The Proposal For A European Parliament And Council Regulation On The Community Design* (94/C 388/03), Official Journal of the European Communities C388 31/12/1994 P 0009, online: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:51994AC0849(01)&from=EN> "The importance of industrial designs has increased dramatically over the last 10 years, as essential elements in the marketing of consumer products. The question of their legal protection has, quite rightly, attracted growing attention from interested groups in the industrialized world, including Europe" at No C 388/9 [EC, *Opinion*].

[624] Susanna Monseau, "European Design Rights: A Model For the Protection of All Designers From Piracy" (2011) 48:1 American Business Law Journal 27 at 58.

Protection for fashion design currently exists within four distinct intellectual property regimes in the UK. Two stem from national design rights (registered and unregistered)[625] and two are European Community rights (Design Directive and Design Regulation).[626] Both the UK Registered Design Right and the EC Registered Design right offer five years of protection upon mandatory registration, a showing of a novelty standard for originality, and payment of a fee.[627] Registrations are renewable for a maximum term of up to twenty-five years.[628] However, these two options are not a popular choice among fashion designers.[629] It has been argued that the reluctance of fashion designers to use these avenues may suggest that they are not interested in protection, or alternately it could be that the design rights are "not well suited to the fashion industry."[630]

Similarly, the recent response to the Hargreaves Report by the UK government suggests that the unregistered design right is the most conducive form of protection for fashion designers where "designs are rapidly superseded."[631] The Report further held that "[t]hese industries do not wish to use their time, money and energy registering designs whose value is transient."[632]

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625 Note that the Unregistered Design Right UK UDR was initially implemented as a response to the proliferation of copyright claims in the 1980s concerning the infringement of drawings from the design of automotive parts. The UDR was meant to appeal to these industries, and was therefore limited in scope i.e., surface decoration is excluded, and instead, rights only extend to the shape and configuration. They do however apply to a range of products other than the automotive sector, and clothing companies have in made use of this right, see Charlotte Waelde et al, *Contemporary Intellectual Property: Law and Policy*, 3rd ed (Oxford: Oxford University Press, 2014) at 322-324.

626 The Design Regulation extends Community design protection for unregistered rights.

627 UK RDR, *supra* note 621, ss 1B, 7, 8; *Design Directive, supra* note 621, art 4, 12.

628 *Design Directive*, *supra* note 621, art 10 [Term of Protection]; Erika Myers, "Justice in Fashion: Cheap Chic and the Intellectual Property Equilibrium" (2009) 37:1 AIPLA QJ 47 at 63.

629 *Ibid*.

630 *Ibid* at 64. Myers discussed the use of registration as evidence by Sprigman and Raustiala to comment on the fact that desginers are not interested in IP in the EU (Community). Myers instead suggests that this evidence of registration could be used to advance the possibility that the registered design rights are not well suited for the industry.

631 UK Intellectual Property Office, *Consultation on the Reform of UK Designs Legal Framework Government Response – April 2013*, *UKIPO* (30 April 2013) at 1 [*Consultation on the Reform*].

632 *Ibid* at 5; Notably there are important differences between the UK UDR and the unregistered EU Community Unregistered Design Right (EU CUDR). For example where the UK UDR can apply in the case that the works would otherwise not be protected by the regular UK RDR, for the EU Community designs, individuals seeking

Further, because only a fraction of designs become profitable, it is not in the designers' best interest to register all of their works.[633] In the EU, the more popular protection used by designers seems to be the unregistered design right because it is used for products that have a "short market life" and there are no formalities required for registration.[634] The scope of protection, however, is not as strong as the registered right.[635] Unlike in Canada and the US, there is a very strong policy component that has contributed to the recognition of design rights both in the UK and in the EU.[636]

3.2.2.3 Innovation Policy

Conceptually different from cultural or creative economy policies, innovation policy

> …refers to the government policies aimed at fostering the use of the best [science and technology] to produce new and competitive 'first-to-market' products and new production processes, and the innovative organizational approaches and management practices that support these activities.[637]

Design has fared slightly better under Canada's innovation policy than under its cultural policy. However, this view of design as a process or enhancement does not take into consideration the various cultural industries that design cuts across. Rather, it focuses greatly on engineering and industrial design. The Jenkins Report,[638] commissioned by the federal government in 2012, was undertaken for the purpose of evaluating and creating a pathway to

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protection under the EU CUDR must also be eligible for protection by the EU registered design system. Therefore, it is possible for designers to enjoy protection in the UK, this may not extend to the EU CUDR see Waelde et al, *supra* note 625 at 356.

[633] *Consultation on the Reform*, *supra* note 631 at 13.

[634] Myers, *supra* note 628 at 64; *Design Regulation*, *supra* note 621, s 2 art 11, the unregistered Community design right lasts for "a period of three years as from the date on which the design was first made available to the public within the Community".

[635] Notably, both the *Regulation* registered and unregistered design rights are limited by exclusions that are similar to copyright fair dealing i.e., "acts done privately and for non-commercial purposes" as well as for the purpose of citation, teaching, as long as they are compatible with fair trade, see *Design Regulation*, *supra* note 621, s 4 art 20.

[636] See generally, EC, *Opinion*, *supra* note 623; Compendium, Europe, *supra* note 600.

[637] G Bruce Doern & Christopher Stoney, "Federal Research and Innovation Policies and Canadian Universities: A Framework for Analysis" in G Bruce Doern & Christopher Stoney, eds, *Research and Innovation Policy: Changing Federal Government-University Relations* (Toronto: University of Toronto Press, 2009) 3 at 9 [citations omitted].

[638] *Innovation Canada*, *supra* note 536.

building "a more innovative economy."[639] The importance of design was recognized and linked to the successful commercialization of products, however the value of design and design as an independent activity or initiative was not articulated.[640]

Of the three innovation policy documents outlining the government's commitment to innovation in the form of science and technology in 2002,[641] 2007,[642] and 2014,[643] none have explicitly recognized design as a standalone discipline but have instead acknowledged design as an enhanced activity in support of the manufacturing sector i.e., industrial design. In 2014, the Canadian government introduced its innovative strategy policy report *Seizing Canada's Moment: Moving Forward in Science, Technology and Innovation 2014*.[644] Within that Report, design was acknowledged as a complementary component to its newest priority, which was deemed to be advanced manufacturing.

> Advanced manufacturing will provide higher-value added services, such as R&D, design and after-market support, that link to opportunities in global value chains. Automation, 3D printing and advanced data management, for instance, can revolutionize the way manufacturers operate in both traditional and emerging industrial sectors.[645]

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[639] *Ibid* at ii [about the cover].
[640] *Ibid* at 2-1.
[641] Industry Canada, *Achieving Excellence: Investing in People, Knowledge and Opportunity*, Catalogue No C2-596/2001E-IN2 (Ottawa: Industry Canada, 2002) at 4 (this document also incorporates examples where design has been successful, in the case of a wheelchair and the cellphone at 9 & 10), online: <http://publications.gc.ca/collections/Collection/C2-596-2001E.pdf>; Industry Canada, *Knowledge Matters: Skills and Learning for Canadians*, prepared by Human Resources Development Canada, Catalogue No SP-482-02-02 (Ottawa: Industry Canada, 2002), online: <http://publications.gc.ca/site/archivee-archived.html?url=http://publications.gc.ca/collections/Collection/RH64-13-2002E.pdf>.
[642] There is a single reference to Blackberry's phone design, see Industry Canada, *Mobilizing Science and Technology to Canada's Advantage*, Catalogue No lu4-105/2007E-PDF (Ottawa: Public Works and Government Services Canada, 2007) at 1, online: <https://www.ic.gc.ca/eic/site/icgc.nsf/eng/00871.html>.
[643] *Innovation Canada*, *supra* note 536.
[644] Canada, *Seizing Canada's Moment: Moving Forward in Science, Technology and Innovation 2014*, Catalogue No lu37-4/1-2014E-PDF (Ottawa: Industry Canada, 2014), online: <https://www.ic.gc.ca/eic/site/icgc.nsf/vwapj/Seizing_Moment_ST_I-Report-2014-eng.pdf/$file/Seizing_Moment_ST_I-Report-2014-eng.pdf> [*Moving Forward*].
[645] *Ibid* at 21.

Finally, "methods of design and production" referred to in the report related to examples of "simulation, automation, and additive manufacturing."[646] Outside of product design, electrical circuit board design, and communications, design in and of itself as an innovation tool and discipline was not explicitly mentioned.

There are a number of policy tools mentioned in *Moving Forward*, which outlined millions spent in funding for a number of initiatives such as internships in high-demand fields, long-term support for the automotive industry, and funding for the Canadian Accelerator and Incubator Programs.[647] In addition to these initiatives, the 2014 policy document acknowledged the importance of patents to the success of these industries.[648]

3.3 Policies Directly Affecting Fashion Design Industries

The section will review the national, provincial and municipal policies that have both hindered and supported fashion design. As mentioned above, while the author acknowledges that there may be a number of initiatives and programs such as small business support or tax incentives that are not directly linked to fashion design subject matter, this section will only focus on those that are directly related to fashion design subject matter. For example, while design, specifically fashion design, has not been included in Canada's cultural or innovation policy framework, the industry has been affected by policies related to the Apparel and Textile Industries (ATI).[649]

[646] *Ibid* at 19.
[647] *Ibid* at 5.
[648] *Ibid*, for examples include mention of the number of patent applications as a successful private-public partnership programs such as Mitacs at 27; the impact of Canadian patents which is 20% more than the rest of the world at 41 [citations omitted].
[649] Therefore, this section will not focus on 'design', but on the fashion design related to the ATI.

3.3.1 Apparel and Textiles: Trade and Manufacturing Policies

It is accurate to say that the Canadian fashion industry has been and continues to be in flux.[650] The fashion industry has changed drastically due to trade liberalization agreements.[651] Some of these policies have made it challenging for small and medium sized enterprises to compete against foreign textile importers and retailers who receive many benefits that are not available to their domestic counterparts.[652] This section below will review two major phases, the first reshaped the industry, and the second explains where we stand today.

The first phase took place in the mid to late 1980s and encouraged trade liberalization. The initial shift came in the form of the *Canada-United States Free Trade Agreement* (FTA) in 1989,[653] a huge benefit for Canadian clothing exporters,[654] and the end of the *Multifibre Arrangement* (MFA), which was comprised of a number of trade quotas negotiated with lower-wage countries.[655] Following the end of the MFA, Canada continued to pursue liberalization and entered into two additional agreements that would contribute to reshaping the landscape of the domestic ATI.

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[650] *Shape of the Future*, *supra* note 272 at 2 the report states that due to increasing global competition, the Canadian apparel landscape is going to go through many changes (notably this study was conducted in 2004).
[651] See *Apparel Industry Profile 2010-2014*, *supra* note 273.
[652] While not directly related the intellectual property rights, it is important to demonstrate that Canadian designers are constantly facing challenges and competition from foreign producers. An example of how this might have an adverse affect on the fashion industry is while designer spend their time creating works, these trade agreements make it conducive for foreign producers to copy designs and sell them at much lower prices within the same season.
[653] *Canada-US Free Trade Agreement Implementation Act*, SC 1988, c 65.
[654] Wyman, "Trade Liberalization", *supra* note 456, Wyman observes that Canada's exports to the States increased more than ten-fold following the FTA.
[655] *Multifibre Arrangement* (1974-1994); Statistics Canada, "Analysis in Brief: Stretching or Shrinking? The Textile and Clothing Industries in Canada" by Diana Wyman, Catalogue No 11-621-M – No 22 (Ottawa: Minister of Industry, March 2005), online: <http://www5.statcan.gc.ca/olc-cel/olc.action?ObjId=11-621-M2005022&ObjType=46&lang=en>; In the last round of agreements in 1986 the MFA had the effect of "tighten[ing]" the bilateral agreements, transforming them into a set of quotas, see Wyman, "Trade Liberalization", *supra* note 456.

In 1994, the *North American Free Trade Agreement*[656] (NAFTA) was concluded between Canada, the United States and Mexico.[657] One of the opportunities stemming from the agreement was the progressive removal of trade tariffs for textile and apparel goods between the three nations.[658] The Agreement created "rules of origin" for textiles, meaning that only those textiles originating from North America would qualify for and benefit from the "preferential NAFTA tariff and quota treatment."[659] A report published in 2008 indicates that eighty-nine percent of apparel exported from Canada in 2006 was destined for export to the United States.[660]

NAFTA was followed in 1995 by the implementation in Canada of the World Trade Organization's *Agreement on Textiles and Clothing*[661] (ATC). The purpose of the ATC was to

> …secure the eventual integration of the textiles and clothing sector — where much of the trade is currently subject to bilateral quotas previously negotiated and implemented under the *Multifibre Arrangement* (MFA) — into the [*General Agreement on Tariffs and Trade*] GATT on the basis of strengthened GATT rules and disciplines.[662]

This meant that rather than preventing and limiting the import of goods into Canada based on quota or quantities, customs tariffs would be used, freeing up the playing field for foreign companies.[663] The gradual implementation of the ATC was divided into four steps over the

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656 *North American Free Trade Agreement Between the Government of Canada, Mexico and the Government of the United States*, 17 December 1992, Can TS 1994 No 2 (entered into force 1 January 1994), online: <https://www.nafta-sec-alena.org/Home/Legal-Texts/North-American-Free-Trade-Agreement> [NAFTA].

657 Global Affairs Canada, "Report from the Trilateral Working Group on Textiles and Apparel to the NAFTA Free Trade Commission March 7th, 2005", online: < http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/textile_report.aspx?lang=en > [Working Group on Textiles].

658 NAFTA, *supra* note 656, at Annex 300-B.

659 Working Group on Textiles, *supra* note 657.

660 See *Global Value Chain*, *supra* note 141 at 2 Figure 2.1 and 2.2, in 2006 it was reported that the United States accounted for 89% of the 31.5 % of Canadian clothing manufacturing exports; however, statistics from 2008 demonstrate that the percentage of exports of Canadian-made apparel to the United States accounted for 24% of Canadian exports while 71% of the apparel sold domestically. Further, the United States accounted for 84% of Canadian market share (which accounts for 1% of the total US apparel market share) see *Pressing Ahead*, *supra* note 12 at 33-35.

661 *Agreement on Textiles and Clothing*, 1868 UNTS 14, (entered into force 15 April 1994, terminated 1 January 2005) [ATC] online: WTO <https://www.wto.org/english/docs_e/legal_e/16-tex_e.htm#top>.

662 WTO, *A Summary of the Final Act of the Uruguay Round: Agreement on Textiles and Clothing*, online: WTO <https://www.wto.org/english/docs_e/legal_e/ursum_e.htm> [emphasis added].

663 WTO, "Textiles: Back in the Mainstream" Understanding the Agreement, online: The World Trade Organization <https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm5_e.htm>.

course of ten years.[664] Products included in the ATC covered materials from silk, cotton, animal hair and vegetable textile fibres; apparel such as women's, men's and children's clothing; and other products such as sails, garments for dolls, safety belts and electric blankets.[665]

From a position of strengthening the industry based on proactive programs such as quotas to limit imports into domestic markets, financial support for primary textile and apparel firms and even the creation of a *Fashion-Design Assistance Program*,[666] to one that aimed at trade liberalization, signing the ATC represented a departure from the protectionist approach adopted by Canada prior to globalization and free trade agreements.[667] With the transformation of these quotas to tariffs under the ATC,[668] Canada experienced a tremendous number of imports from *least developed countries*[669] (LDC) such as Bangladesh and China.[670] It was reported that as consumers began to enjoy the lower prices and higher selection of foreign produced textile and clothing, Canada's own clothing industry had significantly declined.[671] Notably the textile

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[664] *Ibid*.
[665] ATC, *supra* note 661, Annex: List of Products Covered by the Agreement.
[666] Maryse Robert, *Negotiating NAFTA: Explaining the Outcome in Culture, Textiles, Autos, and Pharmaceuticals* (Toronto, University of Toronto Press, 2000) at 126-128.
[667] For example, Canada developed its *National Policy*, which placed high tariffs on imports in an effort to protect and build domestic industries, until just after the second world war, see generally, Collections Canada, Library and Archives "Key Terms: National Policy", online: <https://www.collectionscanada.gc.ca/confederation/023001-3010.36-e.html>; see generally Richard Harris, Ian Keay & Frank Lewis, "Protecting Infant Industries: Canadian Manufacturing and the National Policy, 1870-1913" (2015) 56 Explorations in Economic History 15.
[668] It is important to note that the MFA and ATC were not interrelated agreements, or rather as Nordas points out, the "ATC is *not* an extension of the MFA. Rather, it is a transitory regime between the MFA and the full integration of textiles and clothing into the multilateral trading system" at 13, see Nordås, *supra* note 369 [emphasis in original].
[669] Committee for Development Policy and United Nations Department of Economic and Social Affairs, *Handbook on the Least Developed Country Category: Inclusion, Graduation and Special Support Measures*, United Nations (November 2008), online: <http://www.un.org/en/development/desa/policy/cdp/cdp_publications/2008cdphandbook.pdf> *Least Developed Countries* categorization was developed by the United Nations Conference on Trade and Development (UNCTAD). In 1970, the Committee for Development Planning "formed a working group to define a methodology for identifying LDCs and to reflect upon special measures for countries so classified" based on several categories and eligibility criteria at 3; In 1999, the Director General of the World Trade Organization called on its members to remove the tariffs and quotes on products that originated from LDCs, see WTO, "Least Developed Countries: WTO DG Moore Seeks Package For Poorest States", online: <https://www.wto.org/english/thewto_e/minist_e/min99_e/english/about_e/06ldcs_e.htm>.
[670] Wyman, "Trade Liberalization", *supra* note 456, reports that China eventually flooded the market – in 2005, while clothing imports increased by 7%, China's market had increased by 47%.
[671] *Ibid*.

industry was less susceptible to the negative effects of liberalization than the garment industry due to the fact that the former is "technology-driven and less labour-intensive" and therefore less susceptible to fluctuation.[672]

Following this trend, in 2003 the Canadian government declared that it would remove and otherwise completely eliminate quotas and tariffs on imports to Canada in favour of the forty-eight LDCs. This was done in an effort to "encourage foreign development in the least developed countries through duty-free and quota-free access to the Canadian market for exports from these countries thereby promoting economic growth."[673] The practical effect of this initiative on Canada's domestic market was that LDC countries could use textiles from low-wage countries such as China without paying duties for those textiles; and import finished products (also employing low-wage workers) into Canada without having to pay import duties.[674] The Richter study indicates that this has created "an uneven playing field" for Canadian designers and manufacturers due to the fact that they would have to pay duties for those very same textiles.[675]

Well aware of the adverse impact on the domestic ATI, the government implemented several programs in an effort to help counter the negative effects. One of these programs was the enactment in 2001 of a statutory instrument called the *Design Remission Order*[676] by the federal

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672 Juan-Luis Klein, Diane-Gabrielle Tremblay & Denis R Bussieres, "Social Economy-Based Local Initiatives and Social Innovation: A Montreal Case Study" (2010) 51:1 Int J Technology Management at 121 at 124.

673 Canada Border Services Agency, *Introductory Guide to the Market Access Initiative for the Least Developed Country and the Least Developed Country Tariff*, Catalogue No RC4322(E) (Ottawa: CBSA, 2003) at 2 online: <http://publications.gc.ca/site/eng/442000/publication.html>.

674 *Shape of the Future*, *supra* note 272 at 14. The study indicates that taking all of the factors into consideration (wages, textiles, tariffs) that it would cost almost 40% less to import apparel than to make it locally. On the other hand, it should be noted that it is possible that Canadian retailers who import these finished products from LDCs could benefit from the tariffs in the same way that other retailers bringing clothing into Canada do. Notably, this would not apply to those who produce or manufacture locally.

675 *Shape of the Future*, *supra* note 272 at 14; see Galvin, *supra* note 153 at 249 (based on a response provided by a participant in his interview).

676 *Designer Remission Order, 2001* (SOR/2002-4).

government, which was initially slated to end in December 2010 but was extended to January 1, 2015.[677] The purpose of this program was to offset the price of textiles for Canadian designers, because of the uneven playing field created by the trade policies.[678] Further, in 2010, the removal of tariffs on the importation of some raw materials and textiles was removed or phased out over time.[679]

Another initiative created by the government was the Canadian Apparel and Textiles Industries Program (CATIP), launched in 2002 to assist domestic competition in light of the imminent pressure on the industry.[680] The program initially focused on three areas, which included i) the introduction of best practices and leading technologies, ii) facilitating access to capital and iii) developing and implementing global market strategies.[681] Even though the CATIP initiative was slated to wind down in 2006, a new component was added in 2004 with different objectives and additional funding under the program name CANtex.[682] The CANtex program was delivered in partnership between Industry Canada, administrator of the entire program, and

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[677] This was extended to 2010, see *Order Amending the Design Remission Order*, SOR 2006-1024; and later extended to 2014 see *Order Amending the Design Remission Order*, SOR 2010-1414; In the Regulatory Impact Analysis Statement published in the Canada Gazette, the *Issue and Objectives* noted that the 2010 order was "set to expire on December 13, 2010, after which companies would face duties of up to 10% on their fabrics. However, as announced in Budget 2010 and implemented through the *Jobs and Economic Growth Act*, duties on manufacturing inputs, including fabrics, will be eliminated by January 1, 2015." It further stated that the "[a]verage annual duties foregone resulting from this extension are estimated at $37,500", see *Order Amending the Designer Remission Order*, 2001, SI/2010-87 and 88, (2010) C Gaz II, vol 144 n 25, (8 December 2010) at 2302, online: <http://publications.gc.ca/collections/collection_2010/canadagazette/SP2-2-144-25.pdf>.

[678] This Order allowed apparel designers to apply for a remission on tariffs paid for fabrics that were imported into Canada over the value of $14.00 per square meter from 2001-2005 and under $14.00 from 2005-2010, see Canada, Department of Finance, "Backgrounder: Government of Canada Measures to Help Improve the Competitiveness of the Apparel Industries" News Release 2005-71 (Ottawa: Department of Finance, 2005), online: <http://www.fin.gc.ca/n05/data/05-071_1-eng.asp> ["*Backgrounder*"].

[679] Canada, Department of Finance, "Notice of Ways and Means Motion to Amend the *Customs Tariff*" ss 6 + 12, online: <http://www.budget.gc.ca/2010/plan/anx5a-eng.html>; Canadian Apparel Federation, Textile Tariffs – Update 2010, <http://www.apparel.ca/Textile_Tariffs1.html>.

[680] Industry Canada, *Final Audit Report: Audit of the Canadian Apparel and Textile Industries Program (CATIP)*, Audit and Evaluation Branch Catalogue No Iu4-141/2-2008E-PDF (Ottawa: Industry Canada, 2008) 2.2 Program Description, online: Government of Canada Publications <http://publications.gc.ca/site/archivee-archived.html?url=http://publications.gc.ca/collections/collection_2009/ic/Iu4-141-2-2008E.pdf>.

[681] *Ibid*.

[682] *Ibid*.

Canadian Economic Development for Quebec Regions.[683] Combined with CATIP's original program they provided over 84 million dollars of funding between them.[684] The number of projects that received grants was equally distributed between Ontario and Quebec, at 46% to each, with the remainder spread between Alberta, British Columbia, Nova Scotia and Manitoba.[685]

The program ended in 2010, and not 2006, with the acknowledgement that the industry would be facing ongoing and future challenges:

> As CATIP sunsets, industry has expressed concerns about a continued coordinated federal approach to support the apparel and textile sectors. Some complementary programs exist federally and in some provinces.
> […]
> The apparel and textile sectors have experienced significant restructuring as a result of trade liberalization and international cost competition—developments which were anticipated in the creation of the CATIP program. While many of these developments were anticipated, both sectors are adjusting to the new market realities. As well, both sectors have indicated the need for additional assistance, in support of activities focused on their strategic priorities.[686]

These initiatives were eventually phased out and not replaced.[687]

The second phase, of which Canada is currently in the midst, is post-liberalization, resulting from the mass restructuring of the industry. The transformation has been profound, shifting the industry from a production and manufacturing industry to one that heavily relies on services such as retail and wholesaling.[688]

Two of the participants interviewed in this research cited one or several of the above-mentioned trade agreements as challenges for the independent design community; specifically

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[683] *Ibid*.
[684] *Ibid* at 2.3. Program Resources.
[685] *Ibid* at Figure 3.
[686] *Ibid* at Rationale.
[687] Galvin, *supra* note 153 at 130-131, prior to these programs, between the years of 1981 to 1986, the federal government created the Canadian Industrial Renewal Board, which helped smaller clothing and textile firms with restructuring financially and with other policy tools.
[688] See generally *Pressing Ahead*, *supra* note 12.

foreign competition and the elimination of quotas/tariffs.[689] Canadian designers who incorporate imported fabrics are required to pay duties on those fabrics, whereas retailers who import the very same fabrics from outside of Canada as finished apparel are not required to pay those duties and tariffs because they mostly originate from LDC countries.[690] Apart from saving duties, these retailers profit from inexpensive labour overseas.[691] The end result of these agreements is that Canadian designers and manufacturers have been positioned to compete with retailers and manufacturers whose labour and production costs and practices are significantly less.[692]

> If [the government] really – if they were so interested in our industry, before they tackle this [intellectual property] issue, they might want to tackle […] non quotas of […] huge amounts of product coming into the country. We can't compete with that. They get preferential tariff treatments, that product comes into the country duty free, […] there's no protection for our industry at all. And that's more of a detriment to our industry than the copying…[693]

Further, it has been suggested that Canadian designers who predominantly produce in Canada are facing higher production costs, and on the other hand they would not be able to produce their products on the scale required to manufacture overseas, due to higher production quota requirements: Competing globally becomes a very difficult challenge:

> … for a designer, a young designer, an emerging designer, that would produce […] locally, they [will] not meet the minimum requirement to produce in low cost manufacturing countries like China. They are fighting a losing war. It's like going to war without any equipment and it's been like that for the last 20 years [since the quotas were removed].[694]

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[689] (Participant, Interview August 28 2014, 10, 28); (Participant, Interview July 31 2014, 12-13).
[690] See *Pressing Ahead*, *supra* note 12 at 52.
[691] *Ibid*; Galvin, *supra* note 153 at 248-249.
[692] See e.g., Shareholder Association for Research and Education "Investor Brief: How are Canadian Companies Addressing Safety Risks in Bangladesh Apparel Factories?" (Vancouver: SHARE, 2015), online: <http://www.share.ca/research-reports/investor-briefs/>; The Current, "Canadian Companies, Poor Record in Aftermath of Rana Plaza Collapse" *CBC Radio* (23 April 2015) (radio show), <http://www.cbc.ca/radio/thecurrent/the-current-for-april-23-2015-1.3045262/canadian-companies-poor-record-in-aftermath-of-rana-plaza-collapse-1.3045335>; The Current, "Statements from Canadian Companies on their Efforts in the Aftermath of the Rana Factory Disaster" *CBC Radio* (23 April 2015), online: <http://www.cbc.ca/radio/thecurrent/statements-from-canadian-companies-on-their-efforts-in-the-aftermath-of-the-rana-factory-disaster-1.3045375>.
[693] (Participant, Interview August 28 2014, at 10).
[694] (Participant, Interview July 31 2014, at 12).

Because of these global trade objectives that have adversely affected Canadian fashion industries in the last decade, the importance of this sector of the economy has become the subject of extensive research, policy building and investment in the provinces who rely more heavily on this industry.[695]

3.3.2 Provincial and Municipal Policies: Montreal, QC and Toronto, ON

While cultural policy is crafted both at the federal and provincial levels, federal cultural policy does not extend to all areas of design.[696] Instead, the province of Quebec and the city of Montreal have compensated by including these industries as a part of their respective cultural policies.[697] This is significant because federal cultural policy is implemented nationally and by a number of tools available only to the federal government, such as copyright law. Provinces only have the power to regulate cultural industries within their own territories, resulting in very specific programs, funding, and legislative support in each region, so that policy approaches in Quebec and Ontario may be starkly different.

Apart from Quebec, design has not been mindfully integrated into Canadian "economic development strategies."[698] The lack of a coherent design policy has led to the frustration of

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[695] This is more so the case in Quebec than in any other province, see Quebec, "The Quebec Fashion and Clothing Industry Strategy" *Québec Développement économique, Innovation et Exportation* (October 2007), online: Québec Développement économique, Innovation et Exportation <http://www.mdeie.gouv.qc.ca/ministere/english/about-us/strategies/departmental-strategy/the-quebec-fashion-and-clothing-industry-strategy/> [Quebec Fashion] For example, in 2007 the Government of Quebec earmarked $82 million over three years to implement a strategy aimed at rebranding and restructuring Montreal as the fashion capital of Canada.

[696] Although some jurisdictions have explicitly included design and fashion design as a part of their policies under a broader more inclusive heading of creative economy or industries (will be discussed in detail below).

[697] Norma M Rantisi & Deborah Leslie, "Creativity by Design? The Role of Informal Spaces in Creative Production" in Time Edensor, Deborah Leslie, Steve Millington & Norma M Rantisi, eds, *Spaces of Vernalcular Creativity: Rethinking the Cultural Economy* (New York: Routledge, 2010) 33, in describing the various institutions that support design policy at the provincial and municipal level, Leslie described initiatives such as the City of Montreal's 1996-2006 Commerce Design Montreal which among other things had the goal of "foster[ing] the development of cultural capital" at 37; *Ibid*, Société de Développement des Entreprises Culturelles [SODEC], whose aim is to "support the economic viability of cultural enterprises in the province", which includes design at 38.

[698] Though at the time of their research in 2007, Meric Gertler and Tara Vinodrai observed that at a provincial level, Ontario was just beginning to respond to acknowledge the needs of its design industries, see Gertler & Vinodrai, *supra* note 612, 65 at 72 fn 1.

designers for a myriad of reasons, including funding. For example in a response concerning the availability of government grants for fashion design one participant noted that,

> …at the […] arts council, you just get a flat out no […] there's nothing; and same with at - any federal level. […] they just say that say fashion is a business. […] Fashion is a business not an art – that's the line that I have gotten a lot; and then from the other side of that when you try to go to a bank or other business professionals, to try to get advice on it as a business, they look at it as more of something cultural and not something that's viable to make a lot of money on.[699]

Ontario and Quebec house the two largest and most important design and production centres in Canada: Toronto and Montreal, which is why this study has focused on these two geospatially proximate design production centres. These cities are the two largest fashion sectors and have the highest concentration of fashion designers in Canada, although research shows that in 2009, the number of designers in the area of "theatre, fashion and other" in Montreal was nearly double that of the number in Toronto.[700]

Similar to the federal level, the provinces have generally not approached the design discipline as a whole, but have rather focused on supporting the specific design industries within their regions. Therefore it is important to review fashion design specific related policies and initiatives at the provincial and municipal levels.

3.3.2.1 Montreal, Quebec

At the provincial level, the Quebec government has played an important role in the direct support of the fashion design industry through the deployment of a number of programs. In 2007, the Quebec government announced that it had earmarked 82 million dollars to be disbursed over

[699] (Participant, Interview October 14 2014, at 1-2).
[700] Vinodrai, "Evolving Design Economy", *supra* note 594 at 161.

several years in support of the industry through its initiative PRO MODE, almost half of which was to be designated for design and design technologies. [701]

The province also offers financial support in the form of a tax incentive for fashion and textile designers up to a maximum of $60,000 for in-house design activities, or sixty-five percent of fees for activities carried out by a consultant.[702] In order to become eligible for the tax incentive, firms or individuals must earn at least $150,000 in gross earnings and conduct at least twenty percent of production in Quebec.[703]

There is also SODEC (Société de Développement des Entreprises Culturelle) a government agency, overseen by the Quebec Ministry of Culture and Communication, that has as a part of its mandate to help implement, develop and sustain the Quebec cultural economy.[704]

The province is also highly supportive of municipal initiatives and together they have worked together to help support the industry, as Montreal houses seventy percent of Quebec's fashion industry.[705] One such initiative is the *Montréal Style libre* (Montreal Free Style) strategy which includes establishing four platforms for supporting the industry: first, through an event platform (support to fashion related initiatives); second, an identity based platform to increase the brand and profile of the city; third, to increase the online strategy; and fourth with the launch of Bureau de Mode de Montreal (Montréal Fashion Bureau).[706] The Bureau is an agency that

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[701] Quebec Fashion, *supra* note 695, [summary].
[702] Québec, Ministère de l'Économie, de l'Innovation et des Exportations, « Crédit d'impôt pour le design de produits fabriques industriellement (volet design de mode) » (Québec: MEIE, n.d.), online: Canada Business Network <http://www.economie.gouv.qc.ca/fr/bibliotheques/programmes/mesures-fiscales/credit-dimpot-pour-le-design-de-produits-fabriques-industriellement/credit-dimpot-pour-le-design-de-produits-fabriques-industriellement-volet-design-de-mode/>.
[703] *Ibid*.
[704] Société de Développement des Entreprises Culturelle, *Mandat*, online: SODEC <http://www.sodec.gouv.qc.ca/fr/page/route/-1/15>.
[705] Communauté métropolitaine de Montréal, "The leaders of Québec's fashion industy gathered for the mmode Metropolitan Cluster forum" (May 28 2015) Press Release online: <https://mmode.ca/wp-content/uploads/2015/05/Comm_Grappe-mode_28-mai_EN.pdf>.
[706] Ville de Montréal, "Une Nouvelle Stratégie Mode Pour Montréal: Habiller Les Gens, Le Rêve et le Virtuel" (3 March 2009) Ville de Montréal (Press Release), online:

serves to promote fashion "by working with the industry's leading stakeholders, resulting in value-added activities that help give Montréal its distinctive identity."[707] It was established in 2009 by the City of Montreal with funding support of $2.4M over three years granted by the Quebec government.[708]

Design is explicitly recognized as a cultural sub-sector of the city alongside the performing arts, music and sound recording.[709] Leslie and Rantisi argue that the impetus on design served a dual purpose for Montreal, the first purpose was to have competitive edge in the face of globalization, and second was to "preserve French Canadian culture through the establishment of vibrant and distinct design culture."[710] As a part of their design mandate, the city applied for and was designated a UNESCO City of Design in 2006.[711] Since then, they have continued to create programs, competitions and a number of other initiatives to exemplify the importance of design to their culture, for their city and for their citizens.[712]

<http://ville.montreal.qc.ca/portal/page?_pageid=5798,42657625&_dad=portal&_schema=PORTAL&id=11835&ret=http://ville.montreal.qc.ca/pls/portal/url/page/prt_vdm_fr/rep_annonces_ville/rep_communiques/communiques> [*Nouvelle Stratégie Mode*]; Amina Yagoubi & Diane-Gabrielle Tremblay, "The Role of Intermediaries in the Professional Trajectories of Fashion Designers in Montreal, UNESCO City of Design" Conference Proceedings, International Forum on Knowledge Asset Dynamics, 12-14 June 2013, <www.ifkad.org/Proceedings/2013/papers/session5/066.pdf>; Ville de Montréal, "Fashion City Presentation: A Key Player" *Ville de Montreal* (2009), online: Ville de Montreal <http://ville.montreal.qc.ca/portal/page?_pageid=6297,50629558&_dad=portal&_schema=PORTAL>.

[707] *Ibid*.

[708] *Nouvelle Stratégie Mode*, *supra* note 703.

[709] Board of Trade of Metropolitan Montreal, *Culture in Montréal: Economic Impacts and Private Funding*, (November 2009) at 3, online: < http://www.btmm.qc.ca/documents/publications/etudes/CCMM_Culture_en.pdf>.

[710] Leslie & Rantisi, "Design Economy", *supra* note 313 at 319.

[711] Note that the requirements to be established as a UNESCO City of Design includes having an established design industry, the cultural landscape fuelled by design and the built environment, design schools and research centres, practicing groups of creators and designers with a continuous activity at a local and/or national level, experience hosting fair, events and exhibits focused on design, design-driven creative industries (including jewellery), see UNESCO, Creative Cities Network, *supra* note 315 .

[712] Ville de Montréal, Bureau du Design Montreal, "UNESCO City of Design in Action and by the Numbers: 2006-2012 Report" (September 2013) at 23-24, online: <https://designmontreal.com/sites/designmontreal.com/files/publications/mtlud_report_2006-2012_engl_0.pdf > for example, the UNESCO City of Design initiative in Montreal has contributed greatly to the development of design and has spurred projects in the design sector, including 35 design and architecture workshops, 23 project competitions which have results in 102 engagement contracts, totalling roughly $225 million in development projects; Leslie & Rantisis, "Culture of Design", *supra* note 311, 181 authors note that "[c]urrent design policies in Montréal emphasize economic sustainability at the expense of broader social and cultural imperatives and needs.

There are also several programs that combine support from both the provincial and municipal levels of government. In spring 2015, following some consultations initiated by the Quebec government, a deliberate cluster called *mmode* was created. This cluster initiative brings together all facets and segments of the industry including at the core, designers, manufacturers, distributors and retailers as well as government, R&D, consultants, logistics, e-commerce, education and other aspects.[713]

The purpose of establishing this cluster is to help structure, strengthen and position Montreal fashion both domestically and globally. It is an important initiative especially given that between 2014 and 2015, several major Quebec based retailers such as Parasuco,[714] Bikini Village,[715] and Jacob[716] either filed for bankruptcy or fully shut down. *Mmode* is a "private-public partnership" which brings together a few levels of governments to provide funding of $600,000 over the first three years.[717]

Public support for private sector endeavours have also been positively received for events such as the *Montreal Fashion Week*, put together by an industry association Sensation Mode, who received some funding and support from both levels of government as well as from private sector sponsorship. In 2013 however, it was announced that the funding they had received from the government was reduced by half of what they had previously received, and the organizers

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Design has been prioritized in Montréal because of the contribution it makes to quality of place and economic competitiveness, rather than quality of life" at 196 [citations omitted].

713 mmode, online: <http://mmode.ca/en/> [Cluster Chart].

714 The Canadian Press, "Parasuco Retail Closes Stores, Lays Off Half Its Staff, Files for Bankruptcy" *CBC News* (6 February 2015), online: <http://www.cbc.ca/news/canada/montreal/parasuco-retail-closes-stores-lays-off-half-its-staff-files-for-bankruptcy-1.2947711>.

715 The Canadian Press, "Bikini Village, Quebec-based Company, Files for Bankruptcy" *CBC News* (17 February 2015), online: <http://www.cbc.ca/m/touch/canada/story/1.2960170>.

716 The Canadian Press, "Jacob to Close all 92 Stores" *CBC News* (21 October 2014), online: <http://www.cbc.ca/news/business/jacob-to-close-all-92-stores-1.2807910>.

717 Eva Friede, "Montreal 'Cluster' Aims to Put City Back on Fashion Track" *Montreal Gazette* (29 May 2015), online: <http://montrealgazette.com/life/fashion-beauty/saving-montreal-fashion-cluster-is-launched>; see *mmode*, Cluster Chart, *supra* note 713.

instead opted to focus on organizing an annual event that combines both fashion and design together.[718]

It should be noted that earlier intentional clusters such as 'LABoratoire creative' were also created to offer support to young designers.[719] Following a number of consultations concerning the deterioration of the fashion design industry, a strategy was implemented by "local civil society-based organizations" [720] to focus on strengthening certain aspects of the transforming industry, namely design.[721] The result was the creation of a common shared space for the purpose of helping independent designers by offering services unique to market, including space, subcontractors, and marketing in order to help them develop.[722] Since many independent designers are not equipped with business or marketing skills, these services were offered in a cluster framework. As noted by Allen Scott, in his book on the film industry cluster in Hollywood,

> The propensity of firms in cultural-products sectors to converge together in distinctive spatial clusters within the city is above all a reflection of an organizational structure in which each individual unit of production is organically caught up in a wider system of socioeconomic interactions, on which it depends for survival.[723]

In all, there are a number of stakeholders in the Montreal fashion industry, and as demonstrated above, support exists in a number of forms and from several different levels of government and fashion design related associations. The support for the industry has had profound effects within

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[718] Funding was reduced by half to $125,000, see Eva Friede, "Montreal Fashion Week Is No More" *Montreal Gazette* (27 November 2013), online: <http://www.montrealgazette.com/life/fashion-beauty/Montreal+Fashion+Week+more/9223668/story.html>.
[719] Klein, Tremblay & Bussieres, *supra* note 672 at 130. Notably, it was not modeled as an incubator and did not require startups to leave once they had launched. Instead, they wanted the designers to stay and continue working within the LABs, at 131.
[720] *Ibid* at 123, they are referred to as CDEC, which stands for Les corporations de développement économique communautaire. These organizations were created by community leaders in the 1980s due to the rampant unemployment during that time. They "operate precisely at the level of city neighbourhoods and act as intermediary organisations, for example in the support of entrepreneurship" at 128 [citation omitted].
[721] *Ibid* at 129.
[722] *Ibid* at 131-133.
[723] Allen J Scott, *On Hollywood: The Place, the Industry* (New Jersey: Princeton University Press, 2014) at 6.

the community, creating opportunities and relationships. As one participant noted "…Montreal's got a very – from what I can tell – it's got the most intense local design scene of possibly anywhere in the world."[724] Throughout the interviews, a number (but not all) of the participants from Montreal commented on how small the design community was and how they managed to maintain relationships with one another.

There are a dozen fashion-design programs promoting the development of fashion designers within the creative and business sectors of the industry in Montreal, including LaSalle College Montreal and the Université du Québec à Montréal. These schools admit roughly 1800 students, and produce 300 graduates every year.[725] Major Montreal-based retailers include Aldo, Le Chateau, La Vie en Rose, Reitmans, Point Zero, Tristan America; independent SMEs include Marie St Pierre, M0851, Philip Dubuc, Denis Gagnon, Tavan & Mitto and atelier b.[726]

3.3.2.2 Toronto, Ontario

At the provincial level, the Ontario Ministry of Tourism, Culture and Sport is responsible for the support of "cultural industries, arts, heritage, archaeology, libraries, museums and cultural agencies."[727] More specifically, the support mentioned includes initiatives such as "developing innovative and globally-competitive content for the film, television, interactive digital media, recorded music, book and magazine publishing industries."[728] Therefore, unlike the Quebec government's integration of fashion within its policy mandate, fashion design has not explicitly

[724] (Participant, Interview October 23 2014, at 9).
[725] *Apparel in Montréal 2009 supra* note 285 at 4.
[726] See e.g., Le Chateau, online: <http://www.lechateau.com/style/company/links/about.jsp>; Tristan (formerly known as Tristan and America), online: <http://www.tristanstyle.com/store/app/about/us/>; Point Zero, online: <https://www.pointzero.ca>; La Vie En Rose, online: <https://www.lavieenrose.com/en/>; Reitmans, online: <http://www.reitmans.com/>; Maison Marie Saint Pierre, online: <http://www.mariesaintpierre.com/ca/en/about/; M0851, online: <http://www.m0851.com/>, Philippe Dubuc, online: <http://dubucstyle.com/?lang=fr> ; Tavan & Mitto <http://www.tavanmitto.com>; Atelier b, online: <https://atelier-b.co>.
[727] Ontario, Ministry of Tourism, Culture and Sport, online: <http://www.mtc.gov.on.ca/en/culture/culture.shtml>.
[728] *Ibid*.

been recognized within the meaning of a 'cultural industry'[729] by the Ontario provincial government. It has therefore been suggested that Ontario based designers do not receive the same funding opportunities that Quebec based designers do.[730] In fact, as Vinodrai points out in her study on the Ontario design sector as a whole:

> Policy instruments have included local design referral programs, tax credits, public and business education and awareness campaigns, investments in design-related higher education, public procurement strategies, and national and regional branding initiatives. With few exceptions, such policies and strategies have not been enacted in Ontario or the rest of Canada.[731]

Specifically, she argues that despite the financial support for "knowledge-intensive economic clusters", "design has not been an explicit focus or target of the local and regional economic development agenda."[732] More recently, in 2016 the province of Ontario published a summary of consultations "Culture Talks", with the purpose of understanding how the province could enhance and harness culture by creating a cultural strategy. Some participants in the consultation highlighted experiencing "fashion" side by side with architecture, the design sector, sporting and fine arts.[733] The government responded by including fashion in its cultural strategy report.[734] However it is unclear as to how and to what degree fashion will be integrated into the funding and policy structure.

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[729] Ontario, Legislative Assembly, Official Records of Debates (Hansard), 39th Parl, 2nd Sess, No 11 (31 March 2010) at 429 (Christine Elliott), Elliott appealed to have the fashion industry recognized under Ontario's cultural mandate so that fashion designers would be eligible to apply for grants, also noting that Quebec has already done so.
[730] *Ibid*; Ashlee Froese, "How Does Politics Affect the Fashion Industry" (8 June 2011), Canada Fashion Law (blog), online: <http://canadafashionlaw.com/2011/06/08/politicsfashionindustry/>; Tanya Talaga, "Fashion Should be Designated Cultural Industry: Designers, MPPs" *The Toronto Star* (31 March 2010), online: <http://www.thestar.com/news/ontario/article/788449--fashion-should-be-designated-cultural-industry-designers-mpps>.
[731] Tara Vinodrai, "The Place of Design: Exploring Ontario's Design Economy" (2009) Martin Prosperity Institute, Working Paper Series: Ontario in the Creative Age, Ref No 2009-WPONT-014 at iii, online: International Council of Design <http://www.ico-d.org/database/files/library/Canada_The_Place_of_Design_TVinodrai.pdf> [emphasis in original].
[732] Vinodrai, "Evolving Design Economy", *supra* note 594 at 157.
[733] Ontario, "Culture Talks" *supra* note 312.
[734] Ontario, Ministry of Tourism, Culture and Sport, "The Ontario Culture Strategy: Telling our Stories, Growing our Economy" (20 July 2016), online: <https://files.ontario.ca/ontarios_culture_strategy_en2_aoda_final-s.pdf>.

The City of Toronto has been more active than the province in initiating policies aimed at supporting the industry.[735] The importance of the fashion design cluster in Toronto was identified by the City of Toronto, who set into action in the 1980s to mitigate the various trade liberalization initiatives of the federal government.[736] In the early 1980s, the City established a committee – the Garment Industry Liaison Committee, later known as the Fashion Industry Liaison Committee (FILC) – for the purpose of promoting, providing support and liaising between the various stakeholders.[737] A participant interviewed in Galvin's thesis on the Toronto fashion cluster revealed that this initiative was funded fully at the municipal (City of Toronto) level, not the provincial or federal levels.[738] However, the participant further stated that the City of Toronto had budgeted a mere $30,000 to $35,000 annually for the development of that same economic cluster which is a fraction compared to the initiatives funded in Montreal.[739]

One of the earliest and most important municipal-based initiatives that continues to play an important role in the Toronto cluster is the *Toronto Fashion Incubator* (TFI). TFI is a volunteer fashion resource and development centre established in 1987,[740] initiated by the now disbanded FILC a volunteer branch of the City of Toronto's Economic Development Division.[741] The organization is "dedicated to supporting and nurturing fashion designers and entrepreneurs"[742] and offers essential business development and creative support to emerging

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[735] *Key Industry Sectors*, *supra* note 288, Notably the City of Toronto website currently identifies fashion and apparel as a key sector that has "reinvented *itself* to respond to the changes in the global market." [Emphasis added].
[736] Galvin, *supra* note 153 at 135.
[737] *Ibid* at 137-138.
[738] *Ibid*.
[739] *Ibid* at 227 + 231.
740 Toronto Fashion Incubator, *supra* note 143, the Fashion Incubator was officially granted "incubator" status in 1989. Start up funding was received from the Federal Innovations Program of Employment and Immigration Canada. The TFI now received funding from a number of sources including corporate sponsorship and membership fees, it is has "incubator" status, which allows it to receive grant funding from the City of Toronto Incubation Program.
[741] *Key Industry Sectors*, *supra* note 288.
[742] Toronto Fashion Incubator, *supra* note 143.

fashion designers through its various programs.[743] It plays a prominent role in the Toronto fashion industry and has served as a template for fashion associations and incubators in Paris, New York and London.[744]

Similarly, Ryerson University provides a Fashion Zone[745] option for their students who wish to work in an incubator modeled environment to help student based fashion start-ups. In 2015, Joe Fresh Centre for Fashion Innovation was created with a 1 million dollar gift to Ryerson University's Fashion Zone to "provide a structured platform for emerging companies to develop their businesses over an 18-month period of mentorship from business and academic experts, including Joe Fresh executives."[746]

In addition to municipal initiatives, there are several independent private sector initiatives in Toronto. One example was the production of the second largest fashion week in North America,[747] after New York. Toronto *Fashion Week*,[748] which was created by Robin Kay who also co-founded the *Fashion Design Council of Canada* alongside Pat McDonagh in 1999.[749] Funding for this endeavour was received through private sector sponsorship, and it was eventually sold to IMG after a over a decade, an international event management company that produces fashion week events across the globe including London, Milan, New York, and Tokyo.

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[743] *Ibid*.
[744] *Ibid*.
[745] Similar to the concept of an incubator, "Fashion Zone" permits students to work alone or with one another to launch an array of services or products in the fashion industry, see Ryerson University, *Fashion Zone*, online: <http://www.ryerson.ca/zonelearning/zones/fashion-zone/>.
[746] Joe Fresh, "Joe Fresh Partners With Ryerson University To Support Entrepreneurs With $1 Million Grant" (17 June 2015) Joe Fresh (blog), online: <http://blog.joefresh.com/2015/06/joe-fresh-partners-with-ryerson-university-to-support-young-entrepreneurs-with-1-million-grant/>.
[747] *Key Industry Sectors*, *supra* note 288.
[748] Nathalie Atkinson, "Thoughts on Toronto Fashion Week, or Whatever It's Called Now That IMG Owns It" *National Post* (9 August 2012), online: <http://life.nationalpost.com/2012/08/09/thoughts-on-toronto-fashion-week-or-whatever-its-called-now-that-img-owns-it/> (Toronto Fashion Week was acquired in 2012 by IMG, a company that produces the London, Paris, and New York Fashion weeks).
[749] "Pat McDonagh, Legendary Canadian Designer on Her Life and Legacy" *Globe and Mail* (2 June 2014) (video), online: <http://www.theglobeandmail.com/news/news-video/video-pat-mcdonagh-legendary-canadian-designer-on-her-life-and-legacy/article18949185/>.

It was eventually cancelled by IMG in July 2016 due to the lack of "local commercial funding."[750] It was reported that the first fashion week received sponsorship from a single participant, Holt Renfrew, for $25,000 and by 2011 there were "16 corporate sponsors, including electronics giant LG, L'Oréal, Kellogg's and MasterCard, paid between $60,000 and $1-million to participate."[751]

However, as Galvin explains, private sector alliances and initiatives have proved to be challenging within the industry, as demonstrated by an interview he conducted with a private sector actor who attempted to hold an event with his/her competitors in Toronto. The participant in his interview said,

> "This industry is so competitive and protects itself so jealously that sharing of ideas is very, very difficult." … "This individual organized a dinner with a competitor, and the one question that everyone kept asking was this: How can you even consider doing something like this with your competitor when they are the enemy?'[752]

Other than the earlier municipal strategy to help mitigate restructuring due to trade liberalization and some private sector initiatives, there has not been a huge policy drive to help support the fashion design industry in Toronto, even though the industry continues to be quite active.

In Toronto, there are several fashion design programs offered at academic institutions such as Seneca College, George Brown College and Ryerson University.[753] Key retailers originating from Toronto include Roots Canada,[754] Danier Leather,[755] and Canada Goose;

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[750] IMG, *Fashion*, online: <http://img.com/services/categories/fashion.aspx>.
[751] Francine Kopun, "Toronto Fashion Week Sold to IMG, Robin Kay Steps Down" *Toronto Star* (9 August 2012), online: <http://www.thestar.com/business/2012/08/09/toronto_fashion_week_sold_to_img_robin_kay_steps_down.html>; Lauren La Rose, "IMG Pulls Plug on Toronto Fashion Week Due to Funding" CBC News (7 July 2016), online: <http://www.cbc.ca/news/canada/toronto/img-pulls-plug-on-toronto-fashion-week-due-to-lack-of-funding-1.3668720>.
[752] Galvin, *supra* note 153 at 226.
[753] *Key Industry Sectors*, *supra* note 288.
[754] Notably, Roots Canada sold its majority stake to Searchlight Capital Partners in 2015, but will be continue to manufacture leather goods line in Canada, and will continue to keep its Canadian identity, see Roots, online:

examples of SME independent designers include Smythe, Mercy, David Dixon, Greta Constantine and Mikael Kale.[756]

3.3.3 Summary

As demonstrated above, support for the fashion industries in Montreal and in Toronto has been driven to varying degrees by provincial and municipal levels of government as well as by local associations.[757] The development and clustering of these industries in major urban areas such as in Toronto and Montreal, has in turn garnered attention from the local governments who acknowledge the cultural and economic significance of fashion design.[758] As Nathalie Atkinson observes,

> So how else does Canada actively promote its viable design exports – from contemporary clothing labels such as Smythe to classic furniture designs like Solair chairs – elsewhere? It doesn't, really. Not as a country, anyway. Non-governmental Montreal and Toronto Fashion Week organizations have in the past worked with local and provincial agencies to fly in and host foreign journalists and buyers, part of the funding provided by tourism and economic-development grants.[759]

Montreal and Toronto are unique metropolitan centres, with vibrant cultural industries. While the two hubs are the largest centres for fashion design in Canada, their approaches have been quite

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<http://rootsinformation.com/about/qa-for-more-information/> However, upon conducting a Google search, the title website heading read Roots USA & International.

[755] In March 2016 it was announced that Danier Leather was winding down its operations and liquidating its stores, see The Canadian Press, "Danier Leather Stores Liquidating as Retailers Starts Winding Down" *CBC News* (8 March 2016) online: <http://www.cbc.ca/news/business/danier-leather-liquidation-1.3479161>.

[756] *Sector Profile Report*, *supra* note 291 at 2; Canada Goose, <http://www.canada-goose.com>; Smythe, online: <http://smythelesvestes.com>; David Dixon, online: <http://www.daviddixon.ca>; Mercy, online: <http://www.mercystudio.com>; Greta Constantine, online: <http://www.gretaconstantine.com/about.html>; Mikhael Kale, online: <http://www.mikhaelkale.com/index2.php>.

[757] In 2013 Will Straw, Director of the McGill Institute for the Study of Canada wrote an article describing the changes in Canadian cultural policy over the last several decades, which has shifted from an innovative national cultural policy to one that is initiated by city centres. He states that this can be credited to "activists, creators, politicians and thinkers who have thought in richly stimulating ways about the place of culture in urban life. The Federal government, which has largely vacated the realm of significant policy-making in the cultural sector, can only watch all this activity from the sidelines" see Will Straw, "Canadian Cities Take Over Cultural Policy" *Huffington Post* (6 March 2013), online: <http://www.huffingtonpost.ca/will-straw-phd/canadian-cities-take-over_b_3375679.html>.

[758] *Apparel in Montréal 2009 supra* note 285 at 1; *Key Industry Sectors*, *supra* note 288.

[759] Nathalie Atkinson, "What Canada Can Learn From These Countries About Promoting Its Fashion And Design" *National Post* (17 October 2014), online: <http://www.theglobeandmail.com/life/fashion-and-beauty/fashion/what-canada-can-learn-from-these-countries-about-promoting-its-fashion-and-design/article21130506/>.

different towards growth within the sector.[760] There seems to be evidence of a large push from both the private and public sectors in Montreal, as evidenced by the concerted effort in creating the city's deliberately formed fashion cluster, *mmode*.

However there is a clear difference in development paths and funding initiatives provided by the two provinces and cities. For example, in comparing the amount of funding that the two cities invest in the fashion sector, Galvin underscores that there is a correlation between the funding and opportunity for the sustainability and success: while the City of Toronto's budget was roughly $35,000 in 2008, in Montreal it was a three year 2 million dollar budget (of the 82 million dollars mentioned above) dedicated to the development of the Montreal fashion cluster alone.[761]

Even on the level of marketing and advertising, both the municipal and provincial governments and institutional agencies' dedication to the local and global promotion of fashion design is more apparent. For example, Mode Montreal, created by the Montreal Fashion Bureau has established a web presence, including an entire website and blog dedicated to mapping fashion in Montreal, its mandate "to promote Montréal fashion, as well as to stimulate pride in local shopping."[762] The City of Toronto Key Economic Sector webpage has provides some key information about the Toronto fashion design segment, and also provides a webpage for individuals to access Toronto made fashion.[763]

Nonetheless, both cities produce and house a significant number of designers in Canada. A non-scientific indicator of the activities is illustrated by the annual Canadian Arts & Fashion

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[760] Vinodrai, "Evolving Design Economy", *supra* note 594. For example Vinodrai suggests that Toronto "highlights the importance of strong clusters and economic diversity to generate opportunities", while Montreal "highlight the importance of a broad range of supportive institutions and policies to anchor creative activity…" at 164.
[761] Galvin, s*upra* note 153 at 231.
[762] Mode Montreal, *supra* note 143.
[763] *Key Industry Sectors*, *supra* note 288; City of Toronto, *Shop Toronto Design*, online: <http://www1.toronto.ca/wps/portal/contentonly?vgnextoid=b5d8d97441ed2410VgnVCM10000071d60f89RCRD&vgnextchannel=cd3bd88c563e2410VgnVCM10000071d60f89RCRD>.

Awards held in Toronto, where a majority of the nominees and award winners were from these two cities (another private sector initiative).[764]

3.4 Conclusion

Design is a multi-faceted endeavour that cuts across a number of disciplines and industries, and because of its characteristics it has the capacity of being regulated and supported through a number of policies at different levels of government.

In Canada, design policy and legislation have only been peripherally included in national policy following the end of the NIDC. However as will be seen in Chapter 4, there is an extensive intellectual property legislative regime available to protect design and its various elements despite it.[765] What will also be seen in Chapters 5 and 6 is that independent fashion designers do not use these laws to protect designs.

The second half of this chapter provided contextual background of the current state of the fashion design industry, given the major shifts that have occurred over the past few decades due largely to trade policies that have dominated the apparel and textiles industries. It also provided information about the workforce, industry clusters, and the way in which the provincial and municipal governments have incorporated fashion design specific policies in these two cities. These policies have manifested in the form of financial support such as grants and tax exemptions, programs, and through other means, as well as general information about the support designers in Montreal and Toronto may receive. The chapter contributes to understanding the dynamics within the industry, and helps to provide insight into one aspect of the conditions in which independent designers interact.

[764] Canadian Arts and Fashion Awards, online: <http://www.cafawards.ca>.
[765] As mentioned above, the omission of a design policy may be construed as a policy in of itself.

4 CHAPTER FOUR - The Legal Framework for Fashion Design in Canada

The current legal landscape for fashion design protection in Canada is intricate and fragmented. Much of this has to do with its history and the fact that design subject matter continues to be an issue for which there is little enthusiasm at the federal level, the level that intellectual property policy and laws are created. Similar to design law, trademark law was not specifically allocated to either the federal or provincial government under the *Constitution Act*. Based on the definition provided in Chapter 1, design is a process that can produce a number of different outputs and can be classified in a number of ways. Within this framework, fashion design produces a physical artefact and has been grouped together with other mass produced subject matter under industrial design law, however it is the design and not the physical artefact to which intellectual property protection applies. As mentioned above, there are contentious issues that arise from fashion design subject matter when it is translated into law. Specifically this includes fashion design *requirements*, for example, the art, form and utility, and the *classification* of fashion design as physical artefacts.

Fashion designers are able to seek protection for various elements of their designs, from discrete to overlapping areas of intellectual property laws.[766] The remainder of this chapter does not include a discussion about social norms that are followed within the fashion industry, which is covered in Chapter 5, but rather focuses on various possible ways that different elements of fashion design can be protected by federal legislation, and in some circumstances, by civil or

[766] Such as copyright, industrial design, trademark, and patent law to confidential information and trade secrets, Each of these legal regimes has distinct features that may make them more or less accessible and attractive to fashion designers. Patent law is not used for the purpose of fashion design protection *per se*, yet certain elements used in the production of fashion design, such as textile, and other materials or processes for the creation of certain materials could be protected. It will nonetheless be surveyed in this chapter; confidential information is not an intellectual property law per se but it is often used to protect elements of intellectual property and trade secrets that would otherwise not be protected under the statutory or common law intellectual property protection.

common law. In this chapter I will discuss the law, case law and practical examples of the way that law can be applied to protect fashion design. The purpose of this chapter is to set the stage for the ensuing discussion and analysis of the findings in Chapter 5. This approach will illustrate the ways in which each legal regime is available to protect fashion design and will provide a framework to compare and contrast with the responses and analysis described in the findings, which reveals the way in which independent fashion designers operate within and outside of the conceptual framework of intellectual property law.

Each section will begin with a discussion of the various elements of fashion design that can be protected by each intellectual property legal regime, followed by an overview of the scope of protection, the rights granted to the rightsholders, infringement, and conclude with an analysis of the contours of protection for each legal framework. It is organized in the order of copyright, industrial design, trademark, trade secret and patent law.

4.1 Copyright Act

4.1.1 In the Context of Fashion

Copyright law can be used to protect a number of different elements in fashion design: images or graphics applied to a work,[767] an actual design,[768] trademarks,[769] trademark labels[770] and textiles.[771] However as will be discussed below, in the section on the scope of protection, under subject matter, protection in some circumstances can shift based on the quantity of articles reproduced for some of these categories.

4.1.1.1 Prints, Photographs, Graphics

[767] *Copyright Act*, *supra* note 6, s 2 [artistic works].
[768] *Ibid*, s 64(1) [design].
[769] *Ibid*, s 64(3)(b).
[770] *Ibid*, s 64(3)(b).
[771] *Ibid*, s 64(3)(c).

Copyright can apply to prints, photography or graphic representations, which are normally considered to be artistic works, independent of the article to which they are applied. Designers and artists both use prints (e.g., paintings, drawings, block printing) or motifs that can be screened, printed or hand painted on to fabrics to achieve a certain look. For example, in the world of luxury fashion, companies like Etro,[772] Valentino,[773] and Gucci[774] have collaborated with various artists to create motifs.[775] Creating custom prints is commonly done in the luxury fashion segment, but it is clearly a more difficult undertaking for independent designers, since production costs related to creating custom prints can be quite expensive. However, some independent designers do create custom prints for their collections on their own or collaborate with artists, which is not unheard of given the limitation of suppliers and selection of fabrics available to independent designers.

Photography or other graphic representations are also eligible for copyright protection either as a part of the design or independent of the substrate to which they are applied. Examples of this can include the image of human icons such as Marilyn Monroe, Michael Jackson or Bob Marley or fictitious characters such as Mickey Mouse, or places printed or silk-screened onto fabric.[776]

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[772] Italian design house Etro collaborates with various artists such as Mika Ninagawa and Thukral and Tagra, creating new motifs and imagery which are then used on various articles such as scarves see, Etro, *Creative Souls*, online: <http://www.etro.com/en_it/creativesouls/get/list/>.

[773] Robert Everett-Green, "Métis Artist Christi Belcourt Inspires Valentino Fashion Line" *The Globe and Mail* (4 August 2014), online: <http://www.theglobeandmail.com/arts/art-and-architecture/metis-artist-christi-belcourt-inspires-valentino-fashion-line/article25824113/>.

[774] Another example is the Flora motif reinterpreted by Toronto based artist Kris Knight, his motif was used for the 2015 Cruise season, see Gucci, *Flora by Kris Knight: Cruise 2015*, online: < http://www.gucci.com/cn-en/worldofgucci/articles%2Fflora-by-kris-knight>.

[775] Not all labels properly collaborate with artists, for example, US based world-renown graffiti artist Rimes recently brought forth a trademark and copyright action against designer Jeremy Scott and label Moschino, for using his art and tag without authorization as a print on a dress they created. The defendants motions to dismiss and motion to strike were denied, see *Joseph Tierney v Moschino SPA et al*, 2:15-cv-05900-SVW-PJW US District Court, Central District of California (13 January 2016).

[776] *Copyright Act*, *supra* note 6, s 64(3).

4.1.1.2 Design (Shape and Ornamentation)

Copyright protection can apply to the design itself, although this subject matter is also suitable for industrial design law. The elements of design could include the shaping of a garment or accessory, which can be achieved by draping, cutting and patterns and ornamentation, which are incorporated into the design. It can also protect the configuration of elements in aggregate that compose the design.[777]

4.1.1.3 Other Elements of Design

Finally, copyright protects subject matter in section 64(3) notwithstanding the quantity produced.[778] Such subject matter relevant to fashion design includes "trademark or representation therefore or a label" and in the case of "material that has a woven or knitted pattern or that is suitable for piece goods or …for making wearing apparel."[779] The first applies both to the artistic expression in the trademark or its label or can be a design that is protected by trademark law. The latter applies to textiles, which is different than the subject matter in the first category. Where the first category includes the application of an image or graphic representation of the image to a finished work, textiles can differ in that the pattern is woven or knitted into the fabric itself, creating the visual aesthetic or motif. Textiles have traditionally been given a heightened level of protection under copyright law, arguably because of the strength and influence of the industry in Britain in the early 1800s.[780] Notably, industrial design law may also protect textiles.

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[777] *Ibid*; *Industrial Design Act*, *supra* note 7, s 2 [design].
[778] *Copyright Act*, *supra* note 6, s 64(3).
[779] *Ibid*.
[780] Kriegel, *supra* note 555, at 240-241, as Krigel observes, industrial arts industry was supported by a number of initiatives. One such initiative was the creation of the House of Commons Select Committee on Arts and Manufacture, and between 1835-1836, evidence was collected as to the state of design at that time and resulted in "spurr[ing] Parliament to revisit the matter of design copyright" at 241.

4.1.2 Scope of Protection

In order to qualify for copyright protection in Canada, an article of fashion design must meet several eligibility requirements. These are i) originality and authorship, ii) fixation, iii) expression and, iv) subject matter.[781] In addition to those requirements, the issue of v) registration, and vi) the distinction between authorship and ownership will be discussed because they are important considerations for designers.

4.1.2.1 Originality and Authorship

Copyright protects original expression. In *CCH v Law Society of Upper Canada*,[782] the Supreme Court of Canada distinguished the threshold requirement of originality in Canada from that of the United Kingdom, which is the sweat of the brow,[783] and of the United States, which is a spark of creativity,[784] The Court held that the appropriate measure of originality is achieved when the author demonstrates that judgment and skill has been used and that it was neither trivial, nor mechanical.[785] This necessitates that the article of fashion design emanated from the designer and that it was not copied from another, since, if the work had been copied then the standard of originality would not be met.[786]

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[781] Gervais & Judge, *supra* note 7 at 44.
[782] *CCH Canadian*, *supra* note 183 at para 24.
[783] The sweat of the brow doctrine, see *University of London Press Ltd v University Tutorial Press Ltd*, [1916] 2 Ch 601 "The word 'original' does not in this connection mean that the work must be the expression of original or inventive thought. Copyright Acts are not concerned with the originality of ideas, but with the expression of thought, and, in the case of 'literary work,' with the expression of thought in print or writing. The level originality required relates to the expression of the thought. But the Act does not require that the expression must be in an original or novel form, but that the work must not be copied from another work - that it should originate from the author" at para 608-609.
[784] See *Feist Publications Inc v Rural Telephone Service Co*, 499 US 340, (1991), in this case, the Supreme Court held that "[t]he vast majority of works make the grade quite easily, as they possess some creative spark 'no matter how crude, humble or obvious' it might be. Originality does not signify novelty; a work may be original even through it closely resembles other works so long as the similarity is fortuitous, not the result of copying" at para 10.
[785] *CCH Canadian*, *supra* note 183 at paras 24-25.
[786] *Ibid* at para 28.

4.1.2.2 Fixation

Next, the work must be fixed in a tangible medium or permanent form.[787] The requirement for fixation is not explicit for all subject matter in the *Copyright Act*, except for in some circumstances such as in the case of dramatic works or in the case of sound recordings.[788] Elements of fashion design and artistic works within the context of the industry would fulfill this requirement easily, because they are tangible works otherwise classified as physical artefacts.

4.1.2.3 Expression

Copyright law does not extend to protect ideas, methods, or procedures but rather the original expression of those ideas, methods or procedures.[789] The idea/expression dichotomy is an interesting consideration in the protection of fashion design due to the proliferation of trends. Trends are ideas that disseminate between and within different segments of the fashion industry and can sometimes result in the production of extremely similar works.

For example, designers may have the idea of applying a generic graphic representation of a cheetah print or tiger stripe to a pant due to an animal print trend. The print itself might qualify for copyright protection depending on whether it was an original expression, but simply having a zebra printed pant in collection does not preclude another designer from also designing a zebra print pant, regardless of whether the pants were the same classic style (e.g., boot cut or straight leg) or not. Copyright does not extend to the underlying idea (e.g., animal print, boot cut pant) but rather to the expression of that idea (e.g., the particular print).[790]

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[787] *Canadian Admiral Corp v Rediffusion Inc* (1954), 20 CPR 75, holding that "it must be expressed to some extent at least in some material form, capable of identification and having a more or less permanent endurance" [*Rediffusion*].

[788] *Copyright Act*, *supra* note 6, s 2 [dramatic work], [sound recording].

[789] WTO, *Agreement on Trade-Related Aspects of Intellectual Property Rights of 1994, Including Trade in Counterfeit Goods*, (1994) 25 IIC 209, Part II, Art 9(2) "Copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such" [*TRIPS*].

[790] Particularly in the case of an animal print, unless artistically or abstractly illustrated, there would be no copyright protection.

Another example demonstrating the difference between idea and expression occurs where a number of designers create an article of fashion design based on a trend: a full-length oversized knit camel coloured coat. Notwithstanding the fact that tracking down the original silhouette might prove to be impossible and that most likely, it would already be in the public domain, unless there are original or unique aspects applied to or incorporated in it, such as the cut, finish and detailing, the mere combination of the length (classic), colour and the fact that it is an oversized style is an idea and would not necessarily preclude another designer from creating a very similar garment.

The merger doctrine might still apply where a copyright protected work is not merely an idea but an original expression, as there may be a limited number of ways to express certain ideas or themes such as animal prints or design categories (i.e., camel trench coat). The merger doctrine articulates one of copyright's underlying policies, which is to prevent the extension of protection, and thus a monopoly to ideas. This was discussed in *Delrina Corp v Triolet Systems* where the court held that "[i]f an idea can be expressed in only one or in a very limited number of ways, then copyright of that expression will be refused for it would give the originator of the idea a virtual monopoly on that idea. In such a case, it is said the expression merges with the idea and is thus not copyrightable."[791]

4.1.2.4 Subject Matter

In order for copyright law to apply to an article of fashion design, it must fit into the subject matter categories of "every original literary, dramatic, musical and artistic work" as defined in section 2 of the *Act*.[792] Generally, the different elements of design described above (i.e., prints, design and textiles) would be protected under the category of artistic works. Artistic works

[791] *Delrina Corp v Triolet Systems* (2002), 17 CPR (4th) 289 at para 48.
[792] *Copyright Act*, *supra* note 6, s 2 [definitions]; Note that the *Copyright Act* also includes related rights (performers, sound recording makers and broadcasters) but they are not relevant for the purpose of my research.

include "paintings, drawings, maps, charts, plans, photographs, engravings, sculptures, works of artistic craftsmanship, architectural works, and compilations of artistic works"[793] but can also include designs under section 64 of the *Act*, which is concerned with the protection of useful articles.[794]

As a recap of what was discussed above, design is defined as "features of shape, configuration, pattern or ornament and any combination of those features that, in a finished article, appeal to and are judged solely by the eye."[795] Enacted in 1988,[796] section 64 of the *Copyright Act* states that where copyright exists in "design applied to a useful article or in an artistic work from which the design is derived" and once more than fifty authorized copies of the article are made, it would no longer be an infringement of copyright.[797] Specfically, it would not be an infringment to i) make the article itself in its entirety or ii) make a drawing or other reproduction in any material form.[798] The only option left for a design applied to a useful article would be to apply for industrial design registration independently. Parliament's intention in creating the limited copyright-industrial design overlap was to separate articles of commercial mass-production from works that were traditionally artistic.[799] Prior to 1988, if a work was

[793] *Ibid,* s 2 [artistic works].
[794] *Ibid,* s 64; Articles of fashion design are considered to be useful article and would therefore qualify under the section 64 provision for useful articles, but can be registered as artistic works, see also Gervais & Judge, *supra* note 7 at 1152; This is distinguished from works of artistic craftsmanship, although there has been a history of unsuccessful attempts at protecting clothing under copyright in the United Kingdom, and resultantly it not has been categorized as such in Canada, see generally *Burke & Margot Burke Ltd v Spicers Dress Designs*, [1936] Ch 400 at 408-409, however in this case, the Court held asked whether a "frock" in which the object (intention) is to "gratify the aesthetic emotions by perfection of execution whether in creation or representation? A possible view is that what she does is merely to bring into being a garment as a mere article of commerce. If that is the right view there may be a difficulty in holding that even a lady who designs and executes a beautiful frock is necessarily the author of an original work of artistic craftsmanship"; see also *Merlet and another v Mothercare*, [1986] RPC 115.
[795] *Copyright Act*, *supra* note 6, s 64 [design].
[796] *Copyright Amendment Act*, SC 1988, c 15.
[797] *Copyright Act*, *supra* note 6, s 64; Muhlstein & Wilkinson, *supra* note 125 at 23-24.
[798] *Copyright Act*, *supra* note 6, at ss 64(2)(c)(i)&(ii).
[799] See *House of Commons Debates*, 33rd Parl, 2nd Sess, Vol 6 (26 June 1987) at 7689 and 7692 (Sheila Finestone and Lynn McDonald, respectively) [*House of Commons Debates*, Finestone and McDonald] was cited in *Pyrrha Design Inc v 623735 Saskatchewan Ltd*, 2004 FC 423 at para 18, 249 FTR 89, "The effect of the Bill is that those relatively few designs which are created purely for artistic purposes, and not for manufacturing, will be afforded

eligible for copyright protection but also qualified for industrial design protection, that work would automatically be disqualified from copyright protection,[800] under section 46 of the *Copyright Act*.[801]

Subsection 64(3) provides an exception for certain useful articles to continue to receive protection against copyright infringement,[802] such as (*a*) a graphic or photographic representation that is applied to the face of an article;[803] (*b*) a trade-mark or a representation thereof or a label;[804] (*c*) material that has a woven or knitted pattern or that is suitable for piece goods or surface coverings or for making wearing apparel;[805] (*d*) an architectural work that is a building or a model of a building;[806] (*e*) a representation of a real or fictitious being, event or place that is applied to an article as a feature of shape, configuration, pattern or ornament;[807] (*f*) articles that

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copyright protection, while the vast majority of designs which are created for industrial purpose, that is, products to be manufactured in quantities of more than 50, will have none. The latter will be protected, if at all, under the little-known *Industrial Design Act*, which is only about two pages long, but only if registered within the specific time limit of one year allowed under that Act. Therefore, the ultimate effect of the Bill will be to take most designs outside of copyright and place them under the Industrial Design Act"; Tawfik, *supra* note 125, 267 at 270.

800 *DRG Inc v Datafile Ltd* (1987), 18 CPR (3d) 538 at para 7, 2 FC 243.

801 *Copyright Act*, *supra* note 6, s 46 (prior to the 1988 amendment); Tawfik, *supra* note 125, as Tawfik observes, the amendments to the *Copyright Act* in 1988 were not "intended to modify the pre-existing position that designs capable of being registered under the *Industrial Design Act* were not to benefit from copyright. Rather, the amendments were intended to broaden the scope of the exclusion by making it clear that copyright infringement could not be claimed in respect of all mass-produced designs whether or not they were strictly capable of industrial design registration" 267 at 272.

802 *Copyright Act*, *supra* note 6, s 64(3).

803 *Ibid*, s 64(3)(a).This could include any artistic work that has been either applied via silk screening or other methods of apply it to the surface of the material.

804 *Ibid*, s 64(3)(b). Any trademark (both word or artistic design) would be protected under this section, including those applied to a label, which are then affixed on to a garment or accessory.

805 *Ibid*, s 64(3)(c). This category would include the protection of textiles weaving and textile patterns (artistic).

806 *Ibid*, s 64(3)(d). Architecture would not be applicable to fashion design although some designers may be influenced by architecture and architectural processes and some architects end up designing, see for example Kate Noir, "Architecture and Geometry in Fashion" (23 February 2012), Moden Ode Blog, online: <http://modenodeblog.com/2012/02/23/architecture-and-geometry-in-fashion/>.

807 *Copyright Act*, *supra* note 6, s 64(3)(e). This could include categories of character merchandising such as Disney's plethora of animated characters such as a Mickey Mouse shaped phone, see Disney Store, online: <http://www.disneystore.com/>; personality rights or the rights of movie studios to apply the characters to a number of different items, see Hunger Games, online: <http://hungergames.hollywoodvideo.com/>.

are sold as a set, unless more than fifty sets are made;[808] or (*g*) such other work or article as may be prescribed by regulation.[809]

A successful application of subsection 64(3) and example of the advantage of copyright law for unregistered works of design was demonstrated in *Import-Export René Derhy (Canada) inc c Magasins Greenberg ltée*[810] where Derhy, a French company brought an action against a Canadian retailer for copying a jacket they had originally designed, which had an artistic embroidered design applied to it. Due to the fact that the French company had not registered their design under the *Industrial Design Act*[811] and because over fifty copies had already been produced, they did not have recourse under either industrial design or copyright law for infringement of the jacket design itself.[812] Instead, the French company opted to pursue protection of the embroidered designs applied to the jacket based on the exceptions in subparagraphs 64(3)(a) and (e), which include the graphic or photographic representation and also a representation of a real or fictitious being, or place that is applied to the face of an article – and succeeded.[813] This is an example where rights that do not require registration – such as copyright – can prove to be beneficial to designers because they would not have to invest considerable resources from the outset.

4.1.2.5 Registration

Registration is an option, but is not required for copyright protection in Canada.[814] This means that once a designer creates an eligible work, then copyright automatically subsists.[815] Of all the

[808] *Copyright Act, supra* note 6, s 64(3)(f). Articles that are sold as sets could include gloves, legwarmers, socks etc. however this provision is limited based on the threshold of fifty sets.
[809] *Ibid*, s 64(3)(g).
[810] *Import-Export René Derhy (Canada) inc c Magasins Greenberg ltée* (2004), 37 CPR (4th) 305.
[811] *Industrial Design Act*, *supra* note 7.
[812] *Magasins Greenberg*, *supra* note 810 at paras 13 & 17.
[813] *Ibid* at para 47.
[814] *Berne Convention for the Protection of Literary and Artistic Works*, 1989, 1161 UNTS 3, S Treaty Doc No 99-327, art 5 [*Berne Convention*]; *Copyright Act*, *supra* note 6, s 53 (1); however note that registration does not

intellectual property regimes, copyright registration is the least expensive, costing between $55-$65 per work.[816] This amount is still onerous for designers who create multiple designs per collection, however might be beneficial for those designers who may use the work throughout the different seasons, as is often the practice of luxury designers.

4.1.2.6 Authorship v Ownership

Authorship and ownership are distinct concepts, which is an important consideration for fashion designers. In many instances, and particularly for independent fashion designers, it is common to create their works independently under their own labels, in which case they are both the author and owner of the copyright in their work.[817]

Where a designer is employed by another entity such as a retailer or manufacturer, unless the contract of employment or engagement stipulates otherwise, the copyright in the works belongs to the employer although the designer remains the author.[818] However, the default outcome when a retailer contracts with the designer as an independent contractor is different. Thus, where a designer is hired as a part of a capsule collection (a collection where a larger retailer, say H&M[819] or Danier Leather,[820] hires independent designers to create a limited

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guarantee that copyright is valid, see Canadian Intellectual Property Design Office, *A Guide to Copyright: Benefits of Regisration*, CIPO, online: <https://www.ic.gc.ca/eic/site/cipointernet-internetopic.nsf/eng/h_wr02281.html> CIPO's copyright guide states that "[t]he *Copyright Act* states that a certificate of registration of copyright is evidence that copyright exists and that the person registered is the owner of the copyright. However, the Copyright Office is not responsible for policing or checking on registered works and how people use them. It also cannot guarantee that the legitimacy of ownership or the originality of a work will never be questioned." Note that the registration requirement is unlike the United States, where registration is required prior to claiming certain remedies for infringment, see US *Copyright Act*, 17 US Code § 412.

[815] However, registration is encouraged for evidentiary purposes, see *Copyright Act*, *supra* note 6, s 53(2).

[816] CIPO, FAQ's "Tariff of Fees – Copyright" *Canadian Intellectual Property Office*, (29 July 2011), online: CIPO <http://www.cipo.ic.gc.ca/eic/site/cipointernet-internetopic.nsf/eng/wr00091.html> (although registration is not mandatory, to obtain protection, a $50-$65 registration fee (depending on how the application is filed, whether online or other) applies if one chooses to register copyright).

[817] *Copyright Act*, *supra* note 6, s 13(1).

[818] *Ibid*, s 13(3).

[819] H&M Collaborations, *supra* note 148.

[820] See e.g., Danier Newsroom, "Danier Debuts Fall/Winter 2011" (18 May 2011) (press release), online: <http://danier.mwnewsroom.com/Investor-Relations/MediaPressReleases/in/DANIER%E2%80%99S-DEBUTS-FALL-WINTER-2011>.

collection), based on the *Copyright Act*, this would normally be viewed as an independent contract and therefore the designer him or herself would normally own the copyright to the works.[821] Similarly in the case where visual artists collaborate with designers to create prints as contractors, ownership would remain with the visual artist.

Nevertheless, these default ownership rules may be negotiated and changed by private contracts between the parties, although often times there is little room for negotiation because the retailer or more powerful party is hiring or outsourcing the work and usually sets the terms. For example, if a designer is hired as an independent contractor to create a capsule collection for a retailer, the retailer may require that the designer sign over the 'intellectual property' rights associated with the works and prohibit them from ever remaking the works in the future.

Another significant point regarding the distinction between owner and author, which will be discussed in detail below, is that it is the owner, and not the author that controls the economic rights associated with the work, enumerated in section 3 of the *Act*. Moral rights remain with the author and cannot be assigned to anyone else.[822]

4.1.3 Rights and Infringement

4.1.3.1 Rights

Copyright can provide reciprocal international protection, meaning that as long as a work meets the requirements in section 5 of the *Act*, it will receive protection in foreign countries that are members of the World Trade Organization or Berne Convention.[823] Similarly, a foreign work

[821] *Copyright Act*, *supra* note 6, s 13(1); see e.g., *Pizza Pizza Ltd v Gillespie* (1990), 33 CPR (3d) 515 (Ont Gen Div).
[822] *Copyright Act*, *supra* note 6, s 14.1.
[823] *Ibid*, s 5(1).

will receive protection in Canada as a Canadian work would as long as this requirement is fulfilled.[824]

In Canada, protection will generally last for fifty years following the death of the author,[825] and in the case of joint authorship, the fifty-year period starts running when the last author dies.[826] Canada is on the shorter end of the spectrum in comparison to the term in the United States, the United Kingdom and the rest of the European Union members.[827]

Once a work of fashion design qualifies for protection and is made in a quantity of less than fifty copies, the copyright owner is entitled to exercise the economic rights enumerated in section 3 of the *Act*.[828] In addition to the economic rights, the authors (not the owners) would receive moral rights protection under sections 14.1 and 28.2 of the *Act*. [829]

For the purpose of fashion design, the relevant economic rights include the right to reproduce the work,[830] perform it in public,[831] adapt,[832] display,[833] communicate to the public by telecommunications,[834] to authorize any of these rights,[835] and more recently, to be able to control the first distribution of the work in Canada.[836] These rights grant the copyright owner the exclusive right to prevent the reproduction of the work either in whole or in part by another designer or retailer; or to adapt the work, which could include instances where an animation or

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[824] *Ibid*.
[825] *Ibid,* s 6.
[826] *Ibid,* s 9.
[827] Protection for copyright in those jurisdictions generally lasts for seventy years following the death of the author, see e.g., *Copyright Act*, 17 USC c16, § 302 (1976) (seventy years following the death of the author - this generally applies to works created after 1978); *Copyright, Designs and Patents Act* (UK) 1988 c 48, ss 12 (1) + (2) (seventy years following the death of the author - for artistic, literary, musical and dramatic works).
[828] *Copyright Act*, *supra* note 6, s 3.
[829] *Ibid*, ss 14.1(1) & 28.2.
[830] *Ibid,* s 3(1).
[831] *Ibid,* s 3(1).
[832] *Ibid,* ss 3(1) (c) & (e).
[833] *Ibid,* s 3(1)(g).
[834] *Ibid,* s 3(1)(f).
[835] *Ibid,* s 3(1).
[836] *Ibid,* s 3(1) (j).

cinematographic work is created from the work itself or a representation of the work. They also grant the owner the right to display the work, which can include situations like a fashion show, or a museum display such as the Jean Paul Gaultier exhibition at the Montreal Museum of Fine Arts,[837] or the Metropolitan Museum of Art's Alexander McQueen exhibition *Savage Beauty*,[838] where designs and imagery from various collections were brought together in a retrospective.[839] The owner also has the right to communicate the work to the public via telecommunication, which can include an instance where a fashion show is being live streamed or videotaped and uploaded to a blog. To have the right of first distribution in Canada would give the designers control over the tangible aspect of the work, preventing its importation into Canada unless it was authorized by the owner first. Finally, authorizing any of the acts mentioned in section 3 would also be an infringement.[840]

These rights are subject to a number of exceptions and user rights such as fair dealing which effectively permit certain uses without requiring the user to seek authorization.[841] In Canada, fair dealing is considered to be a 'user right,'[842] which permits individuals to use

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[837] Montreal Museum of Fine Arts, *Jean Paul Gaultier*, (2011), online: <http://www.mbam.qc.ca/en/exhibitions/on-tour/jean-paul-gaultier/>.

[838] Metropolitan Museum of Fine Arts, *Alexander McQueen: Savage Beauty*, (2011), online: <http://blog.metmuseum.org/alexandermcqueen/>.

[839] Both exhibitions drew unprecedented crowd to these art institutions. In the last two nights of the exhibit the gallery announced that it would be staying open until to accommodate the influx of visitors to the exhibit, see Eric Wilson, "At the Met, McQueen's Final Showstopper" *The New York Times* (29 July 2011), online: <http://www.nytimes.com/2011/07/31/fashion/mets-mcqueen-retrospective-is-expected-to-break-records.html>.

[840] *Copyright Act*, *supra* note 6, s 3; *CCH Canadian*, *supra* note 183 at para 38, in *CCH Canadian*, the Supreme Court affirmed that the definition of authorization requires the defendant to "sanction, approve and countenance" any of the infringing acts, as previously defined by the Supreme Court in *Muzak Corp v Composers, Authors and Publishers Association of Canada, Ltd*, [1953] 2 SCR 182 at 193.

[841] *Copyright Act*, *supra* note 6, s 29.

[842] This view is not taken lightly by the courts or by scholars; see *CCH Canadian supra* note 183 at para 63, holding that the purpose of fair dealing is to " ensure that users are not unduly restricted in their ability to use and disseminate copyrighted works"; *SOCAN v Bell Canada*, 2012 SCC 36, the Supreme Court affirmed the Board's consideration of the purpose in light of the user's perspective, citing *CCH Canadian* for the proposition that "users' rights are an essential part of furthering the public interest objectives of the *Copyright Act*" at para 11, see also *Alberta (Education) v Access Copyright*, 2012 SCC 37 at para 22; but see Giuseppina D'Agostino, "Healing Fair Dealing? A Comparative Copyright Analysis of Canada's Fair Dealing to UK Fair Dealing and US Fair Use" (2008) 52 McGill L J 309, D'Agostino cautioned that the Supreme Court's interpretation in *CCH Canadian* tipped the

copyright protected works without the authorization of the owners. Such uses include those for research, parody, satire, education and criticism.[843] In the context of fashion design, use for education could include using a particular design as a model to reconstruct for the purpose of teaching at a fashion school. Other examples of fair dealing could include where garments are used to create a parody or a satire.[844] However, these user rights are not absolute and do require evaluation using six-factor text enunciated in *CCH Canadian v LSUC* which requires the courts to take into consideration the purpose,[845] nature,[846] character,[847] amount,[848] effect of the use[849] and any alternatives to the use,[850] once it has been established that the use falls within one of the purposes identified in sections 29-29.2 of the *Act*.[851] Sections 29.1 and 29.2, covering fair dealing for criticism, review[852] and news reporting,[853] contain a mandatory requirement for attribution of the source of the work, which is unlike other exceptions or user rights such as the

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interpretation of fair dealing toward a "user-centric expression of balance and the objectives of copyright law" because while "the Court recognized that rewarding the creator was an important part of Canada's 'dualistic' copyright objectives, it implied that such reward does not promote the public interest in the same way as protecting user rights" at 327.

[843] *Copyright Act*, *supra* note 6, s 29.

[844] A video parody was created featuring a stop animation video of Lady Gaga and Madonna in a brawl, parodying her 'meat' dress which was worn at the 2010 Video Music Awards designed by Franc Fernandez, a Los-Angeles based designer, see D11Btv, "Secret of Lady Gaga's Meat Dress – A Bloody Parody – Star Arena Exclusive ep01" *YouTube* (10 December 2010), online: < https://www.youtube.com/watch?v=JHH2VCN1ObE>; In a Q&A with the designer who created the dress, he discusses the draping techniques and the specific type of meat that used to create the dress, see Sharon Clott, "Everything You Wanted To Know About Lady Gaga's VMA Meat Dress!" MTV News (13 September 2010), online: < http://www.mtv.com/news/2513136/2010-vmas-lady-gaga-meat-dress-real/>; Subsequently the meat dress was placed in the Rock and Roll Hall of Fame, as a part of the "Women who Rock" travelling exhibition, see Lindy Segal, "Lady Gaga's Famous VMAs Meat Dress is Now Beef Jerky" People Magazine (31 August 2015), online: <http://stylenews.peoplestylewatch.com/2015/08/31/lady-gaga-vmas-meat-dress-photos/>.

[845] *CCH Canadian*, *supra* note 183 at para 54.

[846] *Ibid* at para 58.

[847] *Ibid* at para 55.

[848] *Ibid* at para 56.

[849] *Ibid* at para 59.

[850] *Ibid* at para 57.

[851] *Copyright Act*, *supra* note 6, ss 29-29.2.

[852] *Ibid*, s 29.1.

[853] *Ibid*, s 29.2.

non-commercial user generated content exception that only requires attribution where it is "reasonable in the circumstances to do so."[854]

There are also exceptions that allow works to be used for private purposes[855] and for incidental uses. [856] The latter could cover the circumstance where an individual reproduced a garment that they purchased for personal use, and the circumstance where an individual accidentally taped designs from a runway show and thereby the designs in the background when filming a documentary or interviewing an individual at the venue where the show was taking place.

In addition to the economic rights granted to the owner of the copyright, moral rights are granted to the author of the work. Moral rights are non-economic rights that provide protection to the author against prejudice to the integrity of their work, and where reasonable, the right to be associated with it and conversely the right to not be associated with it.[857]

The right to integrity of the work applies in the case where a work has been distorted, mutilated or modified[858] or used in association with a product, service or cause.[859] In the case of paintings, sculptures and engravings, prejudice is automatically deemed[860] whereas for all other works, prejudice has to be proved based on an objective and subjective test, which takes into consideration the perception of the public and artistic community and of the artist themself.[861] A case for moral rights may arise where a one-of-a-kind couture dress is modified or mutilated for

[854] *Ibid*, s 29.21(1).
[855] *Ibid*, s 29.22.
[856] *Ibid*, s 30.7.
[857] *Ibid*, s 14.1(1).
[858] *Ibid*, s 28.2 (a).
[859] *Ibid*, s 28.2 (b).
[860] *Ibid*, s 28.2 (2).
[861] *Snow v The Eaton Centre Ltd et al* (1982), 70 CPR (2d) 105 (Ont HCJ), Artist Michael Snow, in an attempt to stop the Eaton Centre from tying bows around the neck of his installation "flight stop", provided evidence from "a number of other well respected artists and people knowledgeable in his field" that a agreed with him [*Snow*]; *Prise de Parole Inc v Guérin éditeur Ltée*, [1996] FCJ No 1427 [*Prise de Parole*].

an exhibition at a museum or to promote a cause that the designer does not believe it i.e., using a vegan dress to promote an exhibition supported by the beef industry. A case could also arise if a hand-painted print is completely altered or where a designer's work is being exhibited without proper attribution.

4.1.3.2 Infringement

A claimant may bring forth a claim for copyright infringement within three years from the time the infringement occurred, where the plaintiff knew or should have been reasonably expected to know of the act or omission.[862] Alternatively, in the scenario where the claimant did not know or could not have been reasonably be expected to know, the three years run from the time that the plaintiff first knew or could have been expected to know about the infringing act.[863] In the Toronto and Montreal fashion industries, individuals would likely be notified quite quickly due to the fact that the industry is small and information travels within the clusters, as will be seen in Chapter 6.

Copyright is infringed if an individual does anything that the copyright owner has the right to do without their authorization.[864] For works of fashion design this could include those provisions that deal directly with artistic works.[865] The material requirements for infringement include

> [t]he existence of a copyrighted work, the ownership of copyright in the work, the defendant's infringing act by the exercise of one of the copyright owner's exclusive rights (e.g., the existence of an infringing reproduction of the work), and the absence of the copyright owner's consent to the exercise of that exclusive right.[866]

The main right, which is the right of reproduction, requires that there is a copyright work, that

[862] *Copyright Act*, *supra* note 6, s 43.1 (1)(a).
[863] *Ibid,* s 43.1 (1)(b).
[864] *Ibid,* ss 27(1) & 28.1-28.2, dealing with economic and moral rights infringement respectively.
[865] *Ibid,* ss 3(1), (c), (e), (f), (g), (j) and authorization of such acts.
[866] Gervais & Judge, *supra* note 7 at 151.

there was access to the work by the defendant and that there exists an objective similarity between the original work and the infringed copy.[867] Without access, infringement cannot occur.[868] The threshold for objective similarity includes either direct reproduction of the entire work[869] or reproduction of a substantial part of the work.[870] In order for a reproduction to be substantial, taking a "particle" is not enough to infringe, but rather taking an essential part is.[871] Thus, a qualitative rather than a quantitative assessment seems to be the determinative threshold.[872] For example, in *Cinar Corporation v Robinson*, the Supreme Court held that "substantial copying focuses on whether the copied features constitute a substantial part *of the plaintiff's work* — not whether they amount to a substantial part *of the defendant's work*"[873] and that substantial taking should focus on the originality of the work.[874] Quoting the Court of Appeal, the Supreme Court of Canada held that "the differences may have no impact if the borrowing remains substantial. Conversely, the result may also be a novel and original work simply inspired by the first. Everything is therefore a matter of nuance, degree, and context."[875]

In addition to subsection 27(1), subsection 27(2) pertains to secondary infringement, which protects against the distribution of infringing copies within Canada.[876] In order for secondary infringement to occur in the case of subparagraphs (a) to (c), a demonstration of

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[867] *Ibid* at 154.
[868] When two works are re created by two different authors and they are either similar or identical to one another without access to one another, both works would receive copyright protection. This is referred to as independent creation, see *Hutton v Canadian Broadcasting Corporation*, 1992 ABCA 39, 41 CPR (3d) 45, the Court held that "[a] causal connexion between 2 works is established by proof of copying or inferred from substantial similarity and access. However, an inference of copying can be rebutted by proof of independent creation. The second work does not infringe the copyright of the first if it was created entirely independently" at para 6.
[869] *Copyright Act*, *supra* note 6, s 3(1); *Théberge*, *supra* note 183 at para 42-44.
[870] *Copyright Act*, *supra* note 6, s 3(1); *Théberge*, *supra* note 183 at para 51.
[871] Vaver, *supra* note 126 at 182-185.
[872] *Ibid* at 185.
[873] *Cinar Corporation v Robinson*, 2013 SCC 73 at para 39, [2013] 3 SCR 1168 [*Cinar Corp*][emphasis in original].
[874] *Ibid* at para 26.
[875] *Ibid* at para 40, quoting *France Animation SA c Robinson*, 2011 QCCA 1361 at para 66.
[876] *Copyright Act*, *supra* note 6, s 27(2).

primary infringement (the infringing work at the heart of the distribution) is necessary:[877] in this case, the defendant should have known that their actions infringed copyright or "would infringe copyright if [the copy] had been made in Canada by the person who made it."[878] An example of this could arise when a party has received a number of garments that they knew or should have known would be infringing and sells them or offers them for sale online or in store.[879]

4.1.4 Contours of Protection

There are several ways that copyright protection can be useful in protecting elements of fashion designs. One major benefit includes the fact that there is no registration requirement,[880] unlike industrial design, registered trademarks and patent law. This way, the designer does not have to register all of their designs in anticipation of infringement, allowing them to choose to pursue a possible claim without having to spend the upfront registration costs.

Copyright's level of originality is considered to be the balanced approach i.e., middle ground as compared to the United Kingdom and the United States.[881] It is therefore attainable and does not even require creativity or uniqueness. And the term of protection is one of the longest available among the other intellectual property regimes (save trademark protection), which means that fashion designers will have the opportunity to capitalize on their designs, prints or other works long term. Further, in addition to economic rights, which are quite robust,

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877 *Euro-Excellence Inc v Kraft Canada Inc*, 2007 SCC 37 para 20, [2007] 3 SCR 20 – this is true for all subparagraphs other than 27(2)(e).
878 Vaver, *supra* note 126 at 190-191.
879 *Copyright Act*, *supra* note 6, ss 27(2) (a) & (c).
880 *Ibid*, s 53(2). Although copyright protection requires no formalities, the registration serves an important evidentiary function that creates a presumption that copyright exists in the work and that the individual registrant is the copyright owner.
881 *CCH Canadian*, *supra* note 183 at paras 15-16; see, Teresa Scassa, "Recalibrating Copyright Law?: A Comment on the Supreme Court of Canada's Decision in *CCH Canadian Limited et al v Law Society of Upper Canada*" (2004) 3:2 Canadian Journal of Law and Tech 89, "[t]he U.S. standard embraces traditional copyright works while creating considerable leeway for utilitarian works. The Canadian standard embraces a broad range of utilitarian works while raising the spectre of more subjective interpretations of copyright in the traditional categories of copyright works" at 91.

designers would have the opportunity to assert their moral rights as well. Moral rights can effectively prevent unwanted use in association with certain causes or institutions.[882]

Finally, even though copyright protection in the design itself would not be enforceable under the *Copyright Act* once the commercial threshold has been exceeded, certain elements, such as the particular exceptions mentioned above in subsection 64(3), e.g., textile pattern, artistic works, or trademark,[883] would continue to receive protection.

Designers may also face some challenges when using law to protect their design. One of the main challenges with copyright protection for fashion design arises from relying on copyright protection alone, particularly if the designer intends to produce more than fifty copies. As previously mentioned in Chapter 3, commentators have criticized Parliament's policy behind the enactment of the useful article section and the effectiveness of the section in achieving the intended objectives, which is to remove useful articles from the purview of copyright law once they have been commercially (mass) produced. For example, David Vaver suggests that the legislative intent in distinguishing the difference between art and industrial design based on a commercially designated quantity is unclear, and observes that the

> [a]ttempt to draw a bright line between fine art and industrial design is unfortunately undermined by the list of bric-à-brac that is specifically allowed to retain full copyright: trademark design, labels, architectural works, textile designs, character merchandising items, …and anything else the government feels like adding by regulation.[884]

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882 Some scholars find that moral rights apply irrespective of fair dealing or other exceptions, however this has not yet been resolved by the courts see e.g., in the case of the non-commercial user-generated content exception, Teresa Scassa, "Acknowledging Copyright's Illegitimate Offspring: User-Generated Content and Canadian Copyright Law" in Michael Geist, ed, *The Copyright Pentalogy: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law* (Ottawa: University of Ottawa Press, 2013) 431 at 443-444 [Scassa, "Copyright's Illegitimate Offspring"].

883 In order to qualify for the exception under 64(3)(b) in the case of a trademark, the design should first be recognized as a trademark. Otherwise, it would not qualify under that section, see e.g., the discussion in *Crocs Canada Inc v Holey Soles Holdings Ltd*, 2008 FC 188 at paras 21-23.

884 Vaver, *supra* note 126 at 89 [citations omitted].

Further, Myra Tawfik suggests that the overlap between copyright and industrial design has not been effective, stating that,

> [it] would seem then that in spite of Parliament's best efforts, the segregation of industrial design and copyright has not been entirely successful – and indeed, will not likely be fully achieved unless and until a systematic review of Canadian industrial design law is undertaken that includes a full analysis of its interface with copyright law.[885]

A case that demonstrates the weakness of this "bright line," is that of *Pyrrha Design Inc v 623735 Saskatchewan Ltd*.[886] In 2002, the British Columbia based jewellery designers who were known to create jewellery "featuring vibrantly coloured fibre-optic glass stones, some resembling a cat's eye, set in chunky cast sterling silver mountings of modern character"[887] filed a statement of claim offer discovering that a vendor was replicating their designs without permission. The designers had not previously registered their work under the *Industrial Design Act* but instead, argued that their works qualified for copyright protection.[888] Although the Federal Court acknowledged that the term 'design' was similar in both copyright and industrial design legislation, Justice Rouleau dismissed their copyright claim as more than 50 copies made and the exceptions under section 64(2) did not apply.[889]

On appeal, the Federal Court of Appeal held that it was unclear as to whether there was "no genuine issue to be tried in this case"[890] and found that the case should be given a "full and fair trial" to determine whether jewellery was useful or whether it could fall under copyright subject matter.[891] The Court of Appeal held that a work could both be artistic and at the same time, useful, and that this dual characteristic alone should not automatically determine whether it should be disqualified from copyright protection.

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[885] Tawfik, *supra* note 125, 267 at 273.
[886] *Pyrrha Design Inc v 623735 Saskatchewan Ltd*, 2004 FCA 423, 36 CPR (4th) 432.
[887] *Ibid* at para 6.
[888] *Pyrrha Design Inc v 623735 Saskatchewan Ltd*, 2004 FC 423 at para 16, 249 FTR 89.
[889] *Ibid* at paras 18-19.
[890] *Pyrrha Design (FCA)*, *supra* note 886 at para 13.
[891] *Ibid* at para 16.

> There is something amounting to a genuine issue raised by the appellants' analysis, for otherwise every work of art could be considered useful merely because it can be enjoyed as an adornment. *It is not enough to hold without evidence that because jewellery is worn it is ipso facto useful*. It is doubtful whether the usefulness of a work of art can be determined solely by its existence; there must be a practical use in addition to is [a]esthetic value. Some items of jewellery that are worn may be useful whereas others may not be. For example, a tie pin or cuff links may be useful types of jewellery holding clothing together, while other objects such as a brooch or an earring may be purely ornamental and not useful at all, valuable only for their own intrinsic merit as works of art. Further, a sculpture may be created merely to be observed and admired or it may be made to be used as a paper weight. This issue is a genuine one deserving of a full trial on *viva voce* evidence.[892]

Therefore the court did find that there was a genuine issue raised as to determining whether works based on their categorization of artistic works or useful articles could not transcend boundaries to serve other purposes than the ones for which they were created.[893]

The threshold for copyright infringement could be too low for the purpose of fashion design because it is an industry based on remixing and re-cycling looks and following trends, which may result in many visually similar works. In *DRG Inc v Datafile* the court ultimately stated that there is a scale to consider when balancing the qualitative and quantitative taking: the simpler a work is, the more exact the copy needs to be in order to find infringement.[894] As Vaver observes the "simpler the work, and the closer the line between its idea and its expression, the less need there is to grant broad control …".[895] However, as described in *Cinar Corp*, it is a case of "nuance, degree and context."[896] This threshold might pose a problem in the event of non-

[892] *Ibid* at para 14 [emphasis added].
[893] The question of the authors intent is a not considered as a factor in Canada for artistic works, see *DRG, supra* note 800 at para 17; However in the UK, the view held by the Supreme Court of the United Kingdom was that the creator's intent was to be a factor in deciding how a work should be classified. In that case, the Lucasfilm attempted to assert copyright over a Storm trooper costume that was held to be useful based on the fact that it was created to fulfill that function (served as a costume in a movie), see *Lucasfilm Limited v Ainsworth* [2011] UKSC 39.
[894] *DRG, supra* note 800 at para 21; Vaver, *supra* note 126 at 187.
[895] *Ibid*.
[896] *Cinar Corp*, *supra* note 873 at para 40.

literal copying,[897] which may in some circumstances lead to the protection of ideas rather than the expression of those ideas.[898] If not carefully decided by the courts, the *idea* and not the *expression* may be held to infringe.

There are also several circumstances and user rights that could prevent a finding of copyright infringement – these include independent creation and the merger doctrine. For example, independent creation might allow for qualitatively similar copies to be created without infringing copyright in the original. However, since the defense of independent creation is successful only if access to the original work cannot be proved, it might be difficult for less established or less well-known designers to make use of this argument.[899] If the less established designer wanted to raise a claim, one could argue that they have limited exposure and that it could not have been seen, on the other hand, defending themselves against such a claim from larger designers who have more exposure may be difficult.[900]

Subconscious copying is another common occurrence in the design community, as will be discussed in Chapter 6. Unlike independent creation, subconscious copying has been controversially held to amount to infringement because it assumes that the defendant had access to the original work at one time even though they do not remember when this occurred.[901] This might prove to be harsh on designers given the fact that visual images are littered all over the Internet on social media feeds, online stores, fashion blogs and news articles as well as in print

[897] Non-literal copying can occur when the reproduction is not necessarily verbatim "words on the page or the brushstrokes on the canvas", but can occur where there is an abstract taking of a work, see *Cinar Corp*, *supra* note 873 at para 27 quoting from *Designers Guild Ltd v Russell Williams (Textiles) Ltd*, [2001] 1 All ER 700, at p 706.
[898] *Ibid.*
[899] *Grignon v Roussel* (1991), 38 CPR (3d) 4. The Court held that a "defendant cannot be found to have infringed a copyright unless it is proven that he in some way has access to the plaintiff's work and that there is a cause-and-effect relationship between the two works" at para 40.
[900] Oliar & Sprigman, *supra* note 1 at 1804-1805, Sprigman and Oliar state that proving copying as opposed to independent creation within the community of comedians contributes to the fact copyright lawsuits would likely not succeed.
[901] Vaver, *supra* note 126 at 162-163.

form. The significant difference between independent creation and subconscious copying is that with independent creation there is no access, while for a finding of subconscious copying, the courts have held that individuals are liable even if they cannot recall the first point of contact with the original works. Although there has not yet been an affirmative finding of subconscious copying in Canada,[902] there have been several higher profile cases involving the subconscious copying of musical works in the United States.[903]

As mentioned above, the merger doctrine might prove to be a useful defense for designers who are accused of copying. This doctrine was pursued as a defence in the United States Court of Appeals for the Ninth Circuit case of *Rosenthal Jewelry Corp v Kalpakian*,[904] where the defendants had created a jewel encrusted bee pin based on a "study of bees in nature and in published works."[905] The plaintiff sued for copyright infringement, and the Court of Appeals observed that, there was a distinction between idea and expression, and that even if there was access, that copying did not amount to copyright infringement,

> A finding that defendants "copied" plaintiff's pin in this sense, however, would not necessarily justify judgment against them. A copyright, we have seen, bars use of the

[902] *Gondos v Hardy*, (1982) 64 CPR (2d) 145. In this case conscious and unconscious copying were considered but because there was no causal connection found, the court held that it was a coincidence; in other words, independent creation had occurred. Otherwise, subconscious copying could have been held to infringe. In *Drynan v Rostad* (1994) 59 CPR (3d) 8 at para 53, the court acknowledged that unconscious copying had not been fully explored by the Canadian courts but suggested that if unconscious copying were held to be infringing then they would have to consider the requirements set out by the court in *Francis Day & Hunter Ltd, et al v Bron*, [1963] 2 All ER 16.

[903] See Barbara Green, "Haven't I Heard This Song Before? Subconcious Plagiarism in Pop Music and the Infringement of Copyright – Toward a Partial Defense of Cryptomnesia" (1998-1999) 13 IPJ 53 at 53, Green observes that the defense of subconscious copying does not exist in Canada; The cases in the US include *ABKCO Music Inc v Harrisongs Music Ltd*, 944 F 2d 971, 974 (2d Cir 1991); *Three Boys Music Corp v Bolton*, 212 F 3d 477 (9th Cir 2000); it is difficult to say if subconscious copying could amount to infringement in the design community because much of the works proliferate in trends and it is near impossible to track the stream of consciousness when there are so many iterations of the same thing.

[904] *Rosenthal Jewelry Corp v Kalpakian*, 446 F 2d 738 (9th Cir 1971); see also *Rachel v Banana Republic Inc*, 831 F2d 1503, 1507-1508 (9th Cir 1987), in this case, a producer of realistic jungle animal reproductions (synthetic animal heads) sued another producer or realistic animal reproductions employed by his former clients, Banana Republic. The Ninth Circuit Court of Appeals stated that "[t]o the extent that works are similar in ideas and general concepts, the similarities are noninfringing" and that even if the two were similar, "similarity in expression is noninfringing when the nature of the creation makes similarity necessary. […] [s]uch 'indispensable expression' of ideas may be protected only against virtually identical copying."

[905] *Kalpakian*, *supra* note 904 at 739.

> particular "expression" of an idea in a copyrighted work but does not bar use of the "idea" itself. Others are free to utilize the "idea" so long as they do not plagiarize its "expression."[906]

However, in this case the Court found that the defendant had taken the plaintiffs expression,

> A jeweled bee pin is therefore an "idea" that defendants were free to copy. Plaintiff seems to agree, for it disavows any claim that defendants cannot manufacture and sell jeweled bee pins and concedes that only plaintiff's particular design or "expression" of the jeweled bee pin "idea" is protected under its copyright. The difficulty, as we have noted, is that on this record the "idea" and its "expression" appear to be indistinguishable. There is no greater similarity between the pins of plaintiff and defendants than is inevitable from the use of jewel-encrusted bee forms in both.
>
> When the "idea" and its "expression" are thus inseparable, copying the "expression" will not be barred, since protecting the "expression" in such circumstances would confer a monopoly of the "idea" upon the copyright owner free of the conditions and limitations imposed by the patent law.[907]

Another interesting point that has not been fully explored in fashion law discourse is the reproduction of fashion illustrations or sketches into three-dimensional works.[908] Many designers sketch, create patterns and draw their designs first prior to materializing them into three-dimensional works. On this point, the law clearly states that reproduction or substantial reproduction can occur in "any material form whatever."[909] In *King Features Syndicate Inc v Kleeman (O&M) Ltd*[910] Lord Simonds stated that "it would be contrary to the plain meaning and spirit of the Act if a copy of an artistic work were an infringement only of made in the same dimensions…"[911] Following the decision in *Bayliner Marine Corp v Doral Boats Ltd*[912] it was affirmed that the reproduction of two-dimensional plans into a three-dimensional work could

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[906] *Ibid* at 741.
[907] *Ibid* at 742 [citation omitted].
[908] See e.g., *Théberge*, *supra* note 183, The Supreme Court held that "[t]ransfomation of an artistic work from two dimensions to three dimensions, or *vice versa*, will infringe copyright even though the physical reproduction of the original expression of that work has not been mechanically copied" at para 47 [emphasis in original]; Gregory Hagen et al, *Canadian Intellectual Property Law: Cases and Materials* (Toronto: Emond Montgomery, 2013) at 102.
[909] *Copyright Act*, *supra* note 6, s 3(1).
[910] *King Features Syndicate Inc v Kleeman (O&M) Ltd*, [1940] 2 All ER 355.
[911] *Ibid* at 358.
[912] *Bayliner Marine Corp v Doral Boats Ltd*, (1985), 5 CPR (3d) 289 (FCTD).

amount to copyright infringement.[913] However, when appealed, the Federal Court of Appeal held that because the plans could substantively be protected by industrial design, copyright protection would not apply, based on a reading of the then section 46 of the *Copyright Act*. The Court of Appeal did not find it necessary in that case to deal with the issue at appeal, which was "whether as a matter of law the copyright in a plan is infringed by the making of a copy of an object made according to the plan."[914] However the 1988 amendment was enacted to ensure that once more than fifty copies are made of the design into a three-dimensional work, section 64(2) would be triggered, preventing a finding of infringement "copyright subsists in a design applied to a useful article or in an artistic work from which the design is derived."[915] This means that if the plans are never reproduced in an amount that meets the threshold, then copyright protection would subsist.

Finally, moral rights may present an interesting challenge. It is possible for example that a stylist uses a garment for a client, then takes it upon him or herself to modify in a way that was never intended by designer causing prejudice to the designer's honour or reputation.[916] Undoubtedly, both the subjective and objective elements would have to be demonstrated before such a claim is successful,[917] yet at the same time it is difficult to ascertain the level of control a designer could have on the way their works are used, since they are utilitarian but have many intangible qualities.[918] Similarly, relying on the moral right of attribution, the designer could

[913] *Ibid*; Hagen et al, *supra* note 908 at 102.
[914] *Bayliner Marine Corp v Doral Boats Ltd*, [1986] 3 FC 421, 10 CPR (3d) 289 at para 24; see generally, discussion in Mitchell, *supra* note 561.
[915] *Copyright Act*, *supra* note 6, s 64(2).
[916] *Ibid*, s 28.2 (1).
[917] See *Prise de Parole, supra* note 861.
[918] For example, because clothing and fashion have many symbolic and signaling values, it can be used for a variety of purposes including communicating and interacting. Craik provides the example of particular details of hats, clothing or shoes than can be worn by different individuals to signify or communicate specific messages. It is therefore entirely possible for fashion to be used for the purpose of parody and satire should the individual wearing it so choose to use it in that way, see Craik, *supra* note 368 at 108-115.

request that they are referenced.[919] This is a common practice in fashion editorials, but not necessarily in other contexts.

4.2 Industrial Design Act

4.2.1 In the Context of Fashion

In the context of fashion, industrial design law can protect the way in which an article is shaped, or configured – in other words, the way it is designed. Examples of this include anything from little details, like the 1/3 ornamentation of a jean pocket,[920] and fabric design (angel wings)[921] both woven or printed, boot designs,[922] or the emphasis on the bib of a onesie.[923] Notably, in these areas there is an overlap with the subject matter protected by copyright.

Industrial design law has also been used extensively by luxury brands to protect the design of handbags and other accessories. For example, Gucci has sixty-seven registrations in Canada spanning from the design of handbags, to the shape of a perfume bottle, pens, watches and even logos (between the 80s, 90s and 2000s), while Louis Vuitton has twenty-one registrations that include of designs of handbags, luggage and watches (mostly from the 80s and 90s).[924]

Although the industrial design register utilizes a classification coding system that includes categories for apparel and other garments, as will be mentioned below, the majority of articles previously or presently registered would not be categorized as contemporary or classic

[919] *Copyright Act*, *supra* note 6, s 14.1(1).
[920] "Pants", Bridge SRL, Italy Industrial Design Reg No 159286 (30 June 2015) live.
[921] "Fabric", Victoria Secret Stores Brand Management Inc, USA Industrial Design Reg No 155488 (13 March 2015) registration. The description for the registration reads "The design comprises the features of pattern of the FABRIC of indefinite length and width as shown in solid lines in the drawings. The pattern shown on the surface within the break lines repeats throughout the length and width of the article."
[922] "Boot", Sorel Corp, USA Industrial Design Reg No 160911 (17 September 2015) registration. Note that the illustration shows a belt which is diagonally fastened above the ankle.
[923] "Onesie", 0979690 BC Ltd, Can Industrial Design Reg No 157000 (30 January 2015) registration. Description states that it is the "features are features of one of shape, configuration, ornament or pattern or are a combination of any of these features" but refers to the entire drawing as it is in sold lines.
[924] See CIPO search under Trademark Owner, "Gucci" and "Louis Vuitton."

fashion design. Rather, they seem to include the design of more utilitarian articles, such as the design of the sole of a running shoe,[925] or the crossover maternity panel attached to a skirt (dress),[926] or a baby pyjama with an emphasis on the attached bib.[927]

Industrial design can apply to the design of the overall article, or just a minor detail. By definition, protection can extend to many elements simultaneously as long as they are included as a part of a design, for example protection may apply to a combination of fabric print, shape of a dress and embellishment combined.

4.2.2 Scope of Protection

There are several requirements for industrial design protection to subsist in an article of fashion design, including i) registration, ii) originality, iii) appeal to the eye and, iv) subject matter. There is also the distinction between v) authorship of a design and its ownership similar to the situation in copyright law.

4.2.2.1 Registration

Registration is mandatory for industrial design protection.[928] It is the responsibility of the applicant to file the application within a year from the date that the design is published.[929] Once registration is successful, the article can be protected for up to ten years.[930]

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[925] "Shoe", Nike Inc, USA Industrial Design Reg No 160803 (31 August 2015) registration. Description includes: "The design consists of the features of shape, ornament, pattern and configuration of the bottom portion of the outsole of the Shoe shown in the drawings."
[926] "Skirt with Crossover Maternity Panel", Ingrid & Isable LLC, USA Industrial Design Reg No 162520 (17 August 2015) registration.
[927] "Baby Pyjama with Bib", 9252-5104 Quebec Inc, Can Industrial Design Reg No 155361 (27 April 2015) registration.
[928] *Industrial Design Act*, *supra* note 7, s 4 (1); The registration requirement for industrial design protection is unlike copyright law where registration is optional and unlike trademark law where there exist both registered and unregistered marks (albeit different).
[929] *Ibid*, s 6(3) Publication is defined as the date from which the article is first made available or offered to the public; *Ribbons (Montreal) Limited v Belding Corticelli Limited,* [1961] Ex CR 388 at 402, quoted in *Algonquin Mercantile Corp v Dart Industries Canada Ltd*, [1984] 1 FC 246, 71 CPR (2d) 11.
[930] *Industrial Design Act*, *supra* note 7, s 10(1); After the first five years, the registration can be maintained for a second five-year term upon a payment of the renewal fees, see *Industrial Design Regulations* (SOR/99-460) at s 18(1) [*ID Regulations*].

Unlike in Canada, both registered and unregistered rights exist in the United Kingdom, and in the European Union. The Hargreaves Report on intellectual property in the United Kingdom suggests that the unregistered design right is the most conducive form of protection for fashion designers.[931]

4.2.2.2 Originality

The examiner reviews the application for design registration in order to ensure the requirements are met,[932] and if the Minister "finds that it is not identical with or does not so closely resemble any other design," the design will be registered.[933] The originality requirement for industrial design protection is higher than the copyright requirement of skill and judgment, and lower than the novelty requirement in patent law.[934] The Supreme Court has held that an original design is one that demonstrates a "substantial difference" from what already exists.[935] This standard requires

> …a higher degree of originality than is required with regard to copyright. It seems to involve at least a spark of inspiration on the part of the designer either in creating an entirely new design or in hitting upon a new use for an old one.[936]

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[931] *Consultation on the Reform*, *supra* note 631 at 13. One reason for this is because only a fraction of designs become profitable, and because designers do not have the ability to foresee their successful pieces, it is not in their best interest to register all of their works in anticipation that one will outweigh the others.

[932] *Industrial Design Act*, *supra* note 7, s 5(1).

[933] *Ibid* s 6(1), the Registrar will register a design if it is not identical or does not resemble another existing design; Note that although originality is said to be required, s 7(3) of the *Act* states that the certificate issued by the Minister is proof of originality, despite the fact that originality is not defined, see Hagen et al, *supra* note 908 at 308.

[934] *Victor Stanley Inc, Re*, 2012 CarswellNat 885 (Pat App Bd &Pat Commr Mar 28, 2012) ("The degree of originality required to register an original design is greater than that laid down by Canadian copyright legislation, but less than that required to register a patent" at para 42); see *Rothbury International Inc c Canada (Ministre de l'industrie)*, 2004 FC 578 (FC) at para 35. This may arguably be due to the sometimes-arbitrary distinction between the subject matter at the heart of industrial design and copyright, see Vaver, *supra* note 126 at 89; B. Courtney Doagoo, *supra* note 130, 187 at 203-204.

[935] The Supreme Court held that a slight variation would not amount to the threshold required for registration, see *Clatworthy & Son Ltd v Dale Display Fixtures Ltd*, [1929] SCR 429 at 433, [*Clatworthy*] in particular the Supreme Court held that "…a slight change of outline or configuration, or an unsubstantial variation is not sufficient to enable the author to obtain registration", also citing "originated something, that by the exercise of intellectual activity he has started an idea which has not occurred to any one before, that a particular pattern or shape or ornament may foe rendered applicable to the particular article to which he suggests that is shall be applied" see, *Dover Limited v Nürnberger Celluloidwaren Fabrik Gebrüder Wolff,* [1910] 2 Oh 25 at 29.

[936] *Bata Industries Ltd v Warrington Inc* (1985), 5 CPR (3d) 339 at 347.

This might prove to be difficult to achieve in the case of fashion design because of the limitations previously mentioned i.e., silhouette, trends, finances, and other collection considerations.[937] For example, if a designer attempts to create a slightly different version of a classic harem pant, or a trench coat silhouette in the public domain, it would not merit protection unless it was substantially different. [938]

4.2.2.3 Appeal to the Eye

One of the distinguishing features of industrial design protection is the requirement that the article 'appeal to the eye'.[939] Although not defined in the *Act* itself, its definition was recently re-affirmed in a 2012 decision by the Patent Appeal Board, in *Victor Stanley Inc, Re*,[940]

> 40 As to "appeal to the eye," in the UK case *Amp Inc. v. Utilux Pty.* Ltd [1970] R.P.C. 397 (Eng. C.A.), Megaw LJ stated, at p. 432:
> In my opinion "appeal to the eye" means this: that the features in question not only can be seen, but that, being seen, they are recognised or noted as being features; in the present case, features of shape. Perhaps the word "characteristics" conveys what is meant. A characteristic is defined in the Shorter Oxford Dictionary as a "distinctive mark; a distinguishing peculiarity or quality". The features of shape must be sufficiently significant to be noted by the observer as distinctive.
>
> 41 In the same case, on appeal to the House of Lords, [1972] RPC 103 (UK HL), Lord Pearson stated, at p. 121:
>
> > It is not reasonable to suppose that the only limitation is that the features are visible in the finished article. If that had been the intention, it could have been expressed much more simply. The emphasis is on external appearance, but not every external appearance of any article constitutes a design. There must be in some way a special, peculiar, distinctive, significant or striking appearance - something which catches the eye and in this sense appeals to the eye.[941]

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[937] See Chapter 2.
[938] Registering such as a very specific looking pocket or a reoccfurring signature throughout their various collections might be worth it but not in the case of a seasonal item. An example of this might be a detail that is also a signature or a trademark similar to the leather label registered under Can No TMA800074 discussed below, *infra* note 972.
[939] *Industrial Design Act*, *supra* note 7, s 2 [design or industrial design]; *Victor Stanley Inc*, *supra* note 934 at paras 40-41.
[940] *Ibid* at para 40.
[941] *Ibid* at paras 40-41; note that the Court in Victor Stanley held that appealing to the eye on first impression was important, and that side-by-side comparisons have been traditionally warned against, at para 61, referring to *Dunlop Rubber Co v Golf Ball Development Ltd* (1931) 48 RPC 268.

Therefore if a feature of a design is something that is not visible or appealing to the eye then it will not receive protection.[942] This was the case in *Mainetti SPA v ERA Display Co*,[943] where the design was effectively hidden on the inside the clamps of a skirt hanger and only visible once the skirts were removed from them.[944] The Court held that there was a "clear distinction to be made" between the hidden designs in the hanger clamps and "objects such as chairs, water pitchers, teapots, and perhaps even tent pegs which are visible in use, the artistic design of which may appeal to a purchaser quite aside from the useful function which they serve."[945]

In most cases demonstrating that a design is "visible to the eye" should not be a problem, but quite often, fashion designers might include quite subtle designs or details in a garment, such as a deliberate movement of a fabric or a specific lining for the inside of the pockets or inside of a shoe, or embellishment inside the collar, where the details of the design have less visibility upon first glance. In these scenarios, demonstrating that the design meets the requirement of "visible to the eye" may be more difficult.

4.2.2.4 Subject Matter

The definition for "design" and "industrial design" in the *Industrial Design Act* is the same as the *Copyright Act*.[946] The *Industrial Design Act* further stipulates that an article is "any thing that is made by hand, tool or machine."[947] Industrial design protection does not extend to features that

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[942] *Ibid*; note that functional features which are also appealing to the eye may receive protection, whereas functional features which do not appeal to the eye (which would be solely functional) would normally be excluded by industrial design protection, see *Zero Spill Systems Int'l Inc v Heide*, 2015 FCA 115 at paras 23-25.
[943] *Mainetti SpA v ERA Display Co* (1984), 80 CPR (2d) 206, 2 CIPR 275.
[944] *Ibid* at para 59.
[945] *Ibid*.
[946] *Industrial Design Act*, *supra* note 7, s 2, [interpretation]; see e.g., Muhlstein & Wilkinson, *supra* note 125 at 4 (argue that not all articles of industrial design may qualify for protection because they do not have attributes, i.e., "it's appearance" or ornamentation, that the *Act* protects).
[947] *Industrial Design Act*, *supra* note 7, s 2 [design].

are "dictated solely by a utilitarian function of the article,"[948] which is meant to prevent a monopoly on the underlying function embedded within the design. As held in *AMP Incorporated v Utilux Proprietary Limited*,[949]

> If the article is evidently a mere mechanical device, shaped as it is solely for the performance of its function and not for providing any visual appeal or embellishment, the negative part of the definition excludes it from being a "design" for the purposes of the Act.[950]

For example, a designer can seek industrial design protection on the design aspect of handles on a handbag but not for the use of the handles themselves for the function of holding the bag. Similarly the protection for a grip design of the sole of the shoe does not extend protection to the technology or gripping function present in the design of the sole.

Industrial design protection is currently available for fashion design and is explicitly categorized under "Apparel" section 006 of the Canadian Industrial Design Classification Standard.[951] Under section 006, there are a number of subcategories including blouses, shirts and sweaters,[952] slacks and trousers for men, women and children,[953] and footwear.[954]

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948 *Ibid*, s 5.1(a); *Bodum USA, Inc v Trudeau Corporation (1889) Inc*, 2012 FC 1128 at para 45-46, the Federal Court did not consider the utilitarian function of the double walled glass.
949 *AMP Incorporated v Utilux Proprietary Limited*, [1971] FSR 572.
950 *Ibid* at para 596.
951 Clothing is categorized under class code 006, under the heading "APPAREL undergarments, dresses, hats, gloves, footwear, umbrellas, canes" Canadian Intellectual Property Design Office "Canadian Industrial Design Classification Standard" *Canadian Intellectual Property Office* (last update 13 December 2012), online: CIPO <http://www.ic.gc.ca/eic/site/cipointernet-internetopic.nsf/vwapj/di-Classification-idClassification-eng.pdf/$FILE/di-Classification-idClassification-eng.pdf>; At the time of writing this thesis, Canada was using the Canadian Industrial Design Classification Standard, however, by acceding to the Hague Agreement, the Locarno Classification System, which is used by the World Intellectual Property Office and recognized internationally will be adopted, see *Industrial Design Activities in Canada*, *supra* note 127 at 35; see Canadian Intellectual Property Design Office, "Legal and Technical Implications of Canadian Adherence to the Geneva Act of the Hague Agreement" (last update 1 June 2015), online: <https://www.ic.gc.ca/eic/site/cipointernet-internetopic.nsf/eng/wr03678.html >.
952 Canadian Industrial Design Classification Standard 006-03-03.
953 Canadian Industrial Design Classification Standard 006-03-04.
954 Canadian Industrial Design Classification Standard 006-05.

4.2.2.5 Authorship v Ownership

Similar to copyright law, the author of a design is the first owner[955] unless the work was made for "another person for a good and valuable consideration, in which case the other person is the first proprietor."[956] The difference between copyright and industrial design is that under copyright law an author retains ownership by default if they are a contractor whereas if the author was an employee, the default owners is the employer. Under industrial design law, the author is the first owner unless they have created "for another person for a good and valuable consideration."[957] This can be subject to change based on a contract between parties stating otherwise.

4.2.3 Rights and Infringement

4.2.3.1 Rights

What the *Industrial Design Act* prevents is the unauthorized production, sale, rent, import, or offer for sale or rent of the protected article.[958] The exclusive rights associated with industrial design protection are specifically suited to the industrial design industries, and are different from the economic and moral rights provided by copyright law even though there is some overlap in the subject matter.

4.2.3.2 Infringement

There are a number of tests advanced in case law to assess whether an infringement had occurred in case law.[959] One recent case decided by the Federal Court, *Bodum USA Inc v Trudeau*

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[955] *Copyright Act*, *supra* note 6, s 13(1).
[956] *Industrial Design Act*, *supra* note 7, s 12(1).
[957] *Ibid*, s 12(1).
[958] *Ibid,* s 11(1)(a); note that in *Bodum USA, supra* note 948, the traditional three-prong test was put into question, and the court applied a modified version, based on the 1993 amendments to the *Industrial Design Act* which incorporates the 'aware consumer' at paras 76-80.
[959] See generally Stuart McCormack, "Industrial Design Law" in Stuart McCormack, *supra* note 535, 383 at 422-423.

Corporation Inc[960] concerned the infringement of double walled glasses. In this case, the Court was tasked with determining the proper infringement test between the one advanced by the plaintiff and a modified version advanced by the defendant. The basis of the test was three factors that were first considered in *Valor Heating Co v Main Gas Appliances*,[961] and then reiterated in *Les Industries Lumio v Denis Dusablon et al*,[962]

> a) The designs that are the subject of the comparison must not be examined side by side, but separately, so that imperfect recollection can guide the visual perception of the finished article;
> b) One must look at the entirety, and not the individual components of the design;
> c) Any change with respect to prior art must be substantial.[963]

The Court determined that these factors should be considered through the lens of an "informed consumer."[964] Thus a finding of infringement under industrial design law hinges on a finding of substantial similarity between two works, through the imperfect recollection of an informed consumer, while taking prior art into consideration.

This may prove to be quite tricky it is quite often the details – the very individual components – that distinguish two garments, such as the lining, the stitching, the finishing, or the fabric, and therefore two article of fashion design can be considered very similar, even through the lens of an informed consumer. As mentioned in previous chapters, classic styles do not differ that often, so that the designer's contribution to the design is to remix what already exists with a new interpretation or a different aesthetic.

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[960] See generally, *Bodum USA*, *supra* note 948; Notably, Zero Spill is a more recent case where the Federal Court of Appeal in rejecting the Federal Court's decision that functional features could not be protected by the *Industrial Design Act*, remanded the case for re-determination at the Federal Court. This case has not been heard yet, see *Zero Spill*, *supra* note 942 at para 107.
[961] *Valor Heating Co v Main Gas Appliances,* [1972] FSR 497 [citing the doctrine of imperfect recollection].
[962] *Les Industries Lumio v Denis Dusablon et al,* 2007 QCCS 1204 at para 182.
[963] *Bodum USA*, *supra* note 948 at para 73 [citation omitted].
[964] *Ibid* at paras 77, 80; The Court found justification for this in *Rothbury International, supra* note 934.

4.2.4 Contours of Protection

Industrial design protection explicitly categorizes apparel within its classification system, meaning that registering designs is a straightforward matter. Unlike copyright protection, except for in the exceptions listed in sub-section 64(3), an unlimited number of copies can be made without consequence of protection being limited.

However there are also a few challenges with industrial design protection as well. First, the originality requirement is more stringent for industrial design than for copyright protection. In an industry fuelled by 'remixes' and influence,[965] this means that obtaining protection is more difficult. This may prove to be a benefit for the industry in that it avoids fencing in unoriginal works and making them inaccessible for other designers to use.

Another issue that designers face is that the cost for registration in an industry with such a rapid cycle and high output such as fashion is quite high.[966] As mentioned in the previous chapter, most designers release two collections per year (spring/summer and fall/winter), so that even if a designer were to release ten items per season, it would amount to twenty items per year. For a designer to attempt to protect all twenty designs, for a term of ten years, could require upwards of $15,000 for registration fees alone. This would not include legal fees or enforcement fees, which are required both prior to and after registration. This is quite a heavy financial burden

[965] Muhlstein & Wilkinson, *supra* note 125 at 19, the authors note that the originality standard is quite rigorous especially with regard to improvements and variants of a design that already exists which can be "difficult to accomplish" – this would be true in respect to the nature of fashion design because the differences can be very nuanced; *Hargreaves Report, supra* note 189*,* "[d]ifferent industries have different levels and types of needs from the IP framework, and they are not yet fully understood" at 65, para 7.8.

[966] Canadian Intellectual Property Design Office "Tariff of Fees – Industrial Designs*"* (7 May 2008), online: CIPO <http://www.cipo.ic.gc.ca/eic/site/cipointernet-internetopic.nsf/eng/wr00640.html> (The fee is $400 for a basic examination fee, $350 for maintenance, $100 to record an assignment of the design. This amounts to up to $750 CAD minimum for the protection of a single article of fashion design); This can add up especially since it is possible for designers to produce a number of pieces per collection, see (Participant, Interview October 13 2014, at 15).

for designers who cannot always foresee which of their design are going to be commercially successful.[967]

Finally, the *Industrial Design Act* is territorial which means that the protection afforded by the *Act* does not have foreign application.[968] Like other intellectual property rights that require registration, the registration of a work under classification 006 is protected only in Canada and is therefore useless for designers who export and sell their goods to markets outside of Canada, because protection would not extend to those jurisdictions. Instead, if designers wish to seek protection outside of Canada, they would have to register their designs subject to the intellectual property laws within each of those jurisdictions.

4.3 Trade-marks Act, Unfair Competition, Parasitism and the Civil Code of Quebec

4.3.1 In the Context of Fashion

In the context of fashion design, trademark law could protect designs, names,[969] and other artistic works. Trademark law can also be used for any detail or finishing that distinguishes the goods of one company from another including colours, sound and other identifying markers.

Although not directly related to the design in the traditional sense (i.e., shape of a dress), these identifying markers are extremely important for fashion designers because of the semiotic qualities that they add to the brand. Examples of this can include the now infamous red coloured

[967] *Consultation on the Reform*, *supra* note 631 at 13. Similarly, cost was a factor mentioned in the *Consultation on the Reform*, it was acknowledged that certain industries such as fashion design heavily rely on the *Unregistered Design Right* because in industries with rapid cycles and high output it is not feasible financially or otherwise to register every item.

[968] CIPO, *A Guide to Industrial Designs*, online: CIPO <http://www.cipo.ic.gc.ca/eic/site/cipointernet-internetopic.nsf/eng/h_wr02300.html>.

[969] While it is common to use names and surnames as trademarks within the fashion industry, the name has to have acquired a secondary meaning, *Mario Valentino SPA v Valint NV*, (1999), 4 CPR (4th) 1 (FC), in this case, the Federal Court affirmed the decision of the Registrar of Trade-marks refused the proposed trademark of a luxury fashion designer from Italy who had not demonstrated that his name had secondary meaning, but also that his name could cause confusion with the existing trademarks belonging to Valentino Garavani. Notably, this does not stop individuals from registering their names as business names or trade names.

sole of Christian Louboutin shoes,[970] Prada's red rectangular tag,[971] Mackage's leather tab strategically placed at the "centre back collar inseam of the outerwear…and in the inseam of the other wares",[972] Canada Goose's arm patch design and placement,[973] Adidas's three stripes on a sleeve,[974] Louis Vuitton's design mark,[975] and even Lululemon's two-dimensional stitching design incorporated on a sleeve.[976]

In addition to the protection of a company name or logo and the design and artistic works in a mark,[977] it is also possible to formally receive protection for the three dimensional shape, design or texture of a good. Although not frequently used for the protection of three-dimensional shapes of classic garments (like shirts, pants, jackets), this type of protection has been used for protection of handbag designs/shapes. [978]

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[970] "Red Sole Design", Christian Louboutin, France No 1604221 (24 July 2013) allowed. Colour Claim: "Colour is claimed as a feature of the trade-mark. RED for the design of the mark."

[971] "Prada & Design", Prada SA, Luxembourg No TMA561885 (13 May 2002) live. Colour Claim: "The letters of the word PRADA are in white. The rectangular shaped figure comprising the background is in red. Colour is claimed as a feature of the mark."

[972] "Mackage Signature Tab & Design", 9172-0060 Quebec Inc, Can No TMA800074 (16 June 2011) live. Trade-mark Description: "The trade-mark is a leather tab having the MACKAGE Design embossed thereon, as shown in the attached drawing, permanently inserted at the center back collar inseam of the outerwear jackets, coats, trench coats, parkas, cloaks and ponchos, and in the inseam of the other wares, and held at the bottom by the rivet."

[973] "Canada Goose", Canada Goose Inc, Can No TMA551985 (4 October 2001) live. Wares "(1) Men's women's and children's outerwear namely coats, parkas, jackets, vests, pullovers, sweaters, shirts, hats, scarves, gloves, mittens, socks, coveralls; and sleeping bags".

[974] "Shirt Sleeve Design", adidas AG, Germany No TMA531924 (29 August 2000) registered; However, *in Adidas (Canada) Ltd v Colins Inc,* (l979) 38 CPR (2d) l45, a trademark consisting of "three parallel stripes applied to the outside of the sleeves and of the legs of the training suit in a longitudinal direction" was expunged as not being the proper subject of a trademark. The Court held that "[f]or one particular manufacturer to seize upon one particular type of striping, and by consistent use of it in certain widths and spacing claim that this particular type of stripe has acquired a significance so as to indicate to the public garments of its manufacture appears to be an attempt to convert what is merely ornamental design into a trade mark, which is not permissible" at para 35.

[975] "LOUIS VUITTON TRUNKS & BAGS (& DESSIN)", Louis Vuitton Malletier, société anonyme de droit français, France No TMA784438 (7 December 2010) registered.

[976] "Sleeve Lines Design", Lululemon Athletica Canada Inc, Can No 1546656 (2 January 2013) abandoned. Trade-mark description: "The trade mark consists of two-dimensional stitching applied to the sleeve of clothing as shown in the drawing. The representation of the garment in dotted outline does not form part of the trade mark but merely shows the position of the mark".

[977] "Flowers Dessin" Louis Vuitton Société Anonyme, France No TMA401088 (7 August 1992) registered.

[978] "Handbag flap and handle Design", SAS Jean Cassegrain, Can No 1558503 (4 January 2012) searched.

4.3.2 Scope of Protection

In 2014, the *Trade-marks Act* was amended by Bills C-8[979] and C-31[980] the latter affecting significant changes to the scope and the definitions of the *Act*.[981] This section will discuss both the law pre-amendment, in order to provide context for the case law that have be used as examples, as well as a discussion of the laws post-amendment – where applicable.

As mentioned above, there are a number of ways that designers can use trademark law in the fashion industry. A trademark is a mark used by an individual for the purpose of distinguishing the source of their goods or services from others.[982] Thus there are three general requirements for a trademark to exist: i) a sign, ii) use of the sign, and iii) distinctiveness.

4.3.2.1 Marks

Generally, designers are able to use trademark law to protect designs by way of traditional marks e.g., word or design marks,[983] or a combination of both. Another possible means of trademark protection for fashion design is the use of distinguishing guises.[984] A distinguishing guise is defined by the *Act* as the appearance of "shaping of wares" or "mode of packaging" used to distinguish goods or services.[985] Protection for the distinguishing guise does not extend to any

[979] Canada, Bill C-8, *An Act to amend the Copyright Act and the Trade-marks Act and to make consequential amendments to other Acts*, 2nd Sess, 41st Parl, 2014 (assented to 9 December 2014).
[980] Bill C-31, *supra* note 522.
[981] These have not yet taken effect at the time of writing of the thesis.
[982] *Trade-marks Act*, *supra* note 7, s 2 (definition of 'trade-mark').
[983] Certification marks also exist, but will not be discussed here since they do not directly apply to the subject matter.
[984] *Trade-marks Act*, *supra* note 7, s 13(1). Further, it is important to note that the definition of "distinguishing guise" is repealed pending the coming into effect of recent amendments to the *Trade-marks Act*, The current distinguishing guise would instead be covered by an expanded proposed definition of "trade-mark" as a "sign" which includes a "word, a personal name, a design, a letter, a numeral, a colour, a figurative element, a three-dimensional shape, a hologram, a moving image, a mode of packaging goods, a sound, a scent, a taste, a texture and the positioning of a sign" see Canada, Bill C-31, *supra* note 522, cl 319 (5).
[985] *Trade-marks Act*, *supra* note 7, s 2 [definitions]. The proposed amendment to section 32 of the *Trade-mark Act* in Bill C-31, now requires that at the time of filing, evidence to be shown to demonstrate that distinctiveness has been attained, see Bill C-31, *supra* note 522, cl 339.

functional elements of the good or service, nor should it limit "art or industry."[986] This basically means that if the shape or container also has any functional attributes, then it will not be protected because it could grant a monopoly over that particular function.

When the 2015 amendments take effect, the definition of trademark will change from "mark" to "sign" or combination of signs giving it a broader scope. The new definition of sign articulates a number of different possibilities that were previously not formalized by law:

> "sign" includes a word, a personal name, a design, a letter, a numeral, a colour, a figurative element, a three-dimensional shape, a hologram, a moving image, a mode of packaging goods, a sound, a scent, a taste, a texture and the positioning of a sign;[987]

Significant to fashion, the new definition of "sign" may include a design, a three-dimensional shape, a texture, and even the positioning of the sign (as we saw in the Mackage example above). Three-dimensional shapes and designs will continue to be protected.

Limitations to the subject matter of trademarks that can be protected are listed in section 12(1),[988] which includes the name of the good in any language, or marks prohibited by sections 9[989] or 10.[990]

4.3.2.2 Use

A trademark must be used to distinguish the goods and services of one from another in order to be registered.[991] Use is defined in section 4 of the *Act*: for goods, which is the category that fashion design would qualify under, if at the time that the property is transferred and in the

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[986] *Kirkbi AG v Ritvik Holdings Inc*, 2005 SCC 65 at para 45-46; Note that the proposed amendment to section 12(2) of the *Trade-marks Act* in Bill C-31, would formally integrate functionality doctrine as a prohibition for registering a trademark whereas it previously applied only to distinguishing guises, see Bill C-31, *supra* note 522, cl 326 (4).
[987] *Ibid*, cl 319 (5).
[988] *Trade-marks Act*, *supra* note 7, s 12(1).
[989] *Ibid,* s 9.
[990] *Ibid*, s 10.
[991] *Ibid*, s 2. The requirement of "distinguishing" ones goods or services from another is present in the definition of a trade-mark; *Kirkbi AG, supra* note 986, The Supreme Court affirmed that the "the foundation of a trade-mark is distinctiveness" at para 39.

normal course of trade, the trademark "is marked on the goods themselves or on the packages in which they are distributed or it is in any other manner so associated with the goods that notice of the association is then given to the person to whom the property or possession is transferred."[992] Unlike traditional marks, a proposed distinguishing guise could not be registered.[993]

Trademark protection is also territorial which means that a Canadian mark is protected only in Canada. Designers may choose to register their marks in other countries based on the requirements in those jurisdictions in reference to foreign marks. On the other hand, a designer from foreign jurisdiction has "slightly less stringent" requirements.[994]

4.3.2.3 Distinctiveness

Distinctiveness is central to trademark law.[995] The *Act* defines a distinctive trademark as one that "distinguishes the goods and services in association with which it is used by its owner" from those of another.[996] The *Act* specifically states that the Registrar has the right to restrict the trademark to apply only to the goods and services within the territorial area of Canada that it has "been so used as to have become distinctive."[997]

Where the distinctiveness requirement becomes interesting is in reference to use of personal names, which is normally the case of fashion designers when they create their namesake brands, e.g., Tavan & Mitto, Lida Baday, Marie Saint Pierre, Denis Gagnon, Sid Neigum and Tara Jarmon.[998] Normally, under section 12(1) a word that is "primarily merely the name or

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[992] *Trade-marks Act*, *supra* note 7, s 4(1).
[993] *Ibid*, s 13(1)(a), a distinguishing guise must be distinctive at the date of filing an application for registration
[994] *Ibid*, s 14; Teresa Scassa, *Canadian Trademark Law* (Markham: LexisNexis Canada Inc, 2010) at 37 [Scassa, *Trademark Law*].
[995] *Kirkbi AG, supra* note 986, The Supreme Court affirmed that the "the foundation of a trade-mark is distinctiveness" at para 39.
[996] *Trade-marks Act*, *supra* note 7, s 4(1).
[997] *Ibid*, s 32(2).
[998] These are names of designers in both Montreal and in Toronto; see Tavan & Mitto, online: <http://www.tavanmitto.com>; Lida Baday, online: <http://www.lidabaday.com/>; Maison Marie Saint Pierre, online: <https://www.mariesaintpierre.com/us_en/>; Denis Gagnon, online: <http://denisgagnon.ca/en>; Sid

surname of an individual who is living" cannot be registered;[999] however, this ban is not absolute because section 12(2) permits it if it has become distinctive at the time of filing the application for registration.[1000] Some trademarks may be fully unregistrable because they are generic such as WOOLLY JACKET, for wool jackets or the trademark LITTLE BLACK DRESS for a line exclusively made of little black dresses.[1001] Finally, marks that are confusing with an existing mark will also be denied registration.[1002]

4.3.3 Rights and Infringement

There are two general groupings of trademark protection: unregistered rights, which include common law, [1003] and civil law recourses,[1004] and statutory protection, which do require registration.[1005]

Neigum, online: < http://www.sidneigum.com>; Tara Jarmon, online: <http://www.tarajarmon.fr/>; In 2015 US company Guess was sued by a previous co-owner and artistic director Georges Marciano, for the continued use of his name on the Guess label, which he had previously licensed but stopped, and also the use of his name associated with a Revlon products –also unauthorized (although this is an American company, the Superior Court of Quebec held that the action could be brought forward in Quebec, because the alleged wrong doing occurred there), see *Marciano c Guess? Inc*. 2015 QCCS 3481.

[999] *Trade-marks Act*, *supra* note 7, s 12(1)(a).

[1000] *Ibid*, s 12 (2).

[1001] *Ibid*, s 12(1)(c).

[1002] *Ibid*, s 12(1)(d); Calvin Klein filed a statement of opposition against a Canadian hosiery company for the registration of DONNA KLEIN, for proposed use on a number of apparel items. The Court held that the applicant had failed to demonstrate that there would be no likelihood of confusion (there were numerous grounds of opposition, confusion was only one of them), see *Calvin Klein Trademark Trust v Wertex Hoisery Inc*, (2004) 41 CPR (4th) 552 (Trade-marks Opposition Board); Similarly, Chanel filed a statement of opposition against the registration of the design mark of the overlapping « CC » against a Canadian company who had attempted to register it for menswear. The Court found that the would be a likelihood of confusion between the two marks see *Chanel SA v Morwill Clothing Manufacturing Co*, (1983) 73 CPR (2d) 249 (Trade-marks Opposition Board); FENDI filed an application to oppose the registration of a stylized FENZI trademark for the "operation of a retail clothing store" based on confusion – the application was refused based on 12(1)(d) of the Act, see *Fendi Paola Sorelle SAS v Wiltomar Fashion Group*, (1990) 35 CPR (3d) 47 (Trade-marks Opposition Board).

1003 *Ciba-Geigy Canada Ltd v Apotex Inc*, [1992] 3 SCR 120 at 132; *Trade-marks Act*, *supra* note 7, s 7 (b)&(c).

[1004] *Ibid*, s 7.

[1005] *Ibid*, ss 19, 20 & 22.

4.3.3.1 Unregistered Rights

For unregistered marks, individuals may rely on the common law tort of passing off or in Quebec, individuals may rely section 1457 of the *Civil Code of Quebec* (CCQ) – and possibly a newly emerging right, parasitism - in addition to section 7 of the *Trade-marks Act*.[1006]

4.3.3.1.1 Common Law Tort Passing Off

The doctrine of passing off stems from injurious falsehood in free and fair competition, and as the Supreme Court held in *Consumers Distributing Co v Seiko*, it has

> …expanded to take into account the changing commercial realities in the present-day community. The simple wrong of selling one's goods deceitfully as those of another is not now the core of the action. It is the protection of the community from the consequential damage of unfair competition or unfair trading.[1007]

As noted by Teresa Scassa, unregistered marks can include elements such as names, getup and indicia or any other symbol, although protection is available only within the geographical territory where the goodwill or reputation have been acquired.[1008] This is a very attractive right for designers because as will be discussed in Chapter 6, the elements of design within this independent design segment reach beyond creation of the physical artefact i.e., the garment. The elements of the tort will be discussed in further detail in the section below regarding infringement.

4.3.3.1.2 Section 7

Section 7 of the *Trade-marks Act* is the codified version of passing off. However registration is not mandatory for individuals to take advantage of this recourse. It is important to note as observed by Scassa, prior to the 2015 amendments, the tort of passing off was "broader" than its statutory equivalent as the definition of a trademark (as defined in section 2 of the *Act*) was not

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1006 *Civil Code of Québec*, LRQ, c C-1991, s 1457 [CCQ].
1007 *Consumers Distributing Co v Seiko*, [1984] 1 SCR 583 at 598.
1008 Scassa, *Trademark Law*, *supra* note 994 at 289-290.

required for the purposes of tort.[1009] Once C-31 amendments take effect, the definition of trademarks will also be quite broad.[1010] Section 7 lists paragraphs a) to d) that deal with unfair competition including, misrepresentation that would cause or likely cause confusion,[1011] passing off goods and services as/for those requested,[1012] false description of the character, quality, quantity or composition, geographical origin and the mode of manufacture, production or performance,[1013] and making false statements that would discredit the business or goods of a competitor.[1014]

This section could prove to be quite attractive for designers since it can apply to both registered and unregistered trademarks. Further it is quite broad so as to include "context[s] where it is not just a similar trademark that is used, but also other elements of design or general presentation, as might be the case with the 'look and feel' of a website."[1015] This may provide an opportunity for designers to pursue a claim for infringement for the appropriation of the 'aesthetic' of their collection, their storefront designs and also their websites.

4.3.3.1.3 Section 1457 and Parasitism

Section 1457 of the CCQ protects businesses against unfair competition in Quebec. It states that

> Every person has a duty to abide by the rules of conduct incumbent on him, according to the circumstances, usage or law, so as not to cause injury to another.
>
> Where he is endowed with reason and fails in this duty, he is liable for any injury he causes to another by such fault and is bound to make reparation for the injury, whether it be bodily, moral or material in nature.

[1009] *Ibid*. Scassa argues that "[t]his may give the tort greater latitude in some cases, such as those involving disputes over distinctive sounds or scents" at 281.
[1010] Bill C-31, *supra* note 522, cl 319 (5), the amendment changes the definition of "trade-mark" in section 2 from marks, certification marks, distinguishing guises and proposed marks into "signs" which include "a word, a personal name, a design, a letter, a numeral, a colour, a figurative element, a three-dimensional shape, a hologram, a moving image, a mode of packaging goods, a sound, a scent, a taste, a texture and the positioning of a sign."
[1011] *Trade-marks Act*, *supra* note 7, s 7(b).
[1012] *Ibid*, s 7(c).
[1013] *Ibid*, s 7(d).
[1014] *Ibid*, s 7(a).
[1015] Scassa, *Trademark Law*, *supra* note 994 at 281 [citation omitted].

> He is also bound, in certain cases, to make reparation for injury caused to another by the act or fault of another person or by the act of things in his custody.[1016]

Section 1457 CCQ applies the same elements of the common law tort, following the case of *Ciba-Geigy v Apotex*, although there are slight differences in its application.[1017]

Parasitism is an emerging theory and right in Quebec. Although it is not codified in the current version of the CCQ, it was recognized and applied in *Groupe Pages jaunes Cie c 4143868 Canada inc*[1018] by the Quebec Court of Appeal who read it into the interpretation of section 1457 CCQ. Quoting Jean-Louis Baudouin, the Court concluded that actions of the defendant amounted to unfair competition,

> Il m'apparaît rassurant, pour ma part, de constater que les bonnes vieilles règles civilistes de la responsabilité civile sont suffisamment souples et adaptables pour régler avec efficacité le contentieux du parasitisme, sans qu'il soit besoin de créer marginalement un régime juridique spécial.[1019]

Hailing from France[1020] the theory of parasitism is quite broad, and, as Mistrale Goudreau observes, exceeds the traditional boundaries of unfair competition.[1021] Further, she observes that there are fundamental differences in the way that this theory is applied in Quebec than in France.[1022] One such fundamental difference she argues is that in France while a claimant can select between parasitism or trademark protection under the intellectual property regime, in Quebec a claimant is not limited and may apply for recourse and reparation under all possible

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[1016] *CCQ*, *supra* note 1006, s 1457.
[1017] Scassa, *Trademark Law*, *supra* note 994 at 284-285 [citation omitted].
[1018] *Groupe Pages jaunes Cie c 4143868 Canada inc*, 2011 QCCA 960 [Pages jaunes]. In this case, the defendant Cartotek had created a plastic book cover jacket that had printed advertisements on them, which he had sold to customers. These book jackets were then placed over the yellow pages phone directory cover, fully masking the existing advertisements printed on the front and back, thereby considerably lowering any value that Yellow Pages had offered to its advertising clients when it sold the placements to them originally. Yellow Pages sued Cartotek for, amongst other things, parasitism.
[1019] *Ibid* at para 13, citing from Jean-Louis Baudouin, "Le parasitisme" (2001) 31 Revue générale de droit 789 at 791.
[1020] Mistrale Goudreau, "Le Parasitisme Sanctionne en Cour D'Appel" 2011 23:3 Les Cahiers de Propriete Intellectuelle 1397 at 1399.
[1021] *Ibid* at 1400, 1405.
[1022] *Ibid* at 1405.

rights.[1023] She also notes that the application of the action in France is far more elaborate and nuanced than the way it has been interpreted in Quebec; the latter only requiring that free riding had occurred, i.e., the defendant had unfairly benefitted from the efforts of the claimant.[1024]

Such a right could open the door for a number of infringement claims in the fashion industry, since copying occurs quite frequently and because the boundaries of parasitism are quite broad and untested. Rather than having to prove any harm, this straightforward application of parasitism removes that particular elements required in section 7 for unregistered marks, needing only that the claimant prove that the defendant piggy-backed on their efforts. This right may benefit those designers who may not have a clear case of design infringement but a broader case of identity, theme or DNA theft. Notably this recourse is only available in Quebec and not in Ontario.

4.3.3.2 Registered Rights

Registered rights include the rights based on sections 19, 20 and 22 of the *Trade-marks Act*. Section 19 is straightforward, and grants the right holder the exclusive right to use the trademark throughout Canada.[1025] Section 20 prevents another from using a confusing trademark (with an exception if it a trade name of the individual or use other than a trademark of the geographical place of the business or character or quality of the goods).[1026] Section 20 also addresses counterfeited goods, an issue that is quite persistent in the market of luxury goods.[1027] Finally,

[1023] *Ibid* at 1402.
[1024] *Ibid*; Pages jaunes, *supra* note 1018 at para 21.
[1025] *Trade-marks Act*, *supra* note 7, s 19.
[1026] *Ibid*, ss 20 (1.1)(a) + (b).
[1027] *Ibid*, s 20(1)(a)(b)(c). For example, section 20(1)(a) applies to confusing marks as they apply to the sale, distribution or advertisement of any goods and services, whereas section (b) applies to the any goods and services that are manufactured, imported or exported that have an confusing trade name or mark, finally, section (c) applies to the label or packaging of goods that are not associated with the original mark.

section 22 protects against depreciation of the value of the trademark's goodwill stemming from the use of the trademark by another.[1028]

Each of these three sections require a demonstration that the trademark has been "used", based on section 4 of the *Act*, as interpreted in *Clairol International Corp v Thomas Supply*.[1029] As mentioned above, use of the fashion design aspect would require a finding of use based on goods and not services.[1030] This means that mark must, at the time of transfer of the good, "during the normal course of trade" be either marked on the good itself or on the packaging in a way that receiver of the property has the proper "notice of association" between the mark and the good.[1031]

Unlike other intellectual property rights, trademark protection will last as long as the mark is in use and continues to distinguish the goods and services of one company from that of another. A registered trademark can be renewed every fifteen years for a prescribed fee.[1032]

4.3.3.3 Copyright Overlap

In addition to the protection for signs, a trademark that is also a design may be eligible for copyright protection as mentioned above. Although the overlap between the two statutes is not explicitly acknowledged in the *Trade-marks Act*, it is mentioned in the *Copyright Act* under section 64(3)(b),[1033] which ensures that even after fifty authorized copies of a trademark is reproduced on a useful article, the trademark would remain protected under copyright law. An

[1028] *Ibid*, s 22.
[1029] *Clairol International Corp v Thomas Supply* (1968), 55 CPR 176.
[1030] *Trade-marks Act*, *supra* note 7, s 4(1).
[1031] *Ibid*.
[1032] *Ibid,* ss 46(1) & (2). Note that this will eventually become 10 years. Also note that if a trademark ceases to be used, or if an owner cannot furnish evidence of the use of the trademark in the three years proceeding the date on which the Registrar requires evidence of its use, then it can be expunged, see *Ibid*, s 45(1).
[1033] *Copyright Act*, *supra* note 6, s 64(3)(b).

owner of an article protected by trademark and copyright law might use the latter if the alleged infringement did not trigger trademark protection.[1034]

Quite often, established designers will use their trademark logos on their goods regularly or in a design pattern in order to demarcate authenticity and simultaneously make it difficult for copyists to copy without infringing both their trademark and copyright. Examples include the Louis Vuitton or Gucci and even Guess monograms.[1035]

An interesting example of the trademark and copyright overlap in the context of distinguishing guises and fashion apparel occurred in the case of *Crocs Canada v Holey Soles Holdings*.[1036] In this case, Crocs Canada [Crocs] had created ethylene shoes that had a configuration of holes at the top for airflow due to the rubbery material.[1037] After having established a commercial relationship with Crocs, Holey Soles Holdings [Holey Soles] started to make and sell similar shoes.[1038] Crocs attempted to stop Holey Soles by commencing an action for passing off, and Holey Soles countered by arguing that the holes were functional and could not be protected under the functionality doctrine.[1039] The question at issue was whether the configuration of the circles and semi circles were precluded from protection because they were functional and whether or not Crocs could take advantage of the *Copyright Act* based on exception 64(3)(c) as it related to trademarks.[1040]

[1034] In Canada, this overlap was used in an attempt to halt the parallel importation of chocolate bars by *Kraft*, which would have otherwise not violated trademark law. Kraft, the trademark owner sued an unauthorized distributor for copyright and trademark infringement, not for the sale of unauthorized goods, but rather for the sale of goods that were not authorized in the distribution and trademark licensing chain. Kraft could not bar the imports based on a trademark infringement claim, because the goods were their own, and instead they brought forth a suit for copyright infringement to try to prevent the sale of the chocolate bars, see *Euro-Excellence Inc, supra* note 877.

[1035] As will be discussed below under Remedies, in *Louis Vuitton Malletier SA v Singga Enterprises (Canada) Inc*, 2011 FC 776 [*Singga Enterprises*], Louis Vuitton Malletier, sued the defendant for infringing their monogram which is protected both of trademark and copyright.

[1036] *Crocs Canada*, *supra* note 883.

[1037] *Ibid* at para 2.

[1038] *Ibid* at para 6.

[1039] *Ibid* at para 1.

[1040] *Ibid* at para 9.

In the motion for summary judgement, Federal Court held that although there may be an element of functionality concerning the circle and semi circle holes configured on the shoe, "there is no evidence however clearly linking that function, or indeed any function, to their pattern and arrangement on the tops and sides of the shoes…"[1041] It was further held that not every mark that can be functional or utilitarian should be also excluded from trademark protection.[1042] This means that the configuration of these circles and semi-circles could also achieve distinctiveness and become a trademark.

Another way that copyright and trademark protection can overlap in the fashion industry is in the case of textile design. The design component may receive copyright protection, while the semiotic value associated with the article of fashion could receive trademark protection separately.[1043] An example of this could occur where a designer has a specific textile design created for their collection and that they use this textile until it has developed a secondary meaning in association with their clothing. A complicated situation could arise if a particular fabric was created independently by a textile designer but used by a particular fashion designer until the design has acquired secondary meaning in association with their line as it could effectively prevent others from using it as a fabric for clothing.

4.3.3.4 Certification Marks

In addition to the protection of marks and distinguishing guises, another way in which designers are able to use trademark protection is through the use of certification marks. The function of certification marks is similar to the designation of Haute Couture by the *Chambre Syndicale de*

[1041] *Ibid* at paras 12 & 19.
[1042] *Ibid* at 18; *Trade-marks Act*, *supra* note 7, s 13(1)(b).
[1043] An example of this could theoretically include the Burberry tartan design. Notably, copyright would only apply if the design met the eligibility requirements and the term of protection has not expired. The tartan is also registered as a trademark "Burberry Check (Colour Version)" Burberry Limited, No TMA675605 (25 October 2006) registered and also registered under the Scottish Register of Tartans, STA 1239 – the tartan date is listed as 1920.

la Haute Couture, in that it provides individuals, groups, or associations[1044] with the ability to control the

> (a) the character or quality of the goods or services,
> (b) the working conditions under which the goods have been produced or the services performed,
> (c) the class of persons by whom the goods have been produced or the services performed, or
> (d) the area within which the goods have been produced or the services performed,[1045]

Certification marks might not be able to protect fashion design directly, but can be used indirectly to prevent association with designs from being used without the proper licensing.[1046] There are a number of Canadian certification marks registered such as WOOLMARK,[1047] and FAIRTRADE COTTON PROGRAM.[1048] Notably, "Made in Canada" and "Product of Canada", are two prominent labels that are enforced by the Competition Bureau, and are not certification marks as per the *Trade-marks Act*.[1049] Finally, unlike the *Chambre Syndicale de la Haute Couture*, there is no overarching governing body in Canada that controls a certain quality or character of fashion design.

4.3.3.5 Infringement

4.3.3.5.1 Unregistered Rights

For a successful case of common law passing off three elements must be present:[1050] i) reputation or goodwill associated with the original trademark, ii) a misrepresentation resulting in "deception

[1044] Certification mark can only be adopted by those who are not "engaged in the manufacture, sale, leasing or hiring of goods" or services that the certification marks represent, see *Trade-marks Act*, *supra* note 7, s 23 (1).
[1045] *Ibid*, s 2 [certification mark].
[1046] *Ibid*, s 23 (3).
[1047] "Woolmark" IWS Nominee Company Ltd, UK No TMA144904 (28 May 1965) registered.
[1048] "Fairtrade Cotton Program" Fairtrade Labelling Organizations International eV App 1694416 (18 March 2016) allowed.
[1049] See Competition Bureau Canada, "Enforcement Guidelines: 'Product of Canada' 'Made in Canada'" Catalogue No lu54-25/2009E-PDF, (Ottawa: Industry Canada, 2009) online: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Made-in-Canada-2009-12-22.pdf/$FILE/Made-in-Canada-2009-12-22.pdf>.
[1050] *Ciba-Geigy Canada*, *supra* note 1003 at para at 132.

or confusion" and iii) there has to be actual or likely damage to the plaintiff.[1051] As mentioned above, the plaintiff would have to show that they have acquired goodwill within a specific territory, though, if a designer wishes to have recourse in more than that defined territory or province, they could bring an action under section 7 of the *Trade-marks Act*.[1052]

The level of goodwill associated with the mark, "relies upon the distinctiveness of the mark; i.e., the ability of the mark to trigger a connection in the mind of the consumer between the mark and the particular goods or services of the plaintiff."[1053]

The second requirement is the demonstration of misrepresentation, which causes or is likely to cause confusion as to the source, quality of the goods or services by directing attention to them.[1054] Either actual or likelihood of damage, stemming from confusion caused by the misrepresentation is the final requirement for passing off.[1055] The damage suffered must be caused "by reason of the erroneous belief engendered by the defendant's misrepresentation that the source of the defendant's goods or services is the same as the source of those offered by the plaintiff."[1056]

An example of a luxury fashion brand relying on the tort of passing off arose where the plaintiffs had not registered their line of bags for trademark protection in Canada. The interesting aspect of this case is that *Hermes Canada Inc v Henry High Class Kelly Retail Store*[1057] was concerned with the *design* of the bag and not with a word or artistic mark.[1058] In 2004, plaintiffs Hermes Canada sought an injunction at the Supreme Court of British Columbia against a retailer

[1051] Vaver, *supra* note 126 at 431, 434; see e.g., *Hermes Canada Inc v Park*, [2004] BCSC 1694.
[1052] Scassa, *Trademark Law*, 2d, *supra* note 535 at 379-380.
[1053] *Ibid* at 377.
[1054] *Ibid* at 413; *Kirkbi AG*, *supra* note 986 at para 68; *Mattel Inc v 3894207 Canada Inc*, 2006 SCC 22, The Supreme Court of Canada held the test person for confusion the standard of "ordinary casual consumers somewhat in a hurry [that] are likely to be deceived about the origin of the wares or services" at para 58.
[1055] *Kirkbi AG*, *supra* note 986 at para 68.
[1056] *Reckitt & Colman Products Ltd v Borden Inc*, [1990] 1 All ER 873 at 880.
[1057] *Hermes Canada Inc v Henry High Class Kelly Retail Store*, 2004 BCSC 1694 [*High Class Kelly*].
[1058] *Ibid* at para 15.

who was selling copies of bags similar to the "iconic" Birkin Bag in addition to the entire line of Hermes bags. Hermes had not registered their trademarks in Canada, so the action hinged on demonstrating the elements required for the common law tort of passing off.[1059] Nowhere on the bags did the retailer indicate that the bags were Hermes; instead the marks and engravings on the bags read "Henry High Class" and "Henry High Class Kelly".[1060]

The court acknowledged that the defendants did not actually use the Hermes trademarks. Instead the court held that that the similar bags could cause confusion for the plaintiff's existing clients because they might mistake these products as a "second line" made with inferior quality materials, which could result in tarnishing the company's trademark. The court held that goodwill had been established by Hermes, and that "the issue of misrepresentation is not convincing but it is at least sufficient to establish there is a fair question to be tried".[1061]

4.3.3.5.2 Registered Rights

Infringement of section 19 requires that the mark, the goods and services be identical in order to infringe.[1062] This section is useful in the case of counterfeit goods since most counterfeited goods aim to mimic the original identically. In the case of Canadian independent designers, counterfeiting might not be a huge issue as the counterfeit items are usually aimed at copying items in the luxury market due to the brand affiliation, demand, and the prices of the original goods.[1063] For example, it was reported that Michael Kors, an American mid-range luxury designer began to investigate the alleged proliferation of counterfeit handbags and other items being sold throughout Montreal in an effort to take a civil action against the vendors who were

[1059] *Ibid* at para 22.
[1060] *Ibid* at para 29.
[1061] *Ibid* at para 48.
[1062] *Trade-marks Act*, *supra* note 7, s 19.
[1063] Bertrand Marotte, "Luxury Brand Michael Kors Strikes Back at Quebec Counterfeiters" *The Globe and Mail* (23 April 2015), online: <http://www.theglobeandmail.com/report-on-business/luxury-brand-michael-kors-strikes-back-at-quebec-counterfeiters/article24078693/>.

allegedly selling them.[1064] Michael Kors has numerous trademark registrations for an array of goods.[1065]

Unlike section 19, a finding of infringement under section 20 does not require that the infringing trademarks or goods be identical to the original mark.[1066] For example, section 20 may be triggered when an individual uses a similar or confusing mark on different goods. The definition for confusion is set out in section 6 of the *Trade-marks Act*[1067] and is determined by an evaluation of the factors set out in section 6(5).

> a) the inherent distinctiveness of the trade-marks or trade-names and the extent to which they have become known;
> b) the length of time the trade-marks or trade-names have been in use;
> c) the nature of the wares, services or business;
> d) the nature of the trade; and
> e) the degree of resemblance between the trade-marks or trade-names, including in appearance or sound or in the ideas suggested by them.[1068]

Section 20 might prove to be quite useful where the mark is used by an individual who "sells, distributes or advertises any goods or services with a confusing trade-mark or trade-name"[1069] or sells label or packaging that uses another's trademark or name.[1070] With the broader interpretation of trademarks, this type of protection may cover many different circumstances

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[1064] *Ibid*.
[1065] See e.g., "Michael Michael Kors" Michael Kors International GmbH, USA No TMA823427 (4 May 2012) registered. Michael Kors brought an action against Beyond the Rack (BTR), an online shopping site (flash sales) for trademark infringement alleging that BTR sold counterfeit bags as it was not an authorized dealer, which BTR denies doing. *Michael Kors, LLC v Beyond the Rack Enterprises Inc*, 2012 FC 1355; BTR sought to strike several paragraphs from their plaintiffs statement of claim but was denied at the federal court and then the federal court of appeal level, see *Michael Kors LLC v Beyond the Rack Enterprises Inc*, 2013 FCA 107.
[1066] Scassa, *Trademark Law*, *supra* note 994 at 360.
[1067] *Trade-marks Act*, *supra* note 7, s 2 [confusing] "trade-name, means a trade-mark or trade-name the use of which would cause confusion in the manner and circumstances described in section 6".
[1068] *Trade-marks Act*, *supra* note 7, s 6(5); This section was interpreted by the Supreme Court of Canada's decision in *Mattel Inc*, *supra* note 1054; *Tommy Hilfiger Licensing Inc v Produits de Qualité IMD Inc*, (2005) 27 CPR (4th) 1 FC, in this case, a Canadian based company had been using a logos « Explore Canada » which were quite similar to the Hilfiger flag logo design. The Court found that there was no likelihood of depreciation based on section 22, but found that there was a likelihood of confusion in the case of the rectangle flag with the colours because it was a strong mark and had gained distinctiveness at para 124-132.
[1069] *Trade-marks Act*, *supra* note 7, s 20(1)(a).
[1070] *Ibid*, s 20(1)(c).

including details, like the leather tab placed on outerwear or the red sole of a shoe mentioned above. Again, it may be quite beneficial to those designers who have decided to incorporate some element of a trademark into their goods to truly distinguish their goods from the goods of others.

Finally, section 22 of the *Act*, protects registered trademarks against depreciation of the goodwill in their trademark. In *Veuve Clicquot Ponsardin v Boutiques Cliquot Ltée*,[1071] the Supreme Court of Canada applied a four-factor test to determine depreciation, which includes

1) Use of the claimant's registered mark [1072]
2) Proof of goodwill[1073]
3) The likely connection of linkage made by consumers between the claimant's goodwill and the defendants' use[1074]
4) Likelihood of depreciation[1075]

Thus in order for a design to benefit from protection, the designer would first have to register it. The second requirement, establishing goodwill, "presupposes the existence of significant goodwill capable of being depreciated by a non-confusing mark."[1076] Note that the mark need not be famous, yet the factors implicitly require an established level of recognition of the original mark.[1077] Using the example of the leather tag and its placement (Mackage) mentioned above, if enough recognition of the distinct leather tag and its position on the outerwear is garnered so that the public would automatically associate the tag and its placement with the company, then this requirement would be met. The third requirement is to show that a consumer has made a mental

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1071 *Veuve Clicquot Ponsardin v Boutiques Cliquot Ltée*, 2006 SCC 23.
1072 *Ibid* at para 47; as mentioned above, the criteria for use are set out in section 4 of the *Trade-marks Act*, *supra* note 7.
1073 *Veuve Clicquot*, *supra* note 1071 at para 50.
1074 *Ibid* at para 55.
1075 *Ibid* at para 62.
1076 *Ibid* at para 53.
1077 *Ibid* at para 54.

link between the two marks, using the standard of a "somewhat hurried consumer." [1078] This element would be present if another company starting using similar sized and shaped tags that were the in the same colour and in the same placement as those of the original company, even if they did not necessarily have the same material, logo or image; and if these secondary tags were used on an inferior product within the same category of goods. Although it could be considered as non-confusing because the material and markings of the tag were different, it might still fulfill this requirement. The damage that has to be demonstrated is the "likelihood 'of depreciating the value of the goodwill attaching' to the claimant's trade-marks."[1079] A showing of actual damage is not required, so that if customers had not even purchased the secondary brand but were deterred from purchasing it because of the quality, and related this to the first brand, then likelihood of depreciation would be demonstrated.

4.3.4 Contours of Protection

One of the most effective means of protection against counterfeiting for well-known luxury fashion brands has been through the use of trademark protection.[1080] Nonetheless, commentators have argued that the reliance on trademark protection by these well known brands has skewed innovation by encouraging "[d]esigners who are protected by trademark and trade dress to innovate in ways that play to these legal advantages."[1081]

An example of this is when the trademark logo has achieved a strong distinctiveness and as a result designers incorporate their trademarks all over their apparel in an effort to guarantee

[1078] *Ibid* at para 56.
[1079] *Ibid* at para 69.
[1080] Notably, trademark protection has been agressively used by luxury and large brands, see *Singga Enterprises, supra* note 1035; *Louis Vuitton Malletier SA v 486353 BC Ltd*, 2008 BCSC 799; *Louis Vuitton Malletier SA v Yang*, 2007 FC 1179; *High Class Kelly*, *supra* note 1057; see *Tommy Hilfiger Licensing Inc v International Clothiers Inc*, 2004 FCA 252 at para 44, in this case Appeal Court held that the use of the similar Crest Design by another clothing company resulted in confusion.
[1081] Hemphill & Suk, "Economics of Fashion", *supra* note 120 at 1176 -1179.

protection against both copying the artistic work in the logo and counterfeiting.[1082] C Scott Hemphill and Jeannie Suk suggest that reliance on trademark protection diminishes 'design' innovation and instead creates a reliance on the use of the trademarks to ornament their goods.[1083]

It may be difficult for independent designers to take advantage of trademark protection in this context in the same way that Louis Vuitton or Gucci would, because as mentioned above, other than a label, name, design, a tag or some type of trademark incorporated into their works, they typically do not use trademarks in the form of monograms to ornament their works.[1084] One reason for this may be that their monogram might have not achieved the same semiotic status as the famous luxury brands, and therefore their customers might not be making the type of association with their monogram in the same way that they would with the major luxury labels, i.e., that people are not just buying the piece because of the semiotic value associated with the monogram printed or embroidered across it, like a plain white t-shirt with D&G or LV. Another reason is that creating customized prints and fabrics may not be financially feasible for the independent fashion design segment.

Designers may benefit from the recourses available for passing off, parasitism and unfair competition/concurrence déloyale, where they have acquired goodwill can benefit from this type of protection even though they have not registered their marks.

Challenges for fashion designers prior to the amendment might include the requirement of inherent or acquired distinctiveness at the time of registration for a traditional mark, or

[1082] *Ibid*.
[1083] *Ibid*.
[1084] Having said this, some designers alluded to the fact that their clientele is drawn to purchase pieces from them by virtue of the fact that they want to own something made by them, but none of them have used monograms or trademarks to ornament their design.

acquired distinctiveness through use for a distinguishing guise prior to registration.[1085] However, trademark protection (i.e., distinguishing guise) is difficult to obtain for less established designers since distinctiveness is required by the time their works are on the market.

One way that designers may overcome the difficulties of establishing distinctiveness when first introducing a design is by registering their works as industrial designs, which would grant them protection for up to ten years if renewed, otherwise safeguarding a period of time in which they can use to develop distinctiveness.[1086] This way, the registered design has the opportunity to achieve distinctiveness while it is protected from competition. Once distinctiveness has been achieved, the designer can then extend this protection by registering for trademark protection.[1087]

Cost is also a drawback for designers, as trademarks initially cost $250 to file an application, and an additional $200 for issuance. A renewal fee, filed after 15 years of protection is $350. Therefore similar to industrial design protection, the costs for a trademark are quite high and possibly prohibitive for designers who are seeking to protect garment designs. In the long run trademark protection for selective elements that re-occur throughout their collections (i.e., signature, detail etc.) could hugely benefit the designer because of the intangible long term signalling benefits.

4.4 Confidential Information

4.4.1 In the Context of Fashion

The law of confidential information, unlike the other categories of intellectual property law reviewed in this chapter, does not apply to specific subject matter *per se* (marks, expression of

[1085] *Trade-marks Act*, *supra* note 7, s 13(1)(a); Scassa, *Trademark Law*, 2d, *supra* note 535 at 285; Vaver, *supra* note 126 at 457.
[1086] See *WCC Container Sales Ltd v Haul-All Equipment Ltd*, [2003] FCJ No 1266, 28 CPR (4th) 175; see Scassa, *Trademark Law*, 2d, *supra* note 535 at 295-297.
[1087] *Ibid*.

original ideas, inventions, design), but rather it applies to a broad range of secret and confidential elements within a business.[1088] Due to the nature of the expansive research that fashion designers undertake in the forecasting and product development phase of their work, the laws protecting confidential information may prove useful to prevent the dissemination of research and development, and the subsequent copying that might occur before designs are publicly shown. This might include information on trends in patterns, colours, textiles, and designs, which may include information obtained while travelling to different countries.[1089] They can even include suppliers, techniques, processes, future marketing plans, and general elements of the collection.

Thus, protection can be quite broad and long lasting for some elements such as suppliers, client lists, and techniques, while protection for other elements such as the design or colour palette ends once it is shared with the public. The point of having these elements secret is to prevent rival businesses from free-riding on the investment and resources amassed by the original company.

4.4.2 Scope of Protection

Unlike the intellectual property legislation discussed above, the framework for confidential information protection does not stem from a "discrete legal regime." [1090] Confidential information is a hybrid cause of action, stemming from various common law principles.[1091] In *International Corona Resources Ltd v LAC Minerals Ltd* the Supreme Court held that

> The foundation of action for breach of confidence does not rest solely on one of the traditional jurisdictional bases for action of contract, equity or property. The action is *sui generis* relying on all three to enforce the policy of the law that confidences be respected.[1092]

[1088] Hagen et al, *supra* note 908 at 575.
[1089] See *Global Value Chain*, *supra* note 141 at 6.
[1090] Gervais & Judge, *supra* note 7 at 879.
[1091] *Cadbury Schweppes Inc v FBI Foods Ltd*, [1999] 1 SCR 142 [*FBI Foods*].
[1092] *International Corona Resources Ltd v LAC Minerals Ltd*, [1989] 2 SCR 574 [*Lac Minerals*].

Protection lasts for as long as the confidential elements remain secret, in other words, until the information is disseminated to the public. This remains one of the biggest differences between confidential information and other kinds of intellectual property rights:[1093] while the bargain between the creator and the government requires disclosure of the work in some intellectual property regimes (e.g., industrial design and patent law), legal protection for confidential information ends once the information becomes public.[1094]

Confidential information is a broad umbrella under which the term trade secret can be defined.[1095] Trade secret has a "commercial character" which can include methods or know how, technical information and client lists.[1096] At common law, confidential information may be protected by contract, the tort of conversion (where it is considered as property), or as a result of a fiduciary duty between the parties, which is determined by a number of factors.[1097] In Quebec, protection for confidential information is codified in articles 1472, 1612 and 2088 of the *Civil Code of Quebec* (CCQ).

> **1472**. A person may free himself from his liability for injury caused to another as a result of the disclosure of a trade secret by proving that considerations of general interest prevailed over keeping the secret and, particularly, that its disclosure was justified for reasons of public health or safety.[1098]
>
> **1612.** The loss sustained by the owner of a trade secret includes the investment expenses incurred for its acquisition, perfection and use; the profit of which he is deprived may be compensated for through payment of royalties.[1099]
>
> **2088.** The employee is bound not only to perform his work with prudence and diligence,

[1093] Hagen et al, *supra* note 908 at 573.
[1094] *Ibid.*
[1095] Gervais & Judge, *supra* note 7 at 891.
[1096] Alison J Youngman, Craig Collins-Williams & Simon Kupi, "Confidential Information", in Stuart C Stuart C McCormack, *supra* note 535, 431 at 440.
[1097] Hagen et al, *supra* note 908 at 575-576.
[1098] *CCQ, supra* note 1006, s 1472.
[1099] *Ibid*, s 1612.

> but also to act faithfully and honestly and not to use any confidential information he obtains in the performance or in the course of his work.[1100]
>
> These obligations continue for a reasonable time after the contract terminates and permanently where the information concerns the reputation and private life of others.[1101]

Although in Quebec confidential information is rooted in the CCQ, it has been noted that "principles of equity borrowed from the common law" are used in order to interpret these provisions.[1102]

4.4.3 Rights and Infringement

There are three factors required to find infringement of confidential information under common law. Based on the Supreme Court decision in *Lac Minerals*, the test for breach of confidential information includes "that the information conveyed was confidential, that it was communicated in confidence, and that it was misused by the party to whom it was communicated."[1103]

The first criterion requires that the information be confidential, meaning that it cannot be available or already known to the public.[1104] Example of the first criterion (that the information be confidential) can be demonstrated by the requirement of confidentiality and non-disclosure covenants to be signed in contracts and also by labeling information as confidential when relayed from one party to another. There are also other security measures that can be taken by the employer including taking reasonable steps to guard or secure information.

The second criterion required to determine whether the information was communicated in confidence is the reasonable person test which takes into consideration the nature of the

[1100] *Ibid*, s 2088.
[1101] *Ibid*.
[1102] Youngman, Collins-Williams & Kupi, *supra* note 1096 at 439, the authors cite *Positron v Desroches*, [1988] RJQ 1636 (CS) for this proposition.
[1103] *Lac Minerals*, *supra* note 1092 at para 10.
[1104] *Ibid* at para 155.

circumstances under which the information was disclosed:[1105] "[i]n particular, where information of commercial or industrial value is given on a business-like basis and with some avowed common object in mind, such as a joint venture or the manufacture of articles by one party for the other…"[1106] Such a circumstance may arise where an employee or contractor receives the information for a future collection e.g., if the design pattern was disclosed to the contractor in confidence for the purpose of production in confidence, prior to it being released in the public.

Finally, the third element requires that an individual misuse the information in question,[1107] e.g., where for the confider there would be a loss, and for the confidante would there be a gain or advantage.[1108] An example of this might include if the contractor then supplies a competitor with the confidential information – in this case designs – or reproduces them for commercial purposes.

Under the CCQ, there are several provisions that extend to different situations.[1109] For example, article 1612 is concerned with compensation if a trade secret is divulged,[1110] while article 2088 imposes a requirement on employees "not use any confidential information he obtains in the performance or in the course of his work."[1111] Article 2088 CCQ applies in the absence of any non-competition clause and any clause restricting the mobility of the worker.[1112]

[1105] *Ibid* at para 161.
[1106] *Coco v AN Clark (Engineers) Ltd*, [1969] RPC 41 at 48.
[1107] *Lac Minerals*, *supra* note 1092 at para 163.
[1108] Hagen et al, *supra* note 908 at 611.
[1109] For example, article 1472 CCQ, protects individuals who divulge trade secrets in the public interest, covering situations where consumers could be harmed by a product or where a cure is available for a deadly disease but kept secret. In this case, it is a positive obligation imposed to divulge the information. Such a circumstance could include a situation where flammable fabrics were used by a retailer who did not indicate this information on the label, causing potential and imminent harm to anyone walking by an open flame or stove, or in the case where the fibre content of the clothing was mislabelled, causing severe allergic reactions to someone who is allergic to the fibre which was omitted. This article would not relate to issues concerning design directly; Gervais & Judge, *supra* note 7 at 882.
[1110] *Ibid*.
[1111] *CCQ*, *supra* note 1006, s 2088.
[1112] *Éditions CEC inc c Hough*, 2008 QCCS 4526 at para 55.

The type of confidential information foreseen in this section was quoted from Professor Bich in *Éditions CEC inc c Hough*,

> Sont habituellement considérés comme confidentiels les secrets de commerce ou de fabrication, les plans et maquettes liés au développement d'une technique ou d'un produit, les listes de clients secrètes ou contenant des renseignements privilégiés (une liste de clients n'étant pas nécessairement confidentielle, comme on vient de le voir) ou toute autre information qui n'est pas généralement connue ou ne peut pas être obtenue ou reconstituée facilement. [1113]

The application of the common or civil law protection is only successful if all of the requirements are met. What of a scenario where an individual in a common law jurisdiction who was not the intended recipient of the information by any party accessed it online? Such a situation occurred where an individual who had no ties to the fashion industry (not employed by or having any interest related to the industry) did a Google search and was able to find a capsule collection from H&M featuring Balmain, that was not disclosed or meant to be disclosed to the public until the slated release date in November 2015.[1114] The individual then allegedly posted the pictures of the capsule collection online on their social media account.[1115] In this scenario, the information was posted to the H&M website and indexed by Google, so that when the individual entered the search parameters, the webpages appeared. In an interview, the individual who was able to access the information stated,

> The real story is terribly unexciting: H&M's site was indexed by Google and I happened to search at the right time using the right parameters. All images were taken from that H&M URL. No surprise, that site is no longer live. A good note to web dev teams working on super hot designer collabs: stay in your sandbox![1116]

[1113] *Ibid* at para 63 [emphasis omitted], citing Marie-France Bich, "*La viduité post-emploi: loyauté, discrétion et clauses restrictives*" Développements récents en droit de la propriété intellectuelle, (Montreal: Éditions Yvon Blais, 2003) at 307.
[1114] Véronique Hyland, "Did a Random Woman in Chicago Just Hack H&M to Get Balmain Photos?" NY Magazine (8 October 2015), online: <http://nymag.com/thecut/2015/10/did-a-chicago-woman-hack-hm-for-balmain-pics.html>.
[1115] *Ibid*.
[1116] *Ibid*.

Occurrences like this one illustrate the importance of not disclosing the information to the public. Measures taken by the company to prevent such information could include firewalls or encryptions, or else the protection does not apply.

4.4.4 Contours of Protection

Staff, employees, contractors including designers at firms should be bound to keep information confidential and might require signing confidentiality and non-disclosure agreements for this purpose. Commentators have noted that "[a]lthough design trends are publicly available and thus cannot be secrets that belong to any one company, the interpretation of those trends into specific, fixed designs can be maintained confidentially by a company until the company releases the products to magazine editors, during runway shows, in stores or on its website."[1117]

Confidential information can be a very useful tool for designers to protect their proprietary information. For example, it is possible for an entire business strategy to be created and to be protected based on confidential information.[1118] An exceptional example of confidential agreement in the fashion industry was the secrecy surrounding Kate Middleton's wedding dress created by Sarah Burton in 2011. In this situation, the designer herself was bound to a confidentiality agreement with the Royal Palace[1119] to keep the design secret. Within seconds of the reveal, the media had reported that copyists were making similar designs available to the masses within weeks.[1120]

[1117] Tamar Duvdevani & Melissa Reinckens, "Can a Clothing Design be a Trade Secret?" (2011) 2 Law A La Mode 4 at 4.
[1118] Media Alert MA/2005/20, "Italy and WIPO to Host Conference on Fashion and Intellectual Property" WIPO (20 June 2005), online: <http://www.wipo.int/pressroom/en/prdocs/2005/wipo_ma_2005_20.html>.
[1119] Bridget Arsenault & Sarah Ball, "Royal Watch: How Sarah Burton's Parents Finally Saw Kate Middleton's Wedding Dress" *Vanity Fair* (3 November 2011), online: <http://www.vanityfair.com/online/daily/2011/11/Royal-Watch-How-Sarah-Burtons-Parents-Finally-Saw-Kate-Middletons-Wedding-Dress>.
[1120] Jennifer Arrow, "Steal This Look: They're Already Knocking Off Kate's Wedding Dress!" *E!Online* (29 April 2011), online: <http://ca.eonline.com/news/239294/steal-this-look-they-re-already-knocking-off-kate-s-wedding-dress>.

Fashion companies understand the value of confidentiality agreements and actively enforce them. In 2013, retailer J. Crew sued a former employee for a breach of confidentiality.[1121] When the employee resigned to take up a new position with a menswear line similar to the aesthetic of J. Crew, J. Crew alleged upon searching his computer that he allegedly took information from his work computer and furnished to his new employers. This confidential information that was allegedly taken included, "product design specifications and measurements; …production development calendar; contact information for J. Crew's key manufacturing resources; lists of third-party brands with whom J. Crew collaborates; J. Crew's men's design year-end financials, men's design budgets, and men's presentation sample budgets; and design inspirations."[1122] In this case, the employee had signed a confidentiality agreement with the company and had agreed to the obligations set within the parameters of the agreement.[1123]

Although it is an interesting avenue for protection, the benefits of trade secret protection are limited for designs and may only protect the article of fashion design prior to it being revealed at which time the product becomes public information. Notably, once the design is made public and reverse engineered, there is little recourse under trade secret law. Nonetheless trade secret protection can keep techniques, processes and production information that are instrumental to the creation of the design secret, elements that cannot be protected under other intellectual property laws. Finally, in the scenario of H&M's capsule collection mentioned above, it is incumbent on the designer to ensure that in the digital age, steps are taken to ensure that information remains confidential.

[1121] Complaint, *J Crew Group Inc v Dwight Fenton*, Index 650271/2013 Supreme Court of the State of New York, County of New York at paras 8-10.
[1122] *Ibid* at para 10; Jessica Mendelson, "Fashion Company Launches Breach of Confidentiality/Unfair Competition Suit Against Former Employee" *lexology.com* (7 February 2013), online: lexology.com <http://www.lexology.com/library/detail.aspx?g=86ad5e0e-99f6-4abe-8241-876c0b5f53f7>.
[1123] *J Crew Group*, *supra* note 1121 at para 8.

4.5 Patent Act

4.5.1 In the Context of Fashion

Although not directly related to the subject matter or scope of this thesis, it is worth briefly mentioning that patent law can be used to protect some elements that contribute to design in the fashion industry. Examples of this include inventions in fashion, such as smart fabrics and textiles,[1124] innovative clothing inventions such as clothing that has a function,[1125] and new methods of bonding or creating textiles.[1126] The zipper, patented in 1955 is used on a number of garments including jackets, clothes and shoes.[1127]

4.5.2 Scope of Protection

Patents are based on the 'bargain' between the inventor and the government; the "patent bargain" is based on a grant of limited time exclusive rights for the disclosure of new and useful inventions to the public.[1128] It is believed that patents provide incentives to creators that promote and encourage innovation.[1129]

[1124] "Temperature and Moisture Responsive Smart Textile" Can Patent No CA 2599103 (application filed on 28 August 2007) Abstract: "A textile fabric includes a smooth surface with one or more regions having a bound coating of hydrogel exhibiting expansion or contraction in response to change in relative humidity or exposure to liquid sweat or a combination thereof, adjusting insulation performance, air movement, and/or liquid management of the textile fabric in response to ambient conditions."

[1125] An example of this is Spanx, which is a body shaping garment "Two –Ply Body-Smoothing Undergarment", Can Patent No C 2482968, PCT Patent no PCT/US2003/011045 (application filed on 11 April 2002); "Convertible Maternity Garment" Can Patent No CA 2767641, PCT Patent No PCT/IB2010/001553 (application filed on 25 June 2010). Abstract: "A convertible maternity garment that includes a first garment configured and arranged as a maternity garment to be worn by a woman during her maternity term and a second garment constructed from a portion of the first garment to provide a garment having a configuration for non-maternity use, where a removable portion is provided and where a first waistband and an alternate waistband are provided and configured so that both waistbands are functional waistbands that may be present on the garment simultaneously, but are selectively functional."

[1126] "Bonded Composite Knitted Structural Textiles" Can Patent No CA 2230939, PCT Patent No PCT/US1996/013458 (application filed on 21 August 1996).

[1127] "Zipper", Can Patent No CA 519222 (6 December 1955).

[1128] *Apotex Inc, supra* note 184 at para 37.

[1129] *Teva Canada, supra* note 184 at para 32.

Four eligibility requirements have to be met in order for a patent to be obtained. These include novelty,[1130] usefulness,[1131] non-obviousness[1132] and that it meets the subject matter requirement defined under section 2 of the *Patent Act*.[1133] Each of these requirements have been codified and interpreted by case law.

Novelty requires that the work is undisclosed or does not previously exist or be known to the public more than one year prior to the date of filing the application.[1134] Usefulness requires that the invention is actually useful[1135] and that it is delivers what it claims to deliver.[1136] Non-obviousness is defined as a claim that "would not have been obvious on the claim date to a person skilled in the art or science to which it pertains," considering information disclosed a year prior to filing, (by the applicant or another person who learned it from the applicant either directly or indirectly) or by making it available to the public, and information prior to the claim date by a different person, where the information became available to the public.[1137] Unlike the preceding types of intellectual property law discussed above which preclude methods, utility and functionality, patents protect "any new and useful art, process, machine, manufacture or composition of matter, or any new and useful improvement" of the same.[1138] Notably, case law has expanded the possible categories that patent protection may apply to, including patents for business methods.[1139]

1130 *Patent Act*, RSC 1985 c P-4, s 2 [invention].
1131 *Ibid*.
1132 *Ibid*, s 28.3.
1133 *Ibid*, s 2 [interpretation].
1134 *Ibid*, s 28.2(1)(a).
1135 *Apotex Inc, supra* note 184 at para 52 quoting *Proctor & Gamble Co v Bristol-Myers Canada Ltd*, (1979) 42 CPR (2d) 33 (FCA) at 39 ("By definition an 'invention' includes a 'new and useful process.' A 'new' process is not an invention unless it is 'useful' in some practical sense. Knowing a new process without knowing its utility is not in my view knowledge of an 'invention'").
1136 *Consolboard Inc v MacMillan Bloedel (Sask) Ltd*, [1981] 1 SCR 504 at 525.
1137 *Patent Act*, *supra* note 1130, s 28.3.
1138 *Ibid*, s 2.
1139 *Canada (AG) v Amazon.com Inc*, 2011 FCA 328 at para 63. The Federal Court of Appeals held that it was possible that business methods could be patentable; the patent for various business methods were granted by the

4.5.3 Rights and Infringement

4.5.3.1 Rights

Registration is mandatory as it is a part of the 'bargain' to disclose the invention to the public. Claims are an important part of the registration process and require the technical skills of agents to properly draft them so that they are not too broad or too narrow so as to invalidate the patent. The specifications required are listed in section 27(3) of the Act, which include the directive to "correctly and fully describe the invention and its operation or use as contemplated by the inventor."[1140]

Patent protection can last for twenty years starting from the filing date of the patent, rather than its registration date.[1141] The rights granted include "making, constructing and using the invention and selling it to others to be used, subject to adjudication in respect thereof before any court of competent jurisdiction."[1142]

Like all of the other categories discussed above, patent protection is territorial which means that a successful application in Canada will only be valid within Canadian borders.

4.5.3.2 Infringement

Infringement is not explicitly defined in the *Patent Act*, instead, it is understood implicitly that the rights extended to the patentee would be contravened if anyone exercised them without authorization.[1143] These actions include, "making, constructing and using the invention and

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Canadian Intellectual Property Office, see e.g., "Method and System for Placing a Purchase Order Via A Communications Network" Patent CA 2246933 (11 September 1998).

[1140] *Patent Act*, *supra* note 1130, s 27(3).

[1141] *Ibid*, s 44.

[1142] *Ibid*, s 42.

[1143] Hagen et al, *supra* note 908 at 796.

selling it to others."[1144] Hagen et al, observe that infringement can also arise from inducing someone to contravene exclusive patent rights.[1145] These criteria were set out in *Dableh v Ontario Hydro*.[1146]

4.5.4 Contours of Protection

The strength of patent protection lies in the relevance of subject matter that the designer is attempting to patent. Patent protection would not be a useful tool for design in of itself. However, in the case that the designer were innovating new techniques or processes, or creating new machinery, fabrics or other types of inventions that could then be applied to the fashion industry, then patent protection would be extremely useful.[1147]

Aside from this, patent law is not suitable to the subject matter, as it extends only to the specific works listed in the *Act* as interpreted by case law, (i.e., invention, composition, methods). Design is not included as one of these categories. In addition to the time it takes to register a work and the amount of resources and money it costs, it could take over two years to obtain a patent.[1148] Particular to patents, under section 10 of the *Act*, there is a period of public inspection that takes place following an initial eighteen-month confidentiality period.[1149] Annual maintenance fees that increase over time follow an initial application fee of $200.[1150] Unless the

[1144] *Patent Act*, *supra* note 1130, s 42.
[1145] Hagen et al, *supra* note 908 at 796.
[1146] *Dableh v Ontario Hydro* (1996), 68 CPR (3d) 129 (FCA).
[1147] Lululemon has used patents successfully to protect its clothing line, see *Lululemon Athletica Canada Inc v Calvin Klein Inc*, USDDelaware Case 1:12-cv-01034-SLR; see CBC "Lululemon Settles Yoga Pants Patent Lawsuit with Calvin Klein" *CBC* (21 November 2012), online: <http://www.cbc.ca/news/business/lululemon-settles-yoga-pants-patent-lawsuit-with-calvin-klein-1.1183253>.
[1148] As Rosenblatt suggests, design patents in the US are also not suitable because of the time and costs associated with them, stating that "by the time a design patent issues, copies of the design will have come and gone, and the design will have gone out of style", Rosenblatt, "Negative Space", *supra* note 2 at 352 [citation omitted].
[1149] *Patent Act*, *supra* note 1130, s 10.
[1150] For example, maintenance fees for 2, 3 and 4 is $50 for small entities and $100 for standard fee; by years 15 to 19, the rate increases to $225 for small entities and $450 for standard fee, see CIPO, Fees-Patents, online: <http://www.ic.gc.ca/eic/site/cipointernet-internetopic.nsf/eng/wr00142.html?Open&wt_src=cipo-patent-main>.

designer actually foresees a long term or future benefit from the invention or process they are attempting to protect, this protection may be irrelevant in the fashion industry.

4.6 Remedies

4.6.1 Copyright

There are a number of remedies to choose from if a designer opts to pursue a claim for infringement against a copier for their economic and their moral rights.[1151] These include injunction, damages, accounts, delivery up as well as statutory damages.[1152] An injunction can be granted in the court's discretion to prevent the infringer from starting or from continuing to conduct the infringing act which is being claimed – this could include reproducing, selling, or advertising their infringing articles of fashion design.[1153] Such a remedy may be granted at the beginning, middle or following a final decision.

Damages would be awarded if the plaintiff could demonstrate that a loss was suffered due to the infringement. It is designed to put the claimant back to the same financial position he or she would have been prior to the infringement e.g., lost sales, royalties and intangible losses.[1154] Such an example might also occur if a designer's article of fashion design was copied and sold for a lesser amount, causing customers to abandon the original. This might occur in the case of fast fashion where the costs of reproducing certain designs or pattern are far lower than the investment and resources required for the development of the original design. An accounting of profits occurs when the plaintiff opts to be compensated from the revenues received by the infringer as a result of the sale of the infringing works. In order to do this, the plaintiff must

[1151] *Copyright Act*, *supra* note 6, ss 34(1) & (2).
[1152] *Ibid*.
[1153] See e.g., *Ibid*, s 39.1(1); Vaver, *supra* note 126 at 618; An example of the use of an injunction in the US is in the case of Anna Sui against Forever 21 for the unauthorized copying of copyright protected prints on her designs. While it appears that they settled out of court, the judge issued an injunction and ordered to destroy "all remaining inventory" in their possession, based on their settlement, see *Anna Sui Corp v Forever 21*, 07 Civ 3235 (SDNY 2009), at paras 5-6.
[1154] Vaver, *supra* note 126 at 631-636.

show receipts or revenues stemming from the infringement and it is the responsibility of the defendant to prove his or her costs.[1155]

Statutory damages are an option that a designer may elect if they choose to forgo damages and accounting of profits.[1156] This could in many circumstances work out to be a beneficial option for the plaintiff because more often than not, infringers in the fashion industry infringe for commercial purposes. Statutory damages for commercial purposes can result in an award ranging from $500 up to $20,000 per infringement per work within the proceeding.[1157]

If the infringement was noncommercial, then the amounts decrease in range between $100 and $5000 – such a scenario might occur if someone had unawfully obtained a work and copied it for personal use.[1158] Should the copyright owner elect statutory damages in the case of commercial purposes and if it was proven that the infringer "was not aware and had no reasonable grounds to believe" that they had infringed copyright then this amount drops between the range of $200 and $500 dollars.[1159] For innocent infringers, in other words, those "not aware and had no reasonable grounds for suspecting that copyright subsisted in the work or other subject-matter in question" only an injunction is available.[1160] This section would not apply if the design were registered at the time. [1161]

4.6.2 Industrial Design

Remedies are defined in section 15.1 of the *Industrial Design Act* and include "injunction and the recovery of damages or profits, for punitive damages, and for the disposal of any infringing

[1155] *Copyright Act*, *supra* note 6, ss 35(1) (a) & (b).
[1156] *Ibid,* s 38.1(1).
[1157] *Ibid,* s 38.1 (1) (a).
[1158] *Ibid,* s 38.1(1)(b).
[1159] *Ibid,* s 38.1(2).
[1160] *Ibid,* s 39 (1).
[1161] *Ibid,* s 39 (2).

article or kit." [1162] These remedies are quite similar to the remedies available under trademark law.

Similar to copyright, an innocent infringer is defined as an individual who had no reasonable grounds to suspect that a design was registered at the time of infringement.[1163] One major difference between this provision and the copyright provision is that the *Copyright Act* states that registration bars such a finding (as mentioned above), even though registration is not mandatory. Interestingly, in the *Industrial Design Act*, innocent infringement it does not apply if there was notice of affixed to the object of a "capital letter 'D' in a circle and the name, or the usual abbreviation of the name, of the proprietor of the design were marked on":

> (a) all, or substantially all, of the articles to which the registration pertains and that were distributed in Canada by or with the consent of the proprietor before the act complained of; or[1164]
>
> (b) the labels or packaging associated with those articles.[1165]

In terms of the prescription period, a remedy will not be awarded for an infringement that occurred more than three years from the date of the commencement of an action.[1166]

4.6.3 Trademark

A trademark owner has several remedies available for infringement. These include injunctions, accounting of profits, damages and destruction of the infringing goods. As discussed in the section on copyright remedies, these can be requested in order to stop or prevent infringing acts. Accounting of profits or damages may be sought, but not both; as well, the court may award the

[1162] *Industrial Design Act*, *supra* note 7, s 15.1.
[1163] *Ibid*, s 17(1).
[1164] *Ibid*, s 17(2)(a).
[1165] *Ibid*, s 17(2)(b).
[1166] *Ibid*, s 18.

destruction or disposition of "any offending goods, packaging, labels and advertising material and of any equipment used to produce the goods, packaging, labels or advertising material."[1167]

As of the 2015 amendment, there are new criminal sanctions for infringing sections 19 and 20, which include various scenarios of counterfeiting (trademarks, labels and packaging): if an indictment, then up to $1,000,000 fine or prison term not exceeding five years or both, if a summary conviction, then up to $25,000 or up to six months imprisonment or both.[1168]

An interesting yet straightforward application of both trademark and copyright law in the face of counterfeiting fashion design proved to be extremely successful for Louis Vuitton Malletier SA [LVM] against Singga Enterprises Canada Inc.[1169] In this case, LVM sued Singga Enterprises for selling counterfeited products bearing various trademarks belonging to Louis Vuitton and Burberry based on sections 7(b)-(d), 19, 20 and 22 of the *Trademark Act* and for the infringement of the artistic work of the monograms which are comprised of and within the trademarks.[1170] This landmark decision culminated in Federal Court awarding close to $2.5 million for the plaintiffs, which comprised both trademark and copyright remedies. [1171]

4.6.4 Confidential Information

In *FBI Foods*, it was determined that remedies should be established based on the "facts of the case rather than strict jurisdictional or doctrinal considerations."[1172] Generally, the remedies available for a breach of confidential information can be equitable and legal.[1173]

Due to the nature of confidential information, when it is divulged and made public, there is little that can be done to undo the damage. Therefore prior to disclosure, it would be well

[1167] *Trade-marks Act*, *supra* note 7, s 53.2(1).
[1168] *Ibid*, ss 51.01(1) & (6).
[1169] *Singga Enterprises*, *supra* note 1035.
[1170] *Ibid*, at Schedule A Schedule B.
[1171] *Ibid* at paras 121-122.
[1172] *FBI Foods*, *supra* note 1091 at para 24.
[1173] Hagen et al, *supra* note 908 at 615.

within the interest of the claimant to seek an injunction to prevent further dissemination. In addition to the possibility of an injunction, remedies include damages and accounting of profits.[1174]

4.6.5 Patent

Similar to the other areas of intellectual property law, patent infringement can lead to the award of remedies including injunction, accounting of profits, and damages. Liability for patent infringement is defined in subsection 55(1),[1175] which discusses liability and damages after the grant of a patent, and subsection 55(2),[1176] which defines the appropriate remedy prior to the filing of a patent.

4.7 Conclusion

This chapter demonstrates the variety of fashion design elements that can be protected by different intellectual property laws. What it also demonstrates is that it is a highly specialized area of law, making it difficult for a non-specialist to navigate between the eligibility requirements, rights, duration, and scope of protection for each law. This is further complicated because of the overlap between copyright, trademark, and industrial design laws that may protect the same elements.[1177] Each of these legal regimes is very different and quite nuanced. As will be discussed in the next chapter, many designers are not even aware of the application of the law to their creations.

Even though this chapter illustrates the possible avenues available for design protection, whether or not a designer chooses to register their works or designs is only one aspect of legal protection. In all of these cases, pursuing legal protection also depends on whether they will also

[1174] *Lac Minerals*, *supra* note 1092 at para 159.
[1175] *Patent Act*, *supra* note 1130, s 55(1).
[1176] *Ibid*, s 55(2).
[1177] For example, a single article of fashion design may have copyright, industrial design and trademark protection.

choose to enforce their rights. The reality for a number of independent designers, unlike the major luxury brands who have relatively fewer limitations to consider when creating a collection, is that the cost to protect designs is quite high. For example, if a designer were to create two twenty piece collections per year and only register half of these, it could run up from $1000 if registered for copyright protection,[1178] to $15000 if registered for industrial design protection. However, there are a number of implications involved with enforcement: costs involved with protecting these works both before (legal fees, agent fees) registration and after (enforcement fees). There is also the possibility that a designer might lose a claim and have to pay additional legal costs. As will be discussed in the following chapter, designers would be hard pressed to invest the money, time and effort to protect their designs each season.

Further, time and human resources are quite limited for the majority of the independent designers who either operates entirely independently or who have small teams. In order to truly take advantage of these laws, as a number of luxury brands have, independent designers must decide whether it is worth the resources it would take to take advantage of these protective measures.

Finally, as will be discussed in Chapter 5, fashion design e.g., the protection of a physical artefact is one aspect of the proprietary scope of a designer. Aspects of identity, aesthetic and personality are also a larger part of a fashion designer's overall brand and are not easily protected by intellectual property regimes aside from trademark. Even in this case, it takes time to build distinctiveness, which can be quite difficult.

[1178] Noting that copyright could only apply to designs applied to useful articles if under fifty copies were reproduced.

PART III: EMPIRICAL FINDINGS: QUALITATIVE AND QUANTITATIVE

Introduction

The central purpose of this dissertation is to uncover the way that participants of this study use intellectual property law and experience it in their everyday lives as independent fashion designers in Montreal and Toronto. Further, this study aims to understand how copying is approached by participants and whether mechanisms other than the law exist to help protect against copying within their segment. In seeking to answer these questions, I conducted interviews with twenty small and medium independent fashion design firms in these two cities, using grounded theory and a bottom-up socio-legal theoretical framework. [1179]

What will be discussed below is that the process of creativity – and copying as a part of that process – does not fully reconcile with the way in which intellectual property laws and policy support creativity and innovation for design. Far from a static response, these interviews reveal that the participants maintain multifaceted extra-legal systems to prevent and enforce the norm against negative copying. The preventative mechanisms not only protect them against the possibility of being copied, but they also protect them from being accused of copying, which could have perceived negative effects on their reputation and 'brand' or identity by extension. The enforcement mechanisms also reveal that business integrity, identity as fashion designers,[1180] attribution and both personal and brand reputation play a much larger role in some cases than the fear of economic harm resulting from copying a single garment design. What

[1179] The characteristics of these firms are discussed at length both in the introduction, and industry chapters, 1 and 2 respectively.

[1180] Betsy Rosenblatt, "Belonging as Intellectual Creation" 81 Missouri L Rev _ (forthcoming, 2017) [Rosenblatt, "Belonging"] (note that pinpoints are based on numbering beginning from page one and not the published article).

should be acknowledged at the outset is that economic incentives, though important, are not the only incentives that drive this industry.[1181]

It is important to point out that while the participants demonstrated a consensus on a number of issues, such as the reasons why they did not access the law, the responses illustrate a range of unique experiences, reactions, and ways that they confront issues related to *negative* copying.[1182] Drawing on the foundation and context provided in the previous four chapters concerning fashion design, the industry, its policies and legislative framework, I will explain and analyze the participants responses using a bottom-up theoretical and interdisciplinary approach. In doing so, I will draw on literature from a number of disciplines, including sociology and social norms, intellectual property theory, law and doctrine, as well as economic geography to help contextualize and explain the findings, and in particular the role of reputation, identity and personality within the independent design sector.[1183]

The next two chapters present my findings. I begin in Chapter 5 with an examination of the quantitative findings from the CIPO's copyright, trademark and industrial design law database. Next, I will present the responses from the interviews detailing participants' reasons why they do not use the law. In Chapter 6 I explore 'copying' as understood and defined through the lens of the participants. I will then provide the characteristics of the negative copying norm as teased out by the participant responses and explore the various layers of prevention and enforcement mechanisms, including the motivations for following the norm.

[1181] As business owners, managers or partners, the participants are active in commerce and depend financially on the economic success of their businesses.
[1182] Negative copying will be discussed in greater detail below.
[1183] As mentioned in the methodology and theoretical framework, the theories are grounded in the evidence accumulated through empirical inquiry and explained through an interdisciplinary lens. These disciplines have all been introduced in Chapter 1.

CHAPTER 5 - The Use of Intellectual Property Law: Registration and Reasons

5 The Registration of Design Subject Matter: Copyright, Trademark and Industrial Design Law

As examined in the previous chapter, the legal framework for the protection of design and design elements is vast and extends across a number of different intellectual property law statutes. This section will provide empirical evidence pertaining to the actual use of the intellectual property system: quantitative data based on registrations and qualitative data based on participant interviews. Based on an analysis of the copyright, trademark and industrial design databases available at CIPO, I will discuss reason given by the participants to explain why they have generally not registered their works.

5.1 Copyright Registrations

Copyright provides economic and moral rights protection to owners and authors against the unauthorized use of works, subject to a number of user rights and exceptions.[1184] Since there are no formalities required for the protection of a copyright work, meaning that registration is not required, it is difficult to accurately measure whether designers rely on copyright law to protect their designs or other elements of their design work capable of copyright protection (i.e., prints, designs, textiles) etc.

The information that was available on the copyright database did not provide the whole picture for the purpose of this data collection in this study, because other than the name of the author, the assignee, title of the work and category of the subject matter (general category i.e., artistic, musical, literary), additional information is not required for registration or collected by

[1184] See Chapter 4.

CIPO. When CIPO was contacted to find out how to access more information on the current registrations, the Office stated that the database would not permit a search based on "particular field or sector of activity."[1185]

This means that useful articles, as distinct from artistic works, could not be distinguished or searched under the existing fields available in the database. Ultimately, the copyright database does not provide information that can be used to determine whether copyright law is used for the purpose of protecting design and design elements.[1186]

Despite the lack of information provided by the copyright database, it was possible to cross-reference information obtained therein with the trademark and industrial design databases.[1187] What this exercise revealed was that there were some registrants in the latter two databases that also used copyright to register different elements of design. For example, lululemon athletica, owner of both trademark and industrial design subject matter is also the owner of a single artistic work "RETRO CAMO PRINT",[1188] and Canada Goose registered

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[1185] Email, Canadian Intellectual Property Office, March 18 2016 [unpublished][Email, CIPO].

[1186] While the database was unhelpful in determining the use of copyright protection for design, case law has been similarly sparse. While case law and statements of claims may be helpful in determining whether the judicial system was used, it is still possible for individuals to rely on copyright law without using the judicial system. For example, they may send a cease and desist letter, or alternatively ask them to stop, citing their copyright protection. In terms of caselaw, of the thirty-five cases (grouped by parties, not all levels of cases) available on electronic databases (i.e., Westlaw, Lexis Nexis and Canlii) that appeared for a search pertaining to section 64 of the *Copyright Act*, only five were related to fashion broadly. These were *Magasins Greenberg*, *supra* note 810 at paras 13 & 17 (embroidery on a jacket – plaintiff a French company), *Christina Canada Inc c Entreprises Irwin Canada Ltée*. [1996] JQ no 2335 (bathing suits), *Pyrrha Design (FCA)*, *supra* note 886 at para 13 (jewelry – Canadian company), *Crocs Canada Inc v Holey Soles Holdings Ltd* (2008) 64 CPR (4th) 467 (design on foam shoes – US company), *Layette Minimôme inc c Jarrar*, 2011 QCCS 1743 (baby clothing - Canadian). Prints were not searched for this study.

[1187] In order to find out whether copyright protection is used by designers, I cross-referenced the proprietors of trademark and industrial design registration obtained in the following research within the database in order to determine whether or not there were any examples of copyright registered by those same proprietors. It should be mentioned that in addition to the limitation arising from the fact that the copyright requires no formalities, this cross-referencing exercise might not provide accurate data because in some case where the author is a contractor, the company for which the copyright work is created may not be the same as the individual who registered it. Although it is an unlikely scenario, it is still a possibility that the contracting company requested that the intellectual property rights belong to them.

[1188] "Retro Camo Print" (artistic) lululemon athletica canada inc, owner, Can No 1115736 (11 November 2014) registered.

"CANADA GOOSE ARCTIC PROGRAM DESIGN."[1189] Further, some registrants seemed to use industrial design or trademark alongside copyright registration. For example, one registrant registered a copyright for an artistic work in relation to an industrial design "UMBRELLA DRESS",[1190] while another industrial design proprietor had registered copyright for the artistic work that appeared on a t-shirt he had also registered for industrial design protection.[1191] Some companies registered copyright for related works such Nygård International although it is not entirely clear whether these are elements of design.[1192]

Far from an accurate indication of the use of the copyright system, these examples provide a small window to individuals or companies within the fashion industry who register some aspects of design or related works for copyright protection. Notably, registration is relied upon in some cases but it would seem to be a minority of cases where companies had registered other forms of intellectual property. Again, this does not provide information about the database or the number of those relying on copyright protection.

5.2 Trademark Registrations

Designs capable of being registered as trademarks are design marks or distinguishing guises. Design marks can include logos, labels or other pictorial design elements, applied to garments,

[1189] "Canada Goose Arctic Program Design" (artistic) Canada Goose Inc, owner, Can No 1073477 (24 December 2009) registered.
[1190] "Robe Parapluie" (artistic) Claude Bouchard, owner, Can No 1053688 (30 November 2007) registered; "Umbrella Dress" (artistic) Claude Bouchard, owner, Can No 123042 (3 July 2008) registered; Claude Bouchard has another copyright registration but it is not clear due to the lack of information in the database whether it is related to the same industrial design previous cited "Crochets À Manteaux Avec Cannes De Parapluie" (artistic) Claude Bouchard, owner, Can No 1071841 (15 October 2009) registered; There is also Lac-Mac Limited, which had two copyright registrations, both artistic works but it is unclear as to whether it is related to the registered industrial designs.
[1191] "Chandail" Pierre Patenaude, Can Industrial Design No 79113 (27 September 1996) public domain; "Québec-Paix" Pierre Patenaude, Can Industrial Design No 449459 (31 January 1996) registered.
[1192] Under the search results for Nygård International under the category of Owner/Assignee Name, there are four registrations which include a Reg No 1114341 for a "Woodland Bedding Set" artistic work, (3 July 2014), Reg No 1073762 "Nygård Fashion Concept Store Grand Opening – Time SQ, NY Nov6-09" dramatic work, (7 January 2010), Reg No 1051395 for an "Image/Wardrobing Seminar-Facilitator's Guide" literary work, (28 August 2007), Reg No 104308, "The Fashionista's Guide To Survival" literary work, (17 April 2007).

while distinguishing guises include three-dimensional designs, which can consist of the entire garment itself, e.g., entire design of jacket or pants, including details as to placement and colour.

As mentioned in the introduction chapter, trademarks can be searched using two classification systems. The first is the Vienna Classification Code, which describes the figurative elements of a work.[1193] The second is the Nice Classification that categorizes the elements based on the goods or services for which the marks had been registered.[1194] Therefore, it is possible to classify a single mark under multiple categories and classes of goods. This means that like the industrial design database, it may not be possible to determine the number of unique registrations for each category because each registration can be classified under multiple categories.[1195]

I first conducted a search for registered distinguishing guises. Between years 1995-01-01 to 2015-01-01 the trademark database revealed that only three distinguishing guises were registered under Vienna classification code 9.3 for Clothing, (not including headwear and footwear), all of which were Canadian. Of the three distinguishing guises, two are jackets, and one is a work and design mark.[1196] The first registration was made to Canada Goose for an entire design of their SNOW MANTRA, which includes:

> …distinctive design featuring a combination of the following elements: a) five (5) pockets placed as follows: one on each of the upper breast of the front of the parka; one on each of the upper thigh of the front of the parka, and one on the upper sleeve of the outside of the left arm; b) cuffs at the base of each sleeve; c) a waist-line; d) shoulders that are square-shaped with straps; e) an oval-shaped patch over the elbow of each arm; f)

[1193] In this way, the applicant may apply to register for a coat, and describe or depict the elements of a coat. As an example, if the applicant wanted to register a starfish animation wearing a coat, or pants, the database will retrieve this image under the codes related to 'starfish', 'pants' and 'coat' because these are the elements that they have been classified under.

[1194] If the above example of a starfish design were applied to a shirt, then the Nice Classification system would pull the registration under the category of clothing (25).

[1195] For example when confined to an aggregated search on five categories together (under industrial design, sweaters were lumped into the same category as shirts), there was a total of 620 registrations; when each of the categories were searched by the individual categories, the sum of these categories totaled in 735 registrations. Also, the search only included registered* marks which included those marks that were once registered but later expunged. These did not include marked that were searched* or allowed.*

[1196] The design and work mark is "Grand Gourmet & Design" Les Cuisines Rochette (1976) Inc, Can No TMA679880 (19 January 2007) registered.

> zipper-pulls on the left and right seam zippers, in a rectangular shape; g) a fur trim around the hood; h) a disc-shaped embroidered piece of fabric on one sleeve; i) a rectangular piece of fabric on the upper flap of the bottom left pocket; and j) a skirt around the base of the jacket. The drawings provided show different perspectives of the same mark.[1197]

The second jacket is also a distinguishing guise, but the registration does not provide a description of the distinguishing elements written or depicted of the jacket for which registration is being sought; it is merely a drawing of a jacket design.[1198]

The second search I conducted was to find out how many designs or elements of designs had been registered other than word marks. These registrations included two-dimensional marks, such as the placement of a logo, label or tag.[1199] They also included the stitching pattern on a pocket or garment,[1200] and the overall combination of design elements such as a certain cut, placement of colours, and other design elements.[1201]

Based on a search of the database under the five sub-categories of the Vienna Code combined,[1202] and classification code 25 of Nice Classification for clothing, the system pulled a total of 264 registered trademark designs over the twenty-year span; of those 155 were registered by a total of 106 Canadian registrants. However, the majority of the designs were images, logos, or characters,[1203] leaving only thirty-five designs that would likely qualify for the type of designs

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[1197] "Snow Mantra" Canada Goose Inc, Can No TMA837332 (29 November 2012) registered.
[1198] "Woman's Coat Design" Linda Lundstrom Inc, Can No TMA458774 (7 June 1996) registered.
[1199] See e.g., "Label Design" Compagnie No Excess Inc, Can No TMA459127 (7 June 1996) expunged; "Label on Pants Design" Buffalo International ULC, Can No TMA625362 (15 November 2004) registered.
[1200] Pocket stitching for pants or denim can usually last over a number of seasons, and work to identify the brand. Because it has long term value for those fashion companies who use them it is a popular way to carve out a special niche design. There is a separate classification code that pocket designs can be classified under in the Vienna Classification 9.3.19 Clothing Pockets. A search of this classification category pulled a total number of ninety registrations of pocket designs and stitching, thirty-one of those were Canadian based registrations.
[1201] Such as the eighteen Hockey Canada Heritage and regular Jerseys registered, which encompassed a variety of elements such as a symbol (maple leaf), contrasting colour band, and the word "Canada".
[1202] Subcategories of 9.3 Clothing, which are 9.3.2 Jackets, waistcoats, coats, cloaks; 9.3.3 Trousers, breeches; 9.3.5. Dresses, aprons, ladies' suits or costumes; 9.3.8. Pullovers, sweaters; 9.3.9. Shirts, t-shirts, bodices, shirt-blouses.
[1203] For example, there were thirteen registrations of characters for Disney, including as "Alice in Wonderland" TMA754168; "Goofy Design" TMA856626; "White Rabbit Design" TMA885161; and nice registrations for Newfoundland based company Anchor Island Productions, including "Cindy the Crow Design" TMA735193; "Blu the Bear Design" TMA735195; "Nathan the Newf Design" TMA750150.

or design elements that are the subject matter of this paper, even though the registrants were not all from the independent design segment.[1204]

5.3 Industrial Design Registrations

The most comprehensive database specifically created for design is the industrial design database. As mentioned in Chapter 1, the classification code used to protect subcategories of apparel including shirts, dresses, hats and footwear are listed under class 006.

In an empirical study conducted in 2015, it was revealed that the total number of designs registered under classification code 006 between the years 2000 to 2014 was the highest category at 3858 total registrations,[1205] followed by classification code 044 for furniture at 3510 total registrations.[1206] Of these registrations under class 006, Canadian firms accounted for 501,[1207] whereas US registrants accounted for 2834[1208] of the 3858. This can be compared to category 044 (furniture) of which 727 of the 3510 were Canadian based firms,[1209] whereas 1441 were American registrations.[1210]

The table below profiles the registration data of four sub-categories most relevant to this study, which are i) dresses, skirts, slips, and nightgowns, ii) blouses, shirts, sweaters, iii) slacks, trousers, and iv) coats, vests and capes. The findings below demonstrate that within the specific

[1204] However these thirty-five are not all from the independent design segment. Of these thirty-five designs, eighteen are two-dimensional designs for *Hockey Canada* jerseys, three graphic representations of designs on garments for *Lululemon Athletica*, three label designs with logo for French founded, Montreal company *Buffalo*, one coat design for Canadian independent designer *Linda Lundstrom*, label design for companies *No Excess*, one pant design for *Coalision Inc*, owner of *Löle athletic wear*, two designs that specify the placement of the word Canada and other elements by *Canadian Graphic West* who are manufacturers of licensed clothing, and several other companies who have either protected the placement of a label or have registered a two-dimensional design.
[1205] Notably, the study indicates that classification code 006 was featured in the top ten list of subject matter registered every year and researchers suggest that this could be explained by the fact that Nike and Wolverine World Wide – two companies which are identified as the top ten owners of industrial design registration in the same study – are featured in this category, *Industrial Design Activities in Canada*, *supra* note 127 at 14-15.
[1206] *Ibid*.
[1207] *Ibid* at 21.
[1208] *Ibid* at 28.
[1209] *Ibid* at 21.
[1210] *Ibid* at 28.

twenty-year period being searched, the general use of design protection under these classification codes has been very limited, similar to trademark registration. Notably the numbers in the table below do not represent the total number of unique registrations under each category because works can simultaneously be classified under several classification codes.[1211]

This is because the industrial design database, like the trademark database permits the applicant to register their works under multiple classifications codes. Further, once the application is submitted, the Registrar may also add classifications codes to broaden the search, making it difficult to ascertain an accurate final number of registrations since there is not a single priority classification system to use one code to avoid double counting.[1212] However, it was possible to pull the total number of unique registrations[1213] - altogether 344 works - within this time period for the above four classification codes when the classifications were combined, but it was not possible to pull individual unique registrations for individual classifications codes since they could be cross classified.[1214]

Not all of the classifications under 'apparel' would qualify as the type of 'apparel' that is the focus of this study. This is because some works are capable of being registered under very different classifications, for example, the registration for COFFEE SLEEVE [1215] and

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[1211] Email, CIPO, *supra* note 1185 the response to my inquiry was that there was "no way to modify the search parameters of the Canadian Industrial Designs Database to isolate primary classification codes of registrations that are indexed under multiple classifications"; What these numbers represent is the total number of items that the system generated when a specific code was entered i.e., 006-03-01 for dresses, skirts, slips and nightgowns).
[1212] For example, a single registration was classified under twelve codes, which could cause for it to be pulled from the system in search for twelve categories of subject matter, see "Shirt", Rough Ride, Reg No 138022 (22 June 2011) registered.
[1213] Unique registrations refer to the number of registrations that would only be counted in one of the classification categories as to not be double counted in other categories, so that an accurate accounting of registrations in each category can be conducted.
[1214] See Email, CIPO, *supra* note 1185.
[1215] "Coffee Sleeve", Tim Lee, Reg No 113832, (01 April 2008) public domain.

DISPOSABLE CAPE FOR STAIN PROTECTION DURING HAIR DYING,[1216] were included in at least one of the four categories that were the subject matter of the search.

Furthermore, a number of the industrial design registrations included designs that have an active primary function that is not aesthetic, unlike fashion design, which functions to cover the body and to enhance the aesthetic of the individual wearing it. Those garments registered in the database that had a primary non-aesthetic function, included hospital[1217] and surgical[1218] gowns, breast-feeding garments,[1219] and life preserving protective apparel.[1220]

Based on the table below, the most popular category of the four classifications searched was the outerwear category i.e., jackets, which was heavily dominated by a small number of registrants i.e., App Group, which had twelve registrations, and Nike (both Canada and USA combined), which had thirteen registrations.

[1216] "Disposable cape for stain protection during hair dying", Nick Antonacci, Industrial Design Reg No 126195 (21 September 2009) public domain.
[1217] "Hospital Gown", John H Leask, Industrial Design Reg No 84271 (17 July 1998) public domain.
[1218] "Surgical Gown", Lac-Mac Limited, Industrial Design Reg No 130849 (25 February 2010) registered.
[1219] "Breast Feeding Garment", Jeniffer Hajt, Industrial Design Reg No 136150 (29 March 2011) registered.
[1220] "Anti-Gravity Suit", Mustang Survival Group, Industrial Design Reg No 106733 (14 March 2005) public domain.

Table 1. Industrial Design Registrations from 01-01-1995 to 01-01-2015

Classification Code	Number of Registrations referenced to each category	Number of Canadian Registrations referenced to each category	Total Number of Canadian Registrants
006-03-01 (dresses, skirts, slips and nightgowns)	39	18[1221]	15
006-03-03 (blouses, shirts, sweaters)	124	34[1222]	26
006-03-**04 (slacks,** trousers)	114	54[1223]	30[1224]
006-03-05 (coats, vests, capes)	164	77[1225]	49

5.4 Conclusion

The database findings reveal that intellectual property laws that may apply to fashion design seem not to be used for the registration of design *per se* although some elements that may be attributed to the overall design have been registered under trademark and/or industrial design law. As revealed above, it is difficult to know which designers or companies rely on copyright protection because registration is not necessary, however there was some indication that companies who have invested in some form of intellectual property protection for design aspects

[1221] Of the 18 items registered under classification 006-03-01 in Canada, 15 of them had multiple classifications codes, meaning that the unique registrations related to this category can range between 3 to 18 registrations.
[1222] Of the 34 items registered under classification 006-03-03 in Canada, 16 of them had multiple classifications codes, meaning that the unique registrations related to this category can range between 18 to 34 registrations.
[1223] Of the 54 items registered under classification 006-03-04 in Canada, 24 of them had multiple classifications codes, meaning that the unique registrations related to this category can range between 30 to 54 registrations.
[1224] Of the 30 applicants, Canadian registrants Lululemon Athletica and Rita Langmyr had the highest registrations at 11 and 10 respectively.
[1225] Of the 77 items registered under classification 006-03-05 in Canada, 36 of them had multiple classifications codes, meaning that the unique registrations related to this category can range between 41 to 77 registrations.

(via industrial design or trademark registration), have also accessed copyright protection whether for the same design or related works.

As well, these findings also indicate that a small number of larger companies have invested resources to protect these elements of design, such as lululemon athletica and Nike International (industrial design) and Hockey Canada (trademark). This finding was also supported by the study conducted on the industrial design database in 2015.[1226]

What should be noted is that although it is difficult to know exactly what the independent fashion design segment within Toronto and in Montreal look like in numbers as revealed in Chapter 2, the records of registration are not an indication of the amount of creativity or design production that takes place within these communities. As discussed with the participants, it is possible to create high volumes of design per collection. For example, some firms may create from 5 to over 50 designs twice a year, which totals between 10 to over 100 designs per year. It is therefore important to not conflate the number of designs produced with the number of designs registered as an indicator of the volume of designs created within this segment.

To help contextualize the information derived from these databases, the next section will consider the responses offered by participants to describe the reasons they provided to explain why they themselves – creators from the independent fashion design segment – have not registered their designs with CIPO, or used the law to enforce or prevent copying by others. These responses provide reasons to explain why registration and legal mechanisms have not been used.

[1226] See generally, CIPO, *Industrial Design Activities in Canada*, *supra* note 127.

5.5 Why Design Subject Matter is Not Registered

As demonstrated above, the quantitative data shows that the industrial design and trademark registration databases are rarely used for the purpose of securing exclusive rights for fashion design elements capable of being protected as described in Chapter 4, especially for the independent fashion design segment. The qualitative interviews, based on the participants' responses, provide insight as why they have not registered their designs, or why the law has not been used.[1227]

Not only did the responses indicate that many of the participants were not aware of the different laws that were available to protect designs,[1228] they generally knew little about the relevance or applicability of intellectual property laws for design protection, except for those participants who were aware that copyright protection existed for prints or that trademark protection was important for their brand.[1229] Several responses indicated that intellectual property

[1227] When asked about whether they have considered protecting their designs, a number of designers had not considered legal protection for a several reasons including resources and the feeling of not being able to control it**,** see e.g., (Participant, Interview October 17 2014, at 11) Participant stated that they had not thought about legally protecting their designs; (Participant, Interview February 12 2015, at 11) Participant has not looked into protecting the design; (Participant, Interview November 21 2014, at 4) Participant had looked into seeing a lawyer after an incident had occurred but not prior; see generally (Participant, Interview August 4 2014, at 13) the participant indicated that they had never thought about registering their own designs although they were aware that it was done in other countries; (Participant, Interview July 25 2014, at 13) participant mentioned that they would not protect the design but the brand.

[1228] A number of the participants were unaware of the different laws available for the protection of design, see e.g., (Participant, Interview October 17 2014, at 12); (Participant, Interview February 12 2015, at 11); (Participant, Interview February 13 2015, at 11); This is unlike the findings in the comedian community. In that community there is awareness about copyright law and it applies to certain aspects of works, see Oliar & Sprigman, *supra* note 1 at 1800, 1810-1811.

[1229] Having said this, several of the participants did highlight that they were aware that taking a print would be copying, see e.g., (Participant, Interview October 14 2014, at 8); (Participant, Interview October 17 2014, at 3, 10); (Participant, Interview February 12 2015, at 9); (Participant, Interview August 28 2014, at 7-8); (Participant, Interview October 13 2014, at 3-4); this also demonstrates that there is a conceptual and practical difference perceived by some participants distinguishing between traditional arts and the subject matter of design that is also reflected in the law, see, e.g., Robertson, "Crafting IP" *supra* note 122, 41 at 53, Robertson observes that participants within the craft community also make a distinction between art/design and craft/handwork, and suggests that within the community a subtle hierarchy is perceived to exist between them; Doagoo, *supra* note 130.

law was not at all a part of their business considerations,[1230] while none of them mentioned that it was a consideration in their creative process.[1231] The reasons provided by the participants to explain why they had not used intellectual property laws to protect their designs included a lack of resources such as time and money, the perceived ineffectiveness of the law, and for some, a degree of concern pertaining to the possibility of normalizing registration and enforcement.

5.5.1 Resources: Time, Money and Effort

A number of the participants stated that intellectual property protection was not an option because of the costs and resources associated with registration or enforcement.[1232]

> I feel that I can't protect anything except for the brand – even it's not protected. I can't protect the design, because it changes every six months and it would cost too much to protect a certain style or certain dress, or it's impossible to protect in my opinion and I

[1230] Despite the fact that many of the participants knew or knew of one another, many of them highlighted the demands of their work, the quick paced nature of their industry and the fact that intellectual property for designs (as opposed to trademarks for the business names) has not been a major discussion between their colleagues or friends or within the context of their businesses except for in casual conversations. This demonstrates that there is very little to no information sharing between the participants regarding intellectual property law which is most likely the result of fashion law being in its infancy as a field of legal practice in Canada, see Introduction Chapter; Legal knowledge may be available through associations, clusters and other programs, such as the ones described in Chapter 3 i.e., mmode, the Toronto Fashion Incubator, and Ryerson's Fashion Zone, the latter have legal practitioners on their advisory boards and resource centres; as observed by Tremblay, within the Montreal fashion design community, "younger designers do not know the resources that could be available to them, and while more established designers sometimes help out, associations and intermediary organizations are very useful and could be more active in supporting young designers' careers" at 8, see Diane-Gabrielle Tremblay, "Creative Careers and Territorial Development: The Role of Networks and Relational Proximity in Fashion Design" Urban Studies Research (New York: Hindawi Publishing, 2012) [Tremblay, "Creative Careers"].

[1231] When the participants were asked to describe their creative processes, not one of them cited that they had any concerns or incorprated intellectual property law as a part of their process. A number of them did say that they look outward (internet, magazines, books, films) for inspiration, but none expressed worry about intellectual property rights.

[1232] (Participant, Interview March 9 2015, at 13) The main issue was financial; one participant stated "…yeah I mean if – if it is an easy process and not really expensive – for sure" (Participant, Interview March 6 2015, at 15); (Participant, Interview October 17 2014, at 13) Participant stated that "financially, it would be a nightmare"; One participant stated that "it would be financial […] that would be the main thing" see (Participant, Interview August 28 2014, at 40); (Participant, Interview October 22 2014, at 12) Participant stated that intellectual property protection would be worth it for inventions, and not necessarily for designs; (Participant, Interview November 21 2014, at 11) Participant stated that as an independent designer, "you don't have the funds to kind of like pay for copyrighting our designs. So if you bring copyright into the cost structure and then you have to pay for that, that's going to increase the cost [of the garment]…"; (Participant, Interview 31 July 2014, at 18) participant stated that when they had inquired about protecting a design it was too costly; These findings are similar to those of other creative industries who have cited these very reasons for not using intellectual property law protection. For example, in the case of comedians and tattoo artists who are able to protect their works, they do not because cost is a barrier, see Oliar & Sprigman, *supra* note 1 at 1799-1800; Perzanowski, *supra* note 1 at 568.

> don't think anyone thinks that that they can protect [Courtney: a certain style or a certain thing?] not at our scale, also cost and effort.[1233]

In addition to the perceived costs of registration and enforcement, the extremely high turnover within the industry and expenses related to creating multiple pieces for multiple collections per year would simply drain time and resources that could otherwise be invested in the research, development and marketing of their collections and managing their businesses.[1234] As previously mentioned, the segment interviewed is comprised of SMEs, where the participants are almost always involved in both the design and management aspects of their businesses, meaning that they are involved in the creative inputs, and also decisions regarding the allocation of resources such as time and money.

5.5.2 Perceived [In] Effectiveness

Some designers perceived the law to be ineffective or inapplicable to their works. Notably, the majority of designers who had taken steps to consult with a lawyer in order to determine their legal options once they felt that they were copied normally did not make a claim. For those who did not pursue a claim, reasons included the scope of subject matter, or the fact that they had not previously registered their designs, but also cost, jurisdictional challenges (i.e., if someone was copied by someone outside of Canada), effort, time, and as will be seen below, in some cases, concerns over the way that they would be perceived within the community.[1235] For example, in a

[1233] (Participant, Interview July 24 2014, at 10).
[1234] See e.g., (Participant, Interview October 17 2014, at 13) Participant stated that "it seems like it would be so laborious - there are so many designs to process that it would be so hard"; (Participant, Interview February 12 2015, at 12) In the context of enforcement, the participant stated, ["I feel like I'm constantly doing now with [name of company redacted]. When I see something and if I don't do anything about it then there's no effect"]; (Participant, Interview March 19 2015, at 8) In referring to the territoriality aspect of trademark law which would require multiple regstrations, the participant states, "there's no point because we are changing so fast that by the time we had our designs out we'd be on to the next thing […] The whole thing seems like a cash grab".
[1235] Reasons for this included the fact that the designer had not registered their designs in the first place, and therefore there was little that they would be able to rely on outside of copyright law, and only for those elements that could received protection as useful articles following the fifty-copy threshold, see *Copyright Act*, *supra* note 6, s 64;

CBC interview, Eran Elfassy and Elisa Dahan the designers behind Montreal-based Mackage explained that they felt that the legal framework in Canada was not particularly well-suited to the fashion industry, and that there were still challenges associated with pursuing legal avenues.[1236]

> "If you want to spend all your money protecting your style, you're not going to be innovative anymore. You're not going to spend your time creating," [Eran Elfassy] said.
>
> In France, when one Mackage design was copied by an internationally distributed brand, Elfassy said the matter was dealt with quickly and the items removed from sale in less than two weeks.
>
> "At the end of the day, we're designers, we want to create. We don't want to spend our time fighting in court or finding ways to protect what we do," added his co-creative director, Elisa Dahan.[1237]

In some situations, participants explained that what had been copied was not the design of the garment itself but instead it was the idea or underlying concept of the components of a garment. In fact, as will be discussed in greater detail below, much of the subject matter that the participants were concerned with being appropriated was their story, their concepts, identity, or DNA, which may not in all cases come within the purview of the subject matter that intellectual property law protects.[1238] Furthermore, when asked whether they would want to use intellectual property to protect their works some of the participants contemplated whether laws are even

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Importantly once a participant felt that the law would not apply to them in one situation, they did not mention pursuing legal avenues following this initial incident see e.g., (Participant, Interview July 31 2014, at 17); (Participant, Interview July 9 2014, at 4) for example, participant was told by a lawyer that there was no guarantee that they would be successful if they pursued a claim: "it is not enough or that the law does not guarantee that we would win anything and it would be money again that we would spend for nothing". Notably, this designer had mentioned that they had registered some details of work at one time but did not specify whether it was a trademark or the design; (Participant, Interview November 21 2014, at 4) was advised by the lawyer that the design had been in the public (over seasons – i.e., over one year) and therefore there was little that could be done; see *Industrial Design Act*, *supra* note 7, s 3. Some who had inquired about protection at the creation or start of their collections refrained to do so because of cost and territoriality.

[1236] Nigel Hunt, "Catwalk Copycats an Increasing Concern for Fashion Designers" CBC (March 16 2016), online: <http://www.cbc.ca/news/entertainment/fashion-copycats-runway-1.3494309>.

[1237] *Ibid*.

[1238] Subject matter eligible for protection is discussed in Chapter 4, but the broader subject matter relevant to the participants will be discussed in greater detail below. It is important to restate that intellectual property rights are not inclusive in that they protect only specific cultural activities or outputs. The fact that a creator feels that their 'story' was appropriated demonstrates an intimate link to the work that is not protected under the scope of intellectual property law.

necessary.[1239] For example, one participant noted that they would "…feel that it would be an exercise in futility." The participant further stated that they wouldn't know what they would attempt to protect, because they felt that "…clothing is so – it's always being reinvented."[1240]

5.5.3 If Laws Were Used….

When the participants were provided with a scenario where the use of law to protect fashion design was normalized, i.e., if everyone became protective of their work and used the law, and were asked about whether their creativity or creative process would be affected if protection for design became common, their reaction was divided.[1241] While a number of participants felt that could be an impediment to continue creating, some designers felt that their creative process would be unaffected.[1242] Examples of the former include a few participants who discussed the practical effects of a registration system, and explained the negative aspects of designers having to check such a database all the time.[1243]

> I think that people would become really scared: you created something – and this would be the other side of that [registration] database – and then you better go into the database and [realize that] it already exists. I didn't copy it but it's already there because again in fashion there are all these parts [Courtney: ideas that are floating around] that, well you've got these ideas and you want to apply them to say, a shawl collar sweater. People have been designing shawl sweaters forever, so you go into this database and wonder 'oh is mine too similar to this one?' 'Did I just waste x amount of time on this when somebody already did it?' I didn't copy them but I also didn't know about it and now I found out that it's [in the database]. I think that people would probably design less…they

[1239] For example, the participant mentioned that the resources might be better spent marketing the brand rather than protect the designs, see (Participant, Interview October 17 2014, at 16); (Participant, Interview October 23 2014, at 14) Participant stated that at this point since it was not the norm to protect, then it was not something that they found to be necessary.
[1240] *Ibid*.
[1241] Most of these quotes are in response to the question regarding whether normalized design protection would cause their creativity to change if the design bill passed in the United States; Dubois noted stories from her participants of resistance to the law where the respondents considered that the law could have negative consequences resulting in stilfing creativity and inspiration, see Dubois, *supra* note 121 at 56.
[1242] Some participants who felt that their creativity would be unaffected by design law pointed out that they were inspired and did not copy from others – that they created new works see e.g., (Participant, Interview March 9 2015, at 14); (Participant, Interview August 4 2014, at 15); (Participant, Interview July 25 2014, at 12).
[1243] (Participant, Interview October 17 2014, at 13) Participant explained that another anxiety associated with the flipside of intellectual property law being used by all designers includes the possibility that designers could be accused of and pursued for copying another designer, as a result of independent creation.

> would probably get [Courtney: be afraid] yeah – [and ask themselves] how do I come up with a really unique idea?[1244]

> …if everyone protected their black shift dress, or this and that, and then they're going to say it's similar or not. If this [type of practice existed] I don't think I would be in fashion anymore [Courtney: ok] I would not be very interested – no! It would stop my creativity I guess [Courtney: would it] I'd be a bit scared all the time to not do this and then look out to see if someone did it and look to see if someone registered this and look…. and I don't know if there would be like [a database] on the Internet of all the newly registered or protected items and then just okay I have to look to make sure that it's not done. [Courtney: that it's different enough] Yeah, no, that would be a bit complicated.[1245]

> You know what I like about fashion is that it's so – it's hard to grasp and to put down, you know I feel that laws are very rigid and very, um so it's very hard to apply a lot of them on fashion because it just changes all the time it's just like [Courtney: it's fluid] it's very fluid.[1246]

The same participant stated that it would be "restrictive" and could result in stifling creativity.[1247] This would especially be true given the fact that to begin with there is such a vague sense of intellectual property within the community, so if designs were protected without clear parameters, designers may air on the side of precaution in order to avoid legal issues. Along a similar line, one participant stated that they would not get into this business in the first place, because of the onus of having to constantly check online to see whether something has been made already.[1248] Further, one participant mentioned that laws such as those proposed in the U.S. for design protection would benefit larger companies with more resources,

> I think that it would be incredibly negative and I have a different sort of perspective on that [Courtney: okay] I think that the people who would have the best ability to and take the most advantage of these copyrights and laws that are put into place are people who don't really need them and really large companies who will exploit those things. And I feel like being able to copyright and finding ways to copyrighting things that should actually be more open like public – [Courtney: for people to use] inevitably will become

[1244] (Participant, Interview February 12 2015, at 12).
[1245] (Participant, Interview October 22 2014, at 14). In response to whether they would approach creativity differently if designs could and were protected.
[1246] (Participant, Interview July 8 2014, at 10).
[1247] (Participant, Interview July 8 2014, at 9-10).
[1248] (Participant, Interview February 13 2015, at 15).

> a way for them to capitalize on the fact that they own the right to a [garment name redacted].[1249]

In a different context, one participant stated that based on the volume of collections, it would be difficult to know whether the works had been created before "… how do you know that it hasn't been done before. I mean we don't consciously know everything that's been done so..."[1250] Another expressed wariness about the possible consequences of legal enforcement resulting in the outcome that could develop into a culture of accusing one another of copying, especially in the case of independent creation.[1251] While another expressed that they believed we were at a point in society that intellectual property laws were perhaps less relevant to creativity, stating that:

> We – why are we talking about intellectual property rights and investing all this money into…into protecting your ideas? Why are we even talking about that? We are heading into this world now of pure transparency especially with the Internet. Don't you think it's like – I think we're stepping backwards if you want to start talking about putting legal terms and legal protection behind art and design really? I think people are doing this because they are afraid. I think ultimately when companies do this, not just companies, designers and artists, they do this because they are afraid. They're afraid to fail. And they feel the need to protect themselves, and what I'm realizing is that there is no room for fear. You just have to do it – ultimately your success is determined on whether or not people still talk about you. Whether people still care about your work – it's not about 30 years of good track record, it's about what you're doing right now.[1252]

Further, when asked whether they would protect all or some designs if the law were accessible (e.g., financially, and in terms of time and effort), some participants said that they would only consider protecting several of either their best selling pieces or those that resonated

[1249] (Participant, Interview October 14 2014, at 18), the same participant mentioned that they would consider protecting some works, at 16.
[1250] (Participant, Interview October 13 2014, at 15).
[1251] (Participant, Interview October 17 2014, at 13).
[1252] (Participant, Interview March 4 2015, at 6).

closest to their identity or brand, but not the entire collection,[1253] while just a couple would protect all, depending on the cost.[1254]

Could the use of intellectual property law in the independent fashion design segment be a hindrance rather than an incentive to create? Based on these responses, protection of designs would not seem to benefit all members of the independent design segment, especially those who are more affected by the high-paced demands of the fashion industry, their business models and limitations. Even though some of the respondents felt that their creative process would remain unaffected, others did feel as if regularly protecting design could be burdensome.

5.6 Conclusion

Chapter 4 illustrated the vast legal framework for various elements of design registration across four discrete intellectual property statutes in Canada. Based on the responses, there is a disconnect present between the intended purpose of the law and its actual use within the independent fashion design community.[1255] In this section, I do not advocate for stronger or more cohesive intellectual property law for design, rather, I suggest that based on the participant responses, some segments of creation do not use intellectual property law to spur creativity or to disseminate it. As mentioned in Chapter 1, the theoretical purpose of intellectual property law is

[1253] For example one participant said that they would protect "probably just like our main – we would protect a few styles that are our main sellers – those styles that would best represent our main image" see (Participant, Interview March 6 2015, at 15); (Participant, Interview February 12 2015, at 12**)** Participant said, "I think that I would probably only protect…I'm pretty protective of our [garment reference reacted] and our [garment reference reacted] line [Courtney: okay] Other than that, not all of them."

[1254] See e.g., (Participant, Interview July 9 2014, at 7) For example, this participant said "[i]f the cost was acceptable we would [protect] everything – yes. If not, then we would select a few to make sure that the most important products are not copied."

[1255] The Canadian industrial design registration system specifically provides a classification for the protection of garments, but based on the registrations, the types of works that are commonly registered are articles that have a primary function that is not aesthetic. While it does not make this distinction in law, industrial design protection seems inaccessible to the segment, unlike in other jurisdictions that provide options that are more accessible to a broader range of design industries, see generally discussion on unregistered design right in the United Kingdom in Chapters 1 and 3.

to incentivize creativity and innovation in exchange for the dissemination of works in society.[1256] However, these responses not only demonstrate that intellectual property for design is not accessible to this segment of the industry due to the cost and/or scope of protection, as well as nature of the industry. It also demonstrates that the industry continues to be creative and create collection after collection without it.[1257] A number of participants indicated that they may not even use it if it were available, and further, there exists a genuine concern for some participants that registering designs may cause a level of anxiety that might hinder some creative activities.

[1256] See *Théberge*, *supra* note 183 at para 30; *Apotex Inc*, *supra* note 184 at para 37.
[1257] See Raustiala & Sprigman, "Piracy Paradox", *supra* note 8.

CHAPTER 6 – Copying, Norms, And Mechanisms

6 Characteristics of Copying in the Canadian Independent Fashion Design Clusters of Montreal and Toronto

The last chapter revealed that independent fashion designers generally do not register their designs and suggested possible reasons why. In this section I will discuss the interview responses as they relate to the characteristics of copying within this segment i.e., how copying is defined and perceived, who engages in copying, and what elements are in the public domain or free for designers to use. This is important because in order to understand how copying is negotiated through the social norm and related prevention and enforcement mechanisms, it is first important to understand the elements of copying that occur within this creative segment.[1258] Once I have defined the characteristics in this section, I will proceed to distinguish what is perceived as *negative* copying from what it is not, based on the interviewees responses. This includes distinctions between non-verbatim copying in instances where works are transformed, when they are referenced, and in the case of subconscious copying or independent creation.[1259]

6.1 What is Copying

Roughly 70 percent of the 20 participant firms have experienced what they believe is 'copying'[1260] in one form or another.[1261] Without referring to the intellectual property legal

[1258] Different creative communities have different creative practices and accompanying industry norms that dictate permissible spectrum of using previously created works. Examples exist across various times and industries, see e.g., in Murray, Piper & Robertson, *supra* note 122.

[1259] As mentioned in Chapter 4, subconscious copying occurs where there may have been access to the original at some point, however, the copying is not done intentionally at a conscious level, see generally Vaver, *supra* note 126 at 162.

[1260] One of the intended focus areas of this research was to determine whether copying was accepted in their community. Allowing the participants to define the term would then help understand the context they would describe without imposing legal concepts that they would not be familiar with. For this reason, the term 'copying' was used because it is not a legal term and conveys in lay language that something is taken from another work. This is different from 'infringement', which assumes that someone has done something negative or gone against the law. The reason for using the word 'copying' rather than 'infringement' or 'unauthorized use' was to avoid the

framework as discussed in Chapter 4, and since the framework has remained largely unused,[1262] the participants did not define the characteristics of 'copying' using legal nuances or jargon used to discuss intellectual property concepts such as "substantial copying,"[1263] "reproduction"[1264] or "the public domain."[1265] Instead, within this segment, copying was defined as an action that applies to diverse subject matter and that is interpreted differently from the way that the law defines it even though some parallels between the two can be traced.[1266]

When asked what copying means to them, the participants were not initially asked to describe what they did not consider to be copying, although some questions were later asked to tease out the differences between the two. For example, when asked whether there was a difference between a trend and a copy, all of the participants agreed that they were not the same thing. Furthermore, when the participants were initially asked to define copying in their words, the question did not require the participants to distinguish whether there were different levels or degrees of copying that would fall within an acceptable or negative spectrum. Despite this, what came through in the interviews, and what will be discussed below is that while copying exists in a number of forms, degrees and elements, there is a norm against copying that is *negatively* perceived.

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participant feeling the need to justify or answer in a way that would either make them feel that they or someone they knew were breaking a law i.e., committing infringement.

[1261] This is seventy percent from Montreal and Toronto combined, and copying refers to all of the possible subject matter that will be discussed below. (Participant, Interview March 9 2015, at 3); (Participant, Interview July 25 2014, at 3); (Participant, Interview July 9 2014, at 9); (Participant, Interview October 22 2014, at 3); (Participant, Interview July 24 2014, at 3); (Participant, Interview October 23 2014, at 3); (Participant, Interview July 31 2014, at 3, 5, 17); (Participant, Interview July 30 2014, at 3-4); (Participant, Interview October 17 2014, at 3-4); (Participant, Interview February 12 2015, at 3); (Participant, Interview November 21 2014, at 3); (Participant, Interview October 13 2014, at 4); (Participant, Interview March 19 2015, at 2-3); (Participant, Interview August 28 2014, at 4-5).

[1262] Except for trademark protection.

[1263] See *Cinar Corp*, *supra* note 873 at para 39.

[1264] *Copyright Act*, *supra* note 6, s 3(1); *Théberge, supra* note 183 at 42.

[1265] Jessica Litman, "The Public Domain" (1990) 39:4 Emory L J 965, the public domain as defined by Jessica Litman,"should be understood not as the realm of material that is undeserving of protection, but as a device that permits the rest of the system to work by leaving the raw material of authorship available for authors to use" at 968.

[1266] As mentioned in Chapter 4, each of the intellectual property regimes quantifies infringement differently, in different amounts and with different exceptions that apply.

6.2 Has Everything Been Done?

Can fashion design exist without some degree of copying? Because practical limitations are present within this segment, such as the ones discussed in Chapter 2, i.e., the design process,[1267] suppliers, finances, trends, and functionality, and the fact that people have been wearing clothing forever,[1268] it might seem as if there are corresponding limitations present in creative range or output.[1269] This is not to say that the fashion design industry is not highly creative as the evolution of designs is very much represented in details and other elements that are modernized.[1270]

Instead, different limitations present within the different segments of the fashion industry may account for certain design and commercial decisions that designers are compelled to make.[1271] For example, some participants suggest that there was little in the fashion design industry that has not already been expressed in some way,[1272]

> I don't even think that there are new creations these days since a lot has been done and it's just…I don't even think that it is possible to have creations that are [100%] new.[1273]
>
> …well since everyone is inspired by something that most of the time already exists or has been done, or except, well, most clothes that are wearable…[1274]
>
> I don't know if there were ever a sweet spot in fashion when for example, thong underwear was invented and knits, like stretch fabrics were invented that we still wear today. Like there was sort of this time in like the 60s or 50s. I can see if that kind of thing had been kind of protected then it would be interesting. But I honestly feel like I hate

[1267] This discussion is particularly important when speaking to the particular process of fashion design, which is inclusive of so many tensions, i.e., design goals that include structural and behavioural components aesthetic, functionality, and external factors such as the environment. See Ralph & Wand, *supra* note 318, and discussion in Chapter 2, at 2.2.1.2 and 2.2.1.3.
[1268] (Participant, Interview October 14 2014, at 4).
[1269] See Chapter 2, when discussing limitations such as the body, fabrics, finances, collections, time, and the styles of garments.
[1270] (Participant, Interview October 17 2014, at 8).
[1271] For example, in many couture houses, there may be teams of individuals who are ready to apply various techniques, use certain materials, even create their own materials, fabrics and prints in addition to other advantages of not having the same financial or resource based limitations.
[1272] (Participant, Interview October 13 2014, at 3).
[1273] (Participant, Interview October 22 2014, at 7).
[1274] (Participant, Interview July 24 2014, at 1).

> saying that every things been done because I know that there is like unlimited potential for creativity... but there's a lot – like construction doesn't change a lot, and there are new materials coming out but they are tech fabrics or something…but as far as making every day clothes…[1275]

These sentiments are contextual and may only apply to those participants involved in this study, and not even necessarily ring true for other fashion designers who might have fewer limitations to work with.[1276] Yet at the same time this perception also exists in the broader fashion industry. For example, Leslie Fremar, Canadian-born stylist had a similar observation in an interview for *The Business of Fashion*, about originality and the task of styling clients for awards season, stating

> "To be honest, it's very hard to come up with something extremely original at this point. We've basically seen everything," said Fremar. "If you go too far out of the box, then you get criticized for that. You're working within parameters. You want to push the limits a little bit and you want to look different but you also don't want to be in this frenzy of criticism. I try to eliminate that for my clients.[1277]

While creativity is arguably infinite, these perspectives are quite interesting because they suggest that perceived and practical limitations exist in the fashion industry that might not be present in other creative industries.[1278] These perspectives might also account for the characteristics of copying described by some of the participants as taking the combination of elements or the entire work, because otherwise, everything might be considered to be a copy. What is clear is that

[1275] (Participant, Interview October 23 2014, at 16).
[1276] Although this might be true for the participants in the study, this might not be true for other ready-to-wear, couture or fast fashion firms who have more resources disposable to them or do not have the same types of limitations.
[1277] Lauren Sherman, "Inside the Oscars Dressing Game" *Business of Fashion* (29 February 2016), online: <http://www.businessoffashion.com/articles/intelligence/inside-the-oscars-dressing-game>.
[1278] Similar limitations may exist in different industries. For example in reference to chefs, there are limitations as to the ingredients, cuisine, health and safety concerns, and palatability of the recipe, its aesthetic, creation time and price. Some limitations may be more narrowing if, for example, the chef was appealing to a classic or authentic flavours, but less so where the intent is fusion; For comedians, we could consider that time, substantive limitations i.e., whether it is too raunchy or ethically immoral, and presentation.

despite the existence of copying that is negatively perceived, copying is prevalent in all areas of creation, including in fashion design.[1279]

6.3 Creativity and Subject Matter: From Garment to Concept, Reputation, and Identity

6.3.1 Subject Matter Generally

Intellectual property law protection for fashion design is fragmented and applies only to the subject matter outlined in Chapter 4.[1280] Yet, similar to empirical research conducted in other creative industries,[1281] the subject matter proprietary to the participants include manifestations of creativity that exceed the contours of intellectual property law, either because of public policy considerations[1282] or because the subject matter is too abstract to define boundaries.[1283]

When asked about what copying meant to them, the participants revealed that copying extended beyond the actual garment designs. It includes manifestations such as styling,[1284] the

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[1279] Abraham Drassinower, *What's Wrong with Copying?* (Cambridge: Harvard University Press, 2015). [Introduction].

[1280] For example copyright protects the original expression of ideas; industrial designs protects "shape, configuration, pattern or ornament and any combination of those features that, in a finished article, appeal to and are judged solely by the eye", *Industrial Design Act*, *supra* note 7, s 2; trademark law extends to distinctive marks, which can include one, two and three dimensional designs, distinguishing guises, colours, smells and other subject matter, *Trade-marks Act*, *supra* note 7, s 2; patent subject matter extends to "new and useful art, process, machine, manufacture or composition of matter, or any new and useful improvement…" of that subject matter, *Patent Act*, *supra* note 1130, s 2.

[1281] French Chefs are proprietary over their recipes, see Fauchart & von Hippel, *supra* note 1; In the case of drag queens, it's the use of ideas and concepts – the creation of an aesthetic, the use of certain songs in performances, see Sarid, *supra* note 1 at 152 + 154; In the case of comedians some material would otherwise not meet the fixation requirement i.e., improvised performances, see Oliar & Sprigman, *supra* note 1 at 1801-1802.

[1282] For example, public policies might include the exclusion of ideas or algorithms, in order to prevent the creation of monopolies that might stagnate development, see *TRIPS*, *supra* note 789, Art 9(2).

[1283] Abstract expression such as one's personality or identity are fluid and might change over time, further, it would be difficult to know what is included within the boundaries and moving part of someone's artistic DNA or identity over time.

[1284] Styling is a way that a designer sets the aesthetic or the "bigger picture" of a collection and can include elements such as hair and makeup, accessories and the way that a garment is worn. It is a variable that can change from season to season, and is therefore different from the brand aesthetic or identity. Its significance was described by one participant who stated that, "even though it has nothing to do with the actual […] garment I think that's really key because you can take the same dress and style it differently and it can look completely unrecognizable from the original" see (Participant, Interview October 13 2014, at 12-13).

overall aesthetic,[1285] concepts,[1286] stories,[1287] presentation, and even the "DNA,"[1288] signature looks, textile, methods or techniques,[1289] personality, or identity of the designer themself,[1290] which can in most cases be incorporated into and becomes a part of their design or design story.[1291] As one participant stated, in terms of their creativity "…what am I expressing about my

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[1285] Blakley argues that fashion designers put together "a signature look, an aesthetic that reflects who they are. When people knock it off, everybody knows because they've put that look out on the runway and it's a coherent aesthetic" Johanna Blakley, "Lessons from Fashion's Free Culture" *TED* (25 May 2010), online: <http://www.ted.com/talks/johanna_blakley_lessons_from_fashion_s_free_culture.html> at 8:05+.

[1286] For example, one participant in discussing their aesthetic stated "that we find a little harder to take just because our *look* is something that's taken, we have a [name redacted] look now, its taken a long time to kind of cultivate and to create that" see (Participant, Interview October 13 2014, at 4); (Participant, Interview July 9 2014, at 5) Participant stated that in addition to having their styles copied, their concepts have also and mostly been copied; (Participant, Interview February 12 2015, at 2) in reference to copying, participant stated it was the taking of a concept.

[1287] (Participant, Interview July 30 2014, at 13) Participant stated "[w]e often say that we don't sell only clothing, we sell the story of the clothing too"; Another participant mentioned that consumers don't buy into trends an longer because they are more interested about the story or culture behind the brand, see (Participant, Interview March 4 2015, at 4).

[1288] "DNA" in this context does not literally mean the same thing as it does in field of genetics -- that is, deoxyribonucleic acid. This is a term that the designers used as a metaphor or analogy to refer to the building blocks of their collection or brand.

[1289] Participant noted that some designers were proprietary with their techniques, (Participant, Interview July 8 2014, at 14); (Participant, Interview July 31 2014, at 5); (Participant, Interview October 13 2014, at 4); (Participant, Interview August 28 2014, at 42).

[1290] (Participant, Interview July 9 2014, at 9, 13); (Participant, Interview July 31 2014, at 2-3) Participant stated that "…you have to manage to have your identity screaming out of your clothes for example and be very true to your aesthetic and your philosophy"; (Participant, Interview October 22 2014, at 10) although the respondent did not mention it in context of what copying meant to them, they mentioned the taking of *identity* as an example of subject matter in response to a different question; The participants are referring to an expression of creativity, which can manifest in a number of ways, including an aesthetic, identity or a name, which is inextricably tied to the process of creation in which the individual creator has extended their perceived identity to. This proprietary justification is quite similar to the Hegelian personality theory discussed in the Introduction chapter. This is unlike the type of identity that can be protected by personality or privacy rights, such as image, personality or names that is protected in Canada, see Amy Conroy, "Protecting Your Personality Rights in Canada: A Matter of Property or Privacy" (2012) 1:1 UWO J Leg Stud 3.

[1291] Therefore the scope of the subject matter of importance to designers reaches to both economic and non-economic elements related to creation, such as the stories or identity of the participant or their brand; Creativity and identity are strongly linked and empirically correlated, as well, the authors observe that, "visual, literary, or musical artists and teachers not uncommonly view their art as an expression of self or as inherently linked to their identity" at 315, see Stephen J Dollinger, Stephanie M Clancy Dollinger & Leslie Centeno, "Identity and Creativity" (2005) 5:4 Identity: An International Journal of Theory and Research 315; The authors suggest that social identity theory and self-categorization "provide complementary explanations for why group norms are likely to serve as behavioural standards" as they effect the degree to which individuals tend to follow norms based on their identity in relation to the group and their "self-perception as a group member". So for example, in the context of this dissertation, if a designer self identifies as a creative independent fashion designer, then they will most likely adhere to the norms that are expected to be followed by in the community of creative independent fashion designers, see P Niels Christensen et al, "Social Norms and Identity Relevance: A Motivational Approach to Normative Behavior" (2004) 30:10 Personality and Social Psychology Bulletin" 1295 at 1295-1296.

profound self and my experience as a human, and for me at least, I find that those things are very unchanging."[1292] These findings are aligned with the inherent cultural and social functions of fashion, because they are communicative and symbolic of the creators and are also closely related to the concept of individual creative identity mentioned below, in that the common theme in all of these elements is that they are tied directly to the creator.

In several interviews, some participants even mentioned that these extended elements or subject matter could be more important than the design of a garment itself.

> I was sort of thinking about it before you came; just about copyright and my line and what I feel proprietary about with my line and it is sort of the big picture of the line, the aesthetic of the line. I'd be more concerned about someone kind of trying to do the same kind of overall feeling or mix of pieces almost. But it's hard to put a finger on exactly what that would be. Like this dress is like a really like a particular thing and if someone copied this it would be very obvious it was copied…[1293]

> We often say that we don't sell only clothing, we sell the story of the clothing too. And I think when someone steals the idea, they steal the whole story behind it [Courtney: like the philosophy behind it?] Yeah, and you know she/he can't tell why the seam of the sleeve or why the colour is like this because we have a story for each little detail, so stealing the stories behind the creation is very insulting.[1294]

These excerpts suggest that for some participants there are non-economic, and even personal connections to the manifestation of expression and creativity involved in fashion design, and that these personal connections do not always reconcile with the economic-based legal incentives intended to further creativity.[1295]

[1292] (Participant, Interview October 23 2014, at 10-11).
[1293] (Participant, Interview October 23 2014, at 3).
[1294] (Participant, Interview July 30 2014, at 13).
[1295] The authors in referring to independent fashion and music professionals suggest that "many independent producers are not solely motivated by economic profit but rather a combination of emotional and monetary rewards" Brian J Hracs, Doreen Jakob & Atle Hauge, "Standing Out in the Crowd: The Rise of Exclusivity-Based Strategies to Compete in Contemporary Marketplace for Music and Fashion" (2013) 45 Environment and Planning A 1144 at 1145, the authors suggest the fact creators are motivated by both economic and emotional incentives; At least one - participant alluded to this, "we don't do it for money, or for – we just do it because we love it" see, (Participant, Interview July 24 2014, at 6).

These views also demonstrate that there are threads of similarity between the relationship that designers have with their creative output and characteristics of the personhood justification of intellectual property rights, which stems from an individual's interaction with and will impressed onto a thing.[1296] As Margaret Jane Radin explains, "[o]nce we admit that a person can be bound up with an external "thing" in some constitutive sense, we can argue that by virtue of this connection the person should be accorded broad liberty with respect to control over that "thing."[1297] John Tehranian suggests that personhood is realised through "our interaction with the objects in the external world"[1298] in two ways: formation and expression.

> Formation of personhood takes place internally as an individual's identity is shaped through interaction with objects in the external world. Meanwhile, the expression of personhood occurs when the individual communicates some aspect of her (already formed) identity to others as a way of contextualizing herself, through her relationship with objects, within the broader community.[1299]

These two manifestations of personhood seem to be clearly present between some participants, their designs, and these attributes of identity that they have assigned to them. As will be seen throughout the sections within this chapter, there is a greater relationship between the participants and their creative output that economic incentives alone cannot account for.

As mentioned below, individual creative identity can be expressed in a number of ways. For example, these elements can be present in the way that a garment is finished, or in a particular detail, colour or style that is carried through the designs that represents the individual. It can also be manifested in a new way of re-creating a vintage or older design, where the

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[1296] Margaret Jane Radin, "Property and Personhood" (1982) 34 Stan L Rev 957 as Radin suggests, "From the need to embody the person's will to take free will from the abstract realm to the actual, Hegel concludes that the person becomes a real self only by engaging in a property relationship with something external" at 972-973.
[1297] *Ibid* at 960.
[1298] John Tehranian, "Parchment, Pixels, & Personhood: User Rights and the IP (Identity Politics) of IP (Intellectual Property)" (2011) 82:1 U Colo L Rev 1 at 23.
[1299] *Ibid* at 23.

concept is the combination, but because they are the first to market, it becomes a part of their overall aesthetic, look or brand.[1300]

The challenges relating to the legal protection of this type of subject matter (i.e., identity, concepts) rest on the fact that in some cases these elements may be present in single garments, in variances throughout the collection, and in many cases, they may not even apply to all works. Furthermore, although tangible expression may exist, the intangible emotion connected to these expressions is also of concern for the designer. For example, how does one protect the story behind the design? Stories were defined as ways in which the designs were created, the reasons or accidents within the process of designing that brought about the result of a certain design element that was unique for the designer. When copying a garment, the would-be copier is also taking the story, rationale or history behind the creation.[1301] Protecting stories with intellectual property law in this particular context is inconceivable.

Intellectual property law therefore does not to apply to these elements unless they fulfill the eligibility requirements discussed for each of the legal frameworks described in Chapter 4. For example, copyright and industrial design laws protect the physical expression of artistic works or applied expressions in the form of design and are not concerned with feelings, overall aesthetic, identity, reputation, or concepts of the author of those works unless they are clearly expressed in some tangible or permanent form i.e., they cannot be ideas or concepts. Having acknowledged that this contention exists between this extended subject matter and intellectual property protection, some legal avenues[1302] do distantly lend themselves to the protection of

[1300] (Participant, Interview March 9 2015, at 3).
[1301] (Participant, Interview August 28 2014, at 44); (Participant, Interview July 30 2014, at 13).
[1302] Personality rights also come to mind when thinking about the appropriation of identity or personality, but the scope of protection applies to the traits of an individual themself and not the expressions of the personality in creative production. For example in Ontario, "a proprietary right in the exclusive marketing for gain of his personality, image, and name…" *Athans v Canadian Adventure Camps Ltd*, [1977] 17 OR 2d 425, as cited in Conroy, *supra* note 1290 at 10.

these elements. At the same time they remain largely ineffective, because of their eligibility requirements. For example, trademark law is capable of protecting marks that are distinctive. However, to achieve distinctiveness in conjunction with certain elements of fashion design may be quite difficult since fashion is fluid and cyclical.[1303] While some tangible forms of concept or identity may receive protection over time, unless these elements can be well defined, protection will not subsist.[1304] An example of this is the Christian Louboutin red soles that have been distinctive of his brand and the subject of several lawsuits with differing outcomes.[1305]

It seems that "design-intensive firms" such as fashion design companies, tend to favour trademark protection for company names or brands, and not design. This is attributed to the fact that indicia that can be the subject matter of trademark outlast the actual design of a single garment, which may itself only endure a season.[1306] For example, participants expressed that copying was more than just the design,

> […] Copying could also be a combination of label and marketing strategies because design is not only in the clothing. […] You can copy a brand and copy everything about it, including the clothing and image of the brand.[1307]

> …if we did something that we felt was very signature of our design and we want it to be associated with our brand, for posterity lets say yes, but if it's a dress for a season, no. [Courtney: ok so it might be something…you trademark but not protect the design of a dress] I think that trademarking and protecting your stuff is when you are thinking in the long term. Fashion is every three months you know.[1308]

[1303] See Chapter 2.
[1304] A more consistent expression of aesthetic, identity or DNA might be successfully protected under passing off or even parasitism in Quebec.
[1305] *Christian Louboutin SA v Yves Saint Laurent America Holding, Inc,* 696 F 3d 206 (2d Cir 2012) In this case, the Court of Appeals for the Second Circuit determined that the trademark for the red sole was valid and could be enforced except in the case of monochromatic shoes; *Société Christian Louboutin et Monsieur Christian Louboutin v Société Zara France*, Cour de cassation, Chambre commerciale, No de pourvoi 11-20724 (30 May 2012) Differing from the US case, the Cour de Cassation determined that the trademark was invalid due to the lack of distinctiveness and dismissed the claims for trademark infringment and unfair competition.
[1306] UK Intellectual Property Office, James Moultrie & Finbarr Livesey "Design Economics, Chapter Three: Design Right Case Studies" in *Design Economics*, UKIPO (21 September 2011), online: <https://www.gov.uk/government/publications/the-economics-of-design-rights>, authors suggest that a "commonly stated reason for not registering in fashion companies is the rate of change of designs" at 14.
[1307] (Participant, Interview July 30 2014, at 2).
[1308] (Participant, Interview July 8 2014, at 9).

This seems to be a fitting explanation of why some participants saw trademark protection as more desirable than protection for their individual designs.[1309] It demonstrates that there is a higher degree of proprietary interest in the longer lasting elements, rather than output that lasts for a season and the perceived ability of these longer lasting elements to even benefit the designs.

> I think it would be more intelligent to help designers protect the brand so that the object becomes untouchable – because it's branded – rather than protecting the object itself against other designers.[1310]

Another challenge in attempting to fence in this extended subject matter is that identities, ideas, and concepts may overlap within the design community. For example, there may be a number of designers who have a 'vintage', 'bohemian', 'modern' or 'architectural' aesthetics or identities, which are not unique to only one creator. Therefore, even though the individual design elements in a garment may be distinctive, an overlap may exist in the broader aesthetic related to the collection or brand. One example of the overlap is found is in online retail stores that sell clothing based on distinct aesthetics such as vintage or bohemian looks.[1311] These retailers compile their inventory from a variety of clothing brands and designers that share similar aesthetic themes. In this case, difficulties could arise if any one individual attempted to assert ownership over a certain aesthetic.

Another right that conceptually parallels the designer's proprietary interest in the expression of identity or personality are moral rights.[1312] As mentioned in Chapter 4, moral rights protect the author against prejudice to the integrity of their work and confirm the right to be associated with the work that they authored.[1313] Although there is a clearer connection between

[1309] (Participant, Interview March 9 2015, at 13); (Participant, Interview July 25 2014, at 4); (Participant, Interview October 17 2015, at 13).
[1310] (Participant, Interview July 8 2014, at 24).
[1311] See e.g., ModCloth, online: <www.modcloth.com>; Free People, online: <www.freepeople.com>.
[1312] *Copyright Act*, *supra* note 6, s 28.2.
[1313] *Ibid*, s 14.1(1).

the concept of moral rights and the author's identity, personality, and signature, moral rights protection may be thin in the case of a garment design for all of the reasons discussed in Chapter 4. Further, moral rights would only apply to the eligible tangible expression of identity and concept, since copyright law would otherwise not protect it.[1314] These rights extend to protect the author for specific categories of prejudice caused to the integrity of their existing copyright work, based on both subjective and objective tests, meaning that even if the design meets the threshold for protection, it might not be considered objectively prejudicial to the author's honour and reputation.[1315]

6.3.2 On *Creative Identity* and Reputation

6.3.2.1 Creative Identity

At this time, I would like to highlight a few recurring themes concerning the creative activities that have emerged from the findings. Design is a creative process, and as such, to understand the context within which the participants view the contours of this process, the *negative* copying norms should not be viewed through a legal lens, but rather one that is also embedded in the process of creation. A part of creation, as will be seen next is the personalisation or transferring of one's aesthetic, identity or signature to a creative output whether it manifests in elements of expression that can be perceptible (e.g., an element of a brand or campaign) or in attributes that are more abstract (e.g., theme, stories, feelings).[1316] As Rosenblatt observes, creators create

[1314] 'Identity' and 'aesthetic' as concepts on their own would not comply with the fixation requirement, as they might be fluid and comprised of a number of different components. However, these components may be individually expressed and therefore meet the fixation requirement see *Rediffusion*, *supra* note 787.
[1315] The first step in determining the right to integrity is an evaluation of whether the author has felt prejudice; see *Snow*, *supra* note 861, the second step is the determination of whether the those knowledgeable in the field also deem that the author would have felt prejudice see, *Prise de Parole supra* note 861.
[1316] (Participant, Interview March 6 2015, at 12); (Participant, Interview July 30 2014, at 13); (Participant, Interview November 21 2014, at 9-10).

more than what intellectual property is capable of protecting, such as "personalities and identities" as well as "communities."[1317]

For the purpose of this study and in order to provide a fitting typology to help contextualize the present chapter, I will use two concepts abstractly premised on an adapted model of social identity approach, specifically, self-categorization theory.[1318] The premise of this theory is that "[e]very person has many different actual and possible personal and social identities. The theory holds that the way that people define and see themselves in any particular situation moves up and down between these levels and between different identities at each level…".[1319] As defined by Rina Onorato and John Turner,

> [p]ersonal identity refers to 'me' versus 'not me' categorizations—all the attributes that come to the fore when the perceiver makes interpersonal comparisons with other ingroup members. Social identity, on the other hand, refers to 'us' versus 'them' categorizations—all the attributes that come to the fore when the perceiver compares his or her group (as a collective) to a psychologically relevant outgroup.[1320]

Haslam, Adarves-Yorno, Postmes and Jans explain that in relation to creativity, "when *personal identity* is salient, individuals' creations are more likely to reflect their own idiosyncratic style and that their evaluations of other creations are more likely to be guided by personal

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[1317] See Rosenblatt, "Belonging", *supra* note 1180 at 2.

[1318] Note that under the social identity approach, I refer to self-categorization theory, see Matthew J Hornsey, "Social Identity Theory and Self-Categorization Theory: A Historical Review" (2008) 2:1 Social and Personality Psychology Compass 204; Haslam et al, (below) cite the works of John C Turner regarding social identity and self-concept, as their paper on creativity is directly related to this theory. See John C Turner, "Towards a Cognitive Redefinition of the Social Group" in H Tajfel, ed, *Social Identity and Intergroup Relations* (Cambridge: Cambridge University Press, 1982) ch 1; John C Turner, "A Self-Categorization Theory, in MA Hogg, PJ Oakes, SD Reicher & MS Wetherell, eds, *Rediscovering the Social Group: A Self Categorization Theory* (Oxford: Blackwell, 1987).

[1319] Roy F Baumeister & Kathleen D Vohs, eds, *Encyclopedia of Social Psychology*, vol 1 (Thousand Oaks: Sage Publications, 2007) at 793.

[1320] Rina S Onorato & John C Turner, "Fluidity in the Self-Concept: The Shift From Personal to Social Identity" (2004) 34 Eur J Soc Psychol 257 at 259. Notably the authors suggest that "[t]he idea that social identities, or identifications based on group membership, are as much expressions of *self* as personal identity is also central to self-categorization theory. Consistent with this view, much research demonstrates that social identities feature in people's spontaneous self- descriptions; in fact they often precede references to the personal self"at 260 [citation omitted].

preferences."[1321] On the other hand, when "…*social identity* is salient, individuals derive relevant aspects of their sense of self from their membership of a particular group and value their own and others' actions with reference to internalized understandings of that group membership…"[1322] Derived loosely from personal and social identity concepts, I have distilled two terms that I will use to describe both the individual and collective identities of the participants which will be referred to as *individual creative identity* and *collective creative identity*, respectively.[1323]

What I mean by the term *individual creative identity* is the individual designer's creative attributes that culminate into their creative self as 'individual independent designer X.' This may include an aggregate of subject matter and manifestations i.e., stories, personality, signature, overall aesthetic that contribute to an overall bundle of attributes that distinguishes designer X, from designer Y.[1324] This is different than *collective creative identity*, which is premised on association with a group. Similar to the example provided in Haslam et al, collective creative identity would account for the individual fashion designer affiliating themselves with what it means to be from the independent fashion design segments in Toronto and Montreal.[1325]

1321 S Alexander Haslam, et al, "The Collective Origins of Valued Originality: A Social Identity Approach to Creativity" (2013) 17:4 Personality and Social Psychology Review 384 at 385, the authors suggest that with salient personal identity, the "creative behavior is more likely to be informed by individual differences in the form examined in classical approaches to creativity"; As Fagundes suggests in his research on roller derby girls, derby "can provide a strong sense of individual identity" in part because of the qualities of the personas they create or on the quality of their performance, see Fagundes, *supra* note 1 at 1101; Similarly, in Sarid's study of drag queens, there are identity constitutive intellectual property assets, such as the persona or name, see Sarid, *supra* note 1 at 173.

1322 In particular, the authors suggest that in social identity, the "perceptions [and] evaluations" are replaced by the "shared attributes" of the group, see Haslam, et al *supra* note 1321 at 385-386.

1323 *Ibid*.

1324 *Ibid* at 385. Adpated from the example provided for individual identity. When asked to describe what distinguishes using a free element from copying, one participant noted that the personalization aspect is important, stating that "if you give the same fabric to ten designers, I'm pretty sure that we are all going to so something different with it, so this is how it's personally done" (Participant, Interview October 22 2014, at 9).

1325 Haslam, et al *supra* note 1321 at 385. Adpated from the example provided for social identity. While the experiences within creative communities differ, as mentioned in the Introduction, some of the respondents noted that they were a community, while others identified more with being a part of the design community and did not point to

How this relates to the remainder of this chapter is that as will be seen, *individual creative identity* is quite strong in the segment of independent fashion designers, meaning that the designers are constantly distinguishing themselves, their aesthetic and personalities from others. As will be seen below, in a majority of the interviews, participants made reference to the need to create designs in their own way and highlighted their uniqueness e.g., personality, DNA, signature. *Individual creative identity* relates back to one of the main functions of fashion – of creating and expressing individual identity.

There is also self-recognition as a part of a category or group of creators (i.e., a *collective creative identity*, not community).[1326] I make the distinction between *collective creative identity* and community, because as mentioned in the Introduction, while the clusters are geographically proximate not all of the participants felt that there was a community, unlike in other studies.[1327] Within this group, the participants pride themselves on their *individual creative identity*. Belonging to this group 'fashion designer' is important for the individual and supports the negative copying norm, prevention and enforcement mechanisms, which are motivated greatly by the values that are placed on identity, esteem and reputation that stem from both *individual* and *collective creative identity*. An example of this is illustrated in the case of roller derby girls. As Fagundes explains,

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a kinship type relationship with other designers. As also mentioned in the Introduction, a number of studies in intellectual property and norms have similarly found that there is some degree of association between creators and the creative community with which they are affiliated. For example, as Fagundes observes, describing oneself as belonging to the community of roller derby girls is a huge part of one's identity, which is as he suggests one of the main drivers for enforcement of having unique names. This is what he refers to as an identity-constitutive character of roller derby, see Fagundes, *supra* note 1 at 1098; In the domain of tattoo artists, belonging to the community is considered to be important and "[v]iolating industry norms not only runs the risk of community disapproval, it also undermines a tattoer's self-conception", see Perzanowski, *supra* note 1 at 552.

[1326] As Rosenblatt suggests, "[c]reative endeavors provide opportunities to engage with a larger creative community or network that can provide identity creation and self-empowerment", Rosenblatt, "Belonging", *supra* note 1180 at 14.

[1327] In other studies there was reference made to closeness of the group, for example in Oliar and Sprigman's study, the participants consider themselves as a "tribe", Oliar & Sprigman, *supra* note 1 at 1816; Sarid observed that within the drag queen community, there was a strong sense of family and community – they are a "close-knit" group, see Sarid *supra* note 1 at 143 and 147.

> People don't do derby just for exercise but usually because it becomes a part of who they are-"I'm a derby girl" is a very common selfdescriptive for skaters. This feature also helps to explain the willingness of skaters to create, administer, and obey the subculture's rules about name uniqueness even in the absence of state enforcement.[1328]

Indeed, Rosenblatt suggests that within creative communities, "people define themselves partly by what they make and partly by association with others who create similar types of things. Participation in creative communities provides people with belonging, which in turn provides them with both self-definition and self-worth."[1329] She observes that both identity and community are defined by a sense of belonging, which can also serve as "a major motivator of behavior."[1330] In other words, creators within a community are likely to share goals, values and norms from that are prevalent in their community.[1331]

6.3.2.2 On Reputation

In addition to and separate from economic incentives, creators are motivated to create by social incentives.[1332] This is true for a number of the participants. An interesting aspect of the findings, which will be seen throughout this chapter, is the link between some of the participants' sense of identity, story, or personality as expressed in the garment, collection or brand, and the reputation or esteem of the designer and/or their firm.[1333]

Creative identity and reputation are inextricably locked together in the process of creation, which is evidenced by the fact that many creators including fashion designers are the

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[1328] See Fagundes, *supra* note 1 at 1098
[1329] Rosenblatt, "Belonging", *supra* note 1180 at 7.
[1330] *Ibid.*
[1331] *Ibid* at 25.
[1332] Niva Elkin-Koren, "Tailoring Copyright to Social Production" (2011) 12:1 Theoretical Inquiries in Law 309, as Koren suggests in the context of User-Generated Content, social motivation factors can include "self-expression, creative satisfaction, a desire to establish online reputation or a wish to strengthen one's self-esteem" at 318.
[1333] Tremblay, "Creative Careers", *supra* note 1230, Tremblay explores the role of reputation in the community based on interviews of self-employed fashion designers in Montreal. Reputation is a very important factor in creating, in social relationships, branding and credibility of their business. Citing A Yagoubi, Tremblay makes the link between creativity and reputation, stating that "…relationships based on recognition of social esteem are a prerequisite for professional achievement and strengthening the fashion designers and creative careers in general" Yagoubi & Tremblay, *supra* note 706 at 6.

public faces of their respective firms, and even use their own names as their trademark or trade name and are highly protective of these elements.[1334] I would even argue that similar to namesake restaurants by chefs, or gallery exhibitions by visual artists, the value in the design is not just the physical artefact or output of the fashion design but moreso the attributes associated with the fashion designer's own self and its manifestation through their creative identity.[1335]

Reputation is important for a number of reasons, and has to do with intrinsic (i.e., identity, creativity and belonging) and extrinsic (i.e., relation between the vertical cluster and

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[1334] One of the narratives that will constantly reappear throughout this section, and that will be discussed in great detail in the section concerning enforcement and sanctions, is the importance of the participant's identity on one end, and the anxiety at the prospect of being labeled a copier on the other, which would have an effect on their reputation; see Silbey, *Eureka Myth*, *supra* note 185, Silbey observes that reputation "appears to be the aspect of professional and personal life that the interviewees care most about" 149; Laura A Heymann, "A Name I Call Myself: Creativity and Naming" (2012) 2 UC Irvine L Rev 585, Heymann argues that there is both a denotative and connotative function, the former has to do with trademark interest, i.e., referencing and identifying function, whereas the latter has to do with a copyright-like interest, "[t]he selection or creation of a name with an eye and ear toward the effect it will have on those who hear it is an act that derives from the namer's creative impulses. To be sure, this may not be creativity on the scale of an opera or a novel, but even acts of microcreativity are committed with concerns for audience and authorial identity" at 596. In the present context, the name of the company, whether they are personal or not, have the same qualities for the participants; As mentioned in Chapter 4, even in trademark law a name or surname can only be used as a trademark once a semiotic or secondary association is achieved. That is, a name without more cannot be a trademark. The semiotic qualities of the name, in this case, a fashion designer's name is not only linked to quality, but also to reputation or identity as being creative and innovative.

[1335] (Participant, Interview October 23 2014, at 16) participant suggested that copying is not well received when there is a face associated with the label within the designer community; (Participant, Interview July 24 2014, at 1) participant suggested that companies who don't have names or brands are often those who engage in copying; For example, one participant mentioned that because designers have their names on their products, they are diligent to ensure that they are not associated with copying, see (Participant, Interview July 25 2014, at 7); An interesting interpretation of the social value of creation in art and in haute couture, that relates to the importance of the creator's identity and also ties into the creator's reputation is Pierre Bourdieu's reflection on the need to consider not only the producer's social conditions of production but also the creation of the 'producer' as the artist. Specifically he suggests that "Painting, since Duchamp, has provided countless examples, of which you are all aware, of magical act which, like those of the couturier, so clearly owe their value to the social value of the person who produces them that the question to ask is not what the artist creates, but who creates the artist, that is, the transmuting power that the artist exercises" He further states that "…one only has to analyse the relationship between the 'authentic' original and the fake, the replica or the copy, or again the effects of *attribution* …on the social and economic value of the work, to see that what makes the value of the work is not the rarity (the uniqueness) of the product but the rarity of the producer, manifested by the *signature*, the equivalent of the designer label, that is, the collective belief in the value of the producer and his product" see, Pierre Bourdieu, *Sociology in Question*, translated by Richard Nice (London: Sage Publications, 1993) at 147 [emphasis in original]; Heymann *supra* note 1334, Heymann observes that "the creative impulse is particularly salient when the individual is conferring the name on himself or herself as an identifier for his or her expressive activities" at 597.

with customers) benefits.[1336] It can also act as a type of currency, which is particularly important in this segment because of the commercial component and the need to interact constantly with the vertical and horizontal relationships within those industries.[1337]

The importance of professional reputation is, as Catherine Fisk finds, directly linked to a currency or indicator of 'human capital,'[1338] stating that

> The reputation we develop for the work we do proves to the world the nature of our human capital. Credit is instrumentally beneficial in establishing a reputation and intrinsically valuable simply for the pleasure of being acknowledged. Indeed, credit is itself a form of human capital. If professional reputation were property, it would be the most valuable property that most people own. […] Credit matters in an information economy because it is difficult to measure worker knowledge directly in the way that the ability of the typists and machinists of the industrial economy could be tested simply by watching them perform a task.[1339]

Reputation is a very important asset that is directly linked with the outward image that the individuals maintain with their community, broader cluster and consumers.[1340] This has been demonstrated in a number of studies on creative communities.[1341] This is also particularly so in the fashion industry as one of the main functions of fashion is to relate status and class of

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[1336] Reputation can help ease transactions because they convey a level of security between the individuals partaking in the agreement. However, at the same time, reputation also can also cause financial loss if someone's reputation is poor, see Macaulay, *supra* note 57 at 63-64.

[1337] Posner, *Social Norms*, *supra* note 38 at 49-50. Posner discusses the way in which reputation can used as a type of currency for a variety of different purposes; In their study on comedians, Oliar and Springman also noted that reputation is "an important asset" and could have a significant effect on the success of a comedian's career if it was lowered for being a joke thief, see see Oliar & Sprigman, *supra* note 1 at 1815-1816; As Sarid observed in his study on drag queens, reputation is the "most important asset" , see Sarid, *supra* note 1 at 163; As Dubois notes in her discussion on beneficial copying in reference to reputation, the respondents from her study on emerging fashion designers suggest that it is important for the designer to be related to their work so that they can "build up an identity and promote their work" see, Dubois, *supra* note 121 at 53.

[1338] Human capital, unlike material or financial capital, refers to intangible and inalienable elements and assets such as "knowledge, skills, health, or values" that cannot be separated from the individuals who possess them. It is a terms in the discipline of economics, see Gary S Becker, "Human Capital", in David R Henderson, ed, *The Concise Encyclopedia of Economics*, 2nd ed, (Library of Economics and Liberty, 2008) (accessed on September 24 2016) online: <http://www.econlib.org/library/Enc/HumanCapital.html>.

[1339] Catherine L Fisk, "Credit Where It's Due: The Law and Norms of Attribution" (2004) 95 Geo L J 49 at 49.

[1340] See Erving Goffman, "On Face-Work" in Erving Goffman, ed, *Interaction Ritual* (New York: Doubleday, 1967) 5. One way to consider the importance of identity and/or reputation is through the lens of social interactionism. As described by Erving Goffman "face", is the "positive social value a person effectively claims for himself by the line others assume he has taken during a particular contact" at 5; and that maintaining face has to do with the interaction between themselves and the people around them, at 5-7.

[1341] *Supra* note 1, for example on French chefs, tattoo artists, magicians, comedians and drag queens.

individuals. This might be for example why individuals stop purchasing from companies who have experienced a scandal so as to not also be associated with the lowered reputation.[1342] Similarly, that is why those consumers who put a high value on designer or luxury fashion tend to affiliate themselves with originals i.e., the brand, and not the actual garment design itself. Aside from the fit and quality, this would explain why someone would a basic garment from one designer over another, all else being the same.[1343]

Specifically, Silbey suggests that "[t]here is no doubt that reputational interests function both at the private level, in terms of self-actualization and self-identity, and at the public level, in terms of status, information sharing, and the social glue of affection and belonging."[1344] She also suggests that reputational interests in some ways parallel trademark functions in that the latter promotes "consumer interests (message clarity to render purchasing decisions optimally efficient) and mark owner interests (protecting investment in the development of product quality as represented by the mark)."[1345] In this way reputation provides both protection for their brands or their image – in the way that they are perceived publicly and within the fashion design community – while also serving as a signalling mechanism for their clientele.[1346] Indeed, as Silbey points out, creators are quite proprietary and protective over their brands,[1347] and similar to the findings discussed below, the company's brand reputation was cited as one of the more

[1342] Silbey, *Eureka Myth*, *supra* note 185 at 151.
[1343] Participant suggests that consumers are driven by brands/trademarks – especially in the case of basics, where there is otherwise no difference, i.e., white t-shirt, black pants, see (Participant, Interview July 8 2014, at 16).
[1344] Silbey, *Eureka Myth*, *supra* note 185 at 150.
[1345] *Ibid* at 152.
[1346] *Ibid* at 149, Silbey argues that the concept "goodwill" in trademark law is the closest analogy in intellectual property to the concept and role of reputation; Derby identities were also found to be tied to the personas of the characters, and the names derived from these identities have been used as trademarks, see Fagundes, *supra* note 1 at 1105; this was a similar finding in Sarid's research on drag queens, where the "personal is an expression of the creator's identity" and leveraging this both as a trademark and marketing tool, see Sarid, *supra* note 1 at 150-151.
[1347] Silbey, *Eureka Myth*, *supra* note 185 at 156-157.

important assets, as the participants often expressed anxiety at the prospect of someone or something harming their brand or reputation.[1348]

Reputation however, like some of the subject matter mentioned above, is not capable of being protected by intellectual property law. As Silbey notes, trademark law is the closest aspect of intellectual property that could extend to the "goodwill" or reputation, but it does so narrowly.[1349] In Canada that is misrepresentation, confusion, and depreciation. Trademark does not extend to the behaviour and actions of the trademark holder, the negative gossip that could ensue from the possibility of copying another or other reputational aspects of the brand that are not directly related to trademark functions. While moral rights do protect some elements of reputation, including attribution, the right to anonymity and integrity of the work, these rights apply to reputation in relation to works and not to the designers or their brands. The reputational interests of designers are also far broader than what moral rights are capable of protecting. While the economic viability of the creators is of utmost importance because it allows them to remain in business, their reputation and identity seem to be heavy motivations to adhere to the *negative* copying norm. Notably, reputational interests also have an economic component to them. As mentioned above, damage to one's reputation or identity would have the consequential effect of damaging the face of the company in front of their peers and ultimately their economic success.[1350]

[1348] This can be seen in some of the interviews of the participants, for example, as will be discussed below, a number of designers do not like to engage in publicly confronting their alleged copier because they do not want the negative reputation, see (Participant, Interview August 28 2014, at 22) participant stated "you try to protect your reputation and you might think that something is the truth but the other person can say something else, so it is worth it"; Another participant stated that a way that a designer can defend himself or herself in the face of being accused as a copier was their reputation and background, see (Participant, Interview July 31 2014, at 15).
[1349] Silbey, *Eureka Myth*, *supra* note 185 at 153.
[1350] *Ibid* at 151.

6.4 Who is Copying

There is a general and widespread belief in the media, in academic literature, and among advocates of design protection, that only fast fashion firms engage in design copying.[1351] While it is true that some fast fashion copyists engage in copying designs as a business model, those retailers are not alone.[1352]

Throughout the participant interviews, it was revealed that apart from those who been copied by a fast fashion retailer, or who have known another designer who had been copied, the majority of participants have experienced being copied by a diverse range of entities including peers within their own segment, local retailers, as well as high fashion or luxury designers.[1353]

Participants provided examples of situations where they had been directly copied or had heard of others who had been copied by individuals including,[1354]

[1351] See Hemphill & Suk, "Economics of Fashion", *supra* note 120, this article predominantly discusses the business model and negative effects of the 'fast fashion copyist' as opposed to fast fashion designer business models but does not address types of harmful copying can occur outside of fast fashion or retail segment; see Suk, "Testimony", *supra* note 200; Katherine Boyle, "Fashion Industry Testifies in Favor of Design Copyright Protection (Again)" *The Washington Post* (18 July 2011), online: <https://www.washingtonpost.com/blogs/style-blog/post/fashion-industry-testifies-in-favor-of-design-copyright-protections-again/2011/07/18/gIQAd2MuLI_blog.html>; Jason Linkins, "Urban Outfitters Continues Their Grand Tradition of Ripping off Designers" *Huffington Post* (26 May 2011), online: <http://www.huffingtonpost.com/2011/05/26/urban-outfitters-steal_n_867604.html>.

[1352] Unlike the shift felt in other creative industries and the digital world, the participants that were interviewed for this study did not indicate that they were concerned with private individuals from outside of the industry copying them. Their concern was therefore directed to other businesses or as Gervais coined "professional pirates" within the fashion industry, and not consumers of fashion design, Daniel J Gervais, "The Purpose of Copyright Law in Canada" (2005) 2:2 U Ottawa L & Tech J 315 at 327-328.

[1353] In fact, in an article published by the *Globe and Mail*, it was revealed that copying between peers is more common than it is reported. In the examples provided by Lisa Mesbur from her interviews, Toronto based independent designers freely express their feelings about being copied by other small design firms: "'After six years running Pip Robins, I'm still surprised when other small business owners freely copy my designs'" see Lisa Mesbur, "Indie Designers Are Being Copied By Small-Scale Peers – And There's Almost Nothing They Can Do About It" *The Globe and Mail* (7 August 2015), online: <http://www.theglobeandmail.com/life/fashion-and-beauty/fashion/indie-designers-are-being-copied-by-small-scale-peers-and-theres-nothing-they-can-do-about-it/article25855903/>.

[1354] (Participant, Interview October 17 2014, at 3-4); (Participant, Interview February 12 2015, at 3); (Participant, Interview November 21 2014, at 3); (Participant, Interview October 13 2014, at 4); (Participant, Interview March 9 2015, at 3); (Participant, Interview August 4 2014, at 9); (Participant, Interview July 25 2014, at 3); (Participant, Interview July 9 2014, at 9); (Participant, Interview July 30 2014, at 3, 6); (Participant, Interview July 24 2014, at 3); (Participant, Interview July 31 2014, at 5, 17); (Participant, Interview October 23 2014, at 3); (Participant, Interview October 22 2014, at 3).

- former associates, clients, employees (local)
- Canadian designers (local)
- Canadian designers but not local (i.e., outside of Montreal and Toronto)
- peers/friends (other independent SMEs)
- retailers (local, Canadian and non-Canadian)
- well known non-Canadian fashion designers

These examples demonstrate that copying is not confined to a single business segment (i.e., fast fashion). Furthermore, unlike the other intellectual property and creative communities studies discussed in the Chapter 1 (i.e., magicians, comedians, etc.), copying can be carried out by numerous actors within the industry and not just by the immediate group of independent fashion designers.[1355]

What is more interesting is that many of the participants stated that designers (of the independent or artistic kind) would not copy one of their peers. There were a number reasons for this – other than creative identity – including the fact that they are in close proximity to one another and because they would see and interact with one another at different events.[1356] This is similar to studies on close-knit communities, where the structure of the community works to

[1355] In the fashion industry, the range of copiers might include anyone who wishes to appropriate and commercialize a work (this can include retailers, fast fashion companies, high end luxury design firms, local SMEs designers, or others involved in the chain). In the case of recipes, the range of copiers are not as varied, nor is the case for comedians and magicians. For example, a fast food chain (analogous to a fast fashion company) would not take the time to create an elaborate meal with the same ingredients, quality or price points as a Michelin Star restaurant. Similarly, in the realm of comedians or magicians, the market perhaps does not exist in the same form as the fashion industry for various actors to be able to capitalize on their jokes or magic performances.

[1356] See e.g., (Participant, Interview March 9 2015, at 6) Participant mentioned that larger retailers are more likely to copy than local designers to copy because they invest less on creativity than on distribution; (Particpant, Interview July 24 2014, at 6) "I don't think anyone is interested in copying the designer [Courtney: so again making the distinction between the designers versus like very much industrial?] yes, because we all know each other, we all see each other all the time at events, tradeshows – like I don't think any of us would feel comfortable knowing that we copied [Courtney: one another] yeah, or that we try to look like them, we are really trying to avoid that"; (Participant, Interview October 14 2014, at 9) the participant stated that "all the biggest companies do it" but that copying exactly was negatively viewed; (Participant, Interview July 25 2014, at 3) Particpant said "You know, in [city redacted], all the people know [Courtney: each other] each other, exactly, and it's very close, and you know really what kind of products all the designers are creating. So they protect each other from copying"]; (Participant, Interview July 30 2014, at 17) Participant stated "I would not be afraid of other designers copying, because the retailers are most likely to copy."

prevent copying.[1357] Despite this, copying within the segment occurs. However, when a designer from the independent design segment copies another designer, it does not seem to provoke legal or public reaction by the design originator. This is different than the reaction evoked when major retailers copy local designers.[1358]

Why this is important will be discussed in the section on enforcement mechanisms and sanctions below, where examples are provided to demonstrate that when the would-be copier comes from the same segment or cluster, efforts are made to resolve the issue amicably, directly, and in the majority of situations, legal action or outing the individual publicly does not take place. Notably this is different from when alleged copiers outside of the segment of independent designers have not responded when confronted over copying works; in those cases, the participants seem to bring the issue of copying to light and to the public more quickly.[1359]

6.5 Defining a Public Domain for Fashion

The "public domain" is an intellectual property law concept that refers to works ineligible for protection by virtue of their subject matter,[1360] or because intellectual property protection has expired.[1361] This can create tension between the owner and users of protected works, as observed by Teresa Scassa,

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[1357] Sarid, *supra* note 1 at 160, however one difference between the participants interviewed for Sarid's study and this one is that sanctioning may have the effect of not "making it" in the drag world. Fashion designers' success does not seem to rely on support from the other independent fashion designers in the same way.

[1358] While legal action may still be sparse, public reaction is more likely if an independent designer was copied by a larger retailer; (Participant, Interview November 21 2014, at 11) The participant said that it would not be shocking if someone went after a retailer; One participant suggested that it may be perceived negatively for a designer to sue another designer, however, the sentiment would not be the same if they were to sue a retailer, see (Participant, Interview August 4 2014, at 11); (Participant, Interview October 23 2014, at 16) "I would say its frowned upon like um in the more like – artistic designer community. When there's face, a designer face to a label like – rather than it being a corporation or something, I think its frowned upon"; see the three examples under sanctions.

[1359] Still, in these cases, legal channels are rarely used if at all. See section below on enforcement and sanctions.

[1360] Examples of the "public domain" in copyright law include ideas and mathematical concepts, see e.g., *TRIPS*, *supra* note 789, art 9(2) "Copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such."

[1361] An example of the latter would occur when protection expires, for instance where an article is registered for industrial design protection, it expires after five years unless a maintenance fee is paid to extend it for another five

> [t]he concept of the public domain suggests a pool of concepts, themes, and works that can be freely drawn upon by those seeking to express their own ideas. The interests of copyright owners (not necessarily those of the creators of copyright works) are best served by a narrow public domain. The rights of creators, users, and society arguably lie with a more robust public domain.[1362]

The public domain contains elements that help build future works. Indeed, David Vaver suggests that intellectual property rights are not meant to 'fence in' all ideas, but rather

> [t]he way IP laws are carefully circumscribed shows that copying or independently producing an identical item is acceptable, even to be encouraged, unless it is clearly prohibited. Keeping a broad public domain itself encourages experimentation, innovation, and competition – and ultimately the expectation of lower prices, better service, and broader public choice.[1363]

Vaver argues that overprotection stifles "desirable activities" and "undermines norms that particular groups establish as their own social practice," which otherwise do not include the use of intellectual property laws.[1364] Scholars have long advocated that a strong public domain is favourable, however, it is only in the last several decades that the public domain, the 'balance' (between creators and users), and the assumptions that we make about creativity and creators are being evaluated, tested, and studied.[1365]

Creators do not create *ex nihlio*, rather they draw from all senses, including everything they see, hear, taste and smell. This has contributed to the difficulties in distinguishing between

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years of protection, for copyright law the protection expires fifty years following the life of the author, see *Copyright Act*, *supra* note 6, s 6 and *ID Regulations*, *supra* note 930 at s 18(1); Litman, *supra* note 1265 at 976; there are a number of ways that the public domain is defined in James Boyle, "The Second Enclosure Movement and the Construction of the Public Domain" (2003) 66 Law and Contemporary Problems 33 at 59-61.

[1362] Scassa, "Interests in the Balance" *supra* note 182 at 64-65.

[1363] Vaver, *supra* note 126 at 23.

[1364] *Ibid* at 24.

[1365] See for example, James Boyle, *The Public Domain: Enclosing the Commons of the Mind* (New Haven: Yale University Press, 2008); Pamela Samuelson, "Mapping the Digital Public Domain: Threats and Opportunities" (2003) 66 Law and Contemporary Problems 147; Litman, *supra* note 1265 at 966; see generally Christopher Buccafusco & Paul J Heald, "Do Bad Things Happen When Works Enter the Public Domain?: Empirical Test of Copyright Term Extension" (2013) 28:1 Berkeley Tech L J 1 (an empirical study considering whether the theoretical justifications for term protection "stand up to empirical scrutiny" and concludes that they are mistaken); Note a series of studies conducted on the 'endowment' effect, see generally Christopher Buccafusco & Christopher Jon Sprigman, "The Creativity Effect" (2011) 78:31 The University of Chi L Rev 31; see generally Christopher Buccafusco & Christopher Sprigman, "Valuing Intellectual Property: An Experiment" (2010) 96 Cornell L Rev 17.

users and creators, because they can be considered one in the same.[1366] As Laura Murray and Samuel Trosow suggest,

> We have always insisted that to conceive of copyright as a battle between creators and consumers is misleading and damaging. People learn to create by seeing, imitating, experimenting, listening, practising, and watching; . . . When you think about it this way, you realize that creators are the most ardent consumers of the arts. [1367]

Using a vast variety of elements and drawing from inspiration is a very important process that all of the participants have discussed, whether from movies, food, artwork or other designers. Indeed, one sentiment that came up several times in some interviews was that "everything is public domain – it's the combination – the key is in the combination."[1368]

Virtually everything is free for fashion designers to use as a part of their creative toolboxes. Participants stated that these elements could include cultural influences, general shapes, silhouettes, techniques, the typology or category of the object, i.e., a stiletto heel, a trench coat, a shirtdress, an A-line skirt, an empire waist, or other classic styles and silhouettes. As one participant explained, "[a]gain, like the trench coat, there are some aspects of certain designs – I don't know how anyone could claim ownership over them"[1369] However, it is possible for some silhouettes to be proprietary as long as they were personalized or newly created because they can contribute to the direction or aesthetic of the collection.[1370] Thus, it seems that once a designer has processed the work or combined elements to reflect their own

[1366] Murray & Trosow, *supra* note 512 at xi [introduction]; As well, Scassa observes that while creators and users are often a part of copyright policy discourse, the interests of owners, who are central to policy considerations, are "conflated" with the interests of creators, yet they are not always the same, see Scassa, "Interests in Balance", *supra* note 1362 at 41-42.
[1367] Murray & Trosow, *supra* note 512 at xi.
[1368] (Participant, Interview October 17 2014, at 10); See also (Participant, Interview March 6 2015, at 10) participants stated that it was the combination in the exact way; (Participant, Interview August 28 2014, at 30); (Participant, Interview October 22 2014, at 7) participant mentioned that everything together would have to be taken.
[1369] (Participant, Interview February 12 2015, at 8).
[1370] (Participant, Interview October 13 2014, at 12); (Participant, Interview November 21 2014, at 16).

expression or applied their own individual creative identity, the work is no longer a part of the public domain.

In addition to the substantive elements, two participants mentioned that it was possible for a design to be free to copy after a certain amount of time had passed. For example, one commented that if something truly original was created, it might take up a couple of decades for it to be free for others to use given certain conditions.[1371] However the work would still have to be changed to a certain degree. Another participant commented that

> …within a particular season and I would say like within a year or two years of a season where the designer has created something, I think you are going outside of the bounds and copying something if you are taking all of the elements and copy all of the elements including the fabric choice from the garment that was created by a designer that season and putting it out there as something of your own that same season.[1372]

The same participant qualified this statement by saying that another designer would not of course copy it directly, and that something as simple as changing several elements including the fabric could drastically change the appearance of the garment.

It is apparent that for a number of participants, elements that are considered free to use are quite similar to the legal concept of public domain. For example, designers expect that they may freely use common staples, such as classic shapes, silhouettes and elements such as stitching or placement. What was not so clear is the time limitation required before something becomes a classic or open for everyone to use. While parallels exist between the participant's responses and the legal concept of public domain, it is the combination and personalisation of these elements that becomes the proprietary expression of the designer and removes the design from the public domain.

[1371] (Participant, Interview November 21 2014, at 16). In the example I had provided for the participant, I asked about a theoretical style of pocket that was newly created. Participant noted that if the article had become so well know that it had become an industry staple, and even given a name, then at that point over several decades it could be used.

[1372] (Participant, Interview October 14 2014, at 12).

What was not considered in this research is the role of the consuming public, in other words, the non-fashion design industry "public" component of the public domain. While not within the scope of this study, an example of how this situation can arise is where members of the public commission a tailor to make clothing based on existing designs that originated from another designer.[1373] To what degree the participants from this study would react differently or the same has yet to be investigated.

6.6 Copying in the Fashion Industry

There is general consensus by a number of independent fashion designers that certain kinds of copying are negatively perceived within their clusters in Montreal and in Toronto. The norm against negatively perceived copying will be explored by defining the parameters related to the norm, which are transformation, non-intentional copying, and referencing. What this section also attempts to do is to define how this segment, and not the law, sets the parameters of copying. What will be shown is that within each of these elements there are fundamental differences between intellectual property law principles and the way in which the segment operates.

6.6.1 Norm Against Copying in the Fashion Industry: Copying that is Negatively Perceived

As will be discussed in this section, some of the participants define copying as intentional imitation, replication, or taking an exact or very similar garment, style, image, and/or identity. Although several of the participants acknowledged that copying occurs within the broader fashion design industry, it seems that there are some circumstances where copying is negatively perceived, while in other circumstances it is not.[1374] Thus, the norm within the independent

[1373] I would like to acknowledge and thank Professor Mistrale Goudreau for suggesting that I include this perspective and example.
[1374] A number of studies in creative communities have different terms and parameters of negative copying, including the "anti-copying" norm, "unacceptable" copying, or the norm agains "appropriaton", *infra* note 1378.

designer communities in Montreal and Toronto is that negative copying is negatively perceived and disapproved of, in other words it is not respected.[1375]

Throughout the interviews, some participants mentioned circumstances such as the ones discussed in this section, where they suggest that some types of copying are negatively perceived. I have condensed negatively perceived copying to "negative copying" and will use these terms interchangeably throughout this paper.[1376] I use the term *negative* throughout the thesis and not 'unlawful' or 'economically harmful' because it is the only word that could encapsulate the sentiment of the participants when they described being copied by another designer although the participants did not use this term. *Negative* should be distinguished from 'economically harmful' and 'unlawful' copying because the prior connotes that some economic harm has occured (i.e., lost sales), whereas the latter supposes that the act of copying violated or infringed the law.[1377] Although both could exist in the examples provided by the participants, negative copying can also occur where economically harmful or unlawful copying has not taken place. In order words, there are harms other than legal or economic ones associated with identity and reputation. It is important to acknowledge that finding a term that encapsulated the perception of the interviewees without associating a definitive outcome with the concept was challenging. It is not meant to be a polarized or dichotomous term. As mentioned in the literature

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[1375] The norm in the design community is that *negative* copying is not well perceived, and should be avoided. This is an injunctive norm, as opposed to descriptive norm. An injunctive norm is a norm, which carries certain consequences such as external sanctions, whereas descriptive norms describe what people do, see Robert B Cialdini, Carl A Kallgren & Raymond R Reno "A Focus Theory of Normative Conduct: A Theoretical Refinement and Reevaluation of the Role of Norms in Human Behavior" (1990) 58:6 Journal of Personality and Social Psychology 1015 at 1015-1016; However, it is also a "moral (personal) obligation," because as will be seen in the section on motivations, the participants demonstrate the existence of internal motivators for following norms such as values and identity, see generally Shalom H Schwartz, "Normative Influences On Altruism" in Leonard Berkowitz, ed, *Advances In Experimental Social Psychology*, vol 10 (New York: Academic Press, 1977) 221 at 231.

[1376] See e.g., one participant stated that there are different levels of copying and broke it down into inspiration, and then blatant copying (Participant, Interview November 21 2014, at 2).

[1377] In her study Dubois suggests that where emerging fashion designers are unable to access the law because it is so "remote from fashion designers' affairs," they rely on social norms to explain "unequal power relations, the importance of credit and reputation, and the role of flattery" see Dubois, *supra* note 121 at 48-49.

review, there are a number of different iterations of the norm against copying or appropriation and related norms within studies of intellectual property and norms in creative communities, although they are defined and termed differently.[1378]

When asked what copying means to them, parcipants described copying as the action of "taking",[1379] "stealing",[1380] "recreating",[1381] "ripping off",[1382] "thoughtless reproduction"[1383] or "duplication"[1384] of another person's work. Throughout the responses, some participants attempted to define "copying" by using examples. For example, some participants mentioned that in some circumstance it was enough to take the main aspects of the work (in most cases the pattern or silhouette), while others stated that it would be the combination of a number of elements.[1385]

> Placement and shapes – I think it's just the way you use them. I think it's the combination of everything – the fabric, the buttons, the zippers, everything – it's everything.[1386]

[1378] For example Perzanowski refers to a grey area of copying that ranges between "literal tracing and drawing upon common themes or ideas"; these can fall into the "impermissible copying" category, at 545. The norm he referred to was the "anti-copying norm", see Perzanowski, *supra* note 1 at 554; Oliar and Sprigman refer to it as the "norm against appropriation" in relation to "joke stealing", see Oliar & Sprigman, *supra* note 1 at 1812; Eden Sarid referred to the "gentlewomen's understanding" where several norms against appropriation were described, such as in relation to copying a persona, name, a number or signature singer, non-signature songs, Sarid, *supra* note 1 at 158. In her research Dubois' defines her three typologies of copying through "concepts and ideas that respondents invoke to make sense of design copying and position themselves in relation to this practice," breaking them down into "unacceptable" which is described through *official law*, *power relations*, *credit* and *free riding*. "Tolerated" copying is described through *resource constraints* and *control mechanisms*, and there is also a category of "beneficial" copying, see Dubois, *supra* note 121 at 45. The findings of this thesis were based directly the respondent interviews and emerged from the methodology that was used and do not follow the typologies from these above-mentioned studies.

[1379] (Participant, Interview October 17 2014, at 2); (Participant, Interview March 19 2015, at 2).

[1380] (Participant, Interview July 9 2014, at 9); (Participant, Interview July 31 2014, at 3).

[1381] (Interviewing, Participant March 6 2015, at 1).

[1382] *Ibid*; (Participant, Interview November 21 2014, at 2).

[1383] (Participant, Interview October 23 2014, at 2).

[1384] (Participant, Interview August 28 2014, at 2).

[1385] (Participant, Interview July 30 2014, at 2) Participant stated that it has to be the whole garment and alluded to the fact that this was at least measurable; (Participant, Interview November 21 2014, at 2, 16) Participant stated that it could be a unique detail or the combination of details that make it unique that can be proprietary; (Participant, Interview October 23 2014, at 9) For example, the participant stated that it was the combination of a number of elements that made their line what it is.

[1386] (Participant, Interview March 19 2015, at 6).

> …there are different levels of copying. When you say 'copying', to me they are directly ripping off your design. Everything down to the textiles you use in what combinations like where everything is placed in terms of the details – that's what copying is to me.[1387]

An interesting parameter drawn by some participants is in reference to intent. A few participants suggested that those who engage in copying the work of others do so intentionally or knowingly.[1388] One participant further explained that intention could be assumed in cases where an alleged copier had prior access to the garments, i.e., this can occur where a retailer carries a particular garment and subsequently copies it.[1389] Although intent emerges from some of the interviews as a requisite element of copying, intellectual property laws operate as a strict liability regime, which means that whether intention exists or not is irrelevant to finding liability for infringement.[1390] As will be discussed below, this correlates to the finding that independent creation or subconscious copying of a similar work is more accepted within this particular industry because intent is not present.

Some of the participants describe copying as a conscious or deliberate business model used by some retailers to capitalize on trends and to reduce product design and development costs.[1391] Some participants noted that it is not uncommon to be directed to engage in some form

[1387] (Participant, Interview November 21 2014, at 2).
[1388] Presumably copying that is negatively perceived; (Participant, Interview August 4 2014, at 2, 5); (Participant, Interview July 24 2016, at 1); (Participant, Interview July 9 2014, at 5); (Participant, Interview October 17 2014, at 2-3).
[1389] (Participant, Interview July 30 2014, at 15) This was from their experience prior to becoming an SME.
[1390] See *Copyright Act*, *supra* note 6, s 27(1), knowledge is not required for a finding of infringement, although as Murray and Trosow observe, it's absence can "reduce damages to zero", Murray & Trosow, *supra* note 512 at 105; *Industrial Design Act*, *supra* note 7, s 11(1); although there is an element of knowledge required in s 20 (c) & (d), s 20 (a) & (b) do not have the same knowledge requirement, see *Trade-marks Act*, *supra* note 7, further the "use" of a trademark in an infringement analysis does not require intent, see *International Clothiers Inc*, *supra* note 1080.
[1391] (Participant, Interview July 24 2014, at 1); (Participant, Interview July 31 2014, at 3) the participant used the word stolen, in describing a practice where retailers would farm out Canadian designers' designs and sell them on another platform; (Participant, Interview July 9 2014); (Participant, Interview July 30 2014, at 15).

or degree of intentional copying by retailers who employ this business model when first starting out in the industry.[1392]

> What I experience[d] in the industry is that when someone is copying a piece, they are aware that they are doing the copying. [Courtney: so it is intentional] yeah, because they find it just beautiful and maybe they cannot do better, I don't know. But I know they are aware of it and sometimes they are uncomfortable but the boss is pushing them to make it and it just pass through process of making this same thing cheaper.[1393]

While this is not an uncommon experience, it is a very different business model than the one that is followed by the independent segment that was interviewed for this study.

The emotions expressed by participants towards copying that is negatively perceived include that it is "frowned upon" by the artistic designer community,[1394] that it was akin to "stealing,"[1395] "big fat laziness,"[1396] or that it is "wrong", [1397] and that individuals in the industry are offended by it,[1398] which could result in shunning,[1399] or a feeling "disdain" for the copiers by members of the segment and community.[1400] Some of the participants felt that being called-out as a copier was extremely bad for the would-be copier, stating that it would be "embarrassing"[1401] and would create "bad energy"[1402] for the alleged-copier's reputation or brand.

However what amounts to negative copying other than when it is an identical or extremely similar copy varies for the designer and is not well defined, as there is no definitive quantifiable threshold, bright-line rule or industry standard to determine when something crosses

[1392] In these circumstances, copying could be identical or with some changes. (Participant, Interview July 24 2014, at 1) (Participant, Interview October 17 2014, at 10); (Participant, Interview August 4 2014, at 2).
[1393] (Participant, Interview August 4 2014, at 5).
[1394] (Participant, Interview October 23 2014, at 16).
[1395] (Participant, Interview July 9 2014, at 9).
[1396] (Participant, Interview July 8 2014, at 23).
[1397] (Participant, Interview October 22 2014, at 15).
[1398] (Participant, Interview July 30 2014, at 10).
[1399] (Participant, Interview October 14 2014, at 9).
[1400] (Participant, Interview October 17 2014, at 14).
[1401] (Participant, Interview October 17 2014, at 5); (Participant, Interview March 6 2015, at 19), (Participant, Interview August 28 2014, at 22, 44).
[1402] (Participant, Interview November 21 2014, at 8).

from an inspiration into a copy.[1403] What was also revealed in some of the responses is that negative copying is contextual and evaluated against other variables such as who copied and the circumstances under which the copying occurred i.e., what was taken, how much, and on what scale it was reproduced.[1404]

There are both perceived economic and non-economic harms that may describe why some of the participants expressed copying to be *negative*. Economic harms include the fact that copiers capitalize on the resources of creators or innovators, specifically their intellectual effort, creativity, their resources and time. Because a number of participants within this particular segment produce domestically, as mentioned in Chapters 2 and 3, they spend more money to produce their garments due to tariffs, labour and the cost of manufacturing in Canada. This puts fashion designers at a financial disadvantage when larger companies, that are able to produce at a fraction of the cost and time, effectively take their creations and replicate them, selling them at lower prices,[1405] and in some cases for even higher prices by major retailers that have positioned

[1403] Some participants alluded to the fact that confusion as to the provenance would definitely be indicative of where copying occurred, see generally (Participant, Interview March 9 2015, at 3), (Participant, Interview July 30 2014, at 2, 11); Unlike some professional membership associations, there are no rules of conduct or code of ethics pertaining to copying within the communities of Toronto, Montreal or nationally throughout Canada. An example of a community where such code exists is that of magicians, see e.g., Loshin, *supra* note 1, at 137-138 n 71; or in the case of fashion design, the Fashion Originators' Guild of America, established in 1932, undertook to prevent design copying by means of registration, but whose activities and methods were brought to question and eventually ended up in a Supreme Court decision which held that their practices were unfair competition, *Fashion Originators' Guild of America v Federal Trade Commission*, 312 US 457 (1941); Following the war, the Guild focused their activities on "advocacy for design legislation and promotion of industry and American design" see Hemphill & Suk, "Fashion Originators" , *supra* note 81, 159 at 177; In Perzanowski's study of tattoo artists there was similarly a lack of consensus among the responses as to what constituted "impermissible copying" Perzanowski, *supra* note 1 at 545.

[1404] On a couple of occasions, designers invoked the David and Goliath metaphor in relation to the struggle of independent designers and major retailers, see (Participant, Interview October 17 2014, at 14); (Participant, Interview August 28 2014, at 22); In reference to the tattoo artists, Perzanowski noted that tattoo artists never sue one another, but have instituted legal action where their work has been reproduced in another industry or segment, such as clothing or merchandising, Perzanowski, *supra* note 1 at 530. Similarly but not the focus of this study, Dubois examines the *power relations* as they relate to what the participants expressed as wrongful copying behaviour. For example, in her analysis she observes that when a more powerful party "…capitaliz[es] on the original ideas of the weaker party" it is considered to be "blameworthy conduct" see, Dubois, *supra* note 121 at 53. In this research, the distinction seems to address the difference in segment (see section on sanctions below) and not necessarily power relations.

[1405] (Participant, Interview July 9 2014, at 10); (Participant, Interview November 21 2014, at 3).

themselves in a more expensive segment.[1406] This is particularly harmful to the independent design segment, because unlike fast fashion retailers, designers sometimes invest a number of years to perfect a certain look, detail, aesthetic, and even design that are signature to them which they continuously use, update and better from year-to-year.[1407]

Harm can occur for designers within this segment who sell in overlapping markets. For example this can occur where a capsule collection is created for a retailer, or a retailer carries a designer line and the retailer then reproduces the identical or similar design, concept or aesthetic when the collection has ended. While some argue that the disparity between some markets such as high-end luxury goods would not be affected by those who shop for inexpensive imitations made with a different quality standard i.e., not made in Canada,[1408] the disparity is not so extreme in the luxury or mid-range market, where consumers are otherwise able to splurge on an item of fashion design but forego it because they are able to find it for less elsewhere. A number of participants provided examples that could be construed as them having suffered direct economic harm in the form of lost sales,[1409] and have in some cases experienced their clients or buyers purchasing a similar design from an alleged copier.[1410]

[1406] See below in the section of enforcement, this is what happened in the circumstances that occurred in the situation between US based designer Diane von Furstenberg and Toronto based design firm Mercy; Participants both mentioned examples where their designs were sold for as much as 7-8 times less, and as high as double or triple the amount. Others mentioned that the replica went for roughly the same that theirs was being retailed for. One participant provided an example where a replica of their design was being sold for a fraction of the original (Participant, Interview March 9 2015, at 4).

[1407] These elements can also include colour, fabric, silhouettes, see (Participant, Interview March 9 2015, at 2, 4); (Participant, Interview October 23 2014, at 4); (Participant, Interview Interview October 17 2014, at 16); (Participant, Interview July 31 2014, at 16).

[1408] Blakley, *supra* note 1285, Blakley played an excerpt from a conference where Tom Ford stated that after much research, they realized that individuals who purchase counterfeits are not the client base for luxury goods, at 5:30+.

[1409] (Participant, Interview October 23 2014, at 3-4); (Participant, Interview March 9 2015, at 3); see e.g., However, one participant stated that although there is a different market for made-in-China goods, versus goods made locally or in Canada, they did not state whether there is a definitive loss of their marketshare, and suggested that perhaps because the clientele who purchased the less expensive good may not have been able to afford them in the first place, see (Participant, Interview July 9 2014, at 10).

[1410] (Participant, Interview August 4 2014, at 9); (Participant, Interview October 13 2014, at 5); (Participant, Interview July 31 2014, at 18); (Participant, Interview July 8 2014, at 15).

In addition to economic harms, participants alluded to non-economic harms throughout the interviews. Two non-exhaustive examples of non-economic harms can illustrate this. The first occurs when there is a genuine concern in the form of embarrassment and lowering or losing reputation that could arise from the confusion surrounding the *originator* of a design. One participant mentioned that when larger, better-known companies copy smaller designers, in addition to the economic gain that the company received from using their design, they were concerned about the harm that arises from looking like the one who copied the better-known company.[1411] Some participants perceived that difficulties could arise to prove that they were the originator because the larger company has a broader clientele and more resources.[1412] This is important because as will be seen in the section on sanctions below, these non-economic harms effectively enforce the negative copying norm.

Although reputational harm does not always result in economic loss, there are economic consequences that can arise from the loss of reputation, such as the refusal of some members of the cluster to work with or retail them and for consumers to refuse to shop from them.[1413] There are therefore economic losses that can be associated with the lowering of reputation within and outside of the segment.

Another example of non-economic harm occurs when an alleged copier is so similar to the original designer that it has caused or potentially could cause confusion both within the cluster as well as with consumers.[1414] Two issues that can arise from this: first, that the allure and uniqueness of the product is diluted when there are a number of identical or near identical works

[1411] (Participant, Interview October 17 2014, at 3).
[1412] *Ibid*.
[1413] Rosenblatt, "Fear and Loathing", *supra* note 27 at 12-13, Rosenblatt explains that businesses often try to align their values with that of their consumers and are keenly aware of the consequences of shaming on their reputation and resulting financial impact.
[1414] (Participant, Interview March 9 2015, at 3), (Participant, Interview October 13 2014, at 4) both participants provided examples to demonstrate that entities within the cluster could confuse their works with an alleged copier.

causing the market to be flooded and a particular look to be overly exploited.[1415] Second, the inferior quality of the copy can lead to a reputational issue because individuals will associate the copied design with a particular standard, which may affect the originators if they had not been aware of the originals in the first place. Both of these issues may cause an erosion of individual creative identity, which in turn may corrode the collective creative identity because the elements that make these designers inherently creative or distinctive are no longer unique to that segment since it would be available in different segments. This can in turn put off fashion innovators who would have normally bought a design but would decline to because they don't want to be associated with designs that are available to the masses, on bargain racks at fast fashion retailers. Although these outcomes were not discussed in the interviews, it is possible given the fashion cycle discussed in Chapter 2.

Despite these economic and non-economic harms, and even though some participants stated that they were upset when they experienced negative copying or heard about another designer being negatively copied, a few of the same participants revealed that they somewhat interpreted it as a signal from the industry that the particular designs have the potential to be commercially successful.[1416]

> I'd like to be ahead of the trends. It's not a bad thing to have people copying you because it means that you are on to something.[1417]

> Back to what I was saying, when everyone copies, I just see it as the highest form of flattery and I still believe that. […] Like if a big corporate company is knocking on you, it means that you have it, you have it in you to become just as successful. So I just see it like that.[1418]

[1415] On a more macro scale, a participant stated that the reason that the creative or design identity of countries become blurred is due to the fact that everyone copies one another (Participant, Interview March 9 2015, at 8).
[1416] (Participant, Interview March 9 2015, at 8). For example, while feeling that copying is a negative experience it challenges them to try to be stronger in other areas of their business.
[1417] (Participant, Interview February 12 2015, at 6).
[1418] (Participant, Interview November 21 2014, at 5).

> …yes yes to actually benefit from being copied, because if you are being copied then you must be good.[1419]

As Raustiala and Sprigman point out, copying successful designs is "the trick to being a successful fashion copyist," which requires copyists to evaluate the commercial success of the designs in the first place.[1420] Indeed, as previously mentioned, some retailers who engage in copying as a business model scour the world to purchase and recreate what they deem to be successful designs.[1421] Rather than use this business model however, a few participants suggested thatalternatives such as collaborations or licensing designs would be beneficial to the segment.[1422] As previously mentioned, capsule collections are an example of such collaborations.

As mentioned in Chapter 1, the purpose of intellectual property law is based on the premise that economic – and moral in the case of copyright – incentives actually help innovate, create, and disseminate works to the public.[1423] As a negative right, intellectual property prevents the unauthorized use of works. However, it seems that in addition to preventing economic harms, designers are motivated to protect themselves from non-economic harms connected to individual creative identity and reputation.

What is interesting is that while *negative* copying is frowned upon by participants within the community, it is distinguished by circumstances where copying does not evoke the same disapproval.[1424] While the same harms arguably exist (economic and non-economic) the

[1419] (Participant, Interview July 9 2014, at 5).
[1420] Raustiala & Sprigman, *Knockoff Economy*, *supra* note 98 at 54.
[1421] (Participant, Interview July 25 2014, at 2-3).
[1422] (Participant, Interview March 9 2015, at 6-7); (Participant, Interview October 14 2014, at 4).
[1423] See David Vaver "Intellectual Property Today: Of Myths and Paradoxes" (1990) 69:1 Canadian Bar Review 98, Vaver suggests that "[t]he strongest economic argument is utilitarian…But this is only partly true. No doubt, less activity would occur – but how much less, and in what area? It seems impossible to argue that the current laws encourage just the right amount of research, creaitivity and financing, and just in the right areas. In any event, this fails to make the case for intellectual property. For if the allocation of these property rights is simply a means to an end, namely, to make the fruits of creativity and research available to users, then one must ask if the means is the most effective way to that end" at 100-101.
[1424] These emotions will be discussed in the next section.

participants did not cast them negatively. The next section will attempt to tease out some of the different degrees of copying, or permitted range of copying, which would not fall into the category of negative copying.

6.6.2 Copying in the Context of Inspiration, Transformation, Independent Creation, Subconscious Copying, and Referencing

Taking into consideration the fact that fashion is a highly social and cultural means of communication, symbolism and creative form, it is impossible to not be impacted by the multitudes of images, experiences and collective trends that are prevalent in culture and in society. This section demonstrates that within this context of creation, there are a number of ways that designers can copy and create because of the recognition within the industry that individuals are inspired by their exterior world.[1425] In certain cases, some participants attempted to draw lines to identify the kind of copying that would not be negatively perceived. These include situations where the participants are inspired, or when the works are transformed based on their individual creative identity; the second is where subconscious copying or independent creation occurs.[1426] Finally, the practice of attribution, credit or referencing will be discussed which occurs when the original work is transformed yet referenced or cited as the inspiration. While intention was identified as one of the characteristics of copying, in these three examples, inspiration and referencing both constitute intentional taking, but within certain boundaries are

[1425] (Participant, Interview November 21 2014 at 2, 6-7) Participant states that the creative process that fashion designers are taught often includes usung pre-existing images as a backdrop to sparking inspiration and creativity.
[1426] In Dubois' study on legal consciousness in fashion and intellectual property conducted on emerging designers, she similarly revealed that there were three justifications offered by the respondents to describe their "tolerance" for copying that occurred within the design process – these include "cumulated creativity" (inspiration), "independent creation" and "unconscious copying". These findings are quite similar to the three categories discussed here. The latter two categories are similar to the intellectual property law concepts of independent creation and subconscious copying that are discussed in this section, see Dubois, *supra* note 121 at 51; Similarly Perzanowski noted that within the domain of tattoo artists, many "embrace" inspiration, while others try to avoid even subconsciously copying another artist's work, see Perzanowski, *supra* note 1 at 548-549; Independent creation also exists in the world of comedians. As Sprigman and Oliar suggest this occurrence is "more believable – when jokes plow common themes", or it may arise as a result of subconscious copying, see Oliar & Sprigman, *supra* note 1 at 1814.

not considered to be negative. On the other hand, independent creation and subconscious copying are not considered to be intentional. These three categories will be examined below.

6.6.2.1 Inspiration and Transformation

As discussed above, some participants believe that there is little that has not already been created in the fashion design industry. What then differentiates a new or original design from an existing one in a way that does not trigger negative copying?[1427] Generally speaking, concepts such as originality and creativity have been grappled with for centuries. Drawing on cognitive psychology, Mark Runco asks

> …what constitutes a truly original idea? How different does it need to be from other ideas to be "original?" And even if something is related to what came before, surely it can itself be original. This is a practical issue, because many tactics direct individuals to "mere extensions" of existing ideas. […] there are tactics for "turning a problem on its head," minifying the situation, magnifying, looking to nature, finding an analogy, and many others that imply that you start with a given but then find new ideas by changing that given. The originality of the results might be questioned. Then again, many famous creators have done exactly this. They in some way have "borrowed, adapted, or stolen" from others. Shakespeare apparently did not develop all the plots in his plays, though his characterization and language was incredibly creative.[1428]

This is not unique to one form of creativity, but cuts across all creative realms, for example in the context of music Carys Craig and Guillaume Laroche suggest that

> In some sense, music creation *depends* on the borrowing and adaptation of material passed from one musician to another. This is not to suggest, of course, that musicians are the only artists who borrow from one another, and that only music is therefore worthy of special consideration in copyright; copyright law generally assumes a romantic vision of independent origination that sits uneasily with the realities of human creativity and culture at large.[1429]

[1427] Hemphill & Suk, "Fashion Originators", *supra* note 81, authors observe that Maurice Rentner, the creator of the Fashion Originators Guild of America argued that originality comes from combining elements, "…originality inhered in 'combining' elements of existing sources from which the designer creates a design. Rentner's position distinguished between imitation in fashion trends and copying particular designs. Style trends were of course based on imitation and inspiration. But the fact that all designers engaged in this process of 'adaptation' did not mean that their designs could not be deemed original works" 159 at 167.

[1428] Mark A Runco, *Creativity: Theories and Themes: Research, Development, and Practice*, 2nd ed (London: Academic Press, 2014) at 393.

[1429] Carys J Craig & Guillaume Laroche, "Out of Tune: Why Copyright Law Needs Music Lessons" in Doagoo et al, *supra* note 124, 43 at 48.

The majority of participants reveal that it is widely acceptable to be inspired by other designers, but at the same time, there was a certain degree of transformation, change, "editing,"[1430] or creative intervention required in order to avoid being perceived as a negative copy.[1431] For example, one participant stated "copying is not good a thing, but if you copy then transform it and combine it into something else, then I think you have a recipe for originality."[1432] Similarly, another stated that while they are inspired, they always make sure to do their own take on them; in other words, to express them in their own way.[1433] Another participant suggested that, "most design now is an evolution rather than a new design."[1434] This sentiment was echoed throughout the interviews. A further delineation that was made by one designer is that while it would be acceptable to be inspired by another designer, it would be uncommon if inspiration came from a local one.[1435]

What Litman observed over two decades ago is no less true today: that works are recombinations, interpretations and remixes of other works.

> …the very act of authorship in *any* medium is more akin to translation and recombination than it is to creating Aphrodite from the foam of the sea. Composers recombine sounds

[1430] (Participant, Interview July 8 2014, at 24).
[1431] In Canada transformation is not a requirement for originality or creation of a new design, nor is it a defense to copying copyright protected works. Originality requires "skill and judgment" in copyright law, and a higher degree of originality in industrial design law. As for infringement, "transformation" is not used as a term to determine whether a work is infringing or not. However in the 2012 copyright amendment, the Non-Commercial User-Generated Content (*Copyright Act*, *supra* note 6, s 29.21) provision was added as a defense in light of user-generated content, and YouTube mash-ups which explicitly recognizes transformative, remixed and derivative works as an exception as long as it remains non-commercial, see e.g., Scassa, "Copyright's Illegitimate Offspring", *supra* note 882 at 436; Hemphill & Suk, "Economics of Fashion", *supra* note 120 at 1153, authors make a distinctions between exact copying, which would be considered as detrimental, and inspiration, remix and other type of adaptation from an original work, which would otherwise not be considered direct copying. This is similar to the findings here, where there is a difference between negative copying and other kinds of copying, however, like these findings, a quantifiable threshold is not stated.
[1432] (Participant, Interview March 4 2015, at 2).
[1433] (Participant, Interview March 9 2015, at 12).
[1434] (Participant, Interview October 17 2014) Participant qualified this by stating that it was still possible to be innovative even though the design was in some cases an evolution (this could be seen in the details, in the way that it is worn etc). This was contrasted with purely innovative designs that incorporate oragami or architecture; (Participant, Interview July 9 2014, at 20).
[1435] (Participant, Interview July 30 2014, at 6-7, 12).

> they have heard before; playwrights base their characters on bits and pieces drawn from real human beings and other playwrights' characters; novelists draw their plots from lives and other plots within their experience; software writers use the logic they find in other software; lawyers transform old arguments to fit new facts; cinematographers, actors, choreographers, architects, and sculptors all engage in the process of adapting, transforming, and recombining what is already "out there" in some other form. This is not parasitism: it is the essence of authorship. And, in the absence of a vigorous public domain, much of it would be illegal.[1436]

One designer explained that inspiration can spark from a single detail, stating that "I think every designer does some sort of copying at some level, so that's why – that's what I mean about the different levels of copying, because you can just be inspired by a certain detail and that detail will take you places. But that's not really copying because you are putting your take on it."[1437] More than one participant felt that if they were creating a work in their own way then it would not be considered a copy.[1438] This would be very different from blatant copying or negative copying. Other than to describe the personalisation or transformation requirement, none of the participants were able to provide a definitive or bright line to which they could measure the quantitative or qualitative amount of change necessary for something to go from an inspiration to a negative copy.[1439] However, the majority of participants did mention that what certainly constituted copying was taking all of the elements of a garment, the combination of everything or a signature look which would result in a garment that would not differ from the original.[1440]

[1436] Litman, *supra* note 1265 at 966-967 [emphasis in original][citation omitted].
[1437] (Participant, Interview November 21 2014, at 2).
[1438] See e.g., (Participant, Interview March 9 2015, at 11); (Participant, Interview August 4 2014, at 5, 7); (Participant, Interview July 25 2014, at 7); (Participant, Interview August 28 2014, at 3).
[1439] However, one participant stated that if there was a very unique or original detail, there would be more avoidance than if it were a classic element (Participant, Interview October 23 2014, at 8); Similar to the way that copyright infringement is determined, it is not a clear line, but a case-by-case basis, looking at qualitative and not quantitative taking, see *Cinar Corporation*, *supra* note 873 at para 26, the Supreme Court stated that "a substantial part of a work is a flexible notion. It is a matter of fact and degree"; The difficulty of drawing a line between inspiration and copying also exists for emerging fashion designers, see Dubois, *supra* note 121 at 51.
[1440] Throughout the interview one participant mentioned several elements of a design that could be considered signature, and therefore, proprietary (Participant, Interview October 13 2014, at 4, 7, 12); (Participant, Interview October 14 2014, at 8); (Participant, Interview October 17 2014, at 10); (Participant, Interview July 8 2014, at 30).

It is difficult to determine what constitutes copying that is negatively perceived. What similar studies on intellectual property law and norms demonstrate is that while variations are acceptable, a single formula does not exist to draw a line between inspiration and copying that is negatively perceived, except in the case of imitation or very close copying. For example Fauchart and von Hippel observe that it is inappropriate for chefs to exactly copy one anothers' recipe.[1441] However, "[h]ow different a new recipe should be to avoid the prohibition against exact copying is not precisely specifiable, but chefs think they know a too-close copy when they see it."[1442] Similarly, Perzanowski stated that in reference to tattoos, there was a grey area within which a broad array of borrowing or inspiration from different subject matter could occur.[1443] However, because there were no definitive lines, he noted that it is usually difficult to know whether too much is taken before it is too late.[1444]

Designers are quite cognizant of influences and the role of inspiration in works. Some participants noted that one would definitely be able to tell whether work was merely inspired by another creator or whether the work was a copy.[1445]

> I normally, I always see influences of things, in other collections or in other people's work and you can see where the inspiration came from, but as long as they change it and make it more personal, then, in my mind its not a copy.[1446]

> I do feel that there is a self-correcting thing with this too. Like that line that is hard to put a finger on with whether it's copied, everybody can feel it you know, even though you can't define it. It's such a visual thing, […], its like ok that everyone can tell that was copied [Courtney: ok] there's nothing to discuss. [1447]

These responses indicate that for at least some of the participants, as long as there is some level of change or personalisation from the original work originating from another author, then a new

[1441] Fauchart & von Hippel, *supra* note 1 at 193.
[1442] *Ibid*.
[1443] Perzanowski, *supra* note 1 at 454.
[1444] *Ibid*.
[1445] (Participant, Interview February 12 2015, at 7).
[1446] (Participant, Interview October 13 2014, at 3).
[1447] (Participant, Interview October 23 2014, at 17).

work exists and it would be acceptable.[1448] One participant drew an analogy between positive and negative copying stating that there was a difference between using a work for the purpose of improvement, i.e., transforming it versus making it with the intent of turning a profiting from it i.e., making it less expensive.[1449]

There are two concepts in intellectual property law that may illustrate how the parameters of creation versus copying differ from those within the fashion design community; these concepts are originality and authorship.[1450] Based on copyright law, an original work is considered to be one where the author expends, "skill and judgement" and does not copy the work from another author.[1451] This is arguably a low threshold, and permits a wide array of works to meet this requirement. The originality threshold required for industrial design law is higher than copyright law but lower than patent law; in other words, a much more difficult threshold to meet than required in this segment, i.e., that works are substantially different from what exists in the marketplace.[1452]

What is important to point out, as Abraham Drassinower has, is that the originality requirement in copyright law is less about novelty of expression or new creation than it is about the *source of authorship*.[1453] Novelty, he suggests, is actually concerned with 'what' rather than 'how' it was created.[1454] This has implications in the case of fashion design because once the reproduction threshold is met based on section 64 of the *Copyright Act*, then the burden shifts from demonstrating the *source of authorship* to demonstrating that a work is novel if they want to have industrial design protection. While the threshold for industrial design law might be a

[1448] See e.g., (Participant, Interview August 28 2014, at 3).
[1449] (Participant, Interview July 9 2014, at 11).
[1450] Trademarks do not hinge on authorship but on the ability of the mark to distinguish the goods and services from those of others.
[1451] *CCH Canadian*, *supra* note 183 at paras 24-25.
[1452] *Victor Stanley Inc*, *supra* note 934 at para 42.
[1453] Drassinower, *supra* note 1279 at 61 [emphasis added].
[1454] *Ibid* [emphasis added].

challenge for this particular industry, it would seem that for at least industrial design law, based on Drassinower's observations, some level of transformation of the original work is required, as the burden shifts to 'what' was created. However, transformation of a work is not recognized as a defense or exception for either copyright or industrial design infringement in Canada, but it is considered in a determination of fair use, a defense to copyright infringement in the United States.[1455]

This demonstrates that the authorship and originality requirement in the design segment follows a different formula than in copyright law. The threshold revealed by the interviewees seems to follow copyright's requirement of "skill and judgement," and not the higher standard of novelty required by industrial design law.[1456] This also means that what might be considered as qualitatively infringing under copyright law, might have a different outcome under industrial design law.[1457]

6.6.2.2 Independent Creation and Subconscious Copying

In some of the interviews, participants acknowledged that it is possible for garments to be similar (to the extent that it could be mistaken as copies) and that it would be a coincidence rather than intentional.[1458] Several of the participants suggested that ideas or trends 'float around in the air'

[1455] See *Campbell v Acuff-Rose Music*, 510 US 569 (1994) [*Campbell*] the Supreme Court held that "Although such transformative use is not absolutely necessary for a finding of fair use, […], the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works" [citation omitted]; Conversely, in Canada, transformative use is not considered in the six factor fair dealing test, see generally, *CCH Canadian*, *supra* note 183.

[1456] While transformation requires some degree of personalisation or change of the original work, the novelty standard requires that it is a truly new work, which is weighed against prior art in that industry, see *Industrial Design Act*, *supra* note 7, s 6(1); The Supreme Court held that a substantial difference was required and not a slight variation, see *Clatworthy & Son*, *supra* note 935 at 433.

[1457] As mentioned in Chapter 4 the infringement standards are higher for industrial design law, and different than in copyright law.

[1458] Although they did not use the term independent creation, they mentioned that it was possible for the similarity between works to be a coincidence. (Participant, Interview October 22 2014, at 15-16); (Participant, Interview July 9 2014, at 7-8). As Green suggests, cryptomnesia or subconscious copying is different from plagiarism because the

and people are susceptible to 'catching them.'[1459] This is not an uncommon theory or occurrence in creative clusters or in geographically proximate creative communities. As economist Alfred Marshall suggests, where individuals within the same skill trades are in close proximity, "[t]he mysteries of the trade become no mysteries; but are as it were in the air, and children learn many of them unconsciously."[1460] While a quarter of the participant firms described this phenomenon in different ways, two participants described situations outside of Canada where they encountered near identical piece to one they had conceived or created. One participant even noted that a *collective conscious*[1461] exists to account for these similarities, stating

> …we all respond to what has been presented to seasons ago, by exhibitions that are coming up, by movies that came out […] …you know what people are going to be drawn [to]. When Memoires of a Geisha came out, everyone in advance started making a […] Japanese [inspired] collection cause we knew [Courtney: like the Great Gatsby …] yes. That's funny though – we didn't even think about the great Gatsby and that collection that came after was very great Gatsby and it was in the air…people felt it coming.[1462]

While others weren't as specific, they described the same thing to account for the similarities: shared experiences. These shared experiences include exhibitions, trends, materials, books, shows, movies, and social media.

Although *independent creation* has been extensively written about in copyright literature, there have not been many studies that explore the frequency with which it occurs or practical

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former is an "involuntary recollection of memories which are hidden from consciousness" whereas the latter has an intentional dimension to it, see Green, *supra* note 903 at 54.

[1459] *Ibid*; (Participant, Interviews July 30 2014, at 7, 12); (Participant, Interview July 31 2014, at 2); (Participant, Interview August 28 2014, at 9) this participant used a similar metaphor; (Participant, Interview July 8 2014, at 14).

[1460] Alfred Marshall, *Principles of Economics*, 8th ed (New York: Palgrave Macmillan, 1920) at para IV.X.7; As Karlsson explains, referencing Marshall, that the creative process is comprised of both social and mental processes, and that "[t]he accessibility of existing ideas increases with the size and density of locations, which implies that creative individuals as well as organized creative activities are attracted to larger and denser regions…" denser regions then provide "more diverse set of ideas that small regions" and enable radical creativity and this can be partly attributed to the fact that ideas are perceived to be "in the air", see Karlsson, "Clusters, Networks and Creativity" *supra* note 10 at 95 [citation omitted].

[1461] (Participant, Interview July 8 2014, at 21); see Émile Durkheim, *The Division of Labor in Society*, translated by WD Halls (New York: The Free Press, 1997), Although Durkheim was not mentioned in the interview, it is worth noting that the term "collective consciousness" or "social consciousness" that refers to the "totality of beliefs and sentiments common to the average members of a society [that] forms a determinate system with a life of its own" at 38-39.

[1462] (Participant, Interview July 8 2014, at 21).

ways that this issue is actually mitigated or dealt with in creative communities. As one participant mentioned, "you know what would concern me? It would concern me because people can actually arrive at the same – it's possible that two different people can arrive at a similar idea independently without copying."[1463] To this point, a small number of designers have highlighted that the constant bombardment of images and information has created an organic evolution of ideas and have conceded that exposure to this information is inescapable.[1464]

Independent creation is a concept in copyright law that is best explained as a phenomenon that arises when two individuals without access to one another's work come up with near identical or the same creation.[1465] As Abraham Drassinower observes, independent creation is not merely a defense, but is also the creation of a separate work,

> The defense of independent creation does not depart but rather derives from the *principle* of independent creation at the heart of originality. Originality is nothing other than independent creation. This is why, not merely a defense, a finding of independent creation is a finding of a distinct copyright.[1466]

Independent creation negates infringement in the case of copyright and trade secret law,[1467] and to some degree in the case of trademark law,[1468] yet not at all in the case of industrial design[1469] or patent law.[1470]

[1463] (Participant, Interview October 17 2014, at 13).
[1464] See e.g., (Participant, Interview July 31 2014, at 2); (Participant, Interview July 9 2014, at 18).
[1465] (Participant, Interview July 9 2014, at 7-8), as one participant explained, they once purchased a garment from a market, and used it as an inspiration and transformed it to create a new garment, traveled halfway around the world and saw an almost identical garment created by another designer. Although this would be a textbook example of independent creation, the participant used this example to describe the possibility that two people could come up with the same product through evolution from a different starting point; (Participant, Interview March 4 2015, at 6).
[1466] Drassinower, *supra* note 1279 at 60 [emphasis in original].
[1467] Independent creation can also apply to trade secrets. CIPO points out that law pertaining to trade secrets may not prevent another individual from independently inventing or discovering it because there "is nothing to prevent that person from using it, applying for a patent or publishing the information." CIPO, A Guide to Patents, online: <https://www.ic.gc.ca/eic/site/cipointernet-internetopic.nsf/eng/h_wr03652.html>.
[1468] Although registration provides absolute rights across Canada under sections 19 and 20, which would otherwise prevent the registration of the same mark for the same goods or those that would likely cause confusion, section 7 foresees the possibility of "concurrent goodwill" which covers the case if the same mark is "used concurrently by two or more traders in different geographic regions" for unregistered marks, Scassa, *Trademark Law*, 2d, *supra* note 535 at 401.

In addition to independent creation, another occurrence in the fashion industry is *subconscious copying*. Implicit in the statements made by some of the participants is that it is possible to be influenced without even knowing from where those influences originated.[1471] While these participants did not comment as to whether it was a negative occurrence, they recognized that it was possible and were understanding of it because it was not intentional. In this way, it seems as if they understand it to be more like independent creation than intentional copying. This acceptance is unlike the legal liability related to subconscious copying, which is considered to be an infringing act based on a string of cases in the United States.[1472] For example, one participant mentioned,

> …you know if one of us find a design that looks exactly like our [redacted] it's never like "look they copied us," it's just like "look that also happened." Because who knows, that happens all the time. You do something and it's out in the world and maybe they did copy you, maybe you copied them subconsciously – it's hard to tell. You don't know which one comes first, you don't know how – it could have been someone's project from a long time ago they decided to like uncover again, so its hard to say.[1473]

> I'm still here and whatever will be filled, will be filled because of subconscious images here and there […]. Why would I make a military jacket if I were not influenced by military movies, scenes, old jackets in the flea markets. Old things actually do influence us a lot, old clothing…[1474]

These responses demonstrate that there exists a heightened awareness of independent creation and subconscious copying within the community of independent designers.

[1469] Vaver, *supra* note 126 at 88, there is no Canadian case for this proposition, Vaver cites *Parkdale Custom Bilt Furniture Pty Ltd Puxu Pty ltd* (1982) CLR 191 at 221 (Australian Case).
[1470] Drassinower, *supra* note 1279 at 93; Vaver, *supra* note 126 at 271, note that in Canada, it is possible to continue using the underlying invention if it was created before the claim date of the later filed patent of another individual – without infringing, however, unlike copyright protection, they would not be able to receive a patent for it or to further develop it, at 398; see generally, Christopher A Cotropia & Mark A Lemley, "Copying in Patent Law" (2009) 87 North Carolina Law Review 1421.
[1471] (Participant, Interview March 6 2015, at 3); (Participant, Interview July 9 2014, at 21); (Participant, Interview March 4 2015, at 6).
[1472] See Chapter 4; Vaver, *supra* note 126 at 162-163.
[1473] (Participant, Interview March 6 2015, at 3).
[1474] (Participant, Interview July 9 2014, at 21).

Studies in cognition and creativity support this theory suggesting that the method whereby information is processed in the mind from the time that it is introduced occurs in a state of "incubation."[1475] As Runco explains, this often happens in the unconscious mind

> Incubation is probably often recognized because it explains how progress can be made on a task, even if we are not consciously thinking of the problem. It is usually explained such that associative processes are at work and are free from the censorship of the conscious mind.[1476]

This also explains why trends become absorbed in certain elements of designs eventhough the designer did not deliberately intend it.[1477] It is therefore wholly possible that based on the bombardment of information, an individual might receive information, process it during the incubation period and not remember or realize what source the idea originated from.[1478]

These sentiments demonstrate that intellectual property concepts of independent creation and subconscious copying are inconsistent with the way humans create. Holding designers accountable for independent creation or subconscious copying could have a stifling effect on creativity because it can perpetuate the anxiety of second guessing their creations as their own. This is reflected in the excerpts quoted above of designers who were skeptical that a system whereby registration would be necessary would then cause them to second guess the originality of their own creations despite the fact that they did not copy other designers.[1479] This is aggravated by the fact that independent creation is considered original creation under only under copyright law, but not under trademark, patent or industrial design law. Subconscious copying –

[1475] Runco, *supra* note 1428 at 21.
[1476] *Ibid*.
[1477] (Participant, Interview October 22 2014, at 5). For example, certain colours become widely available because it is the trend or colour palette of the season and then are selected by a designer.
[1478] Runco, *supra* note 1428, Runco further states that in the process of creativity there may be a issue of self-awareness that would otherwise make it difficult for individuals to remember where "our thoughts come from" at 393; Similarly, Green suggests that copyright law does not take into account the realities of the creative process, stating that "[t]he current law fails to recognize that all artistic works subconsciously plagiarize previous artistic works, some copyrighted, some not", see Green, *supra* note 903 at 65.
[1479] See Chapter 5.

copying that could have wholly occurred in the unconscious mind – on the other hand is fully actionable under all intellectual property laws.

6.6.2.3 Referencing and Attribution

As Raustiala and Sprigman indicate, "[s]ome [designers] may originate more than others, but all engage in some copying at some point—or, as the industry prefers to call it, 'referencing.'"[1480] "Referencing" was not explicitly a focus area of the study, nor was it asked about in the interviews until it emerged from some of the earlier discussions. This section examines attribution and "referencing" in the context of the interviews (where it was mentioned), but also draws heavily on excerpts and interviews that were publicly available.

When participants were asked about what inspires their designs, some used the word 'reference' or referred to themselves while describing influences including from other designers.[1481] Referencing is a term used to describe when something is borrowed or taken. A reference can be explicitly attributed or not. When a reference is attributed, it is analogous to a citation or acknowledgement. Designers acknowledge references to indicate that they have consciously been influenced by a concept or aesthetic from another designer, a movement, or a theme.[1482] Explicitly acknowledging a source or reference is encouraged. Implicitly referencing signals that a designer has used something or is joining a trend but has not explicitly made the source known.

In the fashion industry, attributing a reference serves several functions. First, it serves to signal the context of the creator in interpreting their work to peers and to the market; in other

[1480] See Raustiala & Sprigman, "Piracy Paradox", *supra* note 8 at 1728.
[1481] For example, some participants cited themselves when speaking about their line to emphasize the identity or personality of their line, (Participant, Interview July 31 2014, at 3, 11); (Participant, Interview August 28 2014, at 3, 6); (Participant, Interview October 13 2014, at 4).
[1482] (Participant, Interview February 12 2015, at 7-8), for example it is possible to pay tribute to a style or concept by making it a part of their story, i.e., attribute it; (Participant, Interview October 13 2014, at 10).

words it reinforces the communicative function and purpose of fashion design. Second, it acts as means to permissibly use some aspects (to a small extent) or be inspired by or comment on a work, while reinterpreting it in their own way, which allows the designers to protect themselves against being called copiers.[1483] Third, it is a tool that reinforces individual creative identity, belonging and community building.[1484] For example referencing another designer's work demonstrates respect, which in turn motivates following norms that benefit the community.[1485] Examples of each are provided below.

For fashion designers, attribution is either expressed in writing in the collection/concept/media statement, on the designer/store website, expressed in an interview or even made implicit in the styling of a show. References to a more general ongoing theme may appear on website and may be broader and convey the overarching theme of a line, for example,

> Beaufille is a contemporary line that references historical design elements within a modern context to create a sophisticated tough girl aesthetic.[1486]
>
> In Birds of North America you will find elements from Hayley's childhood such as school uniforms, boating paraphernalia, sun-faded fabrics and vintage clothing, as well as unusual colour blocking and graphic pop elements. Her unique design aesthetic results in collections that are both nostalgic and modern.[1487]

Others might explicitly focus on a theme for a certain collection, as demonstrated in these interviews with designers conducted by a reporter and a retailer (blog) respectively:

Example 1

> **Emily Ramshaw**: Can you give us a little preview of what we can expect from your Fall 2013 collection?
>
> **Sunny Fong**: A mix of two ideas, hunting, concepts of hunting, hunting gear,

[1483] Inspiration or borrowing is fine as long as it is personalized (Participant, Interview October 13 2014, at 2) and attributed (Participant, Interview August 28 2014, at 3).
[1484] Rosenblatt, "Belonging", *supra* note 1180 at 25.
[1485] *Ibid*; see, Dubois, *supra* note 121 at 53.
[1486] The Canadian Arts and Fashion Awards, *Beaufille*, online: <http://www.cafawards.ca/nominees/Beaufille.php>.
[1487] Birds of North America, *About*, online: <http://www.shopbirdsofnorthamerica.com/about>.

> camouflage, how to get into your hunting mode. And just in terms of how things are cut or silhouette, I reference a lot of Scandinavian interior design.[1488]

Example 2

> 6. What was your inspiration for Fall/Winter 2012?
>
> The inspiration for the BLAK.I FALL 2012 collection came from tuxedo dressing. The icon image of YSL's "Le Smoking" was the jumping point for us. Since it is a very well known reference, we felt like being able to bring a more urban downtown vibe to formal wear was how we could make our collection a bit different. We replaced wools with cotton stretch denim and satin for leather and introducing the vibrant accent of highlighter yellow.[1489]

Attribution of a reference may also be used as a guide to help the public understand the underlying theme, concept or purpose of a collection on a more abstract level that the designer is trying to achieve or express, such as the example of "the passage of time",

> …MARTIN LIM had an especially esoteric inspiration point. Focusing on the passage of time and our understanding of its changes. The world moves fast these days, but something can be said for slowing down and learning to appreciate each moment. The d[u]o bring this concept to life via garments that stand the test of time, while remaining exciting and current.[1490]

Attribution of a reference is not only a means of signalling to the public, but it is also a signal to other designers and the fashion community to acknowledge that a deliberate link exists, and that the work was inspired by or borrows from something else as a deliberate source of inspiration.

Visual artists also include references to their influences in their artist's statement. Visual artists are encouraged to write an artist's statement for their exhibitions that describes their current work and that acknowledges any influences they may have had. This requirement is normally practiced in schools, but is also practiced professonally. For example, the Department

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[1488] Emily Ranshaw & Ryan Michael Cheung, "*Morning Coffee* with Fan Favourite Sunny Fong, Designer of Vawk" *Flare* (21 March 2013), online: <http://www.flare.com/fashion/morning-coffee-with-fan-favourite-sunny-fong-designer-of-vawk/>.

[1489] TNT "Q & A with BLAK.I" (23 October 2012) TNT Fashion (blog), online: <http://tntfashion.ca/category/uncategorized/page/40/>.

[1490] Janelle, "Martin Lim F/W 13" *models.com* (22 March 2013), online: <https://models.com/oftheminute/?p=54438>.

of Art and Art Professions at New York University requires an artist's statement for admissions applications,

> 2. A one-page artist's statement describing your:
>
> a) goals as an artist;
>
> b) *artistic influences*, including two contemporary artists who are nationally or internationally recognized (these artists should have created new work within the past 20 years and they should be represented in major art museums or art galleries which feature contemporary visual artists);
>
> c) background and interests, including previous art training, and films, literature, or music you enjoy *and how they relate to your art work*;
> […][1491]

This requirement is similar to the way attribution is employed by fashion designers, otherwise providing context for the interpreter of their design story.

Although it is more common to acknowledge influence from historical periods, art or popular culture influences, it was suggested in one interview that designers may not always feel secure about citing their peers, especially local ones,

> I think that small designers have no problem admitting that they are inspired by what they see from idols or mentors – like famous designers. I think that's quite common. Like oh for example, I'm doing something inspired by Chanel or whatever. But I don't think it would be common to say that you are being inspired by another local designer even if he's not from this city.[1492]

Thus, it is common to cite more prominent and iconic design houses.[1493] It is also more common for more well-known or established designers to engage in this practice. For example, the same participant stated that, "in high end luxury companies, they often mention if they use a reference."[1494]

[1491] New York University, *Department of Art and Art Professions*, online: <http://steinhardt.nyu.edu/art/studio/bfa/apply> [emphasis added].
[1492] (Participant, Interview July 30 2014, at 12); One participant stated that they wished that there was more acknowledgement when a designer is inspired by another designer but that it is rarely done, (Participant, Interview October 14 2014, at 4).
[1493] (Participant, Interview August 4 2014, at 7).
[1494] *Ibid*.

An example of a reference outside of fashion can be seen in the case of Yves Saint Laurent's Mondrian collection, titled as such.[1495] As cited in the Metropolitan Museum of Art's Heilbrunn Timeline of Art History,

> As the sack dress evolved in the 1960s into the modified form of the shift, Saint Laurent realized that the planarity of the dress was an ideal field for color blocks. Knowing the flat planes of the 1960s canvases achieved by contemporary artists in the lineage of Mondrian, Saint Laurent made the historical case for the artistic sensibility of his time. Yet he also demonstrated a feat of dressmaking, setting in each block of jersey, piecing in order to create the semblance of the Mondrian order and to accommodate the body imperceptibly by hiding all the shaping in the grid of seams.[1496]

Where violating the copying norm would normally result in some level of sanction, depending on the degree to which there is transformation, referencing may absolve the individual of these negative consequences.[1497]

Attributing a reference in this scenario is akin to citation in literature: authors use quotations, cite works or ideas, but can also use this as a method of paying homage to another's work.[1498] Attribution or referencing requirements in academic research are often codified in university academic integrity policies even though attribution is not a requirement for copyright law.[1499] For example, the University of Ottawa *Academic Integrity: Student's Guide* defines plagiarism as

> …using words, sentences, ideas and facts you have gotten from others and passing them off as yours, by failing to quote or reference them correctly. Plagiarism comes in many forms, including the following:

[1495] Yves Saint Laurent, Mondrian Collection (fall/winter 1965-1966), online: <http://www.metmuseum.org/toah/works-of-art/C.I.69.23; Yves Saint Laurent>.

[1496] *Ibid*.

[1497] (Participant, Interview October 13 2014, at 10); This is similar to Sarid's findings, where if attribution is given on stage explicitly when a work isused without prior authorization, then the there would be no punishment or sanctions from the owner. The ownership of the work is clear and the originator still receives the credit for it, see Sarid, *supra* note 1 at 170.

[1498] (Participant, Interview October 13 2014, at 10).

[1499] See Rosenblatt, "Fear and Loathing", *supra* note 27 at 20, as she observes, there is also a strong citation norm in scholarly work despite the fact that there is no copyright requirement to do so because the norm of citing has been internalized. However, it is important to note that there is an attribution requirement under Canadian law for the purposes of criticism, review, or news reporting, see *Copyright Act*, *supra* note 6, s 29.1-29.2.

- Failing to place words or sentences you have taken from other authors in quotation marks ("…")
- "Copying and pasting" information found on the Internet without providing a reference
- Translating texts without providing a reference for their sources
- Not providing a reference for a paraphrase or a summary[1500]

Fashion designers are also subject to academic integrity policies at school.[1501] Referencing in fashion seems to have more functions than in literature, although conveying influence to the public and to peers remains the main objective.[1502]

Citing references strengthens identity and reputation of the individual within and of the community as a whole. For example, in the study of the community of French chefs, absent the use of intellectual property law, the right to be acknowledged as the author of a recipe is an important norm where the recipe has been made public.[1503] Similarly, tattoo artists feel "personally injured" from copying for non-economic reasons. When tattoos are copied i.e., publicly displayed online or in another way without attribution, the artist misses out on "'notoriety,' 'awareness,' or 'respect'."[1504] As Rosenblatt suggests, attribution is an important extension of the self that is both "larger and longer-lived,"

> …[creators] value the immortality of their work and the reputation it provides. Creators and innovators identify with their work, and that work not only secures their places in

[1500] University of Ottawa "University of Ottawa's Academic Integrity Student Guide" University of Ottawa (n.d.), online: <http://web5.uottawa.ca/mcs-smc/academicintegrity/documents/2011/academic-integrity-students-guide.pdf>.
[1501] Several of the participants did mention that attribution is required in fashion school. Fashion school or programs within colleges or universities are subject to the same academic integrity requirements as other departments and programs, i.e., Ryerson University, School of Fashion website makes reference to the Student Guide, see Ryerson University, *Senate Policy 60*, last revision approval date Jaunary 26, 2016, online: <http://www.ryerson.ca/senate/policies/pol60.pdf>. Note that a fashion school was contacted, but the correspondence was not used in this thesis.
[1502] Influence can be very peripheral or abstract and not literal in the way it appears in literary works – because of the nature of the works it is not possible to directly quote or literally reference.
[1503] Fauchart & von Hippel, *supra* note 1 at 193, it is dishonourable when a chef "presents the recipe of another as his own" - this might occur where a recipe was recreated on television without attribution.
[1504] Perzanowski, *supra* note 1 at 555; Though, not all industries react in the same way, for example, as suggested by Oliar and Sprigman in their study on comedians, although attribution is sought by comedians, it may or may not be "curative" of joke stealing, see Oliar & Sprigman, *supra* note 1 at 1830.

> creative communities, but also has the potential to make lasting contributions to those communities. Attribution permits creators to identify themselves "as belonging within a particular professional space and to a particular product." While creators' desire for attribution does not directly implicate their desire to belong, it reflects that at least some creators crave persistent and non-monetary acknowledgement of their role in creating their work. That acknowledgement not only builds reputation, but as described above, also provides recognition that enables the creator to maintain a self-identity as a creator and a member of a community or network of creators.[1505]

Reference attribution thus performs an important role in the arena of creativity and for creators. It can contribute to a sense of identity, recognition, and reputation within the community.[1506] Importantly and in addition to the acknowledgement of a reference, as will be seen below, it is also used as an enforcement mechanism, used to reinforce identity.

There are two sections of the *Copyright Act* that speak to the requirement of referencing or attribution, yet they do so in very limited ways.[1507] The first is a positive requirement, namely the requirement to acknowledge authorship of a copyright protected work based on the moral rights provision,[1508] while the second one occurs where a user is invoking their right based on the fair dealing provision under sections 29.1 and/or 29.2 of the *Copyright Act*, which requires an attribution of source.[1509] While the moral rights provision provides recourse for designers who wish for their authorship to be acknowledged, it does not neatly apply to the case of fashion design, since moral rights apply to the actual work of the artist itself, and does not impose a

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1505 Rosenblatt, "Belonging", *supra* note 1180 at 16, quoting Jessica Silbey, "Promoting Progress: A Qualitative Analysis of Creative and Innovative Production" in Matthew David & Debora Halbert, eds, *The Sage Handbook of Intellectual Property* (London: Sage Publications Ltd, 2015) 515 at 528-529 [Silbey, "Promoting Progress"].

1506 In Sarid's study, attribution was defined as a "core element" in the drag queens' social norm system and it could be used to "reinstate ownership" if someone used the creation of another, see Sarid, *supra* note 1 at 174; Dubois has identified the importance of giving "credit" as a means of identifying the "original creator" but also that "'[r]eputation' relies on the recognition of and respect for another designer's economic and creative resources" Dubois, *supra* note 121 at 53-54; Perzanowski also observed that where a tattoo is copied and credit is not given to the tattoo artist, the artistfeels as if they were denied "'noteriety,' 'awareness,' or 'respect'", see Perzanowski, *supra* note 1 at 555.

1507 The Canadian *Copyright Act* unlike the laws in the US or UK, has protection for moral rights in addition to economic rights, and the statute for fair dealing is particular to the legislative regime, see Chapter 4.

1508 *Copyright Act*, *supra* note 6, s 14.1 (1). The moral right of attribution can be seen as a positive right, as opposed to the negative rights associated with the section 3 economic rights.

1509 *Ibid*, s 29.1-29.2, in both of these provisions, it is not considered to be infringement if the name of the author, performer, maker or broadcaster and the source are provided.

requirement for other individuals to acknowledge them in the work of another designer who was influenced in the creation of a secondary work.[1510] The requirement under the fair dealing provision might be more relevant to referencing in fashion for this reason, but would narrowly apply only in the case that works of fashion that are protected by copyright are used in the case of review, criticism, or news reporting.[1511] However, these provisions apply only in the case of copyright protected works, and not industrial design or trademark law and thus their application is quite limited for fashion design. The role of referencing and attribution within this community is largely inconsistent with these requirements in the law. Further, these provisions do not capture the nuances with which referencing is used within that industry.

6.6.3 Conclusion

Although a clear quantifiable guideline does not exist to establish what constitutes negative copying, within the interviews, it was apparent that some circumstances of copying are not negative. The norms within this particular segment, supported by a number of mechanisms which will be seen below, demonstrate that *negative* copying is disliked in the community. Notwithstanding the lack of clear distinction provided by the participants, there are circumstances in which copying is not negative, as it is required in the context of creativity, though none of the circumstances are effectively reflected by intellectual property law. For example, personalized or transformed works[1512] and independent creation are considered as original new works under copyright law, but not under any of the other intellectual property regimes. Yet design is capable of being protected by more than copyright law. Furthermore, as a

[1510] *Ibid*, s 14.1 (1).
[1511] *Ibid*, ss 29.1-29.2.
[1512] Transformative use is a factor in the Fair Use defense under US copyright law and does not apply in Canada, see *Campbell*, *supra* note 1455. In Canada, the Supreme Court held that even non-literal copying could amount to infringement of copyright law, see *Cinar Corporation, supra* note 873 at paras 27-28. However if a work is inspired by another work or an idea, then it could be considered an original work and not infringing – that is, if the work incorporates the appropriate level of skill and judgment.

tool for both signalling their influences to the broader public and to their peers, referencing or attribution is a practice that works to absolve the designer from liability when influenced by another designer.

What is also striking is that in the process of distinguishing negative from non-negative copying, the values that are being reinforced within this community are attribution, transformation, identity and personalisation. This demonstrates that the segment promotes and encourages creation, not copying. This is also evidenced by the interviewees' inherent acceptance of independent and subconscious copying, which circles back to the requirement of intention discussed above. This is important because these values encourage rather than stifle creativity by laying blame on those who intentionally seek to exploit another's works.

Furthermore, the findings in this particular segment do not differ wholly from the experiences that have been demonstrated in other creative industries. For example, attribution is an important factor for tattoo artists, French chefs, some comedians and magicians although the degree to which attribution absolves some harm from copying varies depending on the community.

6.7 Alternatives to Law Used by Designers: Prevention Mechanisms

What has been established so far is that while some forms of copying exist, negative copying is disapproved of in the independent design segments in Montreal and Toronto. What has also been discussed is that the elements over which the participants feel proprietary are not effectively protected by intellectual property law, although some elements of design may be. Still, designers do not rely on intellectual property laws to deter copying or to enforce those elements of copying even if they feel that they have been copied.

In the absence of use of these laws, it is important to ask: upon what alternatives do designers rely? Similar to Eden Sarid's observations in his research on intellectual property and norms in the community of drag queens, there are several extra-legal prevention mechanisms that have been developed by independent fashion designers in Montreal and Toronto.[1513] These mechanisms will not be labeled as 'norms' because they were not widely used by all of the participants and are all covered under the same norm i.e., negative copying is disapproved of.[1514] They will be referred to as prevention mechanisms or practices that designers may engage in, in order to prevent being copied by others, and in other cases, to prevent themselves from being put in a situation where they may copy or be accused of copying another designer.[1515] As will be seen, the participants use these mechanisms because they have an inherent aversion to being copied and to being labeled as a copier.

The five mechanisms that will be discussed[1516] are identity, secret information, first mover advantage, self-regulatory behaviour, and emerging industry practice. While the participants use the first mechanism "identity" to prevent others from copying them and to also prevent them from copying others, secret information is primarily used to avoid being copied. The last mechanisms provide insight into the ways that designers prevent themselves from copying others.

[1513] Sarid, *supra* note 1 at 157-160, the prevention mechanisms that were utilized by drag queens within their communities include delimitation of territory that spans "geography, genre and venue"; close social connection related to sanctioning – because an individual is less likely to copy someone they know; and a robust public domain of works that all drag queens are permitted to use.
[1514] Notably, not of all of the designers engage in all of these self-defence mechanisms, nor does the entire community use these mechanisms.
[1515] For example, one participant stated that they take precautions (record keep) while they create in order to "protect ourselves from being accused. Because you want to protect your designs, but you also want to protect yourself" see (Participant, Interview July 30 2014, at 17).
[1516] This is not an exhaustive list, but a list of the ones that were revealed in the interviews.

6.7.1 Identity and Personality as Self-Defense Mechanisms

As mentioned above, participants are proprietary about elements beyond the actual garment itself. Included within the range of these elements are concepts, stories, personality, reputation and brand identity. One of the most striking features about what the participants revealed is the importance of having a strong identity or personality in their work, which makes it uniquely theirs. Notably, some of these details of personality are embedded in a number of elements layered together in the design and might not be totally apparent to the eye at first blush.[1517]

Of what does an identity consist? The participants go to great lengths to cultivate their aesthetic and story in order to make sure that they are identifiable and unique to the public. They do not want to overlap with someone else's look. It is therefore not a single garment *per se*, but the overall look and feel or aesthetic of their work, and effectively their businesses. In this sense it is quite important to be unique, to establish one's own look and avoid being similar to others.[1518] Some of the participant's quotes demonstrate the importance of these attributes:

> It's our difference and identity. So the best thing I can do is try not to do what the others do. If I want to – because they are bigger than us, stronger than us - market differently. So our best chance to be in that market today is to be…is to have our personality.[1519]

> We used to use [redacted material/textile] a lot but we've just stopped, partially because it was expensive but also because there were just too many people in [city redacted] doing it that we just pulled out all together and we decided to be stronger in one thing - in our direction. For us it seems stronger to keep your own direction than copying someone – it's just longer lasting.[1520]

> …well we all have designers that we are inspired by [Courtney: of course] I'm not going to look at a designer and every season try to imitate them because I would lose my personality. [1521]

> …so you have to manage to have your identity screaming out of your clothes for example and be very true to your aesthetic and your philosophy.[1522]

[1517] (Participant, Interview July 31 2014, at 10).
[1518] (Participant, Interview March 9 2015, at 10, 12).
[1519] (Participant, Interview July 9 2014, at 11).
[1520] (Participant, Interview March 6 2015, at 18). Earlier in the interview, the participant stated that they had their particular look that was specific to their line and that it was beneficial to them.
[1521] (Participant, Interview July 24 2014, at 5-6).

> I feel like […] what makes a designer a designer is their aesthetic, the story of their creativity like the thread that runs through their designs. It would just be something if you understood, if you had a sense of, like you could understand other people's aesthetics and you'd be able to say that doesn't fit with what they [create] and they are trying to be that now and it's not what they do...[1523]

> …people borrow other people's ideas but if you're going to do that then you're obviously going to have to sort of say "I borrowed this inspiration from this designer" to know you're referencing them […] "but I've reinterpreted it." It becomes your challenge to reinterpret, like to be influenced by someone's work but to reinterpret it in your own way to safeguard you from being called a copier.[1524]

Although some of these elements are generally not protectable under classic intellectual property law, these very elements are important to designers for two reasons. First because designers use these elements to protect themselves from being copied,[1525] and second, because it prevents them from looking too similar to another designer thereby avoiding being perceived as a copier.[1526] While the first reason is self-evident, it is the second one that is particularly intriguing.

Feldman suggests that one of the four fundamental reasons that norms are enforced is because the norms reflect the "central values of the group and clarify what is distinctive about the group's identity."[1527] The desire to maintain their identity and self-expression is also central to the greater segment's identity as independent fashion designers and therefore maintaining a strong identity or aesthetic helps fulfil the norm against negative copying.[1528] In effect, what

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[1522] (Participant, Interview July 31 2014, at 2-3).
[1523] (Participant, Interview October 23 2014, at 8).
[1524] (Participant, Interview August 28 2014, at 3).
[1525] Similarly, identity-consituent communities may use their identities to prevent individuals from copying, see Sarid, *supra* note 1 at 160.
[1526] (Participant, Interview August 28 2014, at 3); Johanna Blakely, argues that designers like comedians now "develop a persona" or a "signature style" which works as a mechanism because it only works within their own aesthetic – if someone copies, then the effect is not the same as the original, see Blakley, *supra* note 1285 at 8:35+.
[1527] See Feldman, *supra* note 28 at 49. In this dissertation, the concept 'group' refers to the professional segment that they the fashion designers are in i.e., cluster, and not a closer community or association.
[1528] Daniel Katz & Robert L Kahn, *The Social Psychology of Organization*, 2nd ed (Hoboken: John Wiley & Sons, 1978) indicates that a source of internal motivation to conform to a certain behaviour can include value expression and self-identification – "expressing in words or acts one's important values and thus identifying oneself and maintaining a satisfying self-concept…" at 361; As Silbey observes "…building and nurturing reputation develops

make the 'independent fashion design segment a distinct segment in the Toronto and Montreal fashion markets are these very attributes. This in turn protects them against copiers, because the more emphasis on their identity, the more apparent it becomes when another designer copies them. At the same time, their identity separates them from their peers, helping to preserve their identity and to protect them against looking like other designers.

Notably, some participants referred to themselves as independent designers, almost as if it were a label.[1529] As Rosenblatt suggests, individuals

> …crave the reward of acceptance, acknowledgement, and competence, and the resulting sense of belonging, that comes from creating and having one's work recognized or appreciated by community members. Studies bear this out: People create in order to belong to creative communities, and they are motivated to create by belonging to those communities.[1530]

Thus in order to maintain their status, each member of the group of independent fashion designers strive to cultivate their own identity but also share the same values about identity with the fashion design community.[1531]

6.7.2 Secret Information[1532]

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feelings of belonging to a certain community (a work community), of a secure affiliation within it, and that the community is better off for it,…" Silbey, "Promoting Progress", *supra* note 1505, 515 at 529.

[1529] It should be noted that not all of the designers felt that the segment was actually a community, a close-knit community similar to those that have a strong nucleus similar to other creative communities in Toronto. Reference to the term 'group' or 'community' in the context of this paper does not refer to close-knit communities where everyone knows and supports one another directly since this industry is a little more diffuse; rather it refers to a segment of individuals who work in the same cluster.

[1530] Rosenblatt, "Belonging", *supra* note 1180 at 10.

[1531] Katz & Kahn, *supra* note 1528, the authors argue in the context of "small face-to-face groups interacting about a common task can develop a strong unity of purpose and feeling, based on a shared psychological field" there have to be group interactions towards a common goal or task, "the power of the peer group has long been remarked and derives from shared expectations, perceptions, and attitudes of others with whom one can identify" at 108. While the designers are highly independent and do not work with one another in an organization setting, it seems that the Montreal group of designers is much more closely bound than the Toronto group based on the various comments throughout the participant interviews indicating that they participate in a number of collective activities together. Thus what Katz and Kahn suggest applies in the organizational setting loosly applies in both communities even though they do not work together in an orgaztional setting.

[1532] I avoid using the legal term "confidential information" in this section because the way that information is kept confidential does not necessarily conform to the way that a number of participants described the way they use this mechanism. Not only that, but the participants themselves did not invoke the legal terms confidential information or trade secrets.

Another mechanism used by the participants as an alternative to the law or self-protection measure was to keep information private or secret. Many of these measures would likely not trigger the legal protection of confidential information as discussed in Chapter 4, but nonetheless demonstrate that some form of secrecy is used and expected from members of the cluster with which the designers interact.[1533] The type of information that the participants kept secret can be categorized into three broad categories. These are techniques and processes, suppliers and fabric selection, and designs i.e., patterns, designs, or entire collection.

6.7.2.1 Techniques and Processes

Participants generally stated that techniques for cutting, sewing and other elements that were learned in school or as a part of their training were open to anyone to use.[1534] This also includes the techniques and processes that were learned in pattern books, period books and books that presented new and interesting ways to fold or drape textiles.[1535] These techniques may not all be tangible on their own but once they were integrated into the fabric, the cut and style, they became an important detail of a larger picture, and therefore contributed to something that could be perceived as proprietary. However, free use did not extend to techniques that the participant had developed on their own.[1536]

[1533] Not all of the measures taken by the participants would necessarily trigger the hybrid legal protection offered by confidential information, although a number of these situations potentially could. For example, some of the participants mentioned that they use contracts which had confidentiality clauses, see (Participant, Interview March 9 2015, at 13) Participant did not find them particularly useful; (Participant, Interview February 13 2015, at 16); (Participant, Interview July 31 2014, at 19); given the context, some could benefit from a claim breach of confidence (which requires that "the information conveyed was confidential, that it was communicated in confidence, and that it was misused by the party to whom it was communicated" or a fiduciary obligation that can arise from a number of relationships, requiring those with the obligation to act in good faith), see *Lac Minerals, supra* note 1092.

[1534] This is similar to Robertson's findings from the online knitting community that techniques and stitching should be outside of intellectual property law, see Robertson, "Crafting IP", *supra* note 122 at 49.

[1535] See for example, (Participant, Interview October 14 2014, at 5-6), (Participant, Interview October 22 2014, at 3-4).

[1536] These techniques were not ones that were learned in design schools or from books; they were processes and techniques that were self-taught or those that evolved from an existing technique. These techniques could include ways of draping fabrics, stitching, or processes that would result in an overall effect, aesthetic or movement of the

Copyright, industrial design or trademark law relating to designs are not adapted to protect techniques and processes.[1537] Instead, these elements can be protected by the laws of confidential information or by patent law whose eligibility requirements are much more stringent.[1538] Although some of the participants considered these techniques to be proprietary, not all of them took precautions to safeguard them.[1539] Furthermore, none of the designers mentioned that they had actually patented an invention although no more than several mentioned that patent law was the only intellectual property law they would consider investing in, if they had created a new and innovative piece of machinery, fabric, a process, technology, technique or other invention.[1540]

6.7.2.2 Suppliers and Fabric Selection

It is not uncommon to feel proprietary about suppliers (for fabric, hardware and other supplies).[1541] Reasons for this may include the fact that suppliers available to the independent design segment interviewed for this study may be limited in number due to the geographical and financial constraints mentioned in Chapter 2.

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garment. Techniques can also be a signature of a designer because they can result in a certain aesthetic that is signature to a brand. See e.g., (Participant, Interview July 31 2014, at 5, 16), (Participant, Interview October 13 2014, at 12); for example one participant stated that if they were to come up with a signature technique, they would consider protecting it (Participant, Interview July 8 2014, at 27); (Participant, Interview August 28 2014, at 34, 42); For example in 1966, Montreal based seamstress Angelina di Bello, was "the only North American to be authorized by the House of Dior in Paris to make use of the Dior Pleat, which had been invented by Christian Dior to eliminate unsightly slits in the back of a garment and which Dior had copyrighted" see Alan Hustak, "Exacting Seamstress Who Could Identify Fabrics By Touch" *Montreal Gazette* (18 November 2007), online: pressreader.com <http://www.pressreader.com>.

[1537] See *TRIPS*, *supra* note 789, Art 9(2); *Industrial Design Act*, *supra* note 7, s 5.1; *Trade-marks Act*, *supra* note 7, s 13(2).

[1538] See Chapter 4.

[1539] Some designers were stricter about safeguarding their technique than others. For example, while some did not even share their techniques with others in-house, others left it open for their employees to see. It was not clear whether employees had been given notice about the confidentiality of these techniques. As mentioned above, some of them used contracts with confidentiality clauses.

[1540] (Participant, Interview July 8 2014, at 27); (Participant, Interview October 14 2014, at 17); (Participant, Interview October 22 2014, at 12); (Participant, Interview July 25 2014, at 9), while this participant didn't say that they would protect their works with patents, they alluded to the fact that if machines or technology were created or involved in creation then it would not be a free element, in other words, proprietary.

[1541] (Participant, Interview August 28 2014, at 42); (Participant, Interview March 6 2014, at 8-9).

One participant mentioned that some designers expect their fabric supplier to not sell prints they use to others.[1542] Some designers also ask their suppliers not to disclose information about the fabric they have selected to others although this has the unintended effect of designers unknowingly purchasing the same fabrics.[1543] This can cause stress within the community because it can result in two designers using the same textiles or fabrics and selling them in the same stores or within the same vicinity.[1544] The practical consequence is that it not only causes confusion for prospective clients and buyers, but it can result in limiting the variety of designers carried in retail stores because retailers would not want carry numerous garments with the same fabrics (including prints, textures, and colours) in order to provide their clientele with variety.

Another example of the way that participants keep the information secret is by hiding fabric selections, swatches and other details about their selection physically to avoid people seeing them when they walk into their offices.[1545] One participant even mentioned that they obscure the fabric selections if they decide to post information publicly.[1546] This enables them to connect with their clientele without going further to reveal important details such as a colour palette or print before the entire collection is ready to be released to the public. Finally, some participants are quite discrete about their suppliers and will normally not reveal them to other designers.[1547] This also prevents overlapping fabric or hardware use by multiple designers who market their clothing in the same stores or neighbourhoods as mentioned above, and in some cases, provides a competitive advantage.

[1542] (Participant, Interview July 25 2014, at 5).
[1543] (Participant, Interview July 25 2014, at 5) Participant stated that fabric suppliers may not let designers know that another designer has already selected the fabric they chose; because the fabrics are shown to all of the designers, then there is a greater possibility of overlap, see (Participant, Interview October 22 2014, at 13).
[1544] One participant mentioned that the issue with using prints is that there is a chance that another designer may use the same one, see (Participant, Interview October 13 2014, at 12).
[1545] (Participant, Interview July 25 2014, at 11).
[1546] (Participant, Interview July 24 2014, at 12).
[1547] *Ibid*; (Participant, Interview March 6 2015, at 8-9).

6.7.2.3 Patterns, Designs, Theme, or Entire Collection

Some designers tend to not release their designs, concepts or the entire collection to the general public until they are made available for sale.[1548] While intellectual property protection may subsist in patterns or designs as articulated in Chapter 4, the theme, or collection as an aesthetic or concept cannot be protected. There are a number of measures that the participants take, including keeping the information secret within the company before the work is available for sale. For example, in regard to releasing their collection, one participant stated that, "[w]e are very careful because we don't even want people to be able to access the [Courtney: ideas], the outside layers and you know, so only a restricted audience is able to access that." [1549]

Aside from not publicly revealing it ahead of time, other participants mentioned that they physically shelter their works from the public in their studios to prevent unexpected exposure, i.e., "people come to the office and we are in a development phase – we cover things we hide things. We're pretty protective – just people not seeing things too early."[1550]

For some designers there may typically be two reveal dates; the first is when buyers will receive lookbooks or see the collections, and the second is when the collection is made available to end users.[1551] None of the designers indicated (nor were they asked) whether their designs were susceptible to being leaked by buyers. One of the main reasons for keeping the information secret was to prevent competitors from creating the works within the same production cycle, thereby directly competing within the current season. Some of the participants felt that this was an issue.

[1548] (Participant, Interview October 17 2014, at 11).
[1549] (Participant, Interview July 31 2014, at 4-5).
[1550] (Participant, Interview October 17 2014, at 11). These measures could qualify.
[1551] (Participant, Interview October 22 2014, at 11).

> I used to do a lot of behind the scenes and 'sneak peeks', and that was really important for my marketing. That's how we really got the word out about who we were and raised our profile. I probably do less of the behind the scenes stuff now [on social media] because people are – because the production calendar has changed so much. [1552]

> …the disposable fashion companies like the big big ones they can produce something in five to six weeks […]. [Courtney: or less] You could be far into your development cycle and about to ship it or already have shipped it and they can […] knock it off and produce it a month later.[1553]

Those participants who avoid sharing information during the development phase for marketing purposes do not typically share information about the collection directly, not because they are worried about copying, but because they do not want to induce collection fatigue.[1554] Collection fatigue may be more relevant for those designers who release seasonal collections, in which case they have to compete with others who are constantly revealing new works on a weekly or monthly basis. This is the case for a number of the independent design sector because they do not have the same resources to consistently produce small batches of newer work.[1555]

6.7.3 First Mover Advantage

First mover advantage is a strategy that entails releasing one's works to the market prior to one's competitors. It allows firms to gain an advantage over their competition and allows them to capitalize on the market for the new product.[1556] As Raustiala and Sprigman suggest, first-mover

[1552] (Participant, Interview February 12 2015, at 4).
[1553] (Participant, Interview October 17 2014, at 11).
[1554] Collection fatigue occurs when a collection is in the public eye for a long time causing consumers to become tired of the collection. This may also have the effect of preventing people from returning to the designer website because they are not expecting a change in selection. See e.g., (Participant, Interview October 23 2014, at 11); For example one participant said "…we try to show more sneak peaks just to tease them but we don't want to show the whole product just to keep the surprise" (Participant, Interview July 30 2014, at 18).
[1555] Jessica Wong suggests that smaller designers are unable to follow this new business model because of the manufacturing resources available to more established brands, see Jessica Wong, "Pink Tartan Tests See-Now/Buy-Now Model Disrupting Fashion Industry" *CBC News* (23 March 2016), online: <http://www.cbc.ca/news/arts/pink-tartan-see-now-buy-now-1.3504027>; However it is possible for designers who also produce their own work in-house.
[1556] Marvin B Lieberman & David B Montgomery, "First-Mover Advantages" (1988) 9 Strategic Management Journal 41 Lieberman and Montgomery highlight the advantages and disadvantages of this strategy as it pertains to technology based endeavors, stating that first movers can benefit from technological leadership, preemption of assets, and buyer switching costs. These advantages do not apply in the fashion industry *per se*, as will be seen

advantage may potentially be used by fashion designers to establish a short-term gain, however they remain skeptical as to the actual benefits this would provide since copying occurs at such a rapid rate resulting in very little if any meaningful gap between the time the original and copies hit the market.[1557]

In addition to the possible economic benefits of the first-mover strategy,[1558] what was not discussed – and what a few of participants alluded to as one of their reasons for favouring the first mover advantage strategy – was that their decision to release their creations immediately went beyond the commercial advantages of capturing the initial market. Participants used first mover advantage as a marketing tool to signal to the public that they were the *originators* of the product, differentiating themselves as innovators of that particular concept, style or garment.[1559] One participant explained that "…I guess well what we always just try to do is get our ideas out there as quickly as possible. You know, put it in the market and make it available for sale as soon as we can."[1560] This was quite important to the participants, as mentioned above, because the participants were not just selling a garment, but an entire brand, aesthetic and story, which are based on originality and creativity.

This mechanism allows them to take advantage of clientele who want to be affiliated with the 'original' product, rather than the imitation. One participant noted that they initially hesitated about posting anything online, but then realized that they could use this to their advantage by

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below at 41. However the fashion industry can be susceptible to the disadvantages which include being subject to "free-ride[rs]" and "market uncertainty" at 47.

[1557] See Raustiala & Sprigman, "Piracy Paradox", *supra* note 8 at 1759.

[1558] Silbey, *Eureka Myth*, *supra* note 185 at 116, Silbey observes that in her interviews, first mover advantage was quite high and lucrative in copyright and patent based industries.

[1559] This is similar to the case of French chefs. Fauchart and von Hippel suggest that those who released recipes did so for a number of reasons including that it would "enable them to claim the 'innovation space' before another chef got a related idea…", see Fauchart & von Hippel, *supra* note 1 at 196.

[1560] (Participant, Interview October 14 2014, at 5).

signalling their original designs to the public first. In their opinion, it is important that the public recognizes that their design is the original one in order to distinguish it from copies.[1561]

Similarly, another participant noted that this was the primary mechanism they used to protect themselves against copying, rather than relying on intellectual property, "[b]y releasing it quickly and going on to the next idea – I protect myself by putting it out there before anybody else…. I think that's one of the reasons behind my success so far – that I'm successful, my progress, is that I act very quickly."[1562] One participant highlighted the possible effect of designers who imitate an original design, innovation or concept, "…so you can copy but be careful because it might just – you might have egg on your face cause someone might notice that you weren't the first person…"[1563] However, one participant provided examples demonstrating that being innovative and creative can put them at risk of being copied by players within the fashion industry who might have more exposure or greater manufacturing capabilities.[1564]

6.7.4 Other Prevention Techniques

Some designers also use prevention mechanisms to avoid putting themselves into a situation where they can be perceived as a copier. The main reason for this, as mentioned above, is related to the importance that designers place on their creations and creative identity (whether they are in the form of concepts, aesthetics, the garment or identity). Some designers fear the possibility of having similar designs, because of the perception of the public and of the design community that they were not the originators, but rather the copier of the design.

[1561] (Participant, Interview March 9 2015, at 5).
[1562] (Participant, Interview March 4 2015, at 16).
[1563] (Participant, Interview August 28 2014, at 42).
[1564] (Participant, Interview July 31 2014, at 17-18); Silbey, *Eureka Myth*, *supra* note 185 at 117, observes that many copycat companies take advantage of first mover advantage because it saves them the resources in developing the product.

As mentioned in the above sections, while influence is healthy, normal and widely accepted, there is a standard to which some of the participants hold themselves in order to ensure that their identity comes through in their work.[1565] For this reason, participants avoid putting themselves in a position to be influenced or avoid putting themselves in situations where someone might accuse them of copying.[1566] The different mechanisms used to protect themselves vary by designer but generally equate to *avoidance* and *diligence*.

Avoidance mechanisms that were mentioned included the fact that they may avoid going to their peers' fashion shows or other events so as to prevent the possibility of a causal link between their work and the work of another designer.[1567] Some participants decline to look at other designers' or retailer websites or lookbooks and stay away from industry events so as to prevent being influenced by other designers.[1568] For example, one participant stated that they avoided looking in on another designer's collection when given the opportunity prior to the other designer's collection being released, "I don't want to know, I don't want to see. If we have something similar, it's going to be a coincidence."[1569]

Other avoidance techniques are to shop at different suppliers to reduce the possibility of overlap. For example, the same participant said outright that they would not shop at the same stores, "I try not to shop at the same places for fabrics. When I do, when it's an agent in [city

[1565] See e.g., (Participant, Interview July 31 2014, at 2, 11).
[1566] For example, one participant stated that they although inspiration is acceptable, it is also "risky" because they run the risk of losing their personality if they identified with only one designer, see (Participant, Interview July 24 2014, at 5-6).
[1567] (Participant, Interview July 9 2014, at 11). This is similar to Perzanowski's findings that some artists "insulate" themselves from being exposed to another work in fear of later subconsciously replicating it, see Perzanowski, *supra* note 1 at 545.
[1568] (Participant, Interview July 24 2014, at 6).
[1569] *Ibid*.

name redacted], I ask them, 'has someone else used this one?' and I'm not going to buy it. I am not going to use it so it's going to be different."[1570]

Designers also exercise diligence in a number of ways, again to be able to prevent the possibility of any semblance of sameness with another designer. In some cases, participants explained that they created a garment and later found out that it was substantially similar to that of another designer. In one situation, the participant either cancelled or abandoned that design completely prior to going to market in order to avoid coming across as a copier or unoriginal and to avoid confusion.[1571] In another example, one participant mentioned that rather than taking a chance, they went online to ensure that their works were not similar to another designer after learning that they were using the same technique.[1572]

One of the more extreme cases of prevention measures used by a participant to avoid the possibility of being labeled a copier is to keep all records of the creative and production process, from drawings to emails, "[s]o we keep all of our drawings, we try to – we keep all the emails, all the exchange we have to protect ourselves from being accused."[1573] While this diligent documentation may seem excessive, it demonstrates the lengths some participants go through in order to avoid being accused of copying. Not only does it provide the participants with records for their own peace of mind, but it could also serve as evidence if they were ever confronted with a legal claim or accusation. Although the majority of participants did not mention this strategy, they documented other aspects of their process by posting bits of information online.

[1570] *Ibid*.
[1571] (Participant, Interview July 30 2014, at 7).
[1572] (Participant, Interview October 22 2014, at 10).
[1573] (Participant, Interview July 30 2014, at 17).

These strategies are relevant both to the prior discussions on identity, and demonstrative of the inherent internalization of the norms of negative copying which will be discussed in the final section on enforcement mechanisms and sanctions.

6.7.5 Emerging Industry Practice

In addition to the various practices discussed above, there is an emerging industry practice that a small number of the participants mentioned throughout their interviews. The participants did not say that they follow these practices or that the practices emerged from the independent fashion design segment. Instead, the participants learned about them either through their colleagues or through work experience within the industry.[1574] What they learned was that works can be quantitatively changed in order to avoid making what might be perceived by others to be a copy. The measure could be a percentage or a number of elements that have to be changed or differ in order for it to be an original or non-copied garment. Participant responses include,[1575]

- Five elements have to be identical for it to be a copy
- Seven elements have to be different for it not to be a copy
- Ten elements have to be changed for it not to be a copy
- If thirty percent of an idea is changed, then it becomes your own
- If some [undefined] percentage is changed, then it becomes your own

These practices are not the same across the board. The mere fact that they exist demonstrates that some efforts are made to help establish guidelines that would prevent unwanted accusations of copying within other segments of the industry. It is also far from a settled industry practice, as only 6 of the 20 participant firms mentioned that they had heard about it, eventhough none actually mentioned that they practiced it.

[1574] Both inside and outside of Canada.
[1575] (Participant, Interview March 19 2015, at 6); (Participant, Interview March 9 2015, at 11); (Participant, Interview August 4 2014, at 5-6) mentioned that they heard it from a colleague from abroad; (Participant, Interview October 17 2014, at 3, 10); (Participant, Interview October 13 2014, at 10); (Participant, Interview August 28 2014, at 10).

Though a similar formula does not currently exist in any of the intellectual property regimes as demonstrated in Chapter 4, in some creative industries, similar practices have developed to help facilitate the use of works without licensing or authorization.[1576] Despite the fact that these practices are not written in law or regulation, the courts do take them into account in some circumstances. For example, the Supreme Court of Canada has held that industry practices may be a relevant factor in determining "character of the dealing", under the six-factor fair dealing assessment,

> [i]t may be relevant to consider the custom or practice in a particular trade or industry to determine whether or not the character of the dealing is fair. For example, in *Sillitoe v. McGraw-Hill Book Co. (U.K.)*, [1983] F.S.R. 545 (Ch. D.), the importers and distributors of "study notes" that incorporated large passages from published works attempted to claim that the copies were fair dealings because they were for the purpose of criticism. The court reviewed the ways in which copied works were customarily dealt with in literary criticism textbooks to help it conclude that the study notes were not fair dealings for the purpose of criticism.[1577]

This is an important consideration because copyright law should not adopt a one-size-fits-all approach and should take into consideration the nuances present within the different industries.[1578] For example, appropriation artists or parodists may use a higher degree of an original work than what is commonly used in literary or musical works.[1579] The importance of industry-based practices should not be underestimated, yet these practices remain largely unsettled, due to the constant tension between intellectual property owners and users. The two

[1576] Notably, other industries that have been the subject of norms-based intellectual property research have not mentioned a quantifiable industry standard, see *supra* note 1.
[1577] *CCH Canadian*, *supra* note 183 at para 55.
[1578] In their book, Murray, Piper and Robertson investigate the practices in various industries pertaining to their re-use of works and reveal that each has their own contextual nuances for 'taking.' For example, the legal actors necessarily and notoriously re-use pre-existing work to facilitate predictability, see S Tina Piper, "Copying and the Case of the Legal Profession" in Murray, Piper & Robertson, *supra* note 122, ch 6.
[1579] See e.g., appropriation artists such as Andrew Warhol, Jeff Koons, Richard Prince. The practice of appropriation has been "used by artists for millennia, but took on new significance in mid-20th-century America and Britain with the rise of consumerism and the proliferation of popular images through mass media outlets from magazines to television", see Museum of Modern Art, Pop Art: Appropriation, MoMA Learning (visited July 14 2016) online: <https://www.moma.org/learn/moma_learning/themes/pop-art/appropriation>.

examples that illustrate this contention are copyright protected works in the context of education, and in the context of hip-hop music and sampling.[1580]

The context of the publishing industry in relation to universities is an interesting one. As discussed at length by Murray and Trosow, universities have developed guidelines to enable the use of works by instructors and students without having to seek authorization or pay additional licensing fees.[1581] Although these guidelines were not set by the *Copyright Act*,[1582] the Copyright Board, or by litigation,[1583] educational institutions have developed them. An example of guidelines provided to students at York University outlines the permitted uses including,

> (a) up to 10% of a copyright-protected work (including a literary work, musical score, sound recording, and an audiovisual work)
> (b) one chapter from a book
> (c) a single article from a periodical
> (d) an entire artistic work (including a painting, print, photograph, diagram, drawing, map, chart, and plan) from a copyright-protected work containing other artistic works
> (e) an entire newspaper article or page
> (f) an entire single poem or musical score from a copyright-protected work containing other poems or musical scores
> (g) an entire entry from an encyclopedia, annotated bibliography, dictionary or similar reference work[1584]

These guidelines have caused considerable contention between Access Copyright, the collective society representing authors, and the universities who have been trying to set and standardize the industry practice.[1585]

[1580] Murray & Trosow, *supra* note 512, the authors examine these two particular industry practices (music sampling and education) in their book; Note that these examples were also dicussed in my review of their book in Courtney Doagoo, "Book Review: Laura J Murray & Samuel E Trosow, Canadian Copyright: A Citizen's Guide, Second Edition (Toronto: Between the Lines, 2013)" (2015) 27:3 Intellectual Property Journal 411.
[1581] Murray & Trosow, *supra* note 512 at 194-197.
[1582] *Copyright Act*, *supra* note 6, s 29.
[1583] *Alberta (Education)*, *supra* note 842.
[1584] York University, Fair Dealing Application Guides for Copying at York, "Application of the Fair Dealing Policy for Universities – General Application" (13 November 2012) York University at 4, online: <http://copyright.info.yorku.ca/files/2013/10/1.-Application-of-the-Fair-Dealing-Policy-for-Universities-General-Application.pdf>.
[1585] Murray & Trosow, *supra* note 512 at 195-197; Robert Gilbert, "Canada's Writers And Publishers Take A Stand Against Damaging Interpretations" Access Copyright (8 April 2013), online: <http://www.accesscopyright.ca/media/35670/2013-04-08_ac_statement.pdf>; More recently, in a decision was

Another perhaps more contentious example is the use of music samples in rap and hip-hop.[1586]

> Sampling basically comes from the fact that rap music is not music. It's rap over music. So vocals were used over records in the very beginning stages of hip-hop. In the late 1980s, rappers were recording over live bands who were basically emulating the sounds off of the records. Eventually, you had synthesizers and samplers, which would take sounds that would then get arranged or looped, so rappers can still do their thing over it. The arrangement of sounds taken from recordings came around 1984 to 1989.[1587]

The acceptable amount of music used in sampling was based on the normative standards set by the artists. However, heavy litigation by the record labels in the United States caused the sampling practices of the industries to change.[1588] When asked in an interview about whether

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made by the Superior Court of Quebec, Copibec, a collective rights society similar to Access Copyright in Quebec was denied the motion to certify a class action lawsuit against the University of Laval for not renewing their licenses with Copibec. In addition to the determination that Copibec was not the copyright owner, the motion was denied based on the Supreme Court's interpretation of the fair dealing principle as 'user rights' and that it would be impossible determine in a single analysis whether each and every use infringed copyright under a class action suit since the factors do not lend themselves to be interpreted collectively, see *Société québécoise de gestion collective des droits de reproduction (Copibec) c Université Laval*, 2016 QCCS 900 at paras 95-97.

[1586] Murray & Trosow, *supra* note 512 at 127.

[1587] Chuck and that the community used samples as another means of arranging sounds "[j]ust like a musician would take the sounds off of an instrument and arrange them their own particular way. So we thought we was quite crafty with it," see Kimbrew McLeod, "How Copyright Law Changed Hip Hop" Stay Free! Magazine (31 May 2004), online: Alternet <http://www.alternet.org/story/18830/how_copyright_law_changed_hip_hop>.

[1588] Thus "clearance culture" became the norm for a segment of the music industry that relied heavily on borrowing, "even when it is not necessarily required by copyright law" see Kimbrew McLeod & Peter DiCola, *Creative License: The Law and Culture of Digital Sampling* (Durham: Duke University Press, 2011) at 187; There has been much contention in the area of copyright law and sampling. While some courts have approached the creative practice with neutrality, others have been more harsh in their application of the copyright statute, *Grand Upright Music Ltd v Warner Bros Records Inc*, 780 F Supp 182, 183 (SDNY 1991), Judge Kevin Duffy famously stated "'[t]hou shalt not steal' has been an admonition followed since the dawn of civilization…[t]he conduct of the defendants herein, however, violates not only the Seventh Commandment, but also the copyright laws of this country; However this was not the case in Campbell, *supra* note 1455, where the defendants were accused of using a riff from the song Pretty Woman. The use was held by the Supreme Court to be fair use because it was highly transformative and also because it was a parody; see also US Court of Appeals for the Ninth Circuit decision *Newton v Diamond*, 349 F 3d 591, 591 (9th Cir, 2003), the court held that a six second segment of a composition consisting of three-notes used by the Beastie Boys was *de minimus* and therefore could not be actionable under copyright law. However in this case the defendants had already obtained a licence for the sound recording but not for the underlying composition, which is what the plaintiff claimed had been infringed; *Bridgeport Music v Dimension Films*, 410 F3d 792, 801 (6th Cir 2005), in this case, the court set aside the *de minimus* rule stating to "[g]et a license or do not sample. We do not see this as stifling creativity in any significant way. It must be remembered that if an artist wants to incorporate a 'riff' from another work in his or her recording, he is free to duplicate the sound of that 'riff' in the studio. Second, the market will control the license price and keep it within bounds."

copyright clearance was an issue for their album *It Takes a Nation*, Shocklee from Public Enemy said,

> No. Nobody did. At the time, it wasn't even an issue. The only time copyright was an issue was if you actually took the entire rhythm of a song, as in looping, which a lot of people are doing today. […] But we were taking a horn hit here, a guitar riff there, we might take a little speech, a kicking snare from somewhere else. It was all bits and pieces.[1589]

Although sampling music was one of the inherent characteristics of its aesthetic, unlike other industries, such as literature or appropriation art, the courts have interpreted sampling quite strictly.[1590] The norms followed in the broader music industry are quite rigid unlike those norms within the hip-hop community itself.

While this emerging practice within the fashion industry is far from settled or even unified, it does seem to exist fluidly in the domain of retailers, and has trickled down to the independent designers, some of who are aware of it and who loosely referred to it with uncertainty when asked about an existing practice or guideline within the industry.

6.7.6 Conclusion

There are several conclusions that are apparent in the self-regulating mechanisms revealed by the participants. First, it is clear that one of the driving forces preventing participants from copying one another is the anxiety of being labeled a copier. This was evident in the statement made by the participants in describing their emotions and reactions towards those who negatively copy.

[1589] McLeod, *supra* note 1587. Notably, the interviewees discussed how the copyright lawsuits changed the norms of sampling within their creative community.

[1590] There is no provision in the American *Copyright Act* that would suggest that there was a quantifiable allowance for an individual to sample music (akin to using a quote stylistically or substantively); such takings would be subject to determination of fair use. See US, *Copyright Act, supra* note 827, § 107; Yet cases like that of Richard Prince where the original work, like music sampling was literally taken (the appropriation artist enlarged the photographs and then painted over them in his work) was held to be fair use. In this case, the Court of Appeals for the Second Circuit held that a work does not even have to comment on the first as long as it is and that section 107 of the *Copyright Act*'s purposes was not exhaustive and should be "an open-ended and context-specific inquiry" transformative, see *Cariou v Prince*, 714 F3d 694 (2d Cir 2013) at paras 48, 56.

Not only do they want to be unique and express their identities, but they also want to avoid being labeled as someone who does not meet these characteristics. This is consistent with the importance that participants place on their individual creative identity and the collective creative identity as independent fashion designers.

Second, many of these self-defence mechanisms used as alternatives to the law in some cases parallel the type of protections and exceptions that are currently available via some intellectual property rights. These include secrecy and attribution. At the same time, there are distinctions that are quite important in the degree and scope with which the participants exercise these mechanisms.

Thirdly, several of these mechanisms may be directly linked to the dynamic of their environment and circumstance, i.e., limited fabric suppliers and avoidance techniques. While these prevention mechanisms may be less linked to the geospatial proximity, the following section on enforcement mechanisms and sanctions are more closely affected by the relationships within these clusters.

6.8 Enforcement and Sanctions

The independent fashion design community uses extra-legal mechanisms to enforce the negative copying norm.[1591] These mechanisms are driven by a number of motivations including avoiding

[1591] Extra-legal enforcement mechanisms refer to those mechanisms that are not enforced by the state. In the case of this segment, as demonstrated in Chapter 3, there are no governmental programs or agencies that would handle disputes concerning copying arising from the community. This is also the case with industry-based associations, such as the intentional cluster, and other associations. The enforcement of the norm and sanctions are however administered by the independent designers and the broader community. However, it should be noted that legal advisors are present within some of these institutions, see Ryerson Fashion Zone, which has several legal advisors, see Ryerson, *Fashion Zone*, online: <http://www.fashionzone.ca/advisors/>; Robert C Ellickson, "How Norm Entrepreneurs and Membership Associations Contribute to Private Ordering: A Response to Fagundes" (2012) 90 Tex L Rev 247, Ellickson observes that creative communities may have either weak or strong membership associations. In those that are strong, such as guilds, there would be authority to remove violators of the codes of ethics; while in weaker membership associations, they may not impose rules of ethics or conduct on the members. Concerning the latter, he holds that this "unwillingness to involve their associations in infringement disputes may indicate that they expect that their diffuse enforcement of informal norms will adequately constrain copying that

embarrassment and shame; loss of reputation; expression of identity; and also the avoidance of confrontation.[1592] These motivations connect to the esteem of the designer in some way, as described by Richard McAdams, who proposed that "the initial force behind norm creation is the desire individuals have for *respect* or *prestige,* that is, for the relative *esteem* of others,"[1593] and in the case of this segment, their own integrity and reputation as well. This is apparent in the overarching theme within the creative community as demonstrated in their efforts to avoid copying others and also as will be seen below in avoiding to conduct themselves in ways that would adversely affect their reputation.

A few interesting aspects of the enforcement mechanisms are related to the reluctance of some of the participants to make public an incident of negative copying or to participate in publicly confronting the alleged copier directly.[1594] As will be seen below, participants instead i) directly spoke with the alleged copier, or ii) were satisfied with third party intervention. Thus, the norms are enforced both within the immediate segment and by the broader industry.[1595] However as will be seen below the public also intervenes.

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they deem to be illegitimate" at 256-257 [citations omitted]. This could be said about the indepdent design sector, which does not have particularly strong membership associations.

[1592] A few of these are similar to Feldman's observations, see Feldman, *supra* note 28 at 48-49; see Posner & Rasmusen, *supra* note 26.

[1593] McAdams, *supra* note 35 at 342, McAdams further suggests that there are three conditions that need to be present for the emergence of esteem-based norms. First, there has to be some general consensus as to the "esteem worthiness" of the behaviour. Second, there has to be an inherent possibility that the unwanted behaviour will be detected by the community, which can occur through gossip or other means. Finally, the community is knowledgeable of the unwanted behaviour (consensus) and the possibility of being detected, at 358-364.

[1594] The participant's responses include reactions to being "copied" which refers to the design of garments and also a broader interpretation of the subject matter as defined above.

[1595] See Sarid, *supra* note 1 at 157.

6.8.1 Enforcement of Norms

6.8.1.1 Generally: Public Confrontation Can Be Seen as Negative

In teasing out the ways that designers handle situations of copying, some participants were asked about whether taking legal action would be tolerated in the community, and/or whether they would use other means such as social media to confront the issue. Public confrontation of alleged copiers was generally perceived as a negative approach for some of the participants.[1596] The main reason offered to justify why public confrontation could be seen as negative was that it could harm the challenger or their firm's brand or reputation.[1597] It is an especially sensitive situation due to the fact that the participants wear multiple hats as fashion designers, owners and managers of their respective companies, and because as mentioned above, their identities make a part of their aesthetic, which is in turn infused with their brands.

For instance, one participant mentioned that going public "certainly does not help your reputation" and that "you try to protect your reputation and you might think that something is the truth but the other person can say something else, so it is worth it?" [1598] Similarly, another participant who experienced copying stated that they would not go public, explaining that it is

[1596] (Participant, Interview October 23 2014, at 5), participant mentioned that in a case where people were commenting on a public incident in referring to designers, "people were cautious about making, I think looking bad maybe or something."

[1597] See examples below; Also, taking on other companies in the public spotlight can have negative backlash in public eye depending on the context. For example, in a recent situation, Lululemon Athletica, who had previously sued Calvin Klein for patent infringement, took to social media to draw attention to Beyoncé's new athletic line Ivy Park suggesting that they were imitating them stating "@GoodGuySly They do say imitation is the best form of flattery. Maybe Beyonce is so Crazy In Love with our brand, she made her own." This backfired immediately with a flurry of negative tweets aimed at Lululemon, resulting in them swiftly removing the post and sending responding to those negative tweets with a number of apologies, see Bobby Finger, "Lululemon Suggests Beyoncé's Ivy Park Activewear line 'Imitated' Their Brand, Is Wrong" *Jezebel* (31 March 2016), online: <http://jezebel.com/lululemon-suggests-beyonces-ivy-park-activewear-line-im1768275341?utm_campaign=socialfow_jezebel_twitter&utm_source=jezebel_twitter&utm_ medium=socialflow>; see also Jesse Ferraras, "Lululemon Sassed Beyoncé's Ivy Line And It Was A Mistake" *Huffington Post Canada* (2 April 2016), online: <http://www.huffingtonpost.ca/2016/03/31/lululemon-beyonce-ivy-park_n_9586666.html>; Bill Donahue, "Candy Crush Spotlights PR Pitfalls of Trademark Enforcement" *Law 360* (January 24 2014), online: <http://www.law360.com/articles/503736/candy-crush-spotlights-pr-pitfalls-of-trademark-enforcement>.

[1598] (Participant, Interview August 28 2014, at 22).

"put[ting] negative things in the press" and that they "just don't think it's good for your brand equity... it doesn't mean we're not mad. But I think to publish something – you know, to put it out there and it's venomous – it's just probably not a good idea, because what do you stand to gain? Not much. What do you stand to lose? Quite a bit."[1599] It is a conscious decision, as one participant explained that they "chose not to" go public because they did not want "that kind of like press for my brand."[1600] One participant simply stated "when you have a brand, you don't want to look like someone who is arguing with others…"[1601] while another said, "I wouldn't do it for my own. […] when it comes to your own stuff, you don't need that sort of attention immediately."[1602]

Relationships within the marketplace were also cited as a reason to not engage with would-be copiers,

> I think, well with your competitors you don't want to draw any attention you know, you just want to be one step ahead of them – there's so much competition that it's – you don't want to have any negative relationships.[1603]

There have also been incidents where individuals have not reacted in anticipation of a negative reaction from their peers. In one example, a participant attended an event and felt that another designer had copied their design. Instead of reacting, they decided to refrain from saying anything directly to the designer or to anyone else because they felt that others would think that they had negative motives for reacting, "I thought 'oh I won't react because I would look very jealous' [since] she is having […] success with this now."[1604] Brand and reputation are, as the

[1599] (Participant, Interview October 17 2014, at 4).
[1600] (Participant, Interview November 21 2014, at 5).
[1601] (Participant, Interview July 30 2014, at 5).
[1602] (Participant, Interview February 12 2015, at 4).
[1603] (Participant, Interview March 19 2015, at 3).
[1604] (Participant, Interview August 4 2014, at 10).

participants point out, their key assets, and the designers want to avoid drawing negative attention to them.[1605]

Surprisingly, pursuing legal action was not negatively viewed by a number of participants[1606] as a few of the participants revealed that they had contemplated it at one point or another, even going as far as to consult with a lawyer about the possible avenues that they could consider.[1607] More than one participant was encouraged to seek legal action by members of the design community or by other friends.[1608] For some, it was seen as less negative than publicizing the situation. For example, one participant stated that "either do something – hire a lawyer and do something or keep your mouth shut. […] we don't need Tripadvisor for fashion where everyone goes on and […] gives their opinion."[1609]

On the other hand, a few of the participants expressed that seeking taking legal action would not be well received by the community. When asked whether they thought that legal action or threat of legal action would be tolerated within the community, some of the responses received were:

> I think people would tolerate it but I think, just being you know Canadians too, I think they would think why are you raising a fuss over this [Courtney: ok] you know because that's very Canadian to just [Courtney: let it go] yeah, just why are you making a fuss.[1610]

> The reason that people don't [use the law against one another] here, not just here in [name of city redacted], but it makes you look bad. It makes you look weak or disorganized – no one wants to go to trial, no one wants to sue anybody – because that becomes public information and for the most part, and a lot of people in [name of city

[1605] As Jessica Silbey points out these aspects of a business are misaligned with intellectual property claims, Silbey, *Eureka Myth*, *supra* note 185 at 155.
[1606] One participant stated that as long as they try to speak with the alleged copier directly first see, (Participant, Interview March 9 2015, at 8); (Participant, Interview July 25 2014, at 13-14); (Participant, Interview July 9 2014, at 12).
[1607] Despite the fact that none of the designers had registered their designs or contemplated intellectual property law at the outset to protect their designs, some of the participants did reveal that they sought legal advice after they had suspected being copied, but did not pursue it for the reasons discussed in the first section in this chapter.
[1608] (Participant, Interview July 9 2014, at 9), (Participant, Interview July 30 2014, at 10).
[1609] (Participant, Interview October 17 2014, at 14).
[1610] Participant stated this in relation to using legal action against local similar segment designers as opposed to large retailer versus smaller company, see (Participant, Interview October 13 2014, at 19).

> redacted] rather not. And that's why people in [name of city redacted] do business with people they don't like. They do – we do business with people we don't like. No matter how bad it will get, no one is going to put themselves out there – really you've got to be a pretty poor business person if you are trying to get off the ground and you want to put yourself in the media's eye or put yourself out there as someone who is suing someone else for a situation you couldn't handle appropriately.[1611]

> …it's not an intention [to create something similar to another designer]. We never want to do that but we're such in a small community, we source from the same places, so that in the end even the books we look at are pretty much the same, and so in the end there is always going to be something similar. You have to let it go sometimes – [if the detail is the same as another design]; we pretty much did the same thing but in the end it's a bit of a different garment. Whatever, it happens. I'm never like going to [take legal action against] another designer that would have done something similar to one of my designs. I mean it's very possible to have something similar.[1612]

> …I hope so, I would not do it myself, because I – the community is so fragile. I could do it, I could have done it and I don't even say anything. I've seen things that […] are surprisingly close to my aesthetic.[1613]

One participant stated that only in obvious cases would it be appropriate to use the law against another designer, but also expressed concern stating, "but otherwise it's all so grey and when does it stop."[1614]

Having said this, a few participants also made a distinction between independent designers and larger retailers, expressing that if it were a major retailer against a smaller designer, then the perception would be different.[1615]

> I don't know – I don't think so. I feel that it would be [worse] for the one who will sue the other one. Like she's not even making big money with her stuff so [Courtney: why is she going after the other person?] yeah – yeah, the other person, because we are not very rich as designers – it's different for retailers, but for designers, I don't know I don't think that it will be really well perceived.[1616]

[1611] (Participant, Interview March 4 2015, at 19-20).
[1612] (Participant, Interview October 22 2014, at 10).
[1613] (Participant, Interview July 31 2014, at 20).
[1614] (Participant, Interview March 6 2015, at 17).
[1615] (Participant, Interview October 17 2014, at 14); (Participant, Interview November 21 2014, at 11); One participant made a distinction between designers based inside their city and designers outside of their city, at (Participant, Interview July 25 2014, at 13-14); (Participant, Interview October 13 2014, at 19), as noted above, the situation was perceived to be different when it is a larger retailers and a smaller local designer.
[1616] (Participant, Interview August 4 2014, at 11).

A few of the same participants further stated that taking legal action could result in a situation where people from the industry may not want to work with them.[1617] These responses demonstrate the range of attitudes and approaches toward taking legal action or making an incident public against an alleged copier.

Based on the examples provided below, it seems that when an incident is made public (whether to several people or the public), attention is directed to the original in order to caution clients about the alleged knockoffs from other retailers, or alternatively they place the original and infringing works side-by-side.[1618] While this is rare, it occurs mostly where copiers were larger brands or major retailers (as will be seen the sanctions section below). [1619]

Finally, several designers mentioned that they handle copying by moving forward onto the next thing, rather than dwell on being copied.[1620] There are time, resource and financial implications associated with taking legal action, which could drain or impede the small businesses within this segment.

6.8.1.2 Private Direct Communication

Rather than publicly confronting the individual, some of the participants who encountered copying by peers or clients, attempted to directly discuss or resolve it with the alleged copier. For some participants who did approach their alleged copiers directly, it was with the intent of preserving a relationship while at the same time initially keeping it outside of the legal system

[1617] *Ibid*, and further, the individual could come across as difficult to work with; (Participant, Interview October 13 2014, at 19).
[1618] See e.g., (Participant, Interview July 9 2014, at 9-10).
[1619] Granted clothing did post the originals and infringing copies side-by-side but also called out the copier for copying, see example below.
[1620] (Participant, Interview November 21 2014, at 5); (Participant, Interview March 19 2015, at 3); (Participant, Interview October 17 2014, at 5); (Participant, Interview August 4 2014, at 9).

and public eye.[1621] This seems consistent with Ellickson's observation of procedural norms in Shasta County between neighbours who first attempt to resolve the issue directly without one another and without the involvement of others.[1622]

For example, one designer mentioned that they directly contacted someone who they felt was strongly inspired by their work to discuss it with them.[1623] Other participants have contacted the designer, asking them to stop copying or have requested some form of resolution or compensation.[1624] This has led to some of the alleged copiers apologizing and ending their copying activities. However, the outcome has not been positive or successful in all cases; some of the participants have indicated that they have on more than one occasion asked their alleged copier to stop to no avail. In those situations, the participants have not during the time of this writing, taken action against the alleged copier.

6.8.1.3 Third Party Intervention

The unique element of enforcement measures in this community are similar to what Sarid refers to as "correlated-social norms," which are those that are enforced by the broader community, in addition to what Sarid refers to as the "intra-social norms," which the immediate community of independent designers enforces.[1625] While participants tend to speak directly to their alleged copier, it was revealed that some also appreciate when a third party (not always directly within

[1621] (Participant, Interview March 9 2015, at 4-5); (Participant, Interview July 31 2014, at 17, 20), Similarly, comedians seem to prefer when greivances for joke appropriation are dealt with privately, see Oliar & Sprigman, *supra* note 1 at 1821.
[1622] Ellickson, *Order without Law*, *supra* note 35 at 231.
[1623] (Participant, Interview July 30 2014, at 6-7).
[1624] (Participant, Interview July 31 2014, at 17), (Participant, Interview October 13 2014, at 5); (Participant, Interview March 9 2015, at 3-4).
[1625] Sarid, *supra* note 1 at 135. Jonathan Bendor & Piotr Swistak, "The Evolution of Norms" (2001) 106:6 American Journal of Sociology 1493 at 1494-1495, Bendor and Swistak argue that what makes norms social is the fact that there is third party involvement.

the segment) intervenes to i) acknowledge to the original designer that they were copied, and ii) in some cases to make known to the alleged copier or to the public that they are aware of this.[1626]

When referring to a third party, this author simply means that it is not the designer of the original work. It could be a journalist or others from the fashion design clusters such as the contractors (cutters, sewers), manufacturers, graphic designers, employees in the retail sector, and fabric suppliers.[1627] It is also not uncommon for individuals from the segment itself become involved, to the extent of letting the designer know that they saw a possible or alleged copy.[1628] In any case, acknowledgement or intervention from someone other than the designer himself or herself is welcomed. For example, one participant stated that, "you know the only nice thing that happens when someone in the city copies you is that other people are seeing them do it. So it all reflects badly on the copier, you don't need to bring it forward. Someone else is going to notice that you did that first."[1629]Another designer said "when you talk about norms and stuff like that within the fashion system, if you copy the style of somebody else people will just, within the community, people will go like, what are you doing? Who are you? He's already doing that."[1630] In some cases it is the customers themselves who first notice an alleged copy and contact the designer or the retailer where the original designs were being sold.[1631]

One way in which a third party can intervene on behalf of a designer is by communicating to an alleged copier that their works are very similar to the original designer by

[1626] (Participant, Interview October 13 2014, at 5); (Participant, Interview August 28 2014, at 24); (Participant, Interview October 22 2014, at 3).
[1627] *Ibid* [entire footnote]; (Participant, Interview October 14 2014, at 5) while this participant did not mention appreciation, they mentioned that it was typical that journalists will notice and point it out.
[1628] The majority of participant stated that they would let another designer know (if they knew them or were their friend) that they had seen a copy and that they would leave it at that.
[1629] (Participant, Interview August 28 2014, at 19).
[1630] (Participant, Interview July 8 2014, at 2).
[1631] (Participant, Interview March 9 2015, at 4).

directing a reference to the original.[1632] It is in this way that a third party lets the alleged copier know that they have negatively copied either a garment, concept, aesthetic or other element of another designer's work. Most times, the alleged copier picks up on the intended subtext, whether they had done it intentionally or not.[1633] If company A is the originator and company B is the negative copier, then C (a third party intervener) would signal to B that their line was similar to A's by simply stating that their line reminds them of A. This would be enough for the individual to understand the association and cease to continue if they do not want to be labeled a copier.[1634] The delivery is also very important, because it is not necessarily done in a negative or aggressive way, but rather subtly, and in a certain tone.[1635]

Some participants also suggested that use of media or social media on behalf of the copied designer is also a mechanism that gets the message across.[1636] One participant felt that "there's more power to having a third party bring it up on Twitter or Instagram and do it that social media way."[1637] In fact, participants shared that some journalists have written about designers who have been heavily inspired by other designers; in these cases the original designer had not been publicly referenced.[1638]

Other ways in which a third party can intervene occur where a retailer refuses to carry another designer's line or to feature them in an editorial because it is too similar to a line that

[1632] Referencing in this scenario is using the name of the brand or trade name or mark of the original. This can either be communicated in a number of ways: in person, social media, in emails, or by telephone. (Participant, Interview August 28 2014); (Participant, Interview October 13 2014, at 5-6).
[1633] *Ibid*.
[1634] *Ibid*.
[1635] (Participant, Interview October 13 2014, at 6). For example it would not be in a congratulatory or positive tone, as in you have achieved this – great! But as more of a subtle and matter-of-fact comment, as in by the way, you might want to consider this issue.
[1636] (Participant, Interview August 4 2014, at 12), (Participant, Interview October 23 2014, at 17); (Participant, Interview February 12 2015, at 5).
[1637] (Participant, Interview August 28 2014, at 24).
[1638] (Participant, Interview October 14 2014, at 5); (Participant, Interview August 28 2014, at 44); However this has not been the experience of all designers who feel that the press in many cases have not gotten involved since there may be some conflicts such as if the copier is an advertiser or if they were afraid of defaming or slandering a business, see (Participant, Interview July 9 2014, at 9), (Participant, Interview July 30 2014, at 9).

they are already carrying.[1639] However, not all retail stores or buyers have taken that stance and have purchased the alleged copies.[1640] In one incident discussed in greater detail below, a Montreal store, Boutique Onze sold an allegedly copied dress to ModCloth (an online retailer). A customer publicly posted on ModCloth's Facebook account which resulted in ModCloth's investigation of the allegation and removal of the item from their website and for public purchase.[1641]

Finally, when asked about whether the participants themselves would intervene on behalf of another designer if copying happened to someone else in the community, the majority of participants suggested that they would get involved only to the extent of letting the colleague or other designer know about it.[1642] Notably, there were some participants that felt the community does not like to get involved in these types of incidents.[1643] The majority would generally refrain from making it public or going to the alleged copier on behalf of the designer.

[1639] (Participant, Interview July 25 2014, at 4); (Participant, Interview October 13 2014, at 4).
[1640] (Participant, Interview August 4 2014, at 9); (Participant, Interview July 8 2014, at 15).
[1641] In one Facebook post, an individual brought it to the attention of the company that there was a copied design, ModCloth replied that they would investigate the situation, see Marie-Michèle Proulx to ModCloth, "I am heartbroken to see this dress on your website" (22 April 2014) posted on Facebook, online: <https://www.facebook.com/ModCloth/posts/10152314769802171>; this was followed up by another post, where the same individual asked for a follow up since there was no update as to whether the clothing was removed, see Marie-Michèle Proulx, "Hello again Modcloth" (24 April 2014), posted on Facebook, online: <https://www.facebook.com/ModCloth/posts/10152320166662171> ModCloth replied to the thread stating that their "team decided to remove the dress completely from the site. Also, we will investigate further into this vendor's design process, just in case. Thank you again for bringing this to our attention", see ModCloth, "Hey There again Marie-Michèle Proulx!" (24 April 2014), posted on Facebook, online: <https://www.facebook.com/ModCloth/posts/10152320166662171>.
[1642] See e.g., (Participant, Interview October 17 2014, at 6); (Participant, Interview November 21 2014, at 6); (Participant, Interview July 24 2014, at 17).
[1643] (Participant, Interview July 9 2014, at 10); (Participant, Interview July 8 2014, at 14); (Participant, Interview August 4 2014, at 10).

6.8.2 Motivations

One element that separates social norms from the law is the community-based sanctions that exist for violators.[1644] It should be re-stated here that sanctions are not the only factor motivating individuals to follow norms, as mentioned above, other reasons can include conforming to a group, expectations that others are following a norm,[1645] and expressing one's identity.[1646] As demonstrated throughout this chapter, this segment has a strong sense of individual creative identity, notably, there is also strong collective creative identity that motivates and reinforces these values. This can be seen in the current research findings, as it was revealed that preserving their individual and group identity, in addition to facing external sanctions from the community and internalizing the norm, played an important role in this segment.[1647] The section below will illustrate various examples of each.

[1644] See Ehrlich, *supra* note 53, there are a number of society actors or groups, otherwise "associations" who "exercise coercion" such as families, those who are engaged in a contractual performance, professionals etc, at 64; Cristina Bicchieri, *The Grammar of Society: The Nature and Dynamics of Social Norms* (New York: Cambridge University Press, 2006) [Bicchieri, *Grammar*] However, Bicchierri argues that social norms, unlike legal rules "may not be enforced at all", but rather conformity to social norms she hold, are "conditional on expectations about other people's behavior and/or beliefs" and although "shame and guilt" might be felt, this is not the determining factor an individual decision to follow the norm, at 8.

[1645] (Participant, Interview July 24 2014, at 6) Participant stated "I think all the designers that I know - it's just our belief. It's just our artist way of being. It's – we don't do it for money, … we just do it because we love it. We won't do what we wouldn't want someone else to do to us."

[1646] See above, Feldman, *supra* note 28 at 49; Schwartz, *supra* note 1375, Schwartz proposes a distinction here between personal (moral norms) and social norms, stating that "…individuals sometimes act in response to their own self-expectations, their own personal norms. What distinguishes personal norms from social norms is that the sanctions attached to personal norms are tied to the self-concept. Anticipation of or actual conformity to a self-expectation results in pride, enhanced self-esteem, security, or other favorable self-evaluations; violation or its anticipation produce guilt, self-depreciation, loss of self-esteem, or other negative self-evaluations" at 231; see Michael P Vandenbergh, "Order Without Social Norms: How Personal Norm Activation Can Protect the Environment" (2005) 99:3 Nw U L Rev 1101 at 1104.

[1647] *Ibid*; In the case of personal norm, the violator of the norm would feel compelled to adhere to the norm in order to avoid the possibility of feeling embarrassment (regardless of whether it was public or not); Feldman, *supra* note 28 at 48-49; Elster, "Fairness", *supra* note 23 at 370, Elster discusses A Fehr's explaination of third party sanctioning as a heavy cost for the norm violator; Elster, "Economic Theory", *supra* note 23 at 99; Posner & Rasmusen, *supra* note 26 at 373-374, the authors discuss guilt and shame as internalized sanctions; Biccheri proposes that sanctions are not the only determining factor in following a norm, instead individuals may follow norms "automatically and thoughtlessly" and also without incentives, Bicchieri, *Grammar*, *supra* note 1644 at 3.

6.8.2.1 Examples of External Sanctions

In the case of the independent design sector, both the immediate and broader community are directly involved in sanctioning the norm-violator, and this is expressed in a number of ways such as shaming, shunning, gossip and anger.[1648]

There is a perception that the community would react unfavourably to negative copying. As was discussed above, participants expressed that there would be "disdain" and "bad energy" surrounding those who negatively copied.[1649] Related to the ModCloth incident discussed above,[1650] the owner of Boutique Onze, a Montreal based store allegedly copied and was publicly shamed for making and selling designs that were 'inspired' by several local designers and made collections that had previously been carried in their store.[1651] These alleged imitations were copied, manufactured abroad and sold under their own label in the boutique as well as to other retailers. The fact that it was a local boutique that had been publicly praised for carrying local designers made headlines in various news outlets, media and social media (Facebook) websites causing a firestorm of comments from customers, designers and supporters of the designers.

As one participant noted, "some customers were like [Courtney: angry] so mad – so angry, I think that's the best part of it because people don't like when others are cheating…",[1652] especially because it was a local retailer carrying and supporting local brands. Another participant said "I mean the whole thing is wrong. So it's not just another designer doing the same thing – this would already be a bit wrong; doing exactly the same thing in that situation, it

[1648] Several of these reactions were discussed in the section above, on enforcement.
[1649] (Participant, Interview October 17 2014, at 14), (Participant, Interview November 21 2014, at 8).
[1650] This is related to ModCloth, as it was Boutique Onze who allegedly copied the dress designs and distributed them to various retailers including ModCloth.
[1651] CBC News, "Montreal Designer says Boutique Onze Copied and Sold Her Dress" *CBC News* (29 April 2014), online: <http://www.cbc.ca/news/canada/montreal/montreal-designer-says-boutique-onze-copied-and-sold-her-dress-1.2625569> [CBC, "Boutique Onze"].
[1652] (Participant, Interview July 30 2014, at 5).

was just all the way wrong." [1653] The store responded to a request made by the CBC's Homerun, stating that

> The dresses that we were inspired by in question are dresses that date over 2 years ago = 2012 collections. When local Designers are already liquidating, at Marche Bonsecour in April, styles they have shipped to stores in Feb-March, this show us how long the life span is of a collection or any given styles, which is the reason we really did not think anyone would even care. Guess we were wrong.
>
> […]
>
> No profit was made on the said style, we have lost a lot of money having to take them all back from onzeshop.com.
>
> […]
>
> We can assure you that we did not want to disrespect any local designers.[1654]

As mentioned above, shortly after the company sold their private label to ModCloth it was made public on Facebook and ModCloth removed the dress.[1655] As one participant described, "people were emailing Modcloth saying 'shame on you for carrying a design that was knocked off from like a small designer' – you know it looked bad on them. People were leaving comments on their site and they just took it off, they don't want blood on their hands …".[1656]

In another public incident that occurred several years earlier, Nathalie Atkinson, arts and culture writer for the *National Post*, revealed that the fashion design company belonging to the president of the Council of Fashion Designers of America and designer Diane Von Furstenberg had copied Toronto based fashion design firm Mercy.[1657] Mercy's cocktail jacket was sold for

[1653] (Participant, Interview October 22 2014, at 15) The participant was referring to a particular situation that was made public, where the alleged copier was the store owner, and they went as far as producing these alleged copies in China, selling them for half of the price.
[1654] CBC, "Boutique Onze", *supra* note 1651.
[1655] *Supra* note 1641.
[1656] (Participant, Interview October 23 2014, at 17).
[1657] Atkinson, "Jacket", *supra* note 18.

roughly $300 CAD in their 2008 collection, while Von Furstenburg's jacket sold for close to $850 USD, and was featured on the cover of *Elle* magazine and in *Teen Vogue*.[1658]

While the circumstances of this particular case were ironic because of her stature in the fashion industry and advocacy for design protection in the United States, her swift reaction (which was an "undisclosed financial settlement" to Mercy)[1659] demonstrates the importance of those community values that are advocated in her respective design community (and the possible backlash for defying them), since it was not necessarily a question of fear of legal action.[1660] A statement made in an interview with the *Toronto Star* by Mercy designers Jennifer Halchuk and Richard Lyle illustrates the importance of their identity and aesthetic, stating that[1661]

> "[t]he proceeds will not change our lives but it will help our company," explains Halchuk "(But) this incident has strengthened our belief in our aesthetic."
>
> While they say they have no animosity for von Furstenberg, they have one question for the design assistant who stole their jacket: "As you were tearing it apart with seam rippers, did you at least appreciate the effort and the workmanship?"[1662]

Assuming that the designers had registered for industrial design protection in Canada, industrial design laws are territorial and would not have extended to the United States.[1663] There could potentially be a copyright claim in the case that fewer than fifty of the jackets were made by Mercy in Canada, but the United States does not have a similar provision in their copyright laws.[1664]

[1658] *Ibid*.
[1659] Graham, "Copycat Spat", *supra* note 18.
[1660] *Ibid*.
[1661] *Ibid*.
[1662] *Ibid*.
[1663] *Ibid*, "…Scafidi qualifies that the incident did not involve copyright violation because only prints and surface treatments are subject to protection and the von Furstenberg pattern and the Mercy floral are different"; Indeed, a search on CIPO's online industrial design database revealed that there are no registrations for the particular garment, under the name Mercy or under the owners names.
[1664] See Charles E Colman, "An Overview of Intellectual Property Issues Relevant to the Fashion Industry" in Melissa Silvanic, ed, *Navigating Fashion Law: Leading Lawyers on Exploring the Trends, Cases, and Strategies of Fashion Law* (Boston: Aspatore Books, 2012) ch 7. As Colman explains, there is generally thin protection for fashion design per se, however there are some elements that might receive protection. Citing *Chosun Int'l v Chrisha*

In a more recent example, an American chain – Forever 21 – notorious for copying designers, copied Granted Clothing, a British Columbia-based knitwear company.[1665] In a statement released on the company's Instagram account, the company publicly shamed Forever 21 for its business ethics,

> A short message from the designers: As independent business owners and designers of our garments we feel it is important to inform you of an unfortunate and ongoing problem in our industry. This utter lack of respect has literally left us shaking our heads in disbelief.
>
> On the left are imitations of our designs and on the right are our original designs made here in our Vancouver design studio. They are blatant copies of our designs, right down to the colours used.
>
> Local brands like us work day in and day out to create and sustain something unique and original only to find our designs taken and used without consent. We are not the only ones being exploited by large companies who clearly have no business morals. @forever21
>
> The pressure to feed this trending "fast fashion" machine is pervasive and people are contracted by these big companies to scour the internet to find original designs without any regard, make a profit and offer no compensation to the original designers. They do not see the negative ripple effect they cause, only looking at short-term profits and do not value a sustainable business structure. This tarnishes the original brand and identity that sometimes takes years or decades to create.
>
> Our company has managed to overcome many obstacles and will continue to move forward. In order to help us take a stand we ask that you share this with your friends and always be aware of your future purchases.

Creations Ltd, 413 F3d (2d Cir 2005) at 328, he states that "most federal circuits have adopted a two-pronged, disjunctive test for copyright protection of useful articles: 'if a useful article incorporates a design element that is *physically* or *conceptually separable* from the underlying product, the element is eligible for copyright protection'" although the application of this test has been challenging across the circuits, at 119.In the chapter, he also provides examples of different elements that may receive some form of protection e.g., "sculptural components of fashion, see *Keiselstein-Cord v Accessories by Pearl*, 632 F2d 989 (2d Cir 1980).

[1665] Jenna Sauers, "How Forever 21 Keeps Getting Away with Designer Knockoffs" (20 July 2011) *Jezebel*, online: <http://jezebel.com/5822762/how-forever-21-keeps-getting-away-with-designer-knockoffs> "Forever 21 has copied everyone, from big brands like Anna Sui and Diane von Furstenberg to smaller, independent designers like Trovata, Foley + Corinna, and 3.1 Phillip Lim. The chain has most recently been sued by Feral Childe, a fashion label run by a pair of friends named Moriah Carlson and Alice Wu, for producing clothing out of a printed fabric that looks virtually identical to one of Carlson and Wu's original prints"; Sara Harowitz, "Granted Clothing, B.C. Store, Says Forever 21 Stole Its Designs" *The Huffington Post BC* (7 January 2015), online: <http://www.huffingtonpost.ca/2015/01/07/granted-clothing-forever-21-plagiarism_n_6432472.html>; Note that in an interview with the designers from Granted Clothing, they speak of their line as being influenced by the iconic Cowichan sweater attributed to the Coast Salish Peoples, see section on cultural heritage, see Kim P Werker, "Common Language" (2009) Interweave Knits 122 at 122-123.

Thank you for your continued support. +The Granted Family.[1666]

The Instagram message and story made the headlines both in Canada and the USA, receiving support from celebrities and sparking widespread media interest in Canada.[1667] It was reported several months later that Forever 21 and Granted Clothing had reached an amicable resolution.[1668]

In July 2016, Zara and other major retailers were publicly outed on social media for allegedly copying a number of independent designers, two of which were from Canada.[1669] It seems more and more independent designers are coming forward with the support of social media, the fashion design community and their social media followers.

Montreal based designer Olivia Mew, of Stay Home Club was one of the designers that had allegedly been copied. She posted an initial response on her Instagram account once customers had informed her that River Island, a London based company had been selling clothing with replicas of her patch artwork and logo on it. Based on section 64 of the *Copyright Act*, she could receive protection for both had they met the eligibility requirements for copyright in the first place. She received over 6800 "likes" and 300 posts, the majority supporting her and

[1666] Granted Clothing, "A Short Message From the Designers" (6 January 2015), posted on *Instagram*, online: <https://www.instagram.com/p/xhqXtKIoAV/>; Notably within the same post, there was a response from another clothing designer Northern Lights Optic from Canada who mentions that their jeans were copied by a department store but does not reveal who it is "I know this feeling. A large department store copied my jeans design years ago. People suggested I take it as flattery. Yes we all gain inspirations and have a sense of timing trends but it's just a bad feeling when a talentless corporate "designer" blatantly knocks you off."

[1667] Anna Maria Tremonti, "In the Age of Knock Offs, Protecting Original Design is Expensive" *CBC The Current* (12 January 2015), <http://www.cbc.ca/radio/thecurrent/charlie-hebdo-and-muslim-safe-space-the-age-of-knock-offs-and-depression-as-an-allergic-reaction-1.2906917/in-the-age-of-knock-offs-protecting-original-design-is-expensive-1.2906920>. In an interview Robin Kay, president of the Fashion Design Council of Canada, speaks about the Granted Clothing issue and says that prior to this, she was unaware of the company until this incident occurred and that knock-offs create a market for the original, in other words, that there is a "silver lining." "…if the product was good enough to be copied, bravo, it's a fabulous sweater" at 8:06 mins. Furthermore, she states that it is the brand and not the design that is important to build.

[1668] Harowitz, *supra* note 1665, "UPDATE - Apr. 30, 2015: A lawyer representing Granted Clothing says the B.C. company and Forever 21 have resolved the matter on "amicable terms," settling out of court."

[1669] Avneet Dhillon, "Zara Accused of Stealing from Indie Artists, Shoppers Call for Boycott" *CBC News* (21 July 2016), online: <http://www.cbc.ca/news/trending/zara-stealing-artist-1.3689018>.

shaming the other company[1670]

> Hey @riverisland I know you're on a budget and all but let me know if you need any help finding a designer who knows how to draw or a patch manufacturer who knows how to sew - ok? SMDH. Laughably bad knockoff sent in by @liviapenny (thank you!)[1671]

She later followed up with another post, where she discusses 'royalty' and 'credit' for taking the work,

> **stayhomeclubofficial:** After posting about @riverisland copying our patch earlier this week, I'm delighted that @tuesdaybassen has brought tons of attention today to the epidemic of big brands knocking off creators without compensation or credit. In her case, @zara Shamelessly copied multiple designs and essentially laughed in her face when she tried to fight it through proper legal channels. This has been happening to friends and peers for as long as I can remember - it's an infuriating practice that's very hard to battle legally. Here's a handful of recent occurrences, I could name 100 more if I had the time to dig around. @fashionista_com have posted this image and some of my comments if you want to see more. Thank you all so much for supporting hard working small companies like Stay Home Club - because of you we can PROPERLY license work from illustrators we love like @kayeblegvad @laura_manfre @juliapott @juliabe @satoshikurosaki @gemmacorrell @tallulahfontaine @permascowl @elenikalorkoti @cecile.dormeau & more - while the big brands can't even be bothered to pay a royalty or give credit.[1672]

Another independent designer, a Los Angeles based designer had contacted Zara to complain about the alleged copies to which Zara responded,

> We reject your claims here for reasons similar to those already stated above: the lack of distinctiveness of your client's purported designs makes it very hard to see how a significant part of the population anywhere in the world would associate the signs with Tuesday Bassen. This is our firm view, and being fully aware of the 3rd party notifications that you have brought to our attention. In this last regard, please note that such notifications amount to a handful of complaints only; when it is borne in mind that millions of users worldwide visit the respective websites monthly (Zara: 98,000,000 average monthly visits last year, Berksha: 15,000,000 average monthly visits last year), the figures clearly put those notifications into sharp perspective."[1673]

The designer then posted his or her own response to the letter,

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[1670] Kamila Hinkson, "Montreal Artist Frustrated By Fashion Giants Allegedly Ripping Off Designs" *CBC News* (22 July 2016), online: <http://www.cbc.ca/news/canada/montreal/olivia-mew-stay-home-club-copyright-knockoffs-1.3689216>.

[1671] Stay Home Club, "Hey @riverisland I know you're on a budget and all…" (17 July 2016), posted on *Instagram*, online: <https://www.instagram.com/p/BH90LPFh846/?taken-by=stayhomeclubofficial&hl=en>.

[1672] Stay Home Club, "After posting about @riverisland copying our patch…" (21 July 2016), posted on *Instagram*, online: <https://www.instagram.com/p/xhqXtKIoAV/>.

[1673] Tuesday Bassen, "I've been pretty quiet about this, until now." (20 July 2016), posted on *Instagram*, online: <https://www.instagram.com/p/BIEGImxgFKe/?hl=en>.

> **tuesdaybassen** I've been pretty quiet about this, until now. Over the past year, @zara has been copying my artwork (thanks to all that have tipped me off--it's been a lot of you). I had my lawyer contact Zara and they literally said I have no base because I'm an indie artist and they're a major corporation and that not enough people even know about me for it to matter. I plan to further press charges, but even to have a lawyer get this LETTER has cost me $2k so far. ~~ It sucks and it's super disheartening to have to spend basically all of my money, just to defend what is legally mine. Some of you are asking how you can help. Repost and tag them, on Twitter, on Insta, on Facebook. I don't want to have to burden any of you with the financial strain that comes with lawsuits.[1674]

This provides a glimpse of the type of upward battle that these designers have to face when dealing with the larger corporations that could explain why they choose to go public. While the registration of their design or illustration for copyright protection is voluntary and costs $50, the costs associated with pursuing a claim include legal fees and time, both which are challenging for small and medium sized firms.

These examples also illustrate the external sanctions that are actively imposed by both the design community and the broader cluster, including customers who are effectively publicly shaming the company for their actions. For example, following these news articles, a Toronto based designer created a social media post revealing that they too had been copied by Zara and called for a boycott of Zara,

> We had just heard this morning about Tuesday Bassen and other indie companies having their designs ripped off by ZARA. Low and behold, this afternoon it was brought to our attention by Adam J. Kurtz that Zara Bershka Collection has stolen our Healing Cloud design. We had a similar situation arise a few years ago and discovered then that it's a futile legal battle for small, independent companies when you're up against big, greedy, corporations with teams of OP lawyers. It's disheartening and pathetic. We don't even know what to do, but feel free to boycott and repost, tag Zara on Twitter, Instagram, Facebook, etc and call them out for their lack of creativity and for profiting off the hard work of small companies that often just try to stay afloat in the sea of big companies. It's bullshit. #zaraexposed #zaraartthert #zara[1675]

[1674] *Ibid*.

[1675] crywolf, "We had just heard this morning about Tuesday Bassen…" (20 July 2016), posted on *Facebook*, online: <https://www.facebook.com/crywolf.ncw/>.

Furthermore what all of these three situations have in common is that all three of the alleged copiers are not in the same segment as the independent designers, but rather a local retailer, a global brand and fast fashion retailers.

While the designers may not be experiencing direct financial harm in all cases, (either because they have not entered into those particular markets) or the segment is different, it is the fact that these retailers are capitalizing on their design, causing exploitation or being unjustly enriched which undoubtedly affects the *individual creative identities* of these designers for reasons discussed above.

What is also notable is that there are very few situations like this that make it to the media where the alleged copier is also an independent designer, confirming the findings discussed above concerning the fact that designers when experiencing copying within their segment have tended to not made these incidents public.

6.8.2.2 Examples of Internalized or Personal Norms

In addition to the enforcement of norms by way of external sanctions, or social norms, an individual can be compelled to follow normative behaviour within a group or community without the need for the community to actively intervene, which can be tied to their sense of "self-concept."[1676] With internalized norms, the community is not involved with sanctioning the individual, but rather, the feelings of fear, guilt or shame are self-imposed at the prospect of violating norms or the values associated with those norms.[1677] As William Miller explains,

> Shame was above all a status with an almost juridical aspect. The shamed person lost honor, and that loss was palpably observable by others because these others were in fact responsible for the loss of honor by their very way of seeing the shamed person. Being

[1676] Schwartz, *supra* note 1375 at 231.
[1677] Elster, "Fairness", *supra* note 23 at 370; (Participant, Interview October 23 2014, at 8, 12) Participant discusses the personal nature of the design and how copying is inherently contrary to that; One participant stated "for me, the social norms or respect for each other is more important than the law. Even if it was legally enforced I wouldn't do it anyways" see (Participant, Interview July 24 2014, at 15).

> shamed, it was noted, did not necessarily require an observing audience. One needed only to be committed in a serious way to the values and standards of the community in which one claimed membership to feel shame (and to be shamed) for not measuring up to those standards or adhering to those values.[1678]

Therefore, an individual has the capacity to feel shame and does so even though no one in the community is directly involved in making them feel that way.

For example, in one interview, while discussing copying in the community, the participants stated they would be "embarrassed" especially because the public would notice that it would be "hard to just stand behind something where you know that you've done something wrong. It sounds like such a basic – you know when you're a kid – it's hard to lie to a huge group of people and like stand your ground."[1679] When asked about the reaction if someone locally blatantly copied another local designer, one participant shared that "I think people, like locally…you'd have to be just really kind of really stupid to kind of blatant[ly] – you know – that would be like so embarrassing [for] you"[1680] In other words, the norm has become internalized and followed due to fear of guilt, shame of going against the norm. Jon Elster suggests that "[s]ocial norms have a *grip on the mind* that is due to the strong emotions their violations can trigger." Therefore he believes that the intuitive or "emotive aspect" of the norm is perhaps more important than the "cognitive aspects."[1681] As Elizabeth Rosenblatt explains,

> One might assume that public shaming is a more powerful behavior shaper than internal shame because public shaming works in two ways - emotionally and reputationally - while internal shame works only emotionally. But the contrary is true: as a behavior shaper, shaming is actually less predictably effective than shame. The effects of shame on individual emotion are automatic, but the effects of shaming are not. Shaming, unlike shame, depends on the beholder.[1682]

[1678] William Ian Miller, *Humiliation: And Other Essays on Honor, Social Discomfort, and Violence* (Ithaca, Cornell University Press, 1993) at 134, this he was discussing in the context of a culture of honor in saga Iceland.
[1679] (Participant, Interview March 6 2015, at 19).
[1680] (Participant, Interview August 28 2014, at 22).
[1681] Jon Elster, *The Cement of Society: A Study of Social Order* (Cambridge: Cambridge University Press, 1989) at 100 [emphasis in original].
[1682] Rosenblatt, "Fear and Loathing", *supra* note 27 at 13.

As demonstrated above, some of the participants associate strong emotions with negative copying and at the same time they have strong values placed on ideas, concepts, identity and reputation. This is evident when describing the different mechanisms and the measures taken by the participants to not only avoid being copied by other designers, but to also prevent putting themselves in a situation where they could be accused as copiers.[1683] Some participants demonstrated a clear aversion to being considered a copier, as demonstrated by one participant stating that notwithstanding the fact that they have not used intellectual property law to protect their designs, they knew that someone could copy them in the future. Despite this, the participant stated, "main fear would be that [someone would] think that we copied them and it's a coincidence cause we know that happens.[1684] The reasons for which they take such precautions are because they uphold their values as creative independent designers - otherwise a part of a collective creative identity - and for this reason they have internalized the non-copying norm.[1685]

6.8.3 Conclusion

These remarkable findings demonstrate the measures taken by the participants to avoid directly going public about an incident of copying especially when dealing with other independent designers due to the perceived negative attention they would receive for their brands and reputation. Instead, a number of the participants who have experienced being copied have attempted to resolve incidents by directly contacting the would-be copier, or feeling vindicated if the broader community got involved. While it is rare for designers to publicly out their alleged copiers, publicly outing larger companies and retailers seems to be occurring more frequently.

[1683] The mechanisms described above were creating a strong creative identity, first mover advantage, and avoidance mechanisms.
[1684] (Participant, Interview July 30 2014, at 17) This response was given when the participant was asked if they had ever thought of protecting their designs.
[1685] As Rosenblatt suggest, "[b]elonging not only motivates creation of stuff, but also motivates people to create and comply with community norms and values, including copying and attribution norms tailored to the needs of particular creative communities" Rosenblatt, "Belonging", *supra* note 1180 at 25.

> Listen, I think when it happened to me I was able to confront the people [right away] of course, exactly. I think that this is the way. But a now what we experience is that the market is so big so it's difficult to confront the copiers: who is this person making the copies? How will I contact this person? I'm going to call them? For me it's like 'just to let it go.' If it's just one piece or just one t-shirt or one pant - whatever just let it go. But if it is absolutely your entire brand, the same kind of logo – I mean I don't think it means anything to start a fight for a t-shirt or pant - but to really copy a collection or take the same fabrics for the whole collection, things like that.[1686]

This could be due to the positive and expedient responses the designers have been receiving on social media, which seems to help rather than harm their reputation. Instead, based on the examples provided above, when independent designers resort to public shaming, or singling out alleged copiers on social media – often larger retailers – the alleged copiers seem to be the target of negative reputational repercussions.[1687]

One inference that can be drawn from the responses is that geographical proximity or clusters may play a role in the way that the participants interact within their own cluster and segment. The fact that the participants work within the same cluster or industry, and in some ways work together, may account for the reason that designers who have experienced copying have gone directly to the would-be copier first, rather than making something public right away.[1688] However, geographical proximity plays a role within these communities as well. There are a number of actors from within the broader industry who do get involved on behalf of the copied designer, including buyers, journalists, retailers, other designers and contractors. This also explains the role and importance of third party interveners, i.e., individuals outside the independent fashion design segment who are immediately involved, and take some type of action

[1686] (Participant, Interview July 25 2014, at 3-4).
[1687] See the examples above.
[1688] Business relationships are quite important within any business community and therefore harming such a relationship may go against the motivation to have a well functioning industry or cluster. As mentioned above, contracts are unnecessary within the business community he interviewed due to two norms. The first norm is that commitments are of utmost importance and the second is that the businessman must stand behind their products. Macaulay explains that working together and seeing one other professionally or socially, either formally or informally deters individuals from violating the norms of following through on a contract. One non-legal sanction he offers is that "[b]oth businesses units involved in the exchange desire to continue successful in the business and will avoid conduct which might interfere with attaining this goal" see Macaulay, *supra* note 57 at 63.

on behalf of the designer. While designers might not get involved personally, there are individuals within the broader community who do get involved by making them aware of the fact that copying is occurring, or in some cases by letting the would-be copier know.

Another inference that can be drawn from the findings is that the participants have internalized the norm because of their collective creative identity, meaning that they operate on shared values and expect that others within the segment would do the same. This sentiment trickles from the immediate segment and into the broader fashion design cluster within these two cities. This is evidenced by the involvement of immediate and broader cluster and the role they sometimes play in helping regulate negative copying within the industry. What these findings also reveal about some participants is that their perceived equity in their brand, identity, reputation, and the relationships were more important than outwardly taking action if they were copied.

As mentioned above, there are a number of reasons why individuals choose to follow norms. Included in those reasons are external sanctions and situations were the individual has internalized the norm to the extent that any external action is unnecessary. Throughout this chapter there have been a number of examples demonstrating the internalization of the non-copying norm to the point that participants have expressed going out of their way to ensure that even the slightest similarity in works is accounted for. The values associated with negative copying are quite strong, and this results in a strong aversion to being the designer caught on the other side.

PART IV: CONCLUSION

CHAPTER SEVEN - Conclusion

7 Conclusion

In this chapter, I will begin by illustrating the contribution of this dissertation as it relates to empiricial research on intellectual property law and norms. I next highlight the importance of evidence-based research in the field of intellectual property law. Further I discuss the significance of grounded theory methodology and empirical methods in legal research more generally. I conclude by suggesting that strategies other than intellectual property law reform may benefit this particular industry and would merit further research.

7.1 The Use of Intellectual Property Law and Norms in the Independent Fashion Design Segments In Montreal and Toronto

The Montreal and Toronto independent fashion design segment interviewed for this research does not seem to rely on intellectual property law to promote innovation or to protect their designs from copying despite the fact that there is a legal framework available and that this segment is highly creative and innovative.[1689] Similar to the existing studies conducted on intellectual property laws and norms within creative industries including those of French chefs, comedians, magicians, derby girls and drag queens,[1690] the independent fashion design segment in Montreal and Toronto has developed extra-legal responses to copying.[1691] Indeed, the segment

[1689] Rather than protecting their designs, trademark law is used to protect their company names and marks. As noted in Chapter 5, several of the participants consulted with lawyers although the majority of claims were unsuccessful due to a number of reasons.
[1690] *Supra* note 1.
[1691] Sarid, *supra* note 1; See Chapter 6.

within these two cities can be considered within intellectual property's "negative space"[1692] and practicing "IP forbearance." [1693] This research is not only important to understanding whether and what laws are being used, but also to understanding *why* they are not being used and *what* is being used in place of the law. What this and similar empirical research on intellectual property law and norms demonstrates is that the law does not play as significant role in the creation and dissemination of all types of works.[1694]

As Oliar and Sprigman suggest, reasons that may help explain why the participants tend not to lean toward legal protection of designs may be broken down into "practical" and "doctrinal" barriers.[1695] Practical reasons include the nature of the fashion industry such as the production cycle and the design process as well as limitations. As illustrated in Chapter 3, resource allocation is relevant both to register for intellectual property protection in the first place and to later enforce it.[1696]

In Chapter 5, participants made reference to resources such as time, costs, and the knowledge of the legal system and how the law would benefit the protection of their designs in the first place.[1697] This is not unique to the independent design segment.[1698] In addition to these factors, enforcement for copying is difficult where the alleged copier is located in a different

[1692] Rosenblatt, "Beyond the Utilitarian", *supra* note 2 at 447.
[1693] Rosenblatt, "Negative Space", *supra* note 2 at 330, as mentioned in the Introduction, IP forbearance occurs when intellectual property exists for a particular industry but creators decide to not use it.
[1694] In fact, within this particular industry trademark law related to the intrinsic values of creativy and reputation is perhaps more significant than the actual protection of designs. One of the main reasons provided is that the cycle of production is rapid and that it could be quite costly to register designs. Importantly there are both costs associated with registration and enforcement. It may make more sense for designers to register trademarks that can be reused throughout their collection rather than to seek intellectual property protection for separate pieces in each seasons' collections. The longevity and broad application of trademark law is more appealing to this particular segment.
[1695] See Oliar & Sprigman, *supra* note 1 at 1795-1804. The authors refer to copyright enforcement in their study, here I mean copyright, trademark and industrial design law as it relates to design protection.
[1696] See Chapter 5.
[1697] *Ibid*, ss 5.2.1. & 5.2.2.
[1698] See for example in the case of tattoo artists and comedians, *supra* note 1.

jurisdiction.[1699] This can be an issue within the fashion industry because copying can occur in any jurisdiction – and in many cases overseas. Once copying proliferates it becomes difficult to go after all of the copiers. Furthermore, because the protection afforded by trademark and industrial design laws is territorial, the designers may find it challenging to enforce it in those jurisdictions.[1700]

Doctrinal reasons also exist, such as the case of independent creation and subconscious copying, the broad scope of subject matter, and the uncertainty as to what characterises copying other than when it is an exact or near imitation. For example, several of the participants mentioned that they felt that it was not possible to remember all sources of inspiration and alluded to the anxiety of coming up with similar or the same designs without access to another's work.[1701] This could, as mentioned in a few of the interviews and in Oliar and Sprigman's research, make it difficult to pursue a legal claim because it would be hard to know whether the work was actually copied or not.[1702]

The subject matter important to the participants is broader than what copyright, trademark and industrial design law protects. Creative identity (whether individual or collective) is manifested through DNA, stories, concepts, styling, signatures and personalities. It is both what drives creativity and what comprises the elements of the creative production that the designers seek to protect. As with creators in other industries, identity and reputation are hugely important assests.

Lastly, there is no consensus or definitive parameters where copying is not identical. While there are various manifestations of copying within the community, it can range from either

[1699] Rosenblatt, "Negative Space", *supra* note 2 at 353.
[1700] See Chapter 4.
[1701] Chapter 6, s 6.6.2.2.
[1702] See Oliar & Sprigman, *supra* note 1 at 1804-1805.

the most important element or the combination of everything. As explained in Chapter 4, there could be some contentions in this area in relation to literal and non-literal copying as well as the idea/expression dichotomy. As mentioned above, there has been some effort made within other segments of the fashion industry to create a points or percentage system, which could help to determine whether something is copied or not.

Just because this segment seems to practice "IP forbearance," it does not mean that the participants were not proprietary with respect to their works or that they do not enforce behavioural norms related to copying that is negatively perceieved. The norm against copying that is negatively perceived is enforced both externally and internally. As is the case in other communities, it is not uncommon for individuals within the broader cluster to intervene where copying has occurred within the independent design segment. For example, in the community of comedians, some agents and club owners become involved by refusing to work with copiers.[1703] Within the fashion design community, the cluster is broader – even those who do not stand to financially gain can intervene. Intervention can occur in a number of ways such as directly or indirectly making their disapproval known to the copier, gossiping within the community, involving the media, and in some cases, where a buying relationship exists, refusing to buy. Speaking privately with the alleged copier is typically favoured. Contacting a lawyer to seek help is also not uncommon, however claims are rarely pursued or successful. Publicly outing another independent designer has not been done, however going after individuals from a different segment either local or elsewhere has been.

This particular study also has interesting implications for theoretical justifications for intellectual property law, particularly the utilitarian justification, Not only does this dissertation provide insight as to why indepdendent fashion designers do not tend to use the law to protect

[1703] See Oliar & Sprigman, *supra* note 1 at 1818.

their creations, it also demonstrates that there are values other than straightforward economic benefits that drive innovation.[1704]

The findings reveal that the participants have created mechanisms in order to support their values i.e., reputation and creative identity and to enforce the *negative* copying norm within their segment and broader cluster.[1705] As demonstrated in Chapter 6, the harms that are associated with negative copying are much broader than what the law protects. Furthermore, the law does not take into consideration the realities of the industry and the process of creation, which in some cases can be more forgiving than the law.[1706] These values help drive creativity and innovation, but they also create barriers against copying that is negatively perceived, thus setting boundaries for creative production protection outside of the scope of law. This is significant because in the absence of law this creative segment has developed and internalized a strong norm against copying that is negatively perceived.[1707] One of the most significant outcomes from this study is the degree to which this segment has internalized the values of creative identity and reputation. This is demonstrated by the fact that a number of the extra-legal mechanisms were deployed by some of the participants, not just to protect their designs from being copied but precautions were also taken to ensure that those participants would not be accused of copying another.

[1704] This is does not diminish the economic incentives by any means, but demonstrates the importance of non-economic incentives as well.
[1705] There are two important values that explain the characteristics of the design community and why the norm and mechanisms have developed. These are identity (described as individual creative identity and collective creative identity) and reputation. Personal reputation and brand reputation were also identified as important values that drive norm enforcement. There were a number of reputational interests: reputation in the individual creative identity and collective creative identity, reputation of the brand (i.e., to not look aggressive, proprietary or petty), and reputation as an originator of a product. These reputational interests put into context the way copying is perceived and reactions to it, including the reasons for not going public against individuals from the same segment.
[1706] An example is the case of subconscious copying.
[1707] Notably, this norm applies only to this segment and not different segments within the broader industry or cluster.

7.2 Ground Design and Intellectual Property Law Policies in Evidence with a View to Stimulating Innovation

This dissertation also offers strong support for empirical research in evidence-based policy making. In this context, this study suggests that more research is needed on various industries within the design sector prior to broad policy or legal reform. Basing design policy or intellectual property law policy on a single study of a single segment of a broader industry would greatly undermine the contribution of this research.

The importance of evidence-based intellectual property policy making was not only driven home in recent years in the United Kingdom by the Hargreaves Report,[1708] but also in Canada. As Jeremy de Beer suggested in his submission to the House of Commons Committee in 2012, evidence should be the foundation of intellectual property policies.[1709] Specifically, he suggests that

> [t]here is a general consensus among experts that the precise role of IP in innovation systems is highly variable, context-specific, and complex. So we need to inform our ideology and economic theory with evidence of actual business practices and real-world impacts in specific sectors in order to create an effective policy. That's why I echo calls made recently in the Jenkins report and in the Canadian International Council's report, […], for a high-level, independent, evidence-based review of Canada's current IP framework, toward the formulation of a nuanced policy integrated into an innovation agenda.[1710]

Similarly, any deliberate decisions concerning a reform of Canada's intellectual property framework should be made based on research, and more importantly, based on the innovative practices within Canadian industries.

[1708] *Hargreaves Report*, *supra* note 189. Within the particular context of the study, the industry while highly creative and innovative is at a disadvantage to foreign imports of clothing and textiles. The industry shifted dramatically because of international trade agreements and has been focusing on value added services largely due to the absence of innovation and cultural policies that would support a protectionist approach.
[1709] See de Beer, *supra* note 192 at 0905.
[1710] *Ibid*.

As mentioned in Chapter 3, unlike jurisdictions such as the United Kingdom and in the European Union more broadly, Canada has not fully articulated a cultural economy policy that takes into consideration a broader scope of industries including design and intellectual property laws to support them.[1711] In Canada, designers rely on industrial law created with a 1800s British industrialist mindset, which do not reflect the reality of Canada's current innovation environment.[1712] Related to this is the significance that Canadian companies are not the primary beneficiaries of industrial design laws that are currently in place,[1713] as evidenced by CIPO's industrial design registration database study.[1714]

While the purpose of this dissertation was not to endorse or suggest changes to intellectual property law or design policy, there are some valuable insights policy-makers can glean from the social, political and commercial context of creation within this segment. Put into other words, empirical research is important to inform government policy and legislation in relation to innovation.

7.3 Grounded Theory Methodology and Empirical Methods

Another interesting insight this study offers is that it highlights the use of grounded theory research in law, a methodology traditionally used in social sciences disciplines. Grounded theory methodology is flexible and conducive to various kinds of research. In particular, the analysis in this dissertation led to an interdisciplinary inquiry that considers the participant's context (i.e.,

[1711] As was discussed in Chapter 3, cultural policy at the federal level does not specifically include design (it has been discussed in innovation policy more than cultural policy). At the provincial and municipal levels, design has been identified as a contributor to the economy but the way in which it is supported has not been uniform between provinces and cities. This is apparent in the discussion on Toronto and Montreal approaches to fashion design for example.
[1712] See e.g., Trademark and Design 1861, *supra* note 544.
[1713] CIPO, *Industrial Design Activities in Canada*, *supra* note 127, the study states that "data shows that overall 59,961 unique designs were registered in Canada from 2000 to 2014 and 85% of these were foreign-based and the remaining 15% were domestic" at 1, which is quite significant and demonstrates that the current framework is not particularly useful for Canadian-based firms or individuals who conduct design activities. The study further held that the top five countries who use the registration system are the US, Japan, Germany, UK and France.
[1714] *Ibid*.

industry characteristics, policies and geographic proximity) and motives; in other words, the underlying reasons for their actions.[1715] There are three particular benefits of grounded theory that I believe would be beneficial to legal research: it is from the ground up, comprehensive and adaptable.

The use of grounded theory methodology was effective because it allowed me to approach the research from the bottom up. Using a bottom up approach allowed the research to emerge from the participants of the study rather than from a preconceived hypothesis. It also allowed the theoretical framework to emerge from the findings rather than at the beginning of the research. In this sense it does not assume the outcome of the research from the outset and has the capacity to provide an authentic perspective. However and notably, grounded theory takes into account the interaction between the interviewer and the interviewee in that the responses are shaped based on the questions that were asked and explained to the participants. For example a different wording of questions might have elicited different responses. Furthermore, because I explained certain legal concepts in the interviews, the participants may have attempted to respond through the lens of law.

This bottom-up inquiry is beneficial to legal research because it has the potential for interdisciplinary research, which can provide extremely rich data. While I did not consider a number of contextual elements and factors such as the dramatic change in the Canadian apparel industry landscape, the role of proximity, and the motivations of identity and reputation at the beginning of this research, the methodology fostered the ability to situate my research in a comprehensive contextual framework. This is significant, because norms develop from interactions and are context specific.

Finally, grounded theory methodology was not only instrumental to the cultivating the

[1715] Feldman, *supra* note 28.

findings and analysis in this particular research, but can be adapted to a number of different contexts and industries. For example, this methodology may continue to be used to study norms in the context of creative and innovative communities. However, it can also be used in a number of different legal studies in order to understand the context in which laws are used or not and to find out why.

7.4 CIPO as an Active "Catalyst" for Innovation[1716] for Small and Medium Sized Firms: Alternatives to Enhanced Intellectual Property Protection

Finally, this study suggests that strategies and support *other than enhanced intellectual property law* may better serve this sector. In fact, on several occasions, participants expressed their concerns that litigation or extensive protection could have the potential of disrupting both creative and business practices.[1717] Further, while a number of participants had heard the term intellectual property law or copyright, and were aware of trademark law, the majority of them were not knowledgeable about how they could benefit from these laws. Notably, a number of designers had sought legal solutions to certain issues but in many cases these efforts were unsuccessful because of their lack of knowledge about the nuances of intellectual property law.

Rather than focus on intellectual property law reform, there are alternative avenues that could enable this sector to make strategic business decisions pertaining to protecting their innovative production should they decide to do so. These strategies could take into consideration the values that drive innovation and creativity within this industry. There is an opportunity for CIPO, following a coherent innovation strategy, to consider how it might actively assist creative

[1716] Gilles Paquet & Jeffrey Roy, "The Canadian Intellectual Property Office as Innovation Catalyst" in Jonathan D Putnam, ed, *Intellectual Property and Innovation in the Knowledge-Based Economy* (Ottawa: Industry Canada, 2006) 15-1 at 15-25.
[1717] For example in the case of independent creation and subconscious copying.

industries in Canada by offering outreach services to small and medium sized firms.[1718] Three suggestions under the existing legal framework may benefit this segment and would warrant further research. These include an industry-specific educational outreach program, a non-binding opinion service, and alternative dispute resolution services. These services would serve to enhance the normative framework while providing access to intellectual property innovation strategies. Notably pertaining to the last two options, given the particular characteristics of this industry any available recourses should be affordable, accessible and timely.

It is important to highlight that these suggestions were not derived directly from interviews but are aligned with alleviating some of the practical barriers presented in the findings pertaining to resources, i.e., time, money and knowledge of the legal framework. While the independent design community may already have a well-functioning system to prevent unwanted behaviour within their communities, these suggestions go beyond the independent design community and could be useful for a number of creative communities throughout Canada. As reiterated throughout the study, amendments to intellectual property laws should be made in the context of innovation or cultural policy and not independently.

7.4.1 Education on Intellectual Property Strategies As Tool For Innovation

While this avenue might be more suited to start-ups and technology firms, a general recommendation would be to build bridges between the provinces and focus on industry-specific education programs on intellectual property for small and medium sized firms.[1719] These education programs can take many forms and could offer information to fashion designers about

[1718] Paquet & Roy, *supra* note 1716 at 15-25.
[1719] *Ibid*. The recommendations made by Paquet and Roy include, client outreach services for SMEs to help understand and identify their specific needs for innovation, knowledge management and to play a more regional level by building bridges an partnerships with various institutions; While CIPO has started playing larger outreach role, it is still passively providing information in the form of blogs, articles, tutorials and videos, see CIPO, For Business, online: <http://www.ic.gc.ca/eic/site/cipointernet-internetopic.nsf/eng/wr03818.html?Open&wt_src=cipo-business-main>.

different aspects of the existing intellectual property framework in order to allow them to capitalize on some elements of their design i.e., trademarks for design-related elements rather than just for marks.

Further, as was discussed in the previous chapter, incidents stemming from within the segment of independent fashion designers are rare and are confronted differently than when designers are copied by local and foreign retailers such as Zara and Forever 21. Educational tools could help designers navigate these issues using intellectual property law, and could provide them with the knowledge they need to take measures against these well-equipped alleged copyists. It is important to note that this recommendation is not meant to enhance the use of intellectual property law within the community, but mainly to provide information about how it can work to their benefit should they decide to use it as a part of their business strategy.

7.4.2 Non-Binding Opinion

One intriguing response by the UK government to the evidence based design law review was the creation and implementation of a non-binding design opinion service connected to their Intellectual Property Office that would provide designers with information about whether their designs would meet the standard for protection or whether they might have a case for infringement.[1720] This mechanism would be quite beneficial to fashion designers because it would assist them with determining resource allocation. While this would certainly alleviate a financial and accessibility burden for designers within this segment, due to the newness of the program, there is very little information about how useful it has been in the United Kingdom. Nonetheless, I would recommend for the UK experience to be studied to determine whether such

[1720] UK Intellectual Property Office, "Business Guidance on Changes to the Law on Designs" UKIPO (June 2014) at 11, online: <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/323145/changes-to-designs-law.pdf>.

a service could enhance access to and knowledge about intellectual property rights as they relate to designs for those designers who seek that information, especially when dealing with large local and foreign retailers.

7.4.3 Alternative Dispute Resolution for Intellectual Property Related Issues

One final avenue that could be considered is alternative dispute resolution[1721] as a solution to intellectual property law related issues that arise within the community. In most cases where participants reached out to would-be copiers, the would-be copier would apologize, or stop – however on more than one occasion, this method was unsuccessful. Using mediation or arbitration to help resolve such issues takes into consideration the nature of the relationships within this segment and within the broader cluster. Alternative dispute resolution could also be useful mechanism between designers and retailers. I would recommend further research of the UK Intellectual Property Office and European Union Intellectual Property Office to see whether such a service could prove effective for CIPO.

[1721] Notably, the UK Intellectual Property Office currently has such a service, see UK Intellectual Property Office, *Intellectual Property Mediation*, online: <https://www.gov.uk/guidance/intellectual-property-mediation#what-is-mediation>; similarly, the European Union Intellectual Property Office offers a similar service between the parties in a dispute but only during appeal proceedings, see EU Intellectual Property Office, *Mediation*, online: <https://euipo.europa.eu/ohimportal/en/mediation>.

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Appendix A

Questions

Please note that because I am using grounded theory as a method and methodology, many of the open-ended questions here will be followed up with question to delve deeper into situations that have not been anticipated but will deal with the same themes indicated here. Please note that examples have been excluded from this questionnaire.

General Introductory Questions

1. Name (First, Last)
2. Business Name
3. Length of time in the business
4. Target market (demographic i.e. women, men)
5. Product(s) market (i.e. evening wear, shoes, accessories)
6. Product position (i.e. luxury, midrange, fast fashion)
7. Head office location: Toronto or Montreal
8. Number and location of retail outlets
9. Number of grants or subsidies from any government program relating to your business. If so how much?
10. Do you export your products outside of Canada? If so, in what countries? What percentage to what countries?

Focus 1 & 2: the realiance on statutory law (copyright, trademark, trade secret and industrial design) or normative system (social norms) by fashion designers to protect against or prevent copying || the relationship between the laws and norms within the fashion industry.

1. Have you ever thought about protecting your designs?
2. What do you use or have you used in the past to protect your designs from copying?
3. What do you know about different laws that are available for protecting designs?
4. Have you heard about intellectual property law (copyright, industrial design, trademark and confidential information)? In this question I will briefly explain in lay terms what these laws protect and the difference between each law as well as the elements that they protect?
5. If protection was readily available would you protect your design? Would you protect all or several if you had the choice?

6. Would you approach creativity differently if you knew that all designs were legally protected?
7. Have you ever consulted anyone about protecting your designs, i.e. friends, designers, or lawyers?
8. Have you ever registered or considered registering your designs for intellectual property protection?
9. Have you relied on unregistered rights, i.e. copyright or trademark? Do you know that they exist?
10. What happened next? How did you handle this incident? Did the community of designers get involved? What did they do?
11. Has this affected how you design or conduct your business?
12. Is this practice common in the industry?
13. If another designer went through a similar incident, would anyone from the community get involved? How? What would you do?
14. If a designer decides to use the law against another designer (either by threatening legal action or by actually indertaking legal action), would this be a tolerated action in the community?
15. How does the industry react to copying in general?
16. If you export your products outside of Canada or are anticipating doing so, would you concern yourself with intellectual property in those countries? Please explain?
17. Would it matter to you if individuals outside of Canada were copying your designs?
18. Are you aware that in the US they are attempting/planning on implementing a law to protect fashion designs (explain) How do you think that this would impact you and your creative process?

Focus 3: the approach to copying by designers

1. What does copying mean to you?
2. Does the design community at large feel this way?
3. What do trend mean to you?
4. How would you go about researching a trend? In your opinion is there a difference between a copy and a trend. Could you please explain this in detail?
5. Have you experienced someone copying your designs? Can you please describe this experience? Have you ever encountered an incident of design copy: either as a copier or the copied?
6. Explain what you use to inspire your design?
7. Do you incorporate trends into your work or do you create your own?
8. Could you please describe the creative process for you?
9. Do you rely on forecasting data provided by companies like Trendex?
10. Is it a common practice for individuals to be inspired by other designers?

11. Is there general industry rule as to when something becomes a copy rather than a new creation?
12. At what point is inspiration considered to be copying?
13. Is your design process dictated by art or utility or both?

Focus 4: the role of the public domain within the industry

1. What are common elements that are not considered to be 'copying' in the fashion industry? That is what free elements can a designer use?
2. What distinguishes a free element from one that would be considered copying from a designer?
3. Is there an industry norm that distinguishes copying from taking allowable elements?
4. How does a designer access these resources?
5. Have you used different cultures/cultural property in your designs? If so, are these consiere cultural elements generally open to everyone to use?
6. Do different rules apply when a designer is inspired by a culture versus a theme?

End