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## ESSAY

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### TRADEMARK LAW AND THE PRICKLY AMBIVALENCE OF POST-PARODIES

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*This Essay examines what I call “post-parodies” in apparel. This emerging genre of do-it-yourself fashion is characterized by the appropriation and modification of third-party trademarks—not for the sake of dismissively mocking or zealously glorifying luxury fashion, but rather to engage in more complex forms of expression. I examine the cultural circumstances and psychological factors giving rise to post-parodic fashion, and conclude that the sensibility causing its proliferation is grounded in ambivalence.*

*Unfortunately, current doctrine governing trademark “parodies” cannot begin to make sense of post-parodic goods; among other shortcomings, that doctrine suffers from crude analytical tools and a cramped view of “worthy” expression. I argue that trademark law—at least, if it hopes to determine post-parodies’ lawfulness in a meaningful way—is asking the wrong questions, and that existing “parody” doctrine should be supplanted by a more thoughtful and nuanced framework.*

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*“[What most prevents us] from grasping what people are up to is not [so much] ignorance as to how cognition works . . . as a lack of familiarity with the imaginative universe within which their acts are signs.”*

–Clifford Geertz<sup>1</sup>

*“First Amendment protections do not apply only to those who speak clearly, whose jokes are funny, and whose parodies succeed.”*

–Judge Pierre N. Leval<sup>2</sup>

## I. THE RISE OF THE “POST-PARODY”

### A. *An Unusual T-Shirt Catches My Eye*

While riding the New York City subway late last year, I noticed an unusual shirt:

Figure 1: “Homies South Central”<sup>3</sup>



<sup>1</sup> CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* 13 (1973).

<sup>2</sup> *Yankee Publ'g Inc. v. News Am. Publ'g Inc.*, 809 F. Supp. 267, 280 (S.D.N.Y. 1992).

<sup>3</sup> Brian Lichtenberg, *Black Homies Tee with Gold Foil*, BRIAN LICHTENBERG, <http://www.shopbrianlichtenberg.com/black-homies-tee-with-gold-foil.html> (last visited Aug. 18, 2014).

The shirt had obviously been designed to evoke the genteel horse-and-buggy trademark of Hermès, the storied French fashion house:

Figure 2: “Hermès Paris” Horse-and-Buggy Trademark<sup>4</sup>



Less clear, however, was the message the shirt sought to convey. Perhaps its designer wished to highlight the stark difference between the moneyed, old-world fantasy of Hermès and the less glamorous reality of South Central Los Angeles—home to the troubled City of Compton<sup>5</sup> and the birthplace of “gangsta rap.”<sup>6</sup> Instead of a dapper groom beside a horse-and-buggy, the individual depicted on the black and gold shirt stands beside what appears to be a broken-down truck. “Hermès” is displaced by “Homiés,” with the accent preserved (though flipped) to reinforce the reference.

I went online to find out whether the “Homiés” shirt was in fact intended to express its designer’s “[a]nger at being poor, black, disenfranchised, abused, stereotyped, blamed, mistreated, [and] ignored.”<sup>7</sup> No, it turned out—not at all. The man behind the shirt, Brian Lichtenberg, was not African-American, and he professed no particular political agenda, let alone

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<sup>4</sup> William Stoleran, *Hermes Ends Partnership with Wally*, LUXURY INSIDER (Mar. 9, 2010), <http://www.luxury-insider.com/luxury-news/2010/03/hermes-ends-partnership-with-wally>.

<sup>5</sup> See Rory Carroll, *Aja Brown, Compton's New Mayor: 'I See It as a New Brooklyn'*, THE GUARDIAN (Oct. 15, 2013, 11:38 AM), <http://www.theguardian.com/world/2013/oct/15/aja-brown-compton-new-mayor-sees-brooklyn> (recounting how 1980s rap group N.W.A.’s double-platinum album *Straight Outta Compton* “captured the rage of an underclass trapped by urban decay, drugs, gang violence and despair” and “immortalised Compton, an impoverished sprawl south of Los Angeles, for all the wrong reasons”). Although Compton has changed substantially over the past thirty years, “many still consider [it] one of America’s murder capitals.” *Id.*

<sup>6</sup> “Gangsta rap” often contains “stories about crime, gunplay, raw sex and hatred for the police.” Jon Pareles, *Music; Still Tough, Still Authentic. Still Relevant?*, N.Y. TIMES (Nov. 14, 1999), <http://www.nytimes.com/1999/11/14/arts/music-still-tough-still-authentic-still-relevant.html>.

<sup>7</sup> Claudia Calhoun, *The Def Jam Generation*, THE PALEY CENTER FOR MEDIA, <http://www.paleycenter.org/the-emergence-of-hip-hop> (last visited Aug. 18, 2014).

one focused on race, poverty, or violence.<sup>8</sup> His website stressed merchandising, not messaging; it peddled shoes,<sup>9</sup> knitted caps,<sup>10</sup> and various knick-knacks,<sup>11</sup> evoking not only Hermès, but numerous high-end fashion houses.<sup>12</sup>

One of Lichtenberg's other shirts made an ideological interpretation of the Homiés shirt seem even more far-fetched. That shirt began with the same visual motif, but went on to emphasize leisure and friendship. The words "South Central" were gone; in their place was the phrase "Rollin' with the Homiés," transforming the seemingly dilapidated truck into a buoyant joyride.<sup>13</sup>

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<sup>8</sup> See Brian Lichtenberg, *Bio*, BRIAN LICHTENBERG, <http://brianlichtenberg.com/bio.html> (last visited Aug. 18, 2014) (expressing Lichtenberg's devotion to his "chic sensibility" and mentioning no specific social cause).

<sup>9</sup> Brian Lichtenberg, *Homies Black – White Slip Ons (Mens)*, BRIAN LICHTENBERG, <http://www.shopbrianlichtenberg.com/bltee/mens-shoes-footwear/homies-black-white-slip-ons-mens.html> (last visited Aug. 18, 2014).

<sup>10</sup> Brian Lichtenberg, *Charcoal Homies Beanie with White Embroidery*, BRIAN LICHTENBERG, <http://www.shopbrianlichtenberg.com/best-sellers/charcoal-homies-beanie-with-white-embroidery.html> (last visited Aug. 18, 2014).

<sup>11</sup> See, e.g., Brian Lichtenberg, *Black Homies Graffiti Zipper Pouch with Gold Foil*, BRIAN LICHTENBERG, <http://www.shopbrianlichtenberg.com/new-arrivals/homies-graffiti-zipper-pouch.html> (last visited Aug. 18, 2014).

<sup>12</sup> See generally Brian Lichtenberg, *Best Sellers*, BRIAN LICHTENBERG, <http://www.shopbrianlichtenberg.com/best-sellers.html> (last visited Aug. 18, 2014) (advertising "Homiés," "Féline," and "Ballin" merchandise).

<sup>13</sup> See generally Chris Martins, *Hear J Dilla's 'Trucks,' a Gangstafied Gary Numan Tribute*, SPIN (Apr. 17, 2013, 11:06 AM), <http://www.spin.com/articles/j-dilla-trucks-gary-numan-cars-vocal-unreleased> ("'Trucks' playfully turns the New Wave legend's 'Cars' into a dedication to 'big ass trucks with big ass rims.'").

Figure 3: “Rollin’ with the Homiés”<sup>14</sup>



Any remaining possibility of a traditional “political agenda” on Lichtenberg’s part was dashed by the next shirt I encountered: a “muscle tee” designed to evoke the logo of the high-end French fashion house Céline.

Figure 4: “Féline Meow”<sup>15</sup>



<sup>14</sup> Brian Lichtenberg, *Black Rollin with the Homies Tee with Gold Foil*, BRIAN LICHTENBERG, <http://www.shopbrianlichtenberg.com/bltee/tees/black-rollin-with-the-homies-tee-with-gold-foil.html> (last visited Aug. 18, 2014).

<sup>15</sup> Brian Lichtenberg, *White Feline Muscle Tee with Black Ink*, BRIAN LICHTENBERG, <http://www.shopbrianlichtenberg.com/white-feline-muscle-tee-with-black-ink.html> (last visited Aug. 18, 2014).

Clearly, Lichtenberg's main objective was not to create apparel that would empower the marginalized. Indeed, the designer's biography took pains to emphasize that he was not on society's margins, but rather in its spotlight.<sup>16</sup> The bio went on to articulate Lichtenberg's creative ethos:

Since the beginning, [Lichtenberg] has drawn inspiration from a host of creative friends, none of whom were ever slaves to fashion trends, but instead to genuine self-expression and creativity. [Based in Los Angeles rather than New York or Europe, Lichtenberg] has the luxury of operating "outside the box," so to speak. It is from this place that Lichtenberg has had the freedom to take fashion into consideration without ever taking it too seriously. Tongue firmly planted in cheek, Lichtenberg's designs are at the same time both reverential and autonomous.<sup>17</sup>

Of course, poking fun at fashion—even by the rich and famous—is hardly a new trick. In Lichtenberg's lifetime alone, we have giggled at the outrageous designers and models paraded through *Zoolander*<sup>18</sup> and snickered at the haughty fashion editors skewered by *The Devil Wears Prada*.<sup>19</sup> Long before Lichtenberg, nineteenth-century writer Thomas Carlyle amused readers with his description of the so-called "dandy," "a witness and living Martyr to the eternal worth of Clothes."<sup>20</sup> Before that, there was James Gillray, whose late eighteenth-century comedic etchings delighted the public by mocking "the follies of contemporary fashion."<sup>21</sup> And over four centuries ago, playwright John Vanbrugh had theatergoers rolling in the aisles at the antics of "Lord Foppington," a character who at one point interrupts a swordfight to compliment his opponent's cuffs.<sup>22</sup>

Still, something distinguished Lichtenberg's work from the satire preceding it; his apparel was more than an easy laugh at fashion's expense. The simultaneously "reverential and autonomous" character of his products had a subtler flavor—a more complex relationship with fashion—that warranted further investigation. To better understand what Lichtenberg

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<sup>16</sup> See Brian Lichtenberg, *supra* note 8 (claiming that "the California native has been the go-to designer for the music industry's biggest pop stars for over a decade").

<sup>17</sup> *Id.*

<sup>18</sup> *ZOOLANDER* (Paramount Pictures 2001).

<sup>19</sup> *THE DEVIL WEARS PRADA* (Fox 2000 Pictures 2006).

<sup>20</sup> Thomas Carlyle, *The Dandiacal Body*, in *THE RISE OF FASHION: A READER* 166, 166 (Daniel Leonhard Purdy ed., 2004).

<sup>21</sup> Christopher Breward, *THE CULTURE OF FASHION* 111 (1995).

<sup>22</sup> See Matt Wolf, *Review: 'The Relapse'*, *VARIETY* (July 27, 2001, 2:01 PM), <http://variety.com/2001/legit/reviews/the-relapse-1200468966> (describing Lord Foppington's character as "a periwigged Elton John gone gloriously over the top, and beyond").

was up to, I needed context; I thus turned to Google to locate other apparel displaying Lichtenberg's sensibility.

It took no more than a few searches to discover that such goods were plentiful. To be sure, many of the shirts, hats, and other items I came across were thinly veiled knockoffs, putting a slight twist on high-end fashion trademarks to make a quick buck. But other works, like Lichtenberg's, were more creative, borrowing the imagery of luxury fashion and manipulating it in clever ways that could not be reduced to profit-driven "free-riding" on another's prestige.

Limiting my examination to goods that transcended "knockoff" status, I chose a cross-section of Lichtenberg-esque works and tentatively classified them based on apparent ease of interpretation. In a few instances (where the visual material consisted mostly of words), I was reasonably confident that I understood what the shirt was trying to "say":

Figure 5: "Dior Not War"<sup>23</sup>



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<sup>23</sup> *Dior Not War Crew Neck*, WHO CARES NYC, <http://www.whocaresnyc.com/products/dior-not-war-crew-neck> (last visited Aug. 18, 2014).

Figure 6: “Poor”<sup>24</sup>



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<sup>24</sup> See *Poor*, ETSY, [https://imgo.etsystatic.com/031/0/7795656/il\\_340x270.563406452\\_r6vv.jpg](https://imgo.etsystatic.com/031/0/7795656/il_340x270.563406452_r6vv.jpg) (last visited Aug. 18, 2014).

Figure 7: “Envy”<sup>25</sup>

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<sup>25</sup> Melanie Andujar, *Envy Parody Design Inspired by Fendi*, REDBUBBLE, <http://www.redbubble.com/people/melanieandujar/works/10805228-envy-parody-design-inspired-by-fendi?p=t-shirt> (last visited Aug. 18, 2014). This t-shirt evokes the primary logo of the Italian luxury fashion house Fendi:

**F**  
**FENDI**

For one commentator’s view that the public perceives Fendi as “the leading brand for high-quality products that are stylish, durable, lavish and eye-catching,” see Morgan King, *Fendi: The Definition of Luxury*, VISION ARTISTRY MAGAZINE (May 30, 2011), <http://visionaryartistrymag.com/2011/05/fendi-the-definition-of-luxury/>.

Figure 8: “LW Label Whore”<sup>26</sup>

Other works in my sample did not lend themselves to a single obvious interpretation (though outside sources might shed light on the context or purpose of these items)<sup>27</sup>:

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<sup>26</sup> Dentzdesigndeals, *Label Whore – Louis Vuitton Parody – Black Tshirt – Women and Mens Clothing*, WANELO, <http://wanelo.com/p/2780238/label-whore-louis-vuitton-parody-black-tshirt-women-and-mens-clothing> (last visited Aug. 18, 2014). This t-shirt evokes the logo of the well-known fashion house Louis Vuitton:



*File: Louis Vuitton Logo*, WIKIMEDIA COMMONS (Mar. 6, 2011), [http://commons.wikimedia.org/wiki/File:Louis\\_Vuitton\\_Logo.svg](http://commons.wikimedia.org/wiki/File:Louis_Vuitton_Logo.svg).

<sup>27</sup> My research revealed, for example, that the shirt in Figure 9 was inspired by the work of street artist Christophe Schwarz, or “Zevs,” whose “dripping” technique originated in his campaign to metaphorically bloody fashion billboards. As a result, “the viewer is forced to consider the image in an entirely different way.” Erin Wooters, *Street Artist Zevs Detained in Hong*

Figure 9: Dripping Chanel Logo<sup>28</sup>


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*Kong for Defacing Chanel Logo – Interview*, ART RADAR ASIA (July 29, 2009), <http://artradarjournal.com/2009/07/29/street-artist-zevs-detained-in-hong-kong-for-defacing-chanel-logo-interview>.

Zevs explains that he “kept working with the dripping effect throughout [his post-billboard] work because it conveys multiple meanings, and visually shows stark contrast and beautiful pattern and texture.” *Id.*

Figure 11 is the work of a popular designer, Mike Frederiqo, whose website sheds some light on his artistic objectives. See *About Mike Frederiqo*, MIKE FREDERIQO, <http://www.mikefrederiqo.com/about-mike-frederiqo> (last visited Aug. 18, 2014) (noting the artist’s prior work as a tattoo and graffiti artist, Andy Warhol’s influence on Frederiqo’s art, and the “acclaim” that Frederiqo has received for his “redesigned brand logos featuring founders, creative directors and designers imbued within their logo”).

The design depicted in Figure 10 apparently seeks to participate in a dialogue surrounding Lichtenberg’s Homiés shirt; of course, without knowledge of the Lichtenberg shirt (and numerous derivatives thereof appearing across on the Internet), one cannot properly interpret this new variant.

<sup>28</sup> Zevs, *Chanel T-Shirt*, DE BUCK GALLERY, <http://shop.debuckgallery.com/zevs/353-zevs-chanel-t-shirt.html> (last visited Aug 18, 2014). The “drip” design, which can now be found in countless variations across the Internet, modifies the well-known “interlocking ‘C’s” imagery of the fashion house Chanel:



*File: Chanel Logo Interlocking Cs*, WIKIPEDIA (Apr. 14, 2012, 4:27 AM), [http://en.wikipedia.org/wiki/File:Chanel\\_logo\\_interlocking\\_cs.svg](http://en.wikipedia.org/wiki/File:Chanel_logo_interlocking_cs.svg).

Figure 10: “Haters Gonna Hate”<sup>29</sup>Figure 11: “Tribute to Mrs. Vuitton”<sup>30</sup>

<sup>29</sup> *Haters Gonna Hate (Gold Hermes Parody)*, HUMAN, <http://www.lookhuman.com/design/34379-haters-gonna-hate-gold-hermes-parody> (last visited Aug. 18, 2014).

<sup>30</sup> Mike Frederigo, *Tribute to Mrs. Vuitton*, MIKE FREDERIGO, <http://www.mikefrederigo.com/tshirts/tribute-to-mrs-vuitton.html> (last visited Aug. 18, 2014).

Still other products, like the Homiés shirt whose ambiguity had first piqued my curiosity, could potentially be read in a certain way, but at the now-obvious risk of substituting one's own assumptions and biases for the creators' intentions:

Figure 12: "Lord Voldemort"<sup>31</sup>



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<sup>31</sup> *Lord Voldemort*, HUMAN, <http://www.lookhuman.com/design/10579-lord-voldemort?gclid=CODRpMjSn8ACFci17AodfFcARQ> (last visited Aug. 19, 2014).

Figure 13: “N° 1 Cares at All”<sup>32</sup>



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<sup>32</sup> *No 1 Cares*, IMNOTADESIGNER.COM, [http://imnotadesigner.com/inadshop/index.php?route=product/product&path=65&product\\_id=187&sort=p.price&order=ASC](http://imnotadesigner.com/inadshop/index.php?route=product/product&path=65&product_id=187&sort=p.price&order=ASC) (last visited Aug. 18, 2014). This shirt draws on the imagery of Chanel’s well-known “No. 5” fragrance:



CHANEL, *N°5 Eau de Parfum Spray*, [http://www.chanel.com/en\\_US/fragrance-beauty/Fragrance-N°5-N°5-88181/sku/88184](http://www.chanel.com/en_US/fragrance-beauty/Fragrance-N%C2%B05-N%C2%B05-88181/sku/88184) (last visited Aug. 18, 2014).

Figure 14: “LV” with Peace Sign<sup>33</sup>Figure 15: “Class Cred”<sup>34</sup>

<sup>33</sup> *LV Love Victory Peace T-Shirt*, GLAMZELLE, <http://www.glamzelle.com/products/lv-love-victory-peace-t-shirt-2-colors-available> (last visited Aug. 18, 2014).

<sup>34</sup> Annakatee, *Kill Brand Class Cred White Oversize Scoop Neck Tee Shirt*, KABOODLE, <http://www.kaboodle.com/reviews/kill-brand-class-cred-white-oversize-scoop-neck-tee-shirt> (last visited Aug. 18, 2014).

Despite differences in the legibility of these items, they seemed to share a particular sensibility: like Lichtenberg's designs, each work appeared to acknowledge the prestige (or at least the prominent social role) of high-end fashion, while simultaneously using the imagery of luxury for the creator's own artistic ends. These works did not engage in a straightforward, unwavering *critique* of high-end fashion—indeed, some of the shirts seemed to express a desire for luxury goods—yet they declined to treat the iconic imagery of venerable fashion houses as inviolable. Even if luxury items purveyed by the brands in question might be out of financial reach, that fact apparently provided no cause for protest in the traditional sense.<sup>35</sup> Rather, these works uniformly expressed attitudes toward, and relationships with, luxury brands that were far more nuanced than pure loyalty or opposition.

As a result, placing the works in a particular genre proved difficult. The goods could not accurately be described as “parodies”—at least, not as that term is used in intellectual-property law.<sup>36</sup> Their apparently personal and sincere nature meant that they could not be characterized as blank “pastiche.”<sup>37</sup> If one were forced to place each item somewhere on a sort of “communicative spectrum” between empty appropriation of imagery (pastiche) and carefully targeted, humorous critique (parody), most of these works fell a considerable distance from each pole.<sup>38</sup> Further complicating matters, the ambiguity of the expression contained in these fashion goods lay in stark contrast to the

<sup>35</sup> See, e.g., *supra* figs. 6, 7.

<sup>36</sup> The definition of “parody” used in trademark law, discussed at length below, is far narrower than most traditional definitions of the term, which have included styles and techniques “found in all kinds of generic contexts and not just in those that are traditionally satiric.” Robert Chambers, *Parody: The Art that Plays with Art*, in 21 *STUDIES IN LITERARY CRITICISM AND THEORY* 195, 199 (Hans H. Rudnick ed., 2010).

<sup>37</sup> See FREDRIC JAMESON, *POSTMODERNISM, OR, THE CULTURAL LOGIC OF LATE CAPITALISM* 17 (1991) (“Pastiche is, like parody, the imitation of a peculiar or unique, idiosyncratic style, the wearing of a linguistic mask, speech in a dead language. But it is a neutral practice of such mimicry, without any of parody’s ulterior motives, amputated of the satiric impulse, devoid of laughter and of any conviction that alongside the normal tongue you have momentarily borrowed, some healthy linguistic normality still exists. Pastiche is thus blank parody . . .”). For several examples of what might be considered “trademark pastiche” in fashion, see Jon Caramanica, *The Return of Logo Culture*, *N.Y. TIMES* (Nov. 20, 2013), <http://www.nytimes.com/2013/11/21/fashion/the-return-of-logo-culture-in-fashion.html>.

<sup>38</sup> While some of the works could arguably be characterized as “collage,” that description was inappropriate for many of them. Further, the meaning of “collage” and its proper treatment under the law have been debated so extensively in literary, artistic, and legal circles that trying to apply that definition here would more likely obscure rather than clarify the issue at hand. See generally Pierre Joris, *On the Seamlessly Nomadic Future of Collage*, in *CUTTING ACROSS MEDIA: APPROPRIATION ART, INTERVENTIONIST COLLAGE, AND COPYRIGHT LAW* 185, 185-86 (Kembrew McLeod & Rudolf Kuenzli eds., 2011).

output of both the mainstream fashion industry and its fiercest detractors over the past half-century. In order to appreciate exactly how these works are *new*, and why they are proliferating at this particular moment, one must learn a bit about recent fashion history.

B. *An Aggressively Abridged History of the Past Half-Century of Fashion  
(with Some Theory, for Good Measure)*

One would think it obvious that, in order to make pronouncements about a given cultural phenomenon, one must first understand what that phenomenon *is*. Yet when academic commentators have written about fashion at all, they have most often done so without making any serious effort to comprehend the subject matter at hand.<sup>39</sup> Those who carefully examine fashion, by contrast, typically realize in short order that it is a “profound and critical . . . part of the social life of man . . . .”<sup>40</sup> As René König has explained, “fashion is not merely a superficial—decorative or disfiguring—feature of life,” but rather “an important regulator and means of expression within [every] community.”<sup>41</sup> Cultural studies scholar Elizabeth Wilson more recently elaborated: “fashionable dress [in Western cultures] is socially central, a symbolic system of crucial importance [in which] garments as objects, so close to our bodies, also articulate the soul.”<sup>42</sup>

Such multidimensional accounts of fashion are almost entirely absent from (the decidedly sparse) legal scholarship and (the more voluminous, but often dismissive) case law on the subject in the United States.<sup>43</sup> The prevailing theory of fashion in both spheres, to the extent the cultural phenomenon is

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<sup>39</sup> See Tom Wolfe, *Introduction* to RENÉ KÖNIG, *A LA MODE: ON THE SOCIAL PSYCHOLOGY OF FASHION* 15, 17 (F. Bradley trans., Seabury Press 1973) (1971) (noting that most academics have treated fashion as nothing more than “the embroidery of history, if that”). Wolfe goes on to explain that even “novelists who have dwelled on fashion in [a serious] way have usually been regarded in their own time as lightweights—‘trivial’ has been the going word . . . . [This derision has even afflicted] those who eventually have been judged to be literary giants of their eras.” *Id.* at 19. The basis for this dismissive attitude is suspect. As I have explained elsewhere, the word “frivolous” has often appeared in judicial discussions of “fashion”—where the matter under discussion was “ornamental” material geared primarily toward women—but has not been used where more “utilitarian” apparel was concerned. See Charles Colman, *‘A Female Thing’: On Fashion, Sexism, and the United States Federal Judiciary*, 4 *VESTOJ* 53, 57–58 (2013) (noting how “some judges continue[] to treat clothing-related cases as unworthy of their time”).

<sup>40</sup> Wolfe, *supra* note 39, at 17.

<sup>41</sup> *Id.*

<sup>42</sup> ELIZABETH WILSON, *ADORNED IN DREAMS: FASHION AND MODERNITY* xiii (rev. ed. 2013); accord FRED DAVIS, *FASHION, CULTURE, AND IDENTITY* 18 (1992) (“Fashion manages through symbolic means to resonate exquisitely with the shifting, highly self-referential collective tensions and moods abroad in the land.”).

<sup>43</sup> See *supra* note 39 and accompanying text.

theorized at all, has remained largely faithful to a century-old economic account of fashion as just another form of “conspicuous consumption.” That analysis, typically attributed to Thorstein Veblen,<sup>44</sup> reduces fashion to (as paraphrased by cultural theorist Paul Sweetman) “a specifically modern phenomenon that acts to express or maintain distinctions between different social groups in a situation where rigid and inflexible social hierarchies no longer apply.”<sup>45</sup>

Veblen’s account of fashion is appealingly orderly and seemingly intuitive; its success is understandable. However, the empirical shortcomings of his theory have been apparent for decades, and it is now beyond dispute that Veblen’s “‘top down’ approach to the fashion process” is out of date, incomplete, or simply wrong.<sup>46</sup> As Sweetman explains: “while [Veblen’s approach] may have accurately reflected the workings of the fashion process up to the 1950s or 1960s, such a model is no longer appropriate given the declining influence of haute couture—and the ensuing rise of ‘street-style’—since around that period.”<sup>47</sup>

<sup>44</sup> See generally THORSTEIN VEBLEN, *THE THEORY OF THE LEISURE CLASS* (Dover Publ’ns 1994) (1899).

<sup>45</sup> Paul Sweetman, *Shop-Window Dummies? Fashion, the Body, and Emergent Socialities*, in *BODY DRESSING* 59, 61 (Joanne Entwistle & Elizabeth Wilson eds., 2001).

<sup>46</sup> *Id.* at 62 (“Whilst widely influential, the perspective [most often attributed to Thorstein Veblen, as articulated in his 1899 book *The Theory of the Leisure Class* has been] roundly criticized [for, among other things,] its failure to account for or address either the form that fashion takes or its links to wider social, cultural, and artistic movements.” (internal citation omitted)).

Consider one commentator’s elaboration on the problematic unidimensionality of Veblen’s theory:

Since Thorstein Veblen’s 1899 *Theory of the Leisure Class*, the idea of conspicuous consumption has dominated historical and sociological analyses of consumer behavior, and is now a part of our everyday vocabulary. Veblenite theories of consumer behavior argue that fashion changes are motivated by social emulation, conspicuous consumption, and invidious distinction—“the stimulus of an invidious comparison which prompts us to outdo those with whom we are in the habit of classing ourselves.” [But] men’s fashion changes from the late seventeenth century to the mid-nineteenth century were driven by an increasingly inconspicuous form of consumption, a form of consumption—equally invidious, to be sure—that balanced class demands for social distinction with a gender ideology of masculine renunciation. Conspicuous consumption is merely one social dynamic that motivates fashion change: understanding the variety of systems of consumer behavior means identifying how social and gender groups at different historical moments used consumer objects in a number of ways to define themselves in the midst of political, economic, and social change.

DAVID KUCHTA, *THE THREE-PIECE SUIT AND MODERN MASCULINITY: ENGLAND, 1550–1850* 5 (2002) (footnotes omitted).

<sup>47</sup> Sweetman, *supra* note 45, at 62 (internal citation omitted). On rare occasions, legal scholars have addressed the flaws of Veblen’s approach. See, e.g., Barton Beebe, *Intellectual Property Law and the Sumptuary Code*, 123 HARV. L. REV. 809, 822 (2010) (noting that while Veblen’s “trickle-

Indeed, starting in the mid-twentieth century, the “development of modern fashion opened up an important new space for the liberating presentation of the private self.”<sup>48</sup> American consumers became increasingly aware that fashion “had the power to create political change” through its function as “a code, a symbolic vocabulary that offers a sub-rational but instant and very brilliant illumination of the character of individuals and even entire periods, especially periods of great turmoil.”<sup>49</sup> This power was readily evident to those whose ideologies and/or ethnicities played a central role in identity formation. The hippies, for example, “adopted a naturalistic, flowing style, apparently in total opposition to the mainstream styles,” which “originated in the student counter-culture and student campus rebellions of the anti-Vietnam war 1960s.”<sup>50</sup>

Similarly, many African Americans found that they accrued “oppositional economy” by choosing traditional hairstyles like dreadlocks and the Afro; this use of fashion expressed a distinct identity, one’s relationship to history, and one’s political ideology. Hair was far more than a mere status symbol or decorative medium; rather, the consciously selected styles were “cultivated and politically constructed in a particular historical moment as part of a strategic contestation of white dominance and the cultural power of whiteness.”<sup>51</sup>

In other words, by the late 1960s, the “top down” model of fashion posited by Veblen no longer told the whole story (if it continued to tell an accurate story at all). Suddenly, fashion was “evolving on the street without the direction of—and often in opposition to—the editors and high-fashion designers.”<sup>52</sup> But this honeymoon period would not last long. The high-end fashion industry—and mainstream fashion, more generally—rapidly developed techniques to remain relevant and profitable in the new cultural landscape.

The do-or-die moment for luxury fashion arguably occurred in 1966, when designer Yves Saint Laurent (previously at the helm of Christian

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down’ theory of the fashion process may greatly aid quantitative analysis, it has, as an empirical matter, long been discredited” due to its failure to “offer a comprehensive explanation of the modern global fashion process”); see also KAL RAUSTIALA & CHRISTOPHER SPRIGMAN, THE KNOCKOFF ECONOMY 39 (2012) (accepting Veblen’s “conspicuous consumption” theory as a core feature of fashion but supplementing Veblen’s account to some degree). Compare Jeremy N. Sheff, *Veblen Brands*, 96 MINN. L. REV. 769, 774-75 (2012) (accepting Veblen’s theory as a basic premise but arguing against judicial adoption of such reasoning in certain trademark disputes).

<sup>48</sup> CHRISTOPHER BREWARD, *FASHION* 161 (2003).

<sup>49</sup> Wolfe, *supra* note 39, at 17, 19.

<sup>50</sup> WILSON, *supra* note 42, at 192-93.

<sup>51</sup> Kobena Mercer, *Black Hair/Style Politics*, 1987 NEW FORMATIONS 33, 40 (emphasis omitted).

<sup>52</sup> KARL ASPELUND, *FASHIONING SOCIETY: A HUNDRED YEARS OF HAUTE COUTURE BY SIX DESIGNERS* 162 (2009).

Dior) took the unprecedented step “of bringing the radical youth styles [that] had begun to appear[] into haute couture.”<sup>53</sup> Saint Laurent’s brilliant, if cynical, strategy was to sell expensive clothing inspired by youth, subcultural, and countercultural styles to moneyed consumers who were in no way affiliated with the groups that had originated those styles.<sup>54</sup>

Saint Laurent’s appropriation of oppositional styles for wealthy clientele represented the apparent birth of “[t]he marketing of image, divorced from its [ideological or subcultural] origin, that we have become so used to in fashion since the 1960s.”<sup>55</sup> Just a few short years after the average American consumer had discovered fashion’s political potency, the mainstream fashion industry had already begun to strip the visual medium of its “oppositional economy.”<sup>56</sup> Dress historian Karl Aspelund explains the long-term effect of this corporate jiu-jitsu on countercultural and otherwise “subversive” fashion:

Counterculture cannot survive being picked up by media and marketing campaigns, and even if it does survive in some form, the media creation becomes the perceived reality. The media creation stands in for the original, another creature that lives on as a simulacrum even after the original is gone. . . . The universalization of television, as [Jack] Kerouac observed, is right at the heart of [the] lack of subversiveness in modern-day fashion. If the image is everywhere, then how can it be nonconformist or revolutionary?<sup>57</sup>

Indeed, fast-forward twenty-five years, and “antifashion” had practically evaporated; fashion was by and large apolitical.<sup>58</sup> As Fred Davis observed in 1992, “[a]mid today’s cacophony of acceptable fashions, it is difficult to register a riveting antifashion message. What is being opposed?”<sup>59</sup>

By the turn of the twenty-first century, American society “offer[ed] a scenario in which the carefully manipulated associations of the fashionable brand and a keen attention to the vagaries of style [had] transformed the humble equipment of contemporary living into the ephemeral props of

<sup>53</sup> *Id.* at 161.

<sup>54</sup> *See id.* at 166 (noting how this strategy created a “total separation of image from meaning”).

<sup>55</sup> *Id.*

<sup>56</sup> Perhaps surprisingly, this occurred not just with apparel, but with African American hairstyles as well. *See* Mercer, *supra* note 51, at 41 (“Once commercialized in the market-place the Afro lost its specific signification as a ‘black’ cultural-political statement. Cut off from its original political contexts, it became just another fashion: with an Afro wig anyone could wear the style.”).

<sup>57</sup> ASPELUND, *supra* note 52, at 167.

<sup>58</sup> *See* ANNE HOLLANDER, *SEX AND SUITS* 29 (1994).

<sup>59</sup> DAVIS, *supra* note 42, at 187.

ever-changing lifestyle concepts.”<sup>60</sup> The infusion of material objects with psychological and sociological significance was not, of course, a novel means of selling goods,<sup>61</sup> but the new engineers of image manipulation managed to *perfect* the technique by painstakingly studying and harnessing the “mystification” of objects to achieve maximum profits.<sup>62</sup>

The most prominent engineers of this manipulation were multinational luxury conglomerates like LVMH Moët Hennessy Louis Vuitton SA (LVMH), Kering (formerly “PPR”), and Richemont. As LVMH chairman Bernard Arnault has explained, his business model for fashion was not about fulfilling consumers’ own preexisting desires, but rather about *creating* a “fantasy” in which consumers could then participate by buying an outfit, a handbag, a bottle of perfume, or just a tube of lipstick—objects at various price points that made famed brands available, in some form, to most consumers in the developed world.<sup>63</sup> Arnault’s mission was hardly philanthropic, of course; his business strategy, eerily reminiscent of 1970s neo-Marxist commentary on the modern “consumerist society,”<sup>64</sup> deliberately coupled this “fantasy” with social anxiety. As Arnault once candidly acknowledged, “[y]ou feel as if you must buy [the latest ‘must-have’ item] . . . or else you won’t be in the moment. You will be left behind.”<sup>65</sup>

Inspiring such anxiety would require guile. Developments in technology, outsourcing, and other industrial innovations during the twentieth century had led to the widespread availability of high-quality apparel and cosmetics. As a result, something besides quality, something besides style—something that could not easily be reproduced by others at a lower price<sup>66</sup>—would have

<sup>60</sup> Christopher Breward, *Fashion*, in THE OXFORD HANDBOOK OF THE HISTORY OF CONSUMPTION 3 (Frank Trentmann ed., 2012), available at Oxford Handbooks Online, <http://www.oxfordhandbooks.com>.

<sup>61</sup> Sociologist Richard Sennett’s description of the turn of the *twentieth* century seemed equally applicable 100 years later: “Even as they became more uniform, physical goods were endowed in advertising with human qualities, made to seem tantalizing mysteries which had to be possessed to be understood.” RICHARD SENNETT, THE FALL OF PUBLIC MAN 20 (W.W. Norton & Co. 1992) (1974).

<sup>62</sup> *Id.*; see also DANA THOMAS, DELUXE: HOW LUXURY LOST ITS LUSTER 41-42 (2007) (describing how modern-day fashion focuses chiefly on what products represent).

<sup>63</sup> THOMAS, *supra* note 62, at 41-42, 54-55.

<sup>64</sup> See, e.g., JOHN BERGER, WAYS OF SEEING 143 (1974) (arguing that mainstream advertisements convey that the “power to spend money is the power to live” and that “those who lack the power to spend money [will] become literally faceless”).

<sup>65</sup> THOMAS, *supra* note 62, at 41-42.

<sup>66</sup> See generally Charles E. Colman, *An Overview of Intellectual Property Issues Relevant to the Fashion Industry*, in NAVIGATING FASHION LAW: LEADING LAWYERS ON EXPLORING THE TRENDS, CASES, AND STRATEGIES OF FASHION LAW \*52 (2012), available at 2012 WL 167352. Economic and legal realities in the United States contribute to this result:

to be fetishized if consumers were to be made to worry about being “left behind.” The seemingly perfect candidate for the job was the “logo.”

A newfound emphasis on logos appeared sensible from both legal and economic perspectives. The law, especially in the United States, tended to provide more robust enforcement tools to registrants of trademarks than it did to creators of original designs. Just as importantly, logos could be prominently placed on (or all over) a heavily used and relatively affordable component of the fashion ensemble: the handbag.<sup>67</sup> Fashion houses adopting Arnault’s business model would, of course, continue to design apparel and put on spectacular fashion shows, but mainly to “garner headlines and dress up ads to sell leather goods.”<sup>68</sup> This attention enabled companies to push handbags—associated with the magic of *haute couture*, if not truly part of it—“to the forefront of their offerings.”<sup>69</sup> Major fashion houses thereby “shifted the focus [back, arguably] from what the product *is* to what it *represents*.”<sup>70</sup>

Yet this heavy reliance on the logo was (and is) not without its vulnerabilities. To the extent that luxury goods consist primarily of logos evoking the recycled imagery of largely indistinguishable marketing campaigns,<sup>71</sup> they end up providing consumers with very little of the “fantasy” that makes fashion appealing in the first place.<sup>72</sup> As Jean Baudrillard explains,

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Trademark protection is especially important in the [U.S.] fashion industry, because most of the products sold by that industry are not independently protectable under the copyright and patent regimes . . . . In the absence of copyright or patent protection, it is generally the case that anyone can duplicate a particular accessory or item of apparel. What makes *this purse* or *that jacket* valuable, then, is often the source of the good rather than its intrinsic value.

*Id.* at \*25.

<sup>67</sup> See THOMAS, *supra* note 62, at 167-71 (“Handbags are the engine that drives luxury brands today.”).

<sup>68</sup> *Id.* at 51.

<sup>69</sup> *Id.* at 169.

<sup>70</sup> *Id.* at 41, 169. Some estimate that Louis Vuitton makes only five percent of its revenue from apparel. *Id.* at 51.

<sup>71</sup> See Vanessa Friedman, *In Fashion Ads, Plenty of Déjà Vu*, N.Y. TIMES (Aug. 6, 2014), [http://www.nytimes.com/2014/08/07/fashion/cara-delevingne-gisele-bundchen-and-edie-campbell-are-familiar-faces-in-fall-fashion-ads.html?\\_r=0](http://www.nytimes.com/2014/08/07/fashion/cara-delevingne-gisele-bundchen-and-edie-campbell-are-familiar-faces-in-fall-fashion-ads.html?_r=0) (“For an industry that pays a lot of lip service to originality and unique points of view, fashion can seem surprisingly lemminglike at times.”).

<sup>72</sup> Anne Hollander aptly describes this power of fashion:

Western fashion offers a visual way out of the trap of tradition, the prison of unquestioning wisdom. Fashion allows clothing to create an image of skepticism, of comic possibility, of different powers and alternative thoughts, of manifold chances, of escape from fixed meanings and fixed roles. Thus, modern fashion has consistently looked wonderful from a distance, especially to young people seeking change from old ways.

HOLLANDER, *supra* note 58, at 19-20.

this scenario presents the consumer “with a mythology at one remove, which strives to pass off as *fantasy* what is merely *fantasmagoria*, to entrap individuals by way of a rigged symbolics, with the *myth* of their individual unconscious, to make them invest it as a consumer function.”<sup>73</sup>

A great number of American consumers have at one time or another bought into the “rigged symbolics” of the logo, for the post-antifashion landscape long presented few readily accessible, semiotically rich alternatives to mainstream fashion’s prepackaged “fantasy.”<sup>74</sup> In recent years, however, many individual consumers have come to understand—or have recaptured a lost understanding of—“the power of fashion . . . to transform the sense of self in far-reaching ways.”<sup>75</sup>

In the 1960s, fashion’s “communicative role in the production of identities” was largely the province of discrete ideological and ethnic minority groups.<sup>76</sup> Over the past decade, however, technological advances in “do-it-yourself” (DIY) apparel production, increasingly sophisticated web-based platforms for consumer interaction, and myriad avenues for small-scale distribution have made self-fashioning tools available to the quintessentially modern “group of one.” This new, personalized cornucopia of wearable items, whether created by others or designed and produced on one’s own, offers, by its very nature, far richer possibilities for self-expression, identity formation, and “fantasy” than fashion conglomerates can realistically provide.

To be sure, some consumers continue to “produce” or “transform” their identities primarily through the “symbolics” of fashion logos. Others appear to remain comfortable with some participation in the mainstream fashion system, while avoiding the potentially exhibitionist and corporate character of the logo.<sup>77</sup> A third group, it seems, has decided that the luxury fashion system, while purporting to offer objects that facilitate personal expression

<sup>73</sup> JEAN BAUDRILLARD, *THE CONSUMER SOCIETY: MYTHS AND STRUCTURES* 147 (Chris Turner trans., 1998) (1970).

<sup>74</sup> Further, as noted above, this prepackaged “luxury” was available to a greater percentage of the population, at a lower price, than it had ever been. See *supra* note 63 and accompanying text.

<sup>75</sup> Breward, *supra* note 60, at 1.

<sup>76</sup> Ruth Holliday, *Fashioning the Queer Self*, in *BODY DRESSING* 215, 217 (Joanne Entwistle & Elizabeth Wilson eds., 2001).

<sup>77</sup> This second group of consumers has reportedly abandoned prominent logos in favor of more subtle identity indicators. Suleman Anaya, *Has Logo Fatigue Reached a Tipping Point?*, *BUSINESS OF FASHION* (Mar. 11, 2013), <http://www.businessoffashion.com/2013/03/has-logo-fatigue-reached-a-tipping-point.html> (“[L]ogo fatigue [has grown] pervasive enough in the West to power the rise of ‘stealth luxury’ brands like Bottega Veneta, which, over the last decade, grew from a small, family-run enterprise to a global powerhouse driving over \$1 billion-plus sales.”). For a critique of the legal strategies Bottega Veneta has used in support of this business model, see Charles Colman, *The TTAB’s Dangerous Dismissal of ‘Doubt,’* *HARV. J.L. & TECH. DIG.* (Nov. 12, 2013), <http://jolt.law.harvard.edu/digest/trademark/the-ttabs-dangerous-dismissal-of-doubt>.

and fulfill fantasies, can never truly “awaken anything ‘deep within us’”—not only because goods bearing that system’s brands “don’t offend against anything” (true since the fall of antifashion), but also because the “metalanguage of connotations” offered by such fashion is simply inadequate to express the breadth of human emotions and identities.<sup>78</sup>

C. *Today’s “Consumer-Creator”: Neither Unwavering  
Acolyte nor Vocal Dissident*

Fortunately for this third group of consumers, defined by a desire for diverse means of visual self-expression outside of the mainstream fashion system, the technological and other innovations mentioned above provide an increasingly viable “opt-out” mechanism.<sup>79</sup> It is crucial to recognize that this development represents *a fundamental change in the fashion producer–consumer relationship*; mutual dependence is no longer a given. This uncoupling coincides with the rise of the *consumer-creator*, who uses these newly available tools to realize his own vision of fashion by creating works that “speak” to *him*—and, when worn or otherwise displayed, “speak” to others on his behalf.<sup>80</sup>

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<sup>78</sup> BAUDRILLARD, *supra* note 73, at 148. Naturally, there is overlap and movement among these groups; further, I do not claim that such categories are exhaustive, even among the general population or subpopulations within the United States. Rather, I employ this three-tiered framework mainly as a heuristic for conceptualizing the broad, if piecemeal, cultural migration toward the “consumer-creator” role discussed in Section I.C—a role that ultimately yields the fashion items under discussion.

<sup>79</sup> Indeed, these technologies are evolving at a pace that excites the public and alarms corporate America. Nearly every week, it seems, a different law firm posts a bulletin about the surprisingly rapid development of “3D printing” and other DIY technologies—and it would be naïve to think corporate concerns relate only to counterfeiting. *See, e.g.*, Hayden Delaney, *Game of Thrones, 3D Printers & Copyright*, LEXOLOGY (Dec. 24, 2013), <http://www.lexology.com/library/detail.aspx?g=3a000339-c453-405d-8d13-f7e2d21fc960> (discussing the “perfect storm of cheaper 3D printing devices which are becoming increasingly available to end consumers [who are] finding innovative ways to put these devices to . . . use,” and noting that corporations might have to “look at other legal doctrines to afford [the desired level of] protection where copyright simply won’t provide”); Seyfarth Shaw LLP, *3D Printing and Intellectual Property*, LEXOLOGY (Jan. 21, 2013), <http://www.lexology.com/library/detail.aspx?g=117494c2-aa4a-40f6-8b19-96db41724cfb> (noting that as “[p]rinters become faster and more reliable, layers of construction become smaller, allowing for more sophisticated products, [and] the scope of prime materials continues to grow,” we start to “see the first signs of IP holders trying to levy their usual tax on innovation into a new field”).

<sup>80</sup> While the consumer-creator often makes his products available for sale to others, this does not—as a matter of common sense or established doctrine—render them less “expressive.” *See generally* *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 906 (9th Cir. 2002) (holding that even if a parody had a commercial purpose, that alone was not enough to make the parody “commercial” where the commercial purpose was “inextricably entwined with . . . expressive elements” (internal quotation marks omitted)); *see also* *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 574 (1994)

It makes little sense to call this DIY fashion “countercultural,” or even “oppositional,” for—as we have seen in the representative examples depicted above—its creators do not design these objects for political protest. When one can quite literally, and quite affordably, create a unique article of clothing for every day of the week, proclaiming oneself a staunch adversary of the fashion “establishment” seems childish, heavy-handed—for that “establishment” is not (at the moment) the *enemy*, but just another service provider,<sup>81</sup> another component of one’s everyday aesthetic experience. Today, a given consumer might have an attitude toward high-end fashion ranging anywhere from strong distaste to relative indifference to unwavering adulation, but far more nuanced attitudes toward fashion are possible—and, one imagines, quite likely.

All of this brings us back to Brian Lichtenberg, the creator of the Homiés t-shirt, and his fellow consumer-creators whose works appear above. These designers use the trademarks and other marketing imagery of high-end fashion houses in their own works for expressive ends—even if their expression is not necessarily “legible” to others.<sup>82</sup> But while a specific *message* (if it makes sense to speak of one at all) might be difficult to discern, these DIY goods’ design and production indisputably create a means for individuals to exercise agency by taking the “carefully manipulated”<sup>83</sup> brand imagery of aspiring corporate tastemakers and manipulating it once again to visually convey one’s idiosyncratic feelings about luxury and/or fashion.

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(rejecting the Sixth Circuit’s view that a “commercial” purpose renders a parody or other work “presumptively unfair” in fair-use analysis). Non-creator consumers will naturally gravitate toward products from consumer-creators with similar sensibilities. In this Essay, I do not dwell on this distinction; instead, I focus mainly on the creator-consumers, because (1) they are the most likely targets of lawsuits brought by trademark owners, (2) it is their *direct* creativity and expression at issue in such lawsuits, and (3) an examination of *non*-creator consumers’ motivations for buying and wearing the items in question would present interpretive difficulties surpassing even those relating to the creator-consumer. See COLIN CAMPBELL, *The Meaning of Objects and the Meaning of Actions*, 1 JOURNAL OF MATERIAL CULTURE 93, 95 (1996) (“Just because observers [might] find it relatively easy to ascribe meanings to products it should not be assumed that these correspond to those meanings that inform the actions of individuals when making use of those products.”).

<sup>81</sup> See THOMAS, *supra* note 62, at 54 (discussing the current omnipresence of luxury brands once off-limits to “the masses”).

<sup>82</sup> This should not surprise us. As Umberto Eco explains,

Obviously fashion codes are less articulate . . . than linguistic codes are. But a code is no less a code for the fact that it is weaker than other stronger ones. . . . The fact is that communication neither has to do with verbal behaviour alone, nor involves our bodily performances alone; communication encompasses the whole of culture.

Umberto Eco, *Social Life as a Sign System*, in STRUCTURALISM: AN INTRODUCTION 57, 59 (David Robey ed., 1979) (1973).

<sup>83</sup> See *supra* note 60 and accompanying text.

No doubt some fashion companies will object to the designs in question, claiming that consumer-creators could draw on a virtually unlimited amount of visual material without using “*their* property.” (As noted in Part II, plaintiffs often trot out this argument in litigation over defendants’ use of third-party trademarks for creative ends.) From an equitable standpoint, however, these companies would seem to be poorly positioned to lodge such complaints. As Jessica Litman has lucidly explained, active consumer engagement with the rich symbology of trademarks is the natural result of brands’ omnipresent “lifestyle marketing”:

[I]t is not surprising that speakers and writers are drawn to those devices that are, by dint of heavy advertising, doubtlessly universally familiar. “Mickey Mouse,” “Twinkies,” “Star Wars,” and “Spam” are trade symbols, but they are also now metaphors with meanings their proprietors would not have chosen. They got that way in spite of any advertising campaigns because the general public invested them with meaning. The value of persuasive trade symbols, in short, results from mutual investment by producers and consumers.<sup>84</sup>

It is equally unsurprising that consumer-creators’ DIY reflections on luxury-fashion trademarks will often strike others as ambiguous.<sup>85</sup> For each person’s relationship with “luxury fashion”—and all that it might represent—will differ, and imagery expressing one’s experience or emotions, like fashion itself, rarely speaks with the precision of language.<sup>86</sup> Indeed, when it comes to the DIY works under discussion, “clarity of message” is, at best, tangential—and, at worst, counterproductive—to the main objective of the endeavor.<sup>87</sup> Thus, as discussed below, to scrutinize such fashion for a

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<sup>84</sup> Jessica Litman, *Breakfast with Batman: The Public Interest in the Advertising Age*, 108 YALE L.J. 1717, 1732-33 (1999) (footnotes and internal quotation marks omitted).

<sup>85</sup> Some scholars have thoughtfully examined ambiguity in trademark law from the perspective of consumers. See, e.g., Rochelle Cooper Dreyfuss, *Reconciling Trademark Rights and Expressive Values: How to Stop Worrying and Learn to Love Ambiguity*, in TRADEMARK LAW AND THEORY: A HANDBOOK OF CONTEMPORARY RESEARCH 261, 286 (Graeme B. Dinwoodie & Mark D. Janis eds., 2008). Here, I focus specifically on the ambiguity at issue in *consumer-creators’* affirmative use of marks.

<sup>86</sup> As Fred Davis once put it, “while clothing may say something, it is scarcely involved in conversation.” DAVIS, *supra* note 42, at 7-8 n.5; see also *id.* at 13 (“[W]hat most distinguishes clothing as a mode of communication from speech . . . is that *meaningful* differences among clothing signifiers are not nearly as sharply drawn and standardized as are the spoken sounds employed in a speech community.”). Of course, DIY fashion might feature a few words, as do some post-parodies presented here, but that remains a long way off from conversation.

<sup>87</sup> See JEAN BAUDRILLARD, FOR A CRITIQUE OF THE POLITICAL ECONOMY OF THE SIGN 78-79 (Charles Levin trans., 1981) (“Fashion is one of the more inexplicable phenomena . . . . [I]ts compulsion to innovate signs, its apparently arbitrary and perpetual production of meaning—a kind of meaning drive—and the logical mystery of its cycle are all in fact of the essence . . . .”).

“message” in the traditional, linguistic (and, specifically, political) sense of the word is to misconstrue the medium in question and thereby undervalue its more abstract, but crucial, “role in the production of identities.”<sup>88</sup>

In short, I contend that Brian Lichtenberg’s designs, which he describes as simultaneously “reverential” and “autonomous,”<sup>89</sup> are emblematic of an emerging sensibility—one that is precisely what we might expect of consumer-creators living in an Internet age and a DIY technology-equipped world, where the products of famous brands are powerful,<sup>90</sup> but increasingly outnumbered, vehicles for “presenting oneself” to society through appearance (a central component of which is one’s preferred apparel). This emerging fashion sensibility cannot be understood under the traditional—or, as I will consider in Part II, legal—rubric of opposition-or-allegiance. The works in question neither swear off luxury fashion nor wholeheartedly embrace its allure; instead, they seem to give visual form to the complex attitudes that naturally arise toward something both “exclusive” and ubiquitous, venerable yet chameleonic, culturally charged yet semiotically contingent on each individual’s reaction to it.<sup>91</sup>

One might initially be inclined to describe these DIY fashions as “parodies” of luxury brands and their products (with the attendant consequences of that classification, as discussed in Part II). But the term “parody” utterly fails to capture the complex social, psychological, and aesthetic factors shaping these goods. The apparel pictured above strongly suggests that, unlike traditional parodists, the consumer-creators under discussion do not wish to convey a single, or even readily articulable, message. Works of this sort are much more likely to convey contradictory impulses and emotions

<sup>88</sup> Holliday, *supra* note 76, at 217; *see also* Eco, *supra* note 82, at 59 (“I am speaking through my clothes.”).

<sup>89</sup> *See supra* note 17 and accompanying text.

<sup>90</sup> As Professor Dreyfuss has noted, “those who decide to give their marks dominance should be deemed to accept the risk that their marks will be used for expressive [ends].” Dreyfuss, *supra* note 85, at 289.

<sup>91</sup> I cannot, of course, definitively prove that this sensibility represents a sea change; such changes can only be empirically confirmed after the fact. *See* JAMESON, *supra* note 37, at xix (“[P]eople become aware of the dynamics of some new system, in which they are themselves seized, only later on and gradually.”). With that said, the DIY items under discussion arguably challenge René König’s observation about individuals’ attitudes toward fashion in the early 1970s:

To some, fashion is a manifestation of evil, it represents everything that is damnable. To others it opens up, with all its new developments, new horizons, enriches and diversifies life and makes it more attractive . . . . These two opinions allow of no transitions, no compromise; there are no possibilities of conciliation, only extreme and one-sided value judgments.

KÖNIG, *supra* note 39, at 29.

that elude facile dichotomies, like criticism–adulation and humor–sobriety, on which the traditional legal conception of “parody” is premised.

No, the unifying sentiment of the DIY fashion examined above is not humor, not critique, but *ambivalence*.<sup>92</sup> These consumer-creators’ works are a means by which individuals can “inscribe[] upon [their] bodies the often obscure relationship of art, personal psychology and the social order.”<sup>93</sup> If one must decide on a single name for this category of works, (somewhat reluctantly) taking as a starting point the lexicon of trademark law—for it is primarily trademark law that will decide the fate of these goods—the products of Lichtenberg and like-minded designers might be best labeled “post-parodies.” The generality of this term is perhaps its primary virtue, for among the few characteristics common to these works is a shared sensibility that both post-dates, and reflects psychological dynamics far more complex than, those found in traditional parodies.

## II. TRADEMARK LAW’S “PARODY” DOCTRINE AND ITS SHORTCOMINGS

### A. *An Introduction to a Willfully One-Dimensional Doctrinal Approach*

Of course, to call the DIY fashions under discussion “post-parodies” does not resolve the thorny issue of their appropriate legal treatment. While multiple areas of law are potentially implicated in the question of post-parodies’ lawfulness, I will focus on the most significant potential obstacle for their continued creation and existence: federal trademark law.

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<sup>92</sup> I use the term “ambivalence” throughout this Essay to mean “uncertainty or fluctuation, especially when caused by inability to make a choice or by a simultaneous desire to say or do two opposite or conflicting things,” or “the coexistence within an individual of positive and negative feelings toward the same person, object, or action, simultaneously drawing him or her in opposite directions.” *Ambivalence*, DICTIONARY.COM, <http://dictionary.reference.com/browse/ambivalence> (last visited Aug. 18, 2014). Notably, some literature from the field of psychology attributes significant power to ambivalence:

[At times, ambivalence] confuses, devours, and tortures. But it also defines and orders, transforming the unknown into a knowable opposite. It constructively metaphors the world. Ambivalence may appear as competing sides of an image or as a result of the contest between to fantasies . . . . A structural feature of every image and fantasy, ambivalence belongs to symptom, symbol, and context. Unmediated, the ambivalent fusion of opposites devours [the] soul. Mediated by recognition and acceptance, it is therapeutic, imaginative, originating and joining.

Mark Garrison, *The Poetics of Ambivalence*, 1982 SPRING: ANN. ARCHETYPAL PSYCHOL. & JUNGIAN THOUGHT 213, 229.

<sup>93</sup> WILSON, *supra* note 42, at 247.

The foundation of federal trademark law is the Lanham Act, whose somewhat skeletal provisions have been fleshed out by numerous judicial decisions. The most important language of the Lanham Act, for present purposes, is the following:

Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device . . . [that] is *likely to cause confusion*, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person . . . shall be liable in a civil action by any person who . . . is likely to be damaged by such act.<sup>94</sup>

In order to help judges and juries determine whether a defendant's actions have caused a "likelihood of confusion," each federal circuit has developed a multifactor framework that guides the infringement inquiry. These tests are not exclusively (or even primarily) concerned with the question of whether any actual confusion has occurred. Rather, the multifactor tests purport to evaluate "whether, if a defendant is permitted to continue [his conduct], an appreciable number of ordinarily prudent purchasers are 'likely to be confused' about the source, sponsorship, or affiliation of the goods or services at issue."<sup>95</sup>

Even with the guidance of specified factors, infringement is a more complex inquiry than it might initially appear. For one thing, a tension arguably exists between the trademark holder's interest in controlling the mark's use and the public's interest in using the mark for critical, expressive, creative, comparative, and other purposes.<sup>96</sup> In diverse areas of law where

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<sup>94</sup> 15 U.S.C. § 1125(a)(1) (2012) (emphasis added). A separate statutory provision creates a cause of action for registered marks, but its differences from the cited provision are not material to the present discussion. See *Wal-Mart Stores, Inc. v. Samara Bros., Inc.*, 529 U.S. 205, 209 (2000) (giving substantially similar treatment to the provisions concerning registered and unregistered material); see also *id.* at 210 ("The text of [§ 1125(a)] provides little guidance as to the circumstances under which unregistered [material] may be protected.").

<sup>95</sup> Colman, *supra* note 66, at \*26. But see Barton Beebe, *An Empirical Study of the Multifactor Tests for Trademark Infringement*, 95 CAL. L. REV. 1581 (2006) (arguing that a statistical analysis reveals that judges place much greater weight on some factors than others, and tend to "stampede" remaining factors in order to reach their desired outcome).

<sup>96</sup> It is by no means obvious that post-parodists' interests are necessarily in tension with those of trademark owners; even courts sometimes rely on the argument that "parodies only increase fame" to bolster their rulings. See, e.g., *Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC*, 507 F.3d 252, 267 (4th Cir. 2007) ("Indeed, by making the famous mark an object of the parody, a successful parody might actually enhance the famous mark's distinctiveness by making it an icon. The brunt of the joke becomes yet more famous."); *Jordache Enters. v. Hogg Wyld, Ltd.*, 828 F.2d 1482, 1489-90 (10th Cir. 1987) ("[B]ecause of the parody aspect of Lardashe, it is not likely that

disputes arise due to a perceived conflict between a private right or public good and the right to free expression, judges engage in fact-specific balancing of the interests at stake.<sup>97</sup> However, the closest federal trademark jurisprudence comes to such policy-based balancing is a doctrine applied to “artistic” works making use of others’ trademarks, first announced in the 1989 case of *Rogers v. Grimaldi*.<sup>98</sup>

Under the *Rogers* test, the Lanham Act

will not be applied to expressive works “unless the [use of the trademark or other identifying material] has no artistic relevance to the underlying work whatsoever, or, if it has some artistic relevance, unless the [use of trademark or other identifying material] explicitly misleads as to the source or the content of the work.”<sup>99</sup>

In the quarter-century of its existence, the *Rogers* test has often been used to adjudicate the lawfulness of traditional trademark “parodies.”<sup>100</sup> However, the doctrine’s applicability remains limited to “expressive works,” as idiosyncratically defined by the courts.<sup>101</sup> This limitation means the *Rogers*

public identification of JORDACHE with the plaintiff will be eroded; indeed, parody tends to increase public identification of a plaintiff’s mark with the plaintiff.”). For the sake of argument, I will assume the existence of a conflict between the interests of a trademark owner and a post-parodist using the owner’s mark in his work.

<sup>97</sup> See, e.g., David A. Simon, *The Confusion Trap: Rethinking Parody in Trademark Law*, 88 WASH. L. REV. 1021, 1034 (2013) (“First Amendment jurisprudence often resorts to ad hoc balancing, weighing various interests against each other.”).

<sup>98</sup> 875 F.2d 994, 999 (2d Cir. 1989) (“[I]n general the [Lanham] Act should be construed to apply to artistic works only where the public interest in avoiding consumer confusion outweighs the public interest in free expression.”); see also *Brown v. Elec. Arts, Inc.*, 724 F.3d 1235, 1242 (9th Cir. 2013) (“The only relevant legal framework for balancing the public’s right to be free from consumer confusion . . . and [the defendant’s] First Amendment rights in the context of [a Lanham Act] claim is the *Rogers* test.”).

<sup>99</sup> *Brown*, 724 F.3d at 1239 (quoting *Rogers*, 875 F.2d at 999).

<sup>100</sup> See Stacey L. Dogan & Mark A. Lemley, *Parody as Brand*, 47 U.C. DAVIS L. REV. 473, 481 (2013) (observing that “recent parody decisions reflect a trend toward the *Rogers* standard”).

<sup>101</sup> *Brown* explains this limitation and applies it in the video game context:

The *Rogers* test is reserved for expressive works. Even if *Madden NFL* is not the expressive equal of *Anna Karenina* or *Citizen Kane*, the Supreme Court has answered with an emphatic “yes” when faced with the question of whether video games deserve the same protection as more traditional forms of expression . . . [V]ideo games communicate ideas—and even social messages—through many familiar literary devices. . . . Interaction between the virtual world of the game and individuals playing the game is prevalent. Even if there is a line to be drawn between expressive video games and non-expressive video games, and even if courts should at some point be drawing that line, we have no need to draw that line here.

724 F.3d at 1241.

doctrine will not necessarily—and in fact, probably will not<sup>102</sup>—come into play in cases involving allegedly (post-)parodic apparel.<sup>103</sup>

Far more likely to govern the outcome of litigation over apparel of the sort examined above, which makes use of others' logos for (at least partially) expressive or creative ends, is trademark law's "parody" doctrine. That doctrine—unlike the *Rogers* test—does not prescribe any policy-based balancing of the parties' interests or assessment of the constitutional considerations implicated in a particular dispute.<sup>104</sup> Instead, the black-letter law governing "non-artistic" trademark parodies is almost willfully simplistic, hewing closely to (or, arguably, hiding behind) the principle that deceptive or misleading speech is simply not entitled to protection under the First Amendment.<sup>105</sup>

Because the traditional test for trademark infringement is whether a defendant's goods or services are "likely to confuse" consumers as to source or affiliation, federal courts often parrot the maxim that disputes over trademark parodies require no analysis at all beyond the usual multifactor test for trademark infringement.<sup>106</sup> Put differently, either a trademark parody is likely to confuse (and thus infringing in nature) or not (and thus non-infringing):

"Some parodies will constitute an infringement, some will not. But the cry of 'parody!' does not magically fend off otherwise legitimate claims of trademark infringement . . . There are confusing parodies and non-confusing parodies. All they have in common is an attempt at humor through the use

<sup>102</sup> See, e.g., Simon, *supra* note 97, at 1027 (discussing how most courts do not use the *Rogers* standard in parody cases, but asserting that it provides the "most promising approach").

<sup>103</sup> See *Harley Davidson, Inc. v. Grottanelli*, 164 F.3d 806, 812-13 (2d Cir. 1999) (citing *Rogers*, 875 F.2d at 998) (refusing to apply *Rogers* to the defendant's "placement of his [allegedly parodic] bar-and-shield logo on his newsletter and T-shirts"). Cf. *Univ. of Ala. Bd. of Trs. v. New Life Art, Inc.*, 683 F.3d 1266, 1278 (11th Cir. 2012) (finding the defendant's "paintings, prints, and calendars" to be insulated from infringement claims as a matter of law, while holding that *Rogers*' applicability to the defendant's "mini-prints, mugs, cups, . . . flags, towels, t-shirts, [and] other mundane products" presented "disputed issues of material fact").

<sup>104</sup> See generally Rebecca Tushnet, *Trademark Law as Commercial Speech Regulation*, 58 S.C. L. REV. 737, 748 (2007) ("The deeper conflict between trademark law and the modern First Amendment is that information is rarely completely helpful or completely misleading. The idea that prohibitions on fraud improve the information environment depends on truth and falsity being pure binaries. Many trademark (and false advertising) cases, however, are more complicated.")

<sup>105</sup> *Id.* at 746 (noting the Supreme Court's view that "trademark laws that regulat[e] confusing uses of marks are constitutional because the government may regulate 'deceptive or misleading' commercial speech" (internal quotations and footnote omitted)).

<sup>106</sup> See, e.g., *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1405 (9th Cir. 1997) ("[T]he claim of parody is not really a separate 'defense' as such, but merely a way of phrasing the traditional response that customers are not likely to be confused as to the source, sponsorship or approval.")

of someone else's trademark. A non-infringing parody is merely amusing, not confusing."<sup>107</sup>

Another potential concern for parodists and post-parodists is the rise of trademark dilution claims, for which Congress created a federal cause of action in 1996 (as overhauled in 2006).<sup>108</sup> To win a trademark dilution case, a trademark owner–plaintiff need not prove “likelihood of confusion.” Instead, he must show a “likelihood of dilution,” which can arise where a defendant’s conduct creates an “association arising from the *similarity* between a mark and a trade name and a famous mark that impairs the distinctiveness of the [plaintiff’s] famous mark.”<sup>109</sup> While the Lanham Act’s dilution provisions do provide a safe harbor for specified “fair uses” that might include certain parodies,<sup>110</sup> the uncertain scope of this immunity<sup>111</sup> keeps potential dilution liability very much in play for parodic goods.<sup>112</sup>

<sup>107</sup> *Id.* (quoting J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 31.38 (rev. ed. 1995)).

<sup>108</sup> The Ninth Circuit explained the relevant legislative and doctrinal developments in *Levi Strauss & Co. v. Abercrombie & Fitch Trading Co.*:

[In 2003,] the Supreme Court handed down a decision that greatly impacted many courts of appeals’ interpretations of the [Federal Trademark Dilution Act (FTDA)]. In *Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418 (2003), the Court held . . . that the text of the FTDA “unambiguously requires a showing of *actual* dilution, rather than a *likelihood* of dilution.” . . . However, this requirement of actual dilution was not long-lived. In 2006, largely in response to the *Moseley* decision, Congress enacted the [Trademark Dilution Revision Act (TDRA)]. In doing so, Congress did not simply alter the language on which the Court in *Moseley* had relied; instead, Congress replaced the FTDA with a more detailed statute. The TDRA did provide relief for “likely,” as opposed to actual, dilution. 15 U.S.C. § 1125(c)(1). However, it also explicitly provided relief for dilution “by blurring” or by “tarnishment,” *id.*, and defined both types of dilution, *id.* § 1125(c)(2)(ii).

633 F.3d 1158, 1165–66 (9th Cir. 2011).

<sup>109</sup> *Id.* at 1171 (quoting 15 U.S.C. § 1125(c)(2)(B) (2012)).

<sup>110</sup> 15 U.S.C. § 1125(c)(3)(A) (creating a defense to federal trademark-dilution liability for “[a]ny fair use . . . of a famous mark by another person . . . , including use in connection with . . . identifying and parodying, criticizing, or commenting upon the famous mark owner”).

<sup>111</sup> See Simon, *supra* note 97, at 1051 (noting that, while the Lanham Act “exempts parody (and criticism and commentary) as fair use when the parodic use is not done as a mark[,] it says nothing about parodic uses that are source identifying”); see also Dogan & Lemley, *supra* note 100, at 504–12 (highlighting doctrinal uncertainties).

<sup>112</sup> See generally Dogan & Lemley, *supra* note 100, at 483 (noting that some courts disfavor “fair use” parody claims because of “a general aversion to free riding”). The skepticism noted by Dogan and Lemley is evident in the language of judicial decisions like *Deere & Co. v. MTD Products, Inc.*:

Sellers of commercial products who wish to attract attention to their commercials or products and thereby increase sales by poking fun at widely recognized marks of noncompeting products . . . risk diluting the selling power of the mark that is made

In short, when speaking of trademark law's "parody" jurisprudence, the doctrinal analysis is theoretically bifurcated. Yet the central problems, from the post-parodist's perspective, are largely the same, no matter the cause of action. First, trademark law's definition of permissible "parodies" has grown narrower, more formalistic, and less reflective in recent decades. Second, that definition of "parody" is essentially incompatible with the creative expression that defines the post-parodic sensibility.

B. *Some Early, Thoughtful Judicial Engagement with Trademark Parodies and the Progressively Less Thoughtful Jurisprudence that Followed*

In a few early appellate-court decisions involving traditional trademark parodies, judges engaged thoughtfully with the genre. In *L.L. Bean v. Drake Publishers*, for instance, the First Circuit undertook a somewhat ambitious treatment of trademark parodies in an appeal concerning a two-page adult-magazine spread entitled "L.L. Bean's Back-To-School-Sex-Catalog."<sup>113</sup> The defendant in that case had drawn the ire of apparel and consumer-goods company L.L. Bean by "display[ing] a facsimile of Bean's trademark and featured pictures of nude models in sexually explicit positions using 'products' that were described in a crudely humorous fashion."<sup>114</sup>

The panel majority began by observing that "[p]arody is a humorous form of social commentary and literary criticism that dates back as far as Greek antiquity."<sup>115</sup> The First Circuit then reminded the litigants that, despite recent rhetoric describing trademarks as a form of "property," "[t]rademark rights do not entitle the owner to quash an unauthorized use of the mark by another who is communicating ideas or expressing points of view"; indeed, such "unauthorized uses" might be necessary to effectively comment on contemporary American culture:

One need only open a magazine or turn on television to witness the pervasive influence of trademarks in advertising and commerce. Designer labels appear on goods ranging from handbags to chocolates to every possible form of clothing. Commercial advertising slogans, which can be registered as

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fun of. When this occurs, not for worthy purposes of expression, but simply to sell products, that purpose can easily be achieved in other ways. The potentially diluting effect is even less deserving of protection when the object of the joke is the mark of a directly competing product.

<sup>41</sup> F.3d 39, 44-45 (2d Cir. 1994) (internal citations omitted). In Section II.C, I question the federal courts' purported capacity to evaluate the "worthiness" of allegedly dilutive expression.

<sup>113</sup> *L.L. Bean, Inc. v. Drake Publishers, Inc.*, 811 F.2d 26, 27-34 (1st Cir. 1987).

<sup>114</sup> *Id.* at 27.

<sup>115</sup> *Id.* at 28.

trademarks, have become part of national political campaigns. “Thus, trademarks have become a natural target of satirists who seek to comment on this integral part of the national culture.”<sup>116</sup>

Although the district court had found “trademark dilution” in the possibility that the defendant’s spoof might “tarnish” L.L. Bean’s “wholesome” brand with “images of impurity,”<sup>117</sup> the First Circuit cautioned that “[n]either the strictures of the first amendment nor the history and theory of anti-dilution law permit a finding of [dilution by] tarnishment based solely on the presence of an unwholesome or negative context in which a trademark is used without authorization.”<sup>118</sup> The First Circuit, seemingly cognizant of potential overreaching by plaintiffs once trademark rights are untethered from the notion of confusion, laid down a bright-line rule: “The Constitution does not . . . permit the range of the anti-dilution statute to encompass the unauthorized use of a trademark in a noncommercial setting such as an editorial or artistic context.”<sup>119</sup>

The court then addressed the significance of the parodic nature of defendant’s work, explaining that its “reluctance to apply the anti-dilution

<sup>116</sup> *Id.* at 28-29 (quoting Harriette K. Dorsen, *Satiric Appropriation and the Law of Libel, Trademark and Copyright: Remedies Without Wrongs*, 65 B.U. L. REV. 923, 939 (1985)).

<sup>117</sup> *Id.* at 27, 30-31. Presumably because even the most unsophisticated readers of the “L.L. Bean Back-To-School-Sex-Catalog” would not be “likely to confuse” the satirical spread as being associated with the staid apparel and outdoor-goods company whose ubiquitous catalogs it spoofed, L.L. Bean’s lawsuit hinged not on trademark infringement but rather on *trademark dilution* under Maine’s anti-dilution statute. (The federal Lanham Act did not yet include an anti-dilution provision.)

The First Circuit supplied its understanding of anti-dilution statutes’ purpose:

Anti-dilution statutes have developed to fill a void left by the failure of trademark infringement law to curb the unauthorized use of marks where there is no likelihood of confusion between the original use and the infringing use. The law of trademark dilution aims to protect the distinctive quality of a trademark from deterioration caused by its use on dissimilar products.

*Id.* at 30.

<sup>118</sup> *Id.* at 31.

<sup>119</sup> *Id.* at 33. Chief Judge Campbell, dissenting, would have declined to rule at that stage of the litigation; he instead favored certifying key issues for consideration by the Maine Supreme Court, which would, in his words, “permit the state court to decide whether or not a pornographic parody of this type constitutes trademark dilution under the Maine statute.” *Id.* at 35 (Campbell, C.J., dissenting). Chief Judge Campbell would have taken this approach despite recognizing that “[t]he Maine Supreme Judicial Court has expressed an unwillingness, as a matter of policy, to accept a certified question that will not be dispositive of a federal case.” *Id.* Arguably, Chief Judge Campbell’s dissent was emblematic of a broader judicial discomfort with parodies. As David Simon writes, “[t]he issue of what constitutes a parody in trademark law, and what legal effect that finding should have, has been confusing courts for decades.” Simon, *supra* note 97, at 1024.

statute to the instant case also stems from a recognition of the vital importance of parody,” a medium “deserving of substantial freedom—both as entertainment and as a form of social and literary criticism.”<sup>120</sup> The court elaborated on the genre’s importance to a free society:

Trademark parodies, even when offensive, do convey a message. The message may be simply that business and product images need not always be taken too seriously; a trademark parody reminds us that we are free to laugh at the images and associations linked with the mark. The message also may be a simple form of entertainment conveyed by juxtaposing the irreverent representation of the trademark with the idealized image created by the mark’s owner. . . . While such a message lacks explicit political content, that is no reason to afford it less protection under the first amendment. . . . Denying parodists the opportunity to poke fun at symbols and names which have become woven into the fabric of our daily life, would constitute a serious curtailment of a protected form of expression.<sup>121</sup>

In the decades since *L.L. Bean*, however, courts seem to have grown less contemplative of parody’s social value.<sup>122</sup> Most courts now require that trademark parodists, in order to avoid a finding of infringement, demonstrate that they have “not only differentiate[d] the alleged parody from the original but . . . also communicate[d] *some articulable element of satire, ridicule, joking, or amusement.*”<sup>123</sup> Further, the federal appellate courts have reached a general consensus that trademark “‘parody’ is defined as a simple

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<sup>120</sup> *L.L. Bean*, 811 F.2d at 33 (quoting *Berlin v. E.C. Publ'ns*, 329 F.2d 541, 545 (2d Cir. 1964)).

<sup>121</sup> *Id.* at 34.

<sup>122</sup> The reasons for this change are numerous, but the most direct cause is likely an intervening Supreme Court decision, *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 580-81 (1994), which prompted lower courts to draw a questionable distinction between non-infringing “parodies” (works that mock the intellectual property owner—plaintiff, specifically) and infringing “satires” (works that use a plaintiff’s intellectual property for commentary that is not plaintiff-specific). See Bruce P. Keller & Rebecca Tushnet, *Even More Parodic than the Real Thing: Parody Lawsuits Revisited*, 94 TRADEMARK REP. 979, 979 (2004) (“One of *Campbell*’s most significant—and unsatisfying—effects has been to elevate parody . . . and devalue satire. Several courts have since explicitly relied on the distinction . . . even though the actual language from the Court’s opinion counsels a more sensitive approach.”). The *L.L. Bean* court had defined “parodies” broadly, but various courts have read the decision in a revisionist manner, probably to synthesize it with the post-*Campbell* parody-versus-satire jurisprudence. See, e.g., *United We Stand Am., Inc. v. United We Stand, Am. N.Y., Inc.*, 128 F.3d 86, 91-92 (2d Cir. 1997) (distinguishing *L.L. Bean* as a case where the plaintiff’s trademark was “an integral part of the humorous message” and the defendant “poked fun at the plaintiff, but did not cause consumer confusion”).

<sup>123</sup> *Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC*, 507 F.3d 252, 260 (4th Cir. 2007) (emphasis added).

form of entertainment” intended to serve as a vehicle for ridicule or humor.<sup>124</sup> Even if a would-be parodist meets this standard, he can only avoid infringement and dilution liability if he has “successfully” conveyed “two simultaneous—and contradictory—messages: that [his work] is the original, but also that it is *not* the original and is instead a parody.”<sup>125</sup> If a would-be parody is “unsuccessful”—however that might be determined by a particular court in a particular case<sup>126</sup>—it will be found infringing or dilutive.<sup>127</sup>

*C. Under Current Parody Doctrine, Courts Evaluating a (Post-)Parodic Work’s “Success” Will Often Find Themselves Forced Either to Hear What Isn’t There or to Plug Their Ears*

The most recent factually analogous appellate decision to any material resembling the post-parodies depicted in Part I is the Fourth Circuit’s 2007 decision in *Louis Vuitton Malletier v. Haute Diggity Dog*.<sup>128</sup> That decision places in high relief one crucial respect in which trademark law’s current parody doctrine cannot meaningfully evaluate works defined by a post-parodic sensibility.

In *Haute Diggity Dog*, the famous (and famously litigious) luxury fashion house Louis Vuitton filed suit over a dog toy that “loosely resemble[d] miniature handbags and undisputedly evoke[d] Louis Vuitton] handbags of similar shape, design, and color.”<sup>129</sup> The Fourth Circuit panel began by dutifully reciting the black-letter law of trademark parody—a conglomeration of the rules quoted in Sections II.A and II.B:

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<sup>124</sup> *Id.* (quoting *People for the Ethical Treatment of Animals v. Doughney*, 263 F.3d 359, 366 (4th Cir. 2001)).

<sup>125</sup> *Id.* (quoting *Doughney*, 263 F.3d at 366).

<sup>126</sup> As the following Section illustrates, determining such “success” is a perilous endeavor; rare is the judge who acknowledges the danger or futility of such efforts:

Yankee asks this court to engage in literary criticism—judging how successful *New York’s* expressive message was. It is one thing to reject a First Amendment claim because the court disbelieves the claim that a communicative message was intended. It is quite another to reject a First Amendment claim because the court gives low marks to the success of the literary device. Courts are ill equipped to pass literary judgments.

*Yankee Publ’g Inc. v. News Am. Publ’g Inc.*, 809 F. Supp. 267, 281 (S.D.N.Y. 1992) (Leval, J.).

<sup>127</sup> As noted above, I do not focus extensively on the infringement–dilution distinction in this Essay because post-parodic goods will likely suffer under both doctrines, for largely the same reasons. See *supra* Section II.A.

<sup>128</sup> *Haute Diggity Dog*, 507 F.3d at 260.

<sup>129</sup> *Id.* at 258.

For trademark purposes, “[a] ‘parody’ is defined as a simple form of entertainment conveyed by juxtaposing the irreverent representation of the trademark with the idealized image created by the mark’s owner.” . . . “A parody must convey two simultaneous—and contradictory—messages: that it is the original, but also that it is not the original and is instead a parody.” . . . This second message must not only differentiate the alleged parody from the original but must also communicate some articulable element of satire, ridicule, joking, or amusement.<sup>130</sup>

The court then explained that “[b]ecause Haute Diggity Dog’s arguments with respect to the [likelihood-of-confusion] factors depend to a great extent on whether its products and marks are successful parodies,” it would first decide “whether Haute Diggity Dog’s products, marks, and trade dress are indeed successful parodies of [Louis Vuitton]’s marks and trade dress” before moving on to a traditional analysis of infringement and dilution.<sup>131</sup>

Figure 16: Louis Vuitton “Multicolor Monogram” Handbag<sup>132</sup>



<sup>130</sup> *Id.* at 260. Louis Vuitton brought various claims, but only the federal trademark and trade-dress claims, which I will discuss collectively as its “trademark” claims, concern us here.

<sup>131</sup> *Id.* As David Simon explains, this so-called “infusion” framework—in varying forms—appears in many post-*Campbell* trademark parody decisions. Simon, *supra* note 97, at 1033.

<sup>132</sup> *Multicolor Monogram Cruise HandBag by Louis Vuitton*, BAGS BY LOUIS VUITTON, <http://bagsbylouisvuitton.blogspot.com/2011/04/multicolor-monogram-cruise-handbag-by.html> (last visited Aug. 18, 2014).

Figure 17: Haute Diggity Dog's "Chewy Vuitton" Chew Toy<sup>133</sup>

In a surprisingly brief and entirely citationless analysis, the Fourth Circuit wrote:

No one can doubt that LVM handbags are the target of the imitation by Haute Diggity Dog's "Chewy Vuitton" dog toys. At the same time, no one can doubt also that the "Chewy Vuitton" dog toy is not the "idealized image" of the mark created by [Louis Vuitton]. . . .

[T]he juxtaposition of the similar and dissimilar—the irreverent representation and the idealized image of an [Louis Vuitton] handbag—immediately conveys a joking and amusing parody. The furry little "Chewy Vuitton" imitation, as something to be *chewed by a dog*, pokes fun at the elegance and expensiveness of a LOUIS VUITTON handbag, which must *not* be chewed by a dog. The [Louis Vuitton] handbag is provided for the most elegant and well-to-do celebrity, to proudly display to the public and the press, whereas the imitation "Chewy Vuitton" "handbag" is designed to mock the celebrity and be used by a dog. The dog toy irreverently presents haute couture as an object for casual canine destruction. The satire is unmistakable. The dog toy is a

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<sup>133</sup> *Does This Chinese Cabbie Love Louis Vuitton? Or Hate Them?*, THE KNOCKOFF ECONOMY (Aug. 29, 2012), <http://www.theknockoffeconomy.com/does-this-chinese-cabbie-love-louis-vuitton-or-hate-them>.

comment on the rich and famous, on the LOUIS VUITTON name and related marks, and on conspicuous consumption in general.<sup>134</sup>

Thus, the following points proved dispositive for the defendant: (1) that its parody succeeds, in part, because an actual Louis Vuitton bag “must not be chewed by a dog [and yet the parody] presents haute couture as an object for casual canine destruction”; (2) that its dog toy was “irreverent” in nature; (3) that the defendant’s product “immediately” conveys its parodic, and thus “amusing,” character; and (4) that the product “is a comment on the rich and famous, on the LOUIS VUITTON name and related marks, and on conspicuous consumption in general.”<sup>135</sup>

Having checked off these boxes, the Fourth Circuit panel confidently concluded that the criteria for a “successful parody” were “amply satisfied in this case,” with “the ‘Chewy Vuiton’ dog toys [having conveyed] ‘just enough of the original design to allow the consumer to appreciate the point of parody,’ but stop[ping] well short of appropriating the entire marks.”<sup>136</sup> The court nevertheless continued its discussion, purporting to apply the likelihood-of-confusion factors but doing so in an unabashedly outcome-driven manner that served solely to undergird the “parody” determination already made.<sup>137</sup>

Problematically, the court’s core analysis (excerpted above) glosses over several important issues. The panel neglected to specify, for example, whether its characterization of the chew toy as “unmistakable satire” was a factual finding, made as a matter of law based on the record—or something

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<sup>134</sup> *Haute Diggity Dog*, 507 F.3d at 260-61.

<sup>135</sup> *Id.* at 261.

<sup>136</sup> *Id.* The court essentially went through the motions once more in its trademark dilution “analysis.” *See id.* at 265-67 (“[A]s Haute Diggity Dog’s ‘Chewy Vuiton’ marks are a successful parody, we conclude that they will not blur the distinctiveness of the famous mark . . .”).

The court’s dilution discussion is notable, however, for the panel’s unequivocal assertion—assumption, even—that the defendant’s dog toy was ineligible for the Lanham Act’s parody “fair use” defense due to the “defendant’s use of [its] parody as a mark.” *Id.* at 267. With little analysis, the court characterized the defendant’s use of Louis Vuitton’s trademarks and trade dress as “a designation of source for the [defendant’s] own goods or services,” which deprived the defendant of immunity from dilution liability. *Id.* at 266 (quoting 15 U.S.C. § 1125(c)(3)(A) (2012)). This lax analysis is perhaps unsurprising, given the continued uncertainty surrounding the notion of “trademark use,” but it nevertheless provides potential cause for concern among parodists and post-parodists alike.

<sup>137</sup> *See id.* at 267. (“[B]ecause the famous mark is particularly strong and distinctive, it becomes more likely that a parody will not impair the distinctiveness of the mark.”). After engaging in this arguably circular reasoning, the panel did go on to point out that the outcome might have differed if the defendant had used plaintiff’s *actual* mark rather than “adopt[ing] *imperfectly* the items of [Louis Vuitton]’s designs.” *Id.* at 268.

As for the plaintiff’s copyright claim, the court treated it as an afterthought, disposing of it in a single paragraph at the end of its opinion. *See id.* at 269-70.

more akin to judicial notice, and thus necessarily contingent on the presiding judges' background knowledge, assumptions, perceptive capabilities, and even senses of humor. The panel likewise declined to explain whether its determinations concerning this "unmistakable satire" and defendant's social "commentary" were driven primarily or exclusively by (1) the parodist's actual intent; (2) the parodist's apparent intent, as perceived by the defendant's (or, alternatively, Louis Vuitton's) target audience; (3) the parodist's apparent intent, as perceived by an "ordinary" and "reasonable" consumer; or (d) the actual effect on consumers—decided as a matter of law—without regard for the parodist's subjective intent. These ambiguities are notable because (1) they suggest an insufficiently nuanced analysis of communicative dynamics in the parodic context (if not in trademark disputes, more generally), and (2) they mirror issues likely to arise if (or, rather, when) a post-parody becomes the subject of litigation.

Perhaps the Fourth Circuit panel simply did not consider these potentially troublesome details. It may be unseemly to fault those trained primarily in law for failing to take account of the basic principle of linguistics that "[c]ommonly a speaker cannot explicate with precision what he meant to get across, and on these occasions if hearers think they know precisely, they will likely be at least a little off."<sup>138</sup> Nevertheless, where presiding courts make such assumptions—consciously or not—they slight both the parties to litigation and the members of the public for whom that litigation may well determine substantive rights. The fault in such instances lies in "a kind of *reductionism* [resulting from] claiming to have discovered the one true interpretation" when there are invariably a "multiplicity of meanings present."<sup>139</sup>

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<sup>138</sup> ERVING GOFFMAN, *FORMS OF TALK* 10 (2d ed. 1983).

<sup>139</sup> ROBERT WUTHNOW ET AL., *5 CULTURAL ANALYSIS: THE WORK OF PETER L. BERGER, MARY DOUGLAS, MICHEL FOUCAULT, AND JÜRGEN HABERMAS* 83 (2010 ed. 2013). Leading theorists have recognized that "there is never just *one* meaning that can be conveyed by a system of symbols": while a single "'interpretation' may be insightful for some purposes," it will always fall short of "the set of rich meanings which are there in the social setting itself." *Id.*

To be sure, this rush to interpretation is by no means confined to the judiciary:

[Both social theorists and economists—or rational-strategy theorists—often] presume that the behaviour of individuals reflects decision-making and choice and it is on this basis that they proceed to 'interpret' their conduct. The only difference between the assumptions embodied in the two varieties of social theory is that while the [latter] presumes that conduct is oriented to the utility of goods, [sociologists] presume that it is oriented to their symbolic meanings. Typically, however, neither group bother[s] to verify their assumptions; that is, to check with consumers themselves concerning the nature and meaning of their actions.

If, on the other hand, presiding judges' interpretive choices go beyond inadvertent or deliberate-but-intuitive assumptions—if the *Haute Diggity Dog* panel addressed “interpretive uncertainties and discrepancies . . . [by] exploit[ing them] after the fact to [strategically reconstruct] what the speaker indeed by and large meant”<sup>140</sup>—then the parties and the public are hardly any better off. Indeed, when courts, “because of unacknowledged interests [base their rulings on] pseudo-communication,” the result may be a “systematic distortion” of doctrine that prevents candid engagement with real “values and facts” and thus fails to resolve conflicting interests in a transparent and principled manner.<sup>141</sup>

In short, it is worrisome to see courts applying trademark law's “unambiguous message” approach to parodic (and post-parodic) works by pretending to hear what isn't there. Yet it is equally unsatisfactory for judges to plug their ears to block out individually and socially valuable expression. The shortcomings of the latter approach are vividly illustrated in the 2012 decision of *Louis Vuitton v. Hyundai*.<sup>142</sup> There, a judge in the Southern District of New York took a different tack from that of the Fourth Circuit when confronted with a work that incorporated a third-party trademark. Instead of making subjective interpretive leaps, the district court evaluated the purported parody's “success” by placing rigid, unwarranted limits on cognizable expression.

The *Hyundai* case was sparked by yet another complaint by Louis Vuitton, this time over the alleged infringement and dilution of its “toile monogram” trade dress.<sup>143</sup> The basis for the fashion house's new lawsuit was a Hyundai

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CAMPBELL, *supra* note 80, at 96. That said, the phenomenon might well be of greater concern in the context of the U.S. judiciary, due to the prospective aspect of precedent.

<sup>140</sup> GOFFMAN, *supra* note 138, at 11.

<sup>141</sup> WUTHNOW ET AL., *supra* note 139, at 224 (emphasis omitted).

<sup>142</sup> *Louis Vuitton Malletier, S.A., v. Hyundai Motor Am.*, No. 10-1611, 2012 WL 1022247 (S.D.N.Y. Mar. 22, 2012).

<sup>143</sup> See Charles Colman, *Louis Vuitton Sends Absurd Cease-and-Desist Letter to Penn Law Over Student Event Flyer (and More Fun with Trademark Abuse!)*, LAW OF FASHION (Mar. 3, 2012), <http://lawoffashion.com/blog/story/03/03/2012/121>:



commercial aired during the Super Bowl that “included a one-second shot of a basketball decorated with a distinctive pattern resembling the famous trademarks of plaintiff Louis Vuitton.”<sup>144</sup>

Figure 18: Still of Commercial Clip at Issue in *Hyundai*<sup>145</sup>



Like many post-parodic works, Hyundai’s commercial expressed a view of “luxury” that was, in a sense, ambivalent:

[As] explained by Hyundai, “The symbols of ‘old’ luxury, including the [Louis Vuitton] Marks, were used as part of the Commercial’s humorous social commentary on the need to redefine luxury during a recession. . . . The commercial poked fun at these symbols of ‘old’ luxury to distinguish them from [Hyundai] in an effort to challenge consumers to rethink what it means for a product to be luxurious.”<sup>146</sup>

In other words, the Hyundai commercial “poked fun” at luxury, not to swear it off altogether, but rather to redefine the concept. Of course, Hyundai’s desire to have consumers reconsider the meaning of luxury served the company’s own interests, but (as noted in Section II.A) that does

<sup>144</sup> *Hyundai*, 2012 WL 1022247, at \*1.

<sup>145</sup> Chris Shunk, *Hyundai Sued by Louis Vuitton over High-End Basketball*, AUTOBLOG (Mar. 5, 2010, 11:29 AM), <http://www.autoblog.com/2010/03/05/report-hyundai-sued-by-louis-vuitton-over-high-end-basketball>.

<sup>146</sup> *Hyundai*, 2012 WL 1022247, at \*2.

not, factually or doctrinally, undermine the presence of non-commercial expression in the work.

Indeed, Hyundai emphasized to the court that its use of the Louis Vuitton imagery was “‘expressive’ in nature”<sup>147</sup>—but the district court would have none of it. In a passage that encapsulates nearly everything that is wrong with—or, at least, woefully antiquated in—trademark law’s current parody doctrine, the court wrote:

[Hyundai’s] ad is not expressive in the sense that the word is used in trademark law . . . . Hyundai has acknowledged that it intended to make no comment on the Louis Vuitton mark, but instead offered a broader social critique. The Second Circuit has deemed such motivations unworthy of protection.<sup>148</sup>

The decisive issue for trademark infringement liability, in the court’s view, was “whether Hyundai Sonata consumers have made misinformed purchasing decisions based on Louis Vuitton’s role in the ‘Luxury’ ad”—an issue of which Hyundai had supposedly lost sight in “focus[ing] heavily on the ad’s purportedly expressive nature and the protections that should be afforded to it.”<sup>149</sup> In a passage that cuts straight to the heart of the crude and speech-chilling nature of trademark law’s rules concerning “parodies,” the court distinguished earlier cases favoring parodist-defendants by condemning Hyundai’s message as “far more subtle.”<sup>150</sup>

That a work’s *subtlety* was a ticket to a finding of infringement exposes the cramped, outdated, and arbitrary view of “worthy” speech that now pervades trademark law’s parody doctrine. If this spells bad news for traditional trademark parodies, it spells near-certain doom for *post*-parodies. For the characteristic ambivalence of post-parodic works, as illustrated by the works depicted in Part I, tends to take visual forms that, like surrealist art, escapes a definitive, fixed, and readily articulable message.<sup>151</sup>

Thus, whereas the *Haute Diggity Dog* panel apparently felt comfortable grafting its own views of fashion onto the dog toy at issue, the presiding judge in *Hyundai* refused to meaningfully engage with the somewhat more complex expressive content of the defendant’s commercial. Instead, the

<sup>147</sup> *Id.* at \*9.

<sup>148</sup> *Id.* at \*9, \*26 (emphasis added).

<sup>149</sup> *Id.* at \*21.

<sup>150</sup> *Id.* at \*26.

<sup>151</sup> As leading social and communication theorists have recognized, “the connection between speech acts and what the speaker really means to say is never perfect.” WUTHNOW ET AL., *supra* note 139, at 185. Where the “speech act” in question takes the form of primarily nonlinguistic visual imagery, as in many of the Section I.A post-parodies, “the subjective intentions, feelings, and meaning of the speaker” may not be fully legible to the audience. *Id.*; see also Eco, *supra* note 82, at 58-59 (discussing the complexity of signals transmitted through clothing).

court fell back on the dogmatic, black-or-white, “criticism-or-adulation” distinction whose absence defines the post-parodic sensibility—a sensibility that, as explained in Part I, is the inevitable product of recent events in fashion history, the high-end fashion sector’s own business strategies, and the growing availability of DIY technology to consumer-creators in the Internet age.

D. *Asking the Wrong Question Will Rarely Yield a Helpful Answer*

In its current state, trademark law cannot guide judges’ evaluation of the lawfulness of fashion post-parodies in a principled, meaningful way. Courts presiding over trademark parody cases purport to ask very specific questions. But that endeavor, when applied to works that do not fall into the narrow parameters of traditional parodies, will only lead courts to (1) hear something that isn’t there or (2) artificially limit their definition of cognizable speech. Both the *ad hoc* nature of the former approach and the categorical prohibition of the latter will chill a form of creative expression that is valuable, at the very least, because it empowers consumers who wish to be *seen* in a visual culture still controlled in large part by conglomerates whose financial success often requires managing what consumers do and do not see.

Even if the tradeoff made in current parody doctrine between the rights of trademark owners and third-party speakers somehow represents desirable public policy, it is nevertheless indefensible as the proper rule for *post*-parodies—if only because the so-called “articulable message” approach is a conceptual *non sequitur* to the post-parodic project.<sup>152</sup> To try to analyze post-parodic works, like those pictured in Part I, through trademark law’s one-dimensional parody doctrine is akin to asking whether a personal diary “is persuasive,” to query whether a wholly abstract sculpture “supports fiscal reform,” or to inquire about the “credibility” of a dessert. In each instance, the questioner attempts to make value judgments about objects whose very nature is alien to the analytical framework used. The creators of the diary, the sculpture, and the dessert can no more answer the questions posed than a scientist could state whether his data is “heartfelt,” a political speechwriter could list the shapes in nature his oratory most closely resembles, or a jury could evaluate whether a witness’s testimony is “ambrosial.” Asking the wrong question will almost always fail to produce an illuminating answer.

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<sup>152</sup> See *Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC*, 507 F.3d 252, 260 (4th Cir. 2007) (“A parody must . . . communicate some articulable element of satire, ridicule, joking, or amusement.” (internal quotation marks omitted)).

Unfortunately, in the fashion context, at least, federal judges may be unwilling to make a genuine effort to understand post-parodic works.<sup>153</sup> The Fourth Circuit judges who read into the *Haute Diggity Dog* chew toy “a comment on the rich and famous, on the LOUIS VUITTON name and related marks, and on conspicuous consumption in general”<sup>154</sup> arguably revealed their personal views on the subject of fashion as if through a Rorschach inkblot test.<sup>155</sup>

Although the “quite special rage reserved for fashionable dressing [actually underscores the fact] that dress speaks the irrational-unconscious in a special way,”<sup>156</sup> few federal judges have shown themselves capable of rising above the fray—of recognizing the “important imaginative function, the spiritually enlarging character of fashion.”<sup>157</sup> This prejudice is as misguided as it is disappointing. Judges should recognize that, as Elizabeth Wilson has written, “[if] the self in all its aspects appears threatened in modern society, then fashion becomes an important—indeed vital—medium in the recreation of the lost self,” and that “for the individual to lay claim to a particular style may be more than ever a lifeline, a proof that one does at least exist.”<sup>158</sup> Realistically, however, including such florid prose in a judicial opinion, as one might to bolster a ruling for a post-parodist, would require a judge to

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<sup>153</sup> See generally Colman, *supra* note 39, at 57–58 (“[F]ederal judges presiding over [fashion-related] cases still make their distaste for the subject matter clear . . .”). The only plausible alternative to this account of willful resistance, it would seem, is an *inability* to appreciate the dynamics in play when it comes to trademarks, consumer culture, and parodies. See Dreyfuss, *supra* note 85, at 293 (“[I]t is clear from the way certain judges write that they just don’t get it—that they are not gripped by language and remain unworried by trademark holders’ assault on the arsenal guarding ‘the vibrancy of our culture.’ I wonder, too, about their senses of humor.”). It is difficult to say which of these two possibilities is more worrisome.

<sup>154</sup> *Haute Diggity Dog*, 507 F.3d at 261.

<sup>155</sup> This phenomenon is likely driven by (largely subconscious) aspects of social behavior and facilitated by the U.S. legal system’s lack of formalized interpretive tools for visual material. I analyze the former in a working article on judicial projection of internalized social norms—specifically, in the context of *fin-de-siècle* design-patent jurisprudence. See Charles E. Colman, *Patents and Perverts* (Aug. 1, 2014) (abstract), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2477459](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2477459). For an insightful discussion of the latter, see Elizabeth G. Porter, *Taking Images Seriously*, 114 COLUM. L. REV. (forthcoming 2014) (noting that “courts take language seriously” but that “[t]here are no corresponding traditions in law to guide the interpretation of images,” so there is “a danger that implicit biases and naïve realism—the belief that an image represents a transparent window onto a single truth—will infect judges’ decisions” (footnote omitted)).

<sup>156</sup> WILSON, *supra* note 42, at 235.

<sup>157</sup> HOLLANDER, *supra* note 58, at 20.

<sup>158</sup> WILSON, *supra* note 42, at 122. Some anthropological analysis suggests that the derision leveled at fashion stems from humans’ aversion to “ambiguity in boundaries.” *Id.* at 132.

reveal a degree of vulnerability—humanity?—that many on the federal bench deem imprudent on ideological, instrumental, or reputational grounds.<sup>159</sup>

Yet this is precisely the sort of nondogmatic, *human* response required of judges presiding over cases implicating First Amendment values.<sup>160</sup> Contrary to the *Hyundai* court's proclamation that subtle expression is less "worthy" of protection than is blunt (and, in many instances, less effective) speech, neither First Amendment jurisprudence nor most members of American society are concerned solely with protecting explicit, targeted, traditionally political speech. Such speech may be conceptually easier and less emotionally challenging for judges to address in their decisions, but surely obstacles of this nature should not drive our jurisprudence.

Instead, the appropriate doctrine governing post-parodies must start by recognizing that, as professors Stacey Dogan and Mark Lemley have argued, we all "benefit from a culture that allows subtle references and word play that draws from a variety of cultural reference points . . . even if the

<sup>159</sup> Consider once more the following passage by Anne Hollander, who describes the myriad functions of fashion: "Western fashion offers a visual way out of the trap of tradition, the prison of unquestioning wisdom. Fashion allows clothing to create an image of skepticism, of comic possibility, of different powers and alternative thoughts, of manifold chances, of escape from fixed meanings and fixed roles." HOLLANDER, *supra* note 58, at 19-20.

Now imagine a judge including that passage, or some variation of it, in a dispositive decision declining to impose liability on a post-parodic designer. How might the public react? The following commentary on Justice Anthony Kennedy provides some idea of the risks involved:

[Justice Kennedy apparently] believes it is the role of the Court in general and himself in particular to align the messy reality of American life with an inspiring and highly abstracted set of ideals . . . [In one reproductive rights opinion, Justice Kennedy included] a paean to the "heart of liberty," which he said must include "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life"—a phrase Scalia archly ridiculed as the "sweet-mystery-of-life passage." Undaunted, in the partial-birth case, Kennedy included a sweet-mystery-of-fetal-life passage: "The government may use its voice and its regulatory authority to show its profound respect for the life within the woman." Never mind that the two sweet mysteries clash with each other . . . Anthony Kennedy doesn't much care whether his abstractions are true; the important thing for him is that he wants them to be true.

Jeffrey Rosen, *Supreme Leader: The Arrogance of Anthony Kennedy*, NEW REPUBLIC (June 16, 2007), <http://www.newrepublic.com/article/politics/supreme-leader-the-arrogance-anthony-kennedy>.

<sup>160</sup> To be clear, I hesitate to place all of post-parodists' eggs in the First Amendment basket, in part because, as Professor Dreyfuss has suggested, the First Amendment might be "simply too blunt an instrument to parse rights to individual words; perhaps its focus on the communication of ideas makes it an inappropriate way to think about the linguistic material by which ideas are conveyed." Rochelle Cooper Dreyfuss, *Expressive Genericity: Trademarks as Language in the Pepsi Generation*, 65 NOTRE DAME L. REV. 397, 398 (1990). Dreyfuss's concern is all the more acute where "the material by which ideas are conveyed" is not lexical but imagery-based. See *supra* Section I.A.

use causes some level of confusion.”<sup>161</sup> Indeed, few would disagree with the proposition that “the rich connotations and implicit understandings present in any concrete situation are never captured fully or expressed adequately in language.”<sup>162</sup> Accordingly, courts must recognize the value of post-parodic imagery’s characteristic *ambivalence*—a state of mind that psychologists have described as a “structural feature of every image and fantasy,” which can be “therapeutic, imaginative, originating and joining” for both creator and wearer.<sup>163</sup>

Of course, courts can only be as sensitive to these delicate social values as precedent will allow—and prevailing trademark doctrine would require that the post-parodist fit the square peg of his expressive project into the round hole of parody jurisprudence. Perhaps this is unsurprising, for “Western social thought . . . [has] over the centuries developed an almost institutionalized aversion toward dealing in analytically constructive ways with ambiguity.”<sup>164</sup> But by imposing its simplistic, mechanical rules on post-parodists’ work, trademark law demands that fashion (and visual art, more generally) do something contrary to its very nature—that it “speak” with the precision of linguistic discourse.<sup>165</sup> Putting words in the mouth of a parodist (as the Fourth Circuit arguably did in *Haute Diggity Dog*) is, at best, unproductive. Requiring an explicit, targeted, single-minded message from post-parodic works—as the *Hyundai* court essentially demanded of the parodist-defendant in that case—is the height of absurdity.

In the coming years, courts will undoubtedly be confronted with disputes over post-parodies incorporating third-party trademarks, probably in the form of lawsuits brought by high-end fashion brands whose trademarks and trade dress are their most precious assets.<sup>166</sup> Federal judges, as the *de facto*

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<sup>161</sup> Dogan & Lemley, *supra* note 100, at 480-81. Professor Dreyfuss agrees, aptly describing our current state of affairs:

In an economy in which consumers have immediate access to products and services everywhere on the globe, in a legal environment in which symbols are protected in multiple ways, in a culture in which trademarks constitute a significant medium of expression, freedom from all sources of confusion or dilution is simply not achievable.

Dreyfuss, *supra* note 85, at 293.

<sup>162</sup> WUTHNOW ET AL., *supra* note 139, at 194.

<sup>163</sup> Garrison, *supra* note 92, at 229.

<sup>164</sup> DAVIS, *supra* note 42, at 5 n.2.

<sup>165</sup> *Id.* at 13 (“[W]hat most distinguishes clothing as a mode of communication from speech . . . is that . . . differences among clothing signifiers are not nearly as sharply drawn and standardized as are the spoken sounds employed in a speech community . . .”).

<sup>166</sup> See Alexandria Symonds, *Fashion Logo Parodies, Strictly Tongue in Chic*, N.Y. TIMES, Dec. 11, 2013, <http://www.nytimes.com/2013/12/12/fashion/fashion-logo-parodies-tshirts-strictly-tongue->

stewards of trademark law, must avoid both the trap of pseudo-interpretation and the temptation to fall back on one-dimensional rules that ask the wrong questions of post-parodists and their works. Instead, courts should recognize that post-parodies represent an eminently “worthy” medium through which people can make sense of their complex relationships with branded goods—objects that serve “not just to fill material needs, but to decipher our social surroundings, locate our social self, and transmit knowledge about who and what we are.”<sup>167</sup>

In sum, post-parodists’ sensibility and creative output are new, different, and important. Unfortunately, current trademark doctrine cannot sensitively and sensibly determine the lawfulness of post-parodic goods. This Essay is not the place to craft the contours of more appropriate doctrinal framework,<sup>168</sup> but I hope the reader now understands my account of the emerging post-parodic sensibility and the reasons for its incompatibility with trademark law’s current parody doctrine. I cannot, of course, prove without a doubt that the fashion I have presented here embodies a new aesthetic, or that its spirit reflects the particular confluence of historical, economic, and psychological factors I have identified. Ultimately, the question is one of individual interpretation. And that is precisely the point.

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in-chic.html (discussing how, despite the rise of parodic clothing, “[s]ome brands are concerned their market value is being diluted by the existence of parody items” and may take legal action).

<sup>167</sup> WUTHNOW ET AL., *supra* note 139, at 116. See generally MARY DOUGLAS & BARON ISHERWOOD, *THE WORLD OF GOODS: TOWARDS AN ANTHROPOLOGY OF CONSUMPTION* xxiv (Routledge 2001) (1979) (“[G]oods are like flags. We ought to know how goods work as communicators, or rather, since the goods are not active agents, only signals, we ought to know how they are used.”).

<sup>168</sup> Should I revisit this topic in the future, my proposed approach will likely be informed by (1) what I suspect to be an ultimately irreconcilable conflict between the post-parodic project and certain widely accepted, but misguided, assumptions about U.S. trademark law; and (2) the severe interpretive constraints of both judges and juries, at least in the realm of visual imagery. See Porter, *supra* note 155 (“[I]n the realm of the visual, where interpretation can seem largely or wholly organic, it is [easy to overlook] the unspoken arguments or narratives an image tells.”).

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