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# Fashionable IP or IP for Fashion?

Norman L. Balmer\*

Lisa Hedrick's note, *Tearing Fashion Design Protection Apart at the Seams*,<sup>1</sup> addresses yet another mismatch between creativity and statutory incentives for creativity. She raises the quintessential question affecting all intellectual property: Would statutory protection for creativity be beneficial? She insightfully concludes that proposed legislation for fashion design protection may, if enacted, have an illusory effect.

Hedrick and other commentators are quite persuasive in their analyses of existing intellectual property law.<sup>2</sup> They conclude that fashion has no meaningful statutory protection.<sup>3</sup> The paradox relating to the level of creativity in the fashion industry is explored by Professors Raustiala and Sprigman:

Why, when other major content industries have obtained and made use of increasingly powerful IP protections for their products, does fashion design remain mostly unprotected? That the fashion industry produces high levels of innovation, and attracts the investment necessary to continue in this vein, is a puzzle for the orthodox justification for IP rights.<sup>4</sup>

The Constitution provides that Congress shall have the power to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."<sup>5</sup> Congress has opted to exercise its authority in limited, but nevertheless expansive, ways. Referencing committee reports accompanying the 1952 Patent Act, the Supreme Court noted the intent of Congress to have "anything under the sun that is made by man" as statutory subject matter for

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1. Lisa J. Hedrick, *Tearing Fashion Design Protection Apart at the Seams*, 65 WASH. & LEE L. REV. 215 (2008).

2. Hedrick's survey of intellectual property did not include trade secrets and confidential information, which can be forms of significant protection of intellectual property in some industries. *Id.* at 222–29. Unless one was marketing certain golden clothes to a proverbial emperor, intellectual property based on secrecy is not a viable method to protect the fashion industry.

3. Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687, 1775 (2006).

4. *Id.* at 1691.

5. U.S. CONST. art. I, § 8, cl. 8.

patents.<sup>6</sup> Although the patent laws are limited in that the invention needs to be useful, novel, and inventive,<sup>7</sup> the patent grant<sup>8</sup> is the same for a pharmaceutical that may have cost a billion dollars to discover and develop as it is for the proverbial better mousetrap. Similarly, copyright laws protect certain creative works that are not useful articles,<sup>9</sup> and the exclusionary right is the same for a work created in ten seconds as it is for one that involved a lifetime—it is the same for a soda can label as for a literary masterpiece.<sup>10</sup> The protection provided by copyright, like patents, is blind in its legislation to the industry and cost of development.

Patents and copyrights are thus very blunt tools available to Congress for forging policy pertaining to creativity and innovation. But have these blunt statutory tools worked? Perhaps part of the answer lies in defining the criteria for determining whether a tool has worked. If one takes the natural rights labor theory view of John Locke, then the policy goal is focused on the individual who has made something that is his own.<sup>11</sup> A utilitarian theory, on the other hand, focuses on maximizing the benefits to the community.<sup>12</sup>

Regardless of the economic theory used, there is no controlled experiment to prove or disprove the impact of statutory intellectual property. Commentators have therefore heavily relied upon anecdotal evidence.<sup>13</sup> Consequently, the debate continues as to whether or not patents and copyrights are achieving whatever policy goal is selected.<sup>14</sup>

Over the past two centuries, the United States has changed from an agrarian economy to an industrial economy to what some call a service economy.<sup>15</sup> The patent statute has been called upon to address technologies

6. *Diamond v. Chakrabarty*, 447 U.S. 303, 309 (1980) (citations omitted).

7. 35 U.S.C. §§ 101, 102, 103 (2000).

8. *Id.* § 271.

9. 17 U.S.C. § 102 (2000); *see also id.* § 101 (defining "useful article").

10. *Id.* §§ 106, 302.

11. *See* BLACK'S LAW DICTIONARY 958 (8th ed. 2004) (defining "Lockean labor theory").

12. *See id.* at 1581 (defining "utilitarianism").

13. *See generally* Edwin Mansfield, *Patents and Innovation: An Empirical Study*, 32 *MGMT. SCI.* 173 (1986).

14. *See, e.g.,* Dan L. Burke & Mark A. Lemley, *Policy Levers in Patent Law*, 89 *VA. L. REV.* 1575, 1577 (2003) ("[T]here is no reason to assume that a unitary patent system will optimally encourage innovation in the wide range of diverse industries that it is expected to cover."); *see also* Michael H. Davis, *Patent Politics*, 56 *S.C. L. REV.* 337, 386 (2004) ("Failure to understand that patent law plays an active role in fashioning a national industrial policy, or ignorance of the sheer presence of such a policy, leaves the country and its economy at the mercy of that policy.").

15. *See, e.g.,* 150 *CONG. REC.* H615, H620 (daily ed. Feb. 25, 2004) (statement of Rep. Dreier) (noting the changes in the economy since the formation of the United States).

that could not have been even fathomed in 1790 such as iPhones and instant mashed potatoes. Yet, today's patent statute does not differ substantially from the first patent statute enacted in 1793.<sup>16</sup> The copyright statutes have proven not to be as malleable to changes in technology and have been periodically amended to explicitly address changes in technology such as video tapes, cable television, computer chips, e-books, and the internet.<sup>17</sup> The legislative responses to these technological changes have typically not been single-industry-focused and Congress has availed itself of counsel from broad based study groups.<sup>18</sup>

Proposed fashion design protection legislation has a single-industry focus. To the extent that this legislation is technology driven, it is caused by the ease and speed with which information can be transmitted throughout the globe. The question in my mind is whether single-industry-focused intellectual property legislation can provide a petri dish for measuring the net effect of statutory intellectual property as an incentive for creativity and/or as a benefit for society.

Over the past three decades, Congress has been faced with more single industry pleas for statutory protection in light of real or perceived inequities.<sup>19</sup>

16. The Patent Act of 1793 defines patentable subject matter as "any new and useful art, machine, manufacture, or composition of matter, or any new or useful improvement [thereof]." Patent Act of 1973, ch. 11, § 1, 1 Stat. 318, 319 (codified as amended at 35 U.S.C. §§ 1-376 (2000)).

17. See, e.g., Act of Dec. 12, 1980, Pub. L. No. 96-517, § 10, 94 Stat. 3015, 3028 (codified as amended at 17 U.S.C. §§ 101, 117 (2000)) (adding computer programs to the copyright law); see also Act of Nov. 1, 1995, Pub. L. No. 104-39, § 5(a), 109 Stat. 336, 348 (codified as amended at 17 U.S.C. § 101 (2000)) (defining "digital transmissions"); see generally Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended in scattered sections of 17 U.S.C.). Interestingly, the 1790 Copyright Act afforded protection only for "maps, charts and books," the very types of documents sought for the Library of Congress. Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124, 124 (repealed 1802). The Copyright Office began registering computer programs in 1964 by interpreting them to be literary works. See 1 NEIL BOORSTYN, BOORSTYN ON COPYRIGHT § 2.14[1][a] (2000) (discussing the copyrightability of computer programs).

18. For example, in 1974 Congress established the National Commission on New Technological Uses of Copyrighted Works (CONTU) to make recommendations for changes in the copyright law, especially the copyrightability of computer programs. Act of Dec. 31, 1974, Pub. L. No. 93-573, § 201, 88 Stat. 1873, 1873.

19. While most of the single-industry-focused legislative proposals have been promoted by the creators of intellectual property, that is not always the case. Automobile manufacturing companies have secured design patents to protect body parts. See generally *In re Certain Auto. Parts*, No. 377-TA-557, 2007 WL 2021234 (Int'l Trade Comm'n July 5, 2007). In response, the Quality Part Coalition has urged legislative changes to prevent the vehicle manufacturing companies from using design patents to exclude their members from marketing replacement parts. See Quality Parts Coalition, About Us, <http://www.qualitypartscoalition.com/about/about.html> (last visited Dec. 30, 2007) ("The QPC is committed to working with Congress to

For example, the pharmaceutical research houses sought patent term extension to remedy the loss of patent term due to the lengthy approval process before the Federal Drug Administration (FDA).<sup>20</sup> The pharmaceutical research houses argued that incentives were needed to continue to invest in costly research and development (R&D) expense to bring to the public new drugs.<sup>21</sup> Since the enactment of the Drug Price Competition and Patent Term Restoration Act of 1984,<sup>22</sup> numerous amendments have been made affecting the pharmaceutical industry as a whole and the FDA approval process.<sup>23</sup> In 2006, the Congressional Budget Office (CBO) released a study analyzing the research performance of the pharmaceutical industry and its profitability.<sup>24</sup> In 2005, R&D spending was nearly \$40 billion.<sup>25</sup> The dynamics of drug research spending, however, are complex. The CBO stated: "Even though conventional accounting measures overstate the profitability of the drug industry, strong growth in the industry's R&D spending over many years suggests that the returns on pharmaceutical R&D have been attractive."<sup>26</sup> They also noted: "The additional revenue that results from the effect of insurance on the demand for prescription drugs—combined with strong patent protection—can give companies excessive incentives to invest in drug R&D."<sup>27</sup> While far beyond the scope of this Comment, the proposition that patent term restoration enhanced the incentives for research and development cannot be dismissed. The societal benefit, however, may not be so clear.

The single-industry-focused efforts to amend the patent and copyright laws often revolve around a court decision that the industry members consider unfair. The Biotechnology Industry Organization (BIO) sought a legislative

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ensure that U.S. design patent law preserves competition, protects consumers' rights and halts the expansion of an auto industry monopoly at the expense of the American consumer.") (on file with the Washington and Lee Law Review). Public Law 104-208 amended the patent laws to eliminate any remedy for infringement by a medical practitioner's performance of a patented medical activity. Act of Sept. 30, 1996, Pub. L. No. 104-208, § 616, 110 Stat. 3009, 3067 (codified at 35 U.S.C. § 287(c) (2000)).

20. See generally OFFICE OF TECH. ASSESSMENT, PATENT TERM EXTENSION AND THE PHARMACEUTICAL INDUSTRY (1981).

21. See, e.g., *id.* at 3 (summarizing the arguments of the pharmaceutical industry).

22. Drug Price Competition and Patent Term Restoration Act of 1984, Pub. L. No. 98-417, 98 Stat. 1585 (codified as amended in scattered sections of 21 U.S.C.).

23. E.g., Generic Animal Drug and Patent Term Restoration Act, Pub. L. No. 100-670, 102 Stat. 3971 (1988) (codified as amended in scattered sections of 21 U.S.C.).

24. CONG. BUDGET OFFICE, STUDY: RESEARCH AND DEVELOPMENT IN THE PHARMACEUTICAL INDUSTRY (2006) (on file with the Washington and Lee Law Review).

25. *Id.* at 36 fig.5-1.

26. *Id.* at 4.

27. *Id.* at 48.

overturning of *In re Durden*,<sup>28</sup> a case in which an old process was found not to be patentable simply because a previously unknown starting material was used. For the biotech industry, using existing processes with new starting materials was a primary course of research.<sup>29</sup> The initial bills, which were broadened to cover the chemical industry, were opposed by the chemical industry.<sup>30</sup> During the pendency of the bills in Congress, the Federal Circuit distinguished and limited *In re Durden* in a manner that essentially eliminated the adverse effect on the biotechnology industry.<sup>31</sup> BIO, nevertheless, continued its lobbying efforts leading to the Patent Law Amendment of 1995 (Biotech Process Patent Act).<sup>32</sup> Ironically, commentators have urged that to promote patentability, biotechnology inventors should not use the provisions of the special legislation.<sup>33</sup>

Another example of a specialized legislative response to a court decision involved copyrights and architecture. Courts held that while the plans for an architectural work were subject to copyright, the structure itself was not.<sup>34</sup> Congress considered explicit copyright coverage for the structure itself,<sup>35</sup> in

28. *In re Durden*, 763 F.2d 1406, 1411 (Fed. Cir. 1985) (finding that the use of nonobvious starting materials did not create a nonobvious, patentable process). See R.R., *After Five Years, Biotechnology Patent Protection Act Is Law*, BIOTECHNOLOGY NEWSWATCH, Nov. 6, 1995, at 6 (noting that BIO "had fought hard for" the passage of the Biotechnology Process Patent Protection Act).

29. See, e.g., CONG. BUDGET OFFICE, *supra* note 24, at 40 (stating that the extension of patent term would effectively delay the innovation of firms that primarily focus R&D on "unpatentable modifications of existing drugs").

30. The Chemical Manufacturers Association (now the American Chemistry Council) lobbied to amend the bill to cover only the biotech industry.

31. *In re Ochiai*, 71 F.3d 1565, 1572 (Fed. Cir. 1995) (holding that there are no per se rules under *In re Durden* or other case law for determining obviousness; as such, each case should be examined on a case-by-case basis); see 2 DONALD S. CHISUM, CHISUM ON PATENTS § 5.04[8][b][ii] (2005) (discussing the aftermath of *In re Durden*).

32. Act of Nov. 1, 1995, Pub. L. No. 104-41, 109 Stat. 351 (codified at 35 U.S.C. § 103 (2000)).

33. See, e.g., Ladas & Parry, LLP, Patentability of Process Claims in the United States (Aug. 14, 1996), <http://www.ladas.com/Patents/Biotechnology/Durden-ProcessClaims.html> (last visited Dec. 30, 2007) (suggesting that a patentee who opts for a process claim rather than a petition under the new legislation will "have an added weapon to prevent the importation of products made by its patented process") (on file with the Washington and Lee Law Review).

34. See, e.g., *Demetriades v. Kaufman*, 680 F. Supp. 658, 664-65 (S.D.N.Y. 1988) ("Although plaintiffs may have a valid copyright in the architectural plans that served as the basis for the Demetriades house, that protection simply does not extend to the design or the house itself absent a design patent.").

35. See 136 CONG. REC. 1733 (Feb. 7, 1990) (statement of Rep. Kastenmeier) ("[The Architectural Works Copyright Act of 1990] is intended to cover an architect's artistic expression. It does not encompass methods of construction, or purely functional elements comprised of standard features . . .").

significant part due to the fact that on the international front, the Berne Convention permitted such copyrights and the United States sought to comply with the treaty.<sup>36</sup> Although Representative Kastenmeier noted some difficulties in the extension of copyright protection to architectural works,<sup>37</sup> Congress took the steps necessary to be in compliance with the Berne Convention. Since enactment of the Architectural Works Copyright Protection Act<sup>38</sup> (AWCPA), several litigations have ensued asserting copyright infringement of architectural works.

In *Yankee Candle Co. v. New England Candle Co.*,<sup>39</sup> the court found copyright infringement of the architectural blueprints based on the similarities between two structures at issue.<sup>40</sup> Similarly, in *Rotlund Co. v. Pinnacle Corp.*,<sup>41</sup> the court stipulated that the alleged infringer's architect had access to the plaintiff's architectural plans.<sup>42</sup> *Chirco v. Gateway Oaks, LLC*,<sup>43</sup> involved a condominium-type development having a unique arrangement of garages and opposing buildings.<sup>44</sup> Again, the infringer had access to the plans.<sup>45</sup> *Trek Leasing, Inc. v. United States*<sup>46</sup> involved a building constructed as a post office.<sup>47</sup> The sole copyright at issue was the structure itself.<sup>48</sup> The copyright was found to be "thin" and the alleged infringement was sufficiently different that no infringement was found.<sup>49</sup>

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36. See *id.* (introducing the Architectural Works Copyright Act of 1990, which was drafted to bring the United States in compliance with the Berne Convention).

37. *Id.*

38. Architectural Works Copyright Protection Act, Pub. L. No. 101-650, §§ 701-706, 104 Stat. 5089, 5133-34 (1990) (codified in scattered sections of 17 U.S.C.).

39. *Yankee Candle Co. v. New Eng. Candle Co.*, 14 F. Supp. 2d 154, 160 (D. Mass. 1998) (finding invalid Yankee Candle Company's copyright of an architectural work but finding valid its copyright of the architectural blueprints).

40. *Id.* at 160-61.

41. *Rotlund Co. v. Pinnacle Corp.*, 222 F.R.D. 362, 386 (D. Minn. 2004) (imposing sanctions on Pinnacle for its abusive conduct during discovery and other judicial processes).

42. *Id.*

43. *Chirco v. Gateway Oaks, LLC*, No. 02-CV-73188, 2005 WL 1355482, at \*8 (E.D. Mich. 2005) (rejecting the defendant's contention that the plaintiff's building was in the public domain and granting summary judgment for the plaintiff).

44. *Id.* at \*2.

45. *Id.* at \*5.

46. *Trek Leasing, Inc. v. United States*, 66 Fed. Cl. 8, 11 (2005) (granting the defendant's motion for summary judgment because of the plaintiff's failure to show substantial similarity).

47. *Id.* at 10.

48. *Id.* (identifying the only remaining claim as whether there was an infringement of the actual architectural work).

49. *Id.* at 20.

Although the AWCPA has been in effect for over fifteen years, it appears that it has a limited effect on the architecture business and on creativity. First, those constructing large projects likely have little interest having the construction look like another large building. Second, with small projects, a party has little financial incentive to copy a design in the absence of plans because of the cost of the services required to recreate the plans. The exception is where significant secondary benefit will be obtained, such as a consumer draw to the design of stores or the siting of condominiums.

Another single-industry-focused legislation is the Vessel Hull Design Protection Act (VHDPA) enacted in 1998.<sup>50</sup> The impetus for the VHDPA was the Supreme Court decision in *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*,<sup>51</sup> which held that the Florida statutory protection on boat hull design was preempted by the Constitution.<sup>52</sup> It is less expensive to make a mold for a vessel hull from an existing hull than it is to design a mold anew.<sup>53</sup> The creator of a vessel hull must proceed from drawings to mold fabrication,<sup>54</sup> and a picture of the hull, or even the drawings, will still leave a potential pirate with substantial expense when creating the mold. Thus, the real effect of the VHDPA is to protect the maker of a mold from another's design based off the original mold, not so much the creativity behind the design. The VHDPA requires that the vessel hull possess originality with a distinguishable variation over similar works which is not simply trivial.<sup>55</sup>

Thus far, only one reported case involves the VHDPA.<sup>56</sup> The paucity of litigated cases may be indicative of the relatively few hull design registrations and the existence of other adequate hull designs that can be freely used and copied. If so, the VHDPA would only seem to provide a financial incentive to the designer where substantial consumer demand exists for the specific design, and then sufficient incentive would exist for a competitor to create a similar hull design with sufficient modifications to avoid infringement. In essence, designing around an existing design would be less costly than litigation for those few designs that have a market pull.

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50. Vessel Hull Design Protection Act, Pub. L. No. 105-304, §§ 501–502, 112 Stat. 2905–16 (1998) (codified at 17 U.S.C. §§ 1301–1332 (2000)).

51. *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 168 (1989) (finding Florida's statutory protection for vessel hulls to be preempted by the Constitution).

52. *Id.*

53. *Id.* at 144.

54. *Id.*

55. 17 U.S.C. §§ 1301–1302 (2000).

56. *See generally* *Maverick Boat Co. v. Am. Marine Holdings, Inc.*, 418 F.3d 1186 (11th Cir. 2005).

In the one reported case, *Maverick Boat Co. v. American Marine Holdings, Inc.*,<sup>57</sup> a registered boat hull design was found not to meet the originality standard and was denied protection.<sup>58</sup> That the court in *Maverick Boat*, and the court in *Trek Leasing*, focused on the standards for registration and scope of protection is not surprising. The courts are mindful of, and may be specifically called upon to address, the scope of the constitutional authority of Congress to create monopolies for intellectual property. Is there, as Justice Douglas stated in his concurring opinion in *Great Atlantic & Pacific Tea Co. v. Supermarket Equipment Corp.*,<sup>59</sup> a constitutional standard defining the level of creativity that must be met for an exclusive right?<sup>60</sup> If so, only a qualified power resides in Congress.

In none of the examples of industry-specific intellectual property legislation is there irrefutable evidence that an increase in creativity has occurred solely because of the additional intellectual property protection. Without a doubt, patent term restoration has resulted in more income to the pharmaceutical companies because of the lengthened patent term. It is not clear, however, that the Biotech Process Patent Act, the AWCPA, or the VHDPA have netted increased income to innovators and creators in the relevant industries. Rather, it is much more likely that such single-industry-focused legislation is income neutral with few exceptions. With an income neutral intellectual property benefit, where are the financial incentives for investment in creativity and innovation? True, the AWCPA and VHDPA may give some psychological comfort and thus incentives to those who create because copying is prohibited. But with the limited scope of protection, perhaps the sense of security is illusory.

Setting aside patent term restoration, the societal impacts of the Biotech Process Patent Act, the AWCPA, and the VHDPA do not appear to be negative. The costs under these acts, especially in light of the paucity of litigation, have been nominal considering the size of the industries. Interestingly, Congress has been able to sate special interest groups without adversely affecting society. Fashion design protection, given its shortcomings as Ms. Hedrick ably notes, appears to fall into the same category.

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57. *Id.* at 1192 (passing over the question of infringement because the plaintiff did not have a protected hull design).

58. *Id.* (finding that the changes the plaintiff made to its hull design did not create an original design but rather corrected mistakes to render the "original design what it was always intended to be").

59. *Great Atl. & Pac. Tea Co. v. Supermkt. Equip. Corp.*, 340 U.S. 147 (1950).

60. *Id.* at 154 (Douglas, J., concurring).