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Journal of Intellectual Property Law

Volume 4 | Issue 2

Article 2

March 1997

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Recommended Citation

Jo Carrillo, *Protecting a Piece of American Folklore: The Example of the Gusset*, 4 J. INTELL. PROP. L. 203 (1997).

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ARTICLES

PROTECTING A PIECE OF AMERICAN FOLKLORE: THE EXAMPLE OF THE GUSSET

*Jo Carrillo**

I. INTRODUCTION

When one thinks of patent law, one thinks of complicated mechanical inventions, or increasingly, of inventions in genetic engineering. Most controlling cases in patent law concern inven-

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The author would like to thank the following corporate and government actors who gave generously of their time and expertise: Kathleen McDonough, Assistant Archivist, Levi Strauss & Co. Archives; Len Larson, Archivist and Director of Apparel Design and Technical Services, Lee Apparel Co., Inc.; Melissa Leventon, Curator of Textiles, The M.H. deYoung Museum; Dierdre Donahue, Librarian, Costume Institute at the Metropolitan Museum of Art; Robert M. Morrill, Law Offices of Skjerven, Morrill, MacPherson, Franklin & Friel; Seymour Jaron, Owner and President, SJ Manufacturing Co.; Hong Ning Chu, Production Supervisor, O'Neill Sportswear and Owner, HJ Manufacturing; Maurice Kanbar, Inventor, Investor, and President of Skyy Vodka; Laurence Ostrow, Owner and President, ChiPants, Inc.; Stacy Elizabeth Kuranz, Designer; Victoria Garrison, Pattern Maker; Cluett & Peabody Co., Inc.; Patagonia; Century Martial Arts, Inc.; Black Belt Magazine; the Patent and Trademark Office; and the Center for Innovation, Invention, and Ideas in Sunnyvale California.

The author would also like to thank Professors Jenny Parrish, Margreth Barrett, and Keith Aoki for their comments on earlier drafts, as well as Professor Brian Gray.

tions that highly skilled and educated persons spend years articulating and perfecting.¹ Some of these inventions, such as the non-aerosol spray pump,² are complicated in their design, but straightforward in their application. Other inventions, such as genetic inventions³ or inventions based on algorithms,⁴ can be

¹ See, e.g., *Diamond v. Chakrabarty*, 447 U.S. 303, 206 U.S.P.Q. (BNA) 193 (1980) (discussing the patentability of a genetically engineered organism); *Martin v. Wyeth, Inc.*, 193 F.2d 58, 91 U.S.P.Q. (BNA) 314 (4th Cir. 1951) (discussing the patentability of medical and surgical procedures).

² *In re Morton-Norwich Prods., Inc.*, 671 F.2d 1332, 213 U.S.P.Q. (BNA) 9 (C.C.P.A. 1982).

³ See, e.g., *Diamond*, 447 U.S. 303; *Animal Legal Defense Fund v. Quigg*, 932 F.2d 920, 18 U.S.P.Q.2d (BNA) 1677 (Fed. Cir. 1991) (denying standing to farmers and animals rights groups to challenge PTO's interpretive rule allowing non-naturally occurring organisms, including animals, to be patentable); *Ex Parte Allen* 2 U.S.P.Q.2d (BNA) 1425 [Bd. Pat. App. & Inter. 1987] (affirming PTO rejection of a patent for the "always-edible oyster," while affirming that the Chakrabarty rationale extends patent protection to artificially made life forms).

For scholarship related to transgenic animals, see Hugo A. Delevie, *Animal Patenting: Probing the Limits of U.S. Patent Laws*, 74 J. PAT. [& TRADEMARK] OFF. SOC'Y 492 (1992) (arguing that new animal life forms do not fit within 35 U.S.C. § 101, but may be patented under 35 U.S.C. § 112); Lorance L. Greenlee, *Biotechnology Patent Law: Perspective of the First Seventeen Years, Prospective on the Next Seventeen Years*, 68 DENV. U. L. REV. 127 (1991) (giving a historical perspective of biotechnology patent law and examining current trends); John S. Hudson, *Biotechnology Patents after the "Harvard Mouse": Did Congress Really Intend Everything Under the Sun to Include Shiny Eyes, Soft Fur and Pink Feet?*, 74 J. PAT. [& TRADEMARK] OFF. SOC'Y 510 (1992) (reviewing concerns of and offering alternative ways to patent living organisms); W. Lesser, *Animal Variety Protection: A Proposal for a U.S. Model Law*, 75 J. PAT. [& TRADEMARK] OFF. SOC'Y 398 (1993) (discussing the legal difficulties of patenting animals and offering a market based solution); Thomas Traian Moga, *Transgenic Animals as Intellectual Property (or the Patented Mouse that Roared)*, 76 J. PAT. [& TRADEMARK] OFF. SOC'Y 511 (1994) (examining the development of and objections to patenting transgenic animals); Sean Johnston, Comment, *Patent Protection for the Protein Products of Recombinant DNA*, 4 HIGH TECH. L.J. 249 (1989) (examining the patenting problems associated with second generation recombinant protein); Matthew B. Tropper, Comment, *Patentability of Genetically Engineered Life-Forms: Legal Issues and Solutions*, 25 J. MARSHALL L. REV. 119 (1991) (analyzing legal issues and potential solutions to problems raised by genetic engineering).

⁴ Algorithms themselves are not protectable. See, Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287 (1988) (offering a philosophical explanation for why an intellectual property law system can justifiably deny legal protection to creators of everyday ideas and extraordinary ideas—like an algorithm.). See also *Diamond v. Diehr*, 450 U.S. 175, 209 U.S.P.Q. (BNA) 1 (1981) (allowing a mathematical formula to be patented when it is part of a process which, when considered as a whole, is performing a function that patent law is designed to protect); *Gottschalk v. Benson*, 409 U.S. 63, 175 U.S.P.Q. (BNA) 673 (1972) (discussing policy implications behind the patentability of mathematical formulae); Hans A. von Spakovsky et al., *The Limited Patenting of Computer Programs: A Proposed Statutory Approach*, 16 CUMB. L. REV. 27 (1985-1986) (reviewing the history of and

complicated both in their design and in their application.

Yet another aspect of patent law concerns items that are simple or straightforward in design, but complicated in their history—so much so sometimes, that their historical complexity defies the rationale behind granting patent protection in the first place.⁵ Often, these items are so simple and straightforward that they are not even referred to as “inventions.”⁶ Cups, plates, spoons, and napkins are examples of things that fall within this category. Their use punctuates our daily lives to such a degree that although they were once novel additions to our cultural life, we now take them entirely for granted.⁷ Though the items referred to above are not

finding then-current computer program patent protection adequate); Kenneth C. Brooks, Comment, *Human Ingenuity: A Novel Standard for Patenting Algorithms*, 22 GOLDEN GATE U. L. REV. 455 (1992) (recommending that patent protection be extended to algorithms using the “human ingenuity” standard applied in biotechnology patent law); Jeffrey A. Simenauer, Note, *Patentability of Computer-Related Inventions: A Criticism of the PTO's View on Algorithms*, 54 GEO. WASH. L. REV. 871 (1986) (criticizing the PTO's inclusion of all algorithms in the public domain to the detriment of inventors seeking patents on computer programs).

⁵ The historical reasons for granting monopolies based on patents are related to the development of industry (in the early modern European context) and innovation (in the nineteenth century American context). See generally Edward C. Walterscheid, *The Early Evolution of the United States Patent Law: Antecedents (Part 1)*, 76 J. PAT. [& TRADEMARK] OFF. SOC'Y 697 (1994) [hereinafter *Evolution (Part 1)*]; Edward C. Walterscheid, *The Early Evolution of the United States Patent Law: Antecedents (Part 2)*, 76 J. PAT. [& TRADEMARK] OFF. SOC'Y 849 (1994) [hereinafter *Evolution (Part 2)*] (explaining origin and evolution of the ideological theories behind patent law); Edward C. Walterscheid, *Novelty in Historical Perspective (Part 1)*, 75 J. PAT. [& TRADEMARK] OFF. SOC'Y 689 (1993) [hereinafter *Novelty Part 1*]; Edward C. Walterscheid, *Novelty in Historical Perspective (Part 2)*, 75 J. PAT. [& TRADEMARK] OFF. SOC'Y 777 (1993) [hereinafter *Novelty (Part 2)*] (explaining the basis for the novelty requirement and its development in the U.S. and other countries).

⁶ 35 U.S.C. § 100(a) (1994) defines “invention” as an “invention or discovery”. But, since the word “invention” is not capable of precise statutory definition, the courts have control over its meaning. See, e.g., *Gottschalk v. Benson*, 409 U.S. 63 (1972) (distinguishing between an invention and a mere idea); *Spero v. Ringold*, 377 F.2d 652, 153 U.S.P.Q. (BNA) 726 (C.C.P.A. 1967) (defining invention as a mental act, known only to its originator, that has meaning to one of ordinary skill in the art); *United States Plywood Corp. v. General Plywood Corp.*, 370 F.2d 500, 52 U.S.P.Q. (BNA) 80 (6th Cir. 1966) (setting a constitutional standard for invention as including innovation, advancement, and things that add to the sum of useful knowledge); *West Branch Novelty Co. v. Bloom*, 31 F. Supp. 673 (E.D. Pa. 1940) (noting that the word invention is not susceptible to precise definition).

⁷ See, e.g., NORBERT ELIAS, *THE HISTORY OF MANNERS (THE CIVILIZING PROCESS: VOLUME I)*, 53-59 (1978) (discussing *De civilitate morum puerilium (On civility in children)*, a short treatise written by Erasmus in 1530 for the education of boys of noble birth explaining the proper use of then innovative items like plates, spoons, and other table implements).

generic marks in the statutory, trademark sense of the word, they are generic historical items.⁸ They have a common, widespread, descriptive function or use.

Nested within this subcategory of historically generic items is yet another subcategory of items that ride the waves of historical time, if not narrative. These items are like their continuously used counterparts in that they were once novel inventions transformed by widespread use into commonly accepted items of material culture. But these items are different in that they have fallen out of use from time to time, only to be "reinvented" or "rediscovered" in different historical periods. An example of this kind of item is the gusset, which is a diamond shaped piece of fabric that is inserted between seams in clothing so as to give the wearer more freedom of movement. Unlike the cup, plate, or spoon, the gusset disappears and then reappears on the cultural landscape, thus complicating the issue of its ownability.

Today we assume that everything is ownable.⁹ Yet, we also know that there are compelling reasons why some things should not be ownable, or more specifically, why they should not be protected under copyright or patent law.¹⁰ As one scholar put it,

⁸ 15 U.S.C. § 1064(3) (1994) (allowing for cancellation of registration of generic marks). Although "generic" is not defined in the current statute, 15 U.S.C. § 1063 previously provided for cancellation when the registered mark became "the common descriptive name of an article or substance." 15 U.S.C. § 1063(c) (1976). The word "generic" replaced this language in 1988. Pub. L. No. 100-667 § 115(4), 102 Stat. 3935, 3940 (1988). At least one other legal scholar has noticed this connection. See Hughes, *supra* note 4, at 320 (discussing how some "common, everyday ideas are too generically useful to allow someone to monopolize them").

⁹ See, e.g., Richard B. Schmitt, *When NBA's Michael Jordan Jumps, Patent Lawyers May Do the Same*, WALL ST. J., May 10, 1996, at B12D (stating the possibility that athletic moves may be patentable).

¹⁰ There is fast growing literature on this point. For a representative sample of articles, see Margreth Barrett, *The "Law of Ideas" Reconsidered*, 71 J. PAT. & TRADEMARK OFF. SOC'Y 691 (1989) (cautioning against overextending intellectual property law to undeveloped ideas); Paul Goldstein, *Preempted State Doctrines, Involuntary Transfers and Compulsory Licenses: Testing the Limits of Copyright*, 24 UCLA L. REV. 1107 (1977) (discussing the importance of keeping federal copyright law within its "historically limited ambit"); Steven P. Handler, Note, *Copyright Protection for Mass-Produced, Commercial Products: A Review of the Developments Following Mazer v. Stein*, 38 U. CHI. L. REV. 807 (1971) (arguing against extending copyright protection to mass-produced, commercial items on the ground that such extension derogates on the public domain). Cf. Edward Samuels, *The Public Domain in Copyright Law*, 41 J. COPYRIGHT SOC'Y USA 137 (1993) (noting that concern about over-designating intellectual property rights reflects an inherent conservatism found in law generally and is not something peculiar to intellectual property law).

"the object . . . of any . . . property system, is simply to separate those interests that the law will protect from those [that] it will not, and to prescribe the levels and conditions of the protection accorded."¹¹ Thus, in cases where there is concern with recognizing something as ownable, it is typically over ethical or political issues of recognition, not over whether the thing in question is conceptually designatable as property.

The classic case on point is *Moore v. Regents of the University of California*,¹² in which the California Supreme Court was asked to decide whether a cancer patient had a recognizable property interest in the diseased spleen cells excised from his body and used by researchers to develop a patented cell line. The *Moore* court declined to recognize such an interest, preferring instead to leave the issue to the legislature.¹³ In the areas of copyright and patent law, scholars have expressed similar concerns about ethical issues, but they have articulated them within a well established framework allowing for broad ranging discussions about the Constitutional, political, systemic, and institutional implications of over designating intellectual property rights.¹⁴

¹¹ Goldstein, *supra* note 10, at 1108.

¹² 793 P.2d 479, 15 U.S.P.Q.2d (BNA) 1753 (Cal. 1990).

¹³ *Id.* at 496.

¹⁴ See, e.g., Keith Aoki, *Authors, Inventors and Trademark Owners: Private Intellectual Property and the Public Domain Part 1*, 18 COLUM.-VLA J.L. & ARTS 1 (1993) (noting the effect of private intellectual property on the public domain); Barrett, *supra* note 10; Rosemary J. Coombe, *Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue*, 69 TEX. L. REV. 1853 (1991) (discussing the political dimension of the relationship between legal ownership and cultural authority); Robert C. Denicola, *Trademarks as Speech: Constitutional Implications of the Emerging Rationales for the Protection of Trade Symbols*, 1982 WIS. L. REV. 158 (1982) (analyzing the relationship between the trademark monopoly and basic First Amendment rights); Paul Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983 (1970) (discussing the tension between copyright law and the First Amendment); Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533 (1993) (arguing that a properly conceived natural rights theory of intellectual property would provide protection for free speech interests); Robert A. Gorman, *Copyright Protection for the Collection and Representation of Facts*, 76 HARV. L. REV. 1569 (1963) (discussing the limits of copyright law in protecting facts); Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 UCLA L. REV. 1180 (1970) (arguing that the idea-expression line represents an important definitional balance between copyright and free speech interests). Cf. Samuels, *supra* note 10 (noting that since law is by nature conservative about the creation of new causes of action, scholarship about the political implications of extending property rights is too broad and

With respect to the gusset, all of these broad concerns are implicated. Like the spleen cells in *Moore*, the gusset does not fit squarely within standard definitions of private property; nor does it fit squarely within the statutory provisions of protectable property set out by copyright and patent law.

Copyright law protects original design expression, not design ideas.¹⁵ The gusset is not protectable under copyright law because it is essentially a design idea.¹⁶ In its tangible form, the gusset is no more than a diamond shaped piece of fabric that is incorporated into an ordinary garment.¹⁷ In its intangible form, it is no more than an idea. But a representational, graphic design for a gusset or even for a gusseted garment, like pants, is different than a

hence misses the point).

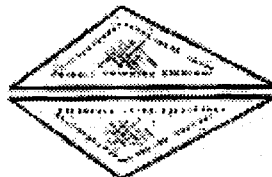
¹⁵ 17 U.S.C. § 102. See, e.g., *Condotti, Inc. v. Slifka*, 223 F. Supp. 412, 139 U.S.P.Q. (BNA) 373 (S.D.N.Y. 1963) (making a distinction between a design expression, which is copyrightable, and a design idea, which is not); cf. *Handler*, *supra* note 10 (criticizing the ways in which courts have applied the idea-expression distinction).

¹⁶ See *infra* Part II.A.

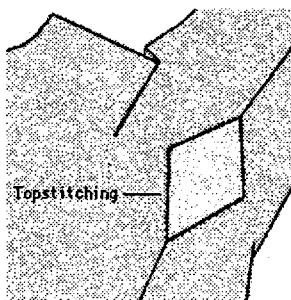
¹⁷



One-piece gusset



Two-piece gusset



NORMA R. HOLLEN, *PATTERN MAKING BY THE FLAT-PATTERN METHOD* 260 (6th ed. 1987).

graphic design for a Dior dress.¹⁸ While the graphic design for gusseted pants is an expression, it is an expression that only slightly modifies two well known ideas—pants and the gusset. Courts have been reluctant to find such slight modifications sufficient grounds for granting a government monopoly in a clothing design, even if that design meets the originality requirement of copyright law.¹⁹ On the other hand, a Dior dress design, is original, and to the degree that it approaches *haute couture*, it may even be considered art.²⁰

While copyright law protects an original design expression, patent law protects ornamentality in the case of design patents²¹ or innovation in the case of utility patents.²² The gusset is neither ornamental nor innovative.

Despite the imperfect fit between the gusset and copyright or patent law, there are two clear but indirect ways to gain a legal interest in an item like a gusset. The first way is to patent an innovative garment that incorporates the gusset.²³ The second is to perfect a trade dress in uniquely marketed, but non-innovative gusseted garments.²⁴ This Article discusses the former method

¹⁸ See, e.g., *Dior v. Milton*, 156 N.Y.S.2d 996, 113 U.S.P.Q. (BNA) 210 (N.Y. App. Div. 1956) (noting the protection of creative elements where skill, talent, and ingenuity are employed).

¹⁹ See *infra* note 89 and accompanying text.

²⁰ Dresses are not copyrightable, but graphic dress designs may be if they constitute original expressions. 17 U.S.C. § 102(a)(5) (1994). See also Allan L. Schwartz, *Fabric and Dress Designs as Protected by Copyright Under Federal Copyright Act*, 26 A.L.R. FED. 408 (1996) (distinguishing between the graphic “dress design” and the actual garment as “design”); Cameron K. Wehringer, *Dress Designs: Time Protection and Copyrights*, 40 J. PAT. & TRADEMARK OFF. SOC’Y 816 (1958) (predicting that copyright protection may eventually extend to actual garments as indicative of original design); Rocky Schmidt, Comment, *Designer Law: Fashioning a Remedy for Design Piracy*, 30 UCLA L. REV. 861 (1983) (arguing for extension of copyright protection to actual garments on the ground that they are the product and, therefore, the legal equivalent of graphic clothing design).

²¹ 35 U.S.C. § 171. See also Perry J. Saidman & Mark B. Mondry, *Sneakers, Design Patents and Summary Judgments: Opening a New Era in the Protection of Consumer Product Designs*, 71 J. PAT. & TRADEMARK OFF. SOC’Y 524 (1989) (discussing the use of design patents in athletic shoe sole design and manufacturing).

²² See *infra* notes 100-112 and accompanying text (discussing how courts define novelty).

²³ See *infra* Part III.B.2.

²⁴ Trade dress is a specific aspect of trademark law, which protects “identifying symbols”. J. THOMAS MCCARTHY, 1 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION, § 8 (4th ed. 1996). Trade dress considerations, though important in this case, are outside the scope of this paper.

and leaves the latter for a later paper. Part II of this Article analyzes the ownability of the gusset as a legal-historical matter. Part III presents and assesses the question of how one private actor tried to capture the gusset from the public domain. By referring to the public domain or the “commons,” this Article does not intend to join the “public domain club,” as one commentator has put it.²⁵ So while this Article places the gusset in the “public domain,” or the “commons,” it does so on the presupposition that the gusset is an item of (material) folklore, and it presents a historical record that authenticates the gusset as such. By use of this record, the example of the gusset is thus distinguished from the unsupported examples typically offered to buttress the theory of the public domain.²⁶

The various contextualizing sources cited in this Article add to ongoing discussions in the field, especially on the topic of the public domain. Commentaries regarding the public domain are noted and sometimes described in this Article. However, these commentaries offer abstractions, not specific examples, other than those recorded in appellate case reporters,²⁷ and they tend to overemphasize the role of courts and bureaucracies and underemphasize the role of free agent citizens in marking out the public domain. For instance, one commentator wrote that it “took a twentieth-century decision of the Second Circuit Court of Appeals to make clear this story [Romeo and Juliet] could not be owned.”²⁸ This Article takes a different tack. It operates on the premise that writers do not consult appellate court opinions before writing their inspired version of Romeo and Juliet. It also asserts that in order to understand why or how something is or becomes non-ownable, one must look at a broader range of evidence than reported court opinions provide.

Thus, this Article considers the gusset in detail with the hope of offering one possible model for thinking about vexing problems such as the idea/expression distinction and the existence of the public

²⁵ Samuels, *supra* note 10, at 147 (discussing Gordon, *supra* note 14).

²⁶ See, e.g., Gordon, *supra* note 14, at 1568-70 (offering examples that turn on, for example, Roman numerals, scriptures, undescribed advertising images, and the ego-id-superego structure; none of the examples are backed up by empirical or historical evidence).

²⁷ See, e.g., Aoki, *supra* note 14.

²⁸ Gordon, *supra* note 14, at 1557.

domain. It uses standard legal sources such as statutes, cases, and congressional reports; but it also relies on original historical sources of the sort found in corporate archives, patents, and Patent and Trademark Office (PTO) records—particularly patent file wrappers and litigation files. Hence, the discussion is based upon a history of pants and the gusset. It attempts to contextualize the discussion of broad, abstract issues in the life of a common item—the gusset.

Finally, the title of this Article uses the word “protection.” Its thesis is that the gusset is not and should not now become privately ownable. Therein lies the gusset’s survival as folklore. That is, by using the word “protect,” this Article does not mean to imply that the gusset should become subject to private ownership. To the contrary, use of the word “protect” means that the gusset—like other items of American folklore²⁹—ought to remain freely available to all. The gusset is more than a mere clothing design. It has a long, global history; over the years it has established itself in American folklore. Although this Article focuses on the gusset’s American embodiment, it invokes broader issues as well—issues related to the protection of folklore generally. These issues are the importance of oral and unofficial histories in some intellectual property determinations, the role of a bureaucracy like the Patent and Trademark Office (PTO) in protecting folklore by declining to grant encroaching patents, and the importance of folklore to even a highly technological society such as ours.

II. OWNABILITY

Simple, straightforward items pose special problems in intellectual property law.³⁰ They are typically not copyrightable nor patentable because their origin extends far beyond any individual actor. When an item’s use extends across historical periods, the quality of being “remembered” and “forgotten” further complicates the issue of ownership.

²⁹ See *infra* note 191 (defining folklore).

³⁰ See, e.g., Leslie Kurtz, *Speaking to the Ghost: Idea and Expression in Copyright*, 47 U. MIAMI L. REV. 1221 (1993) (arguing that simple, generic ideas are more difficult to protect under copyright law than complex, specific ideas); Hughes, *supra* note 4.

Because ownability is the norm in our system, tracking the way in which a particular item or idea comes to be recognized as non-ownable is instructive in its own right.³¹ It reveals a boundary that exists between the category of things and ideas we allow to be privately exploited and the category of things and ideas that we regard as non-exploitable, less-exploitable, or exploitable only within preset limits.³² Things that rest upon or near the boundary—like the excised cell in *Moore*³³—raise concerns because of the ease with which they can be conceived of as “ownable” and the worry over what consequences will ensue if they are.³⁴ Under our system, if something is distinguishable and can be separated from the common stock, it is more easily conceptualized as privately ownable property.³⁵ Thus, in *Moore*, while the common stock raw cell was initially presumed unownable, it became ownable once researchers transformed it into a manufacturable cell-line.³⁶

³¹ But see Samuels, *supra* note 10 (arguing that there is no such thing as the “public domain” in copyright law; private ownability is the firm norm, but there are some limitations on the rights that flow from private ownership, limitations such as those articulated in the fair use doctrine).

³² See, e.g., Gordon, *supra* note 14 (discussing Lockean notions of rights and duties related to the exploitation of property).

³³ *Moore v. Regents of the Univ. of Cal.*, 793 P.2d 479 (Cal. 1990).

³⁴ See, e.g., John J. O'Connor, Note, *The Commercialization of Human Tissue—the Source of Legal, Ethical and Social Problems: An Area Better Suited to Legislative Resolution*, 24 LOY. L.A. L. REV. 115 (1990) (analyzing legal aspects of using human tissue in commercial contexts).

³⁵ See, e.g., Aoki, *supra* note 14 (using the methodology of case analysis to support an explanation of this phenomenon in terms of “author reasoning”).

³⁶ *Moore*, 793 P.2d 479. For discussions of *Moore*, see Aoki, *supra* note 14, at 29 (discussing whether cells drawn from patient tissue should be patentable); Michelle Bourianoff Bray, Note, *Personalizing Personalty: Toward a Property Right in Human Bodies*, 69 TEX. L. REV. 209, 233-39 (1990) (criticizing *Moore*'s failure to affirmatively delineate whether an individual has a property interest in his body); Brian G. Hannemann, Comment, *Body Parts and Property Rights: A New Commodity for the 1990s*, 22 S.W.U. L. REV. 399, 406-07 (1993) (criticizing *Moore*'s failure to resolve the debate over the existence of a property interest in one's body).

This issue has arisen in other contexts involving indigenous persons and pharmaceutical companies. For recent scholarship on this issue, see Klaus Bosselmann, *Plants and Politics: The International Legal Regime Concerning Biotechnology and Biodiversity*, 7 COLO. J. INT'L ENVTL. L. & POL'Y 111 (1996) (analyzing the growth of biotechnology and the contemporaneous loss of biodiversity); Alan S. Gutterman, *The North-South Debate Regarding the Protection of Intellectual Property Rights*, 28 WAKE FOREST L. REV. 89 (1993) (discussing the difficulties of creating property rights in new technologies such as pharmaceuticals); Mark Hanning, *An Examination of the Possibility to Secure Intellectual Property Rights for Plant*

Additionally, while treating the raw cell as private property raised ethical concerns, treating the manufactured cell-line as property did not.³⁷ These ethical concerns were first expressed with language about the “imperfect fit” between the raw cell and the property law system, and later, in more theoretically minded discussions, with language about the ethical and philosophical consequences of treating the raw cell like private property.³⁸ Thus, tracking the ways in which something becomes ownable or non-ownable by individuals brings a boundary line to the fore. It also helps to articulate why common stock property (tangible or intangible) is not considered ownable by individuals, and more specifically, why it should not be. Part II of this Article analyzes this problem in relation to the gusset.

The gusset offers a clear view of the gossamer analytical threads that determine what becomes privately ownable and what does not. This may be because the gusset does not carry the same emotive or ethical charge that body cells, transgenic animals, or sports moves carry. With this in mind, Part II analyzes how the gusset is neither ownable under copyright law nor under patent law.

A. THE GUSSET’S OWNABILITY UNDER COPYRIGHT LAW

Actual garments are not copyrightable as embodied designs. While 17 U.S.C. § 102(a) defines copyrightable “writings” as “original works of authorship,”³⁹ a phrase that includes within its

Genetic Resources Developed by Indigenous Peoples of the NAFTA States: Domestic Legislation Under the International Convention for Protection of New Plant Varieties, 13 ARIZ. J. INT’L & COMP. L. 175 (1996) (examining intellectual property rights in plant DNA).

³⁷ But see Joseph William Singer, *Publicity Rights and the Conflict of Laws: Tribal Court Jurisdiction in the Crazy Horse Case*, 41 S.D. L. REV. 1, 18 n.31 (1996) (registering disapproval with the Moore court’s refusal to grant the patient a property interest in his cell).

³⁸ See, e.g., Nancy E. Field, Note, *Evolving Conceptualizations of Property: A Proposal to De-Commercialize the Value of Fetal Tissue*, 99 YALE L.J. 169 (1989) (arguing against recognition of a commercial property interest in fetal tissue); Sharon Nan Perley, Note, *From Control Over One’s Body to Control Over One’s Body Parts: Extending the Doctrine of Informed Consent*, 67 N.Y.U. L. REV. 335 (1992) (arguing for an extension of property rights in one’s body to include body parts, such as excised tissue and cells, and for an extension of the law of informed consent so that the patient may determine what happens to these parts).

³⁹ 17 U.S.C. § 102(a) (1994).

scope "pictorial, graphic, and sculptural works,"⁴⁰ 17 U.S.C. § 102(b) limits this definition by stating that "[i]n no case does copyright protection . . . extend to any idea . . . [or] concept," regardless of the form in which the idea or concept is "embodied."⁴¹ Thus, with respect to garments, the Copyright Act draws a distinction between actual garments, which are uncopyrightable public domain items, and graphic garment designs, which may be copyrightable expressions.⁴² The House Report on the Copyright Act further clarifies this statutory distinction between embodied design—the garment—and graphic design—the drawing of the garment—by classifying "ladies' dresses" under the rule in *Mazer v. Stein*⁴³ as uncopyrightable "industrial designs," not as copyrightable "applied arts."⁴⁴ This classification presupposes that

⁴⁰ *Id.* § 102(a)(5).

⁴¹ *Id.* § 102(b). For a discussion of the idea-expression dichotomy doctrine, see Judge Learned Hand's comments in *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489, 124 U.S.P.Q. (BNA) 154 (2d Cir. 1960) (discussing the difficulty in drawing a doctrinal distinction between idea and expression); and in *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930) (discussing the importance of applying the idea-expression dichotomy doctrine in light of its abstract purpose of striking a balance between competition and protection).

⁴² 17 U.S.C. §§ 101-102. See also *Whimsicality, Inc. v. Rubie's Costume Co., Inc.*, 891 F.2d 452, 455-56, 13 U.S.P.Q.2d (BNA) 1296 (2d Cir. 1989) (holding that clothes are useful articles and hence not copyrightable, even if they are (mis)described as "soft sculptures"); *Aldridge v. Gap, Inc.*, 866 F. Supp. 312 (N.D. Tex. 1994) (holding that clothes, as useful articles, are not copyrightable); *Jack Adelman, Inc. v. Sonners & Gordon, Inc.* 112 F. Supp. 187 (S.D.N.Y. 1934) (holding that a copyright on a graphic dress design gave the copyright holder the right to a monopoly over the drawing, but not over the actual garment); *Raenore Novelties, Inc. v. Superb Stitching Co.*, 47 N.Y.S.2d 831, 835 (N.Y. Sup. Ct. 1944) (holding that functional, utilitarian garment parts, such as placket closures, are not copyrightable under federal law nor otherwise protectable under state unfair competition laws).

Just as garments are outside the scope of the copyright laws, so are garment patterns (markers). See, e.g., *Beverly Hills Design Studio (N.Y.), Inc. v. Morris*, 126 F.R.D. 33, 37-38, 11 U.S.P.Q.2d (BNA) 1534 (S.D.N.Y. 1989) (noting that garment patterns—as opposed to design drawings—are "functional products not eligible for copyright protection" since they are "template type tools for use in the manufacturing process of making clothing"); *Kemp & Beatley, Inc. v. Hirsch*, 34 F.2d 291, 292 (E.D.N.Y. 1929) (holding that neither actual garments nor garment patterns present copyrightable subject matter).

Proposed amendments to the Copyright Act have repeatedly attempted to exclude from copyright protection designs "composed of three-dimensional features of shape and surface with respect to men's, women's, and children's apparel, including undergarments and outerwear." H.R. 2985, 98th Cong., § 902(e) (1983); H.R. 2706, 96th Cong., § 902(e) (1979).

⁴³ 347 U.S. 201 (1954).

⁴⁴ H.R. REP. NO. 94-1476, at 54-55 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5667-68 (citing *Mazer*, 347 U.S. 201). For an example of cases distinguishing between copyright protection and design patent protection under 35 U.S.C. § 171 see the *White v. Lombardy*

even if the actual garments themselves are not copyrightable, the graphic designs for such garments could be, provided, of course, they first meet the originality requirement of 17 U.S.C. § 102.⁴⁵

If a graphic design is also "useful," as defined by 17 U.S.C. § 101, then copyright protection will be limited. It will extend only to those "pictorial, graphic or sculptural" features of the design that can be "identified separately from, and are capable of existing independently of [its] utilitarian aspects."⁴⁶ This requirement of separability has proven difficult to apply in cases of embodied clothing designs, since clothes are by their nature useful items.⁴⁷

Dresses, Inc. line of cases, 40 F. Supp. 216 (S.D.N.Y. 1941) (invalidating a patent for dress design for want of invention); and 40 F. Supp. 548 (S.D.N.Y. 1941) (invalidating a patent for a dress design on the theory that combining old elements to come up with something new is not an invention for patent purposes).

⁴⁵ See *Soptra Fabrics Corp. v. Stafford Knitting Mills, Inc.*, 490 F.2d 1092, 180 U.S.P.Q. (BNA) 545 (2d Cir. 1974) (noting that only a "minimal quantum" of originality is required); *Millworth Converting Corp. v. Slifka*, 276 F.2d 443, 125 U.S.P.Q. (BNA) 506 (2d Cir. 1960) (holding that a "modest requirement" of originality is needed).

⁴⁶ "[T]he design of a useful article, as defined in this section, shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article." 17 U.S.C. § 101 (1994). See also *Masquerade Novelty, Inc. v. Unique Indus., Inc.*, 912 F.2d 663 (3d Cir. 1990) (holding that the separability test only applies to articles that are first deemed "useful" under 17 U.S.C. § 101).

⁴⁷ A test for determining separability that is based on the designer's creative process rather than on the physical nature of the item in question has been proposed by Robert C. Denicola. Robert C. Denicola, *Applied Art and Industrial Design: A Suggested Approach to Copyright in Useful Articles*, 67 MINN. L. REV. 707 (1983). See *Brandir Int'l Inc. v. Cascade Pacific Lumber Co.*, 834 F.2d 1142 (2d Cir. 1987) (adopting the Denicola test for the Second Circuit); *Nat'l Theme Prods., Inc. v. Jerry B. Beck, Inc.*, 696 F. Supp. 1348, 1353 (S.D. Cal. 1988) (adopting the Denicola test in the Ninth Circuit "to the extent it requires one to look to an artist or designer's creative process, and the decisions going into that process, in creating a useful article").

For criticisms of the Denicola test, see Ralph S. Brown, *Design Protection: An Overview*, 34 UCLA L. REV. 1341 (1987) (noting concern with the "practicality" of the Denicola test because it leaves "too much room for self serving declarations of aesthetic aims"); Shira Perlmutter, *Conceptual Separability and Copyright in the Designs of Useful Articles*, 37 J. COPYRIGHT SOC'Y U.S.A. 339, 372-75 (1990) (arguing that the Denicola test's reliance on the creative process can be found nowhere in statutory language, legislative history, or judicial interpretation); Raymond M. Polakovic, *Should the Bauhaus be in the Copyright Doghouse? Rethinking Conceptual Separability*, 64 U. COLO. L. REV. 871 (1993) (arguing that the Denicola test is the same as requiring courts to differentiate between "art" and "not art"); Malla Pollack, *A Rose is a Rose is a Rose—But is a Costume a Dress? An Alternative Solution in Whimsicality, Inc. v. Rubie's Costume Co.*, 41 J. COPYRIGHT SOC'Y USA 1, 10-18 (1993) (discussing the limitations of conceptual separability tests—including Denicola's—in

For instance, in a case involving belt buckles, one trial court granted summary judgment in favor of the alleged defendant-infringer on the ground that although a belt buckle may be decorative, it is neither jewelry, which is copyrightable,⁴⁸ nor the proper subject matter of copyright law under the separability test. The court reasoned that a belt buckle's intrinsic function is utilitarian,⁴⁹ and therefore, its decorative aspects cannot exist on their own.⁵⁰ Likewise, in a case involving a modification of a milliner's hat design, the court noted that while the design was original in the abstract sense of the word, the design was too slight a modification of a public domain item—the idea of the hat—to be the proper subject matter of copyright protection.⁵¹ In both cases, these courts struggled with deciding where the potentially protectable design ended and the unprotectable utilitarian item began.

Even in a situation where a design is original *and* more obviously artistically separable from the utilitarian article than the above courts regarded the belt and hat designs, the intent of Congress is still to offer only limited protection to the designer.⁵² In *Kieselstein-Cord v. Accessories by Pearl Inc.*, the belt design case noted above, the Second Circuit overturned the lower court's grant of summary judgment while still noting that, as a general matter,

the area of costume designs).

⁴⁸ 17 U.S.C. §§ 101-102.

⁴⁹ *Kieselstein-Cord v. Accessories by Pearl, Inc.*, 489 F. Supp. 732, 735, 206 U.S.P.Q. (BNA) 439 (S.D.N.Y.), *rev'd*, 632 F.2d 989, 208 U.S.P.Q. (BNA) 1 (2d Cir. 1980). *Cf.* *Animal Fair, Inc. v. AMFESCO Indus., Inc.* 620 F. Supp. 175 (D. Minn. 1985) (holding that the exterior design of bear paw slippers is separable and thus copyrightable), *aff'd mem.*, 794 F.2d 678 (8th Cir. 1986). The fact that the lower court's decision in *Kieselstein-Cord* was reversed on appeal remains consistent with the illustration offered above. *See infra* notes 53-61 and accompanying text.

⁵⁰ *Kieselstein-Cord*, 489 F. Supp. at 736 (citing 17 U.S.C.A. § 101 and 37 C.F.R. § 202.10 (1977) the applicable regulation at the time of the belt buckles' creation).

⁵¹ *Millinery Creator's Guild, Inc. v. F.T.C.*, 109 F.2d 175, 177 (2d Cir. 1940), *aff'd*, 312 U.S. 469 (1941).

⁵² *See* 17 U.S.C. § 101; H.R. REP. NO. 94-1476, at 50-51 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5663-64. *See also* Denicola, *supra* note 47 (discussing the legislative history behind offering only limited protection for useful articles); J.H. Reichman, *Design Protection in Domestic and Foreign Copyright Law: From the Berne Revision of 1948 to the Copyright Act of 1976*, 1983 DUKE L.J. 1143 (1983); Handler, *supra* note 10 (arguing that although Congress intended to protect only those designs that have independently existing artistic merit, courts have inappropriately overextended protection to mass-produced, three dimensional items by misapplying the idea-expression distinction).

"the basic requirements of originality and creativity . . . would take the vast majority of belt buckles wholly out of copyrightability."⁵³ The appellate court's operative presumption was that most belt buckles are not original enough to be copyrightable, a presumption that also motivated the trial court's decision. Thus, the two opinions were doctrinally consistent despite opposite results. Nevertheless, the Second Circuit found *Kieselstein-Cord's* buckle designs copyrightable, but only *after* the appellant-designer had successfully rebutted the presumption of ordinariness. Hence, the basic presumption of non-copyrightability remained the rule; moreover, as the Second Circuit conceded, the presumption would still decide most cases. The Second Circuit's main disagreement with the lower court, however, was over whether the presumption had been rebutted under the facts.⁵⁴

While the belt designs in question were ultimately granted protection, the Second Circuit's holding in *Kieselstein-Cord* remains consistent with the general presumption against extending copyright protection to embodied clothing design. The justification for denial of protection to embodied garments is that an actual garment's artistic merits are typically indistinguishable from its utility.⁵⁵ Thus, what distinguished *Kieselstein-Cord's* "Winchester" and "Vaquero" belt buckles from other non-copyrightable buckles was not that they were like embodied designer garments, or even embodied *haute couture* garments, which are not copyrightable once they are marketed, but rather that at least two of the three judges on the Second Circuit were convinced that the buckles were also "works of art" as defined by 17 U.S.C. § 102 and its corresponding regulations.⁵⁶ Specifically, two of the three sitting judges likened the particular buckle designs to copyrightable sculptured and artistic items of jewelry, rather than to mere belt buckles, which are not copyrightable.⁵⁷

In addition, the appellate court noted that the case was "on a razor's edge of copyright law,"⁵⁸ suggesting that the problem was

⁵³ *Kieselstein-Cord*, 632 F.2d at 994.

⁵⁴ *Id.*

⁵⁵ See 17 U.S.C. §§ 101-102; *Mazer v. Stein*, 347 U.S. 201 (1954).

⁵⁶ *Kieselstein-Cord*, 632 F.2d at 992.

⁵⁷ *Id.* at 994.

⁵⁸ *Id.* at 990.

ultimately one of line-drawing. But the court's actual analysis was more contextualizing than a mere line-drawing approach would allow. The issue for the court was whether the belt buckles rose to the level of art; the answer to that question was based on a blend of factors, most of which were analytically detectable only in hindsight. From the designs' inception, the designer had labeled the buckles "sculpture."⁵⁹ However, since the designer's own designation ought not solely determine whether something rises to the level of a "work of art" under the copyright regulations,⁶⁰ additional evidence was required. The designer responded by showing that the belts were expensive, ranging from \$147.50 to \$6,000 wholesale, that consumers used them as "necklaces" rather than as mere belt buckles, that the designer had gained critical acclaim, and finally, that the designer's post-litigation gift of two belt buckles to the Metropolitan Museum of Art for its permanent collection was accepted.⁶¹ Together these factors illustrated that the designer believed his work was art and that his belief was affirmed by at least two distinct communities, consumers and fashion critics. Had this evidence of belief bolstered by affirmation not been introduced, Kieselstein-Cord's designs would have been treated as ordinary, but expensive, belt buckles, and the design, because it was inseparable from the functional buckle, would have remained outside the scope of copyrightability, as embodied clothing designs are generally.

Alternatively, had the belt design been something "printed on or applied" to the metal, as opposed to inherent in the metal belt buckle itself, then the two-dimensional design drawing would have been protectable.⁶² In cases where designs are printed or applied to the useful items, the copyright monopoly is allowed. But the protection extends exclusively to the artistically separable element of the article (*i.e.*, the design), not to its over-all configuration.⁶³

⁵⁹ *Id.* at 991.

⁶⁰ See Registration to Claims of Copyright: Pictorial, Graphic, and Sculptural Works, 37 C.F.R. § 202.10 (1996) (noting that registrability is not "affected by the intention of the author as to the use of the work").

⁶¹ *Kieselstein-Cord*, 632 F.2d at 991.

⁶² H.R. REP. NO. 97-1476, at 54-55 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5663-64; 37 C.F.R. § 202.10 (1996).

⁶³ H.R. REP. NO. 97-1476, at 54-55.

Under this rule, a portrait engraving of Beethoven, Bach, and Brahms silkscreened on a sweatshirt was held to be the proper subject matter of copyright law, while the idea of a sweatshirt was not.⁶⁴ The design of the composers was viewed as conceptually separable from the t-shirt, and therefore subject to independent copyright analysis and protection.⁶⁵

Because of the analytical difficulty posed by the separability test, analogies between clothing works and architectural works have been drawn as clarification. These proposals are primarily based on pre-Berne Convention domestic legislation,⁶⁶ though the post-Berne Architectural Works Protection Act (AWPA) arguably also serves to clarify, rather than compromise the analogy.⁶⁷ Proponents argue that clothing works ought to be treated like architectural works. The parallel is seen as apt since the phrase "architectural works" is statutorily defined to encompass a building embodied in "any tangible medium of expression, including a building, architectural plans, or drawings."⁶⁸ Before 1990, the copyright statute expressly protected "diagrams, models, and technical drawings, including architectural plans,"⁶⁹ but it only implicitly protected structures (buildings), and then only those elements that were conceptually separable from the structure's utilitarian function.⁷⁰ The AWPA, on the other hand, explicitly extends protection to structures,⁷¹ regardless of whether they meet

⁶⁴ *Eagle-Freedman-Roedelheim Co. v. Allison Mfg. Co.*, 204 F. Supp. 679, 133 U.S.P.Q. (BNA) 357 (E.D. Pa. 1962).

⁶⁵ *Id.*

⁶⁶ Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended in scattered sections of 17 U.S.C.).

⁶⁷ Architectural Works Copyright Protection Act, Pub. L. No. 101-650, §§ 701-706, 104 Stat. 5133 (codified as amended at 17 U.S.C. §§ 101-102, 106, 120, 301 (1994)). For a work proposing this analogy, see Leslie J. Hagin, *A Comparative Analysis of Copyright Laws Applied to Fashion Works: Renewing the Proposal for Folding Fashion Works into the United States Copyright Regime*, 26 TEX. INT'L L.J. 341 (1991) (proposing that fashion works, like architectural works, be given protection under the Copyright Act). See also *Fashion Originators' Guild of Am., Inc. v. F.T.C.*, 114 F.2d 80 (2d Cir. 1940) (describing an industry practice meant to deter design piracy in the marketplace), *aff'd*, 312 U.S. 457 (1941).

⁶⁸ 17 U.S.C. § 101 (1994).

⁶⁹ 17 U.S.C. § 101 (1988).

⁷⁰ *Id.* § 102.

⁷¹ 17 U.S.C. § 102(a)(8) (1994); *id.* § 101 (providing that the term architectural work "includes the overall form as well as the arrangement and composition of spaces and elements in the design").

the separability test.⁷² However, it just as explicitly excludes from protection "individual standard features" of the otherwise protected structure.⁷³ The House Report justified this change by noting that "architecture is not unlike poetry," and therefore, "the design of a work of architecture is a 'writing' under the Constitution and fully deserves protection under the Copyright Act."⁷⁴

Proponents of the comparison argue that if this broad definitional protection clarified the law of architectural works, it could work equally well to clarify the law of fashion or garment works.⁷⁵ However, in order to usher in the legal change, garment works first would have to be re-defined as encompassing *any* tangible medium of expression, including drawings, patterns, and actual garments.⁷⁶

While architectural plans, drawings, and now, post-1990 structures are clearly copyrightable,⁷⁷ standard common aspects of these works are not. In any case, under either the previous or the current rule, protection covers the graphic plan, maybe even the physical structure, but stops short of protecting ordinary, "individual standard features."⁷⁸ Proponents agree that this limitation makes analogizing the law of garment works to the law of architectural works a modest proposal, one in line with Congress's original intent to offer limited protection in special areas that border art and industry. Under the proposed change, garment designs, as "garment works," would be copyrightable; protection of embodied

⁷² H.R. REP. NO. 101-735, at 21 (1990).

⁷³ 17 U.S.C. § 101.

⁷⁴ H.R. REP. NO. 101-735, at 12-13 (1990). See also 37 C.F.R. § 202.11(d)(2) (1996) (excluding from registrability "standard configurations of spaces, and individual standard features, such as windows, doors, and other staple building components").

⁷⁵ See, e.g., Hagin, *supra* note 67 (proposing that garment works, like architectural works deserve protection); Schmidt, *supra* note 20 (stating that protection of garment designs would produce the same benefits as protecting architectural works). Cf. Deborah Squiers, *Copyright Claims Rejected for Exercise Clothes Patterns*, N.Y. L.J., July 28, 1989, at 1 (describing a case in which this analogy was proposed but rejected by the judge as "off the mark").

⁷⁶ Clothing is currently included in the definition of a "useful article" under 17 U.S.C. § 101.

⁷⁷ 17 U.S.C. § 102(a)(8) (1994). Structures that were built before the passage of the ACPA (1990) are still subject to the separability test.

⁷⁸ 37 C.F.R. § 202.11(d)(2) (excluding "staple building components" from registrability). See also 17 U.S.C. § 101 (defining "architectural work").

designs would be the norm, but extended protection would not cover "individual standard aspects" of any garment. Thus, garments of *haute couture* and belt buckles that rise to the level of sculptured, critically acclaimed "works of art" would be protected, whereas "individual standard features" of the garment, presumably trouser legs, belt loops, and the like, would remain open for all to use.⁷⁹ Spiral sleeves might give rise to the new "razor's edge" in copyright law, but neoprene waders⁸⁰ or improved styles of industrial clothing, for example, might be protected under either copyright law, depending upon their originality, or under patent law, depending upon their novelty.

On its face, this proposal, though seemingly emulating the Architectural Works Protection Act, may be no more than an embrace of the appellate court's rationale in *Kieselstein-Cord*.⁸¹ Under its terms, only uniquely designed garments would receive extended protection, whereas the vast majority of typically functional garments, like pants, would not. Pants would continue to be treated as they are under the current rule on garments—as outside the scope of copyright law either because of their utilitarian and functional quality⁸² (the separability rationale); the lack of artistic awareness in the process by which they are created (the Denicola test);⁸³ or because they are made up entirely of individual standard features (the Architectural Works Protection Act limitation).⁸⁴

Despite its apparent workability, analogizing garment works to architectural works has been criticized on three broad grounds. The first criticism is based upon procedural grounds related to the feasibility of giving notice of copyright on garments.⁸⁵ The second

⁷⁹ See, e.g., Schmidt, *supra* note 20 (proposing a special copyright for garment designs, limited in scope and term, with its own enforcement and royalty provisions).

⁸⁰ See *infra* note 206 (citing a patent issued for neoprene waders having a seamless crotch).

⁸¹ *Kieselstein-Cord v. Accessories by Pearl, Inc.*, 632 F.2d 989 (2d Cir. 1980).

⁸² See *supra* notes 39-44 and accompanying text (discussing differing treatment of actual garment and graphic garment designs).

⁸³ See *supra* note 47 (discussing the Denicola test for determining separability).

⁸⁴ See *supra* notes 67-73.

⁸⁵ Early copyright acts set out formalities that were prerequisites to federal protection. See, e.g., 17 U.S.C. § 10 (1909) (requiring publication with notice). The 1976 Act eliminated those requirements, by extending protection to the point of creation, when the creation was "fixed in any tangible medium of expression." 17 U.S.C. § 102(a) (1994). Notice requirements are no longer mandatory, effective March 1, 1989. See Berne Convention Implementa-

criticism, based on pre-AWPA law, cites substantive grounds related to applying the tests of originality and the idea-expression distinction to garments, which by their nature are consistently more "standard" than buildings. This criticism applies in a post-AWPA context as well, but there the terms of the debate would center around the meaning of the phrase "individual standard features." The issue, as conceptualized in *Kieselstein-Cord*, would be argued as a straightforward matter of whether an individual clothing designer could successfully rebut the presumption of ordinariness by introducing evidence of critical acclaim.⁸⁶ If this latter approach were allowed, the fear is that courts would then be forced to draw legal distinctions between high and low (or ordinary) fashion on the theory that they could extend copyright protection to the *haute couture* garment, but not to the vast majority of ordinary garments. The third criticism cites policy grounds related to free trade.⁸⁷

While these criticisms of the analogy offer compelling arguments against its application, the garment/architectural works analogy, even if applied in this context, would not justify the extension of copyright protection to gusseted garments. This is particularly true with respect to gusseted lower-body garments (pants), whether in graphic or embodied form. First, gusseted pants, like the milliner's hat and the sweatshirt, are already in the public domain and are therefore outside the scope of copyright law.⁸⁸ Hence, such garments are not now protectable on the basis of their unorigin-

tion Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (codified as amended in scattered sections of 17 U.S.C.). Thus this concern, theoretically, should no longer carry legal significance.

⁸⁶ See *supra* notes 52-57 (discussing rebuttable presumption of ordinariness in *Kieselstein-Cord*).

⁸⁷ See, e.g., Handler, *supra* note 10 (discussing all three criticisms).

⁸⁸ See, e.g., *Jaccard v. R.H. Macy & Co.*, 37 N.Y.S.2d 570 (N.Y. App. Div. 1942) (holding that, in the absence of unfair competition, defendant had the right to copy a wedding dress design and attach plaintiff-designers name to the pattern, since once it is offered for sale the design became part of public domain); *Samuel Winston, Inc. v. Charles James Servs., Inc.*, 159 N.Y.S.2d 716, 718, 111 U.S.P.Q. (BNA) 359 (N.Y. Sup. Ct. 1956) (holding that actual, three dimensional designs and fashions, "once displayed or sold, are forthwith relegated to the realm of public domain, available to all who care to adopt them, with accompanying forfeiture of any claim against the copyists"). For an analysis of the difficulties of determining when a garment is published for public domain purpose, see Wehringer, *supra* note 20.

ality. Second, in the unlikely event that the gusset were to be considered an original "application" to the public domain pant garment,⁸⁹ the gusset has no separable pictorial, graphic, or sculptural qualities,⁹⁰ since it is an intrinsically functional and often hidden aspect of a garment.⁹¹ This means that the gusset would not be copyrightable under the current separability test primarily because it has no life, and certainly no poetic life, independent of the garment that lends it context. Third, even if clothing works were to be treated like architectural works, copyright protection would not be available to most gusseted garments (like gusseted pants) since they are arguably made up entirely of common "standard features."⁹² In other words, the gusset is as ordinary as the vast majority of belt buckles, pant legs, shirt sleeves, window frames, or door knobs, albeit oddly so. It would not be eligible for copyright protection even in the unlikely event that Congress decided to categorically treat fashion designs or works as it treats architectural works. Moreover, the gusset should not be eligible for copyright protection since protecting, and thus privatizing, the gusset would not further explicitly stated Constitutional goals of "stimulat[ing] excellence in design, [and] thereby enriching our public environment."⁹³

In conclusion, while one may analogize between architectural works and garment works, the two are substantially different in

⁸⁹ See, e.g., *Millinery Creator's Guild, Inc. v. F.T.C.*, 109 F.2d 175, 177 (2d Cir. 1940) (holding that what passes in the trade for an original hat or dress design cannot be copyrighted since an "original" creation in these industries is "too slight a modification of a known idea to justify the grant by the government of a monopoly to the creator"), *aff'd*, 312 U.S. 469 (1941); *Gardenia Flowers, Inc. v. Joseph Markovits, Inc.*, 280 F. Supp. 776, 157 U.S.P.Q. (BNA) 685 (S.D.N.Y. 1968) (holding that a flower corsage that duplicated an arrangement commonly used in the flower industry was not "original" and, therefore, not copyrightable).

⁹⁰ The lack of these qualities is to be contrasted with "selected works of architecture[—]those containing elements physically or conceptually separable from their utilitarian function." H.R. REP. NO. 101-735, at 11 (1990).

⁹¹ See *infra* Part II.C.2 (discussing and illustrating early patents incorporating the gusset).

⁹² Architectural Works Copyright Protection Act, Pub. L. No. 101-650, § 702(a), 104 Stat. 5133 (codified at 17 U.S.C. § 101 (1994)) (excluding "individual standard features" from the definition of an architectural work). See also, Telephone Interview with Victoria Garrison, Pattern Maker (Aug. 14, 1996) (noting, in a way consistent with AWP language, that the gusset is defined in her field as a piece of fabric inserted into a body of fabric; the diamond shaped gusset is far and away considered the standard shape of a gusset).

⁹³ H.R. REP. NO. 101-735, at 13 (1990).

the practical sense that most garments are more akin to uncopyrightable functional buildings like photo-developing kiosks⁹⁴ than they are to clearly copyrightable monuments.⁹⁵ This is especially true of gusseted garments. More generally, however, courts have repeatedly held that garment designs, whether they be designer dresses or discount jeans, become public domain items once they are offered for sale to the public.⁹⁶ They are not like "jewelry" and hence do not implicate the *Kieselstein-Cord* approach that allows designers to rebut the presumption of ordinariness in the name of art. At the moment of sale, garment designs presumptively become part of the vast majority of common stock garments, such as belt buckles, shoes, and the like, and there they remain.

Therefore, although treating garment works like architectural works would serve the legitimate purpose of giving designers who use gussets some control over their work, this monopoly would come at a high social cost. First, it would not advance the abstract Constitutional goals of promoting design excellence, or even democracy. Second, extending copyright protection to embodied gusseted garments would complicate notice requirements since practically (though not legally), garments would have to be visibly marked with copyright notification in order to easily impart information to potential licensees.⁹⁷ Third, it would put courts in the position of deciding which common (embodied) clothing designs are "original" enough to emerge from the pool of common stock designs, or alternatively, which aspects can be designated as something above the standard ordinary aspects of the garment. Relatedly, it would leave it for courts to decide what evidence is

⁹⁴ Although not held copyrightable on utilitarian grounds, certain design-related aspects of these sorts of commercial buildings are protectable under the Lanham Act. 15 U.S.C. § 1127 (1994). See, e.g., *Fotomat Corp. v. Cochran*, 437 F. Supp. 1231, 194 U.S.P.Q. (BNA) 128 (D. Kan. 1977) (holding that the non-functional aspects of a kiosk were protectable in a case where there was persuasive evidence linking public confusion with the "distinctive," "arbitrary," "design-related" aspects of the kiosk); *Fotomat Corp. v. Photo Drive-Thru, Inc.*, 425 F. Supp. 693 (D.N.J. 1977) (refusing to preliminarily enjoin defendant's use of a kiosk structure on the ground that the kiosk was functional, and thus not protectable as intellectual property). It is important to note that these cases predate the 1990 Architectural Works Protection Act.

⁹⁵ See, e.g., *Polakovic*, *supra* note 47 (offering the example of the York Cathedral).

⁹⁶ See, e.g., *Samuel Winston, Inc. v. Charles James Servs.*, 159 N.Y.S.2d 716 (N.Y. Sup. Ct. 1956) (holding that actual fashions put on sale enter the public domain).

⁹⁷ See *supra* note 85.

sufficient to rebut the presumption of ordinariness.⁹⁸ This, of course, would force courts into a position they typically resist—deciding the difference between art and industry.⁹⁹

B. THE GUSSET'S OWNABILITY UNDER PATENT LAW

As discussed above, the gusset is not ownable under copyright law because it does not meet either the low originality requirement or the severability requirement. Nor is the gusset innovative enough, on its own, to justify the issuance of a monopoly under patent law.¹⁰⁰ 35 U.S.C. § 102 requires that items be novel before a patent monopoly will issue.¹⁰¹ Novelty has not been statutorily defined except in the most general of terms—a “novel” invention is a “new and useful” one—making novelty a concept whose particulars are decided by courts.¹⁰² But while words like “novelty” and, by corollary, “invention” give courts a wide grant of power to forge socially relevant and context-dependent definitions, 35 U.S.C. § 102 sets a firm statutory boundary by drawing a bright line between privately ownable property, as signified by novelty, and already-owned or public domain property, as signified by the absence of novelty. Under this provision, a novel invention is one that was not previously “known or used by others in this country,” or “patented or described in a printed publication in this or a foreign country,” or otherwise in the public domain.¹⁰³ A novel invention is one that has not been previously described in prior art.¹⁰⁴

But even where there is no identical, or in the case of clothing designs, salient¹⁰⁵ prior art to block the issuance of a utility pat-

⁹⁸ See, e.g., *Trifari, Krussman & Fishel v. Charel Co.*, 134 F. Supp. 551, 107 U.S.P.Q. (BNA) 48 (S.D. N.Y. 1955) (refusing to decide whether the jewelry in question is “junk” or “art”).

⁹⁹ *Id.* at 553.

¹⁰⁰ 35 U.S.C. § 102 (1994) (setting out conditions of patentability and novelty).

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* See also *White v. Lombardy Dresses, Inc.*, 40 F. Supp. 548 (S.D.N.Y. 1941) (modifying the requirement that prior art read identically on the invention by holding that in the case of a common clothing design only the “the salient elements” of the design need read on to block the issuance of a patent).

¹⁰⁵ *Lombardy Dresses*, 40 F. Supp. at 550-51.

ent, there is yet another test for determining whether the novelty criteria has been met—the test of obviousness.¹⁰⁶ Patent law requires a higher degree of originality than copyright law, so the absence of prior art alone is not enough to justify the grant of a utility patent monopoly;¹⁰⁷ an invention must also be non-obvious to a person with knowledge of the field.¹⁰⁸ A comparison between patent and copyright law helps to illustrate the point. An “obvious” invention is not novel enough to be patented even if it has no prior art, whereas an expression may be copyrightable even if there are a multitude of related, nearly identical expressions that are already protected.¹⁰⁹

The “knowledge of those with ordinary skill in the art” test makes apparent that the obviousness test, or as it is sometimes cast, the non-obviousness test, is a socially dependent, fact-based, contextualizing method to determine if an invention is “new,” if not “new and useful.”¹¹⁰ A “new” invention is one for which there is no prior art, and one that “person[s] having ordinary skill in the art” have not anticipated, despite consistent familiarity with the art, its requirements, or its deficiencies and possibilities.¹¹¹ A new invention is one that emerges because of a surge of intellectual activity and attention on the part of the person who deserves the

¹⁰⁶ 35 U.S.C. § 103.

¹⁰⁷ *Id.* § 154.

¹⁰⁸ *Id.* § 103.

¹⁰⁹ See, e.g., *Baker v. Selden*, 101 U.S. 99, 102 (1879) (“The novelty of the art or thing described or explained has nothing to do with the validity of the copyright”); Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965 (1990) (discussing *Baker v. Selden* and its progeny vis à vis the idea of the public domain).

¹¹⁰ See Hughes, *supra* note 4 (discussing whether “non-obviousness,” which requires that there be an “advance” over existing technology, also implicitly requires that there be “new value” in the item; and arguing that there is an implicit “value added” requirement under 35 U.S.C. § 103). See also James Otieno-Odek, *Public Domain in Patentability After the Uruguay Round: A Developing Country's Perspective with Specific Reference to Kenya*, 4 TUL. J. INT'L & COMP. L. 15, 27 (noting that the GATT TRIPs Agreement adds a value added requirement by providing that “patents shall be available for any inventions whether products or processes in all fields of technology provided they are new, involve an inventive step, and are industrially applicable” quoting GATT Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), (Apr. 15, 1994), art. 27(1)). Cf. 2 PETER D. ROSENBERG, *PATENT LAW FUNDAMENTALS* §§ 8.03, 8.06 (1996) (noting that as a general rule, there is no implicit value added requirement for 35 U.S.C. § 101, though there are strict utility requirements in specialized areas, such as the patenting of chemical compounds).

¹¹¹ 35 U.S.C. § 103 (1994).

title “inventor”—a surge that is welcomed by others in the field.

Since prior art and knowledge in the field determine whether an invention will be considered novel for patent purposes, the gusset's origins, both European and American, are relevant to the question of its patentability under United States law. Unfortunately, evidence of the gusset's prior historic use is more oral than written. Although the gusset has been used around the world, particularly in Europe for at least half a millennium, there is little *documentary* evidence of its longstanding use.¹¹² Documentary evidence about the gusset does exist, however, for late nineteenth and twentieth century America. From evidence found in museums, corporate archives, and in United States Patent and Trademark Office records, it is apparent that the gusset has been consistently defined first, as a functional item, and second, as a common stock or public domain item. But while the gusset is in the public domain, it has been incorporated into patented garments, thus creating some question about its status as privately ownable property. The next section analyzes this apparent contradiction by examining two related themes. The first theme is how the gusset has come to be defined as a matter of prior art. The second theme is whether, in light of the gusset's historical definition, it has been treated as privately ownable under patent law.

C. PRIOR USE—DEFINING THE GUSSET FOR PATENT LAW PURPOSES

The gusset, as a descriptive word, came into use as early as 1412.¹¹³ Suits of armor used gussets to allow for movement and ventilation.¹¹⁴ Medieval clothing typically used the gusset for reasons related to the then rudimentary field of pattern making.¹¹⁵ In this use, the gusset served as a decorative way to add

¹¹² Telephone Interview with Melissa Leventon, Textile Curator, The M.H. deYoung Museum (June 8, 1996).

¹¹³ THE OXFORD ENGLISH DICTIONARY 966 (2d ed. 1989). See, e.g., NORMA R. HOLLEN, PATTERN MAKING BY THE FLAT-PATTERN METHOD (6th ed. 1987).

¹¹⁴ In this context, the gusset was “the piece of flexible material introduced to fill up a space at the joints between two adjacent pieces of mail.” See THE OXFORD ENGLISH DICTIONARY, *supra* note 113.

¹¹⁵ Garrison Interview, *supra* note 92. See also 1 HARPER HOUSE PATTERN CATALOGUE (1995) (offering folkwear patterns for sale, many of which include gusseted garments, and providing an extensive bibliography for authentic costume design).

color or different fabric textures to a garment. By 1570 the use of gussets had changed, as had the gusset, which had become defined as "a triangular piece of material let into a garment to strengthen or to enlarge some part, especially in order to afford ease in movement."¹¹⁶ In the seventeenth, eighteenth, and nineteenth centuries, the gusset appeared as a common element of breeches and short pants. And by the late nineteenth century, the gusset was as ubiquitous as breeches themselves. Born of necessity in the suit of armor, the gusset survived in the breeches that men (and later women) wore while riding horses.¹¹⁷

Although the gusset has been in common use since the fifteenth century, its heyday was in the nineteenth century when it was widely used in trousers and breeches.¹¹⁸ In all of its incarnations the gusset's use was primarily functional, not ornamental. Indeed, so functional that over this extensive historic period the gusset transcended private ownership and, in the American context, became a part of the public domain. In the late nineteenth and early twentieth century clothing designers incorporated it into novelty garments for which they eventually acquired patent protection.¹¹⁹ By the late twentieth century the gusset was once again used in everyday trousers and shorts as a public domain item. Although the gusset has had a global history, this Article looks at the gusset in its American embodiment, especially during that period when it became "depicted" for prior use purposes under 35 U.S.C. § 103.¹²⁰

1. *Published Prior Art: The Gusset in Printed Publications Describing Functional and Novelty Wear.* The gusset has had an extensive history. In the American context the gusset is tied to the

¹¹⁶ Garrison Interview, *supra* note 92.

¹¹⁷ The first modern use of the gusset in trousers is difficult to trace, though it was related to the prominence of the horse as a mode of transportation. That is, when breeches buttoned at the knee, it was the gusset that allowed one to extend one's leg up to the stirrup so that one could mount and straddle a horse.

¹¹⁸ See generally CLOTH AND CLOTHING IN MEDIEVAL EUROPE: ESSAYS IN MEMORY OF PROFESSOR E.M. CARUS-WILSON (N.B. Harte & K.G. Ponting eds., 1983); CAROLYN G. BRADLEY, A HISTORY OF WORLD COSTUME (1964); BLANCHE PAYNE, A HISTORY OF COSTUME: FROM THE ANCIENT EGYPTIANS TO THE TWENTIETH CENTURY (1965); PHILIPPE PERROT, FASHIONING THE BOURGEOISIE: A HISTORY OF CLOTHING IN THE NINETEENTH CENTURY (1994).

¹¹⁹ See *infra* Part II.C.2 (discussing and illustrating early patents incorporating the gusset).

¹²⁰ 35 U.S.C. § 103 (1994).

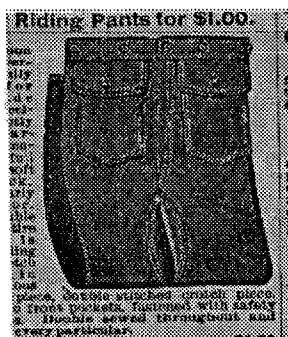
history of and historicization of the American cowboy. Cowboys needed long, durable canvas pants, not breeches; and they needed these pants to be both snug along the legs (to prevent excess material from getting caught in saddle stirrups and girth straps) and yet free enough to allow for ease of movement in mounting, riding, and dismounting horses.¹²¹ They also needed pants that were inexpensive. In 1902 the Sears, Roebuck Catalogue, which termed itself the "Cheapest Supply House on Earth," offered "Cavalry Riding Pants" for \$1.00.¹²² Cavalry Riding pants were made out of buckskin color duck, and the "entire back half," though apparently not gusseted *per se*, was doubled and "extend[ed] between the crotch."¹²³ The 1902 Sears catalogue text distinguished between what it called "patent items" and, by implication, non-patent (or public domain) items. There was no mention of a patent in relation to the Cavalry Riding pant, thereby suggesting that the Sears, Roebuck Company manufactured its quasi-gusseted pant as a public domain garment.¹²⁴

In the early 1940s, the Lee Apparel Company manufactured bib overalls and dungarees with a gusset.¹²⁵ Lee Apparel has not yet

¹²¹ See generally, WILLIAM GILCHRIST & ROBERTO MANZOTTI, *CULT: A VISUAL HISTORY OF JEANS WEAR, AMERICAN ORIGINALS* (1992); *THE JEANS* (Kesaharu Imai ed., 1991) (providing a history of jeans in Japanese text); *THIS IS A PAIR OF LEVI JEANS* (Downey et al. eds., 1995) (offering material from the Levi Strauss & Co. Archives).

¹²² *THE JEANS*, *supra* note 121, at 75 (reproducing SEARS, ROEBUCK & CO., CATALOGUE NO. 111, at 1154 (1902)). While the cavalry pants went for \$1.00, the catalogue itself sold for nearly that much, at 50¢. *Id.*

¹²³ *Id.*



Id. See also, *Cavalry Pants*, HARPER HOUSE PATTERN CATALOGUE, *supra* note 115, at 69.

¹²⁴ *THE JEANS*, *supra* note 121, at 75 (reproducing SEARS, ROEBUCK & CO., CATALOGUE NO. 111, at 1154 (1902)).

¹²⁵ Telephone Interview with Len Larson, Archivist and Director of Apparel Design and Technical Services, Lee Apparel Co. Inc. (Mar. 5, 1996).

set up a corporate archive, so these garments are not available for inspection. However, printed pictures of similar gusseted bib overalls, circa 1940, show the gusset extending to a point, mid-thigh.¹²⁶ They also show, by fair inference, that the length of the gusset from front to back was at least three times shorter than the length of the gusset from side-to-side. In addition to manufacturing the gusseted bib overall, Lee Apparel sold the "famous u-shaped saddle crotch jean."¹²⁷ This garment, though not gusseted, worked like a gusseted garment. Cut with additional fabric in the upper thigh area, it gave its wearer extra room in an otherwise tight fitting garment. This augmentation, though innovative, was not patented either as a design or as a cost cutting manufacturing process. To the contrary, augmenting a jean with additional fabric added to the cost of goods because it took more time to cut and sew the augmented u-shaped saddle jean than it did to sew its unaugmented cross-seamed jean counterpart.¹²⁸

Also in this period, the relationship between cost, preference, and retail availability of lower priced cross-seamed garments became

¹²⁶ See THE JEANS, *supra* note 121, at 80-83 (picturing Stockman Farmer Supply Company brand and Montgomery Ward brand products).

¹²⁷



Id. at 101.

¹²⁸ See Larson Interview, *supra* note 125 (discussing Lee Apparel's manufacturing of overalls and dungarees with a gusset); Interview with Seymour Jaron, Owner and President, SJ Mfg. Co., San Francisco, Cal. (Jan. 11, 1996) (discussing manufacturing processes for lower body garments and historical aspects of manufacturing).

firmly established. Working cowboys preferred Wrangler Jeans to Lee and Levi's Jeans, whereas "dude ranchers" were more inclined to purchase Lee or Levi's brands.¹²⁹ This division in the market influenced the rise of what would become the hegemony of the cross-seam. Cowboys needed a low priced garment, which meant that they preferred jeans that were free of cost raising features, like gussets or extra-fabric augmentation. At the same time the higher bracket jeans were increasingly marketed for "dude ranchers," using the cowboy motif. One 1930 Levi Western Wear wholesale catalogue, for instance, explicitly made reference to historic motifs.¹³⁰ It characterized its jeans vaguely as the jeans of the "men who built the West, and the sons of their sons, busy shaping this West into a monumental Empire," an image in line with Levi's double horse, gold-digger trademark.¹³¹ But it did so within the context of a "Western Wear" advertising campaign in which the American cowboy was the central image. Thus, while cowboy preference influenced jean manufacturers to rely on the cross-seam as standard construction at the low end of the retail market, the historicization of the cowboy played a part in naturalizing this preference at the higher end of the retail jean market. This latter group of customers could afford comfort increasing designs like the gusset or the augmented loose fit jean, but they apparently chose instead to emulate the poor cowboy, at least when it came to jean fashion. Thus, although there was eventually a

¹²⁹ Larson Interview, *supra* note 125.

¹³⁰ See LEVI STRAUSS & CO., WESTERN WEAR 2 (1930).

¹³¹ *Id.*



Id.

homogenization of the "jean" design, manufacturers competed over the different images that they used to sell their products. What was ownable in all of this competition among jean manufacturers, after all, was not the design, since that was in the public domain, but rather image, through the doctrine of trade dress.¹³²

When it came to other garments, gussets were more widely available than they were in jeans.¹³³ Early in the twentieth century, for example, the single-panel, diamond-shaped gusset momentarily gave way to the two-piece, triangle gusset in mass marketed garments. The two-piece, triangle gusset was made up of twin triangular pieces of fabric that were sewn together before being inserted into the pant.¹³⁴ Like its one-piece counterpart, the two-piece gusset was a public domain item, but since it also constituted a manufacturing process in an era where fabric width was only forty-five inches, as opposed to today's sixty inches, the process for cutting twin-gusseted trousers gained patent protection.¹³⁵ For the most part, however, gussets were widely available in twentieth century garments as public domain items, and though some specific processes were indeed patented, the details of gussetting remained obvious to a designer or manufacturer of ordinary skill in the trade.¹³⁶

Levi Strauss & Company was the most prominent company to produce a garment that incorporated the two-piece gusset¹³⁷ as a public domain item.¹³⁸ In 1922 and 1925, Levi Strauss & Co.

¹³² See *supra* note 24 (noting that trade dress protects "identifying symbols").

¹³³ See *supra* notes 121-131 and accompanying text (comparing the history of the gusset to the American cowboy).

¹³⁴ See HOLLEN, *supra* note 17 (illustrating the two-piece gusset). The gusset was used in this context as a way to save fabric in a period when fabric width was forty-five inches, not sixty inches. Jaron Interview, *supra* note 128; Larson Interview, *supra* note 125.

¹³⁵ See U.S. Patent No. 4,392,259, "Trousers Construction," issued to Guido Bredo (July 12, 1983); U.S. Patent No. 478,190, "Trousers and c., and Pattern Therefor," issued to Richard Hamilton and John G. Lewis (July 5, 1892).

¹³⁶ Jaron Interview, *supra*, note 128. An invention must be non-obvious to a person with knowledge of the field before a patent will issue. 35 U.S.C. § 103 (1994).

¹³⁷ See *supra* note 134 and accompanying text (describing the two-piece, triangle gusset).

¹³⁸ Telephone Interview with Kathleen McDonough, Assistant Archivist, Levi Strauss & Co. Archives (Jan. 26, 1996). As there is no patent number or mark on the single remaining "Ladies' Hiking Tog" garment that survives in the Levi Strauss & Co. Archives, the garment itself confirms Levi historian McDonough's statement that it was not constructed under a patent. But note that this type of gusset, which is distinct from the public domain gusset, was eventually patented. See U.S. Patent No. 4,392,259, *supra* note 135; U.S. Patent No.

offered the "Ladies' Hiking Tog," a gusseted pair of breeches.¹³⁹ The cut of the Tog used the two-part gusset construction, but it did so without reference to a patentee. Moreover, the togs were aimed at a different market than the jean market. That is, even though Levi Strauss & Co. relied on the two-part gusset construction in manufacturing togs, that reliance was apparently not concerned with cost. In 1922 a dozen pairs of khaki Hiking Togs sold for \$27, while a dozen corduroy Togs sold for nearly double that price at \$48.¹⁴⁰ Levi Strauss & Co. produced the Ladies' Outing Knickerbockers during this same period. Knickerbockers also incorporated the two-part gusset construction and sold for between \$27 per dozen pairs (for khaki knickerbockers) and \$39 per dozen pairs (for gaberdine knickerbockers).¹⁴¹ This would put the wholesale price of a single pair of togs in the \$2.25 to \$4.00 range, and knickerbockers in the \$2.25 to \$3.25 range, making the retail price of these gusseted garments comparatively expensive for the period.

The use of the gusset in this historical period suggests that the gusset was ultimately set aside in the functional wear market not because it was forgotten, and hence subject to recapture as private property, but rather because it added prohibitively to the cost of goods. The customer base that bought jeans for everyday wear was not the same base that bought gusseted togs and knickerbockers. And whereas producers had tacit consumer permission, so to speak, to innovate for comfort's sake in the \$2.50 to \$4.00 per garment wholesale markets, they could not profitably innovate for comfort in the \$1.00 to \$2.50 per garment retail markets. These economic considerations were no doubt influential in forming today's widespread consumer preference for the cross-seam in pants, which is also supported by fashion considerations. In any case, the gusset remained known to persons of ordinary skill in the garment industry, since its design, use, and incorporation were all public

3,745,589, "Triangular Crotches for Trousers," issued to Ebbe Bruno Borsing, (Jul. 17, 1973); U.S. Patent No. 478,190, *supra* note 135. Also, according to McDonough, there is no evidence that gusseted denim jeans were ever manufactured by Levi Strauss & Co.

¹³⁹ McDonough Interview, *supra* note 138. See also LEVI STRAUSS & CO., MERCHANDISE CATALOGUE (Feb. 6, 1922) [hereinafter LEVI CATALOGUE].

¹⁴⁰ LEVI CATALOGUE, *supra* note 139. Kathleen McDonough believed that the gusseted "Ladies Hiking Togs" were also offered for sale in 1925, though she did not have catalogue confirmation of that offering. McDonough Interview, *supra* note 138.

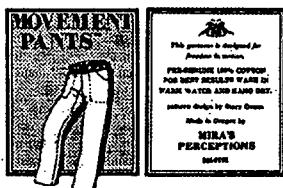
¹⁴¹ LEVI CATALOGUE, *supra* note 139.

domain information, but it was consciously set aside in certain markets, no doubt in part, for economic and stylistic reasons.¹⁴²

In terms of functional wear, the gusset would not reappear in American markets until Stacy Kuranz entered the market with a design she called Movement Pants.¹⁴³ Kuranz's design, like the designs before her was not manufactured with reference to a patentee, even though it used a single, diamond-shaped gusset.¹⁴⁴ Moreover, although Kuranz took the stance of ownership vis à vis the Movement Pant design, she had neither a copyright nor a patent on the gusset.¹⁴⁵ The embodied design was not copyrightable under 17 U.S.C. 102(b).¹⁴⁶ And even if it had been, it would have been considered abandoned and part of the public domain because, as noted above, once a garment is made available for sale to the public, its design becomes common property.¹⁴⁷ Despite having no legally recognizable interest, Kuranz was able to license the use of her design to others, perhaps because most of her

¹⁴² Jaron Interview, *supra* note 128.

¹⁴³ Kuranz testified at the deposition that she sold and distributed her product from approximately 1973 to 1978 in stores and open markets up and down the West coast. She also testified that she got the idea for the gusset from a pair of cut-off martial arts gi pants that she saw while on a trip to New York City in the early 1970s. Deposition of Stacy Elizabeth Kuranz at pp. 8, 16-18, *Beanie Designs, Inc. v. Chi Concepts, Inc.*, No. 87-20420 (N.D. Ca. filed June 16, 1987).



Movement Pants (Circa 1973).

¹⁴⁴ Deposition of Kuranz, *supra* note 143, at 10 (describing the gusset she used as a "diamond-shaped piece of fabric [that] was longer from side to side than it was from front to back, and it was symmetrical from front to back if you would divide the pattern in half, from side to side").

¹⁴⁵ At the time the Movement Pants pattern was created, Kuranz went to a patent attorney who told her that the pattern was not patentable, but that she could establish her place in the life of the gusseted pant by mailing a copy of the pattern to herself. Kuranz followed this advice. Telephone Interview with Stacy E. Kuranz, Movement Pants designer (Aug. 13, 1996).

¹⁴⁶ See *supra* Part II.A.

¹⁴⁷ *Jaccard v. R.H. Macy & Co.*, 37 N.Y.S.2d 570 (N.Y. App. Div. 1942); *Samuel Winston, Inc. v. Charles James Servs.*, 159 N.Y.S.2d 716, 718 (N.Y. Sup. Ct. 1956).

this public domain gusset in shorts and pants targeted at climbers, boaters, and outdoor enthusiasts. None of these companies manufactured under a patent *per se*, despite the fact that a patent had been issued for a similarly gusseted garment to a designer who believed she had invented the gusset.¹⁵³

In sum, manufacturers in the functional wear market abandoned the gusset because of economic and fashion concerns, even though in the novelty market, manufacturers tended to innovate without a focused concern for price. While early in the century functional wear manufacturers produced for a broader range of customers than did novelty wear manufacturers, by mid-century both functional wear and novelty wear manufacturers were producing for a fairly large and often affluent customer base. Gramicci, for example, marketed their gusseted shorts to rock climbers and outdoor enthusiasts; L.L. Bean and Lands' End marketed their garments to affluent suburbanites who were willing to pay a little more for comfort; and Chi Concepts marketed its products to counter-culture idealists who found themselves in professional careers. These affluent customers, unlike the cowboys who influenced jean design or their dude ranching counterparts, preferred the long term comfort of the gusset to the short term relief of either following fashion or buying garments at rock bottom prices. They wanted quality construction, and like the Hiking Tog wearers of yore, they were willing to pay a fair price for it.

In conclusion, while older prior art in printed publications did not clearly depict the common stock gusset, by the 1970s it did. Although the common stock gusset was previously referred to, alluded to, and presupposed, it was in the 1970s that the gusset was finally articulated (primarily through pictures, but also through words) with a high degree of clarity. The Kuranz Move-

¹⁵³ See *infra* notes 276-339 (describing patents issued to Bernice B. Polsky). Although none of the above companies *licensed* with this designer, Patagonia and Gramicci paid her a litigation avoidance fee. However, Cluett, Peabody & Co., Inc., which manufactured the Freedom Pants, did license with Polsky. Telephone Interview with Cluett, Peabody & Co. Attorney (name withheld upon request) (Jan. 16, 1996). See also Matthew Kasten, *Seamless Crotch Patented Pants Traced to RPM*, DAILY NEWS RECORD, June 13, 1986, at 2 (confirming that RPM Fashions, a division of Cluett, Peabody & Co. "licensed from an inventor [Bernice B. Polsky] who is 'totally unrelated to the apparel industry,'" and attributing the information to Cluett, Peabody & Co. executive vice-president, Fred Rosenfeld.).

ment Pants¹⁵⁴ and Kickin' Jeans¹⁵⁵ both generated depictions in printed publications clearly illustrating the standard, common stock gusset as incorporated into street pants. The standard, common stock gusset they showed was an elongated, diamond-shaped piece of fabric that was longer from side to side than it was from front to back, and it was cut with convex/concave sides. The following discussion analyzes how this same definition also emerged in patented prior art.

2. *Patented Prior Art: The Gusset As Incorporated Into Innovative Garments.* As early as 1941, utility patents issued for innovative clothing designs presupposed the same gusset that the printed, off-record prior art depicted. These patents were not for the gusset *per se*. Indeed, where an inventor has tried to claim ownership of the gusset via patent claims, such claims have been disallowed.¹⁵⁶ One inventor put it well when he noted in his claims, "I am aware that it is not new to put insertions in the crotch-seams of the garment. Such, however, I do not claim[.]"¹⁵⁷ Thus, the distinction between the gusset as a public domain item and the garment as a patented item appeared in the claims of even earlier American patents.

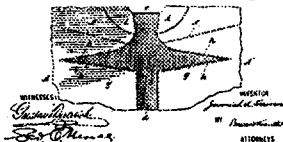
One of the earliest utility patents for a gusseted garment was issued in 1891 to Marshall O. West for an invention that he called "Drawers."¹⁵⁸ West's patent, which was for underwear, not outerwear, improved the drawer by adding a gusset, or as West called it, a "gore." West described the gore as "a diamond-shaped piece [of fabric] elongated at that end . . . which is to serve as the back, and either straight, convex, or concave at its edges to suit

¹⁵⁴ See *supra* note 143.

¹⁵⁵ See *supra* note 151.

¹⁵⁶ See *infra* Part III.B.1 (discussing Polsky's 1983 patent).

¹⁵⁷ U.S. Patent No. 597,747, "Drawers," issued to Jeremiah A. Scriven (Jan. 25, 1898). Scriven used this language to describe the diamond shaped piece of fabric shown below.



Id. at fig.2. See also U.S. Patent No. 1,737,923, "Garment," issued to Harry P. Eckstein (Dec. 3, 1929).

¹⁵⁸ U.S. Patent No. 453,874, "Drawers," issued to Marshall O. West (June 9, 1891).

drawers of different proportions.”¹⁵⁹ With this language West implied what later inventors would expressly iterate—that they regarded the gusset as part of the public domain.¹⁶⁰ Indeed, the general consensus about the gusset was that its dimensions were variable and depended on the dimensions of the garment as a whole, especially since the goal of gusseting, after all, was to incorporate and thus conform the gusset to the garment.

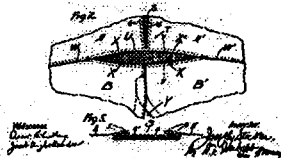
In 1909 Joseph Stecker gained patent protection for an outerwear garment that incorporated a public domain gusset.¹⁶¹ Stecker's invention was a ventilated farmer's overall sporting a gusset, which Stecker called an elastic crotch inset.¹⁶² This gusset came to a point in the upper to mid-thigh range and took the shape of “an elongated diamond-shaped inset.”¹⁶³ Stecker claimed that his “overall-pants” were different from unpatentable, public domain overalls (apparently including the gusseted Lee Apparel overalls) because of the totality of the garment, which had unusually shaped legs and a series of elastic gussets that eased “bending or stooping

¹⁵⁹ *Id.* at 1.

¹⁶⁰ See U.S. Patent to Scriven (No. 597,747), *supra* note 157.

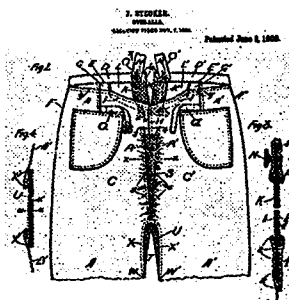
¹⁶¹ U.S. Patent No. 924,013, “Overalls,” issued to Joseph Stecker (June 8, 1909).

¹⁶²



Id. at fig.2.

¹⁶³ *Id.* at 2.



Id. at fig.1.

strain . . . [and] provide[d] novel ventilating means for the same."¹⁶⁴

Like West's undergarment, Stecker's ventilated overalls incorporated the public domain gusset, but he did not lay claim to it. Moreover, like West, who described the public domain gusset as "a diamond-shaped piece elongated at that end . . . which is to serve as the back, and either straight, convex, or concave at its edges,"¹⁶⁵ Stecker described it as "substantially elongated" and having a "diamond form."¹⁶⁶ Thus, by 1909, language describing the public domain gusset began to emerge. The gusset was defined as a diamond-shaped piece of fabric that was either straight, convex, or concave at the edges. It was longer from side to side than it was from front to back, and it came to an end in the upper to mid-thigh range. Moreover, the public domain gusset was distinguishable from the radically different long bicycle pant gusset that had securely positioned itself in the private domain.¹⁶⁷

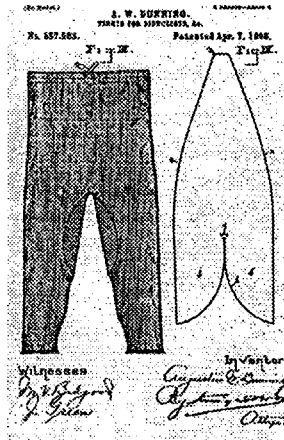
A utility patent issued in 1932 to Guy C. Tanner pressed forward

¹⁶⁴ *Id.* at 1.

¹⁶⁵ U.S. Patent to West (No. 453,874), *supra* note 158, at 1.

¹⁶⁶ U.S. Patent to Stecker (No. 924,013), *supra* note 161, at 3.

¹⁶⁷ U.S. Patent No. 557,563, "Tights for Bicyclists," issued to Augustus W. Dunning (Apr. 7, 1896).



Id. at figs.3-4. Garrison also confirmed the existence of unusually shaped gussets that, unlike the standard gusset, are treated as privately ownable. See Garrison Interview, *supra* note 92.

with a definition of the public domain gusset.¹⁶⁸ In his claims Tanner added that the gusset was "more elastic in a direction transversely of the two legs, that is, in a direction from one leg to the other, and less elastic from front to back."¹⁶⁹ This utility patent's claims were in line with prior claims in that it sought protection for a garment as a whole, not for the idea of the public domain gusset alone.¹⁷⁰

A 1941 patent issued to Irving B. Smith appears to be the first to incorporate the gusset into a pair of street pants.¹⁷¹ Smith's pants were no ordinary pants; they had a detachable or concealable gusset that the wearer could open up for increased lounging comfort.¹⁷² Smith's embodiment incorporated the public domain gusset. His design envisioned a gusset that was an elongated, diamond-shaped piece of fabric that ended in a point near the mid-

¹⁶⁸ U.S. Patent No. 1,891,884, "Undergarment," issued to Guy C. Tanner (Dec. 20, 1932).

¹⁶⁹ *Id.* at 2.

¹⁷⁰ See, e.g., U.S. Patent No. 3,486,507, "Garment Crotch Construction," issued to Robert N. Bregenzner et al. (Dec. 30, 1969) (claiming a panty-type garment); U.S. Patent No. 3,287,739, "Combination Bifurcated Garment," issued to Morris Kaplan (Nov. 29, 1966) (claiming a combination panty and leg covering garment); U.S. Patent No. 2,705,801, "Pantie Girdle," issued to Marion M. Chubby (Apr. 12, 1955) (claiming an entire panty girdle garment); U.S. Patent No. 2,651,047, "Woman's Undergarment," issued to Nellie Emerson (Sept. 8, 1953) (claiming a new form-fitting woman's undergarment); U.S. Patent to Guy C. Tanner (No. 1,891,884), *supra* note 168 (claiming a new feminine undergarment).

The undergarment has its own unique history in patent law, which is outside the scope of this Article. Some scholarship exists about the Victorian era, but little may be found about the undergarment in the twentieth century. See, e.g., CECIL WILLETT & PHILLIS CUNNINGTON, *THE HISTORY OF UNDERCLOTHES* (1951). Nevertheless, if one were to write a history of underclothes in the twentieth century, United States patents would no doubt serve as an important source of archival information.

For an economic history of women's patenting activities relating to household inventions and clothing, see B. Zorina Khan, *Married Women's Property Laws and Female Commercial Activity: Evidence from United States Patent Records, 1790-1895*, 56 J. OF ECON. HIST., 356 (1996).

¹⁷¹ U.S. Patent No. 2,264,958, "Garment," issued to Irving B. Smith (Dec. 2, 1941).

¹⁷²



Id. at figs. 1A-B, 3A.

thigh range and was more elastic from one leg to the other and less elastic from front to back.¹⁷³ So standard was this gusset that Smith did not describe its specifications as previous inventors had. Nonetheless, inventor Smith did add to the description of the public domain gusset by noting that its function was to prevent "binding or chafing or tightness at or in the vicinity of the . . . upper thighs."¹⁷⁴

It is through the utility patent claims articulation process that the public domain gusset came to be defined in the period between 1891 and 1941. This gusset was a diamond-shaped piece of fabric that was elongated at the side ends.¹⁷⁵ It could be cut either in a straight, convex, or concave way, depending entirely on the proportion of the garment into which it was being incorporated.¹⁷⁶ The distance from side to side was longer than the distance from front to back, and the elongated sides came to an end, usually in a point somewhere around the mid to upper-thigh range.¹⁷⁷ In addition, the public domain gusset was more elastic in a direction transversely of the two legs—that is, in a direction from one leg to the other—and less elastic from front to back.¹⁷⁸ Finally, the gusset's function served the purpose of comfort,¹⁷⁹ health,¹⁸⁰ and increased movement,¹⁸¹ particularly in preventing binding, chafing, and tightness in the upper inner-thigh area.¹⁸²

By 1957 patents using the public domain gusset took the tack that I.B. Smith had taken; they used the word "gusset" as a sign—a word with an established meaning.¹⁸³ However, even when these later patents did describe the gusset, they presupposed its obvious-

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 1.

¹⁷⁵ U.S. Patent to West (No. 453,874), *supra* note 158.

¹⁷⁶ *Id.*

¹⁷⁷ U.S. Patent to Stecker (No. 924,013), *supra* note 161.

¹⁷⁸ U.S. Patent to Tanner (No. 1,891,884), *supra* note 168.

¹⁷⁹ See, e.g., U.S. Patent 1,633,610, "Nether Garment," issued to Alexander M. Schneider (June 28, 1927) (purporting the garment to be comfortable).

¹⁸⁰ See U.S. Patent to Eckstein (No. 1,737,923), *supra* note 157 (describing a "sanitary" undergarment).

¹⁸¹ See, e.g., U.S. Patent to Smith (No. 2,264,958), *supra* note 171 (stating that the garment should be worn during relaxation, lounging, or slumber).

¹⁸² *Id.*

¹⁸³ See, e.g., U.S. Patent No. 2,812,516, "Garment with Elasticized Open Crotch," issued to Joan M. Hoffman (Nov. 5, 1957) (using the term "gusset").

ness to a person of ordinary skill in the trade.¹⁸⁴ That is, these later patent texts assumed that the gusset's shape was obviously shorter from front to back than from side to side depending on the garment, or that it obviously and necessarily required an elongation in the area of the inner thighs in order to conform properly to street clothes,¹⁸⁵ or that its shape changed depending on the fabric used in the context-lending garment.¹⁸⁶

Elongation in the area of the inner thigh area distinguished the use of the gusset in outerwear from its use in underwear. Girdles and panty-hose, both of which were initially patented as innovative nylon garments, used a small oval-shaped gusset that was arguably so different from the public domain gusset as to be legally distinct and thus, privately ownable.¹⁸⁷ However, even if those small oval-shaped gussets seemed more like privately ownable gussets than public domain ones, it was obvious to "a person having ordinary skill in the art" that the elongated gussets would not work in garments made of sheer nylon; therefore, modified smaller, circular gussets conformed.¹⁸⁸ Accordingly, most of the patents relating to panty-hose construction were themselves consistent with the patents that have been described in this section, with the exception that later panty-hose patents sought protection for the *process* of gusseting a nylon garment, not for the garment or the gusset itself.¹⁸⁹

3. *An Aside About the Historical Reliability of Prior Use Evidence That Defines the Gusset.* Published prior art and twentieth century patents refer to the common stock gusset and presuppose the same definition for that gusset. Although the Kuranz Movement Pants

¹⁸⁴ See *supra* notes 110-111 and accompanying text (discussing the nonobvious requirement under 35 U.S.C. § 103 (1994)).

¹⁸⁵ See *supra* notes 175-182 and accompanying text (discussing descriptions of the public domain gusset found in patents between 1891 and 1941).

¹⁸⁶ See *supra* note 170 (listing patents for undergarments incorporating the gusset).

¹⁸⁷ *Id.*

¹⁸⁸ 35 U.S.C. § 103 (1994).

¹⁸⁹ See, e.g., U.S. Patent No. 4,549,493, "Method and Apparatus for Applying a Gusset to Manufactured Goods," issued to Vinicio Gazzarrini (Oct. 29, 1985); U.S. Patent No. 4,516,513, "Method and Apparatus for Applying a Patch to Manufactured Goods," issued to Vinicio Gazzarrini (May 14, 1985); U.S. Patent No. 4,021,861, "Panty hose Construction," issued to Walter H. Imboden (May 10, 1977); U.S. Patent No. 3,678,515, "Panty-Hose," issued to Nicholas Wehrmann (July 25, 1972).

and its progeny, and Century Martial Arts, Inc.'s Kickin' Jeans are the clearest visual depictions of the common stock gusset as incorporated into street pants, patents better verbally articulate what constitutes a common stock gusset. The patented garments cited herein incorporate a common stock gusset and therefore constitute an important body of historical evidence.

This section recognizes the importance of historical data in patent analysis.¹⁹⁰ Therefore, the surface historical data drawn from the PTO's files requires further explanation. To introduce and frame, but certainly not exhaust that discussion, this section approaches the gusset question from a slightly different tack. It explores the historical data's reliability, not in definitional terms as was done in the previous section, but in symbolic terms. The patents are obviously reliable in terms of dates and substance, but their reliability goes far deeper, as this section explains.

The public domain gusset, like the common dinner plate, is a common stock item, one best described with the metaphor of a trajectory in time rather than with the metaphor of a single point of invention.¹⁹¹ In other words, even though the gusset, like the plate, spoon, fork, and napkin, is functional, it did not come into use solely because it offered technical solutions or even general,

¹⁹⁰ See *Markman v. Westview Instruments, Inc.*, 116 S. Ct. 1384, 38 U.S.P.Q.2d (BNA) 1461 (1996) (holding that a patent's prosecution history is relevant to the court's determination of the scope of the patent claim).

¹⁹¹ For this reason the gusset fits well within current discussions about protection of folklore. See, e.g., Cathryn A. Berryman, *Toward More Universal Protection of Intangible Cultural Property*, 1 J. INTEL. PROP. L. 293, 310 (1994) (defining folklore and noting that the Berne Convention has altered its authorship provisions to include anonymous folklore protection).

Folklore is a living phenomenon which evolves over time. It is a basic element of our culture which reflects the human spirit. Folklore is thus a window to a community's cultural and social identity, its standards and values. Folklore is usually transmitted orally, by imitation or by other means. Its forms include language, literature, music, dance, games, mythology, rituals, customs, handicrafts and other arts. Folklore comprises a great many manifestations which are both extremely various and constantly evolving. Because it is group-oriented and tradition-based, it is sometimes described as traditional and popular folk culture.

Id. at 310-311, (quoting Kanwal Puri, *Copyright Protection of Folklore: A New Zealand Perspective*, COPYRIGHT BULL., vol. 22, no. 3, at 18-19 (1988)).

nontechnical solutions to identifiable and discrete problems.¹⁹² It came into use for cultural reasons as well. As one historian says of table implements:

[T]heir functions [were] gradually defined, their forms sought and consolidated. Each custom in the changing ritual [that involved them], however minute, establishe[d] itself infinitely slowly. . . . Every movement of the hand—for example, the way in which one [held] and [moved the] knife, spoon, or fork—[was] standardized only step by step [over centuries].¹⁹³

The same is true of the gusset. It came into use gradually, sometimes having more prominence in daily life, sometimes less. Because it added to the cost of goods, it was a potential, although (if constructed properly) barely noticeable, status symbol. Nonetheless, it was a symbol, an idea, and an item without an originator.

What makes the gusset part of the public domain is not that we no longer know the identity of its “inventor.” What makes it a public domain item, in the sense that folklore is public domain, is that it was not and could not be dropped upon the culture for ready assimilation via the market, primarily because it is not novel in any sense of the word. Public domain items often emerge from cultural movement.¹⁹⁴ They appear, not necessarily through invention, and then they are adopted slowly through a gradual, somewhat unconscious process, like the one described for table

¹⁹² Such a development would suggest the gusset would be unpatentable under 35 U.S.C. §§ 101-103 (1994). See also *In re Woodruff*, 919 F.2d 1575, 16 U.S.P.Q.2d (BNA) 1934 (Fed. Cir. 1990) (holding that claiming a new benefit to an old process cannot render that process newly patentable); *AMP, Inc. v. Fujitsu Microelectronics, Inc.*, 853 F. Supp. 808, 31 U.S.P.Q.2d (BNA) 1705 (M.D. Pa. 1994) (noting that 35 U.S.C. § 101 requires an invention to be useful before a utility patent may issue). Cf. *Ryco, Inc. v. AG-Bag Corp.*, 857 F.2d 1418, 8 U.S.P.Q.2d (BNA) 1323 (Fed. Cir. 1988) (noting that invention need not be superior to prior art to be patentable, only an improvement).

¹⁹³ ELIAS, *supra* note 7, at 107-108.

¹⁹⁴ See ELIAS, *supra* note 7; Litman, *supra* note 109; Berryman, *supra* note 191.

implements.¹⁹⁶ Often a public domain item starts out as a cultural irritant, but once the decision is made to adopt it—again in single moments that can span the course of centuries—it slowly, gradually, and unconsciously becomes part of everyday life, sometimes so much so (as with the fork) that its use seems natural, inevitable, and self-explained.¹⁹⁶

But while the gusset is like table implements in many respects, it is unlike them in equally important respects. The gusset's history is only loosely tied, if at all, to shifting standards of adult socialization or "civilization," whereas the history of table implements is intimately tied to such standards.¹⁹⁷ Table implements gave people something to be ashamed of; that is, as table implements and manners became refined they served as a way of pushing bodily functions to a realm of "shame" that grew in psychosocial importance between the fifteenth and twentieth century.¹⁹⁸ However, because they allowed for the steady dephysicalization of the table, table implements also increasingly helped actors maintain, if not expand, this psychosocial territory whose control was constitutive of social status.¹⁹⁹ In other words, as table implements helped push certain bodily functions and activities to the realm of the unspeakable, people become increasingly more sensitive to and less tolerant of once accepted behaviors that they had come to believe were now "naturally" unspeakable. Blowing one's nose into one's hand at the table, for example, was perfectly acceptable in medieval society, but utterly reprehensible by the twentieth century.²⁰⁰ The gusset, for its part, is not wrapped in this sort of intrigue; it has a more straightforward history.

Although the gusset is directly connected to an area of the body that we regard as private, it does not function with the duplicity

¹⁹⁶ See ELIAS, *supra* note 7. See also Berryman, *supra* note 191 (discussing intellectual property law protection of folklore).

¹⁹⁶ For a description of how this process occurs, see PHILIP SELZNICK, *THE MORAL COMMONWEALTH: SOCIAL THEORY AND THE PROMISE OF COMMUNITY* 82-88 (1992) (discussing the work of Thomas Kuhn).

¹⁹⁷ ELIAS, *supra* note 7.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 143-52.

that table implements do. Gussets are not used to distinguish the “well-mannered” from the “not-so-well-mannered;” they merely increase physical comfort. And even when the insertion of a gusset increases the price of a garment, thus serving as a potential marker of its wearer’s economic status, the status symbol is hard to detect since a well-constructed gusseted garment ought to be virtually indistinguishable from a cross-seamed one. In other words, there is a historical and legal significance about the directness with which the gusset has come to us. That significance determines the reliability of documentary evidence regarding gusset use, as found in corporate archives and patents.

The evidence in corporate archives tends to be influenced by advertising campaigns. As discussed above, the data is somewhat vague in both depiction and description, at least up until the mid-1970s. In addition, corporate advertising is more discreet than the evidence found in patents. In corporate advertising, the word “crotch” is used in the early part of the century up to the early 1940s,²⁰¹ avoided in the mid part of the twentieth century,²⁰² and then reiterated as a radicalizing move in the latter part of the twentieth century, specifically in the 1980s and again in the late 1990s with ChiPants’s “Mythic Entrepreneur” advertising campaign.²⁰³ In patents, on the other hand, descriptive clarity of the gusset is achieved by 1941. Of equal importance, the figures and language used to describe the gusset’s shape, purpose, and characteristics are unconsciously and consistently straightforward. They do not convey embarrassment or self-consciousness about referring to an area of the body to which a large degree of shame and embarrassment has been culturally attached. Nor are they twisted by artifice or polite misdirection. Instead these figures and language convey a clear and verifiable definition of the public domain gusset.

²⁰¹ See, e.g., *supra* note 127 (depicting the Lee “Dude Ranch Jean”).

²⁰² See *supra* notes 151-152 (showing Kickin’ Jean and ChiPants advertisements).

²⁰³ Interview with Laurence Ostrow, Owner and President of Chi Concepts, Inc. and ChiPants, Inc. (Jan. 11, 1996) (noting that the ChiPants advertising campaign was “on-line” in its 1990s incarnation). Chi Concepts, Inc. and ChiPants, Inc. are legally distinct entities. Chi Concepts, Inc. sold gusseted pants from 1986 to 1991; it was forced to close after a major earthquake destroyed its Santa Cruz, Cal. and Watsonville, Cal. bases. ChiPants, Inc. currently sells gusseted pants via the World Wide Web; it opened in 1995. See also *supra* note 152 (showing ChiPants advertisement).

The public domain gusset, which is incapable of private ownership under either copyright or patent law systems, is a diamond-shaped piece of fabric that is inserted into pants, trousers, and the like, as a crotch piece that offers greater freedom of movement than is offered by the cross-seam. In order to offer this increased freedom of movement, the fabric must conform to the wearer's crotch area and inner thighs. Hence, the public domain gusset is obviously and necessarily a diamond-shaped piece of fabric that is shorter from front to back and elongated from side to side, so that it can easily and securely shift and stretch with the wearer's own trunk movements. Because the public domain gusset cannot be copyrighted or patented, it is beyond private ownership. Nevertheless, there are two alternative strategies that have been employed to capture the public domain gusset's economic value. The first strategy is in derogation of the public right in the gusset.²⁰⁴ The second respects the gusset as a public domain item, choosing instead to perfect an ownership interest in the image with which the gusset is delivered to the public.²⁰⁵ Part III considers the first of these strategies.

III. ENCROACHING ON THE PUBLIC DOMAIN

Manufacturers, retailers, and designers have regarded the gusset in the same way that they regard pants, shirts, and other common cuts of clothing—as part of the public domain. From time to time, inventors lay claim to a highly unusual garments, like the hip-hugging, gusseted, neoprene waders;²⁰⁶ or to innovative processes, like the two-part gusset construction.²⁰⁷ But for the most part, as the doctrine and the patent claims discussed in Part II show, there is tacit agreement in the garment industry that the basic design and form for pants is well within the public domain.²⁰⁸

²⁰⁴ See *infra* notes 276-339 (describing how Polsky obtained three patents under which terms she purported to claim ownership of the gusset).

²⁰⁵ See *supra* note 24 (discussing trade dress).

²⁰⁶ U.S. Patent No. 5,081,718, "Pants Type Garment Having a Seamless Crotch," issued to David C. Carman et. al. (Jan. 21, 1992).

²⁰⁷ See U.S. Patent to Bredo (No. 4,392,259), *supra* note 135; U.S. Patent to Borsing (No. 3,745,589), *supra* note 138; U.S. Patent to Hamilton and Lewis (No. 478,190), *supra* note 135.

²⁰⁸ See *supra* notes 113-155 and accompanying text (explaining how the gusset has come to be defined).

The same is true of the gusset, even when it is incorporated into otherwise innovative garments. Gussets similar to the Dunning gusset²⁰⁹ are highly unusual in relation to the common stock gusset. Hence, they gain patent protection as innovative items within a particular, sometimes innovative, context-lending garment.²¹⁰ But most gussets are identical or virtually identical to what can be called the common stock (or public domain) gusset. This gusset is the one that has made its way through time as folklore. This part analyzes how something so resolutely public as the gusset becomes private.

In the early 1980s, three separate patents were issued to a single inventor, Bernice B. Polsky. These patents—referred to herein as the Polsky series—attempted to lay claim to the gusset *qua* gusset. Each of the three patents tried to encroach upon the public's right to the gusset in a different way. The first patent stated a direct claim for ownership of the gusset, using a simple encroachment strategy.²¹¹ The second patent tried to capture the common stock gusset by contextualizing it in street trousers.²¹² This strategy followed earlier patent trends that had contextualized the common stock gusset in innovative garments, but it differed from those trends by treating the common pants design itself as innovative—a move that was contrary to the practice in the trade.²¹³ Finally, the third strategy in the Polsky series manipulated the bureaucratic decisionmaking process of the PTO.²¹⁴ Although the third strategy was the most theoretically complex of the three, it can be synthesized at this point by noting that it was based upon a claim that the gusset had been “forgotten,” and was thus subject to

²⁰⁹ See U.S. Patent to Dunning (No. 557,563), *supra* note 167 (claiming a long bicycle pant that incorporates a gusset in its design).

²¹⁰ *Id.*

²¹¹ U.S. Patent No. 4,371,989, “Seamless Crotch,” issued to Bernice B. Polsky (Feb. 8, 1983) [hereinafter U.S. Patent to Polsky (No. 4,371,989)]. See also *infra* notes 276-291 and accompanying text.

²¹² U.S. Patent No. 4,488,317, “Pants-like Garments Having a Seamless Crotch Construction,” issued to Bernice B. Polsky (Dec. 18, 1984) [hereinafter U.S. Patent to Polsky (No. 4,488,317)]. See also *infra* notes 292-314 and accompanying text.

²¹³ See *supra* notes 113-155 and accompanying text (detailing the historical development of the gusset).

²¹⁴ See U.S. Patent No. 4,785,480, “No-Bind Pants with Seamless Crotch,” issued to Bernice B. Polsky (Nov. 22, 1988) [hereinafter U.S. Patent to Polsky (No. 4,785,480)]. See also *infra* notes 315-339 and accompanying text.

recapture by the first person who could (officially) “remember” it.²¹⁵

The particularities of these three strategies are important to consider because they help illuminate the boundary between private property and the somewhat symbolic space known as the “public domain.” More specifically, they are an example of an actual attack on a common resource, the gusset, something much more instrumental than theoretical attacks by scholars.²¹⁶ Polsky’s first two strategies—simple encroachment and contextualizing the gusset in what inventor Polsky argued was an innovative garment—were primarily technical attacks in that they were waged by patent lawyers who presented Polsky’s claim within the parameters and discourse of an established intellectual property framework.²¹⁷ The third strategy, however, seriously challenged that same framework by shifting its focus from substance to procedure.²¹⁸

Astonishingly, interviewed manufacturers and pattern makers in the garment industry had strong negative reactions to the Polsky patent series. Their remarks consistently raised questions about the institutional legitimacy of granting the Polsky patents. One manufacturer said that he thought the PTO had been bribed.²¹⁹ Another said that the PTO had perhaps unwittingly given Polsky a license “to extort other people in business.”²²⁰ One pattern maker more eloquently thought that by granting the second and third patents to Polsky, the PTO had infringed on “everyone else’s right to use the gusset.”²²¹ She likened the gusset to a shirt sleeve or a pant leg, noting that “everyone learns how to gusset in

²¹⁵ See *infra* notes 276-339 and accompanying text (analyzing the details and terms of the three Polsky patents).

²¹⁶ See, e.g., Samuels, *supra* note 10 (arguing that there is no public domain; there is just property that the copyright and patent system will not protect).

²¹⁷ See, e.g., *Markman v. Westview Instruments, Inc.*, 116 S. Ct. 1384 (1996) (holding that construction of patent claims is a question of law for the court and not subject to a Seventh Amendment right to a jury trial).

²¹⁸ See *infra* notes 315-339 (describing the details and problems with Polsky’s attainment of the 1987 patent and the related infringement action).

²¹⁹ Ostrow Interview, *supra* note 203.

²²⁰ Telephone Interview with San Francisco inventor, investor, and entrepreneur Maurice Kambar (Jan. 11, 1996).

²²¹ Garrison Interview, *supra* note 92. This view is consistent with 35 U.S.C. § 131 (1994) which determines the nature of the PTO’s proceedings.

pattern-making 101, and everyone knows that everyone has the right to use the gusset, just as everyone has the right to use a pant leg or a sleeve.²²² She also thought that the PTO "should have asked a few people in the industry before granting the patents to Polsky."²²³ Even Stacy Kuranz, the originator of Movement Pants,²²⁴ recalled consulting a patent attorney who told her that her design was not patentable and wondered aloud how the PTO could have issued the Polsky patents.²²⁵

Yet the PTO could not inquire on its own into industry opinion or practice and, therefore, was dependent on information from Polsky about the prior art.²²⁶ However, Polsky did not adequately fulfill this duty.²²⁷ Moreover, because Polsky offered only the prior art that was recorded in the PTO's own records, she effectively subordinated "off-record," or "unofficial," depictions to "official" depictions. Unfortunately, with property whose historic use is primarily a matter of oral history and off-record depiction as is the gusset's, such a subordination can be detrimental to its continued existence as a public domain item.²²⁸

Consequently, this subordination process became the first point of "forgetting," at least in the gusset's American history. This part analyzes Polsky's patents as the portal by which to examine how something that "everyone had the right to use,"²²⁹ something that had been in the public domain for more than 600 years (at least in the European and American context) arguably became the intellectual property of one individual in less than a single decade.²³⁰

²²² *Id.*

²²³ *Id.*

²²⁴ See *supra* note 143.

²²⁵ *Id.*

²²⁶ 35 U.S.C. § 112 (1994) (discussing the specification of a patent application). "Each individual associated with the filing and prosecution of a patent application has a duty of candor and good faith in dealing with the Office, which includes a duty to disclose to the Office all information known to that individual to be material to patentability." 37 C.F.R. § 1.56 (1996). All individuals associated with the patent prosecution process are held to this duty which extends throughout the prosecution process. *Id.*

²²⁷ See *infra* notes 316-320 and accompanying text (discussing Polsky's incomplete disclosure statement).

²²⁸ But see Samuels, *supra* note 10 (asserting that the public domain does not exist).

²²⁹ Garrison Interview, *supra* note 92.

²³⁰ One clear example of a case where innovative information has been forgotten, and thus subject to recapture, comes from the automobile industry. Otieno-Odek, *supra* note 110, at 21. Though not the subject of litigation, the case involved a 1990 Nissan/Cylinder Block patent for an engine cylinder block with an upper and skirt section of "known general

Most of the information used in this section comes not from the actual patents themselves—though those are important sources of information—but from the patent prosecution files, or the “patent file wrappers.” File wrappers are public documents and are available from the PTO upon request.²³¹ The file wrapper constitutes the recorded history of an individual patent. It is a detailed record of the patentee’s claims, the PTO’s responses to those claims, and the patentee’s response to those responses.²³² In this case, the Polsky file wrappers are important to the analysis because they provide information about how the PTO responded to the initial wording of the Polsky claims and helped to shape their final articulation.²³³

As discussed in Part II, some property, because it is cultural property, is beyond private ownership and, therefore, beyond complete private control. In a system where nearly everything is subject to private ownership, identifying something that is not ownable,²³⁴ something beyond ownership, helps to explore the meaning that we have come to give to the term “property.” It also helps explore what is meant by the phrase “common stock,” and how it is that the commons might be a symbolic space well worth studying.

How do we know that the gusset is in the public domain? Similarly, how do we know that there is such a space as the public

configuration” (i.e., a trapezoid supporting frame fixed to the floor for stationery engines). There was prior art depicted in 1914, but that art, given the gap in time and perhaps more importantly, the new industry context (cars), was not considered sufficient to block the issuance of the 1990 patent. *Id.*

²³¹ See, e.g., 35 U.S.C. § 112 (1994) (explaining the requirement for specification in patent applications); *Norton Co. v. Carborundum Co.*, 530 F.2d 435, 189 U.S.P.Q. (BNA) 1 (1st Cir. 1976) (defining the file wrapper as the written record of the preliminary negotiations between applicant and the PTO).

²³² *Norton*, 530 F.2d 435.

²³³ For a related discussion on how bureaucratic processes can shape or otherwise mediate legal claims, see Wendy Espeland, *Legally Mediated Identity: The National Environmental Policy Act and the Bureaucratic Construction of Interests*, 28 LAW & SOC. REV. 1149 (1994).

²³⁴ There are multiple ways that an item can fall into the public domain. See, e.g., Samuels, *supra* note 10 (detailing the following ways that proponents say items may fall into the public domain: through expiration of copyright; through forfeiture of copyright; as a work categorically excluded from copyright; through aspects of otherwise copyrightable works; as a substitute for preemption analysis; or, as a substitute for measuring the retroactivity of copyright enactments). This Article is primarily concerned with material folklore, and hence, it considers the gusset to be the sort of property that has always been common property that does not fit easily into any of the above categories.

domain? To deal with the gusset first, we know that it is not subject to copyright protection either as graphic or embodied design because it is an "idea."²³⁵ Nor is it subject to patent law protection because it is obvious, or not "novel."²³⁶ It has a long history of off-record and on-record prior art. It is depicted in the historical and professional memories of garment designers, pattern makers, and manufacturers, in popular catalogues and magazines, and in patents.²³⁷ When inventors have "borrowed" the gusset from the public domain for patented garments, they have done so with an awareness of its status as common property.²³⁸ Patented garments that employ the standard, diamond-shaped gusset consistently treat it as part of the public domain.²³⁹ Moreover, the evidence revealing this consistent treatment is fairly straightforward, despite the fact that the gusset is a *special* kind of property, one with folkloric dimensions.

Assuming the gusset is indeed commonly owned property, or maybe even symbolic property, does that mean that it is in the public domain? Is it a common access idea? Alternatively, is there any way that it can be recaptured and brought back within the confines of the private property system by either direct or indirect appropriation? These questions are answered by first analyzing the public domain as a legally recognizable space and then analyzing the Polsky series vis à vis the common stock gusset.

A. THE PUBLIC DOMAIN AS A SPACE

While there is scholarly disagreement over whether there is such a space as the public domain in intellectual property law, the garment industry appears to have reached a more definitive answer, at least in relation to the use of the gusset. Some scholars say that there is a public domain, or a commons, and that its

²³⁵ See *supra* Part II.A (explaining why the gusset is not subject to copyright protection).

²³⁶ See *supra* notes 100-112 and accompanying text (arguing that because the gusset is obvious, it is not subject to patent protection).

²³⁷ See *supra* notes 113-155 and accompanying text (showing that the gusset is prior art).

²³⁸ See *supra* Part II.C.2 (discussing inventors who have previously "borrowed" the gusset recognizing that it was in the public domain).

²³⁹ See *supra* notes 190-205 and accompanying text (explaining that the gusset is treated as part of the public domain by most of the fashion industry).

preservation is important as a political matter.²⁴⁰ They equate the loss of the public domain with the increased privatization of our society.²⁴¹ They seem fairly certain that the incantation "property" seems to overshadow issues related to citizens' rights.²⁴²

In order to counter this serious problem, proponents of the public domain theory in intellectual property law collectively point to the existence and importance of imagining the "public domain," or "commons." At least two proponents have explicitly grounded the existence of the public domain in Lockean theory.²⁴³ They refer to Locke's discussion of the "state of nature" to argue that as a matter of political theory, justifying the institution of intellectual property depends upon accepting a set of presuppositions about the existence of the commons.²⁴⁴

Other scholars take different approaches.²⁴⁵ Some argue that the nature of creativity demands belief in a pool of common access property, or ideas.²⁴⁶ Others analogize the commons in intellectual property to "the public grazing lands on the Western plains of a century ago."²⁴⁷ There is also the position, perhaps linked to Locke, but certainly based on Foucault, that the loss of the intellectual property commons makes the world an increasingly

²⁴⁰ See, e.g., Aoki, *supra* note 14; Coombe, *supra* note 14 (claiming that intellectual property laws may deprive Americans of the optimal cultural conditions for dialogic practice); Gordon, *supra* note 14 (suggesting that current intellectual property law allows for more rights than is justified under a natural rights theory); Hughes, *supra* note 4 (asserting that nothing is beyond legal protection).

²⁴¹ Coombe, *supra* note 14.

²⁴² Gordon, *supra* note 14, at 1537 ("courts have too often turned a deaf ear to these arguments. The incantation 'property' seems sufficient to render free speech issues invisible.").

²⁴³ See, e.g., Gordon, *supra* note 14 (presenting a theory of intellectual property using Locke's treatment of tangible property as a commons); Hughes, *supra* note 4, at 319-23 (offering a philosophical explanation for why both everyday and extraordinary ideas (like an algorithm) should not be easily registrable as private property).

²⁴⁴ See Gordon, *supra* note 14; Hughes, *supra* note 4.

²⁴⁵ There is a growing body of law review literature on this point. Only the most commonly noted tacks are offered here.

²⁴⁶ See Aoki, *supra* note 14; Kurtz, *supra* note 30 (suggesting that the primary purpose of copyright is to promote creativity and disseminate creative works and that extensive copyright protection inhibits literary imagination); Litman, *supra* note 109 (asserting that the public domain should be looked upon as a device for leaving the raw material of authorship available).

²⁴⁷ David Lange, *Recognizing the Public Domain*, 44 LAW & CONTEMP. PROBS., Aut. 1981, at 147, 176.

"artifactual," or artificial, rehearsed place.²⁴⁸ There are theories that link the loss of the public domain to problems of gender or subjectivity.²⁴⁹ And there are theories that argue that a broad and vigorous public domain is critical to developing nations that are just now setting up intellectual property systems with the priority of adapting existing technologies to local conditions.²⁵⁰

In response to all of this stands one resolute contrarian.²⁵¹ About the intellectual property public domain, he says, "there is no such animal: the public domain is simply whatever remains after all methods of protection are taken into account."²⁵² As to the trend of writing in general (universalizing) terms of a "theory of the public domain," he responds that it is appropriate to make inquiries into historical context, but cautions against being "stuck with" constructions of old statutes, especially in the field of copyright law where "the statutes themselves get amended to reflect the new reality."²⁵³ The commentator argues that just because a particular property does not get protection under federal law does not mean that it is "in the public domain," because it might gain protection under unpre-empted state laws.²⁵⁴

Despite the argument that the public domain does not exist, there are clear benefits that flow from designating something as

²⁴⁸ Aoki, *supra* note 14, at 4 (noting that the article's conclusion discusses "some implications of U.S. intellectual property law's focus on rewarding clearly individuated creative/transformational originality in an *artifactual* environment such as ours, in which increasing areas of our public and private social, cultural and scientific worlds are becoming the private intellectual property of other people." (emphasis added)).

²⁴⁹ Coombe, *supra* note 14.

²⁵⁰ Otieno-Odek, *supra* note 110, at 16 ("To developing countries, a vigorous and broad public domain is imperative for the creation of local inventiveness and an adaptive research capability. It is also critical to the creation of a cadre of scientific personnel. A broad public domain would permit a developing country to modify and utilize existing technology and transpose the same to suit its local conditions.") See also *STRENGTHENING PROTECTION OF INTELLECTUAL PROPERTY IN DEVELOPING COUNTRIES: A SURVEY OF LITERATURE* (Wolfgang E. Siebeck ed., (1990)) (reviewing economic literature, both theoretical and empirical, covering the economics of patents and other instruments of intellectual property in developing countries).

²⁵¹ Samuels, *supra* note 10.

²⁵² *Id.* at 138.

²⁵³ *Id.* at 146-47.

²⁵⁴ *Id.* at 166.

public domain, and these benefits help reveal industry opinion.²⁵⁵ Evidence exists, again from the case of the gusset, that tells us that manufacturers do indeed take into account the perhaps mythical space called the public domain, especially when predicting the cost of goods.²⁵⁶ If property is designated as patented, then the patentee has the right to license the patent, and those who would use the invention have the correlative duty to obtain a license from the patentee before they use the information contained in the patent.²⁵⁷ This license would add to the producer's cost of goods. But one other phenomenon that the gusset example illustrates well is that the issuance of a patent is only a first step in bringing the patentee's intellectual property rights to life.²⁵⁸ At least in the garment industry, even if the PTO issues a patent, the industry can still overturn the PTO's decision in a *de facto* way.²⁵⁹ This vote of confidence (or lack thereof) comes in the form of licensing, or refusing to license, under the patentee.

In the specific case of the Polsky series, the industry disagreed with the PTO as to the validity of each patent by simply going along with business as usual, not bothering to license with Polsky.²⁶⁰ Although this carried with it the risk of litigation, the risk never came to pass. While Polsky threatened to sue Patagonia and Gramicci, they paid her a flat fee to stop threatening, thereby registering their need to avoid litigation, but not necessarily signifying ratification of the PTO's decision to grant Polsky a

²⁵⁵ See, e.g., *Badalamenti v. Dunham's Inc.*, 862 F.2d 322, 12 U.S.P.Q.2d (BNA) 1222 (Fed. Cir. 1988) (noting that by virtue of the market alone, there will be few, if any, licensees on a patent that those of ordinary skill in the art industry feel is obvious).

²⁵⁶ See ELINOR OSTROM, *GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* (1991) (arguing that the current policy debate about the commons overlooks important ways in which actors govern common pool resource areas, and that empirical evidence of how actors actually treat common pool resources is needed both as a source of information and as a foundation for theory building).

²⁵⁷ See Gordon, *supra* note 14 (discussing correlative duties within the terms of a Lockean scheme); Kenneth J. Vandeveld, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 BUFF. L. REV. 325 (1980) (discussing correlative duties within the terms of an Hohfeldian scheme).

²⁵⁸ See, e.g., *Badalamenti*, 862 F.2d 322.

²⁵⁹ *Id.*

²⁶⁰ Polsky's three file wrappers show that she brought one law suit to enforce her patent rights. That sole law suit was against Chi Concepts, Inc. *Beanie Designs, Inc. v. Chi Concepts, Inc.*, No. 87-20420 (N.D. Ca. filed June 16, 1987).

patent.²⁶¹ With respect to some of the larger corporations like L.L. Bean and Lands' End, none of them were apparently approached by Polsky, nor did they approach her to license.²⁶² Only Polsky's complaint against Chi Concepts, the smallest of the companies named, registers in Polsky's file wrappers.²⁶³ And, if Chi Concepts licensed, it did so because licensing was less expensive than defending a patent infringement case. This economic calculus, like Patagonia's or Gramicci's calculus, was a business decision, not a vote of confidence for the PTO's decisionmaking process.²⁶⁴

All in all, the industry's stance toward Polsky was either to ignore her patent on the theory that the PTO had made a mistake, or to pay her a nuisance fee—in the interest of preserving investment capital by avoiding litigation costs.²⁶⁵ Most actors in the industry correctly presumed that the gusset was in the public domain, and thus their right to use the gusset preceded Polsky's patent.²⁶⁶ Cluett & Peabody Co., Inc. did license with Polsky in order to produce Freedom Pants.²⁶⁷ However, this effort ended in failure.²⁶⁸ Therefore, while Polsky had a patent, she had never

²⁶¹ Telephone Interview with Patagonia Counsel (name withheld upon request) (Jan. 11, 1996).

²⁶² There is no mention of licensing to either of these large companies in the file wrappers of the three Polsky patents. File Wrapper, U.S. Patent No. 4,371,989, issued to Bernice B. Polsky [hereinafter File Wrapper, U.S. Patent to Polsky (No. 4,371,989)]; File Wrapper, U.S. Patent No. 4,488,317, issued to Bernice B. Polsky [hereinafter File Wrapper, U.S. Patent to Polsky (No. 4,488,317)]; File Wrapper, U.S. Patent No. 4,785,480, issued to Bernice B. Polsky [hereinafter File Wrapper, U.S. Patent to Polsky (No. 4,785,480)].

²⁶³ File Wrapper, U.S. Patent to Polsky (No. 4,371,981), *supra* note 262; File Wrapper, U.S. Patent to Polsky (No. 4,488,317), *supra* note 262; File Wrapper, U.S. Patent to Polsky (No. 4,785,480), *supra* note 262.

²⁶⁴ Ostrow Interview, *supra* note 203.

²⁶⁵ *Id.*

²⁶⁶ See, e.g., Jaron Interview, *supra* note 128 (relaying that as a garment manufacturer, he operates under the assumption that the gusset is a public domain article).

²⁶⁷ See *supra* note 153 (discussing the Freedom Pants licensing agreement).

²⁶⁸ There appears to be a loose consensus among the manufacturers interviewed that one possible reason for the failure of Freedom Pants was a combination of Polsky's lack of experience with garment production and Cluett & Peabody Co.'s lack of care with the production process. Another possibility, however, is that since Cluett & Peabody Co. manufactured Freedom Pants out of polyester twill, they were appealing to the discount end of the market, a market that historically has not been able to afford the gusset innovation, and hence has not developed a preference for it. See *supra* notes 138-142 and accompanying text (discussing the relationship of cost to style preference).

produced a single manufactured product. She had a drawing and description but no manufacturing expertise to back them up in an industry known for its fast, furious, and competitive pace.²⁶⁹

Still, if Polsky's claims were so vague, if she simply reiterated something for which there was clearly depicted prior art, then how did she get not one, but three patents? The next section takes up this issue.

B. ABSTRACTION IN LINES AND CURVES—THE POLSKY INVENTION PROCESS

The Polsky series represents a systematic attempt to lay claim to the gusset. The series begins with the 1983 Polsky patent in which Polsky claimed the gusset, but instead gained protection for a cotton and lycra exercise garment that incorporated the common stock gusset.²⁷⁰ The second patent in the Polsky series was issued in 1984.²⁷¹ It claimed ownership of pants that incorporated the common stock gusset.²⁷² The third patent was issued in 1988.²⁷³ Citing the first two Polsky patents as references, it claimed an innovative garment (pants) that incorporated an "innovative" gusset, as described in the dependent claims.²⁷⁴ The 1988 patent was entirely inconsistent with the 1983 patent in the sense that in 1983, the PTO identified as the standard, common stock gusset the very same gusset Polsky described and "claimed" in the 1988 process.²⁷⁵

1. *Simple Encroachment—The 1983 Polsky Patent.* In 1983, Bernice Polsky filed for a U.S. Patent for an invention she called

²⁶⁹ Kasten, *supra* note 153 (corroborating Polsky's lack of experience in the garment industry); Garrison Interview, *supra* note 92 (describing Polsky's patent claim language as vague in terms of the specificity required to produce a garment and noting that the Polsky patents revealed no new art from her perspective as a pattern maker); Jaron Interview, *supra* note 128 (describing why the Polsky patents reveal no new art from his perspective as a garment manufacturer).

²⁷⁰ U.S. Patent to Polsky (No. 4,371,989), *supra* note 211.

²⁷¹ U.S. Patent to Polsky (No. 4,488,317), *supra* note 212.

²⁷² *Id.*

²⁷³ U.S. Patent to Polsky (No. 4,785,480), *supra* note 214.

²⁷⁴ *Id.*

²⁷⁵ File Wrapper, Patent Application, U.S. Patent to Polsky (No. 4,371,989), *supra* note 262.

"Seamless Crotch." Polsky's initial filing contained three independent claims, only one of which was ultimately allowed by the PTO:²⁷⁶ In the two claims that were rejected, Polsky attempted to lay claim to the gusset.²⁷⁷ She did this by placing her 1983 patent squarely in line with the previous Dunning line of patents,²⁷⁸ perhaps on the mistaken assumption that the gusset shape she claimed as her own was radically different from the standard, common stock gusset.²⁷⁹

Recall that the standard gusset is defined as a diamond-shaped piece of fabric that is inserted into pants in lieu of a cross-seam; it is shorter from front to back, and elongated from side to side; and it conforms with the wearer's inner thigh area so as to allow for increased leg movement.²⁸⁰ "Concave," "elongated," "curved," and "tapering" are terms often used to refer to the common stock gusset.²⁸¹ What Polsky claimed during the prosecution phase of her 1983 patent was a cross-seam alternative having "long tapering portions," "concave edges," and an "elongated curved diamond" shape.²⁸² This claim placed Polsky's gusset well within what had been previously used to identify the public domain gusset.

By citing the Dunning patent, however, Polsky was asserting that *her* diamond shaped gusset was sufficiently different from the common stock gusset to warrant a monopoly.²⁸³ These assertions

²⁷⁶ See File Wrapper, Examiner's Action (July 15, 1982), U.S. Patent to Polsky (989), *supra* note 211, at 264 (rejecting the claims under 35 U.S.C. § 103 and 35 U.S.C. § 102).

²⁷⁷ *Id.*

²⁷⁸ See U.S. Patent to Dunning (No. 557,563), *supra* note 167 (claiming a one-piece vertically ribbed knitted gusset patented to fit the crotch, seat, and legs).

²⁷⁹ File Wrapper, Patent Application, U.S. Patent to Polsky (989), *supra* note 262 (describing the gusset shape claimed as having "unique construction").

²⁸⁰ See *supra* Part II.C.2 (discussing early patents incorporating the gusset).

²⁸¹ *Id.*

²⁸² File Wrapper, Patent Application, U.S. Patent to Polsky (No. 4,371,989), *supra* note 262.



Id. at fig.4.

²⁸³ See File Wrapper, Patent Application, U.S. Patent to Polsky (No. 4,371,989), *supra* note 262 (distinguishing the claimed gusset from prior art based upon its long tapered sides which run down the inside of the legs).

were rejected by the PTO on obviousness grounds.²⁸⁴ The PTO cited as authority the Tanner, Stecker, and Dunning patents.²⁸⁵ The Tanner gusset was a modified common stock gusset incorporated into a nylon garment; however, precisely because the context-lending garment was nylon, the common stock gusset assumed a round shape.²⁸⁶ The Stecker gusset was the common stock gusset incorporated into overalls; and, because it conformed to a heavy denim context-lending garment, the gusset maintained its diamond shape.²⁸⁷ Finally, the Dunning gusset was the bicycle pants gusset, which clearly fell outside the public domain because of its unusual shape.²⁸⁸ In relation to these patents, Polsky's argued that she was inserting a gusset into a cotton-lycra garment in such a way that allowed it to retain a true diamond shape, a shape she hoped to patent.

Again, the PTO rejected Polsky's two independent claims to the gusset as "obvious at the time the invention was made to a person having ordinary skill in the art."²⁸⁹ But it allowed a claim for a cotton-lycra exercise pants-like garment that incorporated the common stock gusset.²⁹⁰ This allowance put Polsky's initial patent squarely in line with the line of patents that incorporated the common stock gusset into a patented context-lending garment.²⁹¹

2. *Remembering & Forgetting—The 1984 Patent Prosecution.* After Irving B. Smith's 1941 patent,²⁹² no other patent was issued for gusseted street trousers until 1984, when Bernice Polsky secured a United States patent for an invention she called "Pants-

²⁸⁴ File Wrapper, Examiner's Action (July 15, 1982), U.S. Patent to Polsky (No. 4,371,989), *supra* note 262 (rejecting claims 1-5).

²⁸⁵ *Id.*

²⁸⁶ See *supra* note 168 and accompanying text. See also Garrison Interview, *supra* note 92 (noting two possible reasons for using a circular gusset in nylon garments: for heavier nylon garments, like girdles, the reason is comfort; and, for lighter nylon garments, like panty hose, the reason is to prevent the nylon fabric from tearing or running).

²⁸⁷ U.S. Patent to Stecker (No. 924,013), *supra* note 161 and accompanying text.

²⁸⁸ U.S. Patent to Dunning (No. 557,563), *supra* note 167.

²⁸⁹ See File Wrapper, Examiner's Action (July 15, 1982), U.S. Patent to Polsky (No. 4,371,989), *supra* note 262 (stating that extending Tanner's crotch piece to midway down the legs would be obvious in light of the Stecker and Dunning patents).

²⁹⁰ U.S. Patent to Polsky (No. 4,371,989), *supra* note 211.

²⁹¹ See *supra* notes 157-189 and accompanying text.

²⁹² U.S. Patent to Smith (No. 2,264,958), *supra* note 171.

Like Garments Having a Seamless Crotch Construction.”²⁹³ The file wrapper shows that Polsky approached the prosecution of her 1984 patent with a particular strategy in mind.²⁹⁴ First, Polsky’s 1984 patent was titled “Pants-like Garments Having a Seamless Crotch Construction.” Like the title for her 1983 patent—“Seamless Crotch”—this title, though more specific, was relatively useless in describing or otherwise marking the scope of what it was that Polsky claimed to have invented. Pants-like garments having seamless crotch construction had been around since the 1970s, if not before.²⁹⁵ Indeed, the pants-like garment that Polsky referred to was the common, everyday pant. And the seamless crotch “construction,” while suggesting a method or process, was an ambiguity by which Polsky apparently hoped to claim ownership to the gusset itself.²⁹⁶ The foundation of Polsky’s 1984 strategy, then, was to present two independent claims for a pants-like garment that incorporated the common stock gusset. This was the ground upon which the PTO had allowed her 1983 patent.²⁹⁷

The 1984 Polsky patent made eighteen dependent claims related to the gusset. These claims described the gusset in terms that had been used before.²⁹⁸ Like early twentieth century patents, rather than simply referring to the gusset, Polsky’s dependent claims described it in full detail.²⁹⁹

Moreover, while it was accurate to say that the PTO had not yet allowed claims for patenting conventional pants with a common stock gusset, it was not accurate to say that there was an absence of prior art for such a garment.³⁰⁰ As discussed above, as early

²⁹³ U.S. Patent to Polsky (No. 4,488,317), *supra* note 212.

²⁹⁴ File Wrapper, U.S. Patent to Polsky (No. 4,488,317), *supra* note 262.

²⁹⁵ See *supra* notes 113-155 and accompanying text (discussing development of the gusset before, through, and after the 1970s).

²⁹⁶ See 35 U.S.C. § 101 (1994) (noting that processes are patentable).

²⁹⁷ See U.S. Patent to Polsky (No. 4,371,989), *supra* note 211 (granting a patent for cotton and lycra spandex garment suitable for athletic activities).

²⁹⁸ See File Wrapper, Patent Application, U.S. Patent to Polsky (No. 4,488,317), *supra* note 262 (describing the design with terms such as “form fitting,” “crotch piece,” and “seamless crotch”).

²⁹⁹ *Id.*

³⁰⁰ See *supra* notes 113-189 and accompanying text (discussing prior gusset related patents).

as 1902, the Sears, Roebuck Company had manufactured an augmented garment that, though not identical, anticipated Polsky's independent claims in all salient respects,³⁰¹ as did the bib overalls of the 1940s,³⁰² and the Lee Dude Ranch Jean with the "famous u-crotch" of the same era.³⁰³ In the early 1970s, Stacy Kuranz had marketed the Movement Pants,³⁰⁴ and in the late 1970s, Century had manufactured the Kickin' Jeans.³⁰⁵ Both of these embodiments anticipated the Polsky invention in *all* respects.³⁰⁶ These embodiments found their way to the market well before Polsky's second patent. Thus, off-record prior art, which Polsky had the duty to discover and disclose to the PTO,³⁰⁷ had not been disclosed and, for that reason alone, was not considered by the Patent Examiner in the prosecution of the 1984 patent.³⁰⁸ Had such off-record prior art been considered, the Patent Examiner would have been statutorily mandated to deny the 1984 Polsky patent.³⁰⁹

In addition to this anticipating off-record prior art, there was also on-record prior art that anticipated the incorporation of the common stock gusset into street garments.³¹⁰ Irving B. Smith's patent for expandable trousers, described above, despite the near silly incorporation of buttons and zippers, marked an important

³⁰¹ See *White v. Lombardy Dresses, Inc.*, 40 F. Supp. 216 (S.D.N.Y. 1941); *White v. Lombardy Dresses, Inc.*, 40 F. Supp. 548 (S.D.N.Y. 1941) (collectively holding that in the area of clothing design, prior art need only read on in salient respects).

³⁰² See *supra* note 126 (giving examples of gusset-using bib overall manufacturers).

³⁰³ See *supra* note 127 (depicting the Lee "Dude Ranch Jean").

³⁰⁴ See *supra* note 143 (discussing Kuranz's statement that she got the idea for her Movement Pants design in the early 1970s).

³⁰⁵ See *supra* note 151 (showing a Kickin' Jeans advertisement).

³⁰⁶ See *supra* notes 143-151 (discussing the re-entry of gusseted pants into the American market).

³⁰⁷ See 35 U.S.C. § 112 (1994) (describing specification requirements which must accompany patent applications); 37 C.F.R. § 1.56 (1996) (describing the duty to disclose information material to patentability); Gary M. Hoffman & Mark J. Thronson, *Standard of Care Established in Intellectual Property Law Opinions*, *COMPUTER LAW.*, Jan. 1993, at 1 (discussing the duty and standard of care individual intellectual property attorneys have in advising clients, especially duties related to the exhaustiveness of the search for prior art.).

³⁰⁸ *File Wrapper*, Patent Application, U.S. Patent to Polsky (No. 4,488,317), *supra* note 262.

³⁰⁹ 35 U.S.C. §§ 101-103 (1994).

³¹⁰ See *supra* note 44 (discussing the *White v. Lombardy* line of cases rejecting patents on dress designs for lack of innovativeness).

moment in the twentieth century life of the gusset.³¹¹ Smith's pants were clearly a novelty item, but because of the historical moment in which they appeared, they were directed at the everyday market. Smith secured his patent in 1941, just as United States was entering World War II. The text of Smith's patent describes an article of clothing in which one could zip up the gussets by day, and release them by night when "reclining or lounging or sleeping."³¹² Smith's text conjured up images of young men on their way to war, spending long nights in transit. It exuded in equal doses a sense of American pragmatism and common cause in the sense that expandable trousers were Smith's admittedly small and untested, but optimistic contribution to the war effort.³¹³

To be sure, Smith's patent was squarely in line with other patents treating the gusset as an obscure, peripheral item recycled from the common stock.³¹⁴ But minus the buttons and zippers, Smith's design boiled down to a pair of street pants with a gusset. If the gusset had been forgotten in everyday wear, which off-record prior art proves it had not been, then Smith's 1941 patent serves as the precise moment at which the gusset reemerges in the collective awareness, at least as that awareness is recorded by the PTO.

3. *Bureaucratic Decisionmaking—The 1987 Patent Prosecution.* Invention is a process that builds on what came before, but there are more original and less original ways to go about the building.³¹⁵ Of Polsky's three patents, the 1987 patent is the most difficult to analyze. This is because Polsky took the less original route.

³¹¹ See U.S. Patent to Smith (No. 2,264,958), *supra* note 171 (claiming pants incorporating a detachable concealable gusset).

³¹² *Id.* at 1.

³¹³ See Selznick, *supra* note 196 (discussing the analytical importance of American Pragmatism at this time and in general).

³¹⁴ See *supra* Part II.C.2 (discussing patents incorporating the gusset into their design).

³¹⁵ "[T]he very act of authorship in any medium is more akin to translation and recombination than it is to creating Aphrodite from the foam of the sea." Litman, *supra* note 109, at 966. "Invention is rarely a completely discrete or fortuitous occurrence; rather, inventors constantly engage in the process of adapting, re-evaluating and transforming what is already 'out there' in some other form." Otieno-Odek, *supra* note 110, at 17 (citing Litman, *supra* note 108, at 967. See also Aoki, *supra* note 14, at 25 (noting other scholars who have discredited the idea of "romantic [individualistic] authorship").

When Polsky applied for her third patent on April 3, 1987, she also filed an "Information Disclosure Statement" as required under 37 C.F.R. § 1.56.³¹⁶ This statement disclosed Polsky's prior patents and the West³¹⁷ line of patents, but it did not mention the off-record prior art, whose disclosure was also statutorily required.³¹⁸ Moreover, this off-record prior art was art that Polsky had actual notice of during the prosecution of her third patent.³¹⁹ Nevertheless, in the Information Disclosure Statement, Polsky averred that the patents she cited in her application "constitu[ted] the closest art of which Applicant [Polsky] is aware."³²⁰

Initially, all twenty of Polsky's 1987 claims, six of which were independent claims, were rejected by the PTO on the ground that they failed under the requirements of 35 U.S.C. § 112, to provide a "written description of the invention . . . in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains . . . to make and use the same . . ."³²¹ The

³¹⁶ File Wrapper, Information Disclosure Statement, U.S. Patent to Polsky (No. 4,785,480), *supra* note 262. 35 U.S.C. § 112 requires specification of prior art in accord with 37 CFR § 1.56, which requires disclosure of information material to the examination of the application. 35 U.S.C. § 112 (1994). In addition, 35 U.S.C. § 115 provides that "the applicant shall make oath that he believes himself to be the original and first inventor of [that] . . . for which he solicits a patent." *Id.* § 115. Although Polsky may still have believed herself the "original and first inventor" of the No-Bind Pants with Seamless Crotch, it would seem apparent that the information she acquired from Kuranz during her deposition would have been material to the examination of the Polsky application and, therefore, subject to the rule of disclosure. *See also* Buzzelli v. Minnesota Min. & Mfg. Co., 521 F.2d 1162, 186 U.S.P.Q. (BNA) 464 (6th Cir. 1975) (holding that when an applicant had failed to disclose clearly material prior art and asserted that no such art existed, that conduct rendered the patent unenforceable).

³¹⁷ *See supra* note 158 and accompanying text (discussing the 1891 patent issued to Marshall O. West for "Drawers").

³¹⁸ *See supra* note 319 (noting that Chi Concepts sent copies of its design to Polsky).

³¹⁹ Chi Concepts sent its embodied designs to Polsky's attorney as part of discovery. Ostrow Interview, *supra* note 203. *See also* Correspondence from the law firm of Harris, Kern, Wallen and Tinsley on behalf of Polsky to Ostrow (Jan. 6, 1987) (on file with Author) (confirming "the patterns were sent to Ms. Polsky on 23 December 1986). In terms of an easily referenced time line, Polsky's original application was rejected on Feb. 25, 1988, Kuranz's deposition was taken on April 20, 1988, Polsky filed her final claims on May 31, 1988, and her final drawings on June 6, 1988, and the patent was issued on Aug. 24, 1988. File Wrapper, U.S. Patent to Polsky (No. 4,785,480), *supra* note 262.

³²⁰ File Wrapper, Information Disclosure Statement, U.S. Patent to Polsky (No. 4,785,480), *supra* note 262.

³²¹ File Wrapper, Examiner's Action (Feb. 25, 1988), U.S. Patent to Polsky (No. 4,785,480), *supra* note 262 (citing 35 U.S.C. § 112 and other grounds, specifically 35 U.S.C. § 102(e), prior art).

PTO issued notice of its rejection on February 25, 1988; under the terms of this notice, Polsky had three months to submit more detailed claims.³²²

Meanwhile, Polsky had notified the PTO of her law suit against Chi Concepts, Inc., in accordance with 35 U.S.C. § 290.³²³ The complaint charged Chi Concepts with infringement related to the 1983 and 1984 Polsky patents. This complaint was soon dismissed without prejudice.³²⁴ However, in an effort to trace its claim of right to the gusset, Chi Concepts deposed Kuranz on April 20, 1988, two months after the PTO rejected Polsky's initial claims for lack of specificity.³²⁵ At the deposition Polsky's attorney requested copies of Kuranz's pattern.³²⁶ In addition, Polsky acquired access to Movement Pants drawings and Chi Concepts' embodied designs.³²⁷

By May 31, 1988, apparently after reviewing Kuranz's deposition testimony, the Movement Pants drawings, and Chi Concepts' embodied designs, Polsky was able to submit a more detailed description of her invention to the PTO.³²⁸ Whereas the rejected claims had used general language—curves were "slight" and points faced "the front center of the garment"³²⁹—the revised claims were specific. To give two randomly selected examples, "slight

³²² *Id.*

³²³ 35 U.S.C. § 290 (1994).

³²⁴ File Wrapper, Report on the Filing or Determination of an Action Regarding a Patent (May 16, 1988), U.S. Patent to Polsky (No. 4,785,480), *supra* note 262.

³²⁵ See *supra* notes 143-152 and accompanying text (discussing the reappearance of the gusset in the American market through Kuranz's Movement Pants and license to Chi Concepts).

³²⁶ It was decided at the deposition that Polsky's attorney, Ms. Finkel, could contact Ms. Kuranz for her original design. Deposition of Kuranz, *supra* note 143, at 158-159. However, Kuranz was not contacted by Ms. Finkel after the deposition, nor did she send patterns to Ms. Finkel's office. Kuranz Interview, *supra* note 145.

³²⁷ Deposition of Kuranz, *supra* note 143. While Polsky did not procure Kuranz's patterns, she did receive Ostrow's patterns. See *supra* note 319. In addition Polsky had access to the Kuranz Movement Pants garment tags, which pictured the pants, and to the pants themselves. See *supra* note 143. Pattern maker Victoria Garrison has confirmed that in order to copy a design, all one needs is the garment and a measuring tape. Garrison Interview, *supra* note 92.

³²⁸ File Wrapper, U.S. Patent to Polsky (No. 4,785,480), *supra* note 262.

³²⁹ File Wrapper, Original Patent Application (Apr. 3, 1987), U.S. Patent to Polsky (No. 4,785,480), *supra* note 262.

curves"³³⁰ became "convexly curved outer edges that extended from the waistband edge down buttocks, outer thigh and leg segments",³³¹ and points facing the "front center of the garment" became "front edges meeting at a first point toward the front center of the garment below the waistline."³³² Citing two distinct patent lines, Polsky positioned her invention as one that was either "a combination of "a conventional garment (trousers) with a gusset, or alternatively, an entirely novel garment (innovative pants with an innovative gusset—"innovative" from Polsky's perspective).³³³ Yet, whereas her initial application offered only a general description of pants, her later description, compiled after access to Kuranz's and ChiPants' combined knowledge and designs, offered information specific enough to be adjudged of use to a person of ordinary skill in the trade.³³⁴

Equally problematic was that even though Polsky was prosecuting her patent at the same time that she was gathering discovery information from ChiPants, she failed to disclose the Kuranz line of prior art to the PTO.³³⁵ Polsky had notice of this line as early as July 16, 1987, the date of ChiPants' answer to her complaint.³³⁶ She certainly had first hand awareness and knowledge of this line by April 20, 1988, the date of Kuranz's deposition.³³⁷ None of this prior art came to the PTO's attention during the Polsky patent prosecution of 1987 and 1988.³³⁸ Finally, Polsky's third patent represented a return to her initial 1983 strategy. This strategy had already been rejected by the PTO, therefore Polsky should have been estopped from attempting to recapture claims about the gusset that she had previously surrendered.³³⁹

³³⁰ *Id.*

³³¹ File Wrapper, Revised Patent Application (May 31, 1988), U.S. Patent to Polsky (No. 4,785,480), *supra* note 262.

³³² *Id.*

³³³ *Id.*

³³⁴ 35 U.S.C. § 112 (1994).

³³⁵ See File Wrapper, U.S. Patent to Polsky (No. 4,785,480), *supra* note 262.

³³⁶ *Id.*

³³⁷ See Deposition of Kuranz, *supra* note 143 (recording Polsky's presence at the deposition).

³³⁸ File Wrapper, U.S. patent to Polsky (480), *supra* note 214.

³³⁹ 35 U.S.C. § 112. Under the doctrine of file wrapper estoppel, Polsky would be estopped from claiming the gusset itself either under her first (No. 4,371,989) or second (No. 4,488,317) patent, and perhaps also under her third (No. 4,785,480) patent since she previously surrendered her broad claims vis à vis the gusset during prosecution of her

C. MEANINGS: GENERALIZING FROM THE POLSKY SERIES

Examining the evolution of the Polsky series makes her invention "process" fairly apparent. It was the kind of process whereby Polsky gathered the various patents issued to garments incorporating gussets, and based on these drawings and descriptions alone, she attempted to imagine an abstract innovation to the line. It was deriving sentences from sentences as a matter of strict logic, or in this case, deriving ideas from ideas as a matter of strict logic.³⁴⁰ Not copyrightable as a matter of substantive law, Polsky's 1987 patent application was granted primarily on procedural grounds; the PTO's scrutiny ended when Polsky filed a more specific description of her claim, whereas it should have just commenced at that point with an inquiry into obviousness.³⁴¹

More specifically, Polsky's invention process was to aggregate and recombine the written descriptions of the common stock gusset that she had found in patent records. The foundation for this process was her mistaken belief that the aggregation itself constituted an "improvement" to the art.³⁴² The PTO did not accede to this style of invention; at each point in the prosecution of the three Polsky patents, when Polsky attempted to claim a proprietary interest to the gusset *qua* gusset, the patent examiner rejected her efforts.³⁴³ It was only after Polsky had the opportunity to study actual designs with historical market success that Polsky's claims to the gusset took on legitimacy.

Unfortunately, all of this subtlety was lost on Polsky. Despite the patent prosecution process of 1983, which forbade her from

applications before the PTO. See generally DONALD S. CHISUM, CHISUM ON PATENTS (1997) (describing the doctrine of file wrapper estoppel).

³⁴⁰ See Selznick, *supra* note 196, at 39-62 (discussing the intellectual tenor that gives rise to "invention" as a matter of logic alone, rather than logic as modified by experience).

³⁴¹ See *supra* notes 315-339 and accompanying text (noting that the patent was granted after a request for specificity was met).

³⁴² 35 U.S.C. § 101 (1994).

³⁴³ File Wrapper, Examiner's Action (July 15, 1982), U.S. Patent to Polsky (No. 4,371,989), *supra* note 262; File Wrapper, Examiner's Action (Feb. 25, 1988), U.S. Patent to Polsky (No. 4,785,480), *supra* note 262. In the application for her Second patent, Polsky claimed the entire pants embodying a gusset (and not the gusset alone). Despite the fact that the "innovative" aspect of the pants was the use of the described gusset, the PTO allowed her claims. File Wrapper, U.S. Patent to Polsky (No. 4,488,317), *supra* note 262.

claiming the gusset *qua* gusset, despite her failure to adequately research the prior art for her 1984 patent prosecution process, and despite her failure to disclose the prior art that she had full knowledge of during the 1987-1988 patent prosecution process, Polsky continued to believe that she had "birthed this creation," meaning that she had invented the gusset.³⁴⁴ She argued that she had based her invention on "12 years of real research and development in the dance studios in Canada," where she said that she "designed and personally sewed each garment" she ever made.³⁴⁵ In addition, Polsky's attorney continued to write cease and desist letters as late as 1995 on the ground that Polsky owned "the seamless crotch," the gusset.³⁴⁶

In all likelihood, Polsky's first U.S. patent was probably valid. However, her second and third U.S. patents should not have been granted. The second was clearly anticipated by off-record prior art and arguably by recorded prior art, as was the third. The third also violated principles of file wrapper estoppel,³⁴⁷ despite having been approved after incomplete disclosure. Yet that patent was granted, giving it the presumption of validity, as well as encouraging Polsky to travel the world in search of foreign patents.³⁴⁸ This meant, of course, that the task of rebutting the presumption of validity, either through market or judicial processes, was left to other manufacturers.

In fairness, it may have been difficult for Polsky—a small scale actor—to find prior art of the sort presented in Part II of this Article, especially if her research efforts were limited to experiential modes.³⁴⁹ However, she had no excuse for failing to disclose Kuranz's Movement Pants, for which she had actual know-

³⁴⁴ Correspondence from Polsky to Ostrow (Sep. 18, 1995) (on file with author).

³⁴⁵ *Id.*

³⁴⁶ Correspondence from the law firm of Rosner, Owens & Nunziato on behalf of Polsky to ChiPants (Jul. 11, 1995) (on file with author).

³⁴⁷ See *supra* note 339.

³⁴⁸ By 1995 Polsky had secured patents for gusseted pants in Germany (#G-89-03-018.4), Canada (#1,222,104), Taiwan (#27768), Australia (#590488), New Zealand (#227198), and Spain (#8900508/2). Correspondence from Polsky to Ostrow, *supra* note 344.

³⁴⁹ Polsky based her claim to the gusset on "12 years of real research and development in the dance studios in Canada." *Id.*

ledge,³⁵⁰ or Century's Kickin' Jeans, a garment she could have discovered in a prior art search. As a patent applicant, Polsky had the duty to fully disclose the prior art—a duty that she acknowledged with an oath.³⁵¹ Nevertheless, Polsky continued to assert that the responsibilities ran in the opposite direction, and that it was the PTO's responsibility as a protector of the public interest to research and disclose prior art.³⁵² When presented with evidence of the gusset as a public domain item, Polsky responded with disbelief.³⁵³

In conclusion, the bureaucratic processes described herein led to the first point in American history where manufacturers had to either seek a single individual's permission to use the gusset or else risk a lawsuit. Manufacturers who were otherwise in tune with the PTO's function in their industry, called its actions *in this case* into question.³⁵⁴ If they produced without first licensing with Polsky, they opened their own businesses up to risk as well as the businesses of their contractors.³⁵⁵ In one case, Polsky even sent cease and desist letters to AONET, the on-line service provider for Chi-Pants.³⁵⁶ Her letter threatened to sue AONET for contributory infringement on the ground that it was reproducing images of the gusset on the worldwide web.³⁵⁷

³⁵⁰ See *supra* notes 315-339 and accompanying text (discussing Polsky's knowledge of and access to Kuranz's designs).

³⁵¹ 37 C.F.R. § 1.56 (1996). See also *supra* notes 316-320 (discussing applicant's duty of disclosure).

³⁵² Correspondence from Polsky to Ostrow, *supra* note 344.

³⁵³ *Id.*

³⁵⁴ In January 1996 an informal gathering of garment manufacturers convened in San Francisco, California to discuss how best to address Polsky's demand for licensing fees of between \$30,000 and \$80,000 per manufacturer for use of "her" gusset. Because of the prohibitive cost of patent litigation, Polsky's threats were problematic. For example, Chi Concepts, Inc. spent close to \$80,000 in the 1980's simply to defend against Polsky's first complaint, which was dismissed in the discovery phase. Ostrow Interview, *supra* note 203.

³⁵⁵ Correspondence from Polsky to Jaron (Jan. 23, 1996) (on file with author) (informing Jaron that Polsky had mailed ChiPants a cease and desist letter and implying that Jaron ought to cease manufacturing activities in order to avoid potential liability).

³⁵⁶ Correspondence from Polsky to AONET Service Provider representative Roger Clay (Dec. 15, 1995) (on file with author).

³⁵⁷ *Id.*

IV. CONCLUSION

The gusset is a humble thing. Nevertheless, it is a common pool resource. Evidence shows that manufacturers and designers have treated the gusset as a common pool resource in the twentieth century. Congress consistently declines to extend copyright protection to embodied clothing design. And although patent protection is available for innovative clothing designs, securing patent protection requires that one have a novel design—indeed, one novel enough, as a practical matter, to make the long, arduous patent process worthwhile.

Proponents and critics of the public domain, while advancing the debate in law review literature about how the commons ought to be governed, have perhaps fallen into the common pool resources trap.³⁵⁸ These policy discussions, because they are not founded in empirical research, too often use the idea of the commons as a metaphor.³⁵⁹ Those in favor of a policy recognizing the commons see federal protection (typically through either collectivization or regulation) as the only way to protect that metaphorical space and the things or ideas in it.³⁶⁰ Those against such a policy see privatization as the only way to protect what is at stake.³⁶¹ Empirical research of how these common pool resources are actually treated clearly identifies and acknowledges the existence of commons in local contexts and identifies other explanatory alternatives that are consistent with the ones identified in this Article as subjects for further research.³⁶²

The garment industry has consistently and confidently treated the gusset as a common pool resource. It was a design, available to all, interpretable by all, and clearly outside the parameters of the copyright regime. The problem arose, however, because the

³⁵⁸ See, e.g., *supra* notes 240-254 (discussing the main strains of scholarly disagreement regarding the public domain).

³⁵⁹ OSTROM, *supra* note 256 (stressing the importance of empirical work as the foundation for theory building in this area).

³⁶⁰ See *supra* notes 240-250 and accompanying text (discussing viewpoints of how scholars equalize privatization with diminishment of the public domain).

³⁶¹ See, e.g., Samuels, *supra* note 10.

³⁶² See OSTROM, *supra* note 256 (arguing that empirical evidence of how actors actually treat common pool resources is overlooked and should be used as a foundation for theory building).

gusset could be incorporated into patented garments. This was possible given the federal policy to grant patent monopolies to novel designs, even if those designs incorporated common stock aspects, like the gusset. To work properly this policy relied entirely on the patentee to distinguish between what was novel and what was "borrowed" from the public domain. The policy was implemented by more specific rules about the importance of full disclosure by the patentee to the PTO.

In this case, while the PTO's process of distinguishing between new and old ("borrowed" from the commons) worked in the first two patents of the Polsky series, despite the lack of full disclosure on the patentee's part,³⁶³ it arguably failed in the third patent (ironically because of the lack of full disclosure on the patentee's part).³⁶⁴ Principals in the garment industry responded to the third patent in the Polsky series by asserting something that the policy literature typically fails to consider—that government bureaucracies, like the PTO, make mistakes. Here, the principals took the stance that the PTO had made a mistake.

Thus, as the patentee proceeded to exploit the PTO's mistake by threatening infringement law suits, a small group of principals came together to consider what their response would and should be. This small group eventually grew to include principals from other arenas as well—arenas peopled by venture capitalists, internet service providers, retailers, contractors, designers, fabric producers, and even cotton growers—all of whom tentatively came together in a loose, self-organized, self-governing incipient "institution" to protect their access to the gusset design. Had these principals been acting with an eye toward law review literature on the intellectual property commons, they would have either appealed to the state to collectivize (or better regulate) the resource, or they would have gone along with what was essentially the privatization of the resource. Instead, they reached for an alternative solution of the sort that empirical data reveals as well. Presuming (a) that the PTO had made a mistake in its regulation of the gusset by granting a patent, and (b) that the mistake had unwittingly led to the

³⁶³ U.S. Patent to Polsky (No. 4,371,989), *supra* note 211; U.S. Patent to Polsky (No. 4,488,317), *supra* note 212.

³⁶⁴ U.S. Patent to Polsky (No. 4,785,480), *supra* note 214.

presumption that the gusset was a privately ownable design, the principals responded by cooperating vis à vis the resource, and thus countering privatization by treating the gusset as a publicly owned item, or common pool resource. Their cooperation was limited, however, by the understanding that "privatization" could be had, if necessary, through the doctrine of trade dress, which allows garment producers to develop and own an image.³⁶⁵

How the principals set up their self-organized, self-governing, incipient institution is a subject for further study. So is whether they will reach an optimal way to manage the common resource of the gusset design. However, before that study of unofficial institution building and maintaining can be done, the common pool resource itself must be identified—in this case, that common pool resource is also a little piece of American (material) folklore, the gusset. This Article tries to identify and understand this resource, recognizing that, because it is intangible (the gusset being essentially a design idea), and because it is a commonly used item with a long and complicated history, the boundaries and accessibility of this "commons," though not defined by law, are made visible by contextualized discussions of law.

³⁶⁵ See *supra* note 24 (noting that the doctrine of trade dress would allow for the ownership of image, which would be roughly equivalent to the drawing off of "resource units" from a tangible commons).

