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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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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 inventions\(^3\) or inventions based on algorithms,\(^4\) can be


\(^3\) 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).


\(^4\) 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).


\(^6\) 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. 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. 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. As one scholar put it,

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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.” 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, 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. 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.

11 Goldstein, supra note 10, at 1108.
13 Id. at 496.
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.\(^{16}\) 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

\(^{16}\) 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).

\(^{17}\) See infra Part IIA.

One-piece gusset

Two-piece gusset

graphic design for a Dior dress.\textsuperscript{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.\textsuperscript{19} On the other hand, a Dior dress design, is original, and to the degree that it approaches \textit{haute couture}, it may even be considered art.\textsuperscript{20}

While copyright law protects an original design expression, patent law protects ornamentality in the case of design patents\textsuperscript{21} or innovation in the case of utility patents.\textsuperscript{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.\textsuperscript{23} The second is to perfect a trade dress in uniquely marketed, but non-innovative gusseted garments.\textsuperscript{24} This Article discusses the former method


\textsuperscript{19} See infra note 89 and accompanying text.

\textsuperscript{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, \textit{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, \textit{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, \textit{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).


\textsuperscript{22} See infra notes 100-112 and accompanying text (discussing how courts define novelty).

\textsuperscript{23} See infra Part III.B.2.

\textsuperscript{24} Trade dress is a specific aspect of trademark law, which protects "identifying symbols". J. \textsc{Thomas} \textsc{McCarthy}, 1 \textsc{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. 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.

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, 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.” 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

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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 folklore—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. 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.

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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. 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. Things that rest upon or near the boundary—like the excised cell in Moore—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. Under our system, if something is distinguishable and can be separated from the common stock, it is more easily conceptualized as privately ownable property. 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.

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).

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

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


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").

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 Personality: 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. & POLY 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. 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. 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," a phrase that includes within its
scope “pictorial, graphic, and sculptural works,” 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.” 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. 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 as uncopyrightable “industrial designs,” not as copyrightable “applied arts.” 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).


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).


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 Intl 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, nor the proper subject matter of copyright law under the separability test. The court reasoned that a belt buckle's intrinsic function is utilitarian, and therefore, its decorative aspects cannot exist on their own. 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. 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. 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 basic requirements of originality and creativity . . . would take the vast majority of belt buckles wholly out of copyrightability.”

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.

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. 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. 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.

In addition, the appellate court noted that the case was “on a razor’s edge of copyright law,” suggesting that the problem was

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53 Kieselstein-Cord, 632 F.2d at 994.
54 Id.
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.” 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, 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. 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. 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.

61 Id. at 991.
62 See Registration to Claims of Copyright: Pictoral, Graphic, and Sculptural Works, 37 C.F.R. § 202.10 (1996) (noting that registratability is not “affected by the intention of the author as to the use of the work”).
63 Kieselstein-Cord, 632 F.2d at 991.
65 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. The design of the composers was viewed as conceptually separable from the t-shirt, and therefore subject to independent copyright analysis and protection.

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, though the post-Berne Architectural Works Protection Act (AWPA) arguably also serves to clarify, rather than compromise the analogy. 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." Before 1990, the copyright statute expressly protected "diagrams, models, and technical drawings, including architectural plans," but it only implicitly protected structures (buildings), and then only those elements that were conceptually separable from the structure's utilitarian function. The AWPA, on the other hand, explicitly extends protection to structures, regardless of whether they meet

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65 Id.
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. However, it just as explicitly excludes from protection “individual standard features” of the otherwise protected structure. 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.”

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. 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.

While architectural plans, drawings, and now, post-1990 structures are clearly copyrightable, 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.” 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

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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 AWPA (1990) are still subject to the separability test.
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 waders 80 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 quality 82 (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

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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. 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.

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. Hence, such garments are not now protectable on the basis of their unorigin-
ality. Second, in the unlikely event that the gusset were to be considered an original "application" to the public domain pant garment, the gusset has no separable pictorial, graphic, or sculptural qualities, since it is an intrinsically functional and often hidden aspect of a garment. 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." 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."

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

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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 AWPA 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).

the practical sense that most garments are more akin to uncopyrightable functional buildings like photo-developing kiosks\textsuperscript{94} than they are to clearly copyrightable monuments.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{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.

\textsuperscript{95} See, e.g., Polakovic, supra note 47 (offering the example of the York Cathedral).

\textsuperscript{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).

\textsuperscript{97} See supra note 85.
sufficient to rebut the presumption of ordinariness. This, of course, would force courts into a position they typically resist—deciding the difference between art and industry.

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. 35 U.S.C. § 102 requires that items be novel before a patent monopoly will issue. 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. 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. A novel invention is one that has not been previously described in prior art.

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

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99 Id. at 553.
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.\textsuperscript{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;\textsuperscript{107} an invention must also be non-obvious
to a person with knowledge of the field.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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

\begin{itemize}
\item \textsuperscript{106} 35 U.S.C. § 103.
\item \textsuperscript{107} Id. § 154.
\item \textsuperscript{108} Id. § 103.
\item \textsuperscript{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,
vis à vis the idea of the public domain).
\item \textsuperscript{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).
\item \textsuperscript{111} 35 U.S.C. § 103 (1994).
\end{itemize}
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

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

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. 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. 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.

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.
119 See infra Part II.C.2 (discussing and illustrating early patents incorporating the gusset).
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)
yet free enough to allow for ease of movement in mounting,
riding, and dismounting horses.\footnote{\textit{See generally, William Gilchrist \& Roberto Manzotti, CULT: A VISUAL HISTORY OF JEANS WEAR, AMERICAN ORIGINALS} (1992); \textit{The Jeans} (Kesaharu Imai ed., 1991) (providing a history of jeans in Japanese text); \textit{This is a Pair of Levi Jeans} (Downey et al. eds., 1995) (offering material from the Levi Strauss \& Co. Archives).} 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.\footnote{\textit{The Jeans}, supra note 121, at 75 (reproducing \textit{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\c. \textit{Id.}} Cavalry Riding pants were made out of buckskin color duck, and the “entire back half,” though apparently not gusseted \textit{per se}, was doubled and “extend[ed] between the crotch.”\footnote{\textit{Id.}} 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.\footnote{\textit{Telephone Interview with Len Larson, Archivist and Director of Apparel Design and Technical Services, Lee Apparel Co. Inc. (Mar. 5, 1996).}}

In the early 1940s, the Lee Apparel Company manufactured bib overalls and dungarees with a gusset.\footnote{\textit{Id.}} Lee Apparel has not yet

\begin{figure}
\centering
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\caption{Riding Pants for $1.00.}
\end{figure}
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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{128}

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

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

\textsuperscript{127} Id. at 101.

\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{129} Larson Interview, \textit{supra} note 125.

\textsuperscript{130} \textit{See} LEVI STRAUSS & CO., \textit{WESTERN WEAR} 2 (1930).

\textsuperscript{131} \textit{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.\textsuperscript{132}

When it came to other garments, gussets were more widely available than they were in jeans.\textsuperscript{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.\textsuperscript{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 \textit{process} for cutting twin-gusseted trousers gained patent protection.\textsuperscript{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 gusseting remained obvious to a designer or manufacturer of ordinary skill in the trade.\textsuperscript{136}

Levi Strauss & Company was the most prominent company to produce a garment that incorporated the two-piece gusset\textsuperscript{137} as a public domain item.\textsuperscript{138} In 1922 and 1925, Levi Strauss & Co.

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\textsuperscript{132} See supra note 24 (noting that trade dress protects “identifying symbols”).

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

\textsuperscript{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.


\textsuperscript{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).

\textsuperscript{137} See supra note 134 and accompanying text (describing the two-piece, triangle gusset).

\textsuperscript{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.\textsuperscript{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.\textsuperscript{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).\textsuperscript{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

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

\textsuperscript{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.

\textsuperscript{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. 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. 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. 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. The embodied design was not copyrightable under 17 U.S.C. 102(b). 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. Despite having no legally recognizable interest, Kuranz was able to license the use of her design to others, perhaps because most of her

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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.
licensors sold in the same small stores and open markets that she did. Only one producer who traced its early designs to Kuranz's Movement Pant pattern sold gusseted pants nationally and internationally. That producer was Chi Concepts Incorporated.

Just after the Movement Pants' emergence in 1973 or 1974, "Kickin' Jeans," a gusseted jean, was marketed by Century Martial Arts, Inc. Kickin' Jeans incorporated a gusset that was made out of a single, diamond-shaped piece of fabric elongated at the sides and shortened from front to back. Shortly after the appearance of the Kickin' Jeans, Chi Concepts, Inc. began to sell lower body garments that used a single, diamond-shaped gusset. In the 1990s other large retailers like Patagonia, Gramicci, L.L. Bean, REI, Royal Robbins, and Lands' End also used

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148 Deposition of Kuranz, supra note 143, at 23-32 (discussing “release agreement,” and names of licensees authorized to use the design).
149 Id. at 112 (noting that she received $37,998 and 30,000 shares of common stock from Chi Concepts in exchange for permission to use the design).
150 Id.
151
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.\footnote{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.).}

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-
ment Pants and Kickin' Jeans 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. 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."

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." 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

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154 See supra note 143.
155 See supra note 151.
156 See infra Part III.B.1 (discussing Polsky's 1983 patent).

Id. at fig. 2. See also U.S. Patent No. 1,737,923, "Garment," issued to Harry P. Eckstein (Dec. 3, 1929).
drawers of different proportions." With this language West implied what later inventors would expressly iterate—that they regarded the gusset as part of the public domain. 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. Stecker’s invention was a ventilated farmer’s overall sporting a gusset, which Stecker called an elastic crotch inset. This gusset came to a point in the upper to mid-thigh range and took the shape of “an elongated diamond-shaped inset.” 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

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159 Id. at 1.
162 Id. at fig.2.
163 Id. at 2.
164 Id. at fig.1.
strain . . . [and] provide[d] novel ventilating means for the same.”

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,” Stecker described it as “substantially elongated” and having a “diamond form.” 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.

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.

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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{170}

A 1941 patent issued to Irving B. Smith appears to be the first to incorporate the gusset into a pair of street pants.\textsuperscript{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.\textsuperscript{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-


\textsuperscript{169} Id. at 2.


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.


\textsuperscript{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.\textsuperscript{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."\textsuperscript{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.\textsuperscript{176}\ 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{178}\ Finally, the gusset’s function served the purpose of comfort,\textsuperscript{179}\ health,\textsuperscript{180}\ and increased movement,\textsuperscript{181}\ particularly in preventing binding, chafing, and tightness in the upper inner-thigh area.\textsuperscript{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.\textsuperscript{183}\ However, even when these later patents did describe the gusset, they presupposed its obvious-

\begin{itemize}
  \item \textsuperscript{173} \textit{Id.}
  \item \textsuperscript{174} \textit{Id. at 1.}
  \item \textsuperscript{175} \textit{U.S. Patent to West (No. 453,874), supra note 158.}
  \item \textsuperscript{176} \textit{Id.}
  \item \textsuperscript{177} \textit{U.S. Patent to Stecker (No. 924,013), supra note 161.}
  \item \textsuperscript{178} \textit{U.S. Patent to Tanner (No. 1,891,884), supra note 168.}
  \item \textsuperscript{179} \textit{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).}
  \item \textsuperscript{180} \textit{See U.S. Patent to Eckstein (No. 1,737,923), supra note 157 (describing a "sanitary" undergarment).}
  \item \textsuperscript{181} \textit{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).}
  \item \textsuperscript{182} \textit{Id.}
  \item \textsuperscript{183} \textit{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").}
\end{itemize}
ness to a person of ordinary skill in the trade.\textsuperscript{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,\textsuperscript{185} or that its shape changed depending on the fabric used in the context-lending garment.\textsuperscript{186}

Elongation in the area of the inner thigh area distinguished the use of the gusset in outwear 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.\textsuperscript{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.\textsuperscript{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 gussetting a nylon garment, not for the garment or the gusset itself.\textsuperscript{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

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

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

\textsuperscript{186} See supra note 170 (listing patents for undergarments incorporating the gusset).

\textsuperscript{187} Id.


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. 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. 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,

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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. INTELL. 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.\textsuperscript{192} It came into use for cultural reasons as well. As one historian says of table implements:

\begin{quote}
[T]heir functions [were] gradually defined, their forms sought and consolidated. Each custom in the changing ritual [that involved them], however minute, establishes[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].\textsuperscript{193}
\end{quote}

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.\textsuperscript{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

\begin{footnotesize}
\begin{enumerate}
\item \textit{ELIAS}, supra note 7, at 107-108.
\item \textit{See ELIAS}, supra note 7; Litman, supra note 109; Berryman, supra note 191.
\end{enumerate}
\end{footnotesize}
implements. 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.

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. 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. However, because they allowed for the steady dephys-icalization of the table, table implements also increasingly helped actors maintain, if not expand, this psychosocial territory whose control was constitutive of social status. 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. 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

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


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, avoided in the mid part of the twentieth century, 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. 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. 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. 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; or to innovative processes, like the two-part gusset construction. 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.

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).
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 gusset\(^{209}\) 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 \textit{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), \textit{supra} note 167 (claiming a long bicycle pant that incorporates a gusset in its design).

\(210\) Id.


\(213\) \textit{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)]. \textit{See also infra} notes 315-339 and accompanying text.
recapture by the first person who could (officially) "remember" it.\textsuperscript{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.\textsuperscript{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.\textsuperscript{217} The third strategy, however, seriously challenged that same framework by shifting its focus from substance to procedure.\textsuperscript{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.\textsuperscript{219} Another said that the PTO had perhaps unwittingly given Polsky a license "to extort other people in business."\textsuperscript{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."\textsuperscript{221} She likened the gusset to a shirt sleeve or a pant leg, noting that "everyone learns how to gusset in

\textsuperscript{215} See infra notes 276-339 and accompanying text (analyzing the details and terms of the three Polsky patents).
\textsuperscript{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).
\textsuperscript{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).
\textsuperscript{218} See infra notes 315-339 (describing the details and problems with Polsky's attainment of the 1987 patent and the related infringement action).
\textsuperscript{219} Ostrow Interview, supra note 203.
\textsuperscript{220} Telephone Interview with San Francisco inventor, investor, and entrepreneur Maurice Kambar (Jan. 11, 1996).
\textsuperscript{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.\textsuperscript{222} She also thought that the PTO "should have asked a few people in the industry before granting the patents to Polsky."\textsuperscript{223} Even Stacy Kuranz, the originator of Movement Pants,\textsuperscript{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.\textsuperscript{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.\textsuperscript{226} However, Polsky did not adequately fulfill this duty.\textsuperscript{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.\textsuperscript{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,"\textsuperscript{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.\textsuperscript{230}

\textsuperscript{222} Id.
\textsuperscript{223} Id.
\textsuperscript{224} See supra note 143.
\textsuperscript{225} Id.
\textsuperscript{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.
\textsuperscript{227} See infra notes 316-320 and accompanying text (discussing Polsky's incomplete disclosure statement).
\textsuperscript{228} But see Samuels, supra note 10 (asserting that the public domain does not exist).
\textsuperscript{229} Garrison Interview, supra note 92.
\textsuperscript{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. 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. 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.

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, 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. 


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).

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." Nor is it subject to patent law protection because it is obvious, or not "novel." 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. 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. Patented garments that employ the standard, diamond-shaped gusset consistently treat it as part of the public domain. 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 IIA (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. They equate the loss of the public domain with the increased privatization of our society. They seem fairly certain that the incantation "property" seems to overshadow issues related to citizens' rights.

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. 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.

Other scholars take different approaches. Some argue that the nature of creativity demands belief in a pool of common access property, or ideas. Others analogize the commons in intellectual property to "the public grazing lands on the Western plains of a century ago." 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

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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).
"artifactual," or artificial, rehearsed place. There are theories that link the loss of the public domain to problems of gender or subjectivity. 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.

In response to all of this stands one resolute contrarian. 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." 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." 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.

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

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240 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/transformative 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)).
241 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.
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. 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. 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. 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. 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. 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 patent. 

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. Vandevelde, 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).
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. Only Polsky's complaint against Chi Concepts, the smallest of the companies named, registers in Polsky's file wrappers. 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.

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. 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. Cluett & Peabody Co., Inc. did license with Polsky in order to produce Freedom Pants. However, this effort ended in failure. Therefore, while Polsky had a patent, she had never

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


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. 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. The second patent in the Polsky series was issued in 1984. It claimed ownership of pants that incorporated the common stock gusset. The third patent was issued in 1988. 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. 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.


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

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. "Concave," "elongated," "curved," and "tapering" are terms often used to refer to the common stock gusset. 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. 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. These assertions

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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.
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. The PTO cited as authority the Tanner, Stecker, and Dunning patents. 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. 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. Finally, the Dunning gusset was the bicycle pants gusset, which clearly fell outside the public domain because of its unusual shape. 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." But it allowed a claim for a cotton-lycra exercise pants-like garment that incorporated the common stock gusset. 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.

2. Remembering & Forgetting—The 1984 Patent Prosecution. After Irving B. Smith's 1941 patent, 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-
Like Garments Having a Seamless Crotch Construction. The file wrapper shows that Polsky approached the prosecution of her 1984 patent with a particular strategy in mind. 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. 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. 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.

The 1984 Polsky patent made eighteen dependent claims related to the gusset. These claims described the gusset in terms that had been used before. Like early twentieth century patents, rather than simply referring to the gusset, Polsky's dependent claims described it in full detail. 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. 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).
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, as did the bib overalls of the 1940s and the Lee Dude Ranch Jean with the “famous u-crotch” of the same era. In the early 1970s, Stacy Kuranz had marketed the Movement Pants, and in the late 1970s, Century had manufactured the Kickin' Jeans. Both of these embodiments anticipated the Polsky invention in all respects. 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, had not been disclosed and, for that reason alone, was not considered by the Patent Examiner in the prosecution of the 1984 patent. Had such off-record prior art been considered, the Patent Examiner would have been statutorily mandated to deny the 1984 Polsky patent.

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. Irving B. Smith's patent for expandable trousers, described above, despite the near silly incorporation of buttons and zippers, marked an important

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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. Thomson, 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.).


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. 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.” 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.

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. 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. Of Polsky’s three patents, the 1987 patent is the most difficult to analyze. This is because Polsky took the less original route.

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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.\footnote{File Wrapper, Information Disclosure Statement, U.S. Patent to Polsky (No. 4,785,480), supra note 262.} This statement disclosed Polsky’s prior patents and the West line of patents, but it did not mention the off-record prior art, whose disclosure was also statutorily required.\footnote{See supra note 158 and accompanying text (discussing the 1891 patent issued to Marshall O. West for “Drawers”).} Moreover, this off-record prior art was art that Polsky had actual notice of during the prosecution of her third patent.\footnote{See supra note 319 (noting that Chi Concepts sent copies of its design to Polsky).} Nevertheless, in the Information Disclosure Statement, Polsky averred that the patents she cited in her application “constitute[d] the closest art of which Applicant [Polsky] is aware.”\footnote{File Wrapper, Examiner's Action (Feb. 25, 1988), U.S. Patent to Polsky (No. 4,785,480), supra note 262.} The

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 . . .”\footnote{File Wrapper, Information Disclosure Statement, U.S. Patent to Polsky (No. 4,785,480), supra note 262.} The

\footnote{See supra note 158 and accompanying text (discussing the 1891 patent issued to Marshall O. West for “Drawers”).}
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

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322 Id.
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.
curves" became "convexly curved outer edges that extended from the waistband edge down buttocks, outer thigh and leg segments", 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." 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). 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.\footnote{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. Polsky had notice of this line as early as July 16, 1987, the date of ChiPants' answer to her complaint.\footnote{335} She certainly had first hand awareness and knowledge of this line by April 20, 1988, the date of Kuranz's deposition.\footnote{336} None of this prior art came to the PTO's attention during the Polsky patent prosecution of 1987 and 1988.\footnote{337} 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.\footnote{339}

\footnote{330} Id.
\footnote{331} File Wrapper, Revised Patent Application (May 31, 1988), U.S. Patent to Polsky (No. 4,785,480), supra note 262.
\footnote{332} Id.
\footnote{333} Id.
\footnote{335} See File Wrapper, U.S. Patent to Polsky (No. 4,785,480), supra note 262.
\footnote{336} Id.
\footnote{337} See Deposition of Kuranz, supra note 143 (recording Polsky's presence at the deposition).
\footnote{338} File Wrapper, U.S. patent to Polsky (480), supra note 214.
\footnote{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. 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.

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. 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. 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).

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).

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


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.
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. 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. When presented with evidence of the gusset as a public domain item, Polsky responded with disbelief.

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. If they produced without first licensing with Polsky, they opened their own businesses up to risk as well as the businesses of their contractors. In one case, Polsky even sent cease and desist letters to AONET, the on-line service provider for Chi-Pants. Her letter threatened to sue AONET for contributory infringement on the ground that it was reproducing images of the gusset on the worldwide web.

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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. These policy discussions, because they are not founded in empirical research, too often use the idea of the commons as a metaphor. 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. Those against such a policy see privatization as the only way to protect what is at stake. 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.

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, it arguably failed in the third patent (ironically because of the lack of full disclosure on the patentee’s part). 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).