Court opinions regarding fashion copyright and trademark cases often depend on John Locke’s labor theory, Georg Wilhelm Friedrich Hegel’s personality theory, and Michael Foucault’s author theory to justify legal protection. This paper argues that the courts first applied the labor and personality theories to emphasize the importance of the designers. Then, the courts applied an author theory to focus on the perception of the consumer. Finally, the courts used the personality theory to allude to the personality of the consumer, implying that consumers, like designers, express themselves through the vocabulary of designs and styles available to them.

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In 2011, Christian Louboutin, a famous designer of luxury shoes, sued Yves Saint Laurent, another high-end French couture brand. Christian Louboutin claimed that Yves Saint Laurent infringed on his trademark, which protected the use of the color red on the bottom of heels. A “battle over suede stilettos,” Christian Louboutin v Yves Saint Laurent considered a profound legal question of whether a color can be trademarked in the fashion industry, galvanizing international attention.1 Questions regarding the realm of attributes that trademark law protects began percolating throughout the entire fashion community, including fashion lawyers. “Can you trademark the color red?” asked fashion lawyer Jeannie Suk.2 The whole fashion community watched to see how the court would rule on this peculiar and highly-publicized case. The Court of Appeals for the Third Circuit shocked the fashion world with its opinion by ruling in favor of Louboutin.

However, the court only granted protection of the red sole when it contrasted against a non-red shoe body. The court’s decision that color can be trademarked and owned by an individual designer inflamed what was already a heated controversy over how fashion designs should be protected. While many fashion lawyers recognized that consumers depend on the red shoe sole to identify the shoe as a Louboutin, others highlighted the obvious: “But red; it’s a color.”3 The court’s opinion in Christian Louboutin both placed intellectual property law at the forefront of the fashion community as well as intensified an already tense debate amongst intellectual property lawyers.

Many fashion lawyers consider the functional and artistic aspects of fashion to argue in favor or against legal protection in the fashion industry.4 Some fashion lawyers privilege the aesthetic over the functional and contend that fashion is an art, deserving of the same legal protections as paintings and sculptures.5 Those lawyers contend that fashion should receive copyright protection, which “extends to original works of authorship fixed in any tangible medium.”6 Some lawyers counter that fashion is a functional good and should not benefit from the copyright protection that paintings and music receive.7 Others recognize how fashion can be artistic as well as functional.8 Because fashion bears artistic elements as well as serves a functional purpose, it often fails to receive copyright or patent protection, as the former protects artistic expressions and the latter protects functional innovations.9 As the current intellectual property legislation provides no specific instruction for the fashion industry, the courts have been empowered to determine where fashion falls on the spectrum of legal protection.10

While many lawyers focus on how fashion illustrates the personality and originality of the designer, others recognize how consumers also depend on fashion as a vocabulary for self-expression.11 When designers express originality in their
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designs, they create a vocabulary, or instrument, through which consumers can express their own identities.\textsuperscript{12}

Separate from the lawyers who narrate the legal protections afforded to fashion exists a discourse amongst scholars concerning the philosophical implications webbed throughout current intellectual property laws. Scholars identify John Locke's labor theory, George Friedrich Hegel's personality theory, and Michael Foucault's author theory in the intellectual property law cases.\textsuperscript{13} The labor theory, introduced by John Locke, offers a theory of justification rooted in labor. Locke's theory articulates that when people cultivate land through their own personal labor, they become entitled to that land as their property.\textsuperscript{14} Scholars draw a parallel between the Lockean theory of physical property ownership of land to intellectual property ownership of ideas, arguing that "we own our ideas because we create them," the same way that we cultivate land through our labor.\textsuperscript{15}

The personality theory, attributed to Georg Wilhelm Friedrich Hegel, offers a different justification organized around identity and personality.\textsuperscript{16} Hegel argues that because our creations are extensions of ourselves, we must have legal protection over them.\textsuperscript{17} Rather than argue that one's individual labor constitutes property ownership, the personality theory argues that if someone infuses her will into a physical object, she then owns that object, as it now encapsulates a piece of her identity.

Although cited less frequently than the labor and personality theories, Michael Foucault's author theory has also been used to justify intellectual property law.\textsuperscript{18} Foucault's author theory, which allows "society [to define] what intellectual property is," can determine the legal owner of intellectual property.\textsuperscript{19} If society recognizes a particular designer or author as the creator of a particular work, then that designer possesses legal ownership of that item.\textsuperscript{20}

While connections between philosophical property theories have been drawn to intellectual property law in general, no scholars have related them specifically to fashion intellectual property law.\textsuperscript{21} The current debate on how legal protections should consider the functionality, artistic, and expressive nature of fashion and the conversation that ties philosophical property theories with intellectual property law exist completely separate from one another, creating a gaping divide.\textsuperscript{22} This is the gap I bridge with my research by answering the following question: How have court justifications in fashion cases evolved from 1954 to 2011 to illustrate different philosophical property theories? In my research, I directly examine the protections offered in fashion copyright and trademark cases from mid-twentieth to the early twenty-first century to illuminate Lockean, Hegelian, and Foucauldian property theories in the legal protections for fashion.

In the narrative and analysis section, I first provide a short overview of what Hegelian, Lockean, and Foucauldian property theories argue. Then, I evaluate fashion copyright and trademark cases that exemplify property theories. I pull from some of the analyses provided by other scholars to illustrate how these philosophical property theories connect to intellectual property law.\textsuperscript{23} I then examine the fashion case law history from 1954 to 2011. I first detail the developments in copyright law for fashion protection. Then, I explore how trademark protections have expanded on the precedent of copyright case law as well as evolved on their own.

Through my analyses of these cases, I illuminate how the courts illustrate the philosophical property theories authored by Hegel, Locke, and Foucault in order to justify fashion protection. In my analysis, I identify three phases in the courts' justifications for protection: the first phase considers the personality and labor of the designer, the second phase emphasizes the recognition and perception of the consumer, and the third phase focuses on the interests and personality of the consumer. Following my analysis and narrative, I consider what implications and conclusions my research has for the other scholars exploring similar areas.

NARRATIVE AND ANALYSIS

Locke's Labor Theory

John Locke's labor theory acts as one of the first to justify the origins of property ownership. In his chapter on "Property" in his larger work, The Second Treatise of Civil Government, Locke offers a theory of property ownership anchored in the belief that through labor, one can appropriate something into her private domain. According to Locke, everything originally existed "in common," meaning that, in the state of nature, no one inherently owned anything.\textsuperscript{24} Locke describes how "once an individual removes out of the state that what nature hath provided [he] mixed his labor with it and enjoined to it something that is his own, and thereby makes it his property."\textsuperscript{25} Because Locke believes that each individual is entitled to the fruits of her labor, by mixing what is held in common with her own labor, one appropriates what was once in "common" into her own private property.

Because Locke's theory is so centered around physical property, many philosophers have criticized those who connect it to intellectual property theory.\textsuperscript{26} Others, however, have departed from the physical examples that Locke offers and have applied his argument that one should receive the fruits of her labor to intellectual property.\textsuperscript{27} The concept that one must receive the rewards for her labor can apply to non-physical forms of property as well. If someone labors and cultivates the idea for a necklace, for example, one could argue that because of her labor, she should own that design. Using Locke's line of reasoning, one could also argue that permitting one to claim ownership and legal protection of her work will encourage others to create their own unique ideas and benefit everyone by creating diversity and innovation in the market.\textsuperscript{28}
Hegel's Personality Theory
Many scholars highlight the presence of a personality theory of property in the justifications and rationale for intellectual property law, which they commonly attribute to Georg Wilhelm Friedrich Hegel. In *The Outline of the Philosophy of Right*, Hegel advances a personality theory to describe how humans appropriate, or acquire, property. Hegel anchors his theory of property ownership around the "concepts of human will, personality, and freedom." Hegel writes that "Personality is that which struggles to lift itself above this restriction and to give itself reality, or in other words, to claim that external world as its own." According to Hegel, the will constantly seeks to "actualize," or manifest itself through ideas. When the will of a person manifests itself in ideas, her personality is unveiled.

Hegel uses this concept of personality expression to outline the process of acquiring property. Hegel writes that "by expressing" an art, talent, or erudition, one may "embody them in something external and alienate them and in this way they are put into the category of 'things.'" Because talents, arts, and eruditions are part of one's personality, if a person can express those talents into something physical, e.g. a clothing design, she can claim ownership over that physical object. Hegel continues to write that by "putting [one's] will into any and every thing," one can make something her own. Be it a song or an article of clothing, if one's physical creation is expressive of her personality, that creation becomes hers.

After describing the process of expressing one's personality so that it can be legally owned, Hegel considers how one should protect her property. Hegel writes that if "[one has] an idea of a thing and mean[s] that the thing as a whole is [hers]," then one has to "[mark] it as [hers]." In order to protect her property, one should mark her work so that the public recognizes that it belongs to her. The personality theory's consideration for marking one's work distinguishes it from the labor theory, which does not consider this aspect. Political philosophers who examine intellectual property law frequently reference Hegel's theory of property ownership, to which they commonly refer as a personality theory. While scholars have yet to apply Hegel's theory specifically to fashion case law, some have conceded that "the personality justification is best applied to the arts" and other creative industries.

Foucault's Author Theory
In his essay "What is an Author?" Michael Foucault introduces a theory that partly considers a process for determining the author of a creative work. In his essay, Foucault argues that the author label is constructed through public recognition. In Daniel Stengel's article "Intellectual Property in Philosophy," he elaborates on Foucault's theory to illustrate how Foucault's method of determining the author of a work can be used to determine the legal owner. Building off of Foucault's theory, Stengel argues that "it is not the author who creates his own work, but [rather] the society." Stengel interprets Foucault's theory to mean that if the public associates a specific person or, in the context of fashion, a particular designer, with a writing or creative expression, then that person owns that particular work. If the public does not attribute a specific person to the work, then the creator does not own it as her property. Unlike the labor theory that focuses exclusively on physical property, Foucault's author theory is designed for intellectual and intangible forms of property, strengthening its relevancy to fashion intellectual property law.

According to the author theory, in order for one to have property ownership of an expression or a concept, society must recognize that that expression belongs to that individual. For example, if the public sees two overlapping G's and recognizes it as the mark of the Gucci brand, then Gucci can claim ownership of that mark. However, if the public sees the overlapping G's and the identity of the Gucci brand does not come to mind, then Gucci cannot claim legal possession of that mark.

COPYRIGHT HISTORY
*Mazer v Stein, 1954*
The Supreme Court opinion in *Mazer v Stein* set the stage for how the courts justify protection in fashion copyright cases. Stein sued Mazer for copyright infringement of lamps and was successful in the lower courts, causing Mazer to appeal to the Supreme Court to reverse that decision. These lamps, while serving a utilitarian purpose of producing light, contained mini sculptures "in the form of human figures" at the base. In *Mazer*, the Court answered the following question: can copyright laws protect the unique and original designs of a functional product, such as a lamp? While this case involved copyright infringement for lamps, the arguments in this case have surfaced in future cases that involve fashion products. Clothing, like a lamp, is functional but also has artistic, maybe even copyrightable, elements. The decision of the Court in Mazer to grant or deny protection on a product
that is partially artistic, partially functional directly affected copyright protection in the fashion industry.

Before answering the primary question presented in the case, the Court contextualized its opinion with a brief history of copyright legislation. After describing the Copyright Act of 1909, the Court wrote that:

The legislative history of the 1909 Act and the practice of the Copyright Office unite to show that 'works of art' and 'reproductions of works of art' are terms that were intended by Congress to include the authority to copyright these statuettes. Individual perception of the beautiful is too varied a power to permit a narrow or rigid concept of art. The Court's loose interpretation of the act to include the base of lamps as a "work of art" significantly expanded copyright protection, which became relevant to later courts that ruled on cases involving fashion. As it placed no specific limits on what is considered to be art and therefore what copyright laws can protect, this decision implied that the aesthetic and artistic elements of clothing can also benefit from copyright protection even if they also serve a functional purpose.

After expressing a loose interpretation of what constitutes art that carved space for items such as lamps and clothing, the Court offered an opinion strongly infused with a Hegelian personality theory. First, the Court wrote that "copyright [...] protection is given [...] to the expression of an idea." Referencing the opinion in a past case, the Court writes:

By writings in that clause is meant the literary productions of those authors, and Congress very properly has declared these to include all forms of writing, printing, engraving, etching, &c., by which the ideas in the mind of the author are given visible expression."

By stating that copyrights protect the expression of an idea that is originally formed in the mind, the Court's opinion invoked strong Hegelian language.

The Court's opinion even more explicitly illustrated a personality theory when it wrote that "personality always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible, which is one man's alone." By arguing that one's personality is illustrated in her work, the Court's justification for protection profoundly illustrated a Hegelian personality property theory. To say that the statuettes expressed the personality of the creator and therefore should receive protection, whether intentionally or not, the Court drew its justification from various portions of a personality theory.

The Court complimented its strong invocation of a Hegelian justification with pieces of a Lockean labor theory. After defining "writings" to include "writing, printing, engraving, etching, &c.," the Court wrote that "the writings which are to be protected are the fruits of intellectual labor, embodied in the form of books, prints, engravings, and the like." This phrase reflected one of Locke's core arguments that one should always receive the fruits, or profits, of her own labor and toil. While other scholars have connected the Mazer opinion to a Lockean property theory, none have referenced this specific language to illustrate the connection. By writing that legal copyright protection is justified because it protects "the fruits of intellectual labor," the Court clearly invoked Lockean language to justify copyright protection. While other political philosophers have incorporated this phrase into their own theories, "fruits of our labor" first emerged in Locke's Second Treatise of Civil Government.

In its Mazer opinion, the Supreme Court used language that exemplified both Hegelian and Lockean property theories in its justification for granting copyright protection. The opinion anchored more of its justification around Hegel's theory as well as illustrated aspects of a labor theory attributable to Locke. While these theories are distinct from one another, they are not necessarily mutually exclusive. The Court's use of both theories attested to their compatibility. In fact, many of the opinions that follow have pulled from both theories to justify granting or denying protection.

The Court's opinion interlaced a personality and labor theory, in order to emphasize the designer's role in determining if protection should be granted. The Court demonstrated how the designer infused her personality into the lamps as well as the labor she exerted. Rarely, if at all, did the Court consider how protection of the design would impact the market for consumers. The Court's emphasis on the labor and personality of the designer in order to justify protection represented the first of three phases in the legal history of fashion, which privileged the designer over the consumer. In this phase, the courts argued for protection through claims that consider the labor and personality of the consumer. Because subsequent fashion copyright cases frequently Shepardized the Court's opinion in Mazer, the justifications for granting fashion copyright protection have expanded on the language from this case. Consequently, both Hegelian and Lockean prop-
erty theories as well as a focus on the designer will surface in following court opinions that consider copyright protection for fashion.

Peter Pan Fabrics v Puritan Dress Co, 1962
A few years after the Supreme Court issued its Mazer ruling, a copyright case involving fabric designs arose in the lower courts.50 In Peter Pan Fabrics v Puritan Dress Co., plaintiff Peter Pan Fabrics copyrighted a design inspired by Byzantium patterns observed on a trip to Istanbul.51 In this case, the court answered the following question: Can designs inspired by other works receive copyright protection?

The court ruled that the copyright was valid. In the opinion, the Southern District Court of New York ruled that:

While the basis of the sketches appears to have been suggested by or perhaps taken faithfully from ancient art forms, their incorporation into a combined design by the Parisian designer is clearly and sufficiently original to satisfy the originality requirement of copyright law.52 The court held that one can reinterpret a previous design in order to express her own original idea. Similar to Mazer, this opinion illustrated aspects of Hegel's personality theory. In a personal interview, fashion lawyer Christopher Sprigman explained how Hegel's personality theory allows for one to reinterpret a previously created work in order to express her own identity.53 If someone infuses her will into a craving for Star Trek, for example, Sprigman explains that Hegel's theory would permit her to own her particular expression or characterization of Star Trek.54 Although she drew her inspiration from a previously created work, her interpretation is an expression of her personality, and therefore is her own.55 While Sprigman illustrates Hegel's argument through a Star Trek example, the same principle applies to fashion. While everything in fashion recycles the same vocabulary of colors, prints, patterns, and themes, each designer expresses her own personality through her own designs that draw inspiration from previous ones.

The Southern District Court of New York, by declaring the plaintiff's reinterpreted design as original and therefore copyrightable, illustrated Sprigman's interpretation of Hegel's theory. Although the plaintiff reworked a previously created design, the plaintiff properly infused “her will” into that design so that it was expressive of her personality, allowing it to receive copyright protection. Despite the prevalence of imitation amongst artists and designers, the court held that, if a certain level of originality is present, one can own her expressive interpretations. Similar to Mazer, the court's ruling in Peter Pan Fabrics reaffirmed a focus on the designer and how an expression of the designer's personality merits copyright protection without placing significant emphasis on the consumer and market competition.

Knitwaves v Lollytogs, 1995
In the 1995 copyright case Knitwaves v Lollytogs, the court's justification depended partly on a labor theory, new aspects of the Hegelian property theory, as well as unveiled a third property theory – the Foucauldian author theory. In Knitwaves, plaintiff Knitwaves sued Lollytogs for infringement of a design copyright on children's sweaters.56 The court began the opinion by detailing the amount of money that Knitwaves spent on its designs.57 The court also described the resulting lost profits for Knitwaves because of the design confusion between the two companies.58 After focusing on the labor and lost capital Knitwaves endured, the court argued that, as a result of Knitwaves’ extensive designs sales, the brand became very recognized.59 The court then pointed to testimony that proved a likelihood of confusion between each company's sweater designs amongst shoppers.60 The court's emphasis on the time and money the designer has placed into the sweaters represented part of a labor theory to justify the validity of the copyrights. The court's reference to the amount of labor exuded by the plaintiff in order to assess the amount of damages that should be returned to the plaintiff paralleled Locke's argument that one deserves compensation for her efforts and exertion, be it physical or monetary. 61 As Locke claims that the mixture of labor and a resource appropriates that resource from “the common” to a private possession, the court's justification illustrated Lockean language.

Complimenting its reference to a labor theory, the court's opinion illustrated a new piece of Hegel’s personality theory not yet revealed in prior opinions. After detailing the process through which one appropriates the expressions of her personality, Hegel writes that if “[one has] an idea of a thing and mean[s] that the thing as a whole is [hers],” then one has to “[mark] it as [hers].”62 Hegel urges creators – in order to ensure that an expression of one's personality is protected – to signal that ownership through a mark. Once the expression is marked, society will begin to recognize that that particular expression belongs to someone and society will depend on that mark to identify the owner of the expression. The court's opinion, which specifically referred to the public's recognition and association of the sweater designs with the Knitwaves brand, exemplified this piece of the personality theory. Because the court's process for justifying copyright protection considered how the public understands or recognizes the product, the court justified protection through Hegelian language.

In addition to the labor and personality justifications, the court offered a new theory: the author theory. In its analysis, the court considered the “substantial recognition” that Knitwaves has established in the market.63 By highlighting this point, the court illustrated pieces of Hegel's personality theory, however, it more clearly demonstrated aspects of Foucault's author theory, which ties property ownership exclusively to societal recognition. As the author theory depends exclusively on the consumer's perception to determine
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the author or owner of a work, the court’s justification, which considered the public recognition of the design, appealed to the same reasoning. By allowing consumer recognition to play a central role in justifying property ownership, the court’s emphasis on how the public identifies the sweater with the Knitwaves brand strongly reflected the author theory. From Mazer to Knitwaves, the courts’ rulings on fashion copyright protection illustrated a constellation of different theories in their opinions in order to justify fashion copyright protection.

While the court’s opinion in Knitwaves reflected a diverse set of philosophical property theories, it also marked the transition from the first to the second phase of justification in the legal history. The court began to turn away from the personality and labor of the designer to the recognition and perception of the consumer. In doing so, the justification in Knitwaves shifted from the first phase of the legal history, which privileged the efforts of the designer, to the second phase of the legal history, which privileged the recognition of the consumer.

TRADEMARK HISTORY

Qualitex v Jacobson Products, 1995

Just as the ruling in Mazer significantly shaped the landscape for copyright protection in the fashion industry, a handful of trademark cases have carved out the foundation to justify fashion trademark protection as well. One of those cases is the 1995 Supreme Court case Qualitex v Jacobson Products. In this case, petitioner Qualitex sought trademark infringement claims against defendant Jacobson over cleaning products. The trade dress, or brand identifying mark, was a “green gold color on the pads that [Qualitex] made and sold[d] to dry cleaning firms for use on dry cleaning presses.” In this case, the Court answered a new question: can a color be trademarked? The Court’s answer to this question has significantly impacted subsequent fashion cases. While Qualitex involved trademarking a color on cleaning products, its precedent has spilled over into the fashion industry, as illustrated by following fashion cases that have cited this opinion when seeking trade dress protection, especially when the protection was for a color. Understanding the Court’s ruling in Qualitex will be imperative when interpreting those subsequent fashion cases.

In Qualitex, the Court opened its opinion by stating what qualifies for trademark protection under the Lanham Act, or The Trademark Act of 1946. The Court concluded that “the language of the Lanham Act describes [the] universe [of protection] in the broadest of terms. It says that trademark ‘include[s] any word, name, symbol, or device, or any combination thereof.’” Due to the unspecific and broad language of the Lanham Act, the Court found no reason not to grant protection for the specific use of a color if it serves to identify the brand. Because the green gold pads “developed secondary meaning,” which means that consumers depend on the green gold color to identify the brand, the Court declared the trade dress to be valid.

The court’s consideration of secondary meaning departed from the personality theory illustrated in past copyright cases. Hegel does write that one should mark her work and that society should recognize that mark. However, Hegel only argues this so that the expression is protected, the expression which belongs to a larger identity, a larger personality. For example, the symbol of overlapping C’s marks a product as Chanel’s. According to the personality theory, in order for Chanel to legally own the mark, the mark (and the expression that bears it) must exhibit aspects of the personality, or aesthetic of Chanel: Paris sidewalks, luxury French couture, pastels and neutral color palettes. The personality theory permits ownership of the item branded with the Chanel mark because Chanel has infused her personality into that branded item.

With secondary meaning, however, society determines the owner of a trademark or trade design. For example, if one sees the overlapping C’s and does not associate the mark with the Chanel brand—Paris sidewalks, luxury French couture, and pastel color palettes—Chanel cannot claim ownership of the mark. With secondary meaning, it does not matter if Chanel believes that she willed her personality into the product: only when society recognizes the connection can she claim protection. With secondary meaning, the designer only has ownership because the consumer uses that design to identify the creator of the product.

Although secondary meaning does not neatly parallel a personality theory, it is very reflective of an author theory, as it places in the hands of the public the power to determine who owns a particular design or mark. With the author theory, a designer’s personal attachment to a product is irrelevant if the public does not recognize the connection. Recalling the two Chanel examples outlined above, the author theory supports the second theory, wherein Chanel can only legally own the overlapping C’s as a trademark if society thinks of Paris sidewalks, luxury French couture, and pastel color palettes, i.e. the Chanel brand, upon seeing it. An author theory justification requires the consumer to play an active role in constructing the creator of a work. Thus, with its consideration of secondary meaning, the Court’s ruling in Qualitex illustrated how the courts’ continued to depart from the precedent set by Mazer, which focused on the personality of the designer, and moved toward a justification that focused more heavily on the recognition and interest of the consumer.

Walmart v Samara Brothers, 2000

Similar to Qualitex, the Supreme Court ruling in Walmart v Samara Brothers involved non-fashion parties but significantly impacted fashion trademark protection. Additionally, Walmart illustrated how the justifications that focus on the designer continued to fade and those that focus on the con-
consumer developed to constitute the core of the courts’ justifications. In this case, Samara Brothers sought trademark infringement claims against Walmart over children’s sweaters. In a unanimous decision, the Court ruled that “design, like color, is not inherently distinctive” and thereby requires secondary meaning in order to be protected under trademark laws. While the courts were already considering secondary meaning in preceding cases such as \textit{Qualitex} in \textit{Walmart}, the Court declared that secondary meaning was now a necessary factor in order to receive protection.

The Court’s ruling further emphasized the role that the consumer plays in determining trademark ownership and protection. By chaining trademark protection to secondary meaning, the Court’s opinion, like \textit{Qualitex}, resembled parts of Hegel’s personality theory that considers marking one’s work, but even more strongly illustrated Foucault’s author theory. The Court’s decision that designs cannot be inherently distinctive by their uniqueness and originality but must instead establish secondary meaning altered the justifications for fashion protection. Departing even further from past cases such as \textit{Mazer}, that emphasized the originality and uniqueness expressed by the designer, the Court’s ruling in \textit{Walmart} concentrated almost exclusively on the consumer. The public’s perception, not the designer’s craftsmanship, now determined whether or not trademark protection was granted. The language of this case will reappear in subsequent cases that considered trademark protection for fashion, previewing the shift in focus from the designer to the consumer, which progressed in following cases.

\textbf{Abercrombie and Fitch v American Eagle Outfitters, 2002} Expanding on the precedent set by the Supreme Court in \textit{Walmart}, Court of Appeals for the Sixth Circuit’s ruling in \textit{Abercrombie and Fitch Stores v American Eagle Outfitters} further emphasized the courts’ focus on the consumer when justifying whether to grant protection. While the case echoed the pattern established by prior cases, it presented a new consideration regarding how the consumer relates to clothing that had not previously been unveiled.

In \textit{Abercrombie}, plaintiff Abercrombie and Fitch claimed that the defendant infringed upon three aspects of trade design from its company catalog. The Court decided not to grant protection on those three elements of trade dress on an unfair competition argument. However, the court’s opinion focused not on how competition impacts designers, but rather how competition affects consumers. The court argued that “the lack of comparable alternatives to pleasing design features means that granting an injunction would deny consumers the benefits of a competitive market.” The court’s emphasis on the consumer and how the consumer benefits from a diversity of designs illuminated a new thought: could it be that the court was implying that consumers require a diversity of styles and designs in order to express their own personalities? The courts have already declared in \textit{Cynthia Designs} that designers can draw inspiration from past designs and patterns in order to express their own identities. Cannot consumers also pair their clothing in such a way that visualizes their own personalities as well?

If a consumer wills a taste for preppy clothing and recycles pieces from Abercrombie, American Eagle, and other brands to create her own preppy look that illustrates her personality, then she, too, is creating her own unique expression through a collection of designs created by someone else. By focusing on how competition in the market benefits consumers, the court’s justification for denying protection alluded to the idea that consumers select designs authored by someone else to express their own identities.

\textbf{Christian Louboutin v Yves Saint Laurent, 2011} The most notorious illustration of fashion protection manifested in the 2011 \textit{Christian Louboutin v Yves Saint Laurent} trademark case. In this case, plaintiff Christian Louboutin trademarked the color of red on the bottom of shoes, which he claimed acted as a brand signifier. Defendant Yves Saint Laurent argued that allowing such a trademark would create unfair competition, as the free use of color is essential to the fashion industry. The court ruled, however, that the trademark was valid – only when the red is \textit{in contrast} to a non-red shoe body.

The court granted protection for three reasons. First, the court highlighted how “Louboutin [had] invested substantial amounts of capital building a reputation and good will” and that Louboutin has a right “to enjoy the benefits of its ef-
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fort.”77 Second, the court argued that the single color red acted as an “expressive and defining quality.”78 Third, the court cited how consumers depended on the color arrangement in question to identify the shoe as a Louboutin. All three arguments illustrated the pluralistic nature of fashion protection as well as reaffirmed the centrality of the consumer.

First, by emphasizing the labor, time, and capital that Louboutin has invested in the development of his signature brand shoe, the Court alludes to elements of a Lockean justification. Second, the court argued that the color red in contrast with a non-red shoe is expressive, or illustrative, of the artist’s personality, which resembled parts of a Hegelian personality theory. Third, the court emphasized how the color red was a defining element that consumers use to identify the shoe as belonging to Louboutin, pulling in a Foucauldian author theory.79 The rationale the court used for granting protection reflected a patchwork of reasoning woven from three different property theories.

After providing these three justifications, the court concluded by considering how its ruling would affect competition.80 The court contemplated whether granting protection for this particular use of red would decrease the diversity of styles in the shoe market.81 By focusing on how it will affect variation in the market, the Court again demonstrated that its concern is not for the amount of creative instruments that will remain accessible to designers, but rather how granting protection over certain instruments will impact the market for consumers.82 In its opinion, the court not only paralleled the pluralistic justifications offered in earlier fashion protection cases, it also illustrated the arching shift of focus from the expression of the designer to the expression of the consumer. The opinion of Christian Louboutin bore the same implications as Abercrombie and Fitch: that competition is required in order for consumers to express their own identities through fashion.

CONCLUSIONS AND IMPLICATIONS

After examining the recent history of copyright and trademark protection for fashion designs in the United States, I argue that the justifications that courts used in order to grant or deny protection from 1954 to 2011 illustrated of a variety of philosophical property theories, including Locke’s labor theory, Hegel’s personality theory, and Foucault’s author theory.

While these theories often appeared together in opinions, the courts applied the theories to advance different justifications. In earlier cases, the courts drew upon a Lockean labor theory and Hegelian personality theory to emphasize the importance of the designer when determining if protection should be granted. Then, the courts depended on a Foucauldian author theory to stress the recognition and perception of the consumer. Finally, the courts returned to the personality theory to argue that the consumer too, expresses her personality through fashion. While the labor, personality, and author theories persisted throughout the fashion legal history from 1954 to 2011, the way in which the courts apply them evolved. In other words, while the same palette of property theories resurfaced throughout each opinion, the application of those theories developed to paint three different phases of justification.

Although the courts have shifted their focus from the designer to the consumer, I do not think that the expression of the designer and the expression of the consumer are mutually exclusive. I believe that both the designer can express her personality into her designs just as the consumer expresses herself through the designs available to her. While most of the courts highlight these processes individually and at different times, I believe that the court’s ruling in Christian Louboutin illustrated the simultaneous nature of expression on part of both the designer and the consumer. Ultimately, I argue that expression, like the culture of copying, has no beginning and certainly no end.

My analysis confirms the analysis of other fashion lawyers who argue that fashion acts as an information technology, a creative language for self-expression.83 Whether the parallel I have identified between court justifications and arguments of fashion lawyers should impact the level of protection designers receive is another debate. However, it is important to recognize that the impact of protection on consumer expression has risen frequently in recent court opinions to determine the validity of fashion protection.

While I have examined these cases through various philosophical property lenses, I am not arguing that these theories can nor should be used to create a contemporary legal system of intellectual property law for fashion, or any other sector. Instead, I intend to highlight that snippets and inklings of them are webbed throughout the collage of cases that constitute fashion intellectual property law. Whether the courts intended to allude to these theorists or properly interpreted them is a conversation left for other scholars. Instead, I intend to illuminate how the justifications used in fashion cases pull from a broad variety of concepts and theories conceived long before the contemporary legal debates in the fashion industry even existed.

The tracings of Lockean, Hegelian, and Foucauldian theories that I have identified in the fashion industry may also exist in other American legal histories, such as entertainment, music, or art law. Perhaps identifying the pluralistic nature of the justifications used in fashion cases reaffirms the contradictions and inconsistencies in the law that other scholars have already unveiled.84 Consequently, recognizing the vast philosophical terrain that these legal justifications expand might encourage policymakers to formulate a more uniform legal system that seeks not to echo all these abstract and theoretical concepts but instead to reflect the legal needs of the twenty-first century.

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Endnotes

[3] Ibid.
[9] One functional purpose of clothing, for example, is keeping people warm. For more description, see Miller, “Copyrighting the ‘Useful Art’ of Couture, 1633-1634.
[16] Ibid.
[19] Ibid., 47.
[20] Ibid.
[22] Ibid.
[25] Ibid., 70.
[26] Christopher Sprigman, interview by Camille Edwards, October 17th, 2016; Lawrence Becker, “Deserving to Own Intellectual Property.”
[28] “Furthermore, intellectual property may be a liberal influence on society […]inasmuch as coming to own intellectual property is often tied to being well-educated. If people become increasingly progressive with increasing education, intellectual property confers economic power on men and women of talent who generally tend to reform society,” qtd. in Justin Hughes, “The Philosophy of Intellectual Property;” 3-4.
[30] Ibid., 29.
[31] Ibid., 28.
[32] Ibid.
[33] Georg Wilhelm Friedrich Hegel, Outlines of the Philosophy of Right, 59.
[34] Ibid., 60.
[35] Ibid., 59, 67.
[36] Ibid., 67.
[38] Michael Foucault, “What is an Author?,” 209.
[39] Ibid., 213.
[44] Ibid.
[45] Ibid.
[46] Ibid.
From Locke to Louboutin

[47] Ibid.
[51] Ibid.
[52] Ibid.
[54] Ibid.
[55] Ibid.
[56] Knitwaves Inc v Lollytogs Ltd 71 F.3d 996 (2nd Cir. 1995)
[57] “Over $1 million a year,” qtd. in Ibid.
[58] $12,000, qtd. in Ibid.
[59] “Knitwaves’ designs have resulted in substantial recognition in the clothing trade,” qtd. in Ibid.
[60] Ibid.
[61] Additionally, by using lost profits to calculate damages, the court adopts Locke’s idea that one should always receive the profits, or fruits, of her labor. See “We hold […] [the] award of $12,000 in lost profits,” qtd. in Knitwaves v Lollytogs
[63] Ibid.
[65] Ibid.
[68] “It would seem then, that color alone, at least sometimes, can meet the basic legal requirements for use as a trademark” Qtd. in Ibid.
[70] Walmart Stores Inc. v Samara Brothers, Inc. 529 U.S. 205 (2000)
[71] Ibid.
[72] “1) The designs of the goods themselves, 2) the design of the catalog created to sell its products by, […] and 3) features of its in-store presentation associated with the sale of its products,” qtd. in Abercrombie & Fitch Stores, Inc. v American Eagle Outfitters, Inc., 280 F.3d 619 U.S. App. (2002)
[73] Ibid.
[76] Ibid. “Trademark protection to Louboutin’s use of contrasting red lacquered outsoles.”
[77] Ibid.
[78] Ibid.
[79] “As the District Court observed, “[w]hen Hollywood starlets cross red carpets and high fashion models strut down runways, and heads turn and eyes drop to the celebrities’ feet, lacquered red outsoles on high-heeled, black shoes flaunt a glamorous statement that pops out at once” as a Louboutin signature shoe” qtd. in Ibid.
[80] “Would put competitors at a significant non-reputation related disadvantage,” qtd. in Ibid.
[81] “Distinctive and arbitrary arrangements of predominately ornamental features that do not hinder potential competitors from entering the same market with differently dressed versions of the same product are non-functional[,] and [are] hence eligible for [trademark protection]” qtd. from Fabrication Enters. Inc, 64 F. 3d. at 59), qtd. in Ibid.
[82] Ibid.