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ECONOMIC SCENE

Why That Hoodie Your Son Wears Isn't Trademarked

By HAL R. VARIAN

The growth of the Internet has created significant challenges for intellectual property law. Virtually every day there is another story about online copyright infringement of some form or another. Music, photos, film, video, books — all the content-producing industries are being shaken up.

The legal motivation for patents and copyright is written into the United States Constitution: to promote the progress of science and useful arts. By granting innovators an exclusive right to their writings and discoveries, Congress provided a strong incentive to engage in innovation. As Abraham Lincoln put it, the patent system added “the fuel of interest to the fire of genius.”

But intellectual property law is not the only way to provide such incentives. Ideas, for example, cannot be patented. Yet university professors churn out hundreds of thousands of publications each year that are full of ideas, both good and bad. The social norms in academia, among them citation requirements and plagiarism taboos, seem to work pretty well.

Another industry that seems to get along well without intellectual property protection is the fashion industry. Brand names and logos are protected by trademark, but the design of clothing is generally not protected in the United States.

Recently, two law professors, Kal Raustiala of the University of California, Los Angeles, and Chris Sprigman of the University of Virginia, wrote a fascinating paper that outlines the workings of the fashion industry and how it manages to function without much intellectual property protection.

At one time, the fashion industry did have a self-imposed system of intellectual property protection. In the 1930s, the Fashion Originators' Guild prohibited copying among its members and urged retailers not to sell items from those who copied other designs. The guild was reasonably successful in these efforts. But in 1941, the Supreme Court held that its practices violated antitrust laws, and since then the fashion industry in the United States has had no intellectual property protection for designs.

A result has been that “piracy” of designs is common in the fashion industry. Designers constantly experiment with new shapes and colors. If a particular style catches on, it is quickly copied. Skinny jeans have been fashionable for the last few years, but there are signs that the

trends are now moving toward straight-leg designs. If the tide changes, pretty soon everybody will be selling straight-leg jeans.

According to Mr. Raustiala and Mr. Sprigman, the fashion industry can survive without intellectual property protection because of two interacting factors that they refer to as “induced obsolescence” and “anchoring.”

The first factor means that clothes become unfashionable before they wear out, so trendy people have to keep buying new clothes every year. When you are wearing the same thing as your cool friends, that’s great. But when you start seeing that style on decidedly uncool people, it’s time for something new — which the fashion industry is happy to provide.

But how do the fashionable decide what the next big thing is? Or perhaps more to the point: how does the fashion industry convey to their consumers what they should be wearing? How does the industry “anchor” the consumers in this season’s fashions? This is where copying comes in. If all the designers are showing baby doll dresses in the spring of 2006, then there’s a good chance that is what everybody will be wearing by the summer of 2006.

Mr. Raustiala and Mr. Sprigman argue that the lack of intellectual property protection actually promotes the functioning of the industry. If the extension of copyright to fashion prevented clothes manufacturers from copying each other, the industry would be ceding a major role to the lawyers and become much less creative. We’d see the same thing year after year. In other words, women’s fashion would look much more like men’s fashions — boring, boring, boring.

Since I have the same fashion sense that most economists have — that is, none whatsoever — I cannot attest to the accuracy of the law professors’ description of the fashion industry. But it is consistent with other examples of what happens when there is no intellectual property protection.

The United States did not protect copyrights of foreign authors until 1891, since it was just too tempting to ride free on the production of those great 19th-century British authors. Clipper ships used to carry copies of Charles Dickens’s latest book to America, where it was quickly rushed into print by dozens of printers and sold for next to nothing.

Critics complained that these hastily produced books were poorly printed and cheaply manufactured. That may have been bad for books, but it is not such a big deal for that cheap, but fashionable hoodie sweatshirt your teenage son bought a few months ago, since he isn’t going to wear it next season anyway.

The United States started recognizing international copyright in 1891 partly to protect American writers from cheap foreign competition like the Dickens volumes. This was almost certainly the right thing to do, particularly since copyrights held by Americans received reciprocal recognition abroad.

But not every industry necessarily benefits from strong intellectual property protection. In some cases, it appears that lack of protection can lead to a more vibrant and dynamic industry.

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