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Heritage: the Case of the Fashion Industry**

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The Intellectual Property Rights (IPR) elements of the DIME Network currently focus on research in the area of patents, copy-rights and related rights. DIME's IPR research is at the forefront as it addresses and debates current political and controversial IPR issues that affect businesses, nations and societies today. These issues challenge state of the art thinking and the existing analytical frameworks that dominate theoretical IPR literature in the fields of economics, management, politics, law and regulation- theory.

Intellectual Property Rights on Creativity and Heritage: the Case of the Fashion Industry

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Property rights allow the allocation of the majority of standard industrial goods without any special difficulty. However, when they are applied to creative goods, new problems arise. A new and wonderful case of pure creativity is the “Second Life” world. Here you cannot produce goods but you can create and sell your creations. Creativity is the main reason for competition. So, by selling original houses Anshe Chung, a virtual architect, has become the first creator to earn a billion dollars. Legal problems about property rights arise however and the first court cases came up in 2007. Kevin Alderman sued John Doe for copyright violation (concerning the well-known Eros SexGen bed). Since 2005 Alderman has been selling on Second Life several thousand of this erotic bed at the price of 45 \$ US while Catteneo decided to sell a copy for 15 \$ US. In the same line conflicts around trade marks, real and virtual, often counterfeited, are multiplying. The higher the ratio of the creative component in a good, the higher is the probability of piracy (Benghozi and Santagata, 2001).

If property rights exist in a purely creative world the case is even more complicated when creativity joins up with industry and the mass production of luxury groups which aim at making money. This is the case of the fashion industry.

Only a few articles have been written on the problem of property rights in the fashion industry. They generally use the standard and formal framework of Law and Economics analysis and discuss the efficiency of IPRs in this industry in relation to copying and piracy. They all observe the weakness of IPRs whatever country. Some of them criticize this weakness but others propose a more interesting analysis – the piracy paradox – according to which there is at present a low IPR equilibrium.

These articles chair the discussion within the mental framework of the American case. The first aim of our paper is to add to it some observations based on the French case, which is important here because the *haute couture* system is a French invention and was the first place where IPR problems emerged and lead to different systems of IPR management. Moreover, it is the first time in France that financial groups of luxury goods (such as LVMH and PPR) have succeeded in integrating the apparel system in a larger set, the set of luxury goods, and have tried to implement a new model of IPR management.

The second aim is to consider the relation between IPRs and the two main inputs of the fashion process, creativity and heritage. We think that PRs are not a formal and general system that can be directly used for managing the allocation of any resource, whatever its specific characteristics, everywhere and in any circumstance. On the contrary, a 'substantivist' point of view focuses on these characteristics which in a part explain the present configuration of IPRs in each case, particularly in the case of the fashion industry, and the diverse types of IPR management. So the piracy problems become only a part of the question of IPRs in the fashion industries. And as the productive characteristics of the creation process in fashion does not allow to use the model of perfect property rights, actors may change the forms of property where creativity appears in order to obtain a better protection of their rights. Through managerial and institutional creativity they can modify the configuration of IPRs (Alchian and Demsetz, 1973; North, 1981; Nelson and Winter, 1982).

We consider the discussion on the existence of a low-IPR system in the first part. The second part considers the way of producing fashion goods and the third infers from the specific

characteristics of the cultural inputs of fashion some difficulties to use the standard IPR model. The fourth and the fifth parts study the classic and the new models of management of cultural assets in the fashion industry through the use of IPRs.

1 The debate on IPR efficiency

In the *haute couture* the purpose of producers is not to improve but to create. Creations remain unique and are non-cumulative knowledge which escape from the incremental character of technical progress. Creative products and their main inputs, creativity and heritage, thus have a strong cultural and economic value and standard efficiency considerations lead one to propose a high system of IPRs. Nevertheless, as observed by all the specialists, IPRs are low (see for France, Grumbach, 1993; for USA Litman, 1994, Raustalia and Sprigman, 2006).

Some authors criticize this weakness and claim for a strong IPR system (for example, Terakura, 2000; Hetherington, 2001), either to strictly define them or to strongly enforce them. A more original and very interesting analysis argues *“that the fashion industry counterintuitively operates within a regime of free appropriation in which copying fails to deter innovation and may actually promote it. We call this the ‘piracy paradox’.”* (Raustalia and Sprigman: 5). Two main arguments are used. The first relates to induced obsolescence. Piracy diffuses innovation in a positional goods world and accelerates the diffusion of designs and styles, leading to an acceleration of the renewal of goods (*“In short, piracy paradoxically benefits designers by inducing more rapid turnover and additional sales”*). We agree with this point but think that it does not lead to a pure acceptance of piracy. The induced obsolescence is only an externality, a global effect on the market. Nothing guarantees that the innovator will be the main beneficiary of the induced obsolescence and, from a free-riding point of view, he could take a profit from the obsolescence induced by the copying of other creators while protecting his own innovation. The second argument is that *“a low-IP regime helps the industry establish trends via a process we refer to as ‘anchoring’.* *Our model of anchoring rests on the existence on definable trends... Copying does this by anchoring the new season to a limited number of design themes... Thus anchoring helps fashion-conscious consumers understand (1) when the mode has shifted, (2) what defines the new mode, and (3) what to buy to remain within it”* (Raustalia and Sprigman: 45).. This second point seems doubtful. It misses the difference between copying within the creators' circle and the copy of creators' products by the ready-to-wear or the mass market producers. Creators work at the same time and, preparing a new collection, cannot copy each other. The constitution of definable trends does not derive from their copying but from other mechanisms: all the creators are immersed in the same cultural “mood”; all choose within a limited set of new fabrics, whose designs are close to and often derive from the “cabinets de tendances”. And, if there is “copying” or “meeting”, these processes do not concern the designs (the Chanel or the Galliano style) but some general properties: the length of the skirts, the dominant colours, ... That, however, mainly regards the mass market. So, anchoring cannot be considered as a consequence of a low IPR system.

To understand the effects of low IPRs, we have to consider precisely the relations between *haute couture* and the other segments of the fashion pyramid. That is why it may be interesting to study the historical evolution of the fashion industry (see infra points 4 and 5). For the time being there is no undisputable conclusion as regards to the efficiency of a low IPR system, which would suppose a comparison of a low and a high IPR system. A fashion system existing with low IPRs does not signify that low IPRs are the best system, and are the best system regardless of the organisational characteristics of the industry.

To understand the relation between IPRs and fashion we will now specify the way of

producing fashion products, that is to say the process of creation.

2 Culture as a fundamental input of production in the fashion industry

In the fashion industry, culture intervenes as a "new" culture -culture is a flow, through creativity- and as an "old" culture -culture is a stock, through heritage. Current creativity uses the creativity of the past which has been accumulated to constitute a heritage and, simultaneously, adds to it. Moreover, when cultural industries use creativity and heritage simultaneously, they benefit from a virtuous circle, namely goods, knowledge, ideas produced constitute kinds of heritage which, in return, favour creativity. By mimicking Sraffa we can speak of the production of creative goods and heritage by creative goods and heritage.

Creativity (and therefore heritage) appears, in the fashion industry, in three main forms: product creativity, managerial creativity and institutional creativity. It is mainly located in the top segment of the fashion pyramid, the *haute couture*, and then flows through the other segments (luxury ready-to-wear of the creators, high quality ready-to-wear, ready-to-wear, street fashion of the mass market).

2.1 Product creativity

Haute couture is strictly organized around creativity, its key input (Barrère and Santagata, 2005). Models and designs are not standard outputs but one-offs, yielding unique pieces of work, strictly bound up with individual talent. Competition is primarily based on creativity and not on cost reduction, while new segments of mass fashion compete through prices but on the basis of new creativity or thanks to copying the creativity in the high segments.

In standard industries there is a trend of technical progress which is incremental. Each good is likely to be substituted by a better one, a more sophisticated or a cheaper one; each technology is substituted by a more efficient one. Thus the value of "old" goods or techniques is quickly diminishing. It is not usually the case in creative industries and especially in the fashion industry.

Here there can be innovation and technical progress, in which case there can be incrementality, but this is not its dominant feature. The principle of fashion is precisely that someone may prefer the fashion of the seventies to the fashion of the sixties but nobody can maintain that one is technically superior to the other. Creativity embodied in models and designs thus constitute a heritage of creative products, the value of which is not declining but, conversely, may grow. In the fashion system, this heritage is simultaneously a physical stock of designs and models and the cultural heritage of a style (e.g. the Chanel style). It is highly valuable because new creators can "revisit" old collections and styles and can "revisit" (now the key word of the creation process) the history of fashion. This heritage also allows customers to identify a style.

Creativity is not to decide whether a skirt has to be long or short. A creator uses a lot of common inputs and conditions: the mood of the time, the successful movies, the trends in other arts such as architecture or design, the personalities of the top stars of the moment, ... A creator is creative because his interpretation is unique. Working under the same conditions, John Galliano and Karl Lagerfeld create collections which can have some similar characteristics (the length of the clothes, the dominant colours, ..) but which are fundamentally different. And each one creates his collection within a style, with reference to a specific heritage.

Besides the physical and particular stocks of designs and models there is a common heritage of creative knowledge. The history of the *Maisons* of the great creators (Chanel, Balenciaga, Dior, Saint Laurent) and the cult of creation are major incentives to creativity. The

effects of stock inventory, memory and experience facilitate the apprenticeship and transmission of creativity, especially between generations (Barrère and Santagata, 2005). Yves Saint Laurent was just 21 when he succeeded Christian Dior upon his death. His first collection, the Trapeze line, which was in the critical spotlight, demonstrated a vast culture and an ability to fit into the course of fashion. In the UK, the success of Vivienne Westwood or John Galiano is linked to the tradition of English tailors (Lehnert, 2000). The creative heritage is also the ability to design new luxury goods, close to *haute couture*, and so to widen the product range.

2.2 Managerial creativity

If artistic creativity is the most important in the history of fashion, creativity also concerns the management of the production process. The *Maisons de haute couture* were able to join creativity and craft knowledge. The heritage of craft dexterity passed down from generation to generation of workers having the technical skill to perform sophisticated technical operations. Until the fifties this system was profitable: the *Maisons de Couture* worked according to an artistic logic and under the direction of its founder, the *couturier-créateur*. The market logic was of secondary importance. But the economic conditions of the fashion system considerably changed when the elitist model gave place to a market model. Then many *Maisons* disappeared: after the Second World War there were still 106 *Maisons de haute couture* in Paris, in 1967 only 19 and now there are less than ten. The survivors are the *Maisons* which have been able to introduce new managerial creativity.

Poiret, before the Second World War, was the first to understand the possibility of using his reputation to sell perfumes and accessories in order to make money. Through the system of the 'griffe', the names of famous *couturiers* have become widely known beyond the spheres of their direct customers, and often from one generation to another. They have greatly contributed to the market power of firms (for instance the reputation assets of Dior have acquired a very high value with the globalization of luxury markets). After the War, Christian Dior connected *haute couture* and ready-to-wear by creating high quality ready-to-wear. This gave birth to a new luxury ready-to-wear, the 'prêt-à-porter des couturiers et créateurs' which allowed the *Maisons* to expand their market. Conversely, some creators refused the market logic: Cristobal Balenciaga asserted in 1968 that the *haute couture* was dead, proclaimed his artistic status against the market logic, and "refusing to prostitute himself" closed his *Maison*.

Since the seventies the management of the market power of the *Maisons* has become a decisive factor. Besides the creator and artistic director they are run by a manager. It is the case of the famous pairs Yves Saint Laurent and Pierre Bergé, Tom Ford and Domenico De Sole, Calvin Klein and Barry Schwartz... They modify the main strategies of the *Maisons* by considering market conditions. The profitability of ready-to-wear and accessories offsets the non profitability of the *haute couture* segment and a strict connection is set up between the mass production goods and the laboratory of creativity and the reputation of the top segment.

2.3 Institutional creativity

In the fashion field, creators have invented and imposed a specific institutional organization, the *Maison de haute couture*. In the old system, the models were derived from the *étiquette de la Cour* and the *couturiers* were craft workers. During the *Second Empire*, Charles Worth stood up as a creator, an artist and became a *couturier-créateur*. He defined himself as an "artiste en robes", a "compositeur de toilettes". Poiret defined clothing as a "produit d'art"². Supply appeared as the dominating factor compared to demand and stylists defined good taste and fashion trends.

With this innovation creativity got the upper hand over technical dexterity and the *Maison de haute couture* concentrated the origin of creativity at the top of the system. Later on,

creativity went to lower levels through licenses and the production of accessories. It was also given a higher value by the ‘*griffe*’ system. When creativity has existed for a long time, as in the French *haute couture*, it leads to public policies to improve art, fashion and creativity, and trade associations.

Reproducing creativity also leads to the building up of a common heritage of tastes, i.e. a semiotic and cultural heritage. Fashion implies conventions to distinguish between good taste and bad taste. The existence of a heritage of tastes and preferences, i.e. a common reading of signs, produces homogeneous representations. In a market of sign-goods it allows demand to adjust to supply. It makes fashion understandable; it makes creation credible; it legitimates creative work such as fashion creation. Moreover, it provides a competitive advantage in world markets. The semiotic heritage leads to an image heritage. All French luxury industry goods benefit from this image effect. Consumers clamour for French fashion and luxury products as carriers of the “French touch”. Cultural heritage, mainly the intangible kind, influences individual and social preferences, and consequently affects demand functions insofar as producers can generate demand for these goods through communication strategies. For instance, the demand for Dior perfumes is related at one and the same time to the image of the great *haute couture* creator, to the “French touch” and to the Parisian heritage of fashion, art and culture. Moreover, a creative district emerges allowing for innovations to circulate among the arts and emulating creativity.

So creativity has a big value and must be protected. On the one hand it has a direct value. The recent successes of Dior derive from the talent of Galliano and the recovery of Gucci is closely linked to Tom Ford. The reputation of the Dior and Saint Laurent companies results from the genius of Christian Dior and of Yves Saint Laurent. On the other hand creativity has an indirect value because it is accumulated in heritage and has many effects flowing over clothing models into the luxury domain. The question of IPRs on creativity and heritage is therefore crucial. And fashion producers have a creative role in the organization of a IPR system. That does not mean that they can do and make what they want, because they suffer the constraints of the specific characteristics of inputs; but it means that they can influence the definition and management of these rights.

Moreover fashion is more and more connected to clothing and luxury industries. Firstly because *haute couture* is not per se profitable but creates models and reputation which are exploited in the *prêt-à-porter* in which some segments are mass-produced. Secondly because the *Maisons de Couture* develop accessories (bags, shoes, ties, perfumes, ..) which, for the main part, belong to mass production. Thirdly because financial groups (such as the two leaders, LVMH of Bernard Arnault and PPR of François Pinault) enter the field and build creative groups able to intervene in all the segments of luxury industries. Specific assets of fashion creation become more and more valuable: a trademark such as Dior has a very high specific value related to the name of Dior and to the joint reputation. New groups which are using sophisticated management seek to improve the management of IPRs on these assets and to conduce to a change from the old model, the *haute couture* system based on *Maisons* owned by great creators (Chanel, Dior, Balenciaga, ..) to a new system, with the new model of management through IPRs.

3 Some difficulties to use the standard model of intellectual property rights

In the 1960s the French *grand couturier* Yves Saint Laurent presented a collection called “Mondrian”, openly drawing his inspiration from the famous Dutch painter’s work. This anecdote raises many questions about intellectual property rights. For instance, was Saint

Laurent entitled to use Mondrian's paintings as a source of inspiration regardless of IPRs in Mondrian's creations, and without paying royalties to Mondrian's heirs? Could the fashion designer argue that Mondrian's paintings were a part of our common heritage and therefore free goods? Referring to "heritage" entails defining what portion of Mondrian's creation truly constitutes that heritage. Is it only his style of painting? The colours of his creations? And so on. Could we share between Mondrian's creativity and Saint Laurent's creativity? To complicate matters, a few weeks later, street fashion produced clothes of lesser quality for the ready-to-wear market inspired by Saint Laurent's Mondrian collection. One might question whether producers were entitled to propose a collection so "very close" to Saint Laurent creations. Did Saint Laurent's creations become a heritage that street fashion could use as a source of inspiration as much as Saint Laurent himself had done with Mondrian's paintings?

3.1 A perfect system of Property Rights

By clearly stipulating who holds the rights in each economic resource, a property rights system allows for efficient management –including inter-temporal management– of the use of resources because the holders have the full benefit of their *fructus*. It also allows for resources to be allocated, through *abusus*, to their most efficient uses. This implies a well defined system of property rights, stipulating the monopolistic boundary line around resource uses that a holder of the property right can enjoy, and, alternatively, all the uses prohibited for other people. A perfectly defined PR would be a clear definition of all the uses that the holder is empowered to have in every state of nature. Formally, a PR system is a complex of relations between three sets:

- a set of title holders $\{H_i\}$, $i = 1, \dots, n$
- a set of resources $\{R_j\}$, $j = 1, \dots, m$
- a set of actions which is the particular uses of each resource $\{A_{jk}\}$, $j = 1, \dots, m$; $k = 1, \dots, z$. The uses of my car consist for instance in going to work, going on holiday, carrying luggage, lending it to a friend, and so on.

A perfect PR system implies that each action concerning each resource is entitled to the right of someone without any discussion and with the full consequences of those actions in any state of nature. It implies an injective application: $H_i \Rightarrow A_{jk}$, • i, j, k , what we can observe in a standard production function such as $q = f(I_1, I_2, \dots, I_n)$. That supposes that many conditions are observed :

- we can identify all the inputs (I_i), these inputs are clearly defined as homogeneous ones and are separable
- we know the relation between each input (or the marginal quantity of input) and the output
this relation is stable
- we can measure the value of the output (v_O)

If these conditions are met, we **can** define property rights in inputs; and the observed value of the output v_O can be distributed among the contributions from each input. Starting with the observation of this v_O , we can relate it to some action A_{jk} ; from A_{jk} we can infer the presence of the resource R_j and allocate a part of the value v_O to it; then it suffices to entitle someone to R_j . Each resource is entitled and each PR has a value, that of the highest value among the values of the actions entitled by the PR in the resource. Then, each input is clearly linked to a property right and property rights do not overlap. These property rights can produce efficiency. Within a production function framework, this value of the property rights is related to the productivity of the resource, and in such a way an efficient market can emerge. And, according to economic theory, property rights in inputs **must** be defined to improve efficiency.

3.2 Why creativity-based goods make it difficult to implement PR?

The paradigm of the classical political economy is that of an “energy-based” production. Wealth is an accumulation of commodities, produced by direct and indirect labour. There are no qualitative distinctions between different kinds of labour, but only quantitative differences expressed by the market through the wages hierarchy. “Rare” goods, i.e goods which cannot be reproduced by labour, are marginal ones. Producing is spending inputs which are consumed in the production process, according to a technological combination, and transformed into output. Labour is a sort of intermediary consumption and, as a spending of labour, is made homogeneous as energy spending (human energy, energy given by equipment, natural energy). That implies many implicit conditions: inputs have to be identifiable, separable, homogeneous, reproducible, measurable, organized in stable and known combinations... As far as creativity and heritage are concerned, they are special inputs and do not generally satisfy these conditions:

- **1 Non separability and non additivity.** It is very difficult to identify and to separate the productive contributions of each input: is the success of a fashion collection, and if so to what extent, the result of the creator, of his or her assistants, of the top models, of the manager of the show, of the marketing managers...? We cannot relate v_o to some precise action A_{jk} . Creative production is often a team production. Moreover, creation frequently uses heritage and it is thus difficult to separate new creativity and old creativity accumulated in heritage and used in the creation process. When Lagerfeld became the new director of Chanel, his first decision was to spend a lot of time visiting all the departments of the Chanel Maison to be impregnated by the heritage of the Maison. He did not want to copy Chanel but to be inspired by the Chanel style in order to create a new Chanel in the way of Coco Chanel (Roux, 2003). How can the new value be distributed between direct creative labour and cultural heritage assets, between A_{jk} , A_{jk+1} , A_{jk-1} , ...? Heritage assets are not standard inputs whose value is determined by the market. And if the creator produces thanks to a social heritage, it is impossible to conceive a production function, incorporating that heritage, with which to evaluate marginal productivity. YSL learnt to draw by studying classical paintings and drew his inspiration from the models of Dior and Balenciaga, but a greater use of the “Dior input” would not have increased his output or improved its quality. And, considering the Mondrian collection how can one measure the net value of the YSL's creativity? Moreover, the creation function is generally not additive. Each input or condition of the production process may play a decisive role, according to the O-ring effect.
- **2 Non reproducibility.** While production through the transformation of inputs is an operation which can be infinitely repeated by the productive consumption of the necessary inputs, creation appears as a particular phenomenon, founded on such a radical singularity that we cannot have a similar result by buying other inputs. The dresses of the Trapeze line by Christian Dior are behind us and now we can only have copies, or new models “in the touch of Dior” or “paying homage to Dior”. We will never again have original Dior designs, whatever the consumption of inputs might be. Moreover, while production by the processing of inputs is an operation which can be repeated *ad infinitum* through the consumption of the necessary inputs, some creations arise as one-off phenomena which are so radically unique that no similar outcome can be obtained by buying further inputs.

- 3 Idiosyncrasy.** The outcome of a creative process may vary with the environment or even at random. The same inputs sometimes yield a work of genius and sometimes a mediocre product; Galliano's performances were not the same every day. The relation $R_j - A_{jk} - v_o$ is not stable. The creation of the artist or of the fashion stylist is produced out of nothing, or out of an economic resource, or out of inputs, except for that unique, non-standard resource, be it called genius, creativity, inspiration, or illumination. Yves Saint Laurent claims that in the morning he daydreams in his office and suddenly an idea comes up to him; he then picks up a pen and sketches a garment. After nights out at discotheques John Galliano goes to his office when he has a "flash"; he summons his assistants and tells them of his visions; they get down to work and he goes off to bed. How can any true measure of their talent be established? As we are in an economy of infinite variety (Caves, 2000: 6), creative inputs do not operate in a standard way and the relation between resources and the value of their effects is often indeterminate. Furthermore, some creative inputs are so unique, specific, or idiosyncratic (e.g. the talent of John Galliano or Tom Ford) that their potential market is very small and does not provide a suitable, stable standard of reference.
- 4 Measurability of effects.** Unique cultural creations with no technological dimension but with long-run effects are not amenable to comparison, and there is no scale of value for them in terms of their quality. A YSL concerto is not a Balenciaga or a Poiret composition, a Picasso is not a Poussin, and Borobudur is neither Chambord nor the Empire State Building. It would be nonsensical to try to rank these works by their quality or on any scale of creativity: is the invention of the Trapeze line in any way superior to the innovation of the miniskirt? Even if creators are acknowledged during their lifetime (e.g. Christian Dior), how can their contribution be measured in monetary terms? How can one establish a relation between R_j and v_o ? And how can one differentiate between the value of a collection, say, and its value for the development of fashion and design? The question is that much more difficult because many of the effects are non-market effects. Another point is that individual appreciations and the creation of social appreciation are highly changeable and unpredictable. This makes the value of such effects very random. The most important creations are often *avant-garde* and in opposition to the environment of the moment. The creator is often not acknowledged as a remarkable person and it is only later that his (or her) work becomes valuable. Moreover, the non ended effects of tangible and intangible cultural heritage assets generate further problems to measure value of the effects. Assigning value to creativity and to creativity accumulated in heritage resources is particularly difficult. It is difficult to know what effects a creation might produce across space and, *a fortiori*, over time. The different values of their uses have to be added up and the list of their effects is never complete because new effects may appear later on. This point is reinforced by the non-incrementality of creative processes. While technical objects disappear, the more recent supplanting the former, the purely creative good establishes a final result. It is not substituted by a new, better, powerful good. George Steiner noted that, while the progress of scientific and technical knowledge is cumulative, earlier works in art, literature and music are never superseded: "major art is not relegated to antiquarian status; Chartres does not date... What ... is in advance on Homer or Sophocles, on Plato or Dante? Beyond Hamlet, what novel surpasses Madame Bovary or Moby Dick?" (Steiner, 2001). Singularity and incomparability of creative goods – among whom fashion goods³ – are opposed to the idea of an incremental development of science and technology. Creativity also affects consumption by offering new goods and

by influencing individual preferences. It does not correspond to an alignment on individual preferences but more often to the production of novel goods, previously unknown to consumers. What procedure can produce a rational or reasonable evaluation of such an effect, and capitalize that effect over time?

- **5 Dominance of creativity.** In a creative process, creativity is the main input. Even if other inputs make significant contributions the end-result depends mainly on creativity because a creative producer obtains a very different result from a non-creative producer and increases the value of other inputs (the silk of the dress or the embroidery work). The specificity of creation is analyzed through the image of God's creation. God created the world because he produced it out of nothing. In the same way, the creation of the artist or of the fashion stylist is made out of nothing, or out of an economic resource, but thanks to the singular and non-standard resource, called genius, creativity, inspiration, illumination. Modern times spread the idea of a creation linked to God to one linked to humanity. This notion is outside the standard field of economics. Unlike the production function, the technological combination is unknown and it is difficult to evaluate each input. The measure of time spent is nonsensical: What stake is it for social development that the Messiah of Haendel has been composed within a week, a month or a year? And what interest is there to seek reducing this length of time?

3.3 How do creativity-based goods make it difficult to implement property rights?

The above mentioned characteristics of the creation process lead to four types of difficulties:

1. **To define the entitlement.** The first problem in defining property rights is to identify all the resources (present and past including heritage), which currently have creative effects or can produce some effects in the future, to identify all the producers of resources, to separate their contributions, to distribute rights among them so as to give each producer exclusive rights in their resources and control over the effect of their creative contribution. As seen before, the problems of non separability and non additivity prevent the market or society from entitling perfect property rights. The identification and the sharing of the relations between effect and resource and holder are often problematic. It is not obvious to decide what can be appropriated and who can be defined as owner of a property right.
2. **To organize a market for IPRs.** In order to define property rights that can be transferred by a market process, resources have to be evaluated. But non-separability, non-additivity, the dominance of creativity and the difficulties of measurability disrupt the evaluation of the effects of the resources. Idiosyncrasy is a characteristic of creativity which makes it even more difficult to infer the value of used resources from the value of their effects.
3. **To enforce IPRs.** The third problem is to enforce the definition, entitlement and transfer of property rights. As with the Mondrian dress created by Yves Saint Laurent this may be difficult. Piracy and opportunistic behaviour result from difficulties in identifying resources and in entitling them in order to define exclusive rights.
4. **To justify IPRs.** The difficulties to clearly define and value the productive resources and their holders imply difficulties to justify the present distribution of property rights. Normative problems arise. Is it fair to give the main part to the creator? Or to the owner of the firm? As usual in the field of intellectual property rights, the distribution of monetary earnings is far from contributing to human happiness or social development –

is it fair that Einstein's income was so small compared to that of Bill Gates?

These difficulties to implement property rights are more or less important according to the characteristics of the goods and of their creative process. In a first type of situations, the relation between the resource and the value of its effects is not problematic and the entitlement of resources is enough to define the relation between the holder and the uses of the resource (property rights in perfumes are well defined).

In the second type, the relation is more difficult to define and to evaluate but the effects remain in the private domain. Great fashion creators benefit from their creative image, from a capital of reputation and from a symbolic power. Private assets are formed in this way. They nourish many other goods such as perfumes and luxury goods, and trademarks can capture their main economic consequences. Firms have portfolios of patents and brands and manage these assets by selling or licensing them.

In the third type some effects can be captured by other firms or actors. This is the case when the difficulties to define the entitlement leads to difficulties to enforce PRs, allowing piracy or copying.

In the last cases, the effects flow over into the public area, as with paintings or science. In the fashion industry these diverse cases exist and often overlap. Thus, strategies and power play a key role in the management of IPRs.

4 The classic model of management of cultural assets in the haute couture industry

To understand the problems of IPRs in the classic system of fashion we first have to consider the old system, the fashion model of the Royal Court. The producers were dressmakers (*couturiers* and *couturières*) who mainly reproduced the '*canons de l'étiquette*'. The main source of inspiration was the common heritage of designs. There was not a creative process but only a production process and no IPR was thus at stake. 'Novelty' was introduced at the Court by the courtiers who encouraged their dressmakers to innovate within the *étiquette* rules. They were imitated by others if the *Grands* or the King (the '*arbitres des élégances*') accepted it. Even if there were no IPR on creation and even if producers had a low status, fashion was nevertheless a world of PRs. PRs concerned consumption, based on legal rules (called '*les lois somptuaires*') and social and political conventions determining the type of clothes the courtiers and the people were entitled to wear.

The Classic model of the '*couturier-créateur*' results from the coming to power of the creator. Creation is a team production but the *couturier-créateur* has the pre-eminent role and an absolute power over the creation process.

The creativity of craft workers fades away in the products of the *Maison*. They can make suggestions or create new technical solutions but their creativity disappears in the collective product. Obviously their wages include bonuses for the recognition of their skill but they are not related to particular innovations or ideas. They also benefit from collective training. The heritage of collective knowledge benefited the individuals through training and the ambient culture. It was therefore partly encapsulated in the skills of individuals, increasing the value of their skills, and circulating with them when they changed employers. In this collective heritage no IPRs coming from past work and present creativity existed although this heritage operated much like capital.

To some degree too the craft heritage was a club product (know-how, routines, procedures, etc.), arising from synergies and associated with the specific style of the *maison*. The creator (or the *maison*) had an implicit IPR in the *usus* and the *fructus* of this club heritage but no explicit IPR and therefore no IPR in its *abusus*. Accordingly it was usually not transferable. Its value was reproduced through the training of new employees coming into contact with the older ones in the *maison*. If the *maison* disappeared, the collective specialized knowledge was generally lost. To some extent the heritage of the craft knowledge was also the collective and common heritage of the Parisian fashion district, with open access but only within that district.

The *maisons* paid for labour and raw materials and the creator was the residual claimant as a consequence of his domination: the creator took the main role and submitted all the other inputs. Creativity appeared to be an attribute of the creator, the *couturier-créateur*, even if others (e.g. stylists and managers) did also contribute to these creative acts. The creator owned his individual skill and had a partial IPR (*usus* and *fructus*) in the collective creative skill to which he greatly contributed. The creative products and their heritage assets included specific models and general styles. Particular models were protected by patents. In France, there were IPRs in *dessins et modèles*. These IPRs were weakly enforced and foreign buyers could copy the designs but as the designs were associated with the creator's style they were not very useful in other styles. Moreover, infringements were of little consequence because the relationship between customers and producers was a personal and not a market relationship. Customers addressed their demand directly to bona fide producers. As competition among creators runs by differentiation and as each creator seeks to constitute a clientele, he has to develop an original style instead of copying. And, when copying did occur, IPRs would not provide much of a solution because it would have been very difficult to prove that one stylist had been copying another one instead of having been inspired by the same social and cultural atmosphere or by the common cultural heritage of fashion.

As materials were expensive, piracy was difficult and mainly concerned off-the-peg clothes, which was not the core business of *haute couture*. Here again, the styles were too closely associated with the personality of the creator-founder, who was the owner and head of the fashion firm. As far as the image of the creator is concerned, the reputations built up were internalized in the firm and protected by a trademark. This trademark was not a market IPR but a personal IPR taking the form of a *griffe* (the creator's name). The *griffe* expressed the individual creativity of the couturier and constituted a heritage which was transferable between products, hence the success of derived products (*accessoires*), but not between firms. When the firm disappeared, the reputation heritage assets, whose value was idiosyncratic, disappeared too.

The most important place for piracy was in the ready-to-wear system. Here was a real possibility for ready-to-wear producers to copy designs of *haute couture* garments. And it was actually the case. But these copyists did not compete with the original creators because the outlets of the *haute couture* were reserved to original and legitimated creators within a system of personal relations. Ready-to-wear constituted a different market. Obviously copying made them avoid paying royalties to the *Maisons*. The loss was not very important because ready-to-wear was, before the Second World War, in most countries limited to a supply of low quality goods. In any case French creators considered themselves as artists and not as moneymakers.

Moreover, IPRs could not readily be passed on. Creative knowledge and the corresponding heritage were idiosyncratic. The *maisons* were closely connected with the personality of the founder through a cultural and no managerial rationale. No distinction was possible between the person of the creator and his creative heritage. Cultural heritage assets could thus not be allocated as autonomous resources and no property rights could be entitled for

them. Many *maisons* disappeared when the creator died and no sufficiently creative successor could often be found. As the population of these firms was highly unstable and as some firms disappeared, this kind of heritage was often lost. In most cases, the market failed to organize the transfer and re-allocation of these heritage assets. In short, these assets were hardly transferable, often disappeared upon the death of the creator, and were lost.

No IPRs existed in heritage of collective creative knowledge either but it was linked to a special area, a certain Parisian district, which protected it from absolute unregulated access.

Other common heritage assets (including styles, tastes, institutional and cultural heritage) were the common property of the French fashion system. No IPRs protected them but their use presupposed an idiosyncratic connection with this system.

In the classic management model, IPRs could be low and badly defined without any substantial loss of efficiency and equity in the current period. Therefore this resulted in substantial losses over time:

- when the firm was handed down over time heritage assets were internalized
- when the firm disappeared the market transfer of heritage assets was generally impossible.

In the new model of the fashion market, the *maisons* are purchased by financial groups in the luxury goods industry. The set of problems concerning IPRs is consequently changing.

5 The new model of management of cultural assets in the haute couture industry

5.1 A set of new problems

The new financial groups in the luxury goods industry are very keen to enhance the value of the creative and heritage assets of the *maisons* and develop a more rigorous style of management. They are confronted with three key problems.

The first is the increase in the value of creativity that accompanied the expansion of the fashion field and its closer association with all other luxury goods. The second is the reproduction of the value of their heritage assets by the groups over time. They now operate by a long-term, managerial logic, and no longer by the cultural and individual logic of the *grands couturiers*. The third is the transfer of rights in heritage assets between firms or groups, at some point in time. New IPRs are needed to solve these three problems. IPRs have to be better defined in such a way that creative assets and their connected heritage assets could really be protected and exploited. They have to be separated from the person of the creator so that they can be passed on, either over time or across space, within the group or within the market. Heritage assets have to be enhanced. So the fashion market model implies a better definition of IPRs in creative heritage assets and the emergence of a market for them.

Firms continue to benefit from the private club heritage of craft knowledge, but the main change occurs when this knowledge is kept within the firm or the group over the long term. This is the case of accessory makers like Hermès or Vuitton. Great attention is paid to the training of workers. Their narrow specialization in the firm's products prevents the formation of an external labour market. So the lack of specific IPRs in club heritage assets does not prevent their transfer within firms over time. At some point in time, this private club heritage may be transferred through the market. New luxury groups take control of existing firms to develop their production of accessories.

An important source of value for these groups is that of creative knowledge heritage assets but these cannot be separated from the personality of their creators and they cannot be managed as standard inputs and transferred over time like capital. Transferring them over time, after the

death of the founder-creator, implies a decoupling of the creator's name from him as a person. The trademark provides a solution: Dior is a world-famous trade mark (and was given as a first name to more than one hundred children born in 2007) but Christian Dior died 50 years ago. The trademark is no longer the *griffe*. Nevertheless, this process is not easy.

To produce new creative products from the heritage assets of creative knowledge and products implies organizing a new idiosyncratic link between the heritage of a *maison de couture* and a new creator, capable of reproducing the value of this resource. Lagerfeld has to maintain and expand the value of Chanel's creative heritage, Galliano that of Dior, and so on. When Lagerfeld arrived at Chanel he began by studying the Chanel style for several months. How could it be defined, how could new goods bearing the Chanel brand be made identifiable as continuing the Chanel spirit? If successful, the heritage assets are a source of value, otherwise the potential value is lost. The value of IPRs in the non-cumulative cultural heritage assets is only a potential value and cultural heritage assets are not standard economic resources able to circulate by themselves in a market. This fact increases the importance of the work of new stylists and their key position in the firm. Managers must allow creators to express their creativity, despite their possible unconventional behaviour.

These creators acquire a new specific asset, namely their ability to maintain and expand the value of heritage assets. Accordingly a market for these skills emerges, but it is a narrow market. When Tom Ford and Domenico De Sole announced they were leaving Gucci, the staff began to look for successors but, as they themselves said, there were few potential candidates. Moreover, creators may benefit from a normal staff turnover according to market incentives. These incentives are as important as a market for stylists is emerging. They are also necessary to allow for some renewal among creators. Managers seek to prevent opportunistic behaviour by giving creators a share in profits or in the capital, that is, to share the IPRs with them. Sophisticated contracts manage the relations between great creators and their groups. Galliano has a share in Dior's profits and capital and so he has an incentive to use Dior's heritage efficiently. At first he was authorized to develop his own firm, but afterwards LVMH preferred to take the control of this firm. Internal monetary incentives to be creative may be outdone by external – market – monetary incentives to change jobs.

Lastly, IPRs do not allow a strictly and clearly separate use of Dior's heritage for producing Dior goods and for producing Galliano goods. There is thus a "hold-up" problem. Dior's heritage contributes to increasing Galliano's reputation and not only the firm's reputation. The owner of the heritage (the firm) is not the sole user of the heritage and cannot precisely organize its utilization by its employees, including the creator. So the economic links between old heritage assets, new heritage assets, creators and firms are very important but the legal links are at this moment not sufficient enough to manage them all. Contracts and IPRs remain incomplete. And problems remain, as with the break up between Tom Ford and the Pinault group.

5.2 Reputation heritage assets: from a name to a trademark

The reputation heritage assets procure increasing value for luxury goods industry groups where the market for luxury goods moves into mass production. Groups are thus keen to enforce IPRs in trademarks strongly.

These IPRs allow them to use their pre-existing reputation for new types of products: they obviously create new accessories in order to propose an all-round set of luxury goods to consumers (Vuitton produces not only luggage but also bags, shoes, pens, watches, and so on; Hermès has added a garment collection designed by Jean-Paul Gaultier to its traditional accessories). IPRs also allow for corporate restructuring in this growing industry.

Another important objective of these groups concerns the image heritage of the *maisons*:

the name of Dior or Saint Laurent is still a sign of quality and creativity, and fashion goods are semiotic goods. But their creators are dead or retired. The problem of the present owners is to transfer the positive image of the great creators who founded their *maisons* to the name of the firms. They must start from the fashion designer's name – the *griffe* (an association between the creative products and the name of the creator, a personal IPR) – and move to the trademark (an association between the products and the name of the firm, a market IPR). This transfer allows the value of the designer's name to be extended over time and space. The value outlives the *grand couturier* and extends beyond a particular work to cover the whole product range.⁴ The groups organize communication policies to enhance the reputation of the trademark: creation of museums or exhibitions (e.g. Yves Saint Laurent and Giorgio Armani at the Guggenheim), purchasing of stores on the main squares of the world's major cities.

The capitalization of heritage in trademarks as brand names allows the transfer of IPRs in reputation heritage assets. Financial groups can buy and sell firms and associated trademarks: Gucci's heritage value can be used both by PPR and by the LVMH group because Gucci is no longer a creator's name but a brand name. Nevertheless, the value of trademarks is very uncertain: in 1977, sales of the Armani women's collection were 800 million lire; three and half years later they were 40 billion. And how can a trademark be valued when the creator is dead or has left? What would be the value of Cardin's enterprises without Pierre Cardin or of YSL without Saint Laurent, or Gucci without Tom Ford? And how can the value of Gucci be split between Tom Ford, the creative stylist, and Domenico de Sole, the creative manager (Beaufumé, 2000)?

5.3 Creative piracy and vulgarization of creation

In the fashion industry it is very difficult to delineate an IPR in a specific product. Although there is some degree of creativity in mass production, most cultural creativity is concentrated at the apex of the pyramid, in the *maisons*. There are two main types of creative piracy.

The first is piracy by firms and countries which simply copy designs and models and supply a less expensive product. They save on creative labour and sometimes use inferior quality materials. This kind of piracy benefits from relatively low wage costs. French and Italian professional institutions have obtained the adoption of a "designs and models" legislation, immediately applicable, and are working on projects for a European directive on author's rights and on designs and models to improve protection in every country (Benhamou, 2001). They fear European enlargement will lead to a marked upturn in piracy.

A second type of piracy is the creative piracy of mass fashion. The protection of designs and models cannot, at the moment, prohibit the use of new models of *haute couture* by the manufacturers of mass fashion. It can prohibit complete product piracy: a firm cannot sell a garment labeled Saint Laurent unless it has been produced in the Saint Laurent workshop. But, under the present legal system, nobody can prohibit street fashion from copying the style and specificities of a *haute couture* model. And new fashion technologies enable even faster copying. Professionals refer to the example of the Zara fashion model: two weeks after the *haute couture* and *prêt-à-porter* collection fashion parades in Paris, one can find very similar products in Zara shops. IPRs are inoperative against this kind of copying:

- There can be no confusion: prices and quality are very different; but mass fashion manufacturers can therefore save on creative work and confine themselves to adjustment work.
- As in the age of the dress-creator it would be very difficult to prove that one stylist has copied from another one and it is even more difficult when creation is inspired by the social and cultural atmosphere. Some firms are specialized in the production of trend selections (*cahiers de tendances*). It is nevertheless common knowledge that creative

piracy is systematically organized. Trade organizations are lobbying for a better protection of IPRs, first and foremost within the European legal system.

Another means of combating both types of piracy is to play on consumer preferences. The policy of *haute couture* and *prêt-à-porter de luxe* firms is thus a communication policy to persuade consumers of the social value of a brand. Simultaneously it is a policy to increase the brand's value, to differentiate it from the standard brands and promote it as a luxury brand, if possible a star or superstar brand.

5.4 IPRs in common heritage assets

The two main issues here are to manage common heritage assets so that they can be reproduced over time and to make them productive.

The common heritage of craft knowledge is a configuration of specific assets. They are closely associated with a local geographical context and are non-transferable assets. No market can be organized for them, no IPRs can exist. These assets are formally freely accessible but, in fact, can only be used if firms choose a local installation. Geographical localization constitutes an entry barrier and creates an idiosyncratic relation for firms currently benefiting from these assets. One major consequence of the lack of property rights in this heritage is the absence of any economic management of it. Nobody is responsible for the reproduction of the heritage over time and firms can operate as free riders. In fact, the crisis in *haute couture* has led to a contraction of the craft sector traditionally linked to it and to the loss of highly qualified skills. Public policies are required to manage the economic value of these heritage assets. The institutional heritage of the *maison de haute couture* model is not legally protected either. It may be duplicated abroad but it is connected to the specificities of the Parisian fashion district and to its specialization in a very restricted sphere of the fashion system, that of *haute couture*.

The creative knowledge heritage is also locally embedded, but is not controlled by any market or any property rights. It favours French firms but foreign ones can benefit from it by relocating in the Parisian district, by purchasing French firms and by hiring creators who have benefited from this creative atmosphere. The common heritage of styles is a common one but represents a higher value for the firms which produce culturally similar creations. No IPR is defined in these assets and free access is the rule. The same is true for the common heritage of tastes, the semiotic and image heritage of Parisian *haute couture*, and the French touch. Accordingly, French firms attempt to associate the image of French luxury goods closely with their brands: advertising for perfumes invariably states the brand and the name of Paris. This is currently the only way to avoid piracy and the proliferation of pseudo "Made in Paris" commodities. In the future, there may be a local protection of geographic origin: some firms and institutions would like to obtain some form of protection and draw up legal strategies.

To increase the productive uses of these common heritage assets both public and professional policies are implemented. Museums and exhibitions maintain and expand the semiotic and image heritage. They improve the image of the country and of its creative products as in the case of the "young British artists" campaign. Professionals now think that cultural institutions and policies have a big economic impact on fashion and luxury goods industries (Muller, 2001). They organize industrial policies and partially transform common heritage assets into collective heritage assets, with a collective partial management.

Luxury goods groups like LVMH and PPR are particularly interested in the image of creativity conveyed by these creations and develop sophisticated and expensive communication policies. They appropriate a part of the common heritage of the age of aristocratic luxury and transform it into a market and into democratic luxury. In the present new age, mass markets need powerful images for their goods. The use of heritage is therefore an essential competitive resource. Even so, the common character of the reputation of *haute couture* leads to some

difficulties. Financial groups in the luxury goods industry are mainly interested in the earnings from accessories (perfumes, bags, shoes, watches, pens and so on). *Haute couture* itself is no longer profitable but its creativity is the origin of image and reputation effects. There is therefore a contradiction: reproducing reputation heritage entails reproducing the creativity of *haute couture*, but these groups are seeking to disinvest in *haute couture*. And private strategies can lead to free riding: every group wishes to benefit from the reputation but none of them are willing to invest in *haute couture*. This problem is serious because reputation in creative industries is unstable. For instance, the idea that French creativity has been superseded by Italian creativity may easily become a commonplace and lead to bandwagon effects. Private groups are therefore calling for collective and public policies.

In neither case however can any perfect IPRs for cultural heritage assets be defined. The replacement of the elitist model of the *couturier-créateur* by the market model of fashion leads to a development of IPRs to organize the protection and allocation of creative resources, and particularly of cultural heritage assets whose value is increasing. The specificities of such heritage assets however prevent the building up of a market for IPRs in cultural heritage assets. The standard model of property rights, founded on the paradigm of the production function and of the consumption function, is partially irrelevant here, depending on the specificities of the cultural heritage assets. Four types of problems are linked to creative cultural heritage assets. The first is the common character of many of these assets which involves the incompleteness of the property rights to be defined (e.g. the case of the Mondrian collection). The second problem is the difficulty of separating these cultural heritage assets from the individual persons who build them to organise exclusive property rights. A third limit can be found in the transferability of these property rights, and the fourth problem is related to the difficulty of enforcing property rights in these assets. Finally, these difficulties linked to the definition and the implementation of property rights in cultural heritage assets allow economic actors to develop strategies concerning the uses of cultural heritage assets. From this point of view, cultural heritage assets become portfolios and the recognition of goods as creative ones increases revenues. This proves to be the case for *haute couture* when luxury groups like LVMH manage their luxury trademarks through property rights. One may wonder whether this management scheme of cultural heritage assets might not tend to evacuate the creative character of these heritage assets and change them into economic values that can readily be traded on the market place.

Some conclusions

We cannot argue that the persistence of a low system of IPRs in the fashion industry derives from its efficiency. It is mainly the result of the characteristics of the inputs which are used in the creative production process. As long as creativity and heritage play a decisive role in the creative process, a standard PR system cannot be implemented. Characteristics of creativity constitute strong constraints for defining, entitling, legitimating, enforcing, valuating and exchanging property rights. That has some important consequences on the working of the market and on firm strategies. Firstly, the strategic choices of the firms are not only between a 'low' and a 'high' IPR system. The different economic actors develop different kinds of strategic behaviour in order to obtain earnings and may try to protect copyrights, trademarks, new assets, old assets (heritage), private or collective assets, and so on. They consider the costs and benefits of the different types of property rights and may substitute some for others, for instance the protection of the trademark for the copyright on designs. Secondly, the institutional characteristics of the industry – such as the models of management, the type of ownership, the size of the firms, ... - lead to different historical models of management through IPRs. The financial groups which integrate fashion into the new luxury industries currently try to

implement new IPRs and to move towards a stronger system of IPRs.

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² Poiret declared : « Mon travail n'est pas seulement d'exécuter mais surtout d'inventer. La création est le secret de mon succès. Je ne veux pas que les gens ordonnent leurs vêtements », quoted by Grumbach, 1993, p.19.

³ Goods which mix creative production and technical properties simultaneously obey to the non-incremental property of creativity and to the incremental property of technology, in proportions related to the degree of the incorporated creativity. A research and development process is often closer to a standard production process than creation. The investment in R and D gives a probabilistic result. Products normally follow one another in a better way: the last version of software corrects the former bugs and improves some functions; the new type of car introduces some improvements. For creative goods that include technology improvements are possible: in the luxury industries, the "carré Hermès" silk or the Vuitton luggage is improved by new raw materials and more sophisticated treatments...

⁴ The value of the brand image is especially important for some products in the luxury goods industry such as perfumes. In the case of the perfumes of the French haute couture firms, the value of raw materials represents less than 10 per cent of the price; the greatest value is imparted by the brand image and the general image of French luxury goods.