

Music and Fashion

The Balancing Act Between Creativity and Control

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In June 2002, underground music phenomenon DJ Z-Trip signed a recording contract with Hollywood Records, home to teen pop sensation Hilary Duff and veteran television personality Regis Philbin. While there is nothing new or unusual about underground musicians making uneasy alliances with mainstream record companies, this was a notable event for two reasons. First, Z-Trip's music is made entirely from samples of other songs, none of which had been licensed prior to the signing of the record contract. Second, Hollywood Records is a division of the Walt Disney Company, which has arguably been the most aggressive proponent of intellectual property control in the entire media and entertainment sector.¹

Z-Trip is one of the pioneers of the mash-up, also known as "bootleg" or "bastard pop." This new musical style, which emerged only in the last five years or so, has two basic rules: first, all the source materials must be recycled. Vocals, accompaniment, ambient noise, and anything else that goes into the mix must be sampled from an already existing piece of recorded music. Often, this means the vocal track from one song is "mashed" with the instrumentation from another. However, a single mash-up can incorporate samples from hundreds of songs.² The only other rule of mash-ups is that the samples must be combined to make something new and surprising. In the words of one bootleg artist, "a good mash up / bootleg is a culture clash . . . styles that shouldnt [sic] work together but do."³

¹ Much of the information on DJ Z-Trip's relationship with Hollywood Records has been relayed personally by *Rolling Stone* journalist Bill Werde, who at the time of publication is in the process of reporting and writing about the story for his magazine.

² Mash-up artist Osymyso, for instance, has produced a popular track called *Intro Inspection* that incorporates samples from 101 separate songs.

³ Personal communication with mash-up artist, October, 2003. He preferred to be quoted anonymously.

Predictably, things have not gone smoothly for Z-Trip's music at Hollywood Records. After years of legal acrobatics, the company was only able to license a handful of the dozens of samples on Z-Trip's album. There are many reasons why the record label may have failed to obtain the blessings of these copyright owners. Most likely, some had a strict "zero sampling" policy, prohibiting derivative works of any sort to be created. Others probably didn't understand what a mash-up was, and weren't willing or able to take the time to learn. Some copyright owners may have been difficult or even impossible to track down. Ironically, all of these hurdles can be traced to the system of rigid copyright control that the Walt Disney Company has successfully lobbied to create over the past several decades. In other words, it was hoisted by its own petard.

Hollywood Records recently announced plans to release a DJ Z-Trip album, titled *Shifting Gears*, in April 2005 – a lag of nearly three years from the initial signing date. In that time, mash-ups have progressed from underground art form to mainstream fare distributed by MTV, Lollapalooza, and *Wired Magazine*. These newer mash-ups differ from Z-Trip's underground work in one respect: they are comprised of a small pool of sanctioned, *pre-licensed* samples, which were given to the artists with the express purpose of being mashed. Gone is the innovation, the "culture clash" that defined the form in the first place. In its stead is an often predictable, homogenous artifact that arguably functions more as a marketing pitch for the source materials than as a new and independent work of art. In the words of French economist and music theorist Jacques Attali, "inducing people to compose using predefined instruments cannot lead to a mode of production different from that authorized by those instruments."⁴ Or, as *The New York*

⁴ Attali, 1985, p. 141

Times recently predicted, “the mainstreaming of the mash-up . . . may end up killing the genre.”⁵

Sadly, Z-Trip’s record for Hollywood, when it finally arrives, will almost certainly resemble these newer mash-ups, and lack the samples the company was unable to license. In the words of music journalist Bill Werde, who has extensively reported on mash-ups for *Rolling Stone* and *The New York Times*, “this album will not resemble anything Z-Trip has built his following on. Whatever does come out will be a very sanitized version.”⁶

The moral of this story is fairly straightforward. Intellectual property laws are theoretically supposed to encourage innovation, prevent theft and reward artists. However, in the case of DJ Z-Trip, they did just the opposite. An innovative musician was delayed for years from sharing his work with the market, and in order to do so, he had to change it to make it more derivative and less original. As we shall discuss in this paper, such outright dysfunction is the norm, rather than the exception, in the music industry today.

It would be difficult to find a case analogous to DJ Z-Trip’s in the world of fashion. In this industry, sampling, derivation, and re-appropriation are all accepted and common forms of creative innovation. However, there are still powerful institutions helping to navigate the murky waters that separate legitimate influence from theft. Without the “thick” copyright protection afforded to the music industry,⁷ fashion depends

⁵ Ferguson, 2004

⁶ Personal communication, December, 2004

⁷ According to Vaidhyathan, 2001, “thick” copyright law prizes protection over accessibility with features such as long durations, stringent prohibitions, and harsh penalties. “Thin” law, by contrast, takes the opposite tack, emphasizing accessibility over protection.

more heavily on social regulation and a primitive but highly functional watchdog – shame.

Fashion is perhaps the most cyclical of all design industries. As with music, ideas and aesthetics have been constantly recycled, particularly from the 1930's up to the present day. Sleeves, collars, skirt lengths, patterns, fabrics, buttons, and hems are all elements with seemingly infinite permutations, but in reality there is a fairly limited aesthetic vocabulary, with the proven successes cropping up again and again. What makes fashion distinct from other culture industries, however, is its willingness (perhaps its imperative) to acknowledge sources of inspiration. Inez Brooks Myers, curator of costume and textiles at the Oakland Museum of California, explains:

Designers will say they were inspired by the gingham that Adrian used or inspired by the patchwork skirts that Rudi Gernreich did. They will acknowledge inspiration, copying and borrowing heavily. There is a nuance of change but they acknowledge the source of inspiration. I don't know if that happens in other industries.⁸

On rare occasions, a fashion designer will cross over the invisible line separating influence from theft. One example is particularly illuminating. In 2002, Nicolas Ghesquiere, head designer of *couture* house Balenciaga, produced an embroidered patchwork vest for its spring collection. Not long after it hit the market and the fashion magazines, fashion web site Hintmag.com revealed it to be a stitch-by-stitch replica of a design by a young, somewhat obscure Chinese-American designer in San Francisco, Kaisik Wong. The vest was originally produced in 1973, and was photographed and included in the book “Native Funk and Flash” in 1974. Mr. Ghesquiere claims that at the

⁸ Personal communication, November, 2004

time he produced the vest he was not familiar with Kaisik Wong or his designs and has said in interviews he thought the original vest was a theatrical costume.⁹ When Balenciaga produced the imitation, Mr. Wong had been deceased for over a decade, minimizing the risk of exposure or legal action against the company.

Ghesquiere became one of the few designers ever to be criticized for copying. This may never have happened had he simply stated the source of the original design. “Giving credit where credit is due” seems to be the unwritten maxim of the fashion community. However, by not crediting the source of his design, Mr. Ghesquiere risked the scrutiny of the fashion community – suddenly his talent (and therefore his livelihood) was called into question. While this sole misstep has not hurt his career in the long run, the murmurs of doubt about his credibility unquestionably served as a warning against repeat offenses – as well as a warning against theft to the fashion community as a whole. As Cameron Silver, fashion expert and owner of high-end vintage store *Decades* warns, “The incident doesn’t die. When Ghesquiere passes away, his obituary will mention two things: the bag [he designed] and the Kaisik scandal.”¹⁰

This example underscores the subtle yet effective way in which the fashion community regulates the industry through social mores, codes and conventions, in contrast to the dense copyright protection and brute legal force that characterize the music industry. This difference is not simply a matter of preference or predilection; as we will discuss later, there are also structural features specific to fashion that regulate copying. These include the pace of innovation (which generally renders legal actions moot); the fairly fixed number of garment genres and styles (which virtually requires that

⁹ Horyn, 2002

¹⁰ Personal communication, December, 2004

copying be allowed lest a genre or style is monopolized); and copyright law's philosophical refusal to protect functional items.

But is this a meaningful comparison? Are there significant similarities between the creative communities and social forces that drive fashion and music? If so, how can we account for the drastically different industries that have emerged to enable and exploit them? Why is it that, despite its stringent approach to intellectual property, the American music market dropped by 6 percent in 2003, while fashion sales in the U.S. grew by 5.4 percent?¹¹ And, given the pace of technological change and the ever accelerating cycles of innovation and obsolescence, is there any lesson the music industry can learn from fashion's success in balancing creative demands against market forces? These are the questions we aim to address in the following pages.

Music and Society

Music is so deeply entrenched in our lives we tend to take it for granted. It is nearly always a feature of our environment, either as the focal experience (i.e. listening to a CD, going to a concert), as background noise (i.e. waiting rooms, parties), or as an enhancement to visual information (i.e. movie soundtracks). Music is so common in these contexts that its absence disturbs us. People in silent waiting rooms can often be heard humming to themselves or tapping their feet to compensate for the quiet. Similarly, a movie devoid of music, such as Alfred Hitchcock's classic 1963 thriller *The Birds*, can be far more unsettling than one with a normal soundtrack.

Music's ubiquity can be traced to two defining features: its invisibility and its power. All sound is, of course, invisible by definition. It vibrates at a different range of frequencies, and acts upon different sensory organs, than visible information. But this

¹¹ Apparel Magazine, 2004; RIAA, 2004.

technical invisibility also gives it a social invisibility. This is especially true in our ocularcentric culture, which prizes the eyes over the ears.¹² We devote so much of our attention to what we see that we rarely think about what we hear. Thus, music becomes a kind of stealth agent, influencing our thoughts and feelings while it hides in plain “sight.”

This stealth would be meaningless, however, without the power that it helps to obscure. The power of music has been extolled, debated, and exploited at least since the beginning of written history. In *The Odyssey*, Circe warns Ulysses of the dangers of the music of the Sirens:

If any one unwarily draws in too close and hears the singing of the Sirens, his wife and children will never welcome him home again, for they sit in a green field and warble him to death with the sweetness of their song.¹³

Today, music’s power is still in abundant evidence, from the tens of billions of dollars Americans spend on CDs each year to the focal role music plays in social and political change, such as the civil rights movement. This power can be traced to three spheres of human life in which music exerts a phenomenal degree of influence: cognitive, social, and commercial.

Recent research has established that music is a vital factor in the cognitive development of children, and that it may even have played a central role in the evolution of the human mind.¹⁴ This fact is no doubt evident to readers in their own lives. From the traditional *Alphabet Song* to the current craze for *Baby Einstein*, music is inextricably linked with the process of imparting knowledge and values to children from infancy onwards.

¹² McCann, 2002; Ong, 1982

¹³ Butler, 1944

¹⁴ Cross, 2001; Ho, Cheung, & Chan, 2003

Similarly, research has identified numerous ways in which music both produces and reflects social structures. Attali writes that “all music, any organization of sounds is . . . a tool for the creation or consolidation of a community.”¹⁵ Yet music seems to serve less grandiose social purposes as well. Media research has identified scores of different “uses and gratifications” describing people’s interaction with music, ranging from social lubrication to political message dissemination to personal mood management.¹⁶

Finally, music has become a commercial entity— a development we will examine at length in this paper. For now, suffice to say that music is both a product in and of itself (when distributed via CDs, radio or downloads, for instance), and an essential component of our commercial system (in the form of advertising jingles, theme songs, etc.).

Fashion and Society

While music derives much of its power from its invisibility, fashion is one of the most visible markers we have in contemporary society to express affiliation, lifestyle choice and identity. Yet paradoxically, its utter ubiquity also affords it a status beyond questioning or criticism, similar to music’s. We may make decisions about what clothes to buy, or what shoes to wear, or cattily dismiss someone else’s choice of apparel, but few of us ever stop to wonder why fashion exists, why it changes so rapidly, or what those changes mean about our society.

Consequently fashion, like music, enjoys a social power that far exceeds its apparent role in our lives. A hat is never just a hat, and we rarely wear one simply to guard against the cold. Arguably, fashion is *by definition* the symbolic coding of social power through apparently innocuous means such as shape, texture, or color. This is

¹⁵ Attali, 1985, p. 6

¹⁶ Roe, 1985; Christenson & Roberts, 1998

evident in the breadth and scope of its social functions. It has been used as an index of social rank, as in Victorian England, and as a gauge of social mobility, as in twentieth century America. It has been used to express ideological conformity and allegiance, as in the case of the Mao Suit, and social unrest or nonconformity, as in the case of the 1960s Flower Power movement. Over time, fashion has been used to communicate a dizzying array of social signifiers, such as class, gender, occupation, regional identity and religion.¹⁷ The brilliance of fashion is that, for the system to work, all people have to do is wake up in the morning and get dressed.

Although fashion may seem innocuous and simple on an individual level, religions, governments and other large organizations have long seen the value of fashion as a form of social control, dictating uniforms and dress codes, prescribing and proscribing everything from shoes to hats to underwear. In the middle ages in England, for example, livery – meaning uniform clothing or the badge or cloak color of the lord’s family – was heavily regulated. If a person took a nobleman’s livery, he became his servant and owed him loyalty and other required services. A liveried servant also shared his nobleman’s identity to a certain extent, granting him legal privileges he would not have enjoyed otherwise.

Similarly, during Elizabethan times, Sumptuary laws restricting lavish dress were passed, in order to maintain the boundaries between the nobility and the rising bourgeoisie. Elizabethan lawmakers feared that “letting anyone wear just anything must lead inexorably to moral decline. If you couldn’t tell a milkmaid from a countess at a glance, the very fabric of society might unravel.”¹⁸

¹⁷ Crane, 2000

¹⁸ Secara, 2001

However fashion, like music, was again redefined by the advent of modern capitalism. In contemporary society, fashion serves as a commercial entity, driven by the same forces of manufactured demand and planned obsolescence that characterizes everything from movies to breakfast cereals to presidential candidates. This commodification of fashion has historically interacted with America's social mobility and class competition to produce an almost feverish obsession with fashion among many Americans, particularly women.

In the last few decades, as more traditional notions of social class gave way to increasing fragmentation based on cultural interest, consumers have had greater freedom to construct their social identities based on other parameters, such as participation in certain lifestyles. Leather-clad dominatrix, polo-wearing Connecticut preppie, and SoCal surfer are all accessible identities to anyone with a credit card. Put another way, to paraphrase *Hamlet's* Polonius, "the clothes make the man." This change, from class identification to lifestyle articulation, suggests that fashion offers a greater level of individual agency today than in earlier eras. In contemporary culture, "consumption is conceptualized as a form of role-playing, as consumers seek to project conceptions of identity that are continually evolving."¹⁹

Thus, both music and fashion act as social stealth agents, regulating and reflecting cultural roles and expectations while eluding scrutiny through the very fact of their ubiquity. Music's stealth is aided by its literal invisibility, while fashion does its work in spite of, and because of, its hypervisibility. In contemporary society, both music and fashion are generally thought of primarily in capitalistic terms. Songs and apparel are conceived of as products, and most people relate to them as consumers. However, both

¹⁹ Crane, 2000, p. 11

music and fashion originate within creative communities, which are built on a different kind of relationship: that between an artist and a work.

Musical Community and Commons

The one thing about music everyone can agree upon is that, as Leonard B. Meyer puts it, “music has meaning and that this meaning is somehow communicated to both participants and listeners.”²⁰ In other words music, like all activities that come under the rubric of “art,” is a fundamentally communicative and therefore social act.

As Meyer observes, music can be addressed to two kinds of audience: “participants” and “listeners.” Although this distinction may seem clear enough on first observation, scrutiny demonstrates that there is an immense gray area between these two extremes. Dancers, people clapping in time to the beat, or musicians playing along with recordings would all be difficult to categorize according to this dichotomy.

There are social, political and economic reasons for the existence of these two opposing roles. As Attali argues, the distinction of musicians as a separate category of individual originally served to strengthen and legitimate hierarchical social and political structure during Europe’s feudal era.²¹ Later, of course, the musician/listener dichotomy would come to echo and reinforce the producer/consumer relationship that drives the capitalist system. As we will argue later in the paper, we feel this distinction has ceased to be useful (if it ever was), and is actively preventing our society from allowing music to progress in the current era.

As a social phenomenon, music takes place within communities. From the collective worship of a church choir to the performance of the national anthem at a

²⁰ Meyer, 1961, p. 1

²¹ Attali, 1985

baseball game to a freestyle competition at a hip-hop club, music often serves to define and unite a group of people with one another and with other groups of people. Like fashion, it is an essential element in social identity, both a bonding ritual and a kind of aesthetic shorthand for categories ranging from age to ethnicity to sexual orientation.

But if music occurs within communities, it is also rooted within Community. Music is an ever-evolving language, the lexicon and grammar of which are constantly being updated and negotiated by musicians the world over. This ongoing dialogue constitutes a community that transcends the narrow boundaries of region, style and even period. It has been observed, for instance, that practicing musicians tend to have knowledge of and expertise in a range of styles far broader than the ones they typically perform.²² Thus, music cannot have meaning or power except in the context of other music. Put another way, music dwells in the differences between sounds, not in the sounds themselves.

If difference is the mark of music, then innovation is the engine that drives it. Difference can only exist by dint of innovation. Despite the attempts of some academics, critics and other purists to resist change and confine music within known parameters,²³ it is amply clear that one of the few things all music shares – from the traditional songs of Tuva²⁴ to the most synthetic products of the American pop market – is an ever-changing nature, fueled by the mechanisms of reinvention, reinterpretation and recombination. As sociologist of music Hugo de Jager writes, “the sum total of available elements in a

²² Green, 2002

²³ For a thorough and hilarious review of reactionary screeds in the world of European classical music, see Slonimsky, 1965

²⁴ See CD liner notes for the Tuvan vocal group Huun-Huur-Tu, available at <http://www.huunhuurtu.com/CDliners.html>

society (which is called its ‘cultural base’) influences the number – and perhaps the kind – of innovations a composer living in that society can make.”²⁵

Thus in music, as in other creative communities, one may argue that innovation springs from collective access to the creative commons.²⁶ In plain English, this means that all musicians may draw on a common set of ideas and materials, and that each new composition or performance instantly joins that commons as soon as it becomes publicly available, by whatever means.

Sometimes, this is a subtle and sweeping process that sets the rules for all who follow, as when J. S. Bach redefined Western harmony, or when Charlie Parker revolutionized improvisation in American music. At other times, the process can be more visible and less influential, as when one musician reinterprets or samples another’s work. Either way, every musician is engaged in an ongoing dialogue with all other musicians, past, present and future. This truth has frequently been acknowledged by musicians themselves. As jazz saxophonist John Coltrane once said, “It’s a big reservoir, man, that we all dip out of.”²⁷ Similarly, musicians ranging from Hungarian classical composer Zoltán Kodály to world famous Pakistani Qawwali singer Nusrat Fateh Ali Khan to American jazz drummer Buddy Rich have all been independently quoted as saying: “Music belongs to everybody.”²⁸

Fashion Community and Commons

As with music, fashion encompasses a large gray area between the extreme roles of consumers and producers. This gray area, where creative thinkers draw upon an ever-

²⁵ de Jager, 1972

²⁶ Lessig, 2004; Bollier, 2002

²⁷ Owens, 1995

²⁸ Dobrian, 1992; JazzProfessional.com, undated; Seno, 1997

growing and constantly circulating pool of common memes, is arguably the source of new ideas and trends within the fashion industry. Sociological literature on innovation describes it as an interactive process, dependent upon cumulative knowledge and the capacity for interchange between individuals, institutions and organizations. Academic research on fashion echoes this definition. As Vincent B. Leitch writes, “innovation in fashion is less a matter of creativity *ex nihilo* than of mutation and pastiche.”²⁹ In fashion today, innovation continues to thrive as its central practices – foresight, flexibility, and cooperation – flourish in a fairly open and unfettered creative commons.

While fashion, like music, is a global community – fragmented, multifaceted and highly stratified – it is also tied to an industry that reaps the benefits of agglomeration economies, or the types of spatial concentration that create advantageous economic conditions, resulting in sustained or increased concentration.³⁰ Thus, Paris has remained a central node in the global fashion economy, along with New York and Milan, and London, Tokyo and Los Angeles serve as a second tier. Designers tend to live and work in one or more of these cities, as do buyers and merchandisers, and design schools such as Parsons School of Design in New York and College of St. Martin’s in London. Of course, the actual production of most clothing, with the exception of *haute couture* or signature collections, is outsourced to the third world, concentrated in Asia.

The career of most designers is a peripatetic one, moving between companies every few years. Fashion design, like entertainment, depends more and more on blockbusters. One bad collection can sink a design team. As Richard Wheeler, an accessories designer at Ann Taylor, commented: “teams don’t stay in place for more than

²⁹ Leitch, 1996, p.111

³⁰ Sassen, 2001.

a few years. If there is a bad season, it's always seen as the designer's fault. You fire the designer and hire a new team."³¹ This helps to create a community that is fairly fluid, with talent, ideas, individuals and aesthetics constantly recirculating within a relatively limited sphere.

In short, both music and fashion owe their existence to globalized creative communities, which thrive on the continual circulation of ideas and mining of the creative commons. Unlike technological or industrial development, in which new objects and ideas may be discovered (e.g. Neptune, penicillin) or invented from scratch (e.g. airplanes, zip codes), both music and fashion rely entirely on innovation – the reshuffling of known elements into unique and surprising patterns – for creative advancement.

Thus, in order to innovate effectively, musicians and fashion designers *must* operate within environments that grant them access to ideas and the permission to use them in new and creative ways. Yet neither community exists in a vacuum. Both function within the context of highly structured industries that have emerged over the years to enable and exploit the fruits of creative endeavor. These industries have a constraining effect on the creative communities, by continually pitting the financial, legal and structural imperatives of their own continuance against the requirements of the artists themselves. Often, this means restricting access to the creative commons. In order to understand how market forces came to exert such control over music and fashion, it is useful to examine the histories of these industries.

Music Industry History

³¹ Personal communication, October, 2004

The history of the music industry is, arguably, one of increasing control, narrowing access to the means of production and distribution, and a widening gap between music's social origins and its commercial role.

In traditional societies lacking the capacity to turn music into a static object, either through the printed score or through recording technologies, music was synonymous with live performance. This living music was, by and large, integrated into the fabric of life and shared among the community in a way people in our society can scarcely understand. As Attali writes of music in Europe's middle ages, "The circulation of music was neither elitist nor monopolistic of creativity . . . music in daily life was inseparable from lived time, in which it was active and not something to be watched."³² Similarly, music historian Eileen Southern writes that in West Africa during the slave trade years of the 17th through the 19th centuries, "for every activity in the life of the individual or the community there was an appropriate music; it was an integral part of life from the hour of birth to beyond the grave."³³

Despite the vital role music played for every member of traditional society, there was often what amounted to a class of professional musicians – usually an inherited position – whose role was to serve not only as entertainers but also as traveling cultural historians, news distributors, and political propagandists. The griots of West Africa, jongleurs and troubadours of Western Europe, and bards of Ireland all fit this description. These professional musicians became more and more estranged from society, however, as centralized political and religious powers arose and put a stop to their itinerancy. In Europe during the 16th century, Attali writes, "musicians became

³² Attali, 1985, p. 15

³³ Southern, 1983, p. 7

professionals bound to a single master.” The feudal courts “banished the jongleurs, the voice of the people, and no longer listened to anything but scored music performed by salaried musicians.”³⁴ This officially sanctioned professionalization was the beginning of a long process by which powerful interests would gradually remove music from the public sphere and control its distribution for political or financial gain.

The next major development along these lines was the creation of the printing press, and with it, the idea of copyright. This concept has been a double-edged sword for musicians and musical culture since its inception. On the one hand, it provided an opportunity for composers to achieve both cultural renown and financial compensation for their work. On the other hand, it is evident that “in the beginning, the purpose of copyright was not to defend artists’ rights but rather to serve as a tool of capitalism in its fight against feudalism.”³⁵ In other words, any benefit accruing to musicians was incidental to the primary aim of establishing a financial system based on the control of creative expression. As media scholar Siva Vaidhyanathan reminds us, this is still very much the case: “copyright issues are now more about large corporations limiting access to and use of their products, and less about lonely songwriters snapping their pencil tips under the glare of bare bulbs.”³⁶ As we will discuss a little later on, this function of copyright becomes especially problematic when it comes into conflict with the mechanism at the heart of any creative community, namely the free flow of ideas.

With the development of the printed score, music became a commodity that could be bartered for cash, akin to groceries or clothing. This commodification was reflected in performed music as well, with the development of concert halls and ticket sales. Music

³⁴ Attali, 1985, p. 15

³⁵ Attali, 1985, p. 52

³⁶ Vaidhyanathan, 2001, p. 12

was removed from its function at the center of everyday life and placed on a shelf, or behind a proscenium, where only those who were willing and able to pay could access it. Meanwhile, the music of the streets atrophied, as new musical traditions rooted in professional expertise and requiring the use of expensive equipment overwhelmed the old aesthetics.

With the advent of sound recording at the end of the 19th century and radio broadcasting at the beginning of the 20th, the encapsulation of music within a capitalist framework became complete. A new class of organizations, such as record labels and radio networks, emerged to monopolize the channels of distribution between musical performers and their audiences, now two entirely separate social categories. New and more elaborate conceptions of intellectual property emerged to protect the interests of these organizations, and new financial structures based on the economies of mass production emerged to support them.

These developments had some interesting effects on people's relationship to music. One facet of the mass market music economy is that the cost of manufacturing products was eclipsed by the cost of manufacturing demand.³⁷ Today, the majority of expenditures by record labels is related to marketing and promotion, rather than production and distribution. This means that music sellers spend billions of dollars each year convincing customers to purchase something they used to manufacture freely for themselves and for one another. Ironically, music becomes even more peripheral through this process, as songs essentially become sales jingles advertising the discs they are

³⁷ Cascone, 2002; RIAA, 2003

recorded on. Similarly, live performances have largely become showcases for recorded music, an inversion of their original relationship.³⁸

This situation reflects another, larger inversion, at the center of musical culture today. If the music industry originally developed as an ancillary to musical community, today the community serves as an ancillary to the industry.

Fashion Industry History

For centuries, clothing design and production was the purview of mostly anonymous dressmakers and seamstresses, not yet dictated by the proclamations of individual, famous designers. In the 18th and 19th centuries in the U.S. and Europe, clothes for most people had not only symbolic influence but also economic currency. For many working-class families, clothing was a significant percentage of their material worth. In France, a suit purchased at the time of a young working-class man's marriage was literally expected to last a lifetime, and worn to church, weddings and funerals. In England, clothing was somewhat unavailable to the working classes, and low income families formed clubs to save enough money to purchase clothes.³⁹

Until the 18th century, fashion was the province of the upper class, and production was done by hand. Advances in technology and industrial manufacturing in the mid-eighteenth century in Europe engendered the rise of the textile and apparel industries. The industrial revolution also meant a rising standard of living for the working and rising middle classes, suddenly allowing them to buy much less expensive, mass-produced versions of Parisian *haute couture*.

³⁸ Attali, 1985.

³⁹ Crane, 2000, p. 4

At the end of the 19th century, with the advent of mass production, clothes became even cheaper and more accessible to the working classes. As a result, clothing and fashion first became democratized, and as Diane Crane argues, this evolution was most evident in the United States because of its fluid social structure.⁴⁰ By the early 20th century in America, consumers were buying *haute couture* copies in the recently founded department stores and retail catalogues. Some were sold as approved “reproductions” of European designs but the majority consisted of unauthorized knockoffs.

Despite France’s dominance in the decorative arts (e.g. furniture, porcelain and silver), it was Charles Frederick Worth, an Englishman living in Paris, who first established the concept of the fashion designer as an autonomous artist in the middle of the 19th century. Worth founded the *Maison Couture*, the House of Worth, a name simultaneously establishing the centrality of the designer to fashion and conferring brand-name status on the designer himself.

Succeeding Worth at the forefront of fashion design was Paul Poiret, who not only waged war against the corset but also established what is now thought of as *haute couture*. In the 20th century, following Poiret, many of today’s most famous and most expensive brands were established, including Chanel, Balenciaga, and Dior. As with Worth and Poiret, these brands were almost inseparable from the designers, who often expanded beyond *haute couture* into other artistic disciplines and entertainment endeavors. For example, Coco Chanel often dabbled in costume design. She designed the costumes in 1924 for Jean Cocteau’s operette-danse, *Le Train bleu*, and again in 1931 for Gloria Swanson in the film *Tonight or Never*. She also collaborated with Jean Renoir in 1938, designing the costumes for *La Marsellaise*. Thus, like music, fashion design is an

⁴⁰ Crane, 2000, p. 5

aesthetic practice taking place within artistic communities. However, unlike most music, fashion must meet the added requirement of functionality.⁴¹

Fashion over the past century has undergone a transformation in everything but name. The history of the fashion industry in the US, in contrast to music, reflects a continuing resistance to oligopoly control and strict intellectual property controls. While there is a widening gap between music's social origins and its commercial role, in fashion the two co-exist in relative peace.

For many decades, *haute couture* dictated fashion trends as designers, on high, came down from the proverbial mountain twice a year to tell their upper class customers how high their hemlines must be, what the silhouette of their shoulders should look like, and whether or not pleats were appropriate. Design houses were usually owned by their designers, clothes were still produced by craftspeople domestically, and the fashion community was fairly small, centered in Paris. Thus, while styles may have changed from season to season, the fundamental structure of the business remained stable.

By the 1960s, *haute couture*'s stranglehold on fashion was beginning to weaken. Hollywood, television, rock music, youth culture, the women's movement, revolutionary politics – all served to destabilize the top-down fashion paradigm, with trends generated by consumers (particularly the young), rather than the large *couture* houses. The further democratization of fashion during this time also saw the establishment of casual wear companies such as the Gap (1969), Ann Taylor (1954) and J Crew (1983). These changes in the fashion industry were precipitated by the underlying cultural, political and social

⁴¹ There are some exceptions – the more extreme *haute couture*, experimental fashion, and wearable technology could be argued to serve no functional requirement and make the claim of “art for art's sake.”

shifts following World War II. American consumers, finally liberated from the shackles of the Great Depression and infused with a sense of self-sufficiency and national pride, adopted a far more active role. They were no longer content to simply accept the dictates of Paris, Milan and New York. Essentially, consumers were usurping the autonomy of producers, and the relationship between the two has been complex and tenuous ever since.

If these changes reflected social evolution, they were also enabled by legal developments. During the 1940's in the U.S., several crucial legal decisions established the validity and value of knockoffs, sampling and reappropriation in the fashion industry in the name of healthy competition. For instance, in 1940 the *Millinery Creators' Guild v. FTC* determined that piracy in fashion triggers a downward force on pricing, making it a socially desirable form of competition. Similarly, a year later, the judge in *Cheney Bros. v. Doris Silk Corp.* rejected a request to prohibit design piracy on the grounds that such a prohibition would grant a de facto monopoly to designers, who are formally denied patent and copyright protection. Thus, the fashion industry has consistently and intentionally been denied the legal protections afforded to other design industries, in order to maintain a healthy creative ecosystem and the continuing availability of diverse, inexpensive products to the American consumer base.

The changes in the fashion industry during the mid-to-late 20th century contributed to a creative climate in which every designer truly influences and draws influence from every other. Fashion is a chaotic if highly stratified industry, and the directional flow of aesthetics is now top-down, bottom-up and side-to-side. Ideas flow in

every direction, so any attempt to pinpoint the creative forbears of any given garment (unless it is an *exact copy*) would be an exercise in frustration and futility.

The advent of the modern media system in the 20th century also had an enormous impact on dictating fashion. Cultural icons such as musicians, actors, celebrities, royalty and political figures came to influence trends. Today, newspapers, magazines, and web sites report daily on what Beyonce, Cameron Diaz, and the Bush Twins are wearing. The role of media and entertainment as mediators between designers and consumers, in the form of the myriad magazines, TV shows, and even films about fashion, is hard to understate. While the aesthetic inflection points between celebrity and fashion are beyond the scope of this article, suffice to say that the constant flood of entertainment-focused media has turned celebrities (and their stylists) into the new authorities on trends in fashion.

Thus, the music and fashion industries evolved quite differently, despite their similar origins. The music industry grew to exert ever more rigid and consolidated control over musical expression, to the point where the creative needs of musicians and music listeners have taken a back seat to the financial needs of the marketplace. The fashion industry, however, has evolved with a greater balance between creative and economic demands, offering consumers and aspiring designers a greater degree of control and agency than they enjoyed a century ago. These divergent paths have produced significantly different legal, economic and organizational structures, which we will now examine.

Legal Structures

The legal structure of both the music and fashion industries is contingent upon the notion of intellectual property, which Vaidhyanathan refers to as “the murkiest and least understood aspect of American life and commerce.”⁴² By this, he means that intellectual property laws are complex, difficult to police and enforce, always changing, and often out of step with the latest trends in technology and culture.

Despite their nebulous quality, one thing is clear and consistent about the collection of rights, privileges and practices commonly grouped together under the heading of intellectual property law. They were all founded on the premise that democratic society and creative cultures thrive on the free flow of ideas, and that remunerating people for sharing their ideas is the best way to keep them flowing. This notion can be found in the origins of traditional forms of intellectual property, such as copyrights, patents and trademarks, as well as newer alternative models.

Copyrights give “authors” the exclusive power to control a “work” fixed in a tangible medium. The tangibility is important: copyrights protect the expression of an idea, rather than the idea itself. In practice, this generally means a person or company possesses the rights to copy, perform, or sell a book, song, software program, or some other creative work. American copyright law is based on a constitutional mandate that Congress give creators an incentive to create, for the good of society. Consequently, copyrights have always had built-in limitations, such as a fixed expiration term and specified “fair use” exclusions for journalists, educators, critics, and other contributors to the public sphere. However, these built-in limitations have been scaled back significantly over the years, as media and software companies have successfully lobbied Congress to

⁴² Vaidhyanathan, 2001

push back expiration terms,⁴³ limit fair use in new legislation, and include an ever-greater range of categories as “works” that can be protected under copyright.⁴⁴

Copyright has traditionally been the principal form of intellectual property applied in the American music industry. This application has broadened considerably over the years. Printed material, such as scores, were first covered in 1790. Public performances were not covered until 1889. Mechanical reproduction, a right currently applied to songs on CDs, was first introduced in 1909 to cover piano rolls. In 1972, nearly a century after the invention of recorded sound, a new kind of copyright was developed to describe the performances (rather than the compositions) embodied on records. Television broadcasts and jukebox playback were first added in 1976.⁴⁵ Today, all of these copyrights and more are commonly used in the music industry, creating a dense web of overlapping and interweaving protections that is constantly tested and renegotiated through legislation, litigation, and contractual bickering.

As this brief review demonstrates, copyright changes have always lagged significantly behind technological innovations. As the pace of technological change continues to accelerate, it is becoming ever more difficult to apply existing copyright laws in a meaningful way. This is a problem we will address further in the next section of the paper.

In the fashion industry, copyright has typically been denied to apparel design, due to the idea that apparel are solely useful articles. Useful articles, under the Copyright Act of 1976, only have limited protection – there must be elements of a “pictorial, graphic, or

⁴³ Originally, copyrights were granted for 14-year terms, with the potential for a single 14-year renewal. Currently, copyrights are granted for the life of the author plus 70 years – a potential term of 150 years or more.

⁴⁴ Boyle, 2003; Lessig, 2004; Vaidhyathan, 2001

⁴⁵ Krasilovsky & Shemel, 1995

sculptural work that may be identified separately and can exist independently of the utilitarian aspects of the article.”⁴⁶ Little has changed since the act was passed, despite the 1977 claim by former Register of Copyrights Barbara Ringer that design protection was “one of the most significant and pressing items of unfinished business” of copyright revision.⁴⁷

Unlike other industries, which are increasingly oligopolies, the denial of copyright protection in fashion has effectively prevented monopoly or oligopoly control. Legislators and judges have consistently concluded that the public interest would best be served by denying copyright protection to designers, in effect promoting the free exchange of fashion ideas among a broad community of participants.

Like copyrights, patents were developed at the behest of Congress in order to spur creativity by granting a degree of control and remuneration to creators. Patents, known as the “law of invention,” generally apply to ideas or processes. Unlike copyrights, patents cover both an idea and its execution. Also unlike copyrights, patent terms haven’t been extended to a functional infinity; currently their terms last for 20 years.⁴⁸ The three standards generally required to obtain a patent are usefulness, novelty, and nonobviousness. As a consequence of these features, patents have found little use in the music industry outside of recording technologies and business practices.

Patents play a limited role in the fashion business, as well. In addition to the three general patent standards, fashion law has added additional criteria. According to an historic court ruling on the subject, “the conception of the design must require some

⁴⁶ Mencken, 1997

⁴⁷ Ringer, 1977

⁴⁸ This is the result of a single extension in 1995, from an original term of 17 years.

exceptional talent beyond the range of the ordinary designer familiar with the prior art.”⁴⁹

In other words, innovation isn’t enough – invention ex nihilo is the bottom line.

Apparel designs have consistently failed to meet these requirements, for obvious reasons. However, there are other good reasons for the rarity of patents in fashion. It is commonly believed that even if patent law were modified to accommodate the unique needs of the fashion industry, the length of the patent approval process would render protection useless. Patent protection is most useful for articles and inventions that are used repeatedly and have a long shelf life. Fashion, with its abbreviated time horizons and ephemeral nature, would have to rely on protection retroactively. The cycles of production and distribution, ever faster in the fashion industry, make litigation over IP infringement ineffectual and unwieldy. Thus, there has never been an aggressive push within the U.S. by apparel designers or manufacturers for more rigorous patent protection⁵⁰.

Trademarks, which protect the commercial reputation or “goodwill” of a company or creator, play less of an immediate role in insuring innovation and market diversity. Yet a good argument can be made that it is easier for companies to market and sell a unique product with a unique brand attached to it. Trademarks, which are protected for infinitely renewable 10-year terms, are generally used within the music industry only to protect label names and unique artist names. However, they play a far more central role in the fashion industry.

⁴⁹ Gold Seal Importers v. Morris White Fashions, Inc., 124 F.2d 141, 142 (2d Cir. 1941)

⁵⁰ There have been some notable exceptions, engendered by technological development. Thus, certain components of garments, such as zippers and Velcro closures have been awarded patents, but these components are enabling technologies with uses beyond fashion, rather than the product of the fashion creative community.

According to current trademark law, marks or brands that are descriptive, such as a designer's name, must gain a "secondary meaning" in order to qualify for registration. Thus, designers who intend to trademark their name, such as Calvin Klein or Donna Karan, must prove they've established a reputation in the marketplace – one in which their name has achieved a separate, qualitative significance. Obviously, a great deal of money must be spent to establish a brand that is distinct and recognizable, so it is no surprise that companies guard their trademarks aggressively.

Trademark law, while protecting designers from the unauthorized use of their registered marks (usually their labels), does not extend to the actual design of a garment itself. Thus, it is legal for a manufacturer to make an exact reproduction of another company's apparel design, "without suffering any repercussions under trademark law."⁵¹ To combat this, designers have sought protection under claims of unfair competition. If a designer can demonstrate that the sale of a reproduction is likely to confuse the public, they may be afforded greater protection. This is especially salient for design houses that consistently use their trademarks in the fabric patterns, such as Chanel, Gucci and Louis Vuitton, who have a better chance of proving an unfair competition claim. However, the majority of fashion companies would not benefit from pursuing such litigation, given the seasonal and ephemeral nature of fashion, which makes pursuing such claims burdensome.

As technology has advanced in recent years, producing new creative products such as computer software, and new variations on older creative products such as recorded music and video, many have come to feel that patents, trademarks and copyrights no longer represent a flexible and robust enough framework for control over

⁵¹ Mencken, 1997

intellectual property. This is because the all-or-nothing approach embodied by traditional intellectual property law, which assumes a strict dichotomy between producers and consumers, lacks the capacity to cope with the vast and expanding gray area between the two roles.

Consequently, a variety of new models have been put forward to strike a better balance between the needs of creators, the public, and the industries that connect them. For example, the GNU project⁵² was launched in 1984 in order to encourage information sharing and innovation among the software community. Software developers who participate use a “copyleft” instead of a copyright to designate their work. In the words of the GNU founder, the idea of copyleft is:

[W]e give everyone permission to run the program, copy the program, modify the program, and distribute modified versions – but not permission to add restrictions of their own. Thus, the crucial freedoms that define "free software" are guaranteed to everyone who has a copy; they become inalienable rights.⁵³

Creative Commons,⁵⁴ launched in 2001, aims to apply the same kinds of freedoms to a broader range of creative works. The organization offers creators the ability to assign four conditions to their works that offer more freedom than traditional copyright but more control than a work ceded to the public domain. An “attribution” condition allows others to copy, distribute or perform a work as long as the original creator is given credit. A “noncommercial” condition allows others to copy, distribute or perform a work for free. Under this condition, commercial users would need to pay a negotiated fee. A “no derivative works” condition allows others to copy, distribute or perform a work, as long

⁵² <http://www.gnu.org>

⁵³ Stallman, 1999, p. 59

⁵⁴ <http://www.creativecommons.org>

as it appears (or sounds) exactly like the original. Under this condition, derivative works like samples or collages could only be produced with the original creator's permission. A "share alike" condition allows others to distribute their own derivative works only under a license identical to the one that governs the original work. Millions of works have been released under Creative Commons licenses to date, including works by thousands of musicians, such as the Beastie Boys, the Talking Heads and Gilberto Gil.

Organizational and Economic Structures

Like its legal structure, the music industry's organizational and economic structures are a somewhat hodgepodge result of historical changes in technology, power struggles, and market forces. The entire industry can be seen as an ongoing response to a single challenge: how can music be channeled from performers to consumers in a profitable way? The financial component of this challenge has always conflicted with, and generally trumped, the creative component. In other words, the music business has always been about maximizing revenues, rather than maximizing exposure for musicians or access to music for consumers.

Despite the music industry's emphasis on profit at the expense of musical community, musicians typically do not receive much of the money spent by consumers on their music. According to entertainment law attorney and author Chris Taylor,⁵⁵ the breakdown of revenue distribution from a typical CD sold at \$19.95 is as follows:

- Record label: \$6.17
- Retailer: \$5.95
- Manufacturing: \$1.00
- Distribution: \$4.39⁵⁶

⁵⁵ Taylor, undated. For an entertaining and detailed analysis of record industry revenue breakdown, see Albini, undated.

⁵⁶ Manufacturing and distribution companies are often owned by the same corporate parent as the record label.

- Producer(s): \$0.44
- Songwriter(s): \$0.69
- Artist: \$1.31

Thus, the creative progenitors of a record – the performing artist(s) and composer(s) – are entitled to only a combined 10 percent of the total money spent on their music by consumers.

While these numbers are an accurate average, they still sadly overestimate the true revenue potential for most recording artists under the major label system. This is because a few artists sell extremely well, while most others sell extremely poorly. Of the 35,000 albums released in 2002 by the recording industry, fewer than 5,000 sold over 1,000 units.⁵⁷ And according to the Recording Industry Association of America (RIAA) fewer than 10 percent of albums released ever recoup record label expenditures,⁵⁸ meaning that 90 percent of recording artists never see any royalty checks beyond their initial advances. Many recording artists are debited tens of thousands of dollars for every month their albums are completed after their contractual deadlines. Also, some major labels require their artists to repay recording costs if their projects are cancelled under certain circumstances.⁵⁹ Stacking the cards even further against musicians' favor is the fact that many expenditures – from the producers' royalties to promotional expenses to the cost of creating a music video – are routinely deducted from the artists' royalties, rather than from the record labels' piece of the pie.⁶⁰

How can the power balance between musicians and the music industry be so one-sided? Don't record labels need musicians at least as much as musicians need them? In a

⁵⁷ Spellman, 2003

⁵⁸ RIAA, 2003

⁵⁹ Personal communication with music industry attorney Jonathan Zavin, December, 2004

⁶⁰ Barber, 2002

broad sense, the answer is yes. However, the balance of power is tipped by the vast number of musicians hoping to make a living through their music, and the relatively small number of firms providing opportunities for them to do so.

Every major conduit between musicians and music listeners in America is currently dominated by an oligopoly. The recording industry, radio, music television, concert venues, and music retail are each controlled by a handful of companies commanding the lion's share of audience and revenues. This trend is only accelerating with time. While six "major" record labels accounted for roughly 85 percent of American record sales a decade ago, today there are only four.⁶¹ Radio giant Clear Channel, taking advantage of a 1996 law that exponentially multiplied the maximum number of radio stations one company could run, currently owns approximately 1,200 stations throughout the U.S., including stations in 89 of the top 100 markets.⁶² General merchandiser Wal-Mart, which operates over 3,000 stores in the U.S., is responsible for selling approximately one fifth of all CDs sold in this country each year.

This massive consolidation in the music industry is compounded by a degree of vertical integration. All of the major record labels are part of larger corporate organizations that own music publishers, CD manufacturing plants, electronics manufacturers, distribution companies, and other vital elements of the music supply chain. In addition to its radio station holdings, Clear Channel owns SFX, the largest chain of live event venues in the country. Viacom, another media conglomerate, owns Infinity Radio (with 185 stations) as well as MTV, VH1, and BET – a near monopoly on televised music programming. With such entrenched economic and organizational

⁶¹ Today's four major labels are Universal, EMI, Warner, and Sony BMG. Universal acquired a fifth major label, Polygram, in 1998. Sony BMG is a joint venture between two previously separate major labels.

⁶² Clear Channel, undated

structures commanding a firm grip on the means of production and distribution, it is easy to see why the needs of the music community come as a distant second to the needs of the industry.

The global fashion industry accounts for \$495 billion in the international trade of textiles and apparel.⁶³ Like the music industry, it has experienced some consolidation over the past few years, as competitive pressures forced manufacturers and retailers to seek economies of scale. This is especially true in the case of high-end, luxury manufacturers such as LVMH, Gucci, and Richemond, all of which have experienced rapid consolidation in the past decade. The fashion retail sector has also seen a great deal of recent merger and acquisition activity as companies aim to diversify their portfolios. As a result there are some unlikely pairings, such as the 2004 acquisition of high end retailer Barneys by mass consumer brand Jones Apparel for \$400 million. Manufacturers are also starting to integrate vertically, citing better profit margins. Thus, apparel brands as diverse as Elie Tahari, Juicy Couture, and Oscar de la Renta have started to experiment with retailing.⁶⁴

However, in contrast to music and despite these developments, the apparel industry is still fairly distributed and diverse, and remains horizontally structured, with the manufacture of textiles and the manufacture of clothing still separate. Essentially, there is no such thing as a “typical” fashion enterprise – the sector consists of a broad

⁶³ Becker, 2004. The fashion industry’s decentralized structure, diverse product range and idiosyncratic practices make it far more difficult to describe financially than the music industry. Consequently, this figure conflicts with some other published estimates. This has also prevented us from providing a detailed breakdown of fashion revenue distribution akin to our music industry analysis.

⁶⁴ “Berns Communication Group,” 2004

spectrum of companies in apparel, textile, and accessories ranging from the high-end *couture* houses down to mass-produced, low priced commodity goods.⁶⁵

The supply chain in the fashion industry is also somewhat complicated, with multiple layers and organizational inefficiencies. In the transformation from design and product development to raw material, to fabric, to the apparel manufacturer, to wholesale distributors, and finally to retailers, there are multiple points in this sequence for conflict and redundancy, often causing problems for manufacturers and retailers with overstock and out of stock items. As a result, responding rapidly to market needs has traditionally been somewhat slow.

There is not even a single standard supply chain for the fashion industry. Manufacturing and distribution methods vary depending on the type of product. For example, *haute couture* designers such as Chanel or Yves St. Laurent choose the fabric and design of their collections, which are then produced in relatively small quantities in their own workshops. Distribution is also limited and controlled, usually through the designer's own retail outlets or small, independent fashion boutiques.

In contrast, for more common mass brands, as well as the bridge lines⁶⁶ from designers, the design and manufacture processes are more industrial and prices tend to be much lower. Distribution takes place through high-end specialty chains and some department stores. Basic commodity apparel tends to be designed, produced and marketed for a mass audience through distributors such as retail chains like Wal-Mart, lower-end department stores like JC Penney and specialty chains like The Gap.

⁶⁵ This section is highly indebted to Doeringer & Crean, 2004 for their thorough explanation and analysis of "fast fashion."

⁶⁶ Bridge lines are the lower priced, higher sales volume (and generally more profitable) lines by higher-end designers. Some examples of popular bridge lines include Ralph Lauren's Polo, Donna Karan's DKNY and Calvin Klein's CK.

In an effort to be more competitive and responsive to consumer desire, vertically-integrated specialty chains such as H&M and Zara have recently emerged. Sometimes called “fast fashion” (an allusion to both the standardized supply chain and a degree of disposability akin to fast food), it is a concept developed in Europe to boost consumption while hedging against uncertain consumer demand. The goal is to produce short-cycle fashion products as quickly as possible in relatively small quantities. The products are often trendy and typically aimed at teenagers and young women although this may change with the recent success of Karl Lagerfeld’s collection for H&M.

The critical component of fast fashion is the ability to identify and track apparel trends quickly and marry this knowledge to the supply chain, producing new products in an abbreviated time frame. In Zara’s case, its Spanish headquarters house its designers, factories and distribution center all in one space. Thus the company is able to respond to consumer demand very quickly, turning over its inventory in a matter of weeks rather than months. As a result, the Zara shopper drops into the store an average of 17 times a year, resulting in added sales.⁶⁷ Digital technologies, just-in-time manufacturing techniques and vertical integration of the supply chain are all vital to the success of fast fashion.

In summary, despite the fundamental similarities between the creative communities at the heart of music and fashion, the two industries have evolved very differently, producing radically divergent legal, financial and organizational structures. Music has become a highly speculative industry, depending upon a fraction of its products to generate the vast majority of its revenues and all of its profit margin. Consequently, it has had to reduce risk through massive corporate consolidation, limited

⁶⁷ “Store wars,” 2003

product diversity, and an ever-broadening array of intellectual property controls. In contrast, fashion, with a lower cost of doing business and a shorter lag between conception and execution than music⁶⁸, benefits from the diversity of product engendered by a decentralized industry. Additionally, the industry largely eschews the costly and cumbersome apparatus of intellectual property litigation in favor of a reputation-based system to ensure “fair play.”⁶⁹

Yet many of the most ingrained aspects of the music and fashion industries are the results of the technological and economic realities that shaped them. As we have mentioned, one of the most-used music copyrights is still referred to as a “mechanical,” although the mechanical piano, for which it was named, waned in popularity nearly a century ago. As the locus of possibility changes with technological and social advancement, will these industries have an opportunity, or even a mandate, to undergo fundamental structural changes? In order to answer this, we must examine the ways in which forces like digital technology and globalization are influencing music and fashion today.

Music in the Digital Age

The impact of digital technologies on musical culture and the music industry would be difficult to overstate. In fact, the changes of the last ten years are perhaps the most revolutionary of any since the advent of recorded sound over a century ago. The primary genesis of this change is the fact that, for the first time in history, music can be

⁶⁸ The music industry’s longer lag time relative to fashion is due to its disproportionate investment in the production of demand (i.e. marketing and promotion) and its lack of seasonal and cyclical deadlines, rather than any complexity regarding production or design processes.

⁶⁹ We do not mean to suggest this system is without its flaws. Like any of system of regulation, it can suffer from an asymmetrical balance of power and in many cases, lesser-known, independent designers are not afforded the same privileges as established designers.

produced, distributed and consumed all on the same platform – the personal computer. Within the digital universe comprised of PCs, the Internet, mobile phones, MP3 players, CD burners and other related technologies, music has become almost completely free and unfettered, a species of pure information that can be audited, edited and redistributed with the click of a button. This fact challenges nearly all of the assumptions we previously held about music as a creative community, a commercial product, or a system of institutions.

The digital music revolution has had a profound effect on the way music as an art form is conceived and created. All musical expression can be described as a unique sequence of fundamental sound elements, much as a sentence is a unique sequence of words. Typically, the elements define the limits of expression, while the sequence is the source of innovation. For the last four hundred years, nearly all music in Western society has been based on a set of elements called the tempered chromatic scale – in other words, the notes described by the keys on a piano. Every song in every style – from Bach’s fugues to Miles Davis’ extended improvisations – has relied upon new reconfigurations of this now ancient musical lexicon.

All this has suddenly changed. Today, the musical lexicon has broadened far beyond the limits of the piano keyboard to encompass the entire universe of recorded sound. In other words, audio samples have replaced and augmented musical notes as the new building blocks for composition and improvisation, expanding our aesthetic horizons to an astounding degree. To be sure, this change preceded digital technology by a few decades. Academic musicians like John Cage and Alvin Lucier, as well as pioneering dub reggae and hip-hop producers such as Lee “Scratch” Perry, DJ Kool Herc and

Grandmaster Flash, used analog recording technology to paint sound pictures with samples. However, until the advent of digital music, these were fairly arcane practices, requiring a degree of interest and expertise beyond the scope of more traditional instruments.

Today, the tools of audio sequencing and remixing are as accessible as the keys of a piano or the strings of a guitar. With minimal effort, any PC owner can use free and intuitive software to make new music entirely from pieces of other music and sound. This fact has changed the shape of the creative community, in addition to its practices. As we argued earlier, there has always been a significant gray area between the two opposing roles of producer and consumer. However, the limitations of pre-digital music technology reinforced this distinction, defining producers as the people with the instruments and recording studios, and consumers as the people with discs in their hands and electronics to play them with. The digital age has brought a collision of production and consumption technologies and the liberation of music from physical products. These developments have in turn enabled a consequent collision between the roles of producer and consumer, and the liberation of musical community from the strictures of these roles.

We don't mean to suggest that digital technologies have somehow returned us magically to a pre-feudal communitarian state in which everyone is a musician. Clearly this is not the case. For the most part, the changes have been more subtle. For many music fans, digital technology simply means they have access to a larger library of music, and more control over how they listen to it. However, this new power enables "creative consumption," in which consumers apply aesthetic skill and discretion to such activities as constructing the perfect playlist or recommending music to other fans.

For many musicians, digital technology is only valuable as a way to improve the sound of their traditional instruments in the recording studio and to lower the cost of the recording process. But for everyone involved in music, the bottom line is the same – digital technology gives more people more access to more music, and more power over it. In other words, it has created a vaster, exponentially richer music commons.

These changes also represent a challenge to the traditional ways in which the music industry does business. When recorded music was stuck to physical objects like CDs and cassettes, it possessed two qualities that economists refer to as rivalry (meaning only one person or group can use a resource at a time) and excludability (meaning that a person or group can be prevented from accessing a resource). According to standard economic theory, resources that are both rival and excludable fall under the category of “private goods,” best treated as property and exploited through the market system. However, as soon as music became decoupled from its physical delivery mechanisms, it ceased to be either rival or excludable, recategorizing it as a “public good.” Public goods are notoriously difficult to profit from via traditional market practices; rather, they tend to be managed by governmental or non-profit entities.⁷⁰

It is easy to see, then, why this development renders the traditional music economy suddenly obsolete. The only strategy the music industry can follow if it hopes to keep profiting from the distribution of music is somehow to tie its newly non-rival, non-excludable goods to other rival and excludable goods or services. This is no doubt the rationale behind the music industry’s well-advised recent support for new distribution models like online music subscriptions and its increased enthusiasm for licensing popular songs to video games and other entertainment product categories.

⁷⁰ Johnson, 2000

The industry's loss of physical control over the distribution and use of music has had other significant effects as well. One major effect is a renewed focus on intellectual property as a blunt but powerful instrument of legal control. This new focus has reached its most visible – and most absurd – in the prosecution of music consumers who share files over the Internet. At the time of writing, nearly 7,000 individuals have been targeted by the Recording Industry Association of America (RIAA) for participating in peer-to-peer communities,⁷¹ one of the prominent manifestations of the new digital music commons.

Ironically, as intellectual property has played an increasingly central role in the music industry apparatus of control, copyright law has also become increasingly difficult to apply to music. Remember that copyright only protects the expression of ideas, rather than the ideas themselves. As Vaidhyathan argues, the digitization and networking of music undermines this central “idea/expression dichotomy,”⁷² raising questions about what protections can legitimately be enforced.

Complicating things even further is the erosion of the concept of a copyrighted “work.” Copyright was originally conceived as a way to protect entire compositions or scores. Even with the advent of the sound recording copyright in 1972, the law was commonly applied to complete songs or albums. With the rise of sampling as a compositional technique in recent decades, the American legal system has struggled to maintain a clear sense of where public goods end and property begins.

⁷¹ McGuire, 2004

⁷² Vaidhyathan, 2001

Two recent court decisions demonstrate that these issues are still very much in play. In September 2004, a federal Appeals Court judge ruled that a song by N.W.A.⁷³ which included an unlicensed two-second sample of Funkadelic's "Get Off Your Ass and Jam" violated the sound recording copyright. This ruling overturned a lower court decision which had argued that the sample was so short it didn't constitute theft.⁷⁴ However, in November 2004, another federal Appeals Court judge addressing a different suit supported the argument that a six-second sample of a James Newton song by the Beastie Boys was "not sufficient to sustain a claim for infringement" of a composition copyright.⁷⁵

How can it be that the two-second sample violates copyright while the six-second sample does not? Theoretically, the distinction exists because one case is based on the sound recording copyright, while the other is based on the composition copyright. But does it make any sense for a fragment of a recording to constitute infringement, while a fragment of a composition does not? This inconsistency perfectly demonstrates the difficulty (perhaps the impossibility) of applying laws based on an analog universe to the new digital reality. As scholars such as Vaidhyathan and Lawrence Lessig have argued, this ambiguity may actually work to the benefit of the music industry and to the detriment of musical culture. This is because the threat to traditional business practices provides a convenient rationale for corporations that thrive on intellectual property protections to push for ever tighter controls over the use of creative material – essentially shrinking the size and scope of the commons.

⁷³ The song was initially released in 1990. This considerable lag further demonstrates the inadequacy of the legal system to cope with accelerating technological and aesthetic change.

⁷⁴ Butler, 2004

⁷⁵ "Beastie Boys," 2004

Fashion in the Digital Age

If digital technology defines the current era for music, globalization defines it for fashion. The growing web of communication networks bringing the world ever closer together has radically redefined the ways in which fashion designers interact, trends spread throughout the world, and the fashion industry organizes itself.

In contrast to the music industry, where digital technologies have drastically eroded the industry's economic and organizational structures, their impact in fashion is far less earth-shattering. Digital technologies have made the distribution of design images instantaneous, and broadened their reach. They have also helped accelerate the production and distribution cycles for lower-priced, trendy commodity goods, as we saw in the discussion of H&M and Zara. However, unlike music, which is now divorced from any physical product, apparel and accessories have not fully entered the virtual realm (thankfully, we've heeded our childhood morality tales of emperors and their clothes). Certainly, some avant-garde designers and computer engineers are attempting to fuse apparel and consumer technology, but these experiments are still relegated to the margins, more at home in museums and universities than on the street.

Thus, while music has transformed from a tangible product into a digital one, fashion, remains a utilitarian, physical good. Technology may accelerate business processes, produce new ways of cutting patterns, or develop a more breathable alternative to polyester, but it doesn't divorce the expression of the design from the design itself. Fashion is tactile and physical, necessarily rival and excludable, an indelible fact of its creation that separates it from music.

Technology also creates a living archive of design, ideas, and styles in the microscopic chronicling of the fashion industry by the media. It creates the opportunity for broader “sampling,” as seen in the rapid production of Academy Awards dress knockoffs, but it is also a valuable tool for the social regulation of “theft,” as we saw in the case of Nicolas Ghesquiere at Balenciaga. As one journalist notes:

Designers have always looked to the past for inspiration; most famously, Christian Dior based his landmark New Look collection on memories of his mother, but in those days the past was not so minutely archived by the media and he could pass the belle époque off as his own.⁷⁶

The major change to fashion today comes in the form of globalization, which has drastically increased the already high tempo of the fashion world – accelerating production and consumption, and shortening the shelf lives of trends. However, they also have a paradoxically inverse effect – sustaining the long-term shelf life of products and designs that may have disappeared much more quickly into fashion’s fickle ether. Also thanks to new technologies and communication networks, the traditional dichotomy between consumer and producer, already fragile in America since the 1960s, has deteriorated even further. Fashion consumers, like music fans, have become much more adept at creative consumption, mixing high and low to create new street trends. Fashion consumers today think nothing of combining a Chanel jacket with Levi’s jeans, Converse sneakers, and a Hermes Birkin bag. Similarly, music fans are increasingly likely to combine several songs and albums into larger playlists, often played in “shuffle” mode,⁷⁷

⁷⁶ Porter, 2002

⁷⁷ This trend has become so mainstream that Apple recently released the iPod shuffle, a portable music player tailored to this behavior.

creating a controlled chaos in which R&B, opera, and Celtic jigs may rub shoulders, producing unexpected and often aesthetically gratifying results.

Clothing at one time served the exclusive purpose of shielding us from the elements – keeping us warm in colder climates, protecting us from the sun in tropical climates. With our present control over our physical environment – thanks to air-conditioning, indoor heating, and commuting – our exposure to the elements is greatly reduced. As a result, traditional designs originally produced to protect their wearers, like those with socially denotative functions from other cultures, can be appropriated in new reconfigurations, detached from their original meaning or intent. Globalization, with its ever expanding circulation of images, defines this practice. Suddenly, images of apparel, both traditional and new, high end and low, are available effortlessly and instantaneously. The fashion industry and community borrow freely from this global circulation of images, remixing and reconfiguring them in a persistent and expanding commons.

Conclusion

Music and fashion, two creative communities that share much in common, have evolved over time to produce drastically different industries. To this day, both communities thrive on innovation and change, spurred by the mechanisms of reconfiguration, reinterpretation and reappropriation. Both are sustained by an ever-growing commons, a living archive of all that has come before. Yet music suffers from a fundamental schism separating the needs of the creative community from the needs of the industry that enables and exploits it. Fashion, by contrast, has succeeded in brokering a working balance between aesthetic and financial mandates.

The causes for music's malaise can be traced to the industry's economic foundations and are compounded by the changes wrought through new digital technologies. An exceedingly high cost of doing business, low success rate, and disproportionate balance between the cost of producing demand and supply have all conspired to make the industry risk averse.⁷⁸ This is manifested in its concentrated ownership structures, vertically integrated business organization, and fiercely protective attitude towards intellectual property rights. In an age where new technologies have lowered the costs of production and distribution while decoupling musical expression from any physical media, the industry must reevaluate its most deeply held practices and assumptions or face almost certain dissolution.

Fashion provides a tantalizing example of what the music industry could have been under different circumstances. In the absence of thick copyright protection, the dividing line between influence and theft is maintained through a social apparatus of shame and an aesthetic tradition of transparency. Meanwhile, with historically lower barriers to entry, the fashion industry has thus far proved resistant to corporate consolidation on the scale of the music industry.

Given its present imperative to reassess its core principles, what, if anything, can music learn from fashion? The answers have ramifications far beyond the scope of the music industry, if, as some suggest, music represents the proverbial canary in the coalmine for similar industries ranging from film to television to computer software.⁷⁹

⁷⁸ This description characterizes the music industry as embodied by the major labels and their chief distribution channels. It is important to note that an entirely different calculus may be applied to truly independent record labels and musicians, who often achieve economic sustainability on a far smaller scale and are consequently far more willing and able to take aesthetic risks.

⁷⁹ Historically, the low file size and high consumption rate of songs have interacted with the Internet's limited bandwidth in such a way that cutting-edge music applications (such as peer-to-peer file sharing) have predated similar applications for larger, less wieldy media.

During the 1990s, many believed the efficiencies of digital distribution would provide an opportunity for new and innovative companies to pose a significant challenge to the established record labels. However, these hopes were dashed by the growing expense of marketing and promotion in the face of new communication channels and the resolute inflexibility of a music industry wary of change. In the intervening years, the only organized solution the music industry has sought for its social, economic and organization problems has been increasingly stringent interpretation and enforcement of intellectual property rights.

Clearly, this policy cannot continue without dire consequences. At some point, the aggressive controls the music industry seeks over the behaviors of both musicians and listeners will stifle aesthetic innovation (or force it entirely underground), and alienate its own consumer base. In order to avert such a catastrophic turn of events, the music industry would do well to emulate some of the fashion industry's basic creative, organizational and legal tenets. Specifically, the industry could adopt thinner copyright protections, vertically dis-integrate, and work with the creative community to inculcate a culture of transparency and accountability. In an environment tailored to innovation and change, rather than enforced inertia, perhaps business models could emerge which would appeal to consumers despite the non-rival, non-excludable nature of digital music.

To be sure, the music industry has already made some intelligent moves in this direction. Labels and publishers have recently increased their efforts at licensing recorded music to movies, television, video games, and other secondary media channels, effectively shifting a larger portion of their revenues from a business-to-consumer model to a more reliable business-to-business model. Additionally, after years of institutional

resistance to new consumer-oriented business models, the major labels have exhibited recent enthusiasm for digital music services following the unexpected consumer success of Apple's iTunes Music Store. However, this was a reactive, rather than a proactive change. And while it is a move in the right direction, a major structural reorganization and consumer education marketing campaign will have to be undertaken before digital music subscriptions and other service-based alternatives to traditional music products can achieve dominance in this industry.

Unfortunately, the music industry is unlikely to undergo such major structural change until it is forced to. Vested interests have a way of entrenching themselves even as the ground they stand on turns to quicksand. A more likely future for the music industry is increasing antagonism between sellers and buyers, and increasing homogeneity in the music market, until the entire system breaks under the strain. If and when this finally comes to pass, the musical community may have an unprecedented opportunity to start over from scratch, building a new industry on the ashes of the old. Fashion provides a promising, if imperfect, blueprint for the job.

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