7 The Fashion Originators' Guild of America: Self-help at the edge of IP and antitrust

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Women do not buy hats. They buy fashion. . . . Virtually their sole purpose is to make the wearer happy in the thought that she has a beautiful thing which is in fashion. . . . Men may joke, but it is this curious quality of "fashion" which sells hats, and is, therefore, of great economic value.[1]

The question of intellectual property for fashion design has attracted enormous public attention in recent years. One reason is fashion's economic importance as a global business. Another is that fashion design presents an "edge" case for United States' intellectual property, as fashion design lacks the robust copyright protection accorded to other types of creative activity.[2] A third is the outlier status of the United States among countries with fully developed intellectual property regimes in withholding protection for fashion design. These features have given rise to renewed calls for protection, and active consideration of various legislative schemes to achieve that goal.[3]

The question whether to protect fashion design from copying has a storied past. Since 1914 there have been more than eighty proposals in Congress to provide protection for design. In the 1930s, as American fashion was coming into its own as a cultural force, designers worried

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[1] *Millinery Creators' Guild, Inc. v. FTC*, 312 U.S. 469 (1941) (No. 251), 1940 WL 46567, Brief for Petitioners, at 3.

[2] For a critique of this discrepancy see C. Scott Hemphill & Jeannie Suk, "The Law, Culture, and Economics of Fashion," 61 *Stan. L. Rev.* 1147 (2009).

[3] Innovative Design Protection and Piracy Prevention Act of 2011: Hearing before the Subcomm. on Intellectual Property, Competition, and the Internet of the H. Comm. on the Judiciary, 112th Cong. (2011) (statement of Jeannie Suk).

about knockoffs. Then, as now, they lacked intellectual property protection for original fashion designs. In 1930, the Vestal Design Copyright Bill proposed copyright protection for industrial patterns, shapes, and forms, which would have covered designers of fashion and other useful articles. The Bill was never enacted, mainly due to concerns that it was too difficult to determine whether one design infringed another.[4]

Fashion designers were discouraged by the rampant practice of design copying. Copies were often sold at a fraction of the price, even in the same stores as the originals. Although today the near-singular focus of fashion law reform is legislative reform, designers in the 1930s pursued a range of possible solutions in their attempt to stop those who reproduced their designs and undermined their profitability by selling cheaper copies. Then, as now, designers sought legislative protection. But they also pursued a regulatory solution, as part of New Deal responses to the Great Depression. They ultimately settled on a seemingly effective but controversial solution: a set of self-help measures targeting both copyists and retailers willing to merchandise knockoffs.

The resulting boycott, devised by the Fashion Originators' Guild of America (hereinafter the "Guild"), was arguably the "largest scale private intellectual property scheme ever implemented."[5] At its height, a staggering 4,000 new designs were protected each month.[6] The designers' organized efforts at self-help to create design protection eventually gave rise to antitrust lawsuits in federal and state courts, culminating in a pair of 1941 Supreme Court cases involving dresses and hats.[7]

This chapter tells the story of the Depression-era fashion designers, and the solutions they pursued to remedy the lack of intellectual property protection for their work. It describes the Guild's formation and activities within the social, economic, and legal context of the Depression, and the fatal government scrutiny that eventually led to the Guild's demise. Finally, it suggests some lessons as to both means and ends drawn from this story of fashion: about self-help as a private solution to a public lack on the one hand, and about intellectual property protection for design on the other.

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[4] Steven Wilf, "The Making of the Post-War Paradigm in American Intellectual Property Law," 31 *Colum. J. L. & Arts* 139, 186–87 (2008).

[5] Jonathan Barnett et al., "The Fashion Lottery: Cooperative Innovation in Stochastic Markets," 39 *J. Legal Stud.* 159 (2010).

[6] Thomas F. Conroy, "Guild's Work Good in Upper Brackets," *N. Y. Times*, Feb. 23, 1936, at N17.

[7] *Fashion Originators' Guild of Am., Inc. v. FTC*, 312 U.S. 457 (1941) [hereinafter *FOGA*]; *Millinery Creators' Guild, Inc. v. FTC*, 312 U.S. 469 (1941).

"The King of Fashion" was the title Maurice Rentner gave himself.[8] Seventh Avenue also called him "The Dean," perhaps because most of the garment industry's top executives had at some point worked for him. "Napoleon" was another moniker, which apparently referred to his slight but elegant stature at five feet four inches.[9]

Rentner's Polish Jewish family had arrived in New York in 1902 when he was thirteen.[10] New York was already the center of a garment industry peopled largely by the influx of immigration.[11] As industrialization saw the move from homemade to factory-made clothing, Rentner began work as an errand boy delivering thread for shirtwaists, and then as a traveling salesman of children's clothing. In his twenties, Rentner bought a glove business that grew to become Maurice Rentner, Inc., a high-end producer of ladies' apparel, with six factories to its name. By World War I, Rentner had grown the company into a significant fashion house whose elegant gowns were sold only in exclusive stores like Bonwit Teller, I. Magnin, and Lord & Taylor. Rentner wanted his dresses to be "quietly expensive." French *haute couture* was the model.[12]

After World War I, the apparel industry expanded rapidly. In the 1920s fashion's visibility rose as increasing ease of communication and transportation diffused "big-city" fashion. Rentner began to turn away from Seventh Avenue's reliance on Paris as the Mecca for fashion design. He became a pioneer in American ready-to-wear, daring to produce designs rather than simply continue to copy from Paris models. As American ready-to-wear shifted, Rentner was among the first American manufacturers to develop in-house designers. He was known for well-crafted but uncomplicated silhouettes with unexpected detailing in sumptuous fabrics, in a casual but graceful mode that combined style and comfort. Rentner disseminated his design concepts in his own fashion magazine, *Quality Street*.[13]

[8] Madelyn Shaw, "Maurice Rentner: American Designer and Manufacturer," in *Contemporary Fashion* 564, 565 (2nd edn., Taryn Benbow-Pfalzgraf (ed.), St. James Press, Detroit, MI, 2002).

[9] "Maurice Rentner is Dead at 69; Noted as Dress Manufacturer," *N. Y. Times*, Jul. 8, 1958, at 27 [hereinafter "Obituary"]; "Dress War," *Time*, Mar. 23, 1936, at 88.

[10] "Obituary," *supra* note 9, at 27.

[11] Roger D. Waldinger, *Through the Eye of the Needle: Immigrants and Enterprise in New York's Garment Trades* 49–50 (New York University Press, 1986); Nancy L. Green, *Ready-To-Wear and Ready-To-Work: A Century of Industry and Immigrants in Paris and New York* (Duke University Press, Durham, NC, 1997); Daniel Soyer (ed.), *A Coat of Many Colors: Immigration, Globalism, and Reform in the New York City Garment Industry* 6 (Fordham University Press, New York, NY, 2005).

[12] "Obituary," *supra* note 9; Shaw, *supra* note 8; "Dress War," *supra* note 9.

[13] "Dress War," *supra* note 9; Waldinger, *supra* note 11; Shaw, *supra* note 8.

The dress industry of course felt the impact of the Depression, and myriad apparel businesses went bankrupt in the 1930s. Demand for cheap dresses increased, and prices and quality decreased dramatically. Rentner was troubled by the impact of copies on the profitability of New York fashion houses attempting to sell original designs. Copies of his company's dresses were immediately being sold at lower prices, practically adjacent to the originals. Sketch artists in New York would go to such lengths as to intercept brand new dresses from delivery boys on the way to the stores, resulting in knockoffs for sale that very day at less than half the price of the originals. Rentner had begun his dress industry career copying French designs, and he knew all too well the phenomenon of extracting value from others' design investments.[14] His self-conception had effectively evolved from copyist to creator, which accompanied a similar American stirring in the industry, at least among the fashion houses.

Design copying was generally not illegal, since copyright protection did not extend to apparel.[15] Designers thus had no resort to lawsuits and courts to stop copyists from using the designs and devaluing the original products.

But Rentner had an idea. He set out to recruit other fashion houses to join in the creation of a new organization called the Fashion Originators' Guild of America. The Guild began in 1932 with twelve members, the most important fashion houses in New York. Its stated *raison d'être* was to protect "originators of fashions and styles against copying and piracy,"[16] which the members considered a plague on a still-emerging American dress business. The members entered an agreement that they would all refuse to sell their products to stores that also sold copies of their designs. If stores responded to this pressure and stopped selling copies, it would drive copyists out of those stores, and potentially out of the market entirely. This plan was Rentner's vision of how dressmakers would fight copying in the absence of legal protection for fashion design.

First, the distinction between fashion originals and copies had to be recognized and implemented. The Guild resolved that its members

[14] Sara B. Marcketti, "Codes of Fair Competition: The National Recovery Act, 1933–1935, and the Women's Dress Manufacturing Industry," 28 *Clothing & Textiles Res. J.* 189, 193–94 (2010) [hereinafter Marcketti, "Codes"]; "Dress War," *supra* note 9. Marcketti's work is indispensable for anyone interested in design piracy in the 1930s.

[15] Registration of Claims to Copyright, 37 C.F.R. § 201.4(7) (1938); *Cheney Bros. v. Doris Silk*, 35 F.2d 279, 281 (2d Cir. 1929).

[16] Sara Marcketti & Jean L. Parsons, "Design Piracy and Self-Regulation: The Fashion Originators' Guild of America, 1932–1941," 24 *Clothing & Textiles Research J.* 214, 217 (2006) (quoting FOGA's incorporation papers).

would not copy from European design models, as that was not "conducive to stimulating original designing and to providing an incentive for domestic creators to stress their individual conceptions of the current modes."[17] To promote original designing, in 1933 the Guild began putting on seasonal shows of original dress and coat designs – the predecessor to modern-day New York Fashion Week.[18]

The Guild created a registry for members to register their original designs. A member simply had to submit a sketch and a description of the design along with a signed affidavit of originality. The Guild would reject designs it deemed generic. Rather than committing the Guild to the design's originality, the registration process simply created a repository of designs that members averred were original. Registered products were embossed with a label that indicated "An Original Design Registered by a Member of Fashion Originators' Guild," or "Registered Original With FOGA." The member had exclusive rights to sell the registered design for six months.[19]

The Guild's membership consisted of designers and manufacturers of higher-price dresses and eventually rose from twelve to 176 members.[20] At its height, the Guild's registry took in over 40,000 designs in a year.[21]

Second, the scheme depended on the cooperation of retail shops and department stores not to sell the products of copyists. As a condition of selling Guild members' products, retailers were obliged to sign a "Declaration of Cooperation" that they would not deal in copies. The Guild had a system to distinguish and punish non-cooperative retailers. On white cards, the Guild listed the names of cooperating retailers. On red cards, it listed the names of retailers who refused to sign the pledge or otherwise failed to cooperate. The cards were regularly updated. Guild members refused to sell to red-carded businesses. Furthermore, certain Guild affiliates, who were textile manufacturers, were not supposed to sell textiles to clothing manufacturers who did business with red-carded retailers.[22]

The Guild also facilitated retailers' compliance with the system by instituting a legally ingenious warranty system. Cooperating retailers

[17] "Guild Not to Copy Models of Retailers," *Women's Wear Daily*, Apr. 11, 1935, at 26.
[18] Véronique Pouillard, "Design Piracy in the Fashion Industries of Paris and New York in the Interwar Years," 85 *Bus. Hist. Rev.* 319, 338–39 (2011).
[19] Marcketti & Parsons, *supra* note 16, at 218; "Dresses Ready-To-Wear," 38 *Printers' Ink Monthly* 5, 6–7 (Jan. 1939); Sara Beth Marcketti, *Design Piracy in the United States Women's Ready-to-Wear Apparel Industry: 1910–1941*, at 133 (2005) (unpublished Ph.D. dissertation, Iowa State University) [hereinafter Marcketti, *Design Piracy*]. Marcketti adds that "in practice," designs were protected for only three months.
[20] *FOGA*, *supra* note 7, at 462.
[21] Albert Post, Letter to the Editor, "Style Piracy," *Life*, Sept. 6, 1937, at 6.
[22] *FOGA*, at 461–62.

added a provision to their order forms, insisting that the manufacturer warrant that the dress was not a copy. The retailer reserved the right to return to the manufacturer any merchandise that violated the warranty. The Guild helpfully provided an ink stamp to be used to add the warranty provision to an order form.[23]

In 1936, the majority of moderate- to high-priced dresses in the market (those that wholesaled for $10.75 and above) were made by Guild members, so it was not easy for department stores to refuse to cooperate if they wanted to meet consumer demand for those categories of dresses. The number of retailers who signed on to cooperate eventually rose to 12,000 nationally.[24]

Third, the enforcement of the system of cooperation was crucial to this fight against design copying. The Guild undertook regularly to audit the books of its members and to fine those found in violation of the agreement not to sell to red-carded retailers. The Guild also employed a team – at one point, a staff of twenty-nine investigators – that visited stores to peruse the merchandise and ascertain whether the stores were selling copies of registered original designs.[25]

To decide the fate of retailers accused of selling copies, the Guild set up an internal tribunal and an appeal system to determine whether the merchandise alleged to be a copy was in fact a copy. Once the tribunal concluded that a retailer was selling copies, the retailer would be red-carded and members had to cease doing business with that retailer. The Guild also made it difficult for its members to defect; a member who chose to leave would be banned from the Guild for six months and fined $5,000.[26] In sum, the Guild ran a quasi-legal enforcement system consisting of rules born of agreement, enforcement measures, and officials to police the rules; tribunals to adjudicate claims of rule violation; and effective punishment.

Finally, the Guild engaged in an extensive advertising campaign in newspapers and magazines to explain the Guild's cause. For example, an advertisement in *Women's Wear Daily* explained that a cooperating retailer was "giving necessary encouragement to the trade as a whole to accord greater consideration to the element of quality in fabrics and in

[23] Commission Exhibit 537, Fashion Originators' Guild of America, No. 2769, 28 F.T.C. 430 (1939) (card from Guild instructing cooperating retailer to expect rubber stamp "to be affixed by you on all apparel orders"). The card is contained in Box 1902, Fashion Originators' Guild, Docketed Case Files, Records of the Federal Trade Commission, RG-122, National Archives in College Park, Maryland [hereinafter *FOGA Docket*].

[24] *FOGA*, at 461–62.

[25] *Ibid*. at 463; "Guild Expands Shopping Staff," *N. Y. Times*, Sept. 1, 1936, at 38; *FOGA*, at 462–63.

[26] *FOGA*, at 462–63.

workmanship. This conforms directly to the government's endeavors, through the National Industrial Recovery Act, to elevate standards as a means of augmenting the earning power of labor." Such messages dovetailed with the Guild's assertion, discussed further below, that copyists employed sweatshop labor to be able to produce goods so cheaply. The Guild also used the advertisements to promote a benefit of design protection that resonates with the debates today, that protection would "broaden the diversity of fashions."[27]

While the Guild was launching, in the midst of the Depression, early New Deal interventions were in the works to spur economic recovery by correcting an unregulated market. They included Congress's passage in 1933 of the National Industrial Recovery Act (hereinafter the "Act"). The Act established the National Recovery Administration (hereinafter "NRA"), to oversee cooperation among government, industry associations, corporations, and labor unions, for the purpose of stabilizing the industries. Reflecting New Deal ambivalence toward economic competition, the Act in effect suspended antitrust laws for this purpose. It provided that a particular industry's trade association could create codes of fair practices and competition for that industry. Such industry-specific codes would have the force of law, once submitted to and approved by President Roosevelt. Formulated by industry consensus, the codes would be enforced by each industry, with help from the Federal Trade Commission (hereinafter "FTC") and the federal courts.[28]

Even before the Act, the FTC Trade Practice Conferences had enabled industries to form their own standards of practice to regulate unfair competition. Some industries that had a strong design component, such as upholstery textile and embroidery, secured design protections through these trade practice conferences, but, unlike other rules regulating unfair competition, the design protection rules were deemed "recommended industry practices," not law.[29] The dress industry never did receive design protection through the trade practice conferences, but when the Act was passed, dress industry players argued that legally binding design protection provisions should be part of the industry-specific codes of fair practices that the Act contemplated.

[27] Advertisement, "A Message from the Dress Creators' League of America," *Women's Wear Daily*, July 11, 1933, at 11.

[28] Dalia Tsuk Mitchell, *Architect of Justice: Felix S. Cohen and the Founding of American Legal Pluralism* 76 (Cornell University Press, Ithaca, NY, 2007); Wilf, *supra* note 4, at 151; National Industrial Recovery Act, Pub. L. No. 73-90, 48 Stat. 195 (1933).

[29] Upholstery Textile Industry, 2 CCH Trade Reg. Serv. ¶ 12,250 (8th edn. 1937); Embroidery Industry, 2 CCH Trade Reg. Serv. ¶ 12,608 (8th edn. 1937); FTC, Annual Report 113 (1938) characterizing Group II rules.

The industry codes were presented by forty-three different industries – including the lumber, automobile, and motion picture industries – at public hearings held by the NRA. The dress industry's initial Hearing on the Codes of the Dress Industry, known as the "dress code" hearings, focused on fair labor and trade practices – workers' wages and hours, and the relationship between manufacturers and contractors. The goal was to limit labor exploitation that resulted from fierce, potentially ruinous competition among manufacturers seeking to cut costs and undersell each other.[30]

Industry representatives from apparel firms and trade associations nationwide testified at the dress code hearings held between 1933 and 1935. Rentner represented the Guild as its chairman. His testimony depicted design piracy as a prevalent means for manufacturers to achieve cheaper production and undersell the competition. Copyists could skimp on wages by skipping the costly design process. Rentner believed that competition in the industry should take place not on the ground of price, but rather on the terrain of quality. Samuel Zahn, chairman of the Dress Creators' League of America, testified as well, arguing that unregulated copying encouraged the rushed shortness of the fashion cycle, which in turn led to lower quality goods and poorer working conditions for laborers. Protection against design copying would make the period of salability of fashion merchandise last longer and push manufacturers' investments towards designing rather than copying. Rentner and Zahn tarred design copying with the brush of sweatshop labor, reasoning that firms that focused on making goods so cheaply were wont to exploit workers in the process. In short, the Guild sought to recruit labor in the effort to include design protection in the NRA dress code.[31]

But to know what design copying was, one had to posit a distinction between an original design and a copy. That elicited questions about the role that imitation played in the fashion trends that fueled consumers' demand for new clothes. The dress code hearings thus became the occasion for public debate of these very questions of innovation and intellectual property in fashion, as they related to the NRA's general goal to limit harmful competition in the industry.

Was there such a thing as originality in fashion? Wasn't imitation important, even essential, to the fashion trend cycle? Rentner claimed that originality in fashion was perfectly consistent with some amount of imitation, and "no fashion creator will assert that everything about every

[30] Marcketti, "Codes," *supra* note 14, at 194, 196.

[31] *Ibid.* at 195; National Recovery Administration, Hearing on the Code of Fair Competition for the Dress Manufacturing Industry 31, 114–16 (1934) [hereinafter NRA Hearing]; Marcketti & Parsons, *supra* note 16, at 223–24.

dress he offers is new."[32] But he argued that originality inhered in "combining" elements of existing sources from which the designer creates a design. Rentner's position distinguished between imitation in fashion trends and copying particular designs. Style trends were of course based on imitation and inspiration. But the fact that all designers engaged in this process of "adaptation" did not mean that their designs could not be deemed original works.

Medium and low-priced dress manufacturers testified against protection. They argued that design protection would introduce legal uncertainty about whether manufacturers were infringing a protected design, especially since it would be very difficult to determine originality in fashion. They also emphasized the unfairness to lower-income women who would be deprived of lower-priced versions of fashionable styles. Poor women would have to wear their lack of wealth on their sleeve, so to speak, if denied access to low-priced dresses that looked like the originals.[33]

Indeed, the stratification of higher- and lower-priced dress markets and consumers centrally animated the debate about design copying, and would eventually lead to an identity crisis for the Guild. The Guild's members were creators of high-end dresses, and its anti-copying activities were perceived as protecting high-end designers against copyists. The copies, always sold at lower-price points, reflected the cost-saving advantages of circumventing the design process as well as the lower-quality materials and workmanship used to bring prices down. When these design copies rapidly appeared in stores and on women in the streets, purchasers of the originals became dismayed at the availability of the cheaper and lower-quality versions, and some returned their purchases to the retailer, who would then cancel orders or not reorder the items. The entry of the copies into the market effectively meant that the time window for the original dress as desirable and salable merchandise was closing, almost as quickly as it had opened.[34]

Other industries such as the silk textile industry succeeded in adopting design protection provisions in their codes through the NRA process. But, despite extensive debates at the dress code hearings about design copying, the dress industry did not reach consensus on design protection. The dress code ultimately regulated labor and trade standards including working hours, conditions, and wages, but not copying.

[32] *Ibid.* at 221 (quoting Mildred Finger, *Memoirs of Maurice Rentner from Varying Perspectives* 105 (Fashion Institute of Technology, New York, NY, 1982)).
[33] A.C. Johnston & Florence A. Fitch, *Design Piracy: The Problem and its Treatment under NRA Codes* 47–50 (National Recovery Administration, Washington DC, 1936).
[34] NRA Hearing, *supra* note 31, at 56; Marcketti & Parsons, *supra* note 16, at 223.

A proposed amendment to add design protection was dropped because the industry was too divided, with strong opposition from "popular" (i.e., lower-priced) manufacturers and retailers. The NRA was reluctant to proceed in the absence of complete industry acceptance, especially with the perceived difficulties of determining originality and the administrative burdens of running a fashion design registration system. Overall, though, Rentner perceived the dress code's limitations on labor cost-cutting measures as tending to lessen the unfair advantages that low-priced copyists enjoyed.[35]

The NRA dress code itself was short-lived, however. Within months, the Supreme Court declared unconstitutional Congress's delegation to the president of the power to approve the industry-created codes.[36] The New Deal principles that animated the Act, however, remained in the Guild's project to promote cooperation among fashion industry players, stabilize "the customs and commercial usages of trade," and restrain untrammeled competition.[37] The Guild's system was of a piece with the New Deal promotion of industry-wide cartels for these purposes.

Around this time, the Millinery Creators' Guild, modeled on the Fashion Originators' Guild, was formed with the same goal, to provide protection for fashion designers of hats. The milliners' group implemented a similar system, and over 1,600 cooperating retailers agreed not to sell hats that were copies.[38]

As the Depression continued, the demand for cheap dresses soared. The Guild continued its fight by registering members' designs and red-carding retailers who violated its rules. But the demand for cheaper dresses deepened a dangerous fault line that had surfaced at the dress code hearings. Initially the Guild had registered only high-end dress designs, priced at $16.75 wholesale or higher. The success of the Guild's anti-copying system made it increasingly difficult for mid-price dressmakers to make do with simply copying higher-price dress designs. The mid-price manufacturers were thus spurred to engage in original design themselves and sought to register their designs with the Guild as well. Rentner felt it was important to offer the Guild's protections to those who were creating designs, even if they were in lower price brackets.

[35] Karl Fenning, "N.R.A. Codes," 16 *J. Pat. Off. Soc'y* 189, 199 (1934); National Recovery Administration, Code of Fair Competition for the Dress Manufacturing Industry 2–6 (Oct. 31, 1933) (Reg. No. 228-01); Pouillard, *supra* note 18, at 341–43; Johnston & Fitch, *supra* note 33, at 136.

[36] *A.L.A. Schecter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

[37] Marcketti, *Design Piracy*, *supra* note 19, at 126 (citing FOGA's incorporation papers).

[38] "Business World: Millinery Guild Adopts Label," *N. Y. Times*, Oct. 16, 1935, at 42; *Millinery Creators' Guild v. FTC*, 109 F.2d 175, 176 (2d Cir. 1940).

After all, that was the Guild's defining principle and purpose – to protect and encourage originators.[39]

The Guild accepted the mid-price designs for registration. The price floor for registrable dresses was dropped from $16.75 to $10.75 in early 1935. At this point, though, retailers grew uncomfortable with the expansion of the Guild's cadre of designers. The Guild obligated retailers to return to the manufacturer any dresses the Guild deemed to be copies. Retailers were not eager to take on the burden of including the lower-price ranges in the merchandise subject to Guild surveillance. Lower-price dresses were bought in greater bulk, and cooperating department stores worried about competing in the lower-price ranges with non-cooperating chain stores that sold dresses free of Guild restrictions.[40]

Despite growing retailer disgruntlement, by late 1935 the Guild further extended its reach to original dresses priced below $10, even $6.75. The Guild soon issued a new "declaration of cooperation" stating that retailers who had previously agreed not to sell copies of high-end dresses must henceforth not sell copies of virtually any dresses. More than one hundred styles per month were declared copies. One retailer claimed that covering the lower-price ranges created the "impossible condition" of essentially subjecting all manufacturers and retailers to the Guild's dominion. Retailers resented the expansion beyond the original cooperation agreement, which had contemplated a manageably limited system protecting only original designs priced above $16.75.[41]

By early 1936, the reduction of copying credited to the Guild was significant: 75 percent reduction at the $16.75 range, and 40 percent reduction in the $10.75 range. But retailers' unease with the Guild's perceived heavy-handed overreaching had turned into outright frustration and anger, bordering on revolt. Beginning with the high-end Strawbridge & Clothier, department stores witnessed incidents in which store managers openly disobeyed Guild investigators who came in and demanded that certain dresses be removed as copies. The stores included heavy hitters Bloomingdale's and R.H. White, owned by Filene's. Other members of a major department store group, Associated Merchandising Corp., followed in rebellion, and one by one got red-carded. By February

[39] "Dress War," *supra* note 9; Thomas F. Conroy, "Guild Pushes Fight to Protect Styles," *N. Y. Times*, Feb. 16, 1936, at F9.

[40] "Business World: Expand Dress Style Registration," *N. Y. Times*, Mar. 22, 1935, at 41; "Dress War," *supra* note 9; Conroy, "Guild Pushes Fight to Protect Styles," *supra* note 39.

[41] "Business World: Buyers to Use Dress Stamp," *N. Y. Times*, Oct. 15, 1935, at 41; "Fashion Originators Will Not Set Prices," *N. Y. Times*, Dec. 5, 1935, at 47; "Dress War," *supra* note 9; "Dress Group Decides Against Ban on Copies," *N.Y. Times*, Oct. 11, 1935, at 38; Conroy, "Guild Pushes Fight to Protect Styles," *supra* note 39.

1936, two dozen such stores were red-carded. R.H. White asked individual manufacturers to continue doing business together despite the red-carding, but was rebuffed. The retailer community was outraged.[42]

Sylvan Gotshal was counsel for the Guild's fabric division. His recent distinctions included founding the New York law firm, Weil, Gotshal, and Manges, in 1931, and serving on the drafting committee for the failed Vestal Design Copyright Bill in 1930. In disagreement with the Guild's tactics, Gotshal resigned from his position at the Guild. He presciently stated: "Attempts at coercion of this type against one group of retailers is only going to serve to consolidate the efforts of all those opposed to any protection whatsoever, and in the long run the guild will collapse."[43] He advocated withdrawing the red cards the Guild had issued to the retailers, and entering into arbitration to resolve the situation. The Guild was eventually able to compromise with some retailers, and agreed to withdraw dresses in the range of $6.75 to $7.75 from the Guild's protection.[44]

But it was too late. An all-out "dress war" became unstoppable when Filene's decided to sue the Guild in federal court in March 1936, four years after the Guild's incorporation. Filene's sought a preliminary injunction in a federal district court in Boston, claiming that the Guild violated federal antitrust law. Filene's claimed that the Guild's entire system – red-carding, boycotting non-cooperating retailers, and requiring retailers to accept the Guild's judgment that a dress was a copy – constituted a violation of the Sherman Act.[45]

The court thought it was apparent that the Guild's scheme was "calculated to benefit rather than prejudice public interest," and that its methods were not designed to "enhance prices or to curtail or cheapen production." The question was "whether the coercive influences exerted upon the members directly, and indirectly upon conforming retailers, unduly restrain the free flow of trade to the extent that it can be said that the interest of the public are prejudiced in any way." The court concluded that the fact that members "voluntarily submit to restrictions upon their right to sell to nonconforming retailers" and could resign Guild membership at will meant there was no "unlawful suppression of competition." As for the retailers, again the availability of the choice

[42] Conroy, "Guild Pushes Fight to Protect Styles," *supra* note 39; "Dress War," *supra* note 9; "Fashion Guild Stand Backed by Producers," *N. Y. Times*, Feb 19, 1936, at 35; *Wm. Filene's Sons Co. v. FOGA*, 14 F. Supp. 353, 356 (D. Mass. 1936) [hereinafter *Filene's*].

[43] "Guild Stands Firm on Dress Program," *N. Y. Times*, Feb. 21, 1936, at 31.

[44] *Ibid.*; "Fashion Guild Ban on Store Here Ends," *N. Y. Times*, Feb. 28, 1936, at 30; "Designs Filed at Peak," *N. Y. Times*, Sept. 13, 1936, at F8.

[45] "Dress War," *supra* note 9; *Filene's*, *supra* note 42, at 357.

made the court unwilling to find a "denial or abridgement of the right of fair competition. The right to compete by unfair means I assume is not a right which the anti-trust laws were designed to protect." The retailer who chose not to cooperate with the Guild could work with non-members, who were still a majority of dressmakers in New York. The retailer could "retain his full freedom to sell pirated articles, or he may take the other course and consent to rules adopted by the trade for the purpose of abating the evil of piracy." The judge denied Filene's request for a preliminary injunction.[46]

The case was referred to a special master, who found that the Guild had not tried to fix prices, limit production, or cause quality deterioration. He concluded that the Guild was "beneficial, rather than prejudicial, not only to the interests of the dress industry but as well to the interests of the public." The Guild's members and affiliates "carried with them no monopolistic menace" and did not unduly restrain competition.[47]

Filene's fared no better on appeal in the First Circuit, which concluded that the Sherman Act "does not preclude the members of an industry in which evils exist ... from action collectively in the elimination of such evils and establishing fair competitive practices." Crediting the special master's finding that a retailer who chose by non-cooperation with the Guild to "cut itself off from certain sources of supply" still had "substantial and reasonably adequate markets to which it could resort for the purchase of ready-to-wear dresses," the First Circuit found no unreasonable restraint of trade or monopoly.[48]

Though the Guild thus succeeded in fending off the Filene's lawsuit, legal troubles were far from over. Discord in the dress industry around the Guild's activities had caught the attention of the FTC, which earlier had conducted an inconclusive investigation into the Guild's activities. While the *Filene's* case was still making its way through the First Circuit, the FTC issued a complaint charging the Guild with unlawful restraint of trade in April 1936. The next month, the FTC similarly charged the milliners' group. This set off a process that would eventually hasten the demise of the Fashion Originators' Guild of America.[49]

[46] *Filene's*, *supra* note 42, at 359, 361.
[47] *Wm. Filene's Sons Co. v. Fashion Originators' Guild of Am.*, 90 F.2d 556, 560 (1st Cir. 1937).
[48] *Ibid.* at 559, 560–61.
[49] "Commission Holds Guild a Monopoly: Issues Complaint Against Body and Four Other Groups for Conspiracy," *N. Y. Times*, Apr. 21, 1936, at 42; "Milliners Cited as Curbing Trade: Federal Board Lays Unfair Practices to Two Groups in New York City," *N. Y. Times*, May 27, 1936, at 34.

The FTC held hearings on the matter, in New York and Boston, between July 1936 and January 1938.[50] The Guild's message in those hearings had some internal tension. On the one hand, despite the Guild's apparent success in fighting copyists, it argued that copyists were still quite free, as they could sell goods to any non-cooperating retailer – and many retailers were not cooperating, in fact. That is, especially the smaller retailers who focused on selling copies could still thrive, even in a market regulated by the Guild, since they had no need to do business with Guild members.[51] It was mainly large retailers selling a broader range of goods who would feel the pressure to cooperate in order not to lose access to high-price originals.

On the other hand, the Guild's somewhat contrary message had been that the success of its elaborate system would aim at eliminating the market for copies: "[W]here there are no buyers for the copies, there will be no copy makers . . ."[52] As for the difficulty of distinguishing copying from the imitation that led fashionable women to converge on fashion trends, the Guild emphasized that there was an important difference between "styles" and "designs." Styles were what comprised trends, and could be freely imitated in the modes of fashion. They were too general to be protectable. But designs were particular instantiations of a style, whereby a creator combined design elements into a distinctive original work that should not be copied at will.[53]

An FTC attorney likened the Guild's methods to those of Hitler. The Guild sought to justify its scheme by submitting proof of the untenable industry conditions that drove the Guild to devise its system, and of the economic benefits secured by its activities. However, the FTC examiner conducting the hearings refused to accept this evidence. From the Commission's standpoint, the boycott was illegal "per se," without regard to any purported justification.[54]

[50] For a listing of witnesses and testimony, see Transcript of Record at 165–4451, *Fashion Originators' Guild of Am. v. FTC*, 312 U.S. 457 (1941) (No. 537) [hereinafter Transcript of Record].

[51] See, for example, an article titled "Shops Cut In on Low-End Field," part of the press clippings file contained in Box 1856, Fashion Originators' Guild, Auxiliary Case Files, RG-122, National Archives in College Park, Maryland.

[52] Commission Exhibit 99-a, Fashion Originators' Guild of America, No. 2769, 28 F.T.C. 430 (1939) (letter from FOGA to retailers (June 16, 1933)) (contained in Box 1904, *FOGA Docket*).

[53] Transcript of Record, *supra* note 50, at 4312–15.

[54] "Fashion Guild Called 'Hitler' of Dress Field; Defended as Preventer of Style Piracy," *N. Y. Times*, Sept. 22, 1938, at 32; Transcript of Record, *supra* note 50, at 4307–08; *ibid.* at 4a (Guild petition in Second Circuit).

At this time, Claire McCardell was a fashion designer working for the dress manufacturer Townley Frocks. History would remember her as the inventor of the "American Look." Departing from the fashions of Paris, where she was trained, McCardell designed for the American everywoman in a style that was "easy, confident, athletic . . . free and optimistic." The clothes were mass-produced, affordable, clean, casual, and comfortable. McCardell was so committed to design originality that she even refused to visit collections while vacationing in Paris, to avoid the influence of other designers.[55]

In 1938 McCardell designed a dress called the "Monastic" that instantly brought her fame. The design exemplified the new spirit of fashion as it took a break from Europe. Named after the shapeless robes of clerics, the dress was unwaisted and had the same front and back. It hung from the shoulders, meant to fit any woman, and had no constraints in the form of bust darts or corseting. Worn with a belt, it "did great things for the female figure," and "ma[d]e your waist look tiny."[56]

Marketed as the "Nada Frock" for $29.95 only at Best & Company, the dress was hugely popular, and very widely and quickly copied. An advertisement entitled "Fair Warning" placed by Best & Company sternly declared the design to be a registered original that the Guild would act to protect against infringing copies.[57] But it had little effect. Knockoffs of the dress flooded into the market faster than the originals could be produced. Because of the large number of copies for sale, Henry Geiss, the owner of Townley Frocks, tried to convince McCardell to let the Monastic go and move on to other designs for the next season's collection, but she wanted to keep the design in the collection. Geiss went repeatedly to the Guild for help fending off copyists. But knockoffs were so uncontrollable that the Guild finally declared the Monastic an "open item" that could freely be copied with impunity, eventually selling "for the devastating price of thirty dollars a dozen." As a result of the

[55] "The American Look," *Time*, May 2, 1955, at 87; Constance C.R. White, "Celebrating Claire McCardell," *N. Y. Times*, Nov. 17, 1998, at B15.

[56] Rebecca J. Robinson, *American Sportswear: A Study of the Origins and Women Designers from the 1930's to the 1960's* (2003) (unpublished M. Design dissertation, University of Cincinnati) (manuscript at 116); Bill Cunningham, "Claire McCardell," *Chicago Tribune*, July 31, 1972, at B2; Bernadine Morris, "Looking Back at McCardell: It's a Lot Like Looking at Today," *N. Y. Times*, May 24, 1972, at 58; Kohle Yohannan & Nancy Nolf, *Claire McCardell: Redefining Modernism* 41 (Harry N. Adams, New York, NY, 1998).

[57] The advertisement, apparently from 1938, can be found in Box X38.2.2.6, in the Claire McCardell materials kept by the Special Collections Library of the Fashion Institute of Technology in New York City.

losses and the legal fees associated with desperate attempts to protect the design, Townley Frocks went under that year.[58]

Though the Monastic was in the high-end category that the Guild was originally created to protect, its fate exemplified how the dissatisfaction over the Guild's inclusion of low-price dresses eroded the industry's overall respect for the Guild's rules. The protective efforts regarding the Monastic failed in the period of government investigation into the Guild's activities, a period in which increasing criticism accompanied a marked decrease in the Guild's authority in the industry.[59]

The FTC completed its investigation in February 1939 and issued a cease and desist order against the Guild. The order prohibited the Guild from engaging in activities in combination to limit competition by preventing retailers from buying dresses from manufacturers. It also forbade the Guild from refusing to deal with businesses that did not accept its rules.[60] The Guild filed an appeal in the Second Circuit.

By that point, the FTC had already issued a similar cease and desist order against the milliners' group, prohibiting the same practices.[61] The milliners' Second Circuit appeal was decided first, in January 1940. The court thought the question was about "the alleged evil of style piracy, and whether its abolition will eliminate a socially useful type of competition." The court acknowledged that the creator "suffers a real loss when the design is copied as soon as it appears" and that "the imitator in turn reaps a substantial gain by appropriating for himself the style innovations produced by the creator's investment."[62]

But the court explained that to outlaw piracy "would afford a virtual monopoly to the creator of an unpatented and uncopyrighted design." Congress had "not yet . . . seen fit to extend the privileges of a monopolist to the inventor of an unpatentable idea," and "the courts have refrained from enjoining the pirate because they will not support a monopoly in an unpatentable idea. It would be strange to say that the [milliners] may establish this same monopoly by extrajudicial methods."[63]

The court observed that "piracy has been lethal in its effect on hat prices, and one of its results has been to make the latest fashions readily available to the lowest purchasing classes." That is, consumer access to inexpensive hats came at the expense of high-end hat makers. The court

[58] Yohannan & Nolf, *supra* note 56, at 42; "The American Look," *supra* note 55; Robert Riley et al., *American Fashion: The Life and Lines of Adrian, Mainbocher, McCardell, Norell, and Trigere* 232 (1st edn., Sarah Tomerlin Lee (ed.) Quadrangle/New York Times Book Co., New York, NY, 1975); Robinson, *supra* note 56, at 117.

[59] Marcketti, *Design Piracy*, *supra* note 19, at 137–42, 159.

[60] FTC, Annual Report 73, 101–02 (1939).

[61] *Ibid.* at 105.

[62] *Millinery Creators' Guild v. FTC*, 109 F.2d 175, 177 (2d Cir. 1940).

[63] *Ibid.*

thought it was "safe to say that the members . . . instituted their anti-piracy campaign to protect their markets and price levels."[64] The smoking gun was the testimony of a hat company representative that the defendants:

> had gotten together all of the leading milliners, so-called, to try to create a greater interest in women wearing hats and raising the prices for a better grade milliner because, for instance, the average milliner 15 years ago easily got $30 for every hat they sold, today the God damn thing sells for $1.95, I mean they sell for $1.95 around town, as a result of which they practically ruin every milliner.[65]

The court found the purpose of the milliners' combination was to "maintain their price structure, and to eliminate a distasteful 'evil' which the law nevertheless recognizes to be a socially desirable form of competition." That is, "what is desirable competition to the consumer may be outlaw traffic to the established manufacturer." The Second Circuit thus held that the milliners' boycott violated antitrust law.[66]

This decision set the stage for the Fashion Originators' Guild's Second Circuit appeal, which resulted in an opinion by Judge Learned Hand. This was not Judge Hand's first engagement with fashion. In a famous earlier case, *Cheney Bros. v. Doris Silk Corporation*, he had examined a copying claim involving fabric patterns.[67] There, the plaintiff had asserted a misappropriation claim using an analogy to protection for "hot news" previously recognized by the Supreme Court.[68] Judge Hand had rejected the extension of that principle to fabric patterns. Noting the absence of federal copyright protection for fabric patterns, Judge Hand had emphasized that his hands were tied, "even though there be a hiatus in completed justice" in allowing such design copying to go unregulated.[69]

For Judge Hand, the milliners' case, combined with earlier cases about boycotts and his own opinion in *Cheney Bros.*, controlled the Fashion Originators' case. Once the dress or fabric was offered for general sale, there was no residual property protection. Echoing his *Cheney Bros.* opinion, Hand explained: "It may be unfortunate – it may indeed be unjust – that the law should not thereafter distinguish between 'originals' and copies; but until the Copyright Office can be induced to register such designs as copyrightable under the existing statute, they both fall into the public demesne without reserve."[70] A boycott aiming to create protection for something that existing intellectual property law did not protect had to be rejected.[71]

[64] *Ibid.* [65] *Ibid.* at 178. [66] *Ibid.* at 176, 178. [67] 325 F.2d 279 (2d Cir. 1929).
[68] *International News Service v. Associated Press*, 248 U.S. 215 (1918).
[69] *Cheney Bros. v. Doris Silk Corp.*, 35 F.2d 279, 280–81 (2d Cir. 1929).
[70] *Fashion Originators Guild of Am. v. FTC*, 114 F.2d 80, 84 (2d Cir. 1940).
[71] *Ibid.* at 84–85.

The sharp inconsistency between the First and Second Circuit's conclusions about the Guild – that the boycott was permissible according to one court, but prohibited according to the other – was resolved by the Supreme Court. A unanimous opinion authored by Justice Hugo Black in *Fashion Originators' Guild of America v. FTC*[72] (hereinafter "*FOGA*") embraced in sweeping terms the FTC's view that the Guild violated federal antitrust law. The hat designers' case, *Millinery Creators' Guild v. FTC*,[73] was decided the same day, on the authority of *FOGA*.

The Supreme Court unreservedly accepted the FTC's argument that the Guild's justification for, and any salutary effects of, the boycott were irrelevant as a matter of antitrust doctrine. The Court seemed particularly perturbed that the Guild had set up "an extra-governmental agency," with elaborate institutions of enforcement and self-governance. In other words, the Guild's quasi-judicial tribunals and trappings of process granted to alleged copyists to adjudicate their guilt only deepened rather than ameliorated the offense, by "trench[ing] upon the power of the national legislature."[74]

The Court's ruling went beyond Judge Hand's Second Circuit opinion in a crucial respect. Hand had accepted that the Guild's boycott was permissible to the extent it attacked *illegal* copying, for example, of unpublished designs (which enjoyed common law protection), or designs acquired by fraud.[75] At the Supreme Court, the Guild relied heavily on this concession, arguing that design copying generally was illegal, as a form of unfair competition or an infringement of the "hot news" right the Court had previously recognized. In an early unpublished draft of the opinion, Justice Black gave careful substantive attention to the proposition, offering that "there is much force in petitioners' arguments" that a hot news right could be applied to these facts.[76] The draft reluctantly concluded that the extension must be denied, for fear that the principle might then be extended to "every type of design." In the final opinion, this analysis was omitted, in favor of the sweeping conclusion that a boycott to enforce extant state law protection would be no less illegal.[77]

After the Supreme Court case, the Guild was reduced to a shadow of its former self. The possibility that designers might recreate the protections they had enjoyed by proceeding on an individual and non-compulsory basis with retailers appears to have gone nowhere. Designers

[72] 312 U.S. 457 (1941). [73] 312 U.S. 469 (1941).
[74] *FOGA*, *supra* note 7, at 465 (internal quotation marks omitted).
[75] *Fashion Originators Guild of Am. v. FTC*, 114 F.2d 80, 84 (2d Cir. 1940).
[76] Box 262, Fashion Originators' Guild of America Case File, Hugo LaFayette Black Papers, Manuscript Division, Library of Congress, Washington DC.
[77] *FOGA*, *supra* note 7, at 456, 468.

increased their pursuit of design patents as an alternative. The Guild hoped for a reduction in the time required to issue a design patent, to make approval possible six or seven weeks from the date of filing. The old retailer warranty was replaced by a new Guild-provided stamp, requiring the seller to warranty that the design was not protected by a design patent. Ultimately, however, the design patent route fizzled.[78]

After a pause for World War II, the Guild's activities were limited to advocacy for design legislation and promotion of industry and American design. After the War, the fashion industry saw an influx of European couturiers that eventually came to dominate the high-end fashion market in the United States in the latter half of the twentieth century.[79]

Rentner continued to work on fashion industry interests, for example as a board member of the Fashion Institute of Technology. He died in 1958, but Maurice Rentner, Inc. survived after a merger with Anna Miller & Co., a company owned by his sister. The head designer then was Bill Blass, who would eventually buy the business and operate it under his own name. Rentner's beloved Guild, however, did not long survive him, and it ceased operating entirely in the 1960s. Bill Blass, in 1962, became a founding member of the now-existing modern counterpart to the Guild, the Council of Fashion Designers of America (hereinafter "CFDA"), which began as an organization focused on boosting the fashion industry through public relations and promotion of fashion as high art. Only after four decades did the CFDA seriously take up its well-known contemporary cause of legal protection for fashion design.[80]

After *FOGA*, the quest for new fashion legislation continued. In these debates, the same issues tended to recur. For example, in 1936, during the heyday of the Guild, opponents of legislation "cited the impracticability of protecting certain basic designs, such as polka dots."[81] Such worries required the counter-reassurance, repeated in ensuing

[78] "Fashion Designers Seek Protection," *N. Y. Times*, June 8, 1941, at F6; Elizabeth R. Valentine, "Supreme Court Upsets Fashions," *N. Y. Times*, Mar. 9, 1941, at E10; "Revises Program to Protect Design," *N. Y. Times*, Oct. 25, 1941, at 23; "Patents on Styles Deemed Effective," *N. Y. Times*, Sep. 15, 1949, at 40; Thomas F. Conroy, "Fight to Continue on Style Piracy," *N. Y. Times*, Mar. 9, 1941, at F7.

[79] Shaw, *supra* note 8.

[80] *Ibid.*; Isadore Barmash, "2 Apparel Groups to Weigh Merger at Meeting Today," *N. Y. Times*, Dec. 23, 1965, at 39, 46; Council of Fashion Designers of America, History, http://cfda.com/about/history (last visited Nov. 4, 2012); Amy Fine Collins, "The Lady, the List, the Legacy," *Vanity Fair*, April 2004, at 260; Eric Wilson, "O.K., Knockoffs, This Is War," *N. Y. Times*, Mar. 30, 2006, at 1.

[81] "Replies on Design Bill," *N. Y. Times*, Apr. 15, 1936, at 31.

decades, that "[t]here is no intention whatsoever of registering basic designs of this character, which are definitely in the public domain of apparel designs."[82]

Today, not all fashion designs are treated alike. When *FOGA* was decided, the law treated dress (and hat) designs and fabric designs identically – neither was protected. In 1959, a district court case accorded protection to fabric designs, relying on dicta in an earlier Supreme Court case that pointed out that utility does not eliminate copyrightability. The Copyright Office changed its rules to accord copyright to fabric designs, but remained hostile to dress designs. This discrepancy persists today.[83]

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The rise and fall of the Fashion Originators' Guild carries several lessons.[84]

First, designers have cared deeply about protection, and have been willing to go to great lengths to stop design copying. Today's proposals to add fashion design to federal copyright law continue to spawn debates about whether and to what extent designers do or should want protection from copying. The fashion design community's will to protect its designs even where law did not protect them is undeniable in the historical example of the Guild.

Second, the struggle in contemporary debates about whether fashion is really capable of protectable originality, given that its distinctively short cycles of trends necessarily entail imitation, is not new. From the start, American fashion designers posited the distinction between general "styles" versus specific "designs" – overall trends versus distinctive variations – that suggested that the relational dynamic of originality and copying had both conceptual purchase and economic significance for fashion designers.

Third, the Court's opinion in *FOGA* casts a pall over private self-help measures that might attempt to mimic the effect of intellectual property protection that has not yet been granted by the legislature.[85] An

[82] *Ibid.*

[83] *Peter Pan Fabrics, Inc. v. Brenda Fabrics, Inc.*, 169 F. Supp. 142 (S.D.N.Y. 1959); *Mazer v. Stein*, 347 U.S. 201, 213 (1954); Works of Art (Class G), 37 C.F.R. § 202.10(b) (1956); Kal Raustiala & Christopher Sprigman, "The Piracy Paradox: Innovation and Intellectual Property in Fashion Design," 92 *Va. L. Rev.* 1687, 1747 n. 113 (2006) (noting the discrepancy).

[84] For an earlier suggestion of the Guild's modern relevance, see Randal C. Picker, "Of Pirates and Puffy Shirts," *Va. L. Rev. in Brief 1* (2007).

[85] For a suggestion that self-help might have been more efficient than statutory protection, see Robert P. Merges, "Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations," 84 *Cal. L. Rev.* 1293, 1365–66 (1996).

exception might have existed, as Judge Hand suggested, for self-help designed to enforce an existing legal right, as opposed to creating a right the law does not already recognize.[86] However, the Supreme Court's sweeping rejection of the Guild's argument stymies this suggestion. Either way, schemes like the Title Registration Bureau, set up by the Motion Picture Association of America to govern the allocation of titles for unreleased films, may be subject to serious doubt, because they, like the Guild's system, serve as privately organized substitutes for copyright or trademark protection.[87]

Fourth, if design protection were to succeed in turning more fashion producers away from copying and toward designing, the desired increase in lower-price producers' design originality could breed a delicate risk to the protection system itself. The Guild eventually came to recognize that high price and protection-worthy design were not necessarily linked, but the extension of coverage to lower-price designers fatally frayed industry support for the protection scheme. Today, expensive luxury fashion still provides the goods most popularly considered protection-worthy, and many such goods already receive a certain amount of protection under trademark law. Meanwhile, designers at lower-price levels of lesser fame, who lack those already existing protections, are perhaps *more* vulnerable to copyists' impact on their businesses, as their intellectual property lies in creativity rather than branding. The problem of extending design protection down market to lower-price originators on the one hand, and keeping a perceived adequate unregulated space of free copying on the other hand, poses questions of industry equilibrium that any fashion design protection scheme must confront.

Finally, perhaps originality is overrated as a basis for design protection. Jettisoning originality and focusing instead on the designer's role in providing consumers with desired, distinctive, of-the-moment articles – even articles that are not newly created but rather curated or compiled from creations of the past – is a potential alternative basis for according protection for fashion design even in the absence of copyright protection. Insofar as originality currently provides a restriction on protectability, however, forgoing the constraint of the originality requirement in this way would potentially expand the scope of protection for fashion design beyond that which exists for other creative works in an already expansive copyright regime.

[86] *Fashion Originators' Guild of Am. v. FTC*, 114 F.2d 80, 84 (1940).

[87] Cf. 1 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 2.16 n. 13 (rev. edn., Matthew Bender, Newark, NJ, 2011) (suggesting obliquely that "such private legislation" might be invalid).