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.

Brief for Petitioners, Millinery Creators’ Guild v. FTC (1941)††

The question of intellectual property for original fashion design has attracted enormous public attention in recent years. One reason is fashion’s economic importance, as a global business with annual U.S. sales of more than $200 billion. Another is the awkward discrepancy between the protection accorded to other types of creative activity and the absence of similar protection for fashion design.‡‡ A third is the outlier status of the United States, among countries with fully developed intellectual property regimes, in withholding protection for fashion. These features have given rise to renewed calls for protection, and active consideration of various legislative schemes to achieve that goal.

The question whether to protect fashion design from copying has a storied past. Since 1914 there have been dozens of proposals in Congress to provide protection for fashion design. In the 1930s, as American fashion was coming into its own as a cultural force, designers worried 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 fashion designers as well as designers of other useful articles, but the bill was never enacted.

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†† Brief for Petitioners at 3, Millinery Creators’ Guild, Inc. v. FTC, 312 U.S. 469 (1941) (No. 251), 1940 WL 46567.
Fashion designers were “demoraliz[ed]” over the rampant practice of design piracy. Copies were often sold at a fraction of the price, even in the same stores as the original. The designers’ collective efforts to stymie design piracy even reached the Supreme Court of the United States, in a pair of 1941 cases involving dresses and hats.

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 free rode on 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 an effective but controversial solution, a set of measures targeting both copyists and retailers willing to merchandise knockoffs.

The resulting boycott, devised by the Fashion Originators’ Guild of America (“Guild”), was arguably the “largest scale private intellectual property scheme ever implemented.” At its height, a staggering 4,000 new designs were protected each month. The designers’ efforts to band together to engage in self-help attracted criticism, and ultimately gave rise to a series of antitrust cases in federal and state courts, culminating in the Supreme Court in 1941.

This essay 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 Fashion Originators’ 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 about fashion design protection: about self-help as a private solution to a public lack on the one hand, and intellectual property protection for design on the other.

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66 Fashion Originators’ Guild of Am., Inc. v. FTC, 312 U.S. 457 (1941); Millinery Creators’ Guild, Inc. v. FTC, 312 U.S. 469 (1941).
68 N.Y. Times, Feb. 23, 1936, at 17 (4000 new designs registered per month). See also Albert Post, Life, Sept. 6, 1937 (200,000 original styles protected over previous five years).