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Lobbying for Design Protection: a Perspective on France and the United States During the First Half of the Twentieth Century*

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This article is a historical study on the rise of the legal professions in the fashion industry. Since the late 19th century, creative entrepreneurs in the fashion industry developed a keen interest in using the instruments of law to protect their intellectual property rights, whether these rights be patents, trademarks, copyrights, or trade secrets. In so doing, fashion entrepreneurs, notably Callot Soeurs, Paul Poiret, Madeleine Vionnet, Maurice Rentner, and Christian Dior, worked with lawyers, who defended their interests in the courts, and who contributed to building a growing corpus of case law relevant to the fashion industries.

Based on archives of courts, archives of firms, and press sources, this study examines the profiles of the lawyers that pioneered what has become commonly called today the fashion law, in the context of two major countries producers of garments: France and the United States. Fashion entrepreneurs hired lawyers for occasional cases, but also in-house legal counsels. The article therefore also sheds light on the place of the legal expertise within the management of the fashion firm. It will also examine a series of court cases, in France during the interwar period, and in the US during the postwar era, in order to show how lawyers durably influenced the fashion industry itself.

Keywords: Intellectual Property Rights, Copyright, Silk, Fashion, Industry.

Since the late nineteenth century, entrepreneurs in the fashion industry developed a keen interest in using the instruments of the law to protect their intellectual property rights, whether these rights be patents, trademarks, copyrights, or trade secrets. Fashion entrepreneurs such as

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Callot Soeurs, Paul Poiret, Madeleine Vionnet, Maurice Rentner, and many others worked with legal experts who defended their interests in the courts, and who contributed to building a corpus of case law relevant to the fashion industries. Based on sources from the press, courts, firms, and Congressional hearings, this paper examines the emergence of what has become commonly called today the fashion law, especially in the context of two major fashion producing countries, France and the United States.

Today fashion law has its dedicated media, including a website of the same name that regularly posts news about intellectual property, branding, and thorny examples of infringements to, or enforcement of, intellectual property rights in the realm of fashion. Several prestigious universities offer programs specialized in fashion law. A growing corpus of literature addresses the subdiscipline[1]. Fashion law has not remained the prerogative of a handful of specialized experts. It is also a topic of interest in popular culture, as shown for example in the dedicated media account called *Diet Prada*, that has over the last three years gone through a successful operation of monetization, thereby allowing the co-founders of the media account to receive a living wage for running it[2]. Last but not least, fashion designers themselves, for example Dapper Dan and Virgil Abloh, have based some of their creations on transgressing and contesting the contours of intellectual property[3].

Historians have from some time started to address the questions of creativity and law in the fashion industry. Earliest works took a point of departure in the history of commerce and fashion trade. Then, several studies approached questions of authenticity, counterfeits, piracy, and also tried to understand how grey zones of imitation functioned. Such studies have diversified, following diverse branches of intellectual property. Among those, some are about patenting fashions designs and

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1 S. Scafidi, *Who Owns Culture? Appropriation and Authenticity in American Law*, Rutgers University Press, Brunswick 2005; S.B. Marcketti, J.L. Parsons, *Knock it off: A History of Design Piracy in the US Women's Ready-to-Wear Apparel Industry*, Texas Tech University Press, Lubbock 2016.

2 C. Battan, *Trend Spotting at Zara with Diet Prada*, in "The New Yorker", 28 August 2018, https://www.newyorker.com/magazine/2018/09/03/trend-spotting-at-zara-with-diet-prada.

3 D.R. Day, *Dapper Dan: Made in Harlem: A Memoir*, Random House, New York 2020; D.Kasnic, *Virgil Abloh 1980-2021*, in "The New York Times", 28 November 2021.

textiles[4]. Other works focus on industrial design[5]. Related to industrial design, scholars have also extensively studied brands and trademarks, in some cases with a focus on fashion, or even about specific aspects, such as labels of origin and labels for greener brands[6]. Yet other scholars have approached questions of copyright, often in line with the work of lawyers, to examine the industries considered to be situated at the edge of art and commerce[7]. Such industries raise difficult questions about intellectual property. Should the commercial or the artistic components of creativity be protected? Should art and commerce be protected using the same legal tools for both? How to protect creativity in industries where signatures may not be visible, and where citations may be indirect, implicit, or inexistent? Should mass-produced objects enjoy the protection of intellectual property? Such issues arose along with the question of compensating designers and entrepreneurs for their efforts and investments.

The early phase of fashion law

Publications have shown that motivations for fashion entrepreneurs to protect and defend their intellectual property rights included the defense of their status as artists, business strategies to overcome competition from rival entrepreneurs, and protectionist views on the supremacy of the French fashion industries.

Among the first entrepreneurs who used the law to protect their creativity, French entrepreneurs hold, as far as existing research shows, the lion's share. Paul Poiret, Marie Gerber Callot, and her employee and later on independent entrepreneur, Madeleine Vionnet, gained visibility when they sued counterfeiters in the courts. Poiret was among the first

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4 K.W. Swanson, *Getting a Grip on the Corset: Gender, Sexuality, and Patent Law*, in "Yale Journal of Law and Feminism", XXIII, 2011, pp. 57-116; K. Jungnickel, *Bikes and Bloomers: Victorian Women Inventors and Their Extraordinatory Cycle Wear*, Goldsmiths Press, London 2018.

5 A. Millet, *Vie et destin d'un dessinateur textile, d'après le journal d'Henri Lebert (1794-1862)*, preface by Philippe Minard, Champ Vallon, Seyssel 2018.

6 Sara Cavagnero is currently writing a PhD dissertation on IP law for sustainability in the fashion industry. S. Cavagnero, *Governing the fashion industry (through) intellectual property assets: systematic assessment of individual trade marks embedding sustainable claims*, in "Journal of Intellectual Property Law & Practice", XVI, 2021, 8, pp. 850-68.

7 R. Dreyfuss, J.C. Ginsburg, *Intellectual Property at the Edge. The Contested Contours of IP,* Cambridge University Press, Cambridge 2014; N. Troy, *Couture Culture. A Study in Modern Art and Fashion*, The MIT Press, Cambridge 2003; M.L. Stewart, *Dressing Modern Frenchwomen: Marketing Haute Couture, 1919-1939*, Johns Hopkins University Press, Baltimore 2008.

who tried to sue counterfeiters of his designs in the United States courts. Although he failed to get American counterfeiters condemned, he managed to mobilize his fellow couturiers to demand a greater protection of design. Poiret's campaigning has been studied extensively by Nancy Troy, who showed that the lobbying efforts deployed by the French couturiers were consistent with the process of affixing artistic signatures to serialized objects by the artists of the *ready-made* movement, including Marcel Duchamp. These designers responded to the potential problem of the loss of aura resulting from the mechanical reproduction of artistic production, by using the law to reinforce the authenticity of their production[8].

Poiret's active lobbyism showed its limits rather fast. During First World War, his discourse on the necessity to protect fashion design took a nationalistic turn. Some of his peer couturiers feared that this would deter their cosmopolitan clientele to buy from them. Several couturiers detached themselves from Poiret's syndicate of protection of couture, and most of their lobbying efforts were redirected towards the activities of the Chambre Syndicale de la Couture parisienne, an organization whose members entertained more moderate views[9].

Protecting fashion design in Paris

Couturiers communicated their views on creation, authenticity, and piracy to the press, and they lobbied the French government in order to obtain a better protection of their intellectual property rights. Among them was Marie Gerber-Callot, the eldest of four sisters at the helm of the house of Callot. Her husband, Pierre Gerber, became in 1930 the president of the Chambre Syndicale de la Couture parisienne. In this role, Gerber developed the habit and culture, internal to the trade association, that haute couture houses should remain in Paris and produce all their designs, garments, and accessories in France. In times of economic crisis, this policy aimed to reinforce the national economy, and to keep employment in France.

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8 N. Troy, *Couture Culture. A Study in Modern Art and Fashion*, The MIT Press, Cambridge 2003, pp. 202-3; W. Benjamin, *L'Oeuvre d'art à l'époque de sa reproductibilité technique* (1939), *Oeuvres III*, Gallimard, Paris 2000, pp. 269-316; H. Schwartz, *The Culture of the Copy. Striking Likenesses, Unreasonable Facsimiles*, Zone Books, New York 1996, pp. 140-1.

9 M. Bass-Krueger, *From the Union parfaite to the Union brisée: The French couture industry and the Midinettes during the Great War*, in "Costume", XXXXVII, 2013, 1, pp. 28-44; V. Pouillard, W. Dorogova, *Couture ltd.: French Fashion's Debut in London's West End*, in "Business History", published online, 20 February 2020, pp. 1-23, DOI: https://doi.org/10.1080/00076791.2020.1724286.

Gerber was a pioneer in setting up a special system of agreements for the reproduction of haute couture designs abroad, with foreign buyers. Couturiers were generally eager to sell their designs for authorized reproduction to high-grade manufacturers abroad, if not in France. These couturiers were incensed when they understood that their designs were sneaked out, copied without authorization, and that the copies retailed at various points of sale. Reproduction could be either line-for-line copies in high quality fabrics, or low-grade renditions in inferior materials.

The challenge for the cluster of Paris designers was how to sell the product of their creativity, and receive a fee for its dissemination. During the interwar period, nearly all couturiers remained convinced that the haute couture production had, following Gerber's guidelines, to be made in Paris. Foreign buyers were admitted in the couture salons, where they were encouraged to purchase. In some firms, the visitors had to commit to buying at least a few designs. They paid a one-time fee that authorized them to manufacture reproductions of these designs in their home country. Gerber and his peer couturiers knew that this method had its limits. Many of these foreign corporate buyers would buy the required number of designs, but also copy a few others, and then a much larger amount of copying went on outside of the couturiers' control.

During the Great Depression, Gerber experimented with new ways to capitalize on Paris design, and therefore he experimented with the drafting of special agreements authorizing clusters of foreign buyers to reproduce Paris designs for a fee, or a right of vision. The market that Gerber chose as a laboratory for this intellectual property right policy was Belgium, a small neighboring country, where French was the main business language. Belgian industrialists were capable of making reproductions of Paris fashions that did not betray the quality of the originals. The agreement developed during the Great Depression, and it resulted in cordial exchanges between the French and the Belgian entrepreneurs. It was also, to some extent, an experiment that would pave the way for the agreements that the Paris couturiers made with the French province dressmakers in the postwar era[10].

The project was that the agreement with the Belgian couturiers would be followed by similar agreements with the German and the US

[10] V. Pouillard, *Aménager les échanges entre acheteurs belges et créateurs parisiens*: *la constitution d'une Chambre syndicale de Haute Couture belge pendant l'entre-deux-guerres*, in "Journal of Belgian History", XXXVI, 2006, 3-4, pp. 409-52; D. Grumbach, *Histoires de la mode*, Editions du Regard, Paris 2008, pp. 93, 106, 141.

manufacturers, but this did not happen. It is plausible that the size of these industries, and the greater division between quality lines that this entailed, were reasons why the Belgian agreements were not extended to further countries. In the postwar era, besides the agreements passed by the Paris couturiers with the province manufacturers, a new business model came about. Contrary to Gerber's policy of keeping all of haute couture's manufacturing at home, couturiers experimented with branded ready-to-wear lines, that they designed especially to be reproduced overseas. This allowed to cut down the costs, and to maintain the brand signature of haute couture[11].

Early activity of managers lobbying for fashion law

Before such systems of licenses spread out, the interwar couturiers tried to protect their designs using various methods. Histories of haute couture show that designers entertained a complex relation to the high arts. Many were art collectors, and many practiced one or several high-brow arts. Some of them, such as in the well-known case of Jacques Doucet, employed their revenue to grow a collection of fine art. Yet couturiers, even ones that are now considered to have developed revolutionary forms in their craft, did not necessarily describe themselves as artists, but these same couturiers went to the courts to defend their creations. Most active in that domain was a former employee of Marie Gerber-Callot, Madeleine Vionnet. Known as a fashion virtuoso whose creativity is revered by the connoisseurs to this day, Vionnet was also a pioneer in her use of the law.[12]

Vionnet worked, during her career as a couturiere, with several managers and lawyers. She hired successively two directors for her firm, Louis Dangel during the 1920s, and Armand Trouyet during the 1930s, who became early experts in questions of intellectual property. Vionnet also paid lawyers to represent her in court, such as Maître Flach, who represented

11 A. Palmer, *Dior: A New Look, A New Enterprise (1947-1957)*, Victoria & Albert Museum, London 2009; T. Okawa, *Licensing and the Mass Production of Luxury Goods*, in *The Oxford Handbook of Luxury Business*, eds. P.Y. Donzé, V. Pouillard, J. Roberts, Oxford University Press, Oxford 2021, published online: https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780190932220.001.0001/oxfordhb-9780190932220-e-11.

12 M.E. Davis, *Classic Chic: Music, Fashion, and Modernism*, University of California Press, Berkeley 2008.

her in counterfeiting cases, and when she was sued by former employees at the labor court, the Prud'Hommes, for conflicts in the workplace[13].

The first manager hired by Vionnet, Louis Dangel, was born in Besançon in 1881 in a modest background. His father was an employee of the French postal service. Dangel started a career as a journalist in 1902[14]. He remained an administrator in the fashion press, for the "Revue de la Femme" and the famed "Gazette du Bon Ton", renowned for its refined content and illustrations commissioned to avant-garde artists. Dangel entered in January 1919 in the service of Vionnet as her managing director for a renewable term of five years[15]. Dangel had full power to administer the firm's finances and personnel. He advised Vionnet on the direction of her couture establishment, including her representation at the professional association Chambre Syndicale de la Couture parisienne, an association that took collective decisions on behalf of haute couture firms. Dangel also counseled Vionnet on intellectual property. Besides his appointment, he held various mandates during his career: as an administrator on the board of Lauvois, a firm specialized in perfumes and furs, and on the boards of the "Revue de la Femme" and the "Gazette du Bon Ton". Dangel participated to the creation of a charitable association, *Jardin des Fleurs*, aiming to offer holidays to couture workers, a purpose aligned with Vionnet's charitable work. In 1925, Dangel was treasurer and member of the committee of the class 20, that gathered the fashion industrialists at the Paris Exhibition of Decorative Arts, an event that created a momentum for the Art Deco aesthetics.

Dangel's connections with the media may have influenced his management, notably for the publicity of Madeleine Vionnet, for whom he organized a sophisticated media plan, while at the same time defending her portfolio of intellectual property rights. Dangel also helped Vionnet organize her travel to New York in 1924, where she took an entire collection to showcase on one floor of the New York department store Hickson's.

In 1922, Dangel became a founding member and president of a non-profit association, the Association pour la Défense des Arts Plastiques et Appliqués, with the purpose of defending the artistic property in the realm of applied arts, mostly arts and crafts and luxury business. Members

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13 V. Pouillard, *Paris to New York. The Transatlantic Fashion Industry in the Twentieth Century*, Harvard University Press, Cambridge (Massachusetts) 2021, pp. 43-68.

14 French National Archives, Léonore database, Louis Dangel, Légion d'Honneur file. Https://www.leonore.archives-nationales.culture.gouv.fr/ui/notice/99556.

15 Union Centrale des Arts Décoratifs, Paris, Centre de Documentation, Madeleine Vionnet, box 2, file "Directeurs".

included in addition to Vionnet, the haute couture firms of Jeanne Lanvin, Jenny, Worth, Poiret, Chéruit, Paquin; textile manufacturers Rodier and Bianchini Férier, shoemaker Pérugia, and jeweler Louis Cartier[16].

In his capacity of president of this Association, Dangel lobbied the French government and the media in order to reinforce intellectual property for couture, using the slogan "copying is theft", which was also repeated in Vionnet's communication and carved on the walls of her showrooms in Paris.[17] The same association prevented the reproduction of the patterns for the haute couture designs in France, thereby aiming to undercut the reproduction of haute couture by mass manufacturers in France[18]. From the early 1920s, Dangel proceeded to have supposedly counterfeited garments seized by the police on the premises of the copying firms, in order to show the copies as proof in the court[19].

Dangel's activity at the 1925 Paris Congress of the Association littéraire et artistique internationale (ALAI)

In the mid-1920s, the lobbying of Dangel and of the Association that he presided focused on the revision of the law of 14 July 1909 on the protection of industrial design ("loi du 14 juillet 1909 sur la protection des dessins et modèles"), that the Association judged insufficient to protect couture from counterfeits[20]. His lobbying took a more concrete turn at the 1925 Paris Congress of the Association littéraire et artistique internationale (ALAI), that aimed to reinforce the protection of copyright and harmonize intellectual property rights at the international level. Dangel had an active role in finding financial resources for the organization of this ALAI congress in Paris[21]. Congressists were taken off sessions to visit landmarks, including displays of paintings and signed furniture at Musée Carnavalet and in *hôtels particuliers*, and to

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16 H. Lapauze, *Dans le royaume de la mode*, in "La renaissance de l'art francais et des industries de luxe", 1 January 1923, p. 587.

17 B. Kirke, *Madeleine Vionnet*, Chronicle Books, San Francisco 1991.

18 N. Green, *Ready-to-Wear and Ready-to-Work: A Century of Industry and Immigrants in Paris and New York*, Duke University Press, Durham 1997, p. 81.

19 M. Ducray, *Copier, c'est voler. Ce qu'est la situation de notre industrie de luxe en présence d'une copie audacieuse et clandestine*, in "Excelsior: Journal Illustré Quotidien", 20 février 1930, p. 2.

20 Ducray, *Copier c'est voler*, in "La Liberté", 25 August 1925, p. 3.

21 Association littéraire et artistique international, *Compte-rendu du Congrès de 1925*, 34, s.e., Paris 1925, p. 131.

the houses of Vionnet, Drecoll, Worth, and Poiret[22]. The fourth session of the ALAI, on 4 June 1925, was dedicated to the protection of arts and crafts ("protection des oeuvres de l'art appliqué") [23]. Participants to the meeting mentioned that arts and crafts designs ("dessins et modèles") were much less protected than the authors' right, patent, trademarks, and country-of-origins labels. By contrast, explained meeting participant and rapporteur Fernand Jacq, arts and crafts designs were nearly denied protection.

This was not quite exact in the case of France, where fashion industrialists also used authors' right to protect their designs in the courts. The possibility to combine both industrial design protection, and authors' rights, was based on the doctrine of the unity of the arts, that prevailed in France and in Germany, but not everywhere in Europe, neither in North and South America, other markets that imported haute couture. Lawyers used this combination in the French courts to win their cases against counterfeiters. But this was not possible everywhere, which motivated French industrialists to lobby for a reinforcement of design protection[24].

To this end, the ALAI meeting members put propositions forward. These aimed to protect a design even if it had not been registered; to protect designs independently from the laws on artistic and literary property; to make the registration envelope (technically called envelope Soleau[25]) a sufficient proof for protection; to offer longer protection to designs, even if they were not exploited for some time; and to extend the protection of designs on international markets. These propositions, insisted some members of the group, rested upon the 1902 law of industrial property, that itself was an amendment to the French authors' right law of 1793. The principle they followed was summarized under the concept that there were no distinction between higher and lower arts ("Il n'y a ni arts majeurs, ni arts mineurs"[26]) – and therefore, no

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22 Ivi, p. 149.

23 Ivi, p. 108.

24 Pouillard, *Paris to New York*, cit., pp. 69-106; Association littéraire et artistique international, *Compte-rendu du Congrès de 1925*, cit., p. 109.

25 J. Pénin, *Enveloppe Soleau et droit de profession antérieure: définition et analyse économique*, in "Revue d'économie industrielle", CXXI, 2008, pp. 4, 85-102, 121; E. Hemmungs Wirtén, *In the Service of Secrecy: An enveloped history of priority, proofs, and patents*, in "Journal of Material Culture", XXVI, 2021, 3, pp. 26, 3, 241-61.

26 Association littéraire et artistique international, *Compte-rendu du Congrès de 1925*, cit., p. 110.

distinction between high and low authorship, which in turn, equaled to giving high authorship to all productions of the arts and crafts. The ALAI accepted those principles and recommended the use of the envelope Soleau. The Bureaux Internationaux pour la Protection de la Propriété intellectuelle (BIRPI), then the higher international instance for the unification of intellectual property law, were vested with the role of extending information and practices on the protection of design to countries that followed different rules of authorship.

The discussion then went on the situation of the United States, that remained so far outside of the Berne system of the protection of authors' rights resulting from the Berne Convention of 1886 and its revisions, and would remain outside the Berne system until 1989. Furthermore, the protection of arts and crafts was of the resort of the Convention of the Paris Union of 1883, for the enforcement of which there was no efficient international organization. It is in this context that the group working on arts and crafts at the ALAI in 1925 decided to promote the international registration of designs[27]. The Bureaux Internationaux had started working on this issue before the war. An important question was the harmonization of the term of protection, which was very diverse between member countries, as shown in the table below.

Table: duration of protection for designs in 1925[28]

Duration of protection for designs	*Countries*
Two years	Italy
Three years	Austria and Hungary
Five years	Sweden
Ten years	Japan, Mexico, Serbia-Croatia-Slovenia
Twelve years	Poland
Fourteen years	United States of America
Fifteen years	Cuba, Denmark, Dantzig territory, Germany, Great Britain, Norway, Switzerland, Tunisia
Twenty years	Spain
Fifty years	France
Perpetuity	Belgium, Portugal

[27] Ivi, p. 111.

[28] Ivi, pp. 112 - 3.

Facing such a disparity, the Bureaux Internationaux proposed to unify the term of the protection to fifteen years, with the possibility of an ulterior amendment to twenty or even twenty-five years. Since most designs were made for seasonal industries and submitted to change according to fashion cycles, the Bureaux were pushing for a very long term of protection.

The second important question that the report from the Bureaux Internationaux, discussed in the 1925 meeting of the ALAI, tried to solve, was the centralization of design registration. In 1922, was noted in the report, 284,192 designs had been registered in 22 countries. The idea was to gather all registrations worldwide at the siege of the Bureaux in Berne[29]. This proposal went through further discussions.

Following this, Louis Dangel and Maître Flach, who both worked with Vionnet and were present at the meeting of the ALAI, proposed that the group discuss a new French proposition of law, that aimed to augment the repression against counterfeiters. French representative André François-Poncet presented the text and exposed the methods used to counterfeit designs. Dangel was an ardent supporter of raising the penalties meted out by counterfeiters. His main argument in this discussion was that dresses were works of art – rather than arts and crafts – and should be protected as such, which ruled out the argument of utility put forward by the opponents to a stronger protection for fashion design. Dangel went on working on the commissions aiming, in France, at revising the laws protecting design[30].

In 1927, Dangel was awarded the Legion of Honor by the French government. Marcel Knecht, director of daily "Le Matin", received him in the Legion of Honor as it was the usage. Dangel's Legion of Honor file shows that it is for founding and presiding the Association pour la Défense des Arts Plastiques et Appliqués that he received the distinction[31]. In 1932, two other administrative directors of haute couture firms also favorable to a stronger regime of intellectual property for fashion, Jean Labusquiere at the house of Lanvin, and Marcel Trouyet at the house of Vionnet, were also awarded the Legion of Honor[32].

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29 Ivi, p. 113.

30 Ivi, pp. 116-7.

31 Louis Dangel Legion d'Honneur dossier, online: https://www.leonore.archives-nationales.culture.gouv.fr/ui/notice/99556.

32 *Legion d'Honneur*, in "Vogue", 1 January 1831, p. 68.

Copies perceived as a threat to the industry

Dangel's association gained visibility at least on the domestic market, although his ambition was to curb counterfeits on the international markets. In 1930, it was estimated that the annual revenue of haute couture was then one billion French francs, of which two thirds were made by exports. Dangel's association estimated that haute couture could double its revenue from exports if copying had not been possible[33]. Yet the argument that imitations were an advertising for haute couture did not appear in his interventions[34]. Interviewed by the newspaper "Excelsior" in 1930, Dangel set up to the challenging task of defining creativity in haute couture. What defined the role of Paris in this industry, explained Dangel, was its influence on the industry internationally. But he also nuanced the capacity of haute couture to be innovative, adding that for a prominent haute couture firm, thirty or forty designs over 250 or 300 per season would be veritably innovative and directional. This was acknowledging the ambiguity of creativity in an industry that was derivative and utilitarian, even in higher luxury, as haute couture was[35].

During those years, Vionnet became very active as a plaintiff against counterfeiters in the Paris small crimes court (correctionnelle). In the courts, Vionnet was represented by lawyer Maitre Flach. The activity of couture firms shows that entrepreneurs in the couture trade then started to use the skills of lawyers for a variety of issues, and that the expertise of these jurists specialized during the interwar period. Indeed Maître Flach also defended the house of Vionnet in cases of labor litigations at the consular jurisdiction (Prud'Hommes court)[36].

Dangel was followed at Vionnet by a jurist, Armand-Hyppolite Trouyet[37], who founded a new association for the protection of haute couture, the Protection Artistique des Industries Saisonnières (PAIS), that pursued the objective of defending the designers and protecting their works («défense des créateurs appartenant à toutes les industries

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33 Ducray, *Copier, c'est voler,* cit., p. 1.

34 J.M. Barnett, *Shopping for Gucci on Canal Street: Reflections on Status Consumption, Intellectual Property, and the Incentive Thesis*, in "Virginia Law Review", XCI, 91, 2005, 6, pp. 1381-423.

35 Ducray, *Copier, c'est voler,* cit., p. 2.

36 Pouillard, *Paris to New York,* cit., pp. 43-68.

37 French National Archives, Léonore database, Armand Trouyet, Légion d'Honneur dossier, https://francearchives.fr/fr/findingaid/4c676175b18cff7df15fdd1a372a07ba39fdd632.

saisonnières et la protection de leurs oeuvres»)[38]. Trouyet did not limit his interventions in the media to the defense of creativity against copy. He enjoyed promoting the excellence of Vionnet's work and of her school, and also commented on the designers' aesthetics, for example to show that it suppressed all rigidity ("supprime toute rigidité"[39]) in dress.

Continuous work in associations and in the French media relayed anti-copyists discourses and aimed at reinforcing the character of authenticity of haute couture. Pierre Gerber, director of the couture firm Callot Soeurs but also, at that time, President of the Chambre Syndicale de la Couture parisienne, defended the authenticity of haute couture by taking the perspective of the defense of haute couture as a French national industry. Trouyet, often along with Gerber, attacked copying in the media, whether it be servile reproduction of designs, or counterfeiting of brand labels. The international trafficking of haute couture was a common ground that united these two perspectives on authenticity[40].

There was generally a consensus in the French media against the counterfeiters, also called the pirates of haute couture, yet during the Great Depression, a few voices expressed dissent from the anti-copyist activities waged by Trouyet, as in the satirical paper "Bec et Ongles", that opposed the repressive stance of Trouyet and Gerber to other couturiers. As representative of these other couturiers, the newspaper mentioned Lucien Lelong, who thought that a regular renewal of the couture collections was more efficient to deter copyists, than waging pursuits against them. But in practice all these couturiers worked with the similar agenda of promoting the productions of haute couture and curbing counterfeits[41].

Avoiding a depreciation of the "Paris" brand became a central agenda for the couturiers in the aftermath of the Great Depression[42]. A close reading of the sources for the work of the lobbyists, as exemplified here by Louis Dangel and Armand Trouyet, shows a shift of strategies, from

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38 Association Pour La Protection Artistique Des Industries Saisonnieres - Paris (net1901.org); M. De Camp Crawford, *The Ways of Fashion*, Putnam, New York 1941, p. 72; F. Sterlacci, J. Arbuckle, *Historical Dictionary of the Fashion Industry*, Scarecrow Press, New York 2007, p. 396.

39 "Le Plaisir de Vivre", Octobre 1926, p. 14.

40 See for example *L'Instruction réserve de nouvelles surprises*, in "L'Intransigeant", 28 October 1931, p. 3.

41 *La Mode. Les drames de la couture*, in "Bec et ongles: satirique hebdomadaire", 18 February 1933, p. 15.

42 *L'Instruction reserve de nouvelles surprises*, cit.

promoting author's right law, to increased emphasis on branding and place-of-origin labels. A hypothesis is that the Great Depression toned down the injunctions to buy haute couture originals. At the same time, the campaigns for buying national products and the emphasis on branding took greater importance. Country-of-origin labels were also gaining prominence in other domains, such as in wine and liquors. In fashion, the protection of place-of-origin names and labels, such as "Paris" and drawings of the Eiffel tower, would become protected in France in 1943.

Fashion intellectual property across the Atlantic

The PAIS under the leadership of Trouyet developed international cooperation towards its objectives. In this process, it started working with United States-based entrepreneurs for a better protection of design. Trouyet liaised with entrepreneurs such as Maurice Rentner, a prominent high-end manufacturer who founded an association, the Fashion Originators' Guild of America, with the objective of protecting and registering design in the United States. The Guild aimed to protect all designs, not just the ones originated in the United States, but also the designs bought in Paris by United States industrialists with an official right of reproduction. In other words, the Guild aimed to grant intellectual property to any creative design without distinction of origin. A concrete plan of action was set up in 1929, aiming at better surveillance of the deliveries of haute couture shipping, in order to undercut style *leaks* as they were called, or unwanted copying by intermediaries. The project of a greater integration between the teams led by Trouyet in France and Rentner in the United States, was however cut short by the consequences of the Great Depression and then Second World War.

Despite these limitations to the common effort of associations promoting intellectual property, industrialists and lawyers tried to obtain better protection for design in the United States. Among these advocates was Sylvan Gotshal, who in 1931 founded with Frank Weil and Horace Manges the law firm Weil, Gotshal and Manges, today one of the largest law firms in the world. Gotshal worked to protect law in the textile and fashion industries, and he wrote four books on the topic. By his death in 1968, the "New York Times" presented Gotshal as a «crusader for protection of designs»[43].

[43] *Sylvan Gotshal, Textile Lawyer; Crusader for Protection of Designs is Dead at 71*, in "New

Gotshal had started his activity in the US intellectual property law for the realm of fashion textile during the interwar period. The United States was then the largest consuming market in the world, with an average higher standard of consumption of fashion goods than in Europe[44]. Several European countries then had a rather comprehensive system of intellectual property rights for fashion and design. This was not the case of the United States. Gotshal was alarmed by this situation, and became during the 1920s an advocate for reinforcing intellectual property in the United States. In so doing, Gotshal was up to a daunting task. Fashion production was of good standard in the United States, but fashionable merchandise was considered first and foremost for its function of utility, rather than for aesthetic creativity. Promoting the democratization of fashion, or the access of all to fashionable designs as it was done in the United States was not illogical. Sociologists in the nineteenth century, including in France with scholars such as Gabriel Tarde, wrote that fashion was imitation. In this process, the derivative nature of fashion design made it impossible to protect. Gotshal aligned with the French view that fashion design should enjoy higher protection against copying – and also, therefore, against democratization.

Protecting silk designs: a first step towards protection in the United States?

Gotshal participated in numerous Congressional hearings in which design bills were examined and discussed. A case evoked during the Congressional hearings supporting a design protection amendment was the Cheney vs. Doris Silk case. Cheney was an important US firm specialized in silk manufacturing, whose weight could be sufficient to lobby in favor of a change in the law. Despite the support of several industries, such as the small furniture industry, in favor of the inclusion of design in the US copyright law, other industries, such as the car parts industries, kept opposing design protection.

The Vestal and Sirovich draft bills for design protection in the United States were discussed several times during the 1930s. Gotshal contributed to the rewriting of the Sirovich bill in a form that was much more restricted than earlier drafts, aiming to just keep in the text the

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York Times", 12 August 1968. Https://www.nytimes.com/1968/08/12/archives/sylvan-gotshal-textile-lawyer-crusader-for-protection-of-designs-is.html.

44 V. De Grazia, *Irresistible Empire: America's Advance Through Twentieth-Century Europe*, Belknap Press of Harvard University Press, Cambridge (Massachusetts) 2005.

protection of designs printed on silks, that had been since 1928 protected, at the private initiative of organized industrialists, by a registration bureau. An important number of manufacturers had registered designs for protection. These industrialists generally found the system useful to protect their designs more efficiently than under the United States design patent law of 1842. The American patent law was indeed effective for the protection of scientific innovation but, as silk manufacturers voiced in the Congress hearings on design registration of 1930, the problem was that the patent system was working to slowly to protect silk designs, that were renewed at a seasonal rhythm[45].

As slow and expensive as it was, the design patent system was still used by the textile manufacturers to attempt to protect their designs in the United States. But in such cases, a hurdle remained with the attribution of the patent. Gotshal, in his writings on the defense of a design registration, mentioned the case of a patent in silk, that had been filed by manufacturers Hamil & Booth in 1882, and that the patent administration had refused to register. Gotshal mentioned that such refusals precisely led the silk industrialists and numerous others, including lace makers, wallpaper firms, stove manufacturers, and jewelers, to demand a better protection for arts and crafts. Later on, in 1930 when congressional hearings were taking place in Washington in order to determine whether design could be added to the copyright law, Thorvald Solberg, the United States register of copyrights, explained that the proportion of textile and fashion patent designs applications rejected was still 50%[46].

Despite Solberg's support towards increased protection for arts and crafts under the patent, but also potentially under the copyright law, no progress was made during the first decades of the twentieth century. This, according to Gotshal, was because the United States as a nation were not ready to acknowledge the creative content of the arts and crafts. Copyright was thus limited to the high arts[47]. But the limit between high and low in the arts was itself a movable boundary, and was abundantly discussed in the court hearings.

Gotshal developed a tireless activity to support the inclusion of fashion in the United States intellectual property law. He regularly partic-

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45 *Hearings, United States Congress, House, Committee on Patents, 1930, Copyright registration*, Columbia University Press, New York 1945, p. 8; Marcketti, Parsons, *Knock it off*, cit., p. 33.

46 Ivi, pp. 99, 111.

47 S. Gotshal, *The Pirates Will Get You: A Story of The Fight for Design Protection*, Columbia University Press, New York 1945, pp. 10, 17.

ipated to draft bill hearings in the United States Congress. The first case occurred in 1930, for the copyright registration of designs. The 1930 hearings opened a rich discussion on the potential extension of the United States copyright law to cover some fashion creations. There was no question to extend the copyright law to the protection of the entire scope of fashion design, though, as it was the case in France. During the 1930 Congressional hearings, the kind of objects covered remained restricted to prints on textile.

As mentioned above, from 1928, a group of United States silk manufacturers had started organizing a Design Registration Bureau for the protection of silk designs. These patterns were engraved on metal cylinders, then printed on silk fabrics[48]. The cost of printing fabric, which was the main concrete example of a fashionable merchandise discussed during the 1930 Vestal Bill hearing, was presented as the reason for demanding protection: «In preparation of a piece of printed silk, the cost of preparing, of acquiring, or securing the design and preparing the rollers is a constant figure of any design. It includes the salaries, the cost of the original design, if we purchase it from a designer, or the salaries of our own designers; it includes pentograph operators, the salaries of pentograph operators and engravers; it includes the cost of proper rollers, and when that work is done, that amount is fixed. […] the greater the yardage the lower the cost of producing it. […] Piracy means short yardage, protection means long yardage»[49]. Other forms of creativity legally protected in the United States were also using cylinders to print and disseminate creative content, such as in the music industry. But cylinder printing was not granted proper protection when it was used for textiles[50].

Further discussions brought together the commerce of imitated silk designs, and an analogy with high seas piracy, that proved particularly unconstructive. The 1930s hearings committee members who defended the design bill had still some arguments that could be helpful to their cause. They kept trying to model the protection of the silks designs on the protection of music sheets and music songs. While silks designs were not

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48 *Hearings, United States Congress, House, Committee on Patents, 1930, Copyright registration*, cit., pp. 62-3. On the earlier history of cylinder printing, see L. Febvre, H.J. Martin, *The Coming of the Book: The Impact of Printing 1450-1800,* Verso, London and New York 1976, p. 12.

49 *Hearings, United States Congress, House, Committee on Patents, 1930, Copyright registration*, cit., pp. 102-3.

50 D. Pretel, *Institutionalising Patents in 19th century Spain*, Springer, New York 2018.

protected under the US copyright law, music, including popular tunes, enjoyed copyright protection. Hearings committee member Perkins argued that a bubble pattern printed on silk was similar to the song *Yes, we have no Bananas*: the man who wrote the song did not invent the bananas, but he had the right to copyright the song, said Perkins[51]. A little later in the same hearing, committee member Bloom evoked music again, mentioning that «the deposit of the design in the Copyright Office is merely the registration of that design, the same as you would a sheet of music. Now, the fact is, who originated the design? Not who copyrighted it first, but who originated it first, and if you had the design the same as you have a book or sheet of music, you can deposit it here, but that does not prove who is the originator of the design; you must prove your case in court when the suit is brought to prove who is the infringer. That is the idea»[52]. Such a method of proving copyright infringement in front of a court was applied in the lawsuits filed in France by designers who considered themselves to be counterfeited. But despite the similarities shown by hearing members between creativity in music and in silks, such arguments were not enough to extend copyright protection to silks in the United States.

Arguments again design protection in the United States

The next question that appeared in the hearing was that of the seizure of supposedly counterfeited products. The debate stalled again, because the question of seizing merchandise appeared as infringing on the freedom of the market. A challenge was the responsibility towards the merchant who unknowingly sold goods that proved to be fakes. The argument made in the hearings was that such merchants needed to be protected against risk, and also that competing price levels had to coexist on the market. A further argument against the bill was simply about the breadth of the volume of goods on display in stores, especially in regard with the large popular department stores of cities such as New York. It was impossible to check the entire inventory in order to recoup similarities with other merchandise, argued hearing committee member Lande, who voiced that no penalty could be applied either to the merchant or to the public. The argument was that silk designs, more generally fashion designs, and goods such as tableware and holiday articles, were too

[51] *Hearings, United States Congress, House, Committee on Patents, 1930, Copyright registration*, cit., p. 74.

[52] Ivi, p. 90.

broadly disseminated and too commercial to be properly the object of legal protection. Merchandise was too abundant, too generic, too similar to be protected. Lande however thought that trademark remained a relevant protection for such goods, and that trademark protection could be enforced in a relevant manner. Branding already appeared as the solution to the problem of design protection[53].

Still during the 1930 hearing, representative Lanham exposed that merchants of unauthorized silk goods were equivalent to bootleggers. This term can be found in the works of Elizabeth Hawes, a ground-breaking American designer who developed original lines of women's garments after having trained for a copy-house in Paris. It is that activity that she described afterwards as bootlegging[54]. Further discussions in the Congress became muddled over the question that piracy might be a crime, but this analogy failed to receive entire adhesion by the hearing's participants, who kept discussing back and forth using rather vague concepts of crime, theft, fake and real. The use of the term "pirate" especially contributed to blur the commercial questions that were at stake in the discussion. High seas criminals were far from the reality of silk trade designers, manufacturers, and merchants who sold original designs or cheaper, affordable imitations, that were given away by their intrinsic inferior weight and quality. The discussion mentioned at least one concept that would prove, on the longer term, to be longer lasting in the protection of fashion commerce, which was that of competition[55]. Later on in the same hearings, the argument was pushed further to argue that the French system of design was monopolistic, while United States commerce was competitive[56].

France was brought again in the debate about the question of protecting silks. Lande discussed the sale of silks at the French department stores. In the most optimistic of his social novels of the Rougon-Macquart series, *Ladies' Paradise*, Zola described the attraction of silks on the inventory of the French department stores, where they remained a staple well into the twentieth century[57]. What Lande wanted to underline when he evoked Zola, were considerations about the origins of silk designs. Printed colored silks were also present in the United States department stores, but, affirmed

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53 Ivi, p. 91, 96.

54 Ivi, p. 84; B. Berch, *Radical by Design: The Life and Styles of Elizabeth Hawes*, E.P. Dutton & Co., New York 1988.

55 *Hearings, United States Congress, House, Committee on Patents, 1930, Copyright registration*, cit., p. 89.

56 Ivi, p. 103.

57 Ivi, p. 104.

Lande, the designs of the American silks were in most cases originated in France. Lande went on to describe the system of monopoly over the designs that he observed in France. He argued that the Vestal bill would, instead of protecting the United States manufacturers, protect the French ones. He went on with the argument of the nation: «You are not going to protect American manufacturers. […] You are going to permit under this bill any French claimer of a creation or of an original design to have its legal representative over here copyright it immediately, though it may have originated with some other small French dealer that it bought it from, before you have a chance to prove that». He then pursued: «Now, who is going to have the monopoly in wearing apparel if it is not the Frenchman, if it is not the foreigner? We hope we will get away from that, but at the present time our styles do come from abroad for women, and that is what you are going to do; you are going to foster, not monopoly for America, but you are going to let someone from abroad come in and claim it, and you have to got to go abroad to find your proof that they did not originate it, and your season is gone and you have created a monopoly for a man who may never have been entitled to it, and you have given it to someone not an American citizen. […] This gives a monopoly to the foreigner»[58].

Lande's discourse on the hearing neatly anticipated on the analysis made by historian Carla Hesse, who showed that intellectual property was essentially a part of the instruments available to the protection of international trade. Nations that were at the vanguard of innovation in one domain were eager to protect that innovation, while countries that were laggards promoted more tolerant policies towards copying[59]. Countries that became increasingly innovative would then have a tendency to reinforce their intellectual property laws, but only in the domains where they were innovative, which explains why, for example, the United States had included advertising posters and popular music within the scope of its intellectual property law, but not fashion design.

This belief of international supremacy in design innovation was questioned during the hearing, when Letts, another member of the discussion, asked Lande which percentage of the designs sold in the United States was from Paris. Lande answered that a majority of these designs were from Paris, but he did not produce any figures or evidence to support this claim. Further asked about the «industry in styles […] established and built up in

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58 *Ibid*.

59 C. Hesse, *The Rise of Intellectual Property, 700B.C. - A.D. 2000: An Idea in the Balance*, in "Daedalus", 2002, pp. 2, 26-45, 131.

this country», Lande ended up answering that he did not know. Another member of the group, a shoe expert (Mrs. Bendelari), mentioned that in shoe industry, it was the United States productions that were sought after on global markets[60]. Despite the lack of proofs showing that protecting origination would effectively profit France rather than the United States, the argument made an impact on the commission, making the supporters of intellectual property rights, including Gotshal, a minority.

The discussions then developed on the potential negative effects of protection, specifically in creating hurdles to competition. On the Committee, Williams developed the argument approached earlier on the competitive features of the US market: «a design patent or design copyright that covers only the shape of the article, the same article made in another shape is available to the public. We are dealing here now not with the monopolization of commodities, but with the monopolization of shapes or ornamentations of commodities»[61]. The argument, then, supported a definition of fashion, garments, accessories resting upon their utility[62]. The argument of utility is indeed the one that has remained dominant in the United States to this day. Garments therefore were not considered to be eligible for high authorship protection.

After the committee hearings, its report went to the House for discussion. In the House of Representatives, arguments on the bill went on about the idea of an American fashion democracy. A majority of representatives saw no major inconvenience to pass the bill, but the Congress was adjourned. The bill went to the Senate in the next session, but there it met important opposition in committee. In 1932, register of copyright Solberg, who was a long-term supporter of increased protection for arts and crafts, retired. Despite the persistent support of a small group of lawyers that included Gotshal, the bill did not go through.

Further hearings took place to examine renewed versions of the bill, that aimed to narrow down its scope. Congressman William I. Sirovich played an important role in these new versions known as Sirovich bill, that did not go through either[63]. After the amendments to the Vestal design protection bill of 1930 failed to pass, Gotshal participated again

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60 *Hearings, United States Congress, House, Committee on Patents, 1930, Copyright registration*, cit., pp. 106-7.

61 Ivi, p. 113.

62 Ivi, p. 128.

63 S. Gotshal, *The Pirates Will Get You,* cit., p. 41, Marcketti, Parsons, *Knock it off*, cit., pp. 134-5.

in design protection hearings from 1935 to 1937, and he would also participate in further hearings for design bills during the postwar era. The group of industrialists and lawyers supporting intellectual property rights protection for silk and other fashionable designs in the US never managed to convince the majority that fashion should be protected as art, or even arts and crafts. Rather, fashion productions remained considered to be industrial products, whose value derived from their utility[64].

Conclusion

During the postwar era, the international trade in high fashions intensified again, and with it, the question of intellectual property resurfaced. A new wave of internationalization of haute couture took place in the postwar era, this time based on a shift in the modes of production. While the couturiers who tried to establish earlier in New York had, apart from an unsuccessful attempt by Vionnet, kept producing couture in France to export as finished products to the United States, a new business model emerged during the postwar era. Designers Christian Dior, Jacques Fath, Pierre Balmain proposed, besides haute couture creations, ready-to-wear lines signed with their own trademark, but produced in the United States. This proved to be the winning strategy, that eventually allowed couturiers to sell in the United States, and to capitalize successfully on their brand names, after a half century of failing to do so.[65]

Several important lawsuits waged by Paris couturiers in order to enforce their intellectual property rights in the United States took place during the 1950s and 1960s, such as Boussac vs. Alexander, in which Gotshal represented the French-based Boussac Group, and the Milton case, in which four Paris couturiers sued copyist Frederick Milton[66]. To some extent, the French couturiers then managed to create case law in favor of stricter intellectual property rights for the fashion industry, but without ever obtaining full copyright and design protection for fashion

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64 *Congress Hearings, Design Protection Bill, 1935*, US Government Printing Office, Washington 1935, pp. 29-47, *Congress hearing, subcommittee on patents, 1936*, US Government Printing Office, Washington 1936, pp. 841-8, *Congress hearings on the reorganization of the fashion industry, 1937*, US Government Printing Office, Washington 1937, pp. 462-6.

65 See also Pouillard, *Paris to New York,* cit.

66 US Federal District Courts, FSupp/190/594/1622899/, Société Comptoir de l'Industrie Cotonnière et Industrie Boussac.

creations in the United States. The law does not protect fashion similarly on both sides of the Atlantic to this day. But this paper has shown that the lobbying efforts for increased fashion law were waged for several decades, with similar arguments on both sides of the Atlantic. Dangel and Trouyet in France, Gotshal in the United States, were among the most fervent advocates for providing the arts and crafts in general, and fashion design in particular, with high authorship. If music, including popular songs, were granted protection in the United States, why should it not be the case for fashion or silk designs? In France, haute couture benefitted from high authorship and a reinforcement of the case law. But this did not happen in the United States.

From this, European fashion brands enjoyed a broad spectrum of intellectual property rights. Even in a derivative industry where copying was intrinsic to commercialization, the French system of strong authorship had the effect of vesting the fashion productions with a strong culture of authenticity, thereby reinforcing their branding capital. But over the course of the twentieth century, the production of fashion, in France too, industrialized. Today haute couture is produced in extremely small numbers, catering to a few hundred clients in the world. Haute couture labels advertise designer ready-to-wear, perfumes, cosmetics, and similar products. In the United States, the legislator had ruled out highly industrialized, mass-produced goods from high authorship. Yet such mostly highly industrialized branded goods benefit, in France and elsewhere in Europe, from an intellectual property system that was modelled on the protection of craftsmanship during the interwar years. The law enforced by the earlier designers, entrepreneurs and lawyers in France was not made for today's productions, which has paved the way for challenging intellectual property issues in the contemporary era.

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