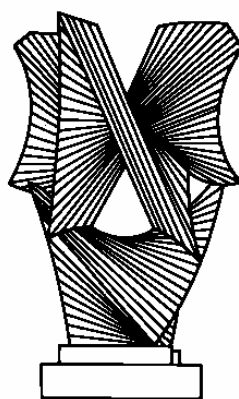


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Of Pirates and Puffy Shirts:  
A Comment on “The Piracy Paradox: Innovation and Intellectual Property in Fashion Design”

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## Of Pirates and Puffy Shirts: A Comment on "The Piracy Paradox: Innovation and Intellectual Property in Fashion Design"

Randal C. Picker\*

For me, HBO's *Sex and the City* was eye-opening. I live a simple and in some ways sheltered life, and I had no idea about the seemingly infinite possibilities and the full range of experimentation in ... fashion. Fashion, of course, is what the show was really about—with a little sex thrown in here and there—and I learned new words week by week: Dolce & Gabbana, Jimmy Choo, Manolo Blahnik. But as my fashion vocabulary is withering, I jumped at the *Virginia Law Review*'s invitation to participate in its new online venture and comment on Kal Raustiala and Chris Sprigman's *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*.<sup>1</sup> The paper is a fun read—even for those of us who are fashion challenged—so I flipped through a recent *Vogue*, popped *The Devil Wears Prada* into the DVD player, and I am once again ready to separate my Lagerfelds from my Diors.

In the spirit of the online format, I want to make two brief points. First, the key piece of historical evidence in the U.S.—the rise and fall of the Fashion Originators' Guild of America—is more complicated than the paper suggests. A contemporaneous account suggests that the Guild was driving increased innovation in creating more meaningful style property rights. Second, I am skeptical about the core claim of the paper that a piracy paradox exists: we get more innovation with fewer property rights. Again, the Guild episode suggests otherwise, but the driving mechanism described in the paper—induced obsolescence—faces powerful limits on its own terms.

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\* Copyright © 2007, Randal C. Picker. All Rights Reserved. Paul and Theo Leffmann Professor of Commercial Law, The University of Chicago Law School and Senior Fellow, The Computation Institute of the University of Chicago and Argonne National Laboratory. I thank the editors of the University of Virginia Law Review for comments and suggestions and also thank the Paul Leffmann Fund, The Russell J. Parsons Faculty Research Fund and the John M. Olin Program in Law and Economics at The University of Chicago Law School for their generous research support, and through the Olin Program, Microsoft Corporation and Verizon. This is a print version—well, it is if you download it and print it out—of a piece that appeared *In Brief*, the University of Virginia Law Review's online magazine. See Randal C. Picker, *Of Pirates and Puffy Shirts*, Va. L. Rev. In Brief, Jan. 22, 2007 (<http://www.virginialawreview.org/inbrief.php?s=inbrief&p=2007/01/22/picker>).

<sup>1</sup> Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 Va. L. Rev. 1687 (2006).

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## I. Dress War

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The March 23, 1936 *Time* magazine cover story “Scholars Without Money” addressed the financial plight of Johns Hopkins University as it came out of the Depression.<sup>2</sup> Another story, “Germans Preferred,” described a poll of 5,000 UK citizens after Adolph Hitler had breached the Treaty of Versailles by marching troops in the Rhineland.<sup>3</sup> The story of interest for us is “Dress War,” which described new antitrust litigation between Boston’s Filene’s department store and the three-year old Fashion Originators’ Guild of America.<sup>4</sup>

The Guild—FOGA to generations of antitrust students—was organized to deal with so-called “style piracy.” *Time* described “every dirty trick” known to the garment business:

Among such tricks was the universal and highly developed practice of copying original styles. By the early Depression years it had gone so far that no exclusive model was sure to remain exclusive for 24 hours; a dress exhibited in the morning at \$60 would be duplicated at \$25 before sunset and at lower prices later in the week. Sketching services made a business of it; delivery boys were bribed on their way to retailers.

The Guild addressed these tactics by organizing a registration and monitoring system for dress styles, all backed by the threat of a group boycott against a retailer that sold knock-offs. Indeed, Filene’s had been red-carded and that was what led to its suit against the Guild.

We know the Guild’s antitrust fate. The Federal Trade Commission eventually took an interest and that led to litigation that resulted in the Supreme Court’s 1941 decision condemning the Guild’s activities as an impermissible group boycott and as a *per se* violation of U.S. antitrust law.<sup>5</sup> But as property rights scholars, we should focus on something else, namely whether the Guild’s efforts at creating stronger property rights in styles increased style innovation. Now innovation is a tricky notion, but focus instead on

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<sup>2</sup> Scholars Without Money, *Time*, Mar. 23, 1936, available at <http://www.time.com/time/magazine/article/0,9171,930834-1,00.html>.

<sup>3</sup> Germans Preferred, *Time*, Mar. 23, 1936, available at <http://www.time.com/time/magazine/article/0,9171,930821,00.html>. According to the poll, the Brits still preferred the Germans over the French, 55% to 24%.

<sup>4</sup> Dress War, *Time*, Mar. 23, 1936, available at <http://www.time.com/time/magazine/article/0,9171,930861,00.html>.

<sup>5</sup> *Fashion Originators’ Guild of Am. v. FTC*, 312 U.S. 457 (1941).

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whether the Guild resulted in greater efforts to produce new styles. Again, the *Time* story is quite interesting:

Prime fact about these agreements was that since the manufacturers who belonged to the Guild did business chiefly in dresses priced not lower than \$16.75 wholesale, the protection of styles did not extend to lower-priced dresses. Business mortality in the higher-price field was soon diminishing, and more & more manufacturers began to do their own designing, confident that style piracy had been effectively outlawed.

And more:

For some time conscientious retailers had been returning dresses to manufacturers in the \$10.75 category, alleging copies in violation of Guild rules. A number of manufacturers of these dresses, hitherto generally committed to copying higher priced dresses for a good proportion of their styles, decided that it was time to originate. They accordingly began to register their dresses with the Guild and were admitted, not as full-fledged members but as affiliates.

It is probably a mistake to make too much of a contemporaneous account from a weekly news magazine, but for the more-property-rights-equals-more-innovation crowd—a group of which I am usually a member—you couldn't ask for much more. Raustiala and Sprigman doubt that the fashion industry actually wants stronger property rights, but the Guild's efforts certainly suggest that a higher-IP regime was desired by high-end designers. That of course wouldn't tell us that moving to that regime would have been good for all of us—social optimality—but that point seems like a counter-example to the paper's claim that copying doesn't hurt originators. The Guild's behavior suggests that they thought that it did (whether it actually did of course is a different matter, but I don't understand the paper's discussion of *FOGA* to take on that question).

The *Time* account provides a readily-accessible window into the fashion design practices of the mid-1930s. It suggests that copying was rapid—at least within a particular location such as New York City. It also suggests that the Guild's effort at property-making was pushing firms out of the copying business and into the design business. And we could undertake a more serious study of these design practices by looking at Proquest's historical newspapers database. I usually read the stories when I read old copies of *The New York Times*, but the ads may be a better way to assess fashion innovation and imitation, though it will take someone with a better eye than I have to undertake that study.

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## II. Fashion Durability and Style Commitments

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After the Supreme Court's 1941 decision, the Originators' Guild could no longer operate as it had before, and we should have expected an increase in copying. But World War II intervened, and as resources shifted to support the war effort, fashion piracy ceased to be an issue. But by 1947, fashion piracy and legislation to deal with it was back on the table. The industry was far from unified in its views, as the *New York Times* reported on July 22, 1947. Maurice Rentner, the former head of the Originators' Guild, pressed for legislation modeled on French law, which protected designs for six months. But Leon Bendel Schmulen of Henri Bendel demurred arguing that "[b]y the time a design of ours is copied in the cheaper dress lines, it's probably time for it to go."<sup>6</sup>

The dispute between Rentner and Schmulen captures two prominent IP positions. Rentner believed that innovation flows from property rights, while Schmulen was happy to live in a no-property world of innovation driven by induced obsolescence. Induced obsolescence is the worldview of the *Piracy Paradox*. Desirable fashions get copied by lower-end producers and that extends those fashions to the masses (people like me). Those seeking high-status through fashion don't want to be confused with me, so they need something move to move on to and the higher-end producers make changes to provide new products to the status conscious so that they can again separate themselves from me. The game theorist in me wants to say this is an ongoing exercise in separating and pooling equilibria. This ongoing cycle of change and copying creates constant churn in the fashion market.

What to make of this? The analytics on this are far from obvious. This is really a question of optimal durability: how long should something be built to last? In a world without fashion copyright, high-end designers lose one means to commit to their customers that the masses won't catch up with them. If the frock in question is all about separation, the value of the good is completely dependent on the technology of copying. With instantaneous copying and low-IP, the high-end designers couldn't sell anything to their customers. But, the more that that they can promise to their customers, the higher the

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<sup>6</sup> Fashion Designer Asks 'Piracy' Ban: Retner's Charge of Copying of Original Styles Confirmed by Others in Industry, N.Y. Times, July 22, 1947, at 20.

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price that they should be able to charge for that promise. Legislation creating a fashion copyright would give high-end designers the means to make credible commitments about separation and to raise their prices.

But even if that is right, we shouldn't expect that idea to translate quickly into legislation. I suspect that most fashion copying is vertical and not horizontal. By horizontal copying, I mean copying at the same level of the fashion pyramid: Dior copies Gucci or Target copies Wal-Mart. By vertical copying, I mean Target copies Dior. The paper seems to describe a "stable regime of free appropriation" as plausibly flowing from the fact that as a designer "one is more likely, over time, to be a copyist than to be copied."<sup>7</sup> But that seems wrong: Dior never expects to copy fashion design from Target, but Target may decide to copy Dior. Legislation to protect fashion designs should be forthcoming then only if the creators have more political power than the copyists. I could imagine that to be true in France, where design may be seen as part of the national culture, but I find that much less likely in the U.S., where Wal-Mart is vastly more important (and probably politically influential) than the entire high-end fashion industry.

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## Conclusion

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*Sex and the City* made clear that fashion could be fun, especially for a Carrie Bradshaw given a TV-sized shopping budget that even Emelda Marcos would have envied. *The Piracy Paradox* builds on the fun of fashion to undertake a serious exploration of whether we can sustain innovation without property rights. That is an important question, as copyright brings with it a real cost in blocking follow-on uses and a new fashion copyright would limit subsequent copying. We need to ask whether that price is worth it. In this brief response, I have emphasized two points. First, the case of the Originators' Guild suggests that we did see a design response to the private property rights regime created by the Guild. More property rights resulted in greater efforts to innovate. Second, copying is likely to be one-sided: low-end firms copy from high-end firms. With a fashion copyright, high-end firms could commit to their customers that they would not face quick

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<sup>7</sup> See Raustiala & Sprigman, *supra* note 1, at 1727–28.

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matching by low-end copyists. Rapid imitation limits the value that high-end designers can promise to their customers.

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