

THE LAWS OF DESIGN IN THE AGE OF MECHANICAL REPRODUCTION

ABSTRACT

This article provides a cultural and historical account of how various laws that relate to design developed, from the 17th through 20th centuries, through a study of their interactions with the furniture design industry. The article examines the complex development of intellectual property laws that apply to furniture design, and demonstrates how the furniture design craft (and later, industry) relied on different facets of the intellectual property system at different stages in its development. It demonstrates how the industry shifted intellectual property regimes as a response to the absence of protection within design rights for the modernist furniture style of the 20th century. From these studies, the article demonstrates how the design industry's claim for increased protection flows from the idea that there is a protectable 'aura of authenticity' around iconic designs — a claim that is largely indefensible and provides little basis for expanded legal protection.

I INTRODUCTION

The intellectual property laws relating to design are recondite and confusing in a multiplicity of ways.

Although there is a specific regime that is called 'design rights', every intellectual property regime can be, and has been, applied to various aspects of design. Many designed objects are covered by laws relating to copyright, trade mark, and patent, leading to a wide variety of different types and periods of protection. In a range of countries, objects as diverse as table lamps¹ and the jewellery designs of

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¹ *Mazer v Stein*, 347 US 201, 460 (1954).

Gucci, Cartier, and David Yurman have been held to be protected by copyright,² as has the Imperial Stormtrooper helmet.³ The Lego mini-figure is covered by trade mark registrations in Europe;⁴ just like the woven leather pattern of Bottega Veneta handbags,⁵ and the dripping wax seal on Maker's Mark bourbon in the US.⁶ Even the patent system is implicated: the design of Croc shoes⁷ and some elements of the iPhone interface are currently protected by US patents (to name but two).⁸

Aside from copyright, patent and trade mark laws, there is a specific intellectual property regime that is variously called (depending on the jurisdiction) 'design rights', 'registered design', or 'design law'.⁹ This regime typically seeks to protect the design of three-dimensional forms, or the application of ornamentation applied to these objects. Notwithstanding the *Hague Agreement Concerning the International Registration of Industrial Designs*,¹⁰ which sought in part to harmonise design protection, the law's application is remarkably idiosyncratic and many countries use very different approaches to the protection of design.¹¹ In Australia, the registered design rights

² *Yurman Studio Inc v Castaneda*, 591 F Supp 2d 471 (SD NY 2008).

³ In the US, at least, although not in the UK: *Lucasfilm Ltd v Ainsworth* [2012] 1 AC 208 (noting a 2006 decision in the District Court, Central District of California, finding for Lucasfilm against Ainsworth, but finding this judgment unenforceable in the UK, and holding that the helmet is not a sculpture for the purposes of c 48, s 4(2) of the *Copyright, Designs and Patents Act 1988* (UK)).

⁴ *Best-Lock (Europe) Ltd v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* (Court of Justice of the European Union, T-395/14, 16 June 2015).

⁵ *Re Bottega Veneta International Sarl* (Trademark Trial and Appeal Board, Case No 77219184, 30 September 2013).

⁶ *Maker's Mark Distillery Inc v Diageo North America Inc*, 679 F 3d 410 (6th Cir 2012).

⁷ US Patent No 6,993,858 (issued 23 May 2003); US Design Patent No D517,789 (issued 23 June 2003). See generally *Crocs Inc v International Trade Commission*, 598 F 3d 1294 (Fed Cir, 2010) (interpreting claim construction standards for design patents).

⁸ *Apple Inc v Samsung Electronics Co*, 678 F 3d 1314 (Fed Cir, 2012).

⁹ A definitional note: in this article we will talk about the multiple forms of intellectual property that may apply to design as the 'design laws' or the 'laws of design'. When we use the terms 'design law' or the 'law of design' (with a single 's') we refer to the single intellectual property regime called, depending on the jurisdiction, a 'design right', 'design patent', 'registered design', and so on. Design laws encompass the design right/registered designs, as well as copyright, patent, trade mark, unfair competition, and other intellectual property laws. We will make it clear when we are only referring to the narrow design law. Also, for the sake of simplicity, we will use the Anglo-Australian form of 'trade mark', rather than the North American form 'trademark', even when referring to US marks.

¹⁰ Opened for signature 6 November 1925, 74 LNTS 328 (entered into force 1 June 1928) ('*Hague Agreement*'); *The Geneva Act (1999) of the Hague Agreement Concerning the International Registration of Industrial Designs*, opened for signature 6 November 1925, 74 LNTS 328 (entered into force 1 June 1928).

¹¹ Indeed it is even more complicated than this. Various other international agreements provide protection for aspects of 'applied arts' and industrial designs, further complicating a maze of overlapping protections. See, eg, *Berne Convention for the*

system protects the visual appearance of a manufactured object, and the rights granted are only for five years, with a possible renewal for an additional five years.¹² These rights are granted only over new and distinctive designs, a much stricter requirement for protection than that of copyright law, whose threshold for protection — original authorship — is notoriously easy to reach.¹³ In the US, designs are part of patent law, and these rights are granted over novel ornamental features, industrially applied.¹⁴ Within Europe, the Designs Directive requires *sui generis* protection by member states for a much larger range of design aspects, notably ‘the appearance of the whole or a part of a product resulting from the features of, in particular, the lines, contours, colours, shape, texture and/or materials of the product’.¹⁵ However, in keeping with the approach taken in Australia, multiple forms of protection are also available within Europe. In England and Denmark, for example, protection of the copyright work underlying the design is also available.¹⁶ Finally, numerous jurisdictions allow for ‘cumulative’ protection for design, which means that protection of a given design by, say, copyright, does not preclude protection by a registered design, as well as a patent, trade marks, unfair competition laws, and so forth.

There is, then, no bright-line legal conception of what encompasses design laws or designs law.¹⁷ Yet, despite this — or perhaps because of it — design represents a significant front in the war over intellectual property protection.¹⁸ Design law has been the basis of huge and controversial damages wins in recent times,¹⁹ and calls

Protection of Literary and Artistic Works, opened for signature July 1967, 828 UNTS 222 (entered into force 29 January 1970), arts 2(7), 7(4); *Paris Convention for the Protection of Industrial Property*, opened for signature 20 March 1883, 828 UNTS 306 (entered into force 26 April 1970), art 5 *quinquies*; *Marrakesh Agreement Establishing the World Trade Organisation*, opened for signature 15 April 1994, 1867 UNTS 154 (entered into force 1 January 1995), annex 1C, arts 25, 26 (*‘Agreement on Trade-Related Aspects of Intellectual Property Rights’*).

¹² *Designs Act 2003* (Cth) s 5. For a fuller discussion of the Australian registered design rights system, see section II below.

¹³ *Ibid* s 15.

¹⁴ See generally Dan Hunter, *The Oxford Introductions to US Law: Intellectual Property* (Oxford University Press, 2012) ch 3.

¹⁵ *Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the Legal Protection of Designs* [1998] OJ L 289, art 1(a).

¹⁶ *Enterprise and Regulatory Reform Act 2013* (UK) c 24, s 74 (repealing *Copyright, Designs and Patents Act 1988* (UK) c 48, s 52); *Dan-Form ApS v Fritz Hansen A/S* U 2001.1715 2H.

¹⁷ For a discussion of the different meanings of ‘designs law’ and ‘design laws’, see above n 9.

¹⁸ For a discussion of the battles over intellectual property protection see generally Dan Hunter, ‘Culture War’ (2005) 83 *Texas Law Review* 1105.

¹⁹ See, eg, *Apple Inc v Samsung Electronics Co*, 678 F 3d 1314 (Fed Cir, 2012); *Apple Inc v Samsung Electronics Co*, 735 F 3d 1352 (Fed Cir, 2013).

for stronger protection for design and designers are common.²⁰ In Britain, the design lobby has recently managed the passage of legislation that protects designed objects as copyright works for the life of the author plus 70 years, rather than the shorter period of 25 years as obtained under the older design system.²¹ In the US, the Council of Fashion Designers of America has sought the introduction of sui generis fashion design protection for years, and continues to do so.²² At the international level, the Intellectual Property Chapter of the recently concluded *Trans-Pacific Partnership Agreement* bolsters design rights, and requires signatory states — including the US, Australia, Singapore, and others — to ‘ensure adequate and effective protection of industrial designs’ and to give consideration to signing and ratifying the *Hague Agreement*.²³ Closer to home, the Australian Authentic Design Alliance is seeking support for its petition to demand that

[t]he Commonwealth parliament amends Australia’s intellectual property laws, so as to give fairer treatment to authentic, quality, original design, give designers the same copyright protection for their creative output as given to architects and ensure that original designers are not pushed out of the market by legal, but unauthorised, cheaper replicas.²⁴

In the face of this complexity, what are we to make of these claims? Is there any principled way of concluding if we should expand or reduce protection? Further, is there any meaningful way that we can understand how we came to create such a complicated mess of laws relating to design, so that we might make some thoughtful progress towards reform? These questions take on additional significance when one

²⁰ See, eg, Anne Theodore Briggs, ‘Hung Out to Dry: Clothing Design Protection Pitfalls in United States Law’ (2001–02) 24 *Hastings Communications & Entertainment Law Journal* 169.

²¹ Enterprise and Regulatory Reform Act 2013 (UK) c 24, s 74 (repealing Copyright, Designs and Patents Act 1988 (UK) c 48, s 52). For regulatory impact, see UK Intellectual Property Office, ‘Copyright Protection for Designs’ (Impact Assessment, Department for Business, Innovation and Skills, 15 May 2012) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31970/12-866-copyright-protection-designs-impact-assessment.pdf>. For commentary see, eg, Dan Hunter, ‘New UK Copyright Law Will Do Nothing to Help Young Designers’, *The Conversation* (online), 1 October 2014 <<https://theconversation.com/new-uk-copyright-law-will-do-nothing-to-help-young-designers-32193>>.

²² See, eg, Innovative Designs Protection Act, S Res 3523, 112th Congress (2011–12); Innovative Design Protection and Piracy Prevention Act, HR Res 2511, 112th Congress (2011–12); Innovative Design Protection and Piracy Prevention Act, S Res 3728, 111th Congress (2009–10); Design Piracy Prohibition Act, HR Res 2033, 110th Congress (2007–08); Design Piracy Prohibition Act, S Res 1957, 110th Congress (2007–08); To amend title 17, United States Code, to provide protection for fashion design, HR Res 5055, 109th Congress (2005–06).

²³ *Trans-Pacific Partnership Agreement*, opened for signature 5 October 2015, [2016] ATNIF 2 (not yet in force), ch 18 s G arts 18.55, 18.56.

²⁴ Authentic Design Alliance, *Support Authentic Design*, Change.org <<https://www.change.org/p/support-authentic-design>>.

considers that, despite numerous reviews of the Australian design system, we still appear to be no closer to a consensus on how it should be reformed.²⁵

We seek to answer these questions through a cultural history of furniture design and its interaction with the intellectual property system. Legal histories explain the foundations of legal principles, and can make evident the path dependencies of the law. And there are some very fine histories of the development of design law in a number of jurisdictions. These histories typically focus on one country and demonstrate, for example, that cast iron stove patterns were fundamental for the development of the US design patent system, or that the linen and calico printing industry drove the early English design law, while silk printing was foundational to the French system.²⁶

This article takes a different approach, focusing instead on one design practice and industry: furniture design. By examining how the intellectual property system has been used over time by furniture designers, we trace the interaction between the craft, industry, practice, firms, and the law over 400 years. We show, for example, how the furniture design craft in the 17th and 18th centuries had no need for intellectual property protection, but by the 19th century the furniture industry came to rely on various intellectual property regimes, and how this changed dramatically in the 20th century. We use this cultural history of one industry for three interrelated aims: (1) to explain the development of intellectual property laws that relate to this industry; (2) to demonstrate in general how intellectual property laws develop in relation to trade interests; and (3) to develop an understanding of the basis of calls for increased protection for designs.

We begin in the first section by explaining the basics of Australian design rights, and briefly note the historical development of Australian design law. This section provides a short introduction to the doctrine and foundation of Australian design law, for those unfamiliar with it.

Then, in the second section we turn to a historical account of the development of furniture design as a practice, and how furniture-makers dealt with issues of copying and authenticity during its earliest stage of growth. We show that the furniture

²⁵ Law Reform Commission, *Designs*, Report No 74 (1995); Australian Government, Advisory Council on Intellectual Property, 'Review of the Designs System' (Final Report, March 2015) <https://www.ipaustralia.gov.au/sites/g/files/net856/f/acip_designs_final_report.pdf>; Australian Government, Productivity Commission, 'Intellectual Property Arrangements' (Draft Report, April 2016) 293–324 <<http://www.pc.gov.au/inquiries/current/intellectual-property/draft/intellectual-property-draft.pdf>>.

²⁶ See, eg, Kathy Bowrey, 'Art, Craft, Good Taste and Manufacturing: The Development of Intellectual Property Laws' (1997) 15(1) *Law in Context* 78, 86; Jason J Du Mont and Mark D Janis, 'The Origins of American Design Patent Protection' (2013) 88 *Indiana Law Journal* 837; Brad Sherman and Lionel Bently, *The Making of Modern Intellectual Property Law: The British Experience* (Cambridge University Press, 1999); David Goldenberg, 'The Long and Winding Road: A History of the Fight Over Industrial Design Protection in the United States' (1997–98) 45 *Journal of the Copyright Society of the USA* 21.

craft had no need for intellectual property protection during its artisanal-workshop period in the 17th through 19th centuries, even though intellectual property laws were developing rapidly as important mechanisms of commercial control. Instead, during this period an individual craftsman's reputation provided sufficient levels of protection, and as a result we see no calls at this time for the expansion of the intellectual property laws to cover furniture design. It was only as the furniture-making craft moved to an industrial model in the mid to late 19th century that intellectual property laws became significant for furniture-makers.

In the third section, we trace how this occurred. We show how various types of intellectual property grew in importance to furniture design, as the craft changed during the industrial era. We show how the new furniture design and manufacture industry deployed numerous aspects of intellectual property, including design rights, copyright, and patent law, to great success. Based on this evolution, one might have imagined that intellectual property would become ever more important to the furniture industry during the 20th century. Instead, the opposite is true. The rise of modernism and the machine aesthetic in the early 20th century meant that the industry was *less* able to rely on the intellectual property system than it had in the 19th century. We show how modernist styles and practices created tensions between furniture design and the disparate regimes of the intellectual property systems — tensions that resonate to this day.

In the final section, we return to the Australian law and examine the modern day relationship between furniture design and the intellectual property system. With the consolidation of modernism as the dominant aesthetic and the emergence of celebrity designers in the middle part of the century, the industry fixed upon a conception of authenticity that it has used as the basis for its intellectual property claims. These claims have become particularly loud as replica furniture designs have flooded the market. We examine those claims in the fourth section, and find them largely without any basis. Based on the work of Walter Benjamin, we demonstrate the lack of any protectable concept of authenticity that might ground the luxury furniture manufacturers' pleas for special consideration. We conclude by suggesting that attempts to reform the law on the basis of authenticity will therefore lead to incoherent legal principles.

II THE DEVELOPMENT OF AUSTRALIAN DESIGN LAW

In Australia, design registrations provide limited monopoly rights over the visual aspects of products that dwell in the grey zone between the artistic and the functional. Bottles, furniture, dresses, boats, bags, cutlery — objects that are 'designed' for some purpose, but whose visual characteristics might be an important selling point — are the targets of the design regime.²⁷

²⁷ J C Lahore, 'Art and Function in the Law of Copyright and Designs' (1971) 4(1) *Adelaide Law Review* 182, 182. Though Lahore points out that designs protection under the legislation can extend to 'the small invention or functional article which makes no claim to any aesthetic consideration, and where appearance may seem quite secondary to function'.

Under current legislation,²⁸ a ‘design’ is the overall appearance of a product, resulting from the ‘visual features’ that include the shape, configuration, pattern and ornamentation of the product.²⁹ Functionality of a product does not of itself preclude registration,³⁰ but it is the appearance — not the function — that is protected from unauthorised copying. Designs are registered in one or more classes, and a certified design confers, among other rights, the exclusive right to make a product that embodies an identical or substantially similar design in relation to that class or those classes.³¹ As noted above, the period of protection is relatively short in comparison to other intellectual property regimes: five years, with a possible five-year renewal.³²

Unlike most other areas of intellectual property, there is no clear principle that explains the need for the Australian design system, and the historical record helps little in this regard. The first Australian law was the *Designs Act 1906* (Cth), which was introduced for purely pragmatic, trade-related reasons: if the Commonwealth of Australia introduced design legislation, it would obtain reciprocal intellectual property protection in the UK and other members of the Commonwealth.³³

The Australian law was, unsurprisingly, almost identical to the English law of the time,³⁴ and the Bill for what would become the 1906 Act was described by the Senator introducing it as a simple ‘machinery measure’.³⁵ The Act was not accompanied by an explanatory memorandum, and though Hansard reveals some discussion on the finer points of the Bill before it was passed, there was no robust debate on the underlying necessity for this type of protection for designs. There was some debate about whether the Commonwealth should merely follow English law,³⁶ but in the end Parliament eschewed such high-level, principled discussion in favour of

²⁸ *Designs Act 2003* (Cth).

²⁹ *Ibid* s 7.

³⁰ *Ibid* s 7(2).

³¹ *Ibid* s 10.

³² *Ibid* s 5.

³³ Commonwealth, *Parliamentary Debates*, Senate, 20 June 1906, 394 (John Keating):

We have passed legislation relating to patents and trade marks, and it is open to us, on fulfilling certain conditions, to obtain in the United Kingdom and in other countries with which the United Kingdom is in convention, reciprocal advantages in respect to our patents and trade marks, by according to the people of the United Kingdom and the other countries referred to corresponding advantages and benefits in the Commonwealth. Before we can secure these, however, it is essential that the legislation we have passed on this subject shall be perfected by our providing adequate laws to cover the protection not only of patents and trade marks, but also of designs.

³⁴ *Patents, Designs and Trade Marks Act 1883*, 46 & 47 Vict, c 57.

³⁵ Commonwealth, *Parliamentary Debates*, Senate, 20 June 1906, 394 (John Keating).

³⁶ Commonwealth, *Parliamentary Debates*, Senate, 20 June 1906, 421: Senator Givens is quoted as saying ‘I do not want to have English law continually “chucked” at me’, to which Senator Keating replied, ‘Whether Senator Givens likes it or not, a law is none the worse for being the law of England’.

simple pragmatism, following the then-dominant approach of adopting English law unless there were strong reasons not to do so.³⁷

Design law in Australia therefore does not owe its existence to a clearly defined set of principles, nor does it come about in response to a problem in the law in Australia at the time of its introduction. Instead, Australian design law was simply imported from the mother country as a trade mechanism, in order to gain stronger international protection for Australians whose work might be exported to Britain.

But with this said, one can make some claims in favour of the design law. For example, if the *Designs Act 2003* (Cth) were repealed tomorrow, three-dimensional objects that are not ‘sculptures’ or ‘works of artistic craftsmanship’ would fall outside the definition of ‘artistic work’ under the *Copyright Act 1968* (Cth), and so would not attract copyright.³⁸ These objects would probably not be registrable as trade marks — although there is scope for registration of shapes as marks³⁹ — the shape must be used to distinguish the goods or services of one particular trader from another.⁴⁰ And patent protection would be unavailable for all but functionally

³⁷ Commonwealth, *Parliamentary Debates*, Senate, 20 June 1906, 406 (Sir Josiah Symon):

if there is some very good reason for [departure from the English law], let it be done. But unless that is so it is very unwise in a Bill of this description to depart from the English Act; because we want to have the benefit of the authorities and decisions in England on similar legislation, and also the benefit of any arrangements made internationally with regard to equivalent systems of copyright.

³⁸ However, drawings or plans on which they were based, if any, would have attracted copyright, only to have (most likely) lost it again under the ‘industrial application’ provisions in the *Copyright Act 1968* (Cth) ss 74–7A. The complexities of the copyright-designs overlap are of perennial interest to intellectual property scholars, and are the subject of many worthy articles. It is not central to the thesis and history presented here.

³⁹ *Trade Marks Act 1995* (Cth) s 6. For a discussion of the registration of shape marks in the Australian system see Julia Baird, ‘The Registrability of Functional Shape Marks’ (2002) 13 *Australian Intellectual Property Journal* 218; Jani McCutcheon, ‘Monopolised Product Shapes and Factual Distinctiveness under s 41(6) of the *Trade Marks Act 1995* (Cth)’ (2004) 15 *Australian Intellectual Property Journal* 18; Mark Davison, ‘Shape Trade Marks: The Role and Relevance of Functionality and Aesthetics in Determining their Registrability’ (2004) 15 *Australian Intellectual Property Journal* 106; Patricia Loughlan, ‘The Concept of Sign in Australian Trade Mark Law’ (2005) 16 *Australian Intellectual Property Journal* 95, 97; Amanda Scardamaglia and Mitchell Adams, ‘Registering Non-Traditional Signs as Trade Marks in Australia: A Retrospective’ (2016) 26 *Australian Intellectual Property Journal* 149.

⁴⁰ *Trade Marks Act 1995* (Cth) s 17. For a discussion of the overlap between the design and trade mark systems in Australia, see Megan Richardson, ‘Australian Intellectual Property Law: The Form/Function Dilemma: A Case Study at the Boundaries of Trade Mark and Design Law’ (2000) 7 *European Intellectual Property Review* 314; Amanda Scardamaglia, ‘Protecting Product Shapes and Features: Beyond Design and Trade Marks Australia’ (2012) 7 *Journal of Intellectual Property Law and Practice* 159.

innovative products.⁴¹ Whether one views this as an important or unimportant gap in intellectual property protection depends in large part on whether one makes their living from these kinds of objects.

We return to examine the moral, legal and political claims of precisely these people in the last section; but in order to understand the wider context of design we turn now to a broader cultural history of furniture design, and its interaction with the intellectual property system.

III FROM ATELIER TO FACTORY

Furniture has been produced for as long as humans have congregated together, but what we think of as furniture design can be traced back to the master craftsmen who emerged in the 17th century. The *maîtres ébénistes* of the 17th and 18th centuries emerged by providing royalty and the nobility with individualised pieces that only these classes could afford.⁴² During this period there was no connection between the furniture that the upper classes could afford and the types of chairs, tables, and dressers that lower classes adopted.⁴³

The separation between different social strata was self-evident and rigidly enforced, and this division was found in the actual furniture designs deemed suitable for each class. During this period the work that came from the ateliers of master craftsmen emphasised decorative features such as the general line of the object, the form of turned legs, or the technique of carving the ornamental features in the wood.⁴⁴ These ornamentations marked the furniture as belonging to the upper class, and these luxury features affirmed and reinforced the social status of the owner.

Although copying did not occur across the classes it did occur at the highest levels of the atelier, in the form of pattern books that circulated between regions and countries.⁴⁵ The master craftsmen adopted certain styles and localised them, and part of becoming a furniture craftsman, during what is called the ‘decorative era’, involved learning to copy accurately. Thus, from the earliest period of furniture design, the culture of reproduction and copying formed a significant part of the process of becoming a furniture-maker.

⁴¹ *Patents Act 1990* (Cth) s 18.

⁴² Charles Gandy and Susan Zimmermann-Stidham, *Contemporary Classics: Furniture of the Masters* (McGraw-Hill Companies, 1981) 1.

⁴³ Jean Baudrillard, *The System of Objects* (James Benedict trans, Verso, 1996) 137 [trans of: *Le Système des objets* (first published 1968)]:

In the 18th century there was simply no relationship between a ‘Louis XV’ table and a peasant’s table: there was an unbridgeable gulf between the two classes of object, just as there was between the two corresponding social classes. No single cultural system embraced them both.

⁴⁴ Gandy and Zimmermann-Stidham, above n 42, 2.

⁴⁵ *Ibid.*

During the 150 years from the 1700s, industrialisation gradually crept into the workshops and transformed furniture design in two connected ways. Firstly, manufacture moved slowly from the individual atelier of the master craftsman, to industrial production in a factory-like workshop; and secondly, the cheaper, manufactured furniture became available to the middle classes. By the end of the 17th century, the great *ébéniste* of Louis XIV's France, André Charle Boulle (1642–1732), had seen and understood the idea of division of labour, and had applied it in his atelier.⁴⁶ By 1808, the prominent Austrian master of Biedermeier-style furniture, Josef Dannhauser, employed as many as 350 furniture-makers doing specialist jobs on the workshop floor, and his factory had begun to offer its furniture for sale on the premises and in salesrooms nearby.⁴⁷ The increased output of industrialisation led to the ability to offer crafted furniture to classes other than royalty and nobility, and the middle class started to aspire to the furniture of their betters.

The artisanal workshops of the master craftsman of this early decorative period were, thus, poised on the brink of industrialisation. The start of the industrial age and the development of steam power in the 19th century quickly led to large-scale factory production of furniture. Industrialisation also drove mimicry and, as in areas like clothing and fashion, the middle class sought to emulate the fashions of its social superiors.⁴⁸ The period from 1850–1920 was an age of democratisation in furniture design, because these new factories could produce more and better furniture for all classes. It is not surprising that, with the increased output, the 'design' of the furniture became an important aspect of its marketing. A notable feature of this era was the emergence of heavy, machine-produced wooden furniture that mimicked the handmade furniture forms of the gentry and nobility. This furniture adopted the style of bespoke furniture that was fashionable in the upper class a few years previously, together with a range of marketable 'innovations', such as mechanical workings or veneers.⁴⁹

As in the ateliers of the *maîtres ébénistes*, copying was part of the culture of these new furniture factories. The nature of the copying differed from that of the earlier period, and reproduction of designs did not involve copying designs from other, more stylish, regions. Instead, copying was focused on recreating the forms of upper-class, bespoke furniture for a broader, middle-class audience.

⁴⁶ Karl Mang, *History of Modern Furniture* (John William Gabriel trans, Harry N Abrams, 1979) 7 [trans of: *Geschichte des modernen Möbels* (first published 1978)].

⁴⁷ *Ibid*; *The Biedermeier Style* (8 January 2016) Rupert Cavendish <<http://www.rupert-cavendish.co.uk/blog/the-biedermeier-style>>.

⁴⁸ See generally Philip Mansel, *Dressed to Rule: Royal and Court Costume from Louis XIV to Elizabeth II* (Yale University Press, 2008).

⁴⁹ 'The furniture industries of England and continental Europe dabbled in every major traditional style: Empire, Biedermeier, Louis XV, Gothic, and Oriental all cascaded onto the consumer market. Americans followed, with an added emphasis on mechanical gadgetry': Gandy and Zimmermann-Stidham, above n 42, 2.

Industrialisation changed the artisan's relationship to the design of the object, and this period in the late 19th century witnessed the first obvious proprietary claims in features of the design of furniture. Until the industrial era, the identity of the artisan was sufficient to attest to the quality of the object produced, and when a nobleman commissioned a great artisan to build them furniture there was no question where the piece came from. The great Thomas Chippendale may not have built every part of the bed that he delivered to William, Fifth Earl of Dumfries, in 1754, and he certainly did not seek intellectual property protection for it. But the piece was definitively a Chippendale and valued accordingly. Dumfries paid over £90 for the bed, a figure that would have easily built a home for one of his estate workers. The aura of the great artisan was the thing that mattered to sell the work, and it lives in the object still: the bed was offered for auction in 2007 with a reserve of £4 million.⁵⁰

But industrialisation meant commercial scale production in a factory, and this severed the bond between the artisan and the object. For all areas of what we think of these days as 'design', intellectual property took over from artisanal imprimatur, creating a new formal, legal system of signification and control.⁵¹ Each country that had a strong design-based industry began creating intellectual property systems that reflected the trade interests and commercial realities of the dominant design industries. So, in many countries, copyright and patent were pressed into service to protect the trade interests of designers. For example, from the mid-19th century, patent law was significant for certain aspects of furniture design, particularly when dealing with processes for industrial furniture production. For example, in 1841 Michael Thonet secured a patent in Austria for the method for bending wooden saplings to mass-produce the iconic Viennese café chairs, which sell to this day.⁵²

During this period (and even a little before it) various sui generis designs systems emerged in a range of countries, typically as a result of lobbying by particular industries, aggrieved at the perceived limitations of existing intellectual property systems. The 1711 Ordinance of the Consul of Lyons is usually said to have been the first intellectual property protection for any object of 'design'.⁵³ This law protected designs for the silk industry in Lyons, which was an important and vulnerable industry within France. The UK followed suit a little later, granting its first legislative

⁵⁰ Deyan Sudjic, *The Language of Things: Understanding the World of Desirable Objects* (W W Norton, 2008) 90.

⁵¹ A tiny number of significant furniture-makers retained the atelier model, for example George Nakashima. For further discussion, see section III below.

⁵² Sam Burchell, *A History of Modern Furniture: Celebrating Baker Furniture 100 Years of Fine Reproductions* (Harry N Abrams, 1991) 103; John Dunnigan, 'Michael Thonet: One Hundred and Fifty Years of Bentwood Furniture' in Fine Woodworking (eds), *Fine Woodworking on Bending Wood* (Taunton Press, 1985) 55.

⁵³ Frank D Prager, 'History of Intellectual Property: From 1545 to 1787' (1944) 26 *Journal of the Trademark and Patent Office Society* 711.

designs protection in 1787 for its commercially significant linen industry.⁵⁴ English copyright law existing at the time protected engravers and writers,⁵⁵ but not textile pattern-makers, who, angered by sales of copycat cloths,⁵⁶ lobbied Parliament for protection.⁵⁷ In what is usually seen as the first British design Act, the resulting *Calico Printers' Act 1787* conferred an automatic two-month period of monopoly protection on persons 'who shall invent, design, and print ... any new and original pattern ... for printing linens, cottons, calicos, or muslins'.⁵⁸

As the industrial age began, a range of European countries created or changed their intellectual property laws in response to newly-emerging trade interests in their design industries. Generally, this involved various extensions of domestic copyright laws. It is revealing to note that countries like Denmark and Sweden, places which we associate with modern design, did not have particularly strong design industries during this time. As a result their copyright laws were usually restricted to pure art — as opposed to applied art, which better fits the interests of designers of objects. It was not until a pan-European push in the early 20th century to allow copyright protection for applied arts⁵⁹ that Denmark amended its copyright protection to design objects.⁶⁰

A similar trade-driven legal evolution occurred in the US during the 19th century. Copyright and patent law were present at the founding of the new republic, but various new pressures emerged as the industrial era progressed, driving the introduction of new design-related laws. In the US, pressures from cast-iron stove manufacturers in the early 19th century led to the first formal mechanism for granting intellectual property

⁵⁴ *An Act for the Encouragement of the Arts of Designing and Printing Linens, Cottons, Callicoes, and Muslins, by Vesting the Properties Thereof in the Designers, Printers and Proprietors, for a Limited Time 1787*, 27 Geo 3, c 38 ('*Calico Printers' Act*'). The law was an extension of copyright, and so does not resemble what we would call design rights these days. The first recognisable 'design law' statute in the UK was probably the *Copyright of Designs Act 1839*, 2 Vict, c 13 and *Designs Registrations Act 1839*, 2 & 3 Vict c 17 that featured novelty requirements and a formal registration process.

⁵⁵ *Engravers' Act 1735*, 8 Geo 2, c 13. The protection lasted for 14 years from the date of the print.

⁵⁶ Bowrey, above n 26, 86.

⁵⁷ Ibid, quoting United Kingdom, Petition of 16 March 1787, Journal of the House of Commons (1787).

⁵⁸ Brad Sherman and Lionel Bently, *The Making of Modern Intellectual Property Law: The British Experience* (Cambridge University Press, 1999) 63.

⁵⁹ See generally Stina Teilman-Lock, 'The Fashion Designer as Author: The Case of the Danish T-Shirt' (2012) 28(4) *Design Issues* 29, 30.

⁶⁰ The first Danish law seeking to extend protection to design was the *Act on Authorial and Artistic Rights* of 1902, but in 1907 the Supreme Court struck down its application to a coffee pot design. It was not until 1908 that the law was amended to encompass applied arts: see Stina Teilman-Lock, 'What's Worth Copying is Worth Protecting: Applied Art and the Evolution of Danish Copyright Law' in Kjetil Fallan (ed), *Scandinavian Design: Alternative Histories* (Berg, 2012) 35, 37–38. See generally Uma Suthersanen, *Design Law in Europe* (Sweet & Maxwell, 2000).

rights to designers in 1842.⁶¹ As cast-iron manufacturers developed techniques to make their goods more intricate and refined — and thus more saleable — they grew more interested in preventing others from copying their designs. But the existing law of the time offered little in the way of protection. Manufacturers hoping to ward off would-be copiers could not rely on trade mark law, which lacked a formal federal regime at the time, and they could not reliably use common law unfair competition principles.⁶² Utility patents protected only articles embodying ‘novel’ and ‘non-obvious’ features⁶³ and these were thresholds that precluded most works of applied art or design from obtaining protection. This resulted in some awkward manoeuvres to fit these newly designed cast-iron stoves into the utility patent box. Meanwhile, copying was rampant because it was so easy to buy a competitor’s stove, disassemble it and use it as a matrix from which to make moulds for producing nearly identical products.⁶⁴ By 1842 stove designers had convinced Congress to enact a design patent statute,⁶⁵ thereby creating the dichotomy between utility and design patents that remains to this day; utility patents protect useful inventions, design patents protect ornamental features.

During the latter part of the 19th century both types of patents were utilised by US furniture designers. Design patents were, obviously, of value to ornamental features; but in the late 19th century, utility patents were pressed into service because mechanisation became extremely popular. During the second half of this period, the emphasis in chair design changed from a style that featured elaborate figuration on a static object, to a style that stressed articulated systems with springs, levers, rockers, and movement.⁶⁶ Mechanical aspects of the chairs could, of course, be the basis of a utility patent, and chair designs were the subject of numerous patent applications and grants. For example, Theodore J Palmer was granted a US patent in 1870 for an oscillating chair design where the chair arms were made of springs so that

[w]hen the chair is moved forwards or backwards ... a tension is produced in the spring arms, which tends to replace the back, and seat to the former position, thus facilitating the easy rocking of the chair.⁶⁷

Numerous variations on this type of spring-loaded system were patented, most notably by the prolific US chair inventor Franklin Chichester, who acquired patents for chairs

⁶¹ Du Mont and Janis, above n 26, 849–52; Carma Gorman, ‘Law as a Lens for Understanding Design’ (2014) 6(3) *Design and Culture* 269, 278.

⁶² Du Mont and Janis, above n 26, 849–52.

⁶³ Gorman, above n 61, 277–8.

⁶⁴ *Ibid* 278.

⁶⁵ Du Mont and Janis, above n 26, 849–52.

⁶⁶ Jenny Pynt and Joy Higgs, *A History of Seating 3000BC to 2000AD: Function Versus Aesthetics* (Cambria Press, 2010) 164. See generally Sigfried Giedion, *Mechanization Takes Command: A Contribution to Anonymous History* (Oxford University Press, 2nd ed, 1955).

⁶⁷ US Patent No 102,701 (issued 3 May 1870); Pynt and Higgs, above n 66, 164.

that rotated in any direction by means of springs under the seat,⁶⁸ and a series of spring- and lever-based chairs for the users of the newly invented ‘type-writer’ that were intended to reduce back pain, allow for easy raising of the seat height, reduce cost of production, and so on.⁶⁹ Various other patents were granted around this time for specialised chair designs for seamstresses,⁷⁰ barbers,⁷¹ and dentists.⁷² There were even patented designs for adjustable school desks.⁷³

By the end of the 19th century, then, intellectual property laws were central to the industrial furniture design system. The furniture industry of each country grew clever at exploiting various elements of regimes like patent, copyright, and registered designs, depending on the particular way that the law of that country had developed. One would have expected, at the turn of the century, that the industry would continue in similar vein. What no-one could have foretold was the way that a dominant design style would affect the entire industry’s use of the intellectual property system.

IV THE MACHINE AESTHETIC

The early 20th century witnessed the birth of what we now call ‘mid-century modern’ design, but which at the time was often called the ‘machine aesthetic’. This style complicated the reception of intellectual property into the furniture design system, rendering previous regimes unavailable to the manufacturers. As a result, the emergence of mid-century modern design practices spurred relentless intellectual property regime-shifting on the part of the furniture design industry, as we will see in the section that follows.

The pared-down forms of the machine aesthetic were visible in the Shaker style of the late 18th century, and Thonet’s bentwood chairs of the mid-19th century.⁷⁴ However modernist furniture, especially steel modernist furniture, came to be popularised in the early part of the 20th century by three connected design movements, the Wiener Werkstätte in Austria, De Stijl in the Netherlands, and the Bauhaus in Germany. Members of these new modernist movements not only used machines in the production of their work, but used the machine as the aesthetic that directed

⁶⁸ US Patent No 333,393 (issued 29 December 1885); Pynt and Higgs, above n 66, 166.

⁶⁹ US Patent No 574,602 (issued 5 January 1897); US Patent No 659,811 (issued 16 October 1900); US Patent No 647,178 (issued 10 April 1900); US Patent No 712,495 (issued 4 November 1902).

⁷⁰ US Patent No 114,532 (issued 9 May 1871); US Patent No 200,508 (issued 19 February 1878).

⁷¹ US Patent No 83,644 (issued 3 November 1868); US Patent No 598,877 (issued 8 February 1898).

⁷² *Ibid.*

⁷³ US Patent No 556,565 (issued 17 March 1896); US Patent No 483,265 (issued 27 September 1892).

⁷⁴ Gandy and Zimmermann-Stidham, above n 42, 8.

the form of their work.⁷⁵ The Wiener Werkstätte was particularly notable for its use of abstract geometrical forms, while De Stijl and the Bauhaus were known for the rigor of their style, an aesthetic that reduced ornamentation to a minimum and took its cue from the machines used to manufacture the work.⁷⁶

Emerging from the factory, we should not be surprised that the modernist furniture movement relied on the protections of the intellectual property system. Modernism was deeply connected with the changes in the means of furniture production, and the iconic designers of this time — Le Corbusier, Marcel Breuer, Ludwig Mies van der Rohe, Gerrit Rietveld, and others — were reliant on factories for the commercial fabrication of their designs. Modernist furniture was made in a factory, was inspired in its style by the factory, and was made to look like it was made in a factory. The commercial reality of factory production meant that there was a formal and substantive commercial separation between the furniture designer and the manufacturer — the manufacturer and designer were sometimes different corporate entities, and in any event a ‘Breuer chair’ or a ‘Le Corbusier chaise longue’ was no longer produced in a workshop that was controlled by the designer. Unlike earlier ateliers, the commercial realities of fabrication meant that manufacturers had to find a legal means of enforcing exclusivity over commercially significant designs in order to recoup the costs of tooling and manufacture. In this they were utterly different from the great craftsmen of earlier periods, such as Thomas Chippendale, George Hepplewhite, and Thomas Sheraton, the ‘big three’ of the 18th century. These craftsmen certainly controlled large workshops and commanded numerous artisans, but they operated without the need for intellectual property because their furniture could only come from their workshop.

This was not true with modernist furniture design in the time of the Bauhaus, de Stijl or the Werkstätte; or at least it wasn’t true in quite the same way. As we discuss below, in time we would see the emergence of the celebrity designer and the iconic design, a development that creates a similar aura around modernist furniture design as is found in the furniture of artisans of earlier eras. But during the early development of modernism, designers were not celebrities and the industry was confronted with two intellectual property conundrums. First, manufacturers had to develop a way of using intellectual property to limit the dissemination of the designs, in order to pay for the costs of tooling and to generate profit. Second, modernism’s stripped-back machine aesthetic removed many of the ornamental features and unusual mechanical features that previously had been the subject of the designer’s craft, and which were more readily the subject of legal protection. Ornamentation applied to a surface will often be protected by copyright, and mechanical innovations will often satisfy the requirements of patent law. However furniture designed according to the famous

⁷⁵ Ibid 6–7.

⁷⁶ For a useful discussion of the movement from individualised craft to machine technology in the Bauhaus, see T’ai Smith, ‘Anonymous Textiles, Patented Domains: The Invention (and Death) of an Author’ (2008) 67(2) *Art Journal* 54, 65; Gandy and Zimmermann-Stidham, above n 42, 7.

diktat of the Bauhaus — ‘form follows function’⁷⁷ — will likely possess neither copyright ornamentation nor patentable ‘innovations’.⁷⁸ How were designers of this period to handle the competing pressures of commercial control with their desire for an uncompromising aesthetic?

What emerged was an extremely complicated dynamic, one that can be seen within design laws to this day. An instructive set of cases, unearthed and examined by Otakar Máčel, demonstrates the complexity of the use of intellectual property to control and protect early modernist design.⁷⁹ The cases involve the design of the cantilever chair, and they implicated — as litigants or witnesses — some of the most recognisable names in modernist furniture design: Mart Stam, Mies van der Rohe, Walter Gropius, and Breuer.⁸⁰ The issue was ultimately who held various intellectual property rights over the form of the chair, and thus which of a number of competing European licensees held the right to reproduce various models of the chair. In two disputes that ran at almost the same time in Germany, courts were asked to consider whether the cantilever chair could be protected by patent, and whether copyright subsisted in it. Strangely, the actions involved different parties, and the two intellectual property regimes were considered entirely separately from each other. One court held that the first creator of the chair was Stam and the artistic form of cantilever chairs was something that was protected by copyright.⁸¹ Another court held that Mies van der Rohe held a valid patent over the technical features of cantilever chairs

⁷⁷ Walter Gropius, the founding head of the Bauhaus, is often credited with the aphorism ‘form follows function’, using it as a statement about minimalist design. This phrase was however used earlier in a slightly different sense by the 19th century American architect, Louis Sullivan: see Graeme B Dinwoodie, ‘Federalized Functionalism: The Future of Design Protection in the European Union’ (1996) 24 *American Intellectual Property Law Association Quarterly Journal* 611, 627 n 39.

⁷⁸ However, it may be that the mismatch between modernism and design patents in the US led to certain features of modernist design. Gorman suggests that modernist theorists like Edgar J Kaufmann Jr emphasised technological novelty because utility patents could protect this: see Gorman, above n 61, 282.

⁷⁹ Otakar Máčel, ‘Avantgarde Design and the Law: Litigation Over the Cantilever Chair’ (1990) 3(2–3) *Journal of Design History* 125, 130–43. See also Otakar Máčel, ‘From Mass Production to Design Classic: Mies van der Rohe’s Metal Furniture’ in Alexander von Vegesack and Matthias Kries (eds), *Mies van der Rohe: Architecture and Design in Stuttgart, Barcelona, Brno* (Skira, 1998) 18, 18–64; Carl Magnusson, ‘Mies’s design in production at Knoll’ in Alexander von Vegesack and Matthias Kries (eds), *Mies van der Rohe: Architecture and Design in Stuttgart, Barcelona, Brno* (Skira, 1998) 68, 68–73.

⁸⁰ Smith notes also that some of the Bauhaus designers took out patents on some of their designs — Gropius patented his Theaterbau design in 1929, Breuer patented 12 chairs designs between 1928–37 (one of which was the subject of the dispute mentioned in the text), and Mies van der Rohe patented eight chair and furniture designs during or shortly after his tenure at the Bauhaus (one of which was in dispute here): Smith, above n 76, 56 n 6.

⁸¹ Máčel, above n 79, 125–37.

that could spring back and forth, since the earliest versions of the chair were not sprung.⁸²

Odd though it is, the split control of patent and copyright interests is not the strangest aspect of the cantilever chair case. The licensee of Stam's copyright interests, emboldened by the win in Germany, went on to file cases all over Europe seeking to gain monopolistic control over the form of the cantilever chair. The licensee was successful in the Netherlands, Switzerland, and Czechoslovakia on the same basis as his win in the German courts;⁸³ but he lost in both Sweden and Denmark on the basis that chairs of this sort were merely technical innovations and not worthy of copyright protection.⁸⁴

The cantilever chair cases show the multiple overlapping rights, inconsistent jurisdictional approaches, and the out-and-out strangeness that bedevil design law to this day. It is remarkable that, within Germany alone, two different intellectual property regimes could award ownership rights over the same object to different people, and it is equally surprising that one regime — copyright — could come to such different conclusions about protection and control in countries as closely linked by legal tradition as those of Northern Europe. Perhaps most unusual of all is the observation that because of the outcome of these cases and the length of copyright protection, in Germany no-one may legally make or import a variant of the cantilever chair without the permission of Stam's licensee until 2056, seventy years after Stam's death.⁸⁵

In time, a number of European countries with significant trade interests in furniture design came to resemble the German approach. For example, the rise of the Scandinavian modern furniture movement in the second half of the 20th century led to greater acceptance of the artistic merits of furniture design in Danish courts.⁸⁶ Although Scandinavian courts were often suspicious of protecting designs during the early part of the 20th century, by 1960, 'The Chair', Hans Wegner's iconic design, was a significant enough artistic work for the High Court of Eastern Denmark to hold it covered by copyright protection.⁸⁷ And, after a change in the *Danish Copyright Act*,⁸⁸

⁸² Ibid 137–40.

⁸³ Ibid 135–7.

⁸⁴ '[T]he Danish Supreme Court did not consider the chairs to be "original artistic works destined to be prototypes for industrial art" according to the definition of design as objects of artistic copyright according to Danish copyright law': Máčel, above n 79, 135; Teilmann-Lock, 'What's Worth Copying is Worth Protecting', above n 60, 6.

⁸⁵ Cf Máčel, above n 79, 125, who suggests that the prohibition will lapse in 2036, 50 years after Stam's death (Stam died 21 February 1986).

⁸⁶ This was also coupled with the rise of a pan-European desire to protect applied arts: see Stina Teilmann-Lock, 'The PH Lamp: An Intellectual Property Biography of a Danish Design Icon' (unpublished, copy on file with author) 5.

⁸⁷ *Snedkermester Johannes Hansen v Firmaet I Thorballs Eftf ved Viggo Johansen* U 1960.483 Ø; Teilmann-Lock, 'The Fashion Designer as Author', above n 59, 35; Teilmann-Lock, 'What's Worth Copying is Worth Protecting', above n 60, 43–5.

⁸⁸ Lov nr 158 af 31.5.1961 om ophavsretten til litterære og kunstneriske værker.

later courts found copyright in various furniture designs, such as Arne Jacobsen's well-known 'Ant Chair' and the series of modular high chairs for children produced by Stokke.⁸⁹

This kind of regime-shifting — abandoning design rights for some other more hospitable intellectual property regime — is characteristic of the strategies of furniture manufacturers in the latter part of the 20th century. It has been particularly notable in the US because the design patent system is, as one commentator suggested, 'singularly ill-equipped to deal with functionalist modern design'.⁹⁰ In the US a design patent may be obtained for a new, original and non-obvious ornamental design for an article of manufacture, and protection lasts for fourteen years. These requirements — especially the novelty and ornamentation stipulations — are a poor fit with modernist furniture design. Copyright may apply to any design, but its availability is significantly restricted by the 'separability test', which says that the design elements of a useful article are protected by copyright 'only if, and only to the extent that, such design incorporates pictorial, graphic or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article'.⁹¹ Few styles of furniture designs qualify, and even those that do are likely to be overturned if challenged.

This has led to a strange regime shift in the approach of high-end furniture manufacturers, away from *both* design law and copyright law, and into trade mark and trade dress. Knoll provides a good example of this strategy. The company licenced the design of the Butterfly chair from its Argentinian designers, Antonio Bonet, Juan Kurchan, and Jorge Ferrari-Hardoy in the late 1940s. But the company abandoned production of the chair in 1950 after other manufacturers produced cheaper knock-off versions. Knoll had paid for the license to manufacture the chair, but because it was a 'useful article' it could not be copyrighted in the US.⁹² The chair also did not have any ornamental features that could have been protected by a design patent, and was too similar to an earlier chair style to be eligible for a utility patent. Knoll was forced to use what was at the time a bizarre strategy: it argued that the chair was a shape mark and the knock-offs were causing 'source confusion' among customers.⁹³ Knoll was ultimately successful in this claim, but the terms of the judgment did not provide the hoped-for level of protection. The judge ordered that competitors prominently label that their products did come from Knoll — thus to avoid consumer confusion — but did not preclude them from selling their competing versions.⁹⁴

In time this sort of strategy has led to a surge in shape registrations within the US system. Cassina has, for example, registered as trade marks on the US Principal

⁸⁹ Teilmann-Lock, 'What's Worth Copying is Worth Protecting', above n 60, 10.

⁹⁰ Gorman, above n 61, 281–2.

⁹¹ *Copyright Act*, 17 USC §101 (definition of 'pictorial, graphic and sculptural work') (1947).

⁹² Gorman, above n 61, 282.

⁹³ *Knoll Associates v Burtman Ornamental Iron Works*, 10 FRD 627 (D Mass, 1950).

⁹⁴ Gorman, above n 61, 282.

Register the outline of the ‘Fauteuil Grand Confort’ (commonly known as the ‘LC2’) and the ‘Chaise Longue à Reglage Continu’ (the ‘LC4’) by Le Corbusier, Jeanneret, and Perriand.⁹⁵ The American manufacturer Herman Miller has registrations for Charles and Ray Eames’ recliner and the Noguchi coffee table, amongst others, and Knoll has shape registrations for all of Mies van der Rohe’s ‘Barcelona’ collection.⁹⁶

These types of registrations are useful in a number of ways. They may be the basis for a customs seizure under some circumstances, and of course lawyers for the high-end furniture manufacturers can cite the registrations in a cease and desist letter to replica manufacturers.⁹⁷ This may scare off some retailers, but it is not clear how effective these registrations will be if the mark owners take the matter further and bring an infringement suit against replica furniture retailers. Some have argued that these shapes are so well known and have been unenforced for so long that they have fallen into the public domain,⁹⁸ and, as we explore in the next section, the high-end manufacturers’ claims of ownership are built on shaky foundations.

Nonetheless, the luxury manufacturers have had some successes with this strategy. In 2006, in *Herman Miller Inc v A Studio srl*⁹⁹ the authorised manufacturer of the Eames recliner had registered a mark for the shape of the chair and its accompanying ottoman. It sued A Studio, the Italian maker of unauthorised versions of the chair, alleging trade mark infringement of the shape. The Italian company sought to have the matter dismissed on the basis that producing chairs that happened to have the same silhouette as the registered mark was descriptive fair use.¹⁰⁰ This is a standard defence in US law,¹⁰¹ reserved for situations where a plaintiff has a registration for a weak mark which has acquired distinctiveness sufficient to register, but which the defendant must use in order to describe its own products. For example a trade mark of pine tree shape of a car air freshener was held not to have been infringed by a competitor who released a pine scented air freshener that also was in the shape of

⁹⁵ US Trade Mark No 4,266,765 (registered January 1 2013): ‘a mark consisting “of a three-dimensional configuration of a chair” in respect of arm chairs, bar stools, bean bag chairs, ottomans, rocking chairs and high chairs, inter alia’.

⁹⁶ See Ernest Beck, ‘Knocking Off the Knockoffs’, *New York Times* (New York), 28 October 2004, 8.

⁹⁷ And of course, unlike every other type of intellectual property protection, trade mark protection is renewable to the end of time, as long as the mark continues to be used and the modest renewal fee is paid; so these benefits can continue indefinitely.

⁹⁸ Beck, above n 96, 8:

To win a judgment, Knoll’s lawyers would have to convince a jury that there is a ‘likelihood of confusion’ in the mind of the consumer ... And to the undiscerning eye, often the cheap reproductions are quite similar to the originals ... David Harrison, a trademark lawyer at Roden & Livingston ... argues that after 75 years the design of the Barcelona chair is in the public domain. Knoll can do little more than ‘make a lot of noise’.

⁹⁹ 79 USPQ 2d 1905 (WD Mich 2006) (*Studio*).

¹⁰⁰ *Ibid.*

¹⁰¹ 15 USC § 1115(b)(4) (2006).

a tree. This use was descriptive of the smell of the freshener. In the *Studio* case, the defendant was held to be unable to rely on this defence because the mark did not describe the defendant's product, it *was* the defendant's product. The court could not make the descriptive fair use requirements fit the situation of reproduction of furniture design, and so refused the defendant's motion for summary judgment. However, this and other similar replica cases have generally not proceeded successfully at trial for the manufacturers, and shape trade marks in the US have not profoundly changed the landscape of furniture design protection.

This type of regime shift into trade mark is not a complete panacea for high-end manufacturers. In general, furniture shapes have not been strongly protected by either the trade mark or design regimes — an observation borne out by the proliferation of replica retailers who have entered the Australian marketplace over the last 10 years.¹⁰² High-end manufacturers have been understandably unhappy with this development, and have sought to make life as difficult as possible for the replica sellers. Herman Miller sued reproduction retailer Matt Blatt over the same Eames recliner as was in issue in the *Studio* case. However, in the absence of patent or trade mark protection, Herman Miller was forced to use passing off and consumer protection laws to seek to regulate the defendant's use.¹⁰³ Since these laws require evidence of consumer confusion for the plaintiff to prevail, Herman Miller was unsuccessful against Matt Blatt, as the latter's product was clearly designated as a replica product.¹⁰⁴ As a result

¹⁰² Shapes are protectable under the Australian trade mark system, since the *Trade Marks Act 1995* (Cth) amended the definition of a trade mark in s 6 to include a range of 'non-traditional' signs, such as shapes, sounds, colours and scents. Since the *Trade Marks Act 1995* (Cth) came into effect in 1996, there have been 975 registrations for shape marks, mostly for bottles of alcohol or perfume, and confectionery: see Scardamaglia and Adams, above n 39, 157.

¹⁰³ Australian Design Review, *Real vs Replica: Herman Miller Reaches Settlement with Matt Blatt* (3 November 2011) <<http://www.australiandesignreview.com/news/12808-real-vs-replica-herman-miller-reaches-settlement-with-matt-blatt>>.

¹⁰⁴ This outcome is consistent with the decision 30 years ago in *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191. In that case, the High Court concluded that a consumer would not confuse Parkdale's cheap replica chairs with Puxu's expensive 'Contour' line of chairs, because of the difference in cost and quality, and the care that consumers would take with this kind of purchase. As a result, it has been commonly accepted that a commercial rival could copy someone else's product with impunity, unless the product was protected by a registered design, and as long as the replica product was clearly marked with the rival's brand. The outcome of these cases are, however, highly fact dependent and it is hard to create bright-line rules about when something will infringe the common law 'passing off' action, or its statutory counterpart. Thus, in *Peter Bodum A/S v DKSH Australia Pty Ltd* (2011) 280 ALR 639, the Full Federal Court concluded that a replica producer of coffee plungers that resembled the well-known Bodum Chambord cafetière had infringed ss 52 and 53 of the *Trade Practices Act* (1974) (Cth) (now ss 18 and 29 of the *Australian Consumer Law*, contained in Schedule 2 of the *Competition and Consumer Act 2010* (Cth)) because of the possibility of consumer confusion as to source. See generally Peter Knight, "'Secondary Signification' in Product Design Gets a New Lease on Life in Australia' (2012) 104 *Trademark Reporter* 1014.

of this and similar setbacks, the manufacturers and retailers of luxury products have formed a trade group, the Authentic Design Alliance, seeking stronger protection of the designs and the destruction of the replica trade in Australia.¹⁰⁵ In this, they are copying their English counterparts who successfully lobbied for an expansion of the copyright law to include mass-produced artistic works, which can include furniture designs for objects like chairs, lamps and sofas.¹⁰⁶ This kind of regime-shifting is, of course, the gold standard for industries and a preferable solution to dealing with incremental expansion via case law. But of course this solution is only available where the industry lobby is powerful, well-funded, well-organised and able to convince legislators of the merits of their position.

V THE LAW OF FURNITURE DESIGN IN THE AGE OF MECHANICAL REPRODUCTION

As we saw in the previous section, the rise of modernist design practices gave rise to certain sorts of strategic behaviours on the part of the luxury furniture industry. It shifted its intellectual property strategy towards the use of trade mark and trade dress, and it grew increasingly restive at a perceived lack of protection from knock-offs. This latter concern has become extremely significant within the industry during the latter part of the 20th century, with the emergence of replica furniture manufacturers — mostly based in China — who produce similar but cheap versions of expensive furniture designs created initially by name-brand designers like Mies van der Rohe, the Eames, or Le Corbusier. Luxury manufacturers seek to stop replica manufacturers and retailers, claiming these downmarket versions of the iconic designs are unlicensed versions, and because they are inferior. And almost constantly, the luxury manufacturers call for increased protection to shut down these replica designs.

This history of furniture design goes some way to explaining why luxury manufacturers chafe against what they perceive as an unfair level of protection. Their resort to constant regime-shifting and lobbying is not just naked self-interest, it reflects a mismatch in how the artisans see their work and what the law protects. Design law generally protects original ornamental features of the design, but as we saw above, none of these aspects are ones that reflect the design and manufacture processes of modernist furniture. And most other intellectual property laws do not protect furniture design particularly strongly. So high quality manufacturers understandably, if unjustifiably, feel short-changed.

There is a theoretical concern at the heart of luxury manufacturers' claims for stronger protection. They seek protection for their mere connection to the celebrity designers of the modernist era, and in doing so they seek to imbue their products with an aura

¹⁰⁵ Authentic Design Alliance, 'ADA Press Release' (Press Release, ADA 01, 28 May 2016) 1 <https://indd.adobe.com/view/publications/f477f23a-c664-45c4-ab0c-f9d1004853c8/1/publication-web-resources/pdf/ADA_PRESS_RELEASE.pdf>.

¹⁰⁶ *Enterprise and Regulatory Reform Act 2013* (UK) c 24, s 74.

of authenticity that is lacking in replica designs. But modern luxury furniture manufacturers suffer from the ‘aura’ problem that was first diagnosed by Walter Benjamin in ‘The Work of Art in the Age of Mechanical Reproduction’.¹⁰⁷ Published in 1936, Benjamin was responding to the time when artistic practice, like design practice, was moving into the machine age. Although a small number of artistic forms like bronze sculpture or engravings had long been based around reproducibility, the speed of creation and increasing significance of photography and cinematography during the early part of the 20th century challenged the concept of an artistic work as a single, unique object hewn from the artist’s hand.¹⁰⁸ Benjamin noted that the first casualty in this new artistic practice was the ‘aura’ of the artistic object; that is, the unique, authentic expression. He suggested that ‘[t]he presence of the original is the prerequisite to the concept of authenticity’¹⁰⁹ and since there was no ‘original’ in cinema or photography, the artistic aura of authenticity was destroyed.¹¹⁰ Benjamin’s objective was to connect art and politics, especially as a way to critique fascism and bolster communist practice,¹¹¹ and although these concerns have largely withered, his lasting legacy has been to demonstrate how new technologies of reproduction destroyed the artist’s dependence on aura and ritual.¹¹²

Although modernist furniture manufacturers came of age within the era of mechanical production and reproduction, they still cling to the idea of authenticity and originality that Benjamin demolished 80 years ago. Lobbying efforts and marketing by luxury manufacturers use terms like ‘authentic’, and ‘original’ to describe their products, along with other terms like ‘real’ or ‘genuine’ — in contrast to words

¹⁰⁷ Walter Benjamin, ‘The Work of Art in the Age of Mechanical Reproduction’ in Hannah Arendt (ed), *Illuminations* (Harry Zohn trans, Schocken, 1969) 217, 217–51 [trans of: *Illuminationen* (first published 1955)].

¹⁰⁸ It is revealing that during the early commercial phase of its development in the 19th century, lithography was considered vulgar because of its ability to mass-produce the image. John Ruskin, writing in 1898, said that he would not let lithographic works into his house because they were cheap and crudely drawn, and degraded the quality of artistic expression: see John Ruskin, *Elements of Drawing* (George Allen, 6th ed, 1898) 347.

¹⁰⁹ *Ibid.*

¹¹⁰ Cf Stina Teilman-Lock, *The Object of Copyright: A Conceptual History of Originals and Copies in Art, Literature and Design* (London: Routledge, 2015), who reads Benjamin’s concept of aura differently. For Teilman-Lock, the concept of authenticity and mechanical reproduction exist in a dialectic relation. She argues that the work of art gains an aura in the middle of the 19th century precisely because mechanical reproductions begin to circulate, and prior to the era of reproduction the concept of an aura could not have existed.

¹¹¹ Richard Kazis, ‘Benjamin’s Age of Mechanical Reproduction’ (1977) 15 *Jump Cut* 23.

¹¹² Benjamin, above n 107, 224: ‘For the first time in world history, mechanical reproduction emancipates the work of art from its parasitical dependence on ritual.’

like ‘fake’, ‘replica’ or ‘knock-off’ which they reserve for the lower quality manufacturers.¹¹³ Gorman notes:

Retailers such as Design Within Reach tout the ‘authenticity’ of these licensed designs [ie the mid-century modernist designs from Europe] in their advertisements, as if suggesting that designs that are still under copyright are superior to furnishings from the same era that are in the public domain.¹¹⁴

In championing a distinction between ‘real’ versus ‘replica’, or ‘authentic’ versus ‘knockoff’, the high-end manufacturers suggest that their licensed designs have an aura of authenticity that differs from the makers of unlicensed versions.¹¹⁵ In doing so they are harking back to the grand, decorative age of furniture production, the age of the ateliers and *ébénistes* of the period before the industrial era. They liken the celebrity designer to the great artisans of that time, and claim an ineffable aura of quality and authenticity by virtue of this association.

This claim does not withstand scrutiny, for a range of reasons. First, as we have seen above, the industrial production of modernist furniture does not resemble artisanal furniture production, even for iconic designs and designers. Celebrity designers almost never oversaw production, and these days the majority of them are dead anyway. Further, high-end furniture manufacturers cannot claim an aura of authenticity from the quality of their production, since the materials and the production techniques used by luxury furniture manufacturers are no more ‘real’ or ‘authentic’ than those used by the makers of unlicensed versions, even if the quality of their steel or wood or leather might well be higher than their lower-rent competitors.

Where, then, might this aura of authenticity come from? The only remaining basis is in the luxury furniture manufacturers’ connection with the iconic designers who first conceived of the product. This could come directly via a licence from the designer (or his/her estate) or from some claimed connection with the ‘original’ design. But for

¹¹³ Authentic Design Alliance, ‘ADA Press Release’ (Press Release, ADA 01, 28 May 2016) 1 <https://indd.adobe.com/view/publications/f477f23a-c664-45c4-ab0c-f9d1004853c8/1/publication-web-resources/pdf/ADA_PRESS_RELEASE.pdf>. These terms are also common in the typical discourse about ‘replica’ furniture: see Rebecca Smithers, ‘Buy Your Design Classic Now — It’s About To Rocket In Price’, *The Guardian* (online), 29 July 2016 <<https://www.theguardian.com/money/2016/jul/29/buy-design-classic-now-about-to-rocket-in-price-copyright-law>>.

¹¹⁴ Gorman, above n 61, 283. The emphasis on copyright here comes from Gorman’s focus on the European scene.

¹¹⁵ It is worth noting in passing that the concept of ‘licence’ here is a largely empty rubric. It is only necessary to license a design if that design is protected by some intellectual property right. It is not generally necessary to license a furniture design to produce it; but it is in the interest of luxury manufacturers like Knoll or Herman Miller, as well as the estates of the celebrity designers, to enter into ‘licensing agreements’ in order to say, truthfully, that their product is for instance a ‘genuine, licensed Eames’, or ‘Le Corbu’.

a number of reasons it is hard to reconcile these claims of an aura of authenticity with the actual practice of modernist design.

First, every single important icon of furniture design went through multiple iterations to get to the point where it became the stable form that we recognise today. Take, for example, the Barcelona chair, designed by Mies van der Rohe in 1929 for the German Pavilion at the International Exhibition in Barcelona. It has changed form quite dramatically in the period since its initial design:

The face of the original cushions consisted of one rectangular piece of pigskin which was buttoned and tufted ... The stuffing, originally specified to be traditional cotton, horsehair, and burlap, was later changed to more durable foam rubber. Initially, chrome-plated flat-bar steel was used, although in the United States production, it has been replaced with more durable stainless steel.¹¹⁶

In 1977, Knoll reintroduced a version that was quilted in nine rows and rested on leather or rubber straps. The matching ottoman has had a similarly storied set of changes, changing its form and structure and its constituent parts during its history of manufacture.¹¹⁷ The same can be said of a range of other similarly iconic chairs, such as the LC4 chaise longue designed by Perriand, Le Corbusier, and Jeanneret¹¹⁸ or the 'S shaped' plastic chair designed by Verner Panton.¹¹⁹

¹¹⁶ Gandy and Zimmermann-Stidham, above n 42, 56.

¹¹⁷ *Ibid* 56:

Like most pieces of furniture with a more than fifty-year history, the Barcelona Ottoman has undergone several changes and adaptations since its debut in 1929. The first change occurred in 1930, when the Ottoman was once again used by Mies in the Tugendhat residence in Brno. Photographs of the living room of the house show a more defined upholstery due to the introduction of welting. Subsequent versions retained this feature. As on most steel furniture from this period, chrome plating replaced the original nickel plating. Today, the frames of the US models of the ottoman and the chair are made of polished stainless steel.

¹¹⁸ *Ibid* 73–5:

Many variations were attempted on the design, materials, and finishes of the original version of the chaise longue. In the early 1930s, both Thonet (the first manufacturer of Le Corbusier's furniture) and Charlotte Perriand substituted laminated wood, solid wood, or bamboo for the original metal. Changes in the general proportions and structure of the chaise longue resulted from these modifications. Today's chaise longue, reintroduced in 1965 by the Milanese manufacturer Cassina, is available with the original chrome or lacquer finish on the tubular steel lounge. However, a black enameled iron base has replaced the original two-toned base of blue-gray stretchers and dark gray legs.

¹¹⁹ The licensed version of the chair has been produced using five different plastics since 1963, cold-moulded, fibre-glass reinforced polyester resin, painted polyurethane rigid foam, coloured thermoplastic polystyrene, painted polyurethane rigid foam, and coloured polypropylene: see Verner Panton Furniture, *Panton Chair* <<http://www.verner-panton.com/furniture/archive/7/>>.

There is, therefore, no stable, original design from which the luxury manufacturers can trace their lineage of 'authenticity'. Further, many of these changes were not created by the iconic designers, but by engineers, steelworkers, lowly draftspeople, and even salespeople in the factories where these designs evolved. No manufacturer can draw a clear, unimpeded lineage back to, say, the Eames or Mies van der Rohe or Breuer, to found their claims to authenticity.

There is a second reason to be wary of the claimed aura of authenticity in furniture design. The aura dissolves when one considers the licensing history of these designs. There is almost no iconic design that has been continuously produced for the life of the design. A surprising number of designs that we think of as 'classics' were dropped by their manufacturer-licensees during the 1960s, '70s and '80s, until mid-century modernist furniture came back into style in the mid-1990s. Thus, most designs have been out of production for long periods, even if they have only been in the control of one licensee. Indeed, most designs do not have this latter kind of licence stability, and most have been licensed by various manufacturers at various times. Of those manufacturers, few ever had any connection to the designer from where an aura of authenticity might emanate.

Consider the world's most famous furniture designs as examples. All of the Eames' designs have been out of production for long periods. Herman Miller let many of their modernist designs lapse in the '50s, and only brought back the Eames' designs in 1994.¹²⁰ Mies van der Rohe's iconic Barcelona chair has been manufactured by at least three different licensees since 1929: Bamberg Metallwerkstätten in Berlin, later Gebrüder Thonet in Vienna, and then by the US firm Knoll.¹²¹ The LC4 chaise longue by Le Corbusier, Perriand and Jeanneret was designed in 1928 and is currently being made under licence by Cassina SpA — but the Italian company only licensed the design in 1965.¹²² Recently, the Danish furniture manufacturer Howe reintroduced Arne Jacobsen's 'Mosquito' and 'Tongue' chairs, originally designed for the Munkegaard School in the mid-1950s. Except for a brief period in the 1990s, the designs had been out of production since the 1960s.¹²³ The list goes on. The majority of manufacturers' claims that their design is 'authentic' cannot, therefore, be based on historical stability of licensing of the design, or of uninterrupted manufacture of the design.

As it happens, there exists a very small number of modernist furniture manufacturers who can claim a form of authenticity aura in their work; but these manufacturers resemble the 18th century artisans like Hepplewhite and Chippendale, whose control over the exclusivity of their designs came from their control over an atelier, not from intellectual property laws. The best example is George Nakashima who, as late as the mid-20th century, owned and operated a small workshop in New Hope, Pennsylvania, where he produced small batch work for wealthy clients. He rarely worked with

¹²⁰ John R Berry, *Herman Miller: The Purpose of Design* (Rizzoli, 2009) 233.

¹²¹ Gandy and Zimmermann-Stidham, above n 42, 52.

¹²² Fiona Baker and Keith Baker, *Modern Furniture Classics* (Carlton Books, 2000) 89.

¹²³ HOWE, *The Story* <<http://munkegaardchair.com/story>>.

the kinds of industrial furniture-makers who nowadays claim ‘authenticity’ in their products; and when he did so the collaborations were largely unsuccessful, short-lived, or conflicted.¹²⁴ Instead he oversaw a small coterie of skilled artisans who produced his design within his workshop. Like Chippendale some 200 years before him, Nakashima commanded premium prices for his designs because he controlled the output from his workshop. Unlike most modernist furniture manufacturers, Nakashima’s work can claim a unique aura of authenticity and originality.

Unfortunately, this aura has a downside. Nakashima’s work was valuable as a consequence of his imprimatur on each piece, and when he died the workshop came close to dying also. His daughter Mira worked with her father and eventually took over the atelier on his death. She noted:

the strong personality that Dad had projected, the Nakashima that the world knew and revered, and the myth he had fostered of the studio as a one-man operation — all of which had been assets while he was alive — were now a liability that nearly brought an end to the business. I began to have some inkling of this even at my father’s funeral service, when, during the eulogy, the priest stated that since my father’s hands were now still, ‘There will be no more of his furniture made.’ I wanted to shout from the choir loft, ‘Yes there will!’¹²⁵

Mira Nakashima continues to produce designs in the style and in the workshop of her father. The Nakashima workshop is one of few that can claim the kind of aura of authenticity that is at the core of the modern luxury design claims for greater protection. All of the others making claims for authenticity have no historical, legal, or practical basis.

¹²⁴ For example, some time around 1946, Nakashima made a commercial arrangement with Knoll. Nakashima was to design a series of pieces to be mass-produced and marketed by Knoll, retaining the right to hand-make the same designs in the New Hope workshop. The conflict in the market between industrial and handmade furniture of the same design eventually did for the collaboration, and the relationship ended eight years later. See Mira Nakashima, *Nature Form & Spirit: The Life and Legacy of George Nakashima* (Harry N Abrams, 2003) 76–7. Other relationships with industrial manufacturers were even less successful. In 1957, Nakashima created a series of designs for Widdicomb-Mueller, a furniture manufacturer in Grand Rapids, Michigan. The result was only on sale from 1958–61: at 162. The one successful collaboration was with a craft workshop in Japan called Sakura Seisakusho to produce Nakashima designs in Japan. This was a small-scale venture, which followed the master craftsman model much more closely, and seemed to have been a positive experience for both sides: at 190–7.

¹²⁵ Ibid 244.

VI CONCLUSION

The Australian design system does not seem to be working.

The most up-to-date statistics provided by IP Australia, the government body responsible for handling, examining and certifying design applications, shows that although 2015 saw the highest number of applications on record, the total was only 7024, compared to 73 188 trade mark applications and 28 605 patent applications. More strikingly still, only 1 229 certifications were issued, meaning that slightly more than a thousand enforceable design rights were created in 2015.¹²⁶

It is not clear if this is a bad thing or a good thing. For all the calls for expanded protection by the design industry, their claims are very poorly grounded: as we have seen above, they rely on a conception of authenticity that is impossible for the design industry to sustain. And calls for more principled reform — whether these are from the Australian Law Reform Commission, the Australian Council on Intellectual Property, or the Productivity Commission — are almost always ignored by Parliament.

The cultural history we present provides some guidance as to why design is such a vexed area of law. Tracing the history of the furniture design industry and the laws of design shows how closely the law and industry are connected, and demonstrates how thin are the normative principles underlying design law. No wonder then that reform in this area is almost impossible — there is too little principle and too much politics to have a clear roadmap about how to progress.

This article has also shown that one particular style — mid-century modernism — can have a remarkably profound effect on the intellectual property system and on the industry that is reliant on it. The aesthetic choice of minimalism has structured, to a huge degree, widespread unhappiness within the industry about the perceived limits of intellectual property protection. Finally, our history provides an explanation of why the design industry seeks stronger protection, and a theoretical account of why these desires should be resisted.

Intellectual property is a complex system, one that has developed in response to normative principles, the needs of our society, commercial interests, aesthetics, and historical accident. Design industries have driven the development of the laws of design, and the history of the laws is a complex dance between commercial interests, public policy, style, fashion, and legal principle.

The future development of these laws will, no doubt, be equally intriguing.

¹²⁶ IP Australia, 'Australian Intellectual Property Report 2016' (Report, IP Australia, 2016) <<https://www.ipaustralia.gov.au/ip-report-2016>>.

