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TRADE RESTRAINTS — ASSOCIATIONS OF MANUFACTURERS TO COMBAT STYLE PIRACY — ILLEGAL RESTRAINTS OF TRADE — In order to combat the practice of "style piracy" among competitors, a large number of producers of women's coats and dresses formed an association, whose membership was composed of designers, manufacturers, and distributors. Producers adjudged copyists by the association were not permitted membership. The clear purpose of the association was primarily to boycott retailers [1] who refused to deal solely with

[1] "As a result of their [the guild's] efforts, approximately 12,000 retailers throughout the country have signed agreements to 'cooperate' with the Guild's boycott program, but more than half of these signed the agreements only because constrained by threats that Guild members would not sell to retailers who failed to yield to their demands—threats that have been carried out. . . ." Principal case, 61 S. Ct. 703 at 705.

members of the association, and secondarily to boycott, and eliminate competition from, the copyists. In addition there was provided a system of registration for designs made by members, and a judicial type of machinery for protecting the designers' interest therein. The association further limited the business activities of its members through, among other things,[2] restrictions on their participation in retail advertising and their retail sales, and on the discounts which they might allow. On essentially these findings,[3] the Circuit Court of Appeals for the Second Circuit affirmed the trial court's approval of the Federal Trade Commission's cease and desist order.[4] *Held*, by unanimous decision of the Supreme Court on certiorari,[5] that the practices of the association constituted unfair methods of competition and were illegal under the Federal Trade Commission,[6] Clayton,[7] and Sherman Anti-Trust Acts.[8] *Fashion Originators' Guild of America v. Federal Trade Commission*, (U. S. 1941) 61 S. Ct. 703.

Producers of women's clothing who maintain departments for the development of novel designs for their products, and independent designers, have found that other clothing manufacturers can purchase on the market garments embodying these novelties, copy them, produce them in volume, and drastically undersell the "creators."[9] They have found that the vast majority of their

[2] Justice Black also refers in the opinion to the combination's cooperation "with local guilds in regulating days upon which special sales shall be held"; to prohibitions against its members' "selling women's garments to persons who conduct businesses in residences, residential quarters, hotels or apartment houses"; and to its denial of "the benefits of membership to retailers who participate with dress manufacturers in promoting fashion shows unless the merchandise used is actually purchased and delivered." Principal case, 61 S. Ct. 703 at 706.

[3] In Millinery Creators' Guild v. Federal Trade Commission, (U. S. 1941) 61 S. Ct. 708, decided the same day on the basis of the principal case, the Court found essentially the same fact situation as in the principal case, and yet there was in that case no affiliation with textile manufacturers, converters, or dyers. See the opinion of the circuit court, (C. C. A. 2d, 1940) 109 F. (2d) 175. From this it may be concluded that the presence of this affiliation as found in the principal case had no major effect upon the decision there reached.

[4] Fashion Originators' Guild of America v. Federal Trade Commission, (C. C. A. 2d, 1940) 114 F. (2d) 80.

[5] Certiorari was granted in the Fashion Originators' Guild case and the Millinery Creators' Guild case because of the inconsistency between the holdings of the Court of Appeals for the Second Circuit [notes 3 and 4, supra; also see Esterlee Frocks v. Fashion Originators' Guild of America, (D. C. N. Y. 1940) 3 C. C. H. FED. TRADE REG. SERVICE, ¶ 25,464] and the holding of the Circuit Court of Appeals for the First Circuit in William Filene's Sons Co. v. Fashion Originators' Guild of America, (C. C. A. 1st, 1937) 90 F. (2d) 556.

[6] 38 Stat. L. 717 (1914), 15 U. S. C. (1935), §§ 41 et seq.

[7] 38 Stat. L. 730 (1914), 15 U. S. C. (1935), §§ 12 et seq.

[8] 26 Stat. L. 209 (1890), 15 U. S. C. (1935), §§ 1 et seq.

[9] Excellent general discussions of the practical and legal problems raised by style piracy may be found in Callmann, "Style and Design Piracy," 22 J. PAT. OFFICE SOC. 557 (1940), and Chafee, "Unfair Competition," 53 HARV. L. REV. 1289 (1940). Both articles conclude that the only real solution to the problem is some form of legislative action. OPPENHEIM, CASES ON TRADE REGULATIONS 394 (1936), contains a note on recent proposals to Congress.

designs cannot be patented under the design patent statute, for the reason that the requirement of originality is too strict.[10] And they have further found that they cannot get protection by injunction.[11] In a final effort to protect their interests in the designs and in their exclusive markets, the producers and designers have resorted to self-help in the form of guilds such as those described in the principal case.[12] In reaching a decision that the Fashion Originators' Guild and the Millinery Creators' Guild constitute an illegal restraint of trade, the Court might have chosen any one of several theories as determinative of the question; but rather than restrict its holding, it bases its conclusion on several grounds.[13] (1) It finds that the restrictive sales, upon which the scheme of the guilds was founded, are illegal, under section 3 of the Clayton Act. (2) It also finds illegal, under section 1 of the Sherman Act, the narrowing of the markets to which manufacturers can sell and from which retailers can buy,[14] the subjecting of producers and retailers to organized boycott,[15] the requirement of the guilds that members "reveal to the Guild the intimate details of their individual affairs," and also the guilds' "direct suppression of competition"[16] by copyists. (3) Further still, the Court finds that "the combination is in reality an extra-governmental agency, which prescribes rules for the regulation and restraint of interstate commerce, and provides extra-judicial tribunals for determination and punishment of violations, and thus 'trenches upon the power of the national legislature and violates the statute.'"[17] Under section 2 of the Sherman Act, the Court, conceding that the guilds may not yet be complete monopolies, finds that they tended to become monopolies, thus operated to deprive the public of the advantages of free competition, and were therefore violative

[10] See Callmann, "Style and Design Piracy," 22 J. PAT. OFFICE SOC. 557 (1940); see also Margolis v. National Bellas Hess Co., 139 Misc. 738, 249 N. Y. S. 175 (1931), discussing the defects of the copyright statute as to designs.

[11] Cheney Bros. v. Doris Silk Corp., (C. C. A. 2d, 1929) 35 F. (2d) 279. See also Chafee, "Unfair Competition," 53 HARV. L. REV. 1289 (1940) for a multitude of reasons why an injunction should not issue.

[12] See 49 YALE L. J. 1290 (1940); also a discussion of truthful defamation as an alternative remedy in 40 COL. L. REV. 736 (1940). Esterlee Frocks v. Fashion Originators' Guild of America, (D. C. N. Y. 1940) 3 C. C. H. FED. TRADE REG. SERVICE, ¶ 25,464, suggests the possibility of this alternative self-help remedy.

[13] The body of the opinion contains specific references to and citations of 14 different cases.

[14] Citing Montague & Co. v. Lowry, 193 U. S. 38, 24 S. Ct. 307 (1903).

[15] Citing Eastern States Retail Lumber Dealers' Assn. v. United States, 234 U. S. 600, 34 S. Ct. 951 (1914), which held that the circulation by an association of retailers of reports on listed wholesalers which tended to prevent association members from dealing with the reported wholesalers was an unreasonable and direct restraint of trade within the meaning of the Sherman Act. Loewe v. Lawlor, 208 U. S. 274, 28 S. Ct. 301 (1908), is particularly in point here, but the failure to cite it may be explained in part by note 23, infra.

[16] 61 S. Ct. 703 at 707, citing United States v. American Linseed Oil Co., 262 U. S. 371, 43 S. Ct. 607 (1923).

[17] 61 S. Ct. 703 at 707, citing Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 20 S. Ct. 96 (1899).

of its provisions.[18] Justice Black, speaking for the Court, lays emphasis upon two points in particular. He says that "While a conspiracy to fix prices is illegal, an intent to increase prices is not an ever-present essential of conduct amounting to a violation of the policy of the Sherman and Clayton Acts. . . ." [19] In support of this proposition, obvious enough in itself, Justice Black relies upon a statement in *United States v. Trans-Missouri Freight Association*,[20] a fact which may show a tendency of the Court to return to a still stricter application of the Sherman Act.[21] The opinion next points out that no trade abuse can justify a combination, the aim of which is the "destruction of one type of manufacture and sale which competed with Guild members." [22] Whether reference is here made to the boycott elements of the combination is certainly doubtful, and it may be that the Court's previous attitude, inclining to the conclusion that a boycott is illegal per se, is here being extended to certain restraints of trade other than price fixing.[23] If this change in attitude in fact exists, it would seem to indi-

[18] The proposition that a monopoly is sufficiently found if a combination "tends to that end and to deprive the public of the advantages which flow from free competition" was set forth in United States v. E. C. Knight Co., 156 U. S. 1 at 16, 15 S. Ct. 249 (1895).

[19] 61 S. Ct. 703 at 707.

[20] 166 U. S. 290 at 341, 342, 17 S. Ct. 540 (1897), which held that a combination, the purpose of which was " 'mutual protection by establishing and maintaining reasonable rates, rules and regulations on all freight traffic, both through and local' " had, in operation, the "direct, immediate, and necessary effect" of putting a restraint upon commerce, and that any combination having such effect was illegal. Cf. Standard Oil Co. of New Jersey v. United States, 221 U. S. 1, 31 S. Ct. 502 (1911), for the decision establishing the unreasonableness requirement for illegality.

[21] In view of the fact that the Court here relies on the old Trans-Missouri Freight Assn. test (see note 20, supra) and that it repeatedly emphasizes the illegality of the suppression of competition without any showing of an intent to fix prices or even a direct effect upon prices of the associations in the principal case, it may be that the principal case indicates an inclination of the Court to consider illegal any combination of producers which effects a suppression of competition.

[22] 61 S. Ct. 703 at 708.

[23] Boycotts, in that they restrain a lawful right of free access to markets, have met with the Court's disfavor almost from the time of the first enactment of the Sherman Act. From the commercial boycott of Montague & Co. v. Lowry, 193 U. S. 38, 24 S. Ct. 307 (1903), through the labor boycott of Loewe v. Lawlor, 208 U. S. 274, 28 S. Ct. 301 (1908), to the boycotts found in Paramount Famous Lasky Corp. v. United States, 282 U. S. 30, 51 S. Ct. 42 (1930), and Vitagraph v. Perelman, (C. C. A. 3d, 1938) 95 F. (2d) 142, concerted trade restraints of this nature have been held illegal. Although Justice Frankfurter, speaking for the majority of the Court in United States v. Hutcheson, (U. S. 1941) 61 S. Ct. 463, points out that boycotts by labor in employer-employee disputes are no longer illegal under the federal anti-trust laws, still the exception expressly applies only to labor activities. For practical purposes boycotts organized by the concerted action of manufacturers may be considered illegal per se on the strength of repeated holdings of illegality when they are involved. In general, as pointed out in the circuit court opinion in Fashion Originators' Guild of America v. Federal Trade Commission, (C. C. A. 2d, 1940) 114 F. (2d) 80, the reasons given for so holding are the danger of allowing private parties to adjudicate another's wrongs, the danger of a boycott's leading to monopoly, and the difficulty a court or administra-

cate a definite departure from the test of reasonableness which has long been used as the basis for finding a violation of the anti-trust laws. At any rate, the finding that the guilds were engaged in boycotting their competitors, regardless of any justification which might have been claimed on the grounds of reasonable method or the need for self-protection, was undoubtedly of itself sufficient to support a conclusion of illegality.[24] Nevertheless, the Court finds in addition that "The purpose and object of this combination, its potential power, its tendency to monopoly, the coercion it could and did practice upon a rival method of competition" [25] were all unlawful objects such as would preclude the admission of evidence of the reasonableness of the methods used.

tive tribunal would have in controlling or preventing an unjust use of it. Any combination which effects a suppression of competition would be vulnerable to the second two arguments. Thus, again, considering all the circumstances, the Court may here be holding that a combination of manufacturers which effects a suppression of competition is illegal per se.

[24] Cf. note 23, supra, in so far as it sets forth the proposition that, in other hands than labor's, a concerted boycott is illegal by virtue of its very object.

[25] Principal case, 61 S. Ct. 703 at 708.