

# DESIGN AUTHENTICITY

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## Abstract

*The most iconic modern designs were created in the mid-twentieth century. “Mid-Century Modern” or “MCM” designs are still revered today, and many are the subject of aggressive legal protection schemes. When MCM designs were created, however, legal protection for any industrial design (the ornamental aspect of an article) was almost nonexistent. Trademark and copyright law did not extend to these designs, and design patents did not offer protection worth the effort. As a result, in one of the most celebrated heydays of design, the companies that produced and sold these designs were forced to resort to non-legal strategies to distinguish themselves from the lower-cost copies then available to consumers. Design companies turned to marketing the authenticity of their products. This was no small feat as these designs were mass produced, often collaboratively created, and modified over time.*

*Later in the twentieth century, after the interest in MCM design waned, intellectual property law began to dramatically extend and expand its protections. These developments have left industrial design in a markedly different position in the twenty-first century.*

*The dip in the popularity of MCM design beginning in the 1970s turned out to be short-lived. Again today, MCM design is much sought after by consumers and much imitated by competitors. Today, however, design companies have an arsenal of intellectual property protections at their disposal. The right to copy that existed when these designs were created has, seventy years later, disappeared. As a result, copies of these designs that would have been tolerated in the twentieth century, can now be enjoined in the twenty-first century. Even still, these design companies continue to press claims of authenticity. This article reveals that rather than being an alternative to intellectual property protection, these claims of authenticity are in fact the foundation of the assertion of later developed intellectual property rights. This muddling of concepts distorts both the notion of what is authentic and the basis of intellectual property rights.*

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## I. INTRODUCTION

Design Within Reach (DWR) claims it “offers the world’s largest selection of authentic modern furniture, lighting, and accessories from designers past and present.” The “Within Reach” part of their name is apparently to convey that it makes modern design accessible in the sense of the ease with which a consumer can purchase a wide range of designs, rather than economically accessible as a single “Platner” dining chair could set one back \$10,000.<sup>1</sup> Because these products are not within the economic reach of most consumers, a multitude of companies offer nearly identical pieces for a fraction of the price. For instance, France&Son sells a chair virtually indistinguishable from the Platner chair for under \$1,000.<sup>2</sup> How can the market sustain versions of the same design that are 10 times more expensive than others? DWR distinguishes its high-priced goods from those it characterizes as “knockoffs”<sup>3</sup> by maintaining that its goods are “the real thing;” its goods are “authentic.”<sup>4</sup> But how can a mass-produced, machine-made good that reproduces a design created in an earlier era be authentic? DWR does not sell the original pieces that were produced in the mid-twentieth century. Instead—exactly as its lower-priced competitors do—it sells recent reproductions that are largely, but not always faithfully, based on those classic designs.

DWR answers this challenge with the proposition that in this context authentic does not mean original, but something more subtle: it means that DWR “deal[s] only with manufacturers who hold the *rights* to produce designers’ works.”<sup>5</sup> The rights referred to here are the intellectually property rights to the designs. Accordingly, a machine-made reproduction of classic design is authentic if the manufacturer held a license to produce it. Authenticity hinges on the legal position of the firm.

This Article will reveal that the “rights” that demarcate the boundary between the real and the fake are far less stable than the marketing—and the market—would suggest. These claimed legal rights have a tenuous underpinning. The present-day rights are said to derive from the original designers. Thus, the claim of rights hinges on the original designers having had legal rights to the designs when they were first created, and a chain of custody of those rights to the present holders. But as this Article demonstrates, at the time these designs were created, the law afforded no legal rights to the designer, and thus the designer had no rights to assign.

<sup>1</sup> The Platner Armchair is priced between \$4,661.00 and \$10,231.00, depending on finishes and upholstery, plus tax and \$499 for delivery. *Platner Armchair*, Design Within Reach, [https://www.dwr.com/kitchen-dining-chairs-benches/platner-armchair/1562.html?lang=en\\_US](https://www.dwr.com/kitchen-dining-chairs-benches/platner-armchair/1562.html?lang=en_US) (last visited Aug. 4, 2023).

<sup>2</sup> <https://franceandson.com/products/mid-century-modern-warren-platner-dining-armchair-luxury> (last visited Jan. 13, 2024).

<sup>3</sup> *Frequently Asked Questions*, Design Within Reach, [https://www.dwr.com/customerservice-faq.html?lang=en\\_US](https://www.dwr.com/customerservice-faq.html?lang=en_US) (“At DWR, we don’t do ‘inspired by’ or ‘just as good as’ or ‘in the spirit of.’”) (last visited Aug. 4, 2023).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* (emphasis added).

Where these claims of rights are thin on the law, their proponents supplement with art market concepts. In the art market, authenticity relates to the creator; an authentic piece of art is one that is genuinely created by the artist to whom it is attributed. The producers' present claims to hold rights is a modern manifestation of their marketing practices in the past. As this Article demonstrates, these producers heavily marketed their products as created by artists. And because the designs were the work of artists in lieu of intellectual property rights, these producers exploited the edge they had over competitors: they worked directly with the designers. Pushing this attribute in their marketing claims, this Article shows how the producers suggested that as artists, the designers possessed attribution and moral rights, not based in law, but in the norms of the art world. Producers' present-day claim of rights under present-day intellectual property law thus mixes these art concepts into the chain of legal title. This strategy amounts to a disguised claim that that present-day intellectual property laws should be applied *ex post facto*.

This Article will demonstrate that when the legal rights to design were weak, producers turned to claims of authenticity. Today, however, the legal rights to design are strong. Nonetheless, the producers of MCM design continue to press claims of authenticity presumably because their ownership of such rights continues to be weak. But their claims of authenticity are in turn premised on holding legal rights. The circularity of this strategy imbues both the concept of authenticity and the intellectual property rights with characteristics of each other. Authenticity takes on a particular meaning having to do with the authority to declare a status, while the asserted intellectual property rights begin to resemble rights of attribution. These claims of authenticity and rights are mutually dependent and constitutive in a manner that only serves the interests of the producer. However, they have pernicious impacts on intellectual property law, and they disserve the public. Outside of the bounds of defined rights based on policy objectives, the default right to copy ensures that intellectual property does not impede competition or interfere with the free flow of accurate information. The strategy to protect design identified in this Article threatens to upset that policy balance.

This Article focuses on modern designer furniture as a case study, but its insights have broad implications for design rights generally. The so-called "knockoff" market in consumer goods is large and growing and presents thorny issues for legislatures, brands, competitors, and consumers. The current strategy to address these problems mirrors the one for furniture identified in this Article. Across consumer goods, the terminology used, such as "knockoffs" and "fakes," is often imprecise and describes a broad category that includes counterfeit goods, which are illegal and regulated by both civil and criminal law, as well as replica goods that are entirely legal to produce and sell. "Replica" goods are close imitations of well-known designs that both acknowledge their original model and their independent source of origin. They are not "counterfeit" because they are not passed off as the "authorized" good. These legal distinctions, however, are lost on consumers. Social media platforms are full of evidence of consumers' bewilderment over how to evaluate the various reproductions of designed goods.<sup>6</sup>

This article traces two timelines, both from the mid-twentieth century to today. The first is an art historical account of the emergence of MCM design,<sup>7</sup> and the second is the development of design

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<sup>6</sup> For example, on Reddit replica forums boast over one million users engaged in discussions on the quality, faithfulness of imitation, and reputability of replica sellers. *Buy it for life: Durable, Quality, Practical*, Reddit <https://www.reddit.com/r/BuyItForLife/> (Aug. 4, 2023).

<sup>7</sup> The phrase "Mid-Century Modern" was coined by Cara Greenberg in her 1984 book *Mid-Century Modern: Furniture of*

protection under design patent, trademark, and copyright law.

The mid-twentieth century was one of the most celebrated moments in design history. This era was also important to the development of the practice and theory of design. Not only was the mid-twentieth century an important moment in design history, but it was also the beginning of the modern chapter of intellectual property law in the U.S. It saw a new patent act covering design patents in 1952,<sup>8</sup> a new trademark act in 1946,<sup>9</sup> and a new copyright act in 1976.<sup>10</sup> Moreover, during this same period, the applicability of intellectual property law to design was considered by the Supreme Court three times. The Court decided three industrial design cases—all involving lamps—within the span of a single decade, from 1954 to 1964. Considering that by that time, the Court had only ever decided nine industrial design cases, this represents a remarkable intensity.<sup>11</sup>

The overlaying of these two timelines makes evident the lack of correspondence between the explosion of MCM designs and the availability of legal protection for them. At the height of design in this country, these designs did not enjoy any meaningful protection under U.S. intellectual property law. None of the new statutes or Supreme Court opinions provided new avenues for protections for these designs. With no legal right to combat the copycats that were immediately present in the marketplace, the companies that produced these designs turned to non-legal strategies. Through marketing these producers sought to convince consumers to buy their higher priced goods because only they were “authentic.” Today these same iconic designs are still sought after and still copied. However today—more than 70 years after their creation—these designs have protections that were unavailable when they were created. Indeed, these designs now have an arsenal of robust protections.

This case study of MCM design offers three policy insights. First, undermining the policy rationale of design protection, it demonstrates that the desire and ability to create and produce innovative and successful designs had no appreciable relationship with the availability of legal protections. The law did not incentivize this activity. Second, it demonstrates the poor fit of industrial design within certain intellectual property laws, which have long or indefinite periods of protection. These protections have been asserted long after the design’s creation and even after the designer’s death. Finally, the sea change in design protection that occurred later came about without any policy rationale as to why industrial design should be so extensively protected.

## II. ORIGINAL REPRODUCTIONS

What does authentic mean in the context of a machine-made chair freshly manufactured based on a design of a chair first produced long ago? One view is that the only logical application of authenticity in this context is to products manufactured in the earliest years of a design’s production.<sup>12</sup> Those pieces

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*the 1950s.*

<sup>8</sup> Public Law 593, 82nd Congress, 2nd Session, Chapter 950, 66 Stat. 792, approved July 19, 1952.

<sup>9</sup> Pub. L. No. 79-489, 60 Stat. 427 (1946) (codified as amended at 15 U.S.C. § 1051-1129).

<sup>10</sup> Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541.

<sup>11</sup> *Gorham Co. v. White*, 81 U.S. 511 (1871); *Lehnbeuter v. Holthaus*, 105 U.S. 94 (1881); *Dobson v. Hartford Carpet Co.*, 114 U.S. 439 (1885); *Dobson v. Dornan*, 118 U.S. 10 (1886); *N.Y. Belting & Packing Co. v. N.J. Car Spring & Rubber Co.*, 137 U.S. 445 (1890); *Dolan v. Jennings*, 139 U.S. 385 (1891); *Smith v. Whitman Saddle Co.*, 148 U.S. 674 (1893); *Coats v. Merrick Thread Co.*, 149 U.S. 562 (1893); *Saxlehner v. Eisner & Mendelson Co.*, 179 U.S. 19 (1900); *Kellogg Co. v. Nat’l Biscuit Co.*, 305 U.S. 111 (1938).

<sup>12</sup> Design Addict Forum.

produced in the first run, in the 1940s and 1950s, are authentic, but any current production cannot be said to be authentic.

The major manufacturers of MCM design, and their authorized retailers, are unanimous in their opinion that some current production products are authentic, while others are not. DWR, the largest authorized retailer, prominently states on its website that while others sell “knockoffs, or what some call ‘reproductions,’” it sells only “authored pieces.”<sup>13</sup> This statement suggests that “reproduction” is simply a euphemism for knockoff, but it does not explain why some current production products are not reproductions. And how are only some “authored” when others strictly follow the same design attributed to a designer now deceased?

Maintaining a distinction between original and knockoff is critical to the authorized producers—Herman Miller, Knoll, and Vitra. As we will see, the concept that informs this distinction is authenticity and these producers actively market it. In 2003, Herman Miller launched its “Get Real” campaign. The promotional video ends with the message, “The authentic designs from the original designers.”<sup>14</sup> In the video, things that are “real” are contrasted with things that are “not,” such as plastic flamingos, artificial grass, a toupee, and an Elvis impersonator. Throughout the video, “real” is written in cursive in a looping line that weaves through photos of iconic MCM designs, iconic photos of celebrity MCM designers, and at certain points the line became these designers’ signatures. That is, the literal through line of the video is these designers’ signatures. The suggestion is that their products are authored and therefore real. As part of this campaign, Herman Miller offered 15 pieces of virtual furniture on Second Life for free so long as recipients delete their existing knockoff virtual furniture. Thus, to drive home the difference between real and not real, Herman Miller offered “authentic virtual versions” of its furniture.<sup>15</sup> Far from ironic, the point is that it is not about the physical likeness between the products manufactured today and those from the initial production; it is about having the authority to pronounce something authentic.

The marketing of authenticity extends to the purchasing experience. For instance, Herman Miller sends a “certificate of authenticity,” dated and individually numbered, with the purchase of a MCM

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<sup>13</sup> *About Us*, Design Within Reach, [https://www.dwr.com/about-us.html?lang=en\\_US#about-us-the-dwr-difference](https://www.dwr.com/about-us.html?lang=en_US#about-us-the-dwr-difference) (last visited Aug. 7, 2023) (“We don’t do ‘inspired by’ or ‘just as good as’ or ‘in the spirit of.’”). DWR’s position on offering unauthorized products closely based on MCM designs has seemingly evolved. Until it finally gave in to Knoll’s complaints in 2005, it had sold reproductions of the Barcelona chair, which it called “Pavilion” chairs for substantially lower prices. Christopher Hawthorne, *A Catalog Entrepreneur Takes the New York Test*, NY TIMES, Apr. 3, 2003, at F1. In 2007, DWR told shareholders: “Some of the products we offer, including some of our best selling items, are reproductions of designs that some of our competitors believe they have exclusive rights to manufacture and sell.” And in 2009, it was sued for selling a lower-priced close imitation of the Bellini chair. *See Heller Inc. v. Design Within Reach, Inc.*, 2009 U.S. Dist. LEXIS 71991 \*; 2009 WL 2486054 (S.D.N.Y. 2009).” And Blu Dot, a designer and manufacturer of modern furniture sued DWR in 2009 over its selling copies of its designs, and one case using a photo of a Blu Dot product to sell the copy. Fred A. Bernstein, *Is a Solution Within Reach?*, NY TIMES, Dec. 30, 2009, <https://www.nytimes.com/2009/12/31/garden/31dwr.html> (last visited Jan. 19, 2024). After taking over as CEO in 2009, John Edelman stated that DWR would stop selling knockoffs, but would sell products “inspired by classics. If you see something in Milan, and go ahead and produce something inspired by it, that’s not a knockoff,” he said. “It’s how the industry runs.” *Id.* But according to an owner of a retailer specializing in modern and designer home furnishings, the selling of licensed products along with inspired by products creates confusion “about what is authentic and what is not.” *Id.*

<sup>14</sup> <https://vimeo.com/85834204> (last visited Jan. 21, 2024). The campaign also featured posters and postcards.

<sup>15</sup> <https://virtuallyblind.com/2007/10/08/herman-miller-second-life/> (last visited Jan. 21, 2024) (“Herman Miller is pleased to give you the opportunity to own authentic virtual versions of some of our products.”).

design product. The certificate states that the product is “authentic,” “produced by its original manufacturer,” and “manufactured according to the designer’s specifications,”<sup>16</sup> which we will see is a statement that must be understood loosely. Issuing a certificate of authenticity is the ultimate act of authority since to do so without authority constitutes fraud.<sup>17</sup>

These manufacturers go beyond marketing authenticity and make this distinction real. Be Original Americas is a non-profit organization founded in 2012 that advocates on behalf of paid members, including Herman Miller, Knoll, DWR, and Vitra, “about the economic, ethical, and environmental value of authentic design.”<sup>18</sup> It publicizes that has worked with U.S. Customs and Border Protection to seize nearly 18,000 pieces of “knockoff” furniture worth, which it estimates would cost \$30.3 million if “genuine,” which are, in most cases, destroyed.<sup>19</sup>

### III. CASE STUDY: THE BUBBLE LAMP

A “case study” is a research method in which a deep study is made of a particular case in a real-world context to understand broader phenomena. The “Case Study House” program was landmark experiment in American architecture sponsored by *Arts & Architecture* magazine that attracted top modernist architects and designers, including Richard Neutra, Charles Eames, and Eero Saarinen, to design residences that could be easily and cheaply constructed during the postwar building boom. From 1945 to 1966, it produced 36 designs, 26 of which were built, mostly in the Los Angeles area. “Case Study House #8,” also known as “Eames House,” was designed by Charles and Ray Eames and famously served as their primary residence from 1949 until their deaths. It is now a museum and designated landmark. “Case study” is also a registered trademark for furniture,<sup>20</sup> lighting fixtures,<sup>21</sup> and textiles<sup>22</sup> owned by Modernica, Inc., a Los Angeles-based company founded to put back into production furniture and furnishings designed between 1945 and 1966 by modernist designers including—and beginning with—Charles and Ray Eames. Modernica used CASE STUDY as a mark for selling furniture designed by the Eameses and contemporary designer, George Nelson.

This article will use the case study method to “illuminate” industrial design policy concerns, the fraught nature of defining design, and the trend toward granting exclusive rights over design. One iconic MCM design will serve as a central example throughout this article to shed light on the topic: George Nelson’s “Bubble Lamp.”

A series of lighting fixture designs are today known as “Bubble Lamps.” Each has the same distinctive appearance: a sculptural form consisting of a shade made of translucent, white plastic membrane stretched over a ribbed wire frame that symmetrically encircles a space for a lightbulb. The wire frame comes together at the top and bottom, but balloons outward to form a finite number of different shapes. The overall effect is a simple form that emphasizes its shape and its webbing-like covering. These designs have been incorporated into pendant lights, wall sconces and table lamps. The first such

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<sup>16</sup> Certificate on file with author.

<sup>17</sup> *Balog v. Ctr. Art Gallery-Hawaii, Inc.*, 745 F. Supp. 1556, 1558–59 (D. Haw. 1990).

<sup>18</sup> Be Original Americas, <https://www.beoriginalamericas.com/> (last visited Jan. 21, 2024).

<sup>19</sup> Suzanne Labarre, *The \$4 Billion Problem Designers Can’t Shake*, FastCompany, Apr. 28, 2021 (“After the goods are confiscated, they’re destroyed.”).

<sup>20</sup> U.S. Reg. No. 78,202,152.

<sup>21</sup> U.S. Reg. No. 78,288,188.

<sup>22</sup> U.S. Reg. No. 86,915,415.

lamp was designed in 1947, but the lamps did not go into production until 1952.<sup>23</sup>

Today, the Bubble Lamp is exclusively associated with the designer George Nelson. Nelson is one of a handful of designers who both defined MCM design and made it so successful.<sup>24</sup> Still, his designs are amongst the most iconic.<sup>25</sup> In addition to the Bubble Lamp, Nelson is best known for his designs of the marshmallow sofa, the coconut chair, the platform bench, the sling sofa, the swag leg chair and desk, and the ball clock.<sup>26</sup>

Nelson's influence and impact extended beyond his own designs. While today, Nelson is best known for being a furniture and home goods designer, he was also an architect, photographer, author, and critic.<sup>27</sup> Trained as an architect, he started his career writing about architecture. His intellectual pursuit of architecture afforded him opportunities to speak with and learn from the great modernists of the day including Walter Gropius, Mies van der Rohe, and Le Corbusier.<sup>28</sup>

In 1945, after seeing an article in *Life* magazine on Nelson, which featured his book *Tomorrow's House* and his concept and design for a "Storage wall," D.J. De Pree, founder and CEO of Herman Miller, hired Nelson to serve as the company's design director.<sup>29</sup> Nelson held that position throughout the MCM heyday, until 1972.<sup>30</sup> Hiring Nelson in 1945 was visionary as by that point he had not designed any furniture that was put into production. With this position, however, Nelson began to define himself in the field.

With the income from Herman Miller, Nelson founded his own design studio: George Nelson Associates Inc. in New York.<sup>31</sup> That is, while serving as design director for Herman Miller Nelson did design work outside of the company, and in another city. His firm did design work for Herman Miller,

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<sup>23</sup> Herman Miller first sold Nelson Bubble Lamps beginning in 1952. Company Timeline, Herman Miller, <https://www.hermanmiller.com/about/timeline/> (last visited Aug. 4, 2023).

<sup>24</sup> Nelson received the following design awards: Lifetime Achievement Award, American Institute of Graphic Arts (1991); Scholar in Residence, Smithsonian Institute National Museum of Design (1984); Chairman, International Design Conference in Aspen (1965 and 1982); Good Design Award, Museum of Modern Art (1954); Trailblazer Award, National Home Furnishings League (1954); Best Office of the Year, New York Times (1953); Gold Medal, Art Directors Club of New York (1953); and Prix de Rome for architecture (1932). He has also been the subject of many books, including Stanley Abercrombie & Michael Darling, *George Nelson: Architect / Writer / Designer / Teacher* (2009) and Stanley Abercrombie, *George Nelson: The Design of Modern Design* (2000).

<sup>25</sup> George Nelson's designs are featured in the permanent collections of the Museum of Modern Art, the Brooklyn Museum of Art, and the Philadelphia Museum of Art.

<sup>26</sup> Nelson designed benches, cabinets, sofas, chairs, settees, bedroom furniture, wall and table clocks, tables, lamps, wrought iron fireplace pieces and tools, planters, room dividers, and office furniture. For images of Nelson's most celebrated designs see <http://www.georgenelsonfoundation.org/george-nelson/index.html#featured>.

<sup>27</sup> He was Editor-in-Chief of *Design Journal*, and worked as an editor at *Fortune*, and *Architectural Forum*. Nelson authored and co-authored several iconic books on Modern American design, including *Tomorrow's House* (1945), *Living Spaces* (1952), *Chairs and Display* (1953), *Storage* (1954), *Problems with Design* (1957), *How to See: Visual Adventures in a World God Never Made* (1977), and *George Nelson on Design* (1979).

<sup>28</sup> *Walter Gropius*, MoMA, <https://www.moma.org/artists/2359> (last visited Aug. 4, 2023); *Ludwig Mies van der Rohe*, MOMA, <https://www.moma.org/artists/7166> (last visited Aug. 4, 2023); *Le Corbusier (Charles-Edouard Jeanneret)*, MOMA, <https://www.moma.org/artists/3426> (last visited Aug. 4, 2023).

<sup>29</sup> *Timeline*, Herman Miller, Company Timeline, <https://www.hermanmiller.com/about/timeline/> (last visited Aug. 4, 2023). Nelson's role at Herman Miller was far-reaching; he even served as the primary architect when Herman Miller built its new headquarters complex in Zeeland, Michigan in 1958. *Id.*

<sup>30</sup> Hugh De Pree, *Business as Unusual: The People and Principles at Herman Miller* [] (1986).

<sup>31</sup> <https://shoeleathermagazine.com/2017/sincerest-form-forgery/>; Herman Miller website 2007.

but not exclusively.<sup>32</sup> Between his design studio and Herman Miller's, Nelson collaborated with almost every modernist designer of his time.

The origin story of the Bubble Lamp is one of imitation rather than unique inspiration.<sup>33</sup> Before designing the Bubble Lamp, Nelson had been obsessed with a Swedish design for a pendent light made of a spherical wire frame covered in silk. Nelson wrote,

It was important to me to have certain status symbols around, and one of the symbols was a spherical hanging lamp made in Sweden. ... I wanted one badly. We had a modest office and I felt that if I had one of those big hanging spheres from Sweden, it would show that I was really with it, a pillar of contemporary design.<sup>34</sup>

According to Nelson, when he learned that a Swedish import store was having a sale on these lamps, he "rushed down."<sup>35</sup> He was able to find a "shopworn sample with thumbmarks on it" with a reduced price of \$125.<sup>36</sup> Because in the late 1940s that was still an exorbitant price, Nelson declined to purchase it. Nelson recounts,

I was furious and was stalking angrily down the stairs when suddenly an image popped into my mind which seemed to have nothing to do with anything. It was a picture in *The New York Times* some weeks before which showed Liberty ships being mothballed by having the decks covered with netting and then being sprayed with a self-webbing plastic ... Whammo! We rushed back to the office.<sup>37</sup>

He and others made a roughly spherical frame and were able to locate the manufacturer of the plastic spray. He says that "[b]y the next night we had a plastic-covered lamp ... and it did not cost \$125."<sup>38</sup>

With an expensive and exclusive lamp as his model, Nelson designed a low-cost, mass-producible lamp. Nelson recognized that the Swedish lamp "was very difficult to make" with its silk covering and the difficulty of sewing the silk onto the wire frame. In contrast, his design was made of cheaper materials, was easier and quicker to produce, and "required minimum tools and no welding costs."<sup>39</sup> Because he copied the idea of a spherical metal cage, that shape was able to hold its shape under the tension of "the military grade resinous spray lacquer."<sup>40</sup> The resin spray, after being "coated in a thin layer of plastic," created "a smooth translucent skin that gave off a soft glow."<sup>41</sup>

This origin story presents elements of outright copying, epiphany, and a flash of genius intertwined. This story, endlessly repeated, is a story of copying as a creative act.<sup>42</sup>

Although the Bubble Lamp is exclusively associated with Nelson, the year it debuted, an issue of

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<sup>32</sup> Herman Miller website says that "George Nelson & Associates worked with Herman Miller for over 25 years." 2007. Herman Miller, <http://www.hermanmiller.com/CDA/SSA/Designer/0%2C1597%2Ca4-c954-b11%2C00.html> (last visited Aug. 4, 2023).

<sup>33</sup> See JESSICA SILBEY, *THE EUREKA MYTH: CREATORS, INNOVATORS, AND EVERYDAY INTELLECTUAL PROPERTY* (2014).

<sup>34</sup> Stanley Abercrombie, *George Nelson: The Design of Modern Design* [] (1995) (quoting George Nelson, *George Nelson On Design* (1979)).

<sup>35</sup> *Id.* at [].

<sup>36</sup> *Id.* at [].

<sup>37</sup> *Id.* at [].

<sup>38</sup> *Id.* at [].

<sup>39</sup> *Id.* at [].

<sup>40</sup> *Id.* at [].

<sup>41</sup> *Id.* at [].

<sup>42</sup> The Bubble Lamp is also derivative of Danish designer Klare Klint's celebrated "Fruit Lamp" or LK 101 designed in 1944 and constructed out of folded paper. CITE



*Everyday Art Quarterly* states Nelson did not himself design it. Instead, the article states that an associate in Nelson's firm, William Renwick, designed the lamp.<sup>43</sup> Renwick, it is said, "tailored the idea into the streamlined design."<sup>44</sup> Similarly, it has been suggested that the marshmallow sofa was designed not by Nelson, but by Irving Harper, while in Nelson's employ.<sup>45</sup> It is said that Harper also designed the sunburst clock and the Herman Miller logo, both of which are customarily credit to Nelson.<sup>46</sup> The coconut chair, another iconic design attributed to Nelson, is said to have actually been designed by George Mulhauser.<sup>47</sup> From the Bubble Lamp origin story, it would seem that Nelson was willing to give others credit.<sup>48</sup> However, from the start, these designs were marketed as George Nelson designs. Nelson may have believed that for branding purposes it was advantageous to promote his name alone as the designer.<sup>49</sup> Irving Harper who worked in Nelson's studio said that "[t]he bosses took all the credit after the fact," and explained that "George Nelson's approach was to give individual designers credit only in trade publications."<sup>50</sup>

#### IV. MID-CENTURY MODERN DESIGN

This case study focuses on the Bubble Lamp as an iconic piece of MCM design. MCM refers to a design movement, period, and style. Although numerous periods are cited, this Article will consider it to span the 1940s to 1970s. MCM is primarily an American design movement, albeit one with important European precursors and fellow travelers. MCM design spans commercial products, architecture, and graphic design, however, this article will focus on industrial design, the design of products and useful articles. As applied to industrial design, MCM design is concerned with appearance, but also functionality and manufacturability.

MCM offers a useful lens to consider U.S. design protection. First, this design period is the one of most celebrated in the history of design.<sup>51</sup> Significantly, its impact is still felt today. For example, in

<sup>43</sup> Jeffrey Head, *Bubble Lamp Brouhaha: Legal Battle Over a Midcentury Icon*, LA TIMES (Dec. 28, 2013) <https://www.latimes.com/home/la-lh-lawsuit-bubble-lamp-manufacturing-20131227-story.html>. The George Nelson Foundation website states that the Bubble Lamp was "[d]esigned by William Renwick of Nelson's office." *Bubble Lamps*, George Nelson Foundation, <http://www.georgenelsonfoundation.org/george-nelson/index.html#lighting/bubble-lamps-62> (last visited Aug. 4, 2023).

<sup>44</sup> Hannah Matin, *The Story Behind George Nelson's Iconic Bubble Lamp*, ARCHITECTURAL DIGEST (Nov. 16, 2018), <https://www.architecturaldigest.com/story/the-story-behind-george-nelsons-iconic-bubble-lamp> (last visited Aug. 4, 2023).

<sup>45</sup> *Vintage Modern*, METROPOLIS, Jun. 2001. Herman Miller has stated that the sofa was jointly designed by Harper and Nelson. *Nelson Miniature Chests*, WAYBACKMACHINE, <https://web.archive.org/web/20071228121219/http://www.hermanmiller.com/CDA/SSA/Product/1,1592,a4-c1008-p218,00.html>. Others give sole design credit to Harper. Guy Tebay, *Undercover Icon*, NY TIMES Apr. 30, 2010.

<sup>46</sup> Guy Tebay, *Undercover Icon*, NY TIMES Apr. 30, 2010.

<sup>47</sup> *Coconut Chair*, Art Institute of Chicago, <https://www.artic.edu/artworks/105108/coconut-chair>, (last visited Aug. 4, 2023).

<sup>48</sup> Other George Nelson Associates designers include Suzanne Sekey, Ernest Farmer, Tobias O'Mara, George Tscherney, Lance Wyman, John Pile, Gordon Chadwick, Bill Renwick, George Mulhauser, Robert Brownjohn, Ettore Sottsass, and Michael Graves. *Vintage Modern*, Metropolis, Jun. 2001.

<sup>49</sup> *George Nelson: The Father of Mid-Century Modern Design*, The Edit, <https://www.lumens.com/the-edit/the-makers/george-nelson-the-father-of-mid-century-modern-design/> (last visited Aug. 4, 2023).

<sup>50</sup> Guy Tebay, *Undercover Icon*, NY TIMES Apr. 30, 2010.

<sup>51</sup> It was one of the most popular, collectable, and dynamic periods of design. It is recognized by scholars and museums

1999, *Time* magazine called an Eames chair “the best design of the century.”<sup>52</sup> A vintage George Nelson marshmallow sofa sold at auction for \$66,000 in 1999,<sup>53</sup> and in 2005, a dining table designed by Carlo Mollino and produced in 1949 sold at auction for \$3.8 million.<sup>54</sup> If any design is worthy of protection, certainly these designs are.

Second, these designs make for interesting tests for the protections offered by intellectual property law. MCM design is characterized by clean lines, the transparent use of materials, and the absence of any decorative embellishments. The design principle at work is a synthesis of beauty and function. This philosophy represented a radical break with the past where the “design” was something added to a functional item.<sup>55</sup> As a result, this minimalist design aesthetic poses difficulty for legal standards that are directed to “ornamental” features, and even those aspects of design that can separated from functional objectives.

Finally, MCM design makes for an interesting case study because it came into the world when copying design was legal and has stood witness to the dramatic changes in design protection law over time. In these examples, we can observe the same design in a market without legal protection, and then in a market in which legal protection is available.

The following section will provide a primer on MCM design and introduce the major characters, both individual and corporate, to provide context for the case study.

### A. The Emergence of MCM Design

MCM design grew out of a larger modernist movement, which began in Europe as a reaction to WWI. Symbolizing modernity and social and industrial progress, talented architects converged on a new design vocabulary of rectilinear shapes, undecorated surfaces, and the unconcealed use of steel, glass, and concrete. The design philosophy was to strip away all extraneous ornament and expose the mechanics of construction as a form of honesty, and to embrace modern industrial materials. This philosophy was central to the Bauhaus, the German art school that was a prolific place of design innovation between the wars. The school sought to combine industry with art to produce designers of the machine age. Under the direction of architect Walter Gropius, the vision was to use the new manufacturing methods and materials developed in wartime. Its students and faculty sought to design consumer goods that fulfilled their practical functions, could be made cheaply, and were beautiful. The tubular steel designs of Marcel Breuer and Ludwig Mies van der Rohe are expressions of that vision.

At the same time, a distinctive modern design aesthetic emerged in the Nordic countries guided by the principle that well-designed goods should pervade daily life for everyone. Modern Scandinavian design adhered to the Bauhaus principles of merging beautiful forms with functionality but is softer due to its emphasis on high craftsmanship that came out of the local cabinetmaking tradition. Designer

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worldwide as an influential design movement. CITE

<sup>52</sup> *The Best of the Century*, TIME, Dec. 31, 1999, at 1.

<sup>53</sup> *Sitting Pretty--for a Price*, LA TIMES, E3, Jan. 14, 1999.

<sup>54</sup> *Carlo Mollino*, Christie's, <https://www.christies.com/en/lot/lot-4517220>. (last visited Aug. 4, 2023); *There's a lot of money on the table at auction*, Seattle Times, (June 10, 2005) <https://www.seattletimes.com/nation-world/theres-a-lot-of-money-on-the-table-at-auction/>. In 2019, a Poul Kjørholm PK61 sofa, designed in 1958, sold at auction for \$822,700. CITE

<sup>55</sup> This concept of design parallels the category of applied art in copyright law. See Jane Ginsburg, “*Courts Have Twisted Themselves into Knots*”: U.S. Copyright Protection for Applied Art, 40 COLUM. J.L. & ARTS 1 (2016).

Kaare Klint is credited as “the father of Danish Modern” for introducing clean lines, cost effective production, and functionality to the Nordic furniture industry in the 1920s.<sup>56</sup>

Scandinavian Modern design was soon in demand in the U.S. A 1938 New York Times article states that “Swedish Modern” had “flooded the market.”<sup>57</sup> Driving home the allure, a 1959 issue of the influential *House Beautiful* magazine ran a cover story titled, “The Scandinavian Look in U.S. Homes.”<sup>58</sup> Another boost came from John F. Kennedy’s insistence the presidential candidates be seated in chairs designed in 1949 by Danish designer Hans Wegner in the first televised 1960 Kennedy-Nixon debate.<sup>59</sup>

Homegrown modernist design also emerged in this period. The U.S. analog to the Bauhaus was Cranbrook Academy in Bloomfield Hills, Michigan, founded in 1932. Directed by Finnish architect Eliel Saarinen, Cranbrook Academy was the incubator of mid-century modernism.<sup>60</sup> Designers Charles and Ray Eames, Eero Saarinen (Eliel’s son), Harry Bertoia, and Florence Knoll all came out of this art school.

This modernist design aesthetic quickly made their way into American’s consciousness. In 1932, the Museum of Modern Art (MoMA) held an exhibition of what it termed the “International Style,” featuring Gropius, Breuer, Mies van der Rohe, and Le Corbusier.<sup>61</sup> The 1939 World’s Fair introduced more Americans to the clean lines of the Bauhaus and reinforced the connection of this aesthetic to futuristic ideals. MoMA played a large role in creating the desire for modernist design in the American middle class. It actively promoted modernist design and sought to education the American public on the importance of good design in a modern home. It held a series of exhibits that showcased exemplars of modernist design that it deemed “good design.”<sup>62</sup> These exhibits helped launch the careers of Charles Eames and Eero Saarinen. One MoMA exhibit presented a timeline of furniture designs from

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<sup>56</sup> Stina Teilmann-Lock, *The Myth of Danish Design and the Implicit Claims of Labels*, in *DESIGNING WORLDS: NATIONAL DESIGN HISTORIES IN AN AGE OF GLOBALIZATION* (K. Fallan, & G. Lees-Maffei (Eds.), 156, [ ] (2016).

<sup>57</sup> *800 at Furniture Show; Chicago Opening Puts Emphasis on Swedish Modern*, NY TIMES, May 3, 1938, p. 38. later explained its popularity as “one furniture style that everyone understands.” Rita Reif, *Cooper Union Museum Offers Danish Exhibition*, NY TIMES, Oct. 19, 1962, p. 22.

<sup>58</sup> The editor of *House Beautiful*, Elizabeth Gordon, was both a Scandinavian Modern enthusiast and a Cold War warrior. Because Gordon saw Scandinavian Modern design as exemplifying democracy, she promoted it during the McCarthy-era. MAGGIE TAFT, *THE CHIEFTAIN AND THE CHAIR: THE RISE OF DANISH DESIGN IN POSTWAR AMERICA* (2022).

<sup>59</sup> Phil Patton, *In Debates, the Furniture Is the Message*, NY TIMES, Oct. 11, 2008.

<sup>60</sup> *History of Cranbrook Academy of Art*, Cranbrook Academy of Art, <https://cranbrookart.edu/about/history/> (last visited Aug. 4, 2023).

<sup>61</sup> Many of the most celebrated European modernists, such as Ludwig Mies van der Rohe, Walter Gropius, and Marcel Breuer, were all living and teaching in the United States by the late 1930s.

<sup>62</sup> These exhibits included *Machine Art* (1934), the *Useful Objects* series (1938-49), *Organic Design in Home Furnishings* (1941), *Modern Interiors* (1941), *What is Good Design?* (1942), *New Furniture Designed by Charles Eames* (1946), the *House in the Museum Garden* (1949), *Modern Art in Your Life* (1949) (which featured furniture), and the *Good Design* series (1950-55). These exhibits made the case that manufactured products can be designed in such a way that neither usefulness nor beauty is sacrificed. These exhibits travelled to other cities around the country and were well attended. For instance, MoMA’s “Modern Rooms of the Last Fifty Years” show traveled to twenty venues. Approximately one thousand people representing diverse groups such as the Women’s Auxiliary of the Southeastern Section of the American Society for Engineering Education, a Girl Scout troop, and a nursery school class visited the show in Louisville, Kentucky, and an estimated five hundred people visited the show at Penn State. Terence Riley and Edward Eigen, *Between the Museum and the Marketplace: Selling Good Design*, in *MUSEUM OF MODERN ART AT MID-CENTURY: AT HOME AND ABROAD* (John Elderfield ed., 1994).

1902 that ended in a gallery furnished with the winning submissions, including those by Eames and Saarinen.<sup>63</sup> These MoMA exhibits also led directly to the sale of the furniture on display. MoMA curator Edgar Kaufmann Jr., whose family was in the department store business,<sup>64</sup> facilitated arrangements that filled the gap between designers, manufacturers, and retailers.<sup>65</sup> His *Good Designs* series displayed the items in settings that looked more like a sales showroom than a museum.<sup>66</sup> Designs featured in the exhibition were awarded contracts for their manufacture and sale at department stores.<sup>67</sup> By the late '50s, furniture which would have been seen as avant-garde only a few years prior had become integrated and familiar.<sup>68</sup>

Eventually, MoMA's exhibits and publications shifted the celebration of "good design" away from the International Style and to the American interpretation of this aesthetic.<sup>69</sup> as was found in Scandinavian modern design. MCM design adopted the minimalist aesthetic from the International Style, but often combined it with organic forms and softer, warmer materials echoing Scandinavian design. But while Scandinavian design made heavy use of caning and rich woods such as teak and rosewood, American MCM design adopted the Bauhaus philosophy of designing articles that could more easily and cheaply be mass produced in the machine age.<sup>70</sup> MCM design, like the Bauhaus, also glorified the new materials of the day such as plywood, fiberglass,<sup>71</sup> foam, aluminum, steel, and plastics.

The booming U.S. postwar economy provided the perfect setting for MCM design principles to flourish. The aesthetic of minimalist, slim, mass-producible goods made with new, inexpensive mate-

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<sup>63</sup> GEORGE CASTILLO, *COLD WAR ON THE HOME FRONT*, 36-38 (2010). Curated by Eliot Noyes, a Bauhaus inspired architect and designer who was then MoMA's Director of Industrial Design, who described organic design as an object made in "an ideal choice of material, in visual refinement, and in the rational elegance of things intended for use" ELIOT F. NOYES, *ORGANIC DESIGN IN HOME FURNISHINGS* (Exhibition Catalog, 1941).

<sup>64</sup> Kaufman was a MoMA curator and consultant on industrial design.

<sup>65</sup> Carlos Montes Serrano, Noelia Galván Desvaux, & Álvaro Moral García, *Working with Scale Models: Eero Saarinen and Charles Eames in the Organic Design Competition, MoMA, 1941*, 24 EXPRESIÓN GRÁFICA ARQUITECTÓNICA 26, 30 (2019) ("Noyes and Kaufmann thus sought and obtained sponsorship from twelve chain stores around the country and of nine furniture manufacturing firms who made a commitment to produce the winning prototypes."); Paul Goldberger, *Edgar Kaufmann Jr., 79, Architecture Historian*, NY TIMES (Aug. 1, 1989), <https://www.nytimes.com/1989/08/01/obituaries/edgar-kaufmann-jr-79-architecture-historian.html>.

<sup>66</sup> Betty Pepis, *Museum Presents Settings for Home; Annual Show of Good Designs at the Museum of Modern Art*, NY TIMES, p. 36, Nov. 28, 1951.

<sup>67</sup> *Id.*; John Harwood, *The Interface: IBM and the Transformation of Corporate Design*, 23 (2011); Cherie Fehrman and Kenneth Fehrman, *Interior Design Innovators 1910-1960* 31 (2009).

<sup>68</sup> GEORGE CASTILLO, *COLD WAR ON THE HOME FRONT* 111 (2010) (citing Betty Pepis, *Review of Good Design Exhibition*, NY TIMES, 1953).

<sup>69</sup> *What Is Modern Design?* (1950) and *What Is Modern Interior Design?* (1953), the third and fourth books in MoMA's *What Is Modern?* book series were authored by Edgar Kaufmann Jr. Although subtly recalibrating good design principles, for those in the know, they were a direct challenge to the International Style and its adherents such as American architect Philip Johnson, an important personality in the museum. Although branded as American ingenuity, MCM design derived from both the International Style and Scandinavian design. Maggie Taft, *Morphologies and Genealogies: Shaker Furniture and Danish Design*, 7 DESIGN & CULTURE 313, 321 (2015).

<sup>70</sup> Maggie Taft, *Morphologies and Genealogies: Shaker Furniture and Danish Design*, 7 DESIGN & CULTURE 313, 321 (2015).

<sup>71</sup> This new material was known as fiberglass because it was made of glass fibers, but Owens-Corning claimed to own the trademark FIBERGLAS and was listed as the owner on 16 registrations. All but one for roofing shingles is now listed on the trademark registry as "dead." U.S. Serial No. 73,230,157.

rials was responsive to the socio-economic moment. The postwar period saw a dramatic rise in home-ownership<sup>72</sup> and rapid growth in the consumer economy. People in the U.S. had more homes, more kids, and more money, which meant they needed more furniture.<sup>73</sup> The supply of imported furniture and furniture made with craftsmanship could not meet the demand.<sup>74</sup> The efficiency of factory production and mass-market distribution of MCM furniture ensured its market success. Moreover, because postwar homes were either built small to be affordable for returning veterans or overcrowded with these veterans returning home, the fact that MCM furniture was scaled smaller was an attractive feature.<sup>75</sup> The use of new materials such as plastics, fiberglass, and plywood and wood laminate, that were largely made by machine rather than by hand, made MCM furniture affordable for the booming postwar middle class.

The postwar period was the most creative period in U.S. design history. Until this period, the U.S. furniture industry had not been innovative.<sup>76</sup> Until this point, design innovation occurred in Europe and then was exported to the U.S.<sup>77</sup> This moment of design innovation in the U.S. that occurred postwar was during a period where American cultural capital was being promoted to correspond with the industrial capital the U.S. had achieved after the war. Enabling large-scale production and distribution of furniture designs gave the public a chance to own something representing the height of American contemporary art and culture. The MCM American home and its furnishings eventually became a model for European styles.

### B. The Producers

Two American furniture companies, Herman Miller and Knoll, came to dominate the market for MCM design. Each company realized the promise of MCM furniture early on and specialized in this market. Each developed relationships with the most celebrated MCM designers, which ensured the companies' successes as well as the designers' impact.

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<sup>72</sup> Post war, many Americans found themselves able to buy suburban homes due to the GI Bill and the Federal Housing Authority. Dolores Hayden, *Building Suburbia: Green Fields and Urban Growth, 1820-2000*, 2004. Home ownership was also stimulated by increased mobility that was enabled by affordable cars and a massive new highway system. *Id.*

<sup>73</sup> Homeownership grew dramatically after World War II due to a booming economy, available financing, favorable tax laws, and new benefits for returning veterans. Jane Connory, *Design History Beyond the Canon*, (Feb. 7, 2019), [https://www.google.com/books/edition/Design\\_History\\_Beyond\\_the\\_Canon/CpOD-DwAAQBAJ?hl=en&gbpv=1&dq=the+peak+in+design+history%3F&pg=PA210&printsec=frontcover](https://www.google.com/books/edition/Design_History_Beyond_the_Canon/CpOD-DwAAQBAJ?hl=en&gbpv=1&dq=the+peak+in+design+history%3F&pg=PA210&printsec=frontcover). At 56. While there were 114,000 new homes constructed in 1944, there were 1.7 million new homes constructed in 1950. *Id.*

<sup>74</sup> Margaret Maile Petty, *Attitudes Towards Modern Living: The Mid-century Showrooms of Herman Miller and Knoll Associates*, 29 J. DESIGN HIST. 180, [ ] (2016).

<sup>75</sup> Prize Designs for Modern Furniture, From the International Competition for Low-Cost Furniture Production, MoMA, p. 8.

<sup>76</sup> George Nelson remarked that "you could blow up 2,900 of 3,000 furniture plants and not damage the industry as far as constructive thinking and activity are concerned." George Nelson, *The Furniture Industry*, FORTUNE, Feb. 1947, at 107. In fact, the objective of the MoMA's 1940 Organic Designs in Home Furnishings competition was to spur sorely needed design innovation in this stultified industry. Demetrios, *supra* note [ ], at 36. The competition drew 585 competing designs. *Id.*

<sup>77</sup> See, e.g., T.H. ROBSJOHN-GIBBINGS, GOOD-BYE, MR. CHIPPENDALE [ ] (1944) ("American houses have become the rubbish dumps of Europe.").

## 1. Herman Miller

Herman Miller's success in the MCM furniture business is the result of its relationship with visionary designers. D.J. De Pree took over his father-in-law's Star Furniture Company in Zeeland, Michigan and turned it into the Herman Miller Furniture Company in 1923. At that time, the company produced unbranded furniture in period styles to supply to department stores.<sup>78</sup> During the depression, when the company was struggling to stay afloat,<sup>79</sup> Gilbert Rohde, a Bauhaus-trained designer who specialized in modernist designs, paid a visit to Herman Miller and convinced DePree to experiment with modern designs. Whereas until that point, the company had paid a flat fee to copy designers' designs, Rhode's fee was much higher and not something Herman Miller could then afford.<sup>80</sup> So Rhode proposed a royalty model where he would receive 3% of any furniture sales.<sup>81</sup> Rhode next convinced DePree to bear the expense of showcasing these designs in the Century of Progress Exposition in Chicago in 1933.<sup>82</sup> The Herman Miller-produced Rhode designs received massive public exposure, including international press and favorable reviews.<sup>83</sup> Eventually, De Pree turned exclusively to modernist design.<sup>84</sup> Rhode was hired to be the design director of the company; a position he held until his death in 1944.<sup>85</sup> Rohde fundamentally changed Herman Miller.

In 1945, MCM designer George Nelson was hired to be next design director for Herman Miller.<sup>86</sup> Nelson stated that "we really stood on Rohde's shoulders ... and ... moved from there."<sup>87</sup> In that role, Nelson recruited other designers to work with the company, including Charles and Ray Eames, Isamu Noguchi, and Alexander Girard.<sup>88</sup>

The relationship Herman Miller had with designers Charles and Ray Eames was a key to its success and was emblematic of the kind of relationships it had with other designers. The Eameses became connected to Herman Miller in 1947 when Herman Miller took over the marketing and distribution of the Eameses' molded plywood chairs from the Evans Products Company, a production company that the Eames continued to have a working relationship with.<sup>89</sup> Evans had decided that furniture was

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<sup>78</sup> *How Herman Miller Became America's Top Producer of Modern Furniture*, Curbed; *100 Years of Herman Miller*, Herman Miller, <https://www.hermanmiller.com/about/> (last visited Aug. 4, 2023).

<sup>79</sup> Herman Miller suffered a \$30,000 loss to its bottom line for fiscal year 1931. *How Herman Miller Became America's Top Producer of Modern Furniture*, Curbed.

<sup>80</sup> *How Herman Miller Became America's Top Producer of Modern Furniture*, Curbed.

<sup>81</sup> *How Herman Miller Became America's Top Producer of Modern Furniture*, Curbed.

<sup>82</sup> *How Herman Miller Became America's Top Producer of Modern Furniture*, Curbed.

<sup>83</sup> *How Herman Miller Became America's Top Producer of Modern Furniture*, Curbed.

<sup>84</sup> *How Herman Miller Became America's Top Producer of Modern Furniture*, Curbed. Nelson states that Herman Miller gave up the manufacturing of period reproductions in 1936 at the behest of its first design director Gilbert Rohde. The Herman Miller Collection 4 (1948).

<sup>85</sup> *Herman Miller History: The Story of the Herman Miller Company*, BEVERLY HILLS CHAIRS, (Feb. 2, 2022), <https://www.beverlyhillschairs.com/office-digest/post/herman-miller-salute-history-ergonomics>.

<sup>86</sup> Stanley Abercrombie, George Nelson: The Design of Modern Design (2000).

<sup>87</sup> *How Herman Miller Became America's Top Producer of Modern Furniture*, Curbed.

<sup>88</sup> In 1946, Nelson and De Pree recruited Charles and Ray Eames. Isamu Noguchi began his relationship with Herman Miller in 1947. Alexander Girard came to work with Herman Miller by way of Nelson and the Eameses and stayed for 21 years. 138 Contact Interiors, Aug. 1978, at 73.

<sup>89</sup> Previously, the Eameses had been working mostly with the Evans Products Company ("Evans"), which formed the Evans Molded Plywood Products Division with and for the Eameses and appointed Charles as director of research and development. In 1945, Evans began manufacturing the Eameses' first design for furniture, the molded plywood chair. The

too far removed from its core business and approached Herman Miller to take on the manufacturing of Eames designed plywood chairs. Initially, Herman Miller declined, but then agreed only to take over distribution and sales, leaving Evans to continue to manufacture the chairs. This arrangement resulted in a licensing agreement where Herman Miller acquired from Evans the exclusive market and distribution rights to the Eameses' molded plywood products, while Evans retained the production rights.<sup>90</sup> According to Herman Miller, it signed a licensing agreement with Charles and Ray Eames in 1948.<sup>91</sup> Finally, in 1949, Herman Miller took over the manufacturing as well.<sup>92</sup> But even as Herman Miller had this exclusive relationship with the Eameses for one chair design, the designers continued to work out of the Evans Molded Plywood Products Division,<sup>93</sup> where Charles received an annual salary and he and Ray received royalties on all products made by the patented process for three-dimensionally molded plywood that the Eameses had invented.<sup>94</sup> In the same way, Herman Miller contracted with the Eameses over additional particular products they designed. Herman Miller realized over \$377 million in sales of the Eames brand alone from 1961 to 1998.<sup>95</sup>

In 1947, Herman Miller began its relationship with the artist and designer Isamu Noguchi. Nelson was responsible for bringing Noguchi into the business. Nelson had heard about Noguchi's design for a coffee table<sup>96</sup> and asked him to illustrate an article Nelson wrote, which was published, independent of Herman Miller, as "How to Make a Table."<sup>97</sup> Nelson then suggested that Herman Miller produce Noguchi's latest table design, the "TN-50," which it did.<sup>98</sup>

Even as Herman Miller pivoted toward MCM design, it retained its traditional bearings as a company. It was located in the Midwest, not near the cultural coasts, and its manufacturing processes and distribution channels were too slow to meet the increasing public demand.<sup>99</sup> Nelson therefore tried to present Herman Miller furniture as the most artistically innovative producer of modern furniture of the highest quality in an effort to justify its inaccessibility based on price and availability.

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design would eventually, in 1999, be named "the best design of the century" by *Time* magazine and be included in MOMA's permanent collection. *The Best of the Century*, TIME, Dec. 31, 1999, at 1. <http://content.time.com/time/magazine/article/0,9171,36533-1,00.html>.

<sup>90</sup> Company Timeline, Herman Miller, <https://www.hermanmiller.com/about/timeline/> (last visited Aug. 4, 2023).

<sup>91</sup> *Herman Miller, Inc. v. Mr. Rents, Inc.*, 545 F. Sup. 1241 (W.D. Mich. 1982) (Herman Miller claims that it received a license from Charles and Ray Eames in 1948). *But see* *Herman Miller, Inc. v. Palazzetti Imps. & Exps., Inc.*, 270 F.3d 298, 301-02 (6<sup>th</sup> Cir. 2001) (stating that the Eames were contracted with Evans Products Co. from 1946-47, and then in 1949, Herman Miller purchased from Evan's all their rights to Eames designed furniture). For the Eames DTM design in particular, Evans Molded Plywood Company was not able to manufacture them, so the Eames turned to Warren Kerkmann to be an investor in a new company that would be formed—Kerkmann Manufacturing—to manufacture these tables. Under the arrangement, the profits from the tables would be shared equally between Kerkmann and the Eames. But after only two and a half years, Kerkmann Manufacturing sold the business to Herman Miller. *DTM Plywood "Drop Leg" Tables*, Eames.com, <https://eames.com/en/dtm-1> (last visited Aug. 4, 2023).

<sup>92</sup> Company Timeline, Herman Miller, <https://www.hermanmiller.com/about/timeline/> (last visited Aug. 4, 2023).

<sup>93</sup> Cherie Fehrman and Kenneth Fehrman, *Interior Design Innovators, 1910-1960* 46 (2009).

<sup>94</sup> Cherie Fehrman and Kenneth Fehrman, *Interior Design Innovators, 1910-1960* 46 (2009).

<sup>95</sup> *Herman Miller, Inc. v. Palazzetti Imps. & Exps., Inc.*, 270 F.3d 298, 302 (6<sup>th</sup> Cir. 2001).

<sup>96</sup> By 1944, Noguchi had created three separate designs for a coffee table, although only one had been produced. CITE

<sup>97</sup> *Coffee Table (IN-50)*, Noguchi, <https://www.noguchi.org/artworks/collection/view/coffee-table-in-50/> (last visited Aug. 4, 2023).

<sup>98</sup> Leslie Pina, *Classic Herman Miller* [] (1998).

<sup>99</sup> Stephen B. Adams, *Making a Virtue of Necessity: Herman Miller's Model for Innovation*, 10 BUS. & ECON. HISTORY ON-LINE 1, 11-13 (2012).

Nelson's Bubble Lamps were not originally manufactured by Herman Miller; they were exclusively manufactured by the Howard Miller Clock Company, which also manufactured a large number of wall clocks and other items designed by Nelson.<sup>100</sup> Herman Miller founded the Herman Miller Clock Company in 1926 as a specialized division. In 1937, it was renamed the Howard Miller Clock Company led by Howard Miller, Herman Miller's son. The two companies are no longer related.

The first lamps produced were spheres, but later a variety of shapes were produced.<sup>101</sup> The series of Bubble Lamps included pendant lights, table lamps, floor lamps, and wall sconces. Many, but not all light fixtures came in a variety of shapes and in three sizes.

Shortly after the Howard Miller Clock Company began producing the Bubble Lamps, designers Charles and Ray Eames prominently featured one in the Los Angeles home they designed for themselves in 1949, Case Study House No. 8. This celebrated home was instantly promoted by *Art and Architecture* magazine as a modern solution to the postwar housing boom and was showcased in many Eames and Herman Miller advertisements. Such promotion helped the lamps sell to homeowners as well as commercial establishments.<sup>102</sup>

## 2. Knoll

Whereas Herman Miller was an existing furniture manufacturer that began to focus on MCM design in the 1940s, Knoll was founded in this period specifically to focus on modernist design. The Hans G. Knoll Furniture Company, which became H. G. Knoll Associates, Knoll Associates, Inc., and then Knoll International,<sup>103</sup> was founded in 1938, 15 years after Herman Miller got its start.<sup>104</sup> Unlike Herman Miller, Knoll was not initially a furniture producer, even though its founder Hans Knoll was a third-generation furniture maker. Instead, it began as a store selling modernist design furniture that it imported from Europe.<sup>105</sup> But because the war in Europe interfered with that plan, the company turned to furniture manufacturing.<sup>106</sup> Postwar, Knoll returned to importing, making deals with Swedish manufacturers and designers.<sup>107</sup> In January 1947, Knoll introduced to America the first postwar shipment of Swedish modern furniture.<sup>108</sup>

<sup>100</sup> MoMA collection states that the manufacturer of their Bubble Hanging Lamp was Herman Miller Clock Co. *Bubble Hanging Lamp (model H-727)*, MOMA, <https://www.moma.org/collection/works/82740>, (last visited Aug. 4, 2023).

<sup>101</sup> Hannah Martin, *The Story Behind George Nelson's Iconic Bubble Lamp*, ARCHITECTURAL DIGEST (Nov. 16, 2018), <https://www.architecturaldigest.com/story/the-story-behind-george-nelsons-iconic-bubble-lamp>.

<sup>102</sup> Hannah Martin, *The Story Behind George Nelson's Iconic Bubble Lamp*, ARCHITECTURAL DIGEST (Nov. 16, 2018), <https://www.architecturaldigest.com/story/the-story-behind-george-nelsons-iconic-bubble-lamp>.

<sup>103</sup> The name change occurred in 1943. Paul Makovsky, *Knoll Before Knoll Textiles, 1940-46*, Bard Graduate, <https://www.bgc.bard.edu/research-forum/articles/203/knoll-before-knoll-textiles-1940> (last visited Aug. 4, 2023).

<sup>104</sup> The founding date may have been 1940. <https://www.bgc.bard.edu/research-forum/articles/203/knoll-before-knoll-textiles-1940>. Paul Makovsky, *Knoll Before Knoll Textiles, 1940-46*, Bard Graduate, <https://www.bgc.bard.edu/research-forum/articles/203/knoll-before-knoll-textiles-1940> (last visited Aug. 4, 2023).

<sup>105</sup> Jamie Suzanne Aron, *Woven Images: From the Bauhaus Weaving Workshop to the Knoll Textile Division* (2013).

<sup>106</sup> Jamie Suzanne Aron, *Woven Images: From the Bauhaus Weaving Workshop to the Knoll Textile Division* (2013).

<sup>107</sup> Paul Makovsky, *Knoll Before Knoll Textiles, 1940-46*, Bard Graduate, <https://www.bgc.bard.edu/research-forum/articles/203/knoll-before-knoll-textiles-1940> (last visited Aug. 4, 2023).

<sup>108</sup> Paul Makovsky, *Knoll Before Knoll Textiles, 1940-46*, Bard Graduate, <https://www.bgc.bard.edu/research-forum/articles/203/knoll-before-knoll-textiles-1940> (last visited Aug. 4, 2023). 1947 "marked the beginning of an ongoing relationship that Knoll would have with NK. Knoll imported NK furniture for a few years, and NK became Knoll's licensee in



Whereas Herman Miller helped define American modern design, Knoll was not founded by Americans, nor were its early collaborations with American designers. Knoll was influential in bringing European design to America.

Like Herman Miller, Knoll's success in the MCM furniture market is directly the result of its association with modernist designers. Knoll, however, had somewhat of a different approach in that it associated with a larger number of designers in a variety of ways. Some worked in a Knoll provided studio space to create designs that Knoll would produce, some created a collection of designs that Knoll produced,<sup>109</sup> some created just a few designs that Knoll produced, some had Knoll produce designs that predated the company, and others had their designs sold by Knoll, but had them produced elsewhere.<sup>110</sup>

The first MCM designer to work with Knoll was Danish designer Jens Risom who joined Knoll in 1941.<sup>111</sup> Risom designed the first pieces of furniture that Knoll produced.<sup>112</sup> Risom's role was more than just a designer in the early days of the company. He also commissioned interior designs, oversaw manufacturing, secured business contacts, and developed business strategy.<sup>113</sup> Risom, however, never was a true partner in the firm, choosing instead to maintain his independence as a designer. Knoll paid Risom royalties for his designs.<sup>114</sup> Risom left for the war in 1943, and when he returned in 1947, he established his own firm, Jens Risom Design, Inc.<sup>115</sup>

Hans Knolls' wife, Florence Knoll, was instrumental in the company's ability to specialize in MCM design. Although they did not marry until 1946, she first began to work for Knoll as a freelance interior designer in 1941 and later became Knoll's unofficial design director.<sup>116</sup> Beginning in 1946, Florence Knoll designed many furniture pieces that Knoll produced and are still sold.<sup>117</sup> When Hans died in 1955, Florence became president of the company.<sup>118</sup>

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Sweden when the company began expanding overseas in the 1950s." <https://www.bgc.bard.edu/research-forum/articles/203/knoll-before-knoll-textiles-1940>.

<sup>109</sup> Knoll began to manufacture designs by George Nakashima in 1946. *Knoll Timeline*, Knoll, <https://www.knoll-int.com/discover-knoll/timeline> (last visited Aug. 4, 2023).

<sup>110</sup> In 1965, Knoll Associates achieved a major coup: It executed an agreement with Mies van der Rohe in which he agreed to "sell, assign and convey all of [his] right, title and interest in [his] designs and the exclusive use of [his] name in connection with [such] sale in the United States and elsewhere." *Leather Form S.R.L. v. Knoll, Inc.*, 2005 U.S. Dist. LEXIS 31555 (S.D.N.Y. 2005). Knoll was likely able to make this deal as a result of Florence's previous relationship with van der Rohe. Similarly, in 1947, Knoll agreed to pay royalties to Argentinean designers Jorge Ferrari-Hardoy, Antonio Bonet, and Juan Kurchan to manufacture their Hardoy Chair, designed by in 1938. *Knoll Timeline*, Knoll, <https://www.knoll-int.com/discover-knoll/timeline> (last visited Aug. 4, 2023).

<sup>111</sup> Paul Makovsky, *Knoll Before Knoll*, <https://www.bgc.bard.edu/research-forum/articles/203/knoll-before-knoll-textiles-1940> (last visited Aug. 4, 2023).

<sup>112</sup> STEVEN ROULAND AND LINDA ROULAND, *KNOOLL FURNITURE, 1938-1960* 4 (1999); Paul Makovsky, *Knoll Before Knoll*, <https://www.bgc.bard.edu/research-forum/articles/203/knoll-before-knoll-textiles-1940> (last visited Aug. 4, 2023).

<sup>113</sup> Paul Makovsky, *Knoll Before Knoll*, <https://www.bgc.bard.edu/research-forum/articles/203/knoll-before-knoll-textiles-1940> (last visited Aug. 4, 2023).

<sup>114</sup> ARTHUR J. PULOS, *THE AMERICAN DESIGN ADVENTURE 1940-1975* 85 (1988).

<sup>115</sup> ARTHUR J. PULOS, *THE AMERICAN DESIGN ADVENTURE 1940-1975* 85 (1988).

<sup>116</sup> Florence Knoll took over leading the Panning Unit in 1945. Paul Makovsky, *Knoll Before Knoll*, <https://www.bgc.bard.edu/research-forum/articles/203/knoll-before-knoll-textiles-1940> (last visited Aug. 4, 2023).

<sup>117</sup> *Timeline*, Knoll, <https://www.knoll-int.com/discover-knoll/timeline> (last visited Aug. 4, 2023).

<sup>118</sup> Robert D. McFadden, *Florence Knoll Bassett, 101, Designer of the Modern American Office, Dies*, *NY TIMES*, Jan. 25, 2019, <https://www.nytimes.com/2019/01/25/style/florence-knoll-bassett-dead.html> (last visited Aug. 4, 2023).

Florence Knoll got her start in modernist design at the Cranbrook Academy of Art, the U.S. version of the Bauhaus.<sup>119</sup> There she became close with Cranbrook's director, designer Eliel Saarinen, his son designer Eero Saarinen,<sup>120</sup> Charles Eames, and Finnish designer Alvar Aalto.<sup>121</sup> She later studied architecture and apprenticed with Bauhaus legends Walter Gropius and Marcel Breuer, and studied under Mies van der Rohe.<sup>122</sup>

A few designers worked with both Herman Miller and Knoll.<sup>123</sup> At about the same time Noguchi agreed to have Herman Miller produce his coffee table, he also agreed to have Knoll produce his three-legged Cylinder Lamp designed in 1944.<sup>124</sup> Likewise, Knoll began producing pieces designed by the Eames in 1954, seven years into their working relationship with Herman Miller.<sup>125</sup>

A few designers have had outsized roles in the company's reputation due to their design output and to the market success of their designs. Eero Saarinen, who Florence Knoll brought to work with the company in 1946, designed his tulip collection of tables and chairs (1955-1956), and the Womb chair, which were major successes in the day and are still best-sellers today.<sup>126</sup>

Another designer who produced a successful collection of related designs that Knoll produced is Harry Bertoia. When Florence Knoll officially began Knoll's relationship with Bertoia, he was a sculptor, not an industrial designer. In 1950, she allegedly gave him studio space for two years in Pennsylvania with no strings attached.<sup>127</sup> According to the Knoll company, Florence told Bertoia to fool around with his wire and see if he came up with any furniture designs while on Knoll's payroll.<sup>128</sup> He did. In 1952, he designed a series of chairs that also remains a best seller for Knoll today.<sup>129</sup>

Although the two companies have differences, Herman Miller and Knoll were close competitors. As an example of the two similarly marketed themselves, six months after Herman Miller published its impactful 1948 catalog of its modern design, Knoll followed suit publishing its own catalog charging its readers \$2 more per copy.<sup>130</sup> In fact, Herman Miller may have copied the idea of creating a

<sup>119</sup> She enrolled at the age of 17. Ana Araujo, No Compromise: The Work of Florence Knoll 48 (2021).

<sup>120</sup> Much is made in Knoll company history of her adopting the Saarinen's as her family as she was orphaned at age 12. CITE. See also Virginia Lee Warren, *Woman Who Led an Office Revolution Rules an Empire of Modern Design*, NY TIMES, Sep. 1, 1964, at 40.

<sup>121</sup> Virginia Lee Warren, *Woman Who Led an Office Revolution Rules an Empire of Modern Design*, NY TIMES, Sep. 1, 1964, at 40.

<sup>122</sup> She studied architecture at Columbia and in London, and apprenticed with Walter Gropius and Marcel Breuer in Cambridge, Massachusetts. Paul Makovsky, *Knoll Before Knoll*, <https://www.bgc.bard.edu/research-forum/articles/203/knoll-before-knoll-textiles-1940> (last visited Aug. 4, 2023).

<sup>123</sup> In 1948 Knoll began production of the Model 108 Coffee Table designed by Alexander Girard, a designer who in 1952 became the head of Herman Miller's Textile Division.

<sup>124</sup> Knoll dubbed it the Model 9 Lamp. <https://www.knoll-int.com/discover-knoll/timeline>. Knoll also produced Noguchi's Cyclone tables and stools. OSCAR P. FITZGERALD, *AMERICAN FURNITURE: 1650 TO THE PRESENT* 482 (2017).

<sup>125</sup> *Timeline*, Knoll, <https://www.knoll-int.com/discover-knoll/timeline> (last visited Aug. 4, 2023).

<sup>126</sup> Knoll first produced Saarinen's Grasshopper chair in 1946. *Timeline*, Knoll, <https://www.knoll-int.com/discover-knoll/timeline> (last visited Aug. 4, 2023).

<sup>127</sup> *Timeline*, Knoll, <https://www.knoll-int.com/discover-knoll/timeline> (last visited Aug. 4, 2023). See also Virginia Lee Warren, *Woman Who Led an Office Revolution Rules an Empire of Modern Design*, NY TIMES, Sep. 1, 1964, at 40.

<sup>128</sup> Harry Bertoia had worked as a designer in the Eames Office in 1945. AMY AUSCHERMAN, SAM GRAWE, & LEON RANSMEIER, EDS., *HERMAN MILLER, A WAY OF LIVING* (2019).

<sup>129</sup> He came up with the Diamond chair, the Bird chair, and others.

<sup>130</sup> *The Story of Herman Miller's 1948 Catalog*, YouTube, [https://www.youtube.com/watch?v=YjluW4S-umM&ab\\_channel=HermanMiller](https://www.youtube.com/watch?v=YjluW4S-umM&ab_channel=HermanMiller) (last visited Aug. 4, 2023).

catalog of any kind to showcase its innovative collection from Knoll as it had already done so in 1942.<sup>131</sup>

### C. The Reemergence of MCM Design

At present, there is a great interest in MCM design.<sup>132</sup> The market for MCM design in home furnishings has been hot for decades.<sup>133</sup> While all things MCM have been selling well, furniture by the celebrity MCM designers—George Nelson, Charles and Ray Eames, Eero Saarinen, Isamu Noguchi, and Harry Bertoia, to name a few—are particularly popular.<sup>134</sup> Although this popularity may just be a phase, they seem modern today, in some cases nearly 80 years after they were designed.

This resurgence of interest in MCM design began in the mid-1990s. Between the late 1970s and mid-1990s interest in MCM design lagged and the manufacturers of MCM furniture largely ceased production. Beginning in the 1990s, interior designers and collectors began snatching up the available vintage inventory. Auction prices for vintage MCM furniture soared.<sup>135</sup>

One company synonymous with the MCM design boom is DWR. Founded in 1999,<sup>136</sup> it turned profitable within 18 months of launching.<sup>137</sup> It saw and met a market need. At that time, there were few good options for buying MCM designs.<sup>138</sup> The conventional way was to go through an interior designer who ordered the pieces from Europe and delivered them to buyers after months-long waits. By making these designs available by a few clicks and delivering orders within a few weeks, DWR may be credited in part with building the MCM boom. DWR soon became Knoll and Herman Miller's largest retailer.<sup>139</sup>

## V. LIGHT LITIGATION

<sup>131</sup> Paul Makovsky, *Knoll Before Knoll*, <https://www.bgc.bard.edu/research-forum/articles/203/knoll-before-knoll-textiles-1940> (last visited Aug. 4, 2023) (“The catalogue was hand-assembled by Risom and Knoll, by gluing photographs of the products to printed cardstock.”).

<sup>132</sup> According to Google, searches for “midcentury modern” peaked in January 2022; *midcentury modern*, Google, <https://trends.google.com/trends/explore?date=all&geo=US&q=midcentury%20modern> (last visited Aug. 4, 2023).

<sup>133</sup> <https://archive.curbed.com/2017/11/22/16690454/midcentury-modern-design-mad-men-eames> (describing how MCM design is now ubiquitous; seen everywhere from interior design magazines to television sets to restaurant décor). The MCM descriptor is used often and loosely because marketers know that consumers desire it.

<sup>134</sup> <https://www.thespruce.com/mid-c>.

<sup>135</sup> Laura Fenton, *Why the World Is Obsessed With Midcentury Modern Design*, Curbed (Apr. 8, 2015), <https://archive.curbed.com/2017/11/22/16690454/midcentury-modern-design-mad-men-eames> (noting that an Eames screen sold for \$10,000 in 1994 and a George Nakashima cabinet sold for \$20,700 in 2000).

<sup>136</sup> Jeff Chu, *The Rise and Fall of Design Within Reach*, FASTCOMPANY, Dec. 1, 2009, <https://www.fastcompany.com/1460614/rise-and-fall-design-within-reach> (last visited Aug. 4, 2023).

<sup>137</sup> By 2003 it had 14 retail locations—eight opened that year—with another 25 planned by 2005. According to the company, which was then privately held, revenue went from \$23 million in 2000 to \$80 million in 2003. Julie Sloane, *Designing Men*, CNNMoney, (Nov. 1, 2003), [https://money.cnn.com/magazines/fsb/fsb\\_archive/2003/11/01/358309/](https://money.cnn.com/magazines/fsb/fsb_archive/2003/11/01/358309/)

<sup>138</sup> A pre-existing company with a substantially similar business model was Full Upright Position, based in Portland, Oregon and founded by Deborah Starr in 1993. Starr's company was an online and catalog retailer, as DWR had been at its start, and sold MCM furniture, including icons such as the Eames lounge chair and ottoman, Noguchi coffee table, Nelson bench, and Nelson marshmallow sofa. Full Upright Position went bankrupt in 19[ ]. CITE

<sup>139</sup>

Modernica is a furniture and home goods company specializing in modernist design founded in 1989 and based in Southern California. Modernica became the leading source for MCM reproduction furniture and home goods just as the MCM furniture market began its second boom. Modernica supplied DWR and other retailers, as well as operating their own retail business.<sup>140</sup>

The founders, brothers Frank and Jay Novak, saw an opportunity when Herman Miller's decided in 1993 to discontinue production of the Eames fiberglass shell chair.<sup>141</sup> The Novaks purchased 12,000 shell chair seats that had been manufactured by Century Plastics for Herman Miller, but never used.<sup>142</sup> Modernica manufactured new bases and shock mounts to complete the chairs.<sup>143</sup> Later, Modernica acquired the original preform machine and other equipment that had been used to manufacture the chairs for Herman Miller so that it could manufacture new seats from the original molds.<sup>144</sup>

Following its success with the Eames chairs, Modernica began to manufacture Nelson Bubble Lamps in 1999. The Howard Miller Clock Company stopped producing Bubble Lamps in the late 1970s.<sup>145</sup> In 1979, it sold its entire lamp business to Gossamer Designs in Lighting Ltd., who continued to produce and sell the lamps from its factory in Holland, Michigan until it went out of business in the 1990s.<sup>146</sup> At that time, the Bubble Lamps ceased to be produced by anyone. Modernica acquired the equipment that had been used to manufacture Bubble Lamps from Gossamer through a bankruptcy sale.<sup>147</sup> And just as it had done with the Eames fiberglass shell chair, it began producing Bubble Lamps and revived the product line.

Modernica's Bubble Lamps became very popular.<sup>148</sup> By 2014, Modernica's Bubble Lamps were "a multimillion-dollar business, selling more than 25,000 units a year."<sup>149</sup> It was the only producer of Nelson Bubble Lamps and its website proudly proclaimed: "Modernica is the official site for the

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<sup>141</sup> *Shell Side Chair Generations*, Eames.com, <https://eames.com/en/articles/sideshellgens>. Herman Miller, in collaboration with the Eames Office, did not reissue the Eames Molded Fiberglass Chair until 2013. <https://www.hermanmiller.com/about/timeline/> (last visited Aug. 4, 2023).

<sup>142</sup> Rebecca Suhrawardi, *An Icon Evolved: Herman Miller Releases Eames Shell Chair in 100% Recycled Plastic*, FORBES (Sept. 7, 2022), <https://www.forbes.com/sites/rebeccasuhrawardi/2022/09/07/an-icon-evolved-herman-miller-releases-eames-shell-chair-in-100-recycled-plastic/?sh=6336426b7878> (last visited Aug. 4, 2023).

<sup>143</sup> Rebecca Suhrawardi, *An Icon Evolved: Herman Miller Releases Eames Shell Chair in 100% Recycled Plastic*, FORBES (Sept. 7, 2022), <https://www.forbes.com/sites/rebeccasuhrawardi/2022/09/07/an-icon-evolved-herman-miller-releases-eames-shell-chair-in-100-recycled-plastic/?sh=6336426b7878> (last visited Aug. 4, 2023).

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<sup>145</sup> Allen Penwick, *Furnishing Issues*, THE ARCHITECT'S NEWSPAPER (Sept. 24, 2014), <https://www.archpaper.com/2014/09/furnishing-issues/>.

<sup>146</sup> <https://designaddict.com/community/main-forum/gossamer-designs-lighting15848/>.

<sup>147</sup> Jeffrey Head, *Bubble Lamp Brouhaha: Legal Battle Over a Midcentury Icon*, LA TIMES (Dec. 28, 2013) <https://www.latimes.com/home/la-lh-lawsuit-bubble-lamp-manufacturing-20131227-story.html>. (last visited Aug. 4, 2023).

<sup>148</sup> The lights, which came in a range of shapes and sizes, were priced between \$269 and \$1,395. Jeffrey Head, *Bubble Lamp Brouhaha: Legal Battle Over a Midcentury Icon*, LA TIMES (Dec. 28, 2013) <https://www.latimes.com/home/la-lh-lawsuit-bubble-lamp-manufacturing-20131227-story.html>. When the Howard Miller Clock Company last sold Bubble Lamps in the 1970s, the prices ranged from \$14.75 to \$90. <http://www.georgenelson.org/bubblelamps.html> (last visited Aug. 4, 2023). In 2024 dollars, the most expensive Howard Miller Bubble Lamp was \$1,000 less expensive than Modernica's top-priced lamp. According to the CPI Inflation Calculator ([https://www.bls.gov/data/inflation\\_calculator.htm](https://www.bls.gov/data/inflation_calculator.htm)), \$90 in 1979 would be equivalent to \$300 in 2014.

<sup>149</sup> Jeffrey Head, *Furnishing Issues*, THE ARCHITECT'S NEWSPAPER, Sept. 24, 2014. <https://www.archpaper.com/2014/09/furnishing-issues/> (last visited Aug. 4, 2023).

George Nelson Bubble Lamp Collection.”<sup>150</sup> According to Modernica, even Herman Miller purchased Nelson-branded Bubble Lamps from Modernica.<sup>151</sup>

The Howard Miller Clock Company marketed the lamps interchangeably as “Bubble Lamps,” “Bubble Lighting Fixtures,” and “the Bubble Collection.” Modernica, however, consistently referred to the line of products as “Bubble Lamps,” and devised a name for each model of Bubble Lamp that it sold such as “Saucer,” “Ball,” “Cigar,” “Apple,” “Pear,” “Criss Cross,” “Lantern,” and “Propeller.”<sup>152</sup> Previously neither Nelson nor the Howard Miller company had named the various lamp models, instead simply selling them under their catalog numbers such as “Bubble Lamp H-727,” and “Bubble Lamp H-725.”<sup>153</sup>

Beginning in 2009, ten years after it began manufacturing Bubble Lamps,<sup>154</sup> Modernica began applying for trademark registrations for the Bubble Lamp marks. Modernica received registrations for GEORGE NELSON,<sup>155</sup> NELSON,<sup>156</sup> BUBBLE LAMPS,<sup>157</sup> SAUCER,<sup>158</sup> CRISSCROSS,<sup>159</sup> CIGAR,<sup>160</sup> and two trade dress registrations, one for the Saucer lamp design<sup>161</sup> and one for the Cigar lamp design,<sup>162</sup> all for lighting.<sup>163</sup>

In 2010, Herman Miller applied to register the trademark NELSON LANTERNS for lamps.<sup>164</sup> It received a refusal from the USPTO citing Modernica’s registration for NELSON for lighting.<sup>165</sup>

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<sup>150</sup> On the Wayback machine on August 27, 2010: “Modernica is the official site for the George Nelson Bubble Lamp® Collection. Modernica distributes all George Nelson Bubble Lamps® worldwide. In 1947, George Nelson designed the first Bubble Lamp collection which was manufactured by Howard Miller until 1979 when the collection went out of production. In 1998, Modernica acquired all of the tooling and materials to begin production of this iconic series. The George Nelson Bubble Lamp® collection is featured in the permanent collection of the Museum of Modern Art in New York.” [http://modernica.net/index.php?target=categories&category\\_id=2](http://modernica.net/index.php?target=categories&category_id=2). On March 4, 2012, the site simply stated: “The George Nelson Bubble Lamp® Manufactured exclusively by Modernica.”

<sup>151</sup> CITE. Modernica manufactured Eames Storage Units (ESU) for Herman Miller for a while. Herman Miller manufactured and marketed the Eames Storage Units (ESU) in 1950 and soon ended their production in 1955. Modernica has been building Case Study Units since 1987. CITE

<sup>152</sup> Counter examples are the “Angled Sphere” H-734, the “Almond” H-765, and the “Roll” H-764.

<sup>153</sup> Jeffrey Head, *Bubble Lamp Bronhaha: Legal Battle Over a Midcentury Icon*, LA TIMES (Dec. 28, 2013) <https://www.latimes.com/home/la-lh-lawsuit-bubble-lamp-manufacturing-20131227-story.html>.

<sup>154</sup> Jeffrey Head, *Bubble Lamp Bronhaha: Legal Battle Over a Midcentury Icon*, LA TIMES (Dec. 28, 2013) <https://www.latimes.com/home/la-lh-lawsuit-bubble-lamp-manufacturing-20131227-story.html>.

<sup>155</sup> U.S. Registration No. 3,733,895 for the mark GEORGE NELSON in connection with “Electric lamps; Lamp shades; [and] Lamps,” filed May 29, 2009, and granted January 5, 2010.

<sup>156</sup> U.S. Registration No. 3,823,800 for the mark NELSON in connection with “Electric lamps; Lamp shades; [and] Lamps,” filed May 29, 2009, and granted July 27, 2010.

<sup>157</sup> U.S. Registration No. 2,941,595 for the mark [] in connection with “[[],” filed [], and granted [].

<sup>158</sup> U.S. Registration No. 4,008,337 for the mark [] in connection with “[[],” filed [], and granted [].

<sup>159</sup> U.S. Registration No. 4,000,980 for the mark [] in connection with “[[],” filed [], and granted [].

<sup>160</sup> U.S. Registration No. 3,907,720 for the mark [] in connection with “[[],” filed [], and granted [].

<sup>161</sup> U.S. Registration No. 3,939,483 for certain lamp trade dress in connection with “Electric lamps; Lamp shades; [and] Lamps,” filed May 29, 2009, and granted April 5, 2011.

<sup>162</sup> U.S. Registration No. 3,939,484 for certain lamp trade dress in connection with “Electric lamps; Lamp shades; [and] Lamps,” filed May 29, 2009, and granted April 5, 2011.

<sup>163</sup> Modernica also applied trademark registrations for NELSON for fireplace tools (Serial No. 85,186,747) and a design mark consisting of the three-dimensional configuration of a chair resembling an Eames shell chair ((Serial No. 85,626,264).

<sup>164</sup> Serial No. 8,5067,635 for the mark [] in connection with “[[],” filed [].

<sup>165</sup> Interestingly, Herman Miller has not chosen to use the mark NELSONS LANTERNS in connection with the sale of

Modernica thus found itself within the crosshairs of Herman Miller. Modernica was eventually sued for selling Bubble Lamps and for using George Nelson's name, but not by Herman Miller.

#### A. *George Nelson Foundation v. Modernica*

The George Nelson Foundation ("Foundation") was incorporated in 2010.<sup>166</sup> The Foundation describes itself as a nonprofit "dedicated to preserving the legacy of Mr. Nelson."<sup>167</sup>

In May 2013, the Foundation sued Modernica over the Bubble Lamps. The Foundation sought injunctive relief and damages, claiming trademark and trade dress infringement, trademark dilution, false designation of origin, unfair competition, and unfair and deceptive trade practices. The Foundation also sought cancellation of Modernica's trademark registrations for all marks and trade dress associated with the Bubble Lamps. As the basis of these claims, the Foundation asserted that it owned common-law marks in GEORGE NELSON and NELSON based on its continuous use of the marks in connection with the sale of furniture and accessories designed by Nelson.<sup>168</sup>

The Foundation claimed that it possessed the exclusive right to use the Nelson name and designs as a trademarks based on its common-law rights, and that it had the exclusive right to produce and sell the Bubble Lamp designs.<sup>169</sup> The Foundation stated that "[t]he NELSON Marks have been used, continuously, in interstate commerce since 1947 in connection with furniture and other goods."<sup>170</sup> As a remedy, the Foundation sought not only all of the intellectual property rights associated with the Bubble Lamps, but also all of the equipment used to produce them.<sup>171</sup>

In seeking a dismissal of the case, Modernica argued that neither the Foundation nor any other entity had made any commercial use of the names in years and asserted any previous trademark rights in the name had been abandoned.<sup>172</sup> Modernica also argued that the lawsuit was barred by the doctrine of laches since it was brought so many years after Modernica began using the marks and designs.

The district court denied Modernica's motion to dismiss finding that its defenses could not be determined on the pleadings.<sup>173</sup> The court also ruled that the alleged common law marks

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Bubble Lamps and has abandoned its trademark application. *See* Serial No. 8,5067,635. Perhaps its selection of this seemingly less good mark was a recognition that the names Modernica chose were no longer available.

<sup>166</sup> The Foundation was incorporated and registered as a non-profit Michigan corporation on February 11, 2010. 2022 Complaint, para. 79.

<sup>167</sup> George Nelson Foundation, <http://www.georgenelsonfoundation.org/> (last visited Aug. 5, 2023).

<sup>168</sup> CITE Complaint.

<sup>169</sup> Complaint, *George Nelson Found. v. Modernica, Inc.*, para. 26. The Foundation sought cancellation of U.S. Registration No. 3733895 on the grounds that the mark: (1) disparaged or falsely suggested a connection with George Nelson; (2) was likely to be confused with the Foundation's GEORGE NELSON marks; (3) was likely to dilute the distinctive quality of the Foundation's GEORGE NELSON marks, and (4) was obtained by fraud. It also complained of Modernica's sale of another Nelson designed lamp, the "Half Nelson" table lamp designed in 1949. *Id.*

<sup>170</sup> Complaint, *George Nelson Found. v. Modernica, Inc.*, para. 27.

<sup>171</sup>

<sup>172</sup> In the press, Modernica's President accused Herman Miller of being "a billion dollar business posing as a benevolent company who is trying to steal our company." Jeffrey Head, *Furnishing Issues*, THE ARCHITECT'S NEWSPAPER, Sept. 24, 2014, <https://www.archpaper.com/2014/09/furnishing-issues/>. In February 2014, while *George Nelson Foundation v. Modernica* was ongoing [after Modernica filed motion to dismiss?], Herman Miller also sued Modernica. Herman Miller claims that Modernica is infringing its EAMES and M design trademarks, as well as false advertising, breach of contract, and violating the rights of publicity of Charles Eames. CITE complaint.

<sup>173</sup> 12 F. Supp.3d 635 (denying motion to dismiss).

GEORGE NELSON and NELSON were famous for purposes of a motion to dismiss.<sup>174</sup> The court relied on the Foundation's allegations that the mark had been used for more than 60 years generating hundreds of million dollars of revenue for Herman Miller.<sup>175</sup> As to Modernica's argument that the Foundation had no protectable interest in the marks, the court held that this argument was "more properly framed as a question of abandonment, rather than a failure to establish rights to the mark."<sup>176</sup>

The case eventually settled in 2015.<sup>177</sup> According to the Wayback Machine, Bubble Lamps were last seen on Modernica's website on October 2, 2016, after which the entire category of lighting was removed from the website.<sup>178</sup> Since 2016, Herman Miller has been the exclusive manufacturer of Bubble Lamps in the U.S.<sup>179</sup> Herman Miller increased the prices for the Bubble Lamps, but otherwise sells the exact same lamps that Modernica did, including offering them in size "extra-large," a product not designed by Nelson, nor previously offered by Howard Miller, but instead developed by Modernica.<sup>180</sup>

It would be an understatement to say this litigation raised more questions than answers. This article will demonstrate that the Foundation in fact had no trademark rights to assert against Modernica. It will also show how the Foundation serves as a front for the Herman Miller company. Finally, it will expose Herman Miller's many attempts to monopolize the Bubble Lamp.

What rights could the Foundation have had? Having been formed only in 2010, any rights it possessed would have to have been assigned to it. It sued Modernica in 2013, 14 years after Modernica began producing and selling Bubble Lamps using Nelson's name and designs, and 10 years after Modernica filed the first of its many trademark applications associated with the Bubble Lamps.<sup>181</sup> That is, even if the Foundation had been assigned rights upon its founding in 2010, Modernica would have been using the marks for 11 years before the Foundation had any rights to assert. Nevertheless, in its complaint the Foundation asserted that "Modernica has been and/or is using the NELSON Marks with full knowledge of and/or willful disregard for The Foundation's rights in the NELSON Marks."<sup>182</sup> In fact, the Foundation does not purport to have acquired the rights until January 2013, four months before bringing suit against Modernica. Assuming the assignment and the rights contain in it were valid, if Modernica use was infringing, it had infringed the Foundations predecessor in interest. But who was that predecessor? Who could have had any rights to assign the Foundation?

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<sup>174</sup> 12 F. Supp.3d 635.

<sup>175</sup> 12 F. Supp.3d 635.

<sup>176</sup> 12 F. Supp.3d 635.

<sup>177</sup> The Foundation and Modernica settled on September 17, 2015. 2022 Complaint, para. 152.

<sup>178</sup> [https://web.archive.org/web/20160701000000\\*/http://www.modernica.net](https://web.archive.org/web/20160701000000*/http://www.modernica.net).

<sup>179</sup> *Nelson Bubble Lamp Collection*, Herman Miller, [https://store.hermanmiller.com/collection-nelson-bubble-lamp?lang=en\\_US](https://store.hermanmiller.com/collection-nelson-bubble-lamp?lang=en_US) (last visited Aug. 5, 2023).

<sup>180</sup> Modernica sold Bubble Lamps for \$269 for small saucer and \$1395 for extra-large the last time they were listed at full price on the Wayback Machine, on July 18, 2016. Bubble Lamps sold for between \$15 and \$45 in the 1950s. [https://www.google.com/books/edition/Deconstructing\\_Product\\_Design/8x9J35ZdHmAC?hl=en&gbpv=1&dq=george+nelson+bubble+lamp+success&pg=PA36&printsec=frontcover](https://www.google.com/books/edition/Deconstructing_Product_Design/8x9J35ZdHmAC?hl=en&gbpv=1&dq=george+nelson+bubble+lamp+success&pg=PA36&printsec=frontcover). Compare to the \$125 price tag of the Swedish lamp. William Lidwell and Gerry Manacsa, *Bubble Lamp*, *Deconstructing Product Design* 36.

<sup>181</sup> CITE complaint filed on May 21, 2013 in the United States District Court for the Southern District of New York. Modernica filed its application for BUBBLE LAMPS on April 24, 2003. U.S. Registration No. 2,941,595. In October of 2012, the Foundation filed an Opposition to Modernica's registration application for the GEORGE NELSON and NELSON trademarks. The Opposition was filed on behalf of the Foundation as well as Jacqueline Nelson. CITE

<sup>182</sup> *Compliant, George Nelson Found. v. Modernica, Inc.*, para. 31.

When Nelson died in 1986, he left his estate, including any intellectual property rights he had, to his wife, Jacqueline Nelson (“Jacqueline”).<sup>183</sup> On January 24, 2013, Jacqueline Nelson assigned all of her rights to Nelson trademarks and designs to the Foundation.<sup>184</sup> What rights could the Foundation have acquired from Jacqueline? The heirs state that Nelson never transferred any rights to the Bubble Lamp to anyone during his lifetime.<sup>185</sup>

The references to rights are always loose. Nelson never owned any utility patents and his design patents would have long ago expired. There have never been any claims to any copyrights associated with the Bubble Lamps. The Nelson heirs have stated that when Nelson died he owned “registered and common-law rights in the GEORGE NELSON, NELSON, BUBBLE LAMPS, and other trademarks and trade dress associated with the Nelson-designed Bubble Lamps and other Nelson designs.”<sup>186</sup> However, Nelson never held any trademark registrations, either state or federal. As to common law trademarks, there are issues.

According to Nelson’s heirs, Nelson “and his various entities” made the Bubble Lamps “[for years” and “[a]t some point” Nelson “began licensing his creations, including the Bubble Lamps.”<sup>187</sup> This statement suggests that there may have been various entities that made Bubble Lamps without any formal licensing agreement. The heirs also maintain that Howard Miller was licensed to sell Bubble Lamps and the lamps were manufactured with Nelson-designed equipment.<sup>188</sup> The heirs state that Howard Miller paid royalties under this licensing agreement to Nelson and then Jacqueline until 1991.<sup>189</sup> But no one was licensed to make or sell the Bubble Lamps after 1991. The heirs admit that during Nelson’s life, in 1984, Howard Miller sold the Bubble Lamp equipment to Progressive Technology & Lighting, Inc. without Nelson’s authorization.<sup>190</sup> Thereafter, that equipment was purchased Eurolighting who then manufactured and sold Bubble Lamps.<sup>191</sup> Eventually, Modernica became the exclusive manufacturer of Bubble Lamps.

Even after this significant gap in Nelson and his heirs’ control of the alleged marks associated with the Bubble Lamps, in 2003, Jacqueline signed an exclusive worldwide license agreement with Vitra,

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<sup>183</sup> Complaint at 12, *Patrice Nelson v. Katten Muchin Rosenman*, No. 2017-L-008151 (Ill. Cir. Ct. 2017).

<sup>184</sup> 2017 Complaint, para. 60.

<sup>185</sup> 2022 Complaint, para. 23. However, according to the 2006 royalty agreement between Herman Miller and Jacqueline states that “On February 1, 1957, HMI and Mr. George Nelson (‘Mr. Nelson’) entered into a written agreement (based on a prior verbal agreement and a handshake) to provide Mr. Nelson royalties for furniture products and patterns designed by him. This agreement was modified on March 1, 1957, July 1, 1965, September 27, 1968, and March 23, 1994.” 2022 Complaint, Exhibit A.

<sup>186</sup> 2017 Complaint, para 10.

<sup>187</sup> 2022 Complaint, para. 24.

<sup>188</sup> 2022 Complaint, para. 24.

<sup>189</sup> 2022 Complaint, para. 24.

<sup>190</sup> 2022 Complaint, para. 31.

<sup>191</sup> 2022 Complaint, para. 33. This story does not align with Modernica’s story about its purchase of the equipment.



the authorized producer of most MCM designs in Europe,<sup>192</sup> to manufacture and sell Bubble Lamps.<sup>193</sup> Because this agreement required Vitra to enforce the Bubble Lamp intellectual property,<sup>194</sup> Vitra should have taken action against Modernica in 2003. One suspects that Vitra would have done due diligence on the intellectual property that it purported to license. It would also have been aware of Modernica's use. But rather than sue Modernica, Vitra allowed Modernica to continue to be the exclusive manufacturer of Bubble Lamps in the U.S. for a decade until the Foundation brought suit.

In 2006, three years after licensing the Bubble Lamp to Vitra, Jacqueline and Herman Miller executed a royalty agreement. A 2005 draft of that agreement confirmed Herman Miller's "ownership" of all Nelson's intellectual property in his designs, including designs such as the Platform Bench that were created before Nelson had any relationship with Herman Miller.<sup>195</sup> These private agreements between Nelson and his heirs, Vita, and Herman Miller establish that no one was operating under any certainty about the status on any intellectual property rights with regard to Nelson's designs.

From the beginning, the Foundation was intended to play a role in substantiating the intellectual property rights in Nelson's designs. Herman Miller first approached Jacqueline about the concept of forming a foundation in late 2009 or early 2010.<sup>196</sup> The reasons given for forming a foundation were both to "educate, exhibit and advance the legacy of George Nelson's contributions to American Modernism," and also to "acquir[e] or enforce[e] the Nelson IP."<sup>197</sup> Jacqueline had expressed skepticism over the need for the Foundation, but agreed to its creation on the stipulation that it could not "touch royalties which are due" to her or her son.<sup>198</sup> In order to secure Jacqueline's approval, the group who approached her agreed "it 'would not be necessary to make any legal transfer of rights.'"<sup>199</sup> In July 2010, a Herman Miller agent and the Vitra Chairman wrote to Jacqueline to formally to ask for her support in establishing the foundation. In fact, the Foundation was incorporated five months

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<sup>192</sup> Vitra is a Swiss company founded in 1950, that claims to be "the sole authorised manufacturer of specified Nelson products for markets in Europe and the Middle East." Vitra, <https://www.vitra.com/en-un/product/details/home-desk> (last visited Aug. 5, 2023). Vitra's website also states that "[i]n 1957, Vitra founder Willi Fehlbaum signed his first licence agreement with Herman Miller to produce furniture for the European market." Vitra, <https://www.vitra.com/en-us/product/designer/details/george-nelson> (last visited Aug. 5, 2023). The Eameses began working with Vitra to manufacture and distribute their designs in Europe and the Middle East in 1956. Eames Office, <https://www.eamesoffice.com/authenticity/furniture-partners/#:~:text=Herman%20Miller%20is%20the%20sole,Eames%20La%20Chaise%3A%20worldwide> (last visited Jan. 19, 2024).

<sup>193</sup> 2022 Complaint, para. 29.

<sup>194</sup> 2022 Complaint, para. 32.

<sup>195</sup> 2022 Complaint, para. 58. Jacqueline's lawyer amended the agreement to limit Herman Miller's rights to a specific subset of designs. 2022 Complaint, para. 60.

<sup>196</sup> 2022 Complaint, para. 64.

<sup>197</sup> 2017 Complaint, para. 14. Herman Miller tasked Berry with preparing a proposal for the creation of a foundation in 2009. 67. The proposal emphasized the Foundation's purpose to educate, exhibit, and advance the legacy of Nelson's contributions to American Modernism. 2022 Complaint, para. 68. In January 2010, Mr. Berry sent a proposal for the foundation to Jacqueline's attorney including proposed Articles of Incorporation and Bylaws. 2022 Complaint, para. 69.

<sup>198</sup> CITE complaint.

<sup>199</sup> CITE complaint. [[Interestingly, the complaint (around para. 130) never states that Nico has a vested remainder in Jackie's estate. For him to have any legitimate standing for tortious interference of expectancy, his interest would need to be vested, or else he has a mere expectancy. The complaint buries the count at the very end, perhaps trying to see if it will hold up, but the emphasis earlier on the illegitimacy of the initial transfer of property from Jackie to the George Nelson Foundation and malpractice are far more likely to be successful in Nico's pursuit of compensation for the loss of the Nelson intellectual property.]

earlier without her, her son's, or her attorney's knowledge.<sup>200</sup>

Herman Miller and Vitra agents promised Jacqueline that the Foundation would “protect, promote and extend the legacy of George Nelson’s work.”<sup>201</sup> They also assured her that the foundation would have an “independent nature.”<sup>202</sup> And they told her that forming the foundation would not require her to transfer any of her rights. None of these promises were kept.

The timing and circumstances of the organization’s founding, as well as its funding and activities, however, suggest that the Foundation exists not for promoting Nelson’s legacy, but primarily for the benefit of Herman Miller and Herman Miller’s European partner, Vitra.<sup>203</sup>

The relationship between the Foundation and these companies is tight.<sup>204</sup> The Foundation’s listed incorporator was Herman Miller’s Associate General Counsel and its listed registered agent was Herman Miller’s Vice President of Corporate Communications.<sup>205</sup> The initial board of directors was composed of Herman Miller’s Executive Creative Director, Vitra’s Chairman, an Herman Miller Executive Assistant, the Executive Director, who had close ties to Vitra’s Chairman, and a MoMA curator.<sup>206</sup> The official business address of the Foundation is the address of Herman Miller and it reports no expenses for renting any offices.<sup>207</sup> Beyond the executive director, the Foundation has no employees.

The finances of the Foundation further tie it to Herman Miller. According to the Foundation’s tax filings, Herman Miller has contributed yearly to the Foundation since its inception.<sup>208</sup> During four years of the Foundation’s existence, Herman Miller contributed a half a million dollars annually. Vitra has made donations all but two years. But whereas Vitra’s donations are all between \$20,000 and \$30,000, and with one exception all round numbers, Herman Miller’s donations fluctuate dramatically and, apart from the first year, are all very specific amounts. Herman Miller’s donations appear to be tied to the Foundation’s expenses, and the Foundation’s expenses appear to be tied to its intellectual

<sup>200</sup> 2022 Complaint, para. 79.

<sup>201</sup> 2022 Complaint, para. 75. This correspondence did not copy Jacqueline’s attorney. 2022 Complaint, para. 76.

<sup>202</sup> 2022 Complaint, para. 75.

<sup>203</sup> The Foundation likewise benefits Vitra. According to Vitra, it and not the Foundation own the archives of Nelson’s design legacy. Vitra, <https://www.vitra.com/en-us/product/wall-clocks#:~:text=After%20Nelson's%20death%20in%201986,pieces%20from%20time%20to%20time> (last visited Jan. 19, 2023) (“After Nelson’s death in 1986, his archival estate, encompassing roughly 7400 manuscripts, plans, drawings, photographs and slides dating from 1924 to 1984, was acquired by the Vitra Design Museum.”). If Vitra acquired this archive before the formation of the Foundation, one wonders why it has not since transferred the archive to the Foundation. After all, it supports the Foundation through its charitable contributions. *See infra* note 189. Herman Miller requested Vitra’s involvement in the Foundation. Amended Complaint, Ex. 2, Mar. 9, 2010 email to Rolf Felhbaum, Vitra.

<sup>204</sup> Herman Miller is listed in the 2017 complaint as an entity that was interested in the formation of the Foundation.

<sup>205</sup> 2022 Complaint, para. 82-83. The Nelsons maintain that HMI’s executives remained the Foundation’s registered agent until August 2019 when the Foundation finally changed its registered agent to a third party after the issue was raised in the malpractice action brought by the Nelsons. 2022 Complaint, para. 84

<sup>206</sup> 2022 Complaint, para. 74, 86.

<sup>207</sup> The website contains carefully worded language on the intent of the Foundation:

Through its website, the George Nelson Foundation intends to serve as a growing resource for information on Nelson’s designs, teachings, and writings by including detailed information on his work, videos, audio interviews and other such pertinent material. Additionally, the George Nelson Foundation encourages ongoing and new scholarship and collaborates with other institutions that have similar interests or a significant connection to Nelson by working together to develop lecture programs, conferences, exhibitions, and publications.

There is no mention of any actual contributions to promoting Nelson’s work.

<sup>208</sup> The Form 990 tax filings from George Nelson Foundation indicate the yearly contributions of Herman Miller and Vitra. Any donation of \$5,000 or more must be included on the Form 990. The Foundation lists no other donors.

property litigation. For instance, in 2015, Herman Miller contributed \$502,757. That year, the Foundation reported net expenses of \$494,078. It paid the law firm Katten Muchin, who represented it in the Modernica litigation \$364,000 in legal fees, and paid \$65,000 in consultation fees to Stout Risius, a financial services company. Likewise, the previous year Herman Miller's contribution matches the entirety of the claimed expenses of the Foundation, including \$430,000 in legal fees that year.<sup>209</sup> Thus, Herman Miller's contributions are in synch with the work the Foundation was doing to secure Nelson intellectual property. Herman Miller and Vitra are the Foundation's sole benefactors.

### B. *Nelson v. Katten Muchin Rosenman LLP*

In a published essay criticizing design copycats, Tony Ash, managing director of Vitra stated that "our profits are not outrageous and part of that profit goes to the designer, or their heirs, in the form of a royalty ... In the case of a deceased designer the royalty goes to their spouse ... or the foundation set up to protect and promote their work and heritage, as is the case with the George Nelson Foundation."<sup>210</sup> This case study puts this proposition to the test. If the George Nelson Foundation is Vitra's best example of directing profits to promoting the designer's heritage, this claim does not bear repeating.

In 2017, Nelson's son, George Mico Nelson, and his wife, Patricia Nelson, ("the Nelsons") on behalf of themselves and Jacqueline, sued the law firm Katten Muchin Rosenman LLP and shareholder William J. Dorsey, the law firm Cowen Leibowitz & Latman, P.C. and shareholder Robert Giordanella, and the Foundation for fraud and malpractice.<sup>211</sup> The Nelsons argued that the intellectual property transfer was improper and that the Foundation lawyers had committed legal malpractice.<sup>212</sup>

The Nelsons claimed that the Foundation and its lawyers took advantage of Jacqueline in acquiring from her the rights to George Nelson's intellectual property.<sup>213</sup> The complaint claims that Jacqueline assigned all of her intellectual property rights in Nelson's design believing she was making a much more limited assignment for the purposes of protecting Nelson's designs from infringement.<sup>214</sup> According to the complaint, the Nelsons had not even known that she had signed the transfer agreement drawn up by the Foundation. At the time she did sign in 2013, she was 93 and in failing health, in a

<sup>209</sup> Although the Form 990 currently only requires charities to declare independent contractor distributions if any one company was compensated more than \$100,000, in 2015, it was anything over \$50,000.

<sup>210</sup><sup>210</sup> *Opinion: Copyists Are Eating Away at the Creativity of Our Industry*, Denzeen, Jan. 8, 2015, <https://www.dezeen.com/2015/01/08/tony-ash-md-vitra-copyists-creativity-design-industry-intellectual-property/>.

<sup>211</sup> The Nelsons also sued the Foundation in Maine over the intellectual property transfer arguing that the elderly Jacqueline had been taken advantage of under the Maine Improvident Transfer of Title law. That case was dismissed without prejudice in April 2017. The transfer agreement expressly stated that all royalty payments would cease upon Jacqueline's death. 2022 Complaint, para. 115. The Nelson's "successfully petitioned the Maine Probate Court for a single transaction authority to transfer the royalty interest" Nelson's son in September 2016. 2022 Complaint, para. 115.

<sup>212</sup> Circuit Court of Cook County, Illinois, Law Division (Docket No.: 2017-L-008151).

<sup>213</sup> Complaint in *Nelson v. Katten Muchin Rosenman*, (Ill. 2017). The suit named attorney William Dorsey and his firm, Katten Muchin Rosenman LLP, and attorney Robert Giordanella, and his firm, Cowan Liebowitz & Latman P.C. Jonathan Bilyk, *Family Of Modernist Designer Nelson Says Ex-Lawyers' Missteps Cost Them Rights To 'Bubble Lamps,' Other IP*, COOK CO. RECORD, Aug. 17, 2017 <https://cookcountyrecord.com/stories/511187049-family-of-modernist-designer-nelson-says-ex-lawyers-missteps-cost-them-rights-to-bubble-lamps-other-ip>; Jeffrey Head, *Furnishing Issues*, THE ARCHITECT'S NEWS-PAPER, Sept. 24, 2014 <https://www.archpaper.com/2014/09/furnishing-issues/>

<sup>214</sup>

nursing home. She had was recovering from bladder cancer and radiation therapy, had just broken her hip, and had “diminishing mental capacity.”<sup>215</sup>

In a subsequent lawsuit, the Nelsons allege more specific facts about the transfer agreement. Between December 2012 and January 2013, Karen Stein, the Foundations Executive Director or William Dorsey, the Foundation’s attorney, sent Jacqueline four versions of the transfer agreement.<sup>216</sup> Jacqueline did not respond in any way to these four communications.<sup>217</sup> After these four communications from the Foundation went unanswered, Dorsey sent a final version of the transfer agreement to Jacqueline at her nursing home with a “sign here” sticker and a pre-paid FedEx return envelope. This agreement was never sent to her lawyer or son, who had power of attorney.<sup>218</sup> Without anyone’s knowledge, or any witness, Jacqueline signed the agreement, incorrectly dated it, and returned it to Dorsey.<sup>219</sup>

The complaint also asserts that Dorsey never advised Jacqueline that he was only representing the Foundation, and he did not advise her to seek her own legal counsel.<sup>220</sup> Dorsey apparently became involved in these matters by reaching out to Foundation’s Executive Director, Karen Stein, explaining that he was a design enthusiast, Nelson collector,<sup>221</sup> and intellectual property attorney. He offered his legal services to the Foundation on a pro bono basis. He was retained as lawyer for the Foundation a year after its incorporation. At a minimum, Dorsey did not make clear who exactly he was representing. For instance, the cease-and-desist letter Dorsey sent Modernica on March 15, 2013 was sent “[o]n behalf of our clients, Ms. Jacqueline Nelson (‘Ms. Nelson’) and the George Nelson Foundation.”<sup>222</sup> The complaint asserts that in March 2014 Dorsey informed the Nelsons that “he was no longer working on a pro bono basis for the Nelson Foundation and that Jacqueline was responsible for his fees for the Modernica suit.”<sup>223</sup>

The Nelson lawsuit was a reaction to the Foundation’s settlement with Modernica. The Nelsons alleged that the Foundation rejected a settlement offer from Modernica that would have provided it with royalty payments and instead agreed to a settlement agreement that did not benefit the Nelsons.<sup>224</sup> The Nelsons later alleged that Modernica had approached the Foundation multiple times offering to

<sup>215</sup> 2017 Complaint, para. 34-36; 2022 Complaint, para. 96.

<sup>216</sup> 2022 Complaint, para. 98. Neither Stein nor Dorsey made any attempt to explain the changes from one draft to the next, 2022 Complaint, para. 98. For instance, one change revised the forum selection clause from New York to Michigan. para. 98. Neither Stein or Dorsey ever copied Jacqueline’s lawyer or her son, who had power of attorney. 2022 Complaint, para. 98, 94, 100.

<sup>217</sup> 2022 Complaint, para. 95, 99, 102.

<sup>218</sup> 2022 Complaint, para. 104, 105.

<sup>219</sup> 2022 Complaint, para. 105, 107, 112, 113 (it was not discovered until a year later when Jacqueline’s daughter-in-law “found a copy of the [agreement] in a Depend Adult Diaper box in March 2014 under Mrs. Nelson’s bed.”).

<sup>220</sup> The Nelsons had previously sued the Foundation in Maine over the intellectual property transfer arguing that the elderly Jacqueline had been taken advantage of under the Maine Improvident Transfer of Title law. That case was dismissed without prejudice in April 2017.

<sup>221</sup> His collection of original Nelson designs, or at least part of it, was publicly auctioned in 2022. <https://www.wright20.com/auctions/2022/05/keeping-time-the-william-dorsey-collection>. The auction included 257 lots that fetched sales results as high as a \$13,750 for a desk. <https://www.wright20.com/auctions/2022/05/keeping-time-the-william-dorsey-collection/142>.

<sup>222</sup> 2017 Complaint, para. 71.

<sup>223</sup> 2017 Complaint, para. 89.

<sup>224</sup> 2017 Complaint. This allegation is supported by statements made by Modernica’s founders. CITE

settle in exchange for a license to produce and sell the Bubble Lamp.<sup>225</sup> The Nelson family contended that but for the assignment, the Foundation would not have had the right to pursue or settle the Modernica lawsuit.<sup>226</sup>

This case settled in 2022.<sup>227</sup> As part of that settlement, the transfer agreement between Jacqueline and the Foundation was voided,<sup>228</sup> and the Foundation assigned the trademark registrations for the marks NELSON and GEORGE NELSON to the Nelsons.<sup>229</sup> Without the assignment of rights to the Foundation, any rights that Jacqueline had were restored to her. Jacqueline died in 2017.<sup>230</sup> These rights have now passed to her heirs, her son Mico and wife Patrice.

The contest over Nelson's intellectual property rights between the Nelsons and the Foundation and Herman Miller, however, is still ongoing.

### *C. Estate of Nelson v. MillerKnoll, Inc.*

In 2021, four months before the settlement with the Foundation, the Estate of Jacqueline Nelson sued MillerKnoll, the Foundation, its Executive Director, and her firm. MillerKnoll is the company that owns Herman Miller and Knoll. The Nelsons claimed fraud and trademark infringement, seeking damages and an injunction against "imitating, copying, licensing, or making unauthorized use of the Nelson Marks and Bubble Lamp IP, including, without limitation, by manufacturing, reproducing, displaying, promoting, offering for sale, selling, distributing, importing or exporting products bearing the Nelson Marks and Bubble Lamp intellectual property."<sup>231</sup>

The complaint elaborates the Nelsons' accusation that Herman Miller created the Foundation as part of a fraudulent scheme to get Jacqueline to sign away her rights.<sup>232</sup> The Nelsons detail how agents of Herman Miller and Vitra pressured Jacqueline to sign the transfer agreement. For instance, one Herman Miller agent falsely told Jacqueline that "[n]ot assigning the rights puts them into the public domain and opens wide the ability to copy the designs, confuse the public and reduce royalties."<sup>233</sup> And Vitra's Chairman, who was someone Jacqueline trusted, assured Jacqueline, "I shall have everything double checked by our lawyer with your position in mind."<sup>234</sup>

After the Foundation sued Modernica over the Bubble Lamps, Herman Miller separately sued Modernica for infringing certain Eames designs. The Nelsons allege that the Foundation shared information obtained in its suit against Modernica with Herman Miller, including information subject

<sup>225</sup> 2022 Complaint, para. 131. The Nelsons allege that Modernica made a settlement offer to agree to pay Jacqueline royalties for a license even before the Foundation filed suit. 2022 Complaint, para. 134.

<sup>226</sup> Jonathan Bilyk, *Family of Modernist Designer Nelson Says Ex-Lawyers' Missteps Cost Them Rights To "Bubble Lamps", Other IP*, COOK CO. RECORD, Aug. 17, 2017, <https://cookcountyrecord.com/stories/511187049-family-of-modernist-designer-nelson-says-ex-lawyers-missteps-cost-them-rights-to-bubble-lamps-other-ip>.

<sup>227</sup> On January 27, 2022, the case was settled and dismissed by the Illinois state court. *Estate of Nelson v. MillerKnoll, Inc.*, 2023 U.S. Dist. LEXIS 74002 \*; 2023 WL 3159678 (S.D.N.Y. 2023).

<sup>228</sup> Carolyn Muyskens, *Herman Miller Gets 'Bubble Lamp' IP Row Moved to Michigan*, Law360, May 9, 2023.

<sup>229</sup> 2022 Complaint, para. 29.

<sup>230</sup> 2022 Complaint, para. 10.

<sup>231</sup>

<sup>232</sup> As this federal lawsuit was filed while the state malpractice case pending, it was stayed until that case settled and was dismissed.

<sup>233</sup> 2022 Complaint, para. 50.

<sup>234</sup> 2022 Complaint, para. 55, 73.

to a Protective Order.<sup>235</sup> Modernica settled both lawsuits. Dorsey, the lawyer for the Foundation, attended the settlement conference between Modernica and Herman Miller even though that case did not involve the Foundation or any of Nelson's designs.<sup>236</sup> According to the settlement agreement, Herman Miller, a non-party to the litigation between the Foundation and Modernica, agreed to pay Modernica and Modernica agreed to transfer ownership of all intellectual property rights relating to the Bubble Lamps, including Modernica's trademark registration, as well as the molds and equipment used to manufacture the Bubble Lamps and Modernica's entire infringing Bubble Lamp Business to Herman Miller.<sup>237</sup> Although the Foundation was the plaintiff in the suit against Modernica, it, like the Jacqueline, received nothing of value in the settlement. But the Nelsons were under the mistaken belief that under the settlement, Modernica had transferred all of the intellectual property rights associated with the Bubble Lamp to the Foundation.<sup>238</sup> Neither the Foundation nor Herman Miller ever informed them that the rights were owned by Herman Miller.

The Nelsons further allege that Dorsey, who had initially offered to work on the matter pro bono, ultimately charged the Foundation over \$800,000 in attorney's fees. Based on the Foundation's representation to the Nelsons that they would receive royalties from the intellectual property sought to be recovered from Modernica, the Nelsons agreed to pay for the legal fees incurred in connection with the lawsuit against Modernica.<sup>239</sup> The Nelsons state that Herman Miller assessed the \$800,000 as credits against future royalty payments it would owe the Nelsons.<sup>240</sup> In other words, the Nelsons financed the litigation that resulted in Herman Miller acquiring all the intellectual property rights associated with the Bubble Lamps as well as other valuable assets that enabled it to be the exclusive producer of Bubble Lamps.

Following the settlement of the malpractice case, the case was dismissed with prejudice against the Foundation and its director.<sup>241</sup> In May 2023, MillerKnoll successfully got the case transferred from district court in New York to the United States District Court for the Western District of Michigan by arguing the choice of law and forum selection provisions in Jacqueline's contract with the Foundation prevailed. After the case was transferred, MillerKnoll moved to dismiss arguing that the family's settlement with the Foundation bars its claims against MillerKnoll under the principle of res judicata.<sup>242</sup> MillerKnoll also argues the estate's fraud claims are barred by the statute of limitations.<sup>243</sup> MillerKnoll additionally argues the estate lacks standing to bring the trademark infringement claims because it did not own George Nelson's IP on the date the suit was filed. Moreover, MillerKnoll argues that because it now owns all of the intellectual property related to Bubble Lamps as a result of the settlement with Modernica, the estate's trademark claims with regard to the Bubble Lamp must be dismissed.

In April 2023, the Nelson Estate filed a new trademark application for GEORGE NELSON for carpets and rugs.<sup>244</sup> The Foundation or MillerKnoll may oppose the application to prevent the USPTO

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<sup>235</sup> 2022 Complaint, para. 126.

<sup>236</sup> 2022 Complaint, para. 138-40.

<sup>237</sup> 2022 Complaint, para. 144, 153.

<sup>238</sup> 2022 Complaint, para. 158.

<sup>239</sup> 2022 Complaint, para. 121.

<sup>240</sup> 2022 Complaint, para. 157.

<sup>241</sup> On July 6, 2022. Carolyn Muyskens, *Herman Miller Gets 'Bubble Lamp' IP Row Moved to Michigan*, Law360, May 9, 2023.

<sup>242</sup> Carolyn Muyskens, *Herman Miller Wants Bubble Lamp IP Suit Axed*, Law360, Jun. 12, 2023.

<sup>243</sup> Carolyn Muyskens, *Herman Miller Wants Bubble Lamp IP Suit Axed*, Law360, Jun. 12, 2023.

<sup>244</sup> <https://uspto.report/TM/97908660>.

from issuing this trademark registration.

## VI. LEGAL PROTECTION FOR DESIGN

Professor Reichman conducted a historical survey of industrial design protection both in the U.S. and Europe and found a cyclical pattern of over and under-protection, or “peaks” and “valleys” as he called them.<sup>245</sup> As this article looks only at U.S. design protection and only from the 1940s to the present, a more simplistic pattern emerges: a valley from 1920s through the 1970s, followed by an upwardly sloping curve beginning in the 1980s reaching its peak in the present.

The state of U.S. intellectual property law was not static during the period in which MCM design flourished. Each area of intellectual property law saw major overhauls during this period that resulted in the acts that are still in place today.<sup>246</sup> Even still, as a general matter, in the U.S. there was no design protection to speak of during the entire heyday of MCM design. Herman Miller and Knoll’s lawyers would have been operating during that time under the general understanding that the designs for the products these companies produced were free to be copied by others.

The following section will briefly describe the state of the law during this relevant period. Coincidentally, again the vehicle to explain to the state of the law during this period will be lamp designs: The Supreme Court decided three cases during this period that each involved the protection of lamp designs.<sup>247</sup>

In U.S. law there is no area of law formally categorized as “industrial design,” as there is in other jurisdictions.<sup>248</sup> Rather, protection of industrial design, the appearance of utilitarian products, may be achieved under each of the three main areas of intellectual property law: patent law, copyright law and trademark law. And such protection may be cumulative, meaning that rights holders can stack these protections. Even with all of these options for protection, MCM designers enjoyed minimal protection when their designs debuted.

### A. Design Patents

During the period under review—1940 to 1970—there existed a more constrained concept of industrial design, which was thought to be protected, if at all, by design patents. Through design patent law, one may protect the appearance of an article of manufacture, such as furniture and lighting.

Although design patents would appear to be the best fit for protecting industrial design, they were of little practical use to MCM designers. During that period, design patents proved to be of slight value because they were both difficult to secure<sup>249</sup> and toothless even when one could secure a design

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<sup>245</sup> J.H. Reichman, *Past and Current Trends in the Evolution of Design Protection Law – A Comment*, 4 FORDHAM INTELLECTUAL PROP., MEDIA & ENTMT’L L.J. 387, 387-89 (1993); J.H. Reichman, *Design Protection and the New Technologies: The United States Experience in a Transnational Perspective*, 19 U. BAL’T. L. REV. 6, 123 (1989).

<sup>246</sup> Lanham Act 1946, Patent Act 1947, Copyright Act 1976.

<sup>247</sup> See *Mazer v. Stein*, 347 U.S. 201 (1954); *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964); *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234 (1964).

<sup>248</sup> Some jurisdictions have laws that are specifically directed at industrial design protection. [[give examples.]

<sup>249</sup> Thomas B. Hudson, *A Brief History of the Development of Design Patent Protection in the United States*, J. OF THE PATENT OFFICE SOC’Y, 380 (1948).

patent registration.<sup>250</sup>

A few of the MCM designers sought design patents, but they did so rarely, considering the number of successful designs they produced. George Nelson applied for four design patents for his MCM designs.<sup>251</sup> Other design patent holders include Jens Risom and Isamu Noguchi.<sup>252</sup> Charles Eames received 17 design patents,<sup>253</sup> which is the most that any MCM designer received.<sup>254</sup> For reference, in the category of seating alone, Charles and Ray Eames produced 35 MCM designs that were commercialized.<sup>255</sup> Thus, the bulk of MCM designs were not submitted to the Patent Office.

While it may be that MCM designs were a mismatch for design patent law because of the absence of ornamentation, one might expect to see greater reliance on design patents by mid-twentieth century designers in the auto industry. In contrast to MCM furniture, American cars in the 1950s were famously embellished with decorative tail fins, hood ornaments, elaborate taillights, and applied chrome trim. However, even in the auto industry, designers largely did not pursue design patents. For instance, between 1940 and 1960 General Motors received, by direct application or assignment, only ten design patents and Ford received only nine.<sup>256</sup> None of these design patents feature the design flourishes that we associate with car design of that period. Instead, they are for mundane features.

While there is no evidence that points directly to why the designers who pursued design patents sought them for certain designs and not others, it may be that they were not optimistic that their other

<sup>250</sup> Thomas B. Hudson, *A Brief History of the Development of Design Patent Protection in the United States*, J. OF THE PATENT OFFICE SOC'Y, 380 (1948).

<sup>251</sup> Ball clock (U.S. Patent No. D162,976 (filed Mar. 20, 1950) assigned to Howard Miller Clock Company); armchair (U.S. Patent No. D184,111 (filed Oct. 3, 1957) assigned to Herman Miller); chair (U.S. Patent No. D184,238 (filed Oct. 3, 1957) assigned to Herman Miller); furniture leg (U.S. Patent No. D205,665 (filed Apr. 12, 1965) assigned to Herman Miller).

<sup>252</sup> During the mid-century, Risom received [1] design patents: Design for a chair frame or the like, U.S. Patent No. D141,703 (June 26, 1945) (assigned to H. G. Knoll, Associates); Design for a chair, U.S. Patent No. D141,839 (July 10, 1945) (assigned to H. G. Knoll, Associates); Juvenile crib, U.S. Patent No. D161,377 (filed Jan. 24, 1948); armchair, U.S. Patent No. D165,788 (Jan. 29, 1952) (assigned to Jens Risom Design Inc.); Drawer for a card catalog cabinet, U.S. Patent No. D 212,011 (Aug. 20, 1968). Risom also received a utility patent: card catalog drawer, U.S. Patent No. 3,495,731 (filed Aug. 10, 1967). [cite design patents for Noguchi].

<sup>253</sup> Eames held design patents for a table (U.S. Patent No. D147,613 (filed May 20, 1946) assigned to Evans Products Company), a stool (U.S. Patent No. D147,614 (filed May 20, 1946) assigned to Evans Products Company), a chair (U.S. Patent No. D147,615 (filed May 20, 1946) assigned to Evans Products Company), his LCW chair (U.S. Patent No. D150,683 (filed Mar. 27, 1947) assigned to Evans Products Company), his DCM chair (U.S. Patent No. D150,685 (filed Mar. 27, 1947) assigned to Evans Products Company), his DCW chair (U.S. Patent No. D155,272 (filed Mar. 27, 1947) assigned to Evans Products Company), a tilt-back chair (U.S. Patent No. D150,684 (filed Mar. 27, 1947) assigned to Evans Products Company), an easy chair (U.S. Patent No. D155,275 (filed Mar. 27, 1947) assigned to Evans Products Company), another table (U.S. Patent No. D151,119 (filed Mar. 27, 1947) assigned to Evans Products Company), a coffee table (U.S. Patent No. D152,949 (filed Mar. 27, 1947) assigned to Evans Products Company), another tilt-back chair, U.S. Patent No. D155,274 (filed Mar. 27, 1947) assigned to Evans Products Company), a loud-speaker enclosure, U.S. Patent No. D182,794 (filed Feb. 13, 1957) (assigned to Stephens Tru-Sonic Inc.), a loud-speaker cabinet, U.S. Patent No. D185,963 (filed May 20, 1957) (assigned to Stephens Tru-Sonic Inc.), an upholstered chair, U.S. Patent No. D192,799 (filed Feb. 24, 1961) assigned to Herman Miller), a chair base, U.S. Patent No. D193,339 (filed May 23, 1961) assigned to Herman Miller), a chair seat, U.S. Patent No. D210,940 (filed Jan. 30, 1967) (assigned to Herman Miller), and a chaise lounge, U.S. Patent No. D219,212 (filed Mar. 3, 1969) (assigned to Herman Miller).

<sup>254</sup> There appear to be no applications filed on behalf of Charles Eames that were not granted. CITE patent search. Interestingly, these patents list only Charles, and not his wife and co-designer Ray Eames as “inventors.”

<sup>255</sup> Complete Works, Eames Office, <https://www.eamesoffice.com/works/seating/> (last visited Aug. 7, 2023).

<sup>256</sup> CITE patent search.



designs met the threshold criteria for design patents. In particular, the novelty and ornamentality requirements were more effective gatekeepers back then than they are today. MCM designer Jens Risom complained that “an original design of a day bed is unpatentable” unless “the day bed flips up and fries an egg or something like that.”<sup>257</sup> He was no doubt being facetious, but designers were wary of the then high thresholds to protection under design patent law.

Under the 1902 Patent Act, effective until 1952, design patents protected only “new, original, and ornamental design[s] for an article of manufacture.”<sup>258</sup> The word “new” was a requirement of novelty; the design must not be “known or used by others in this country before his invention thereof, and not patented or described in any printed publication in this or any foreign country before his invention thereof, or more than two years prior to his application, and not in public use or on sale in this country for more than two years prior to his application, unless the same is proved to have been abandoned.”<sup>259</sup> As with utility patents, this standard requires a comparison of the claimed design to the prior art.<sup>260</sup> If the designs were different, but a skilled designer could have created the claimed design after viewing the prior art, then the design was not patentable for lack of invention, the standard we would today call non-obviousness.<sup>261</sup> In addition to being new and original, the design must have been ornamental to receive protection. To be ornamental “it is necessary that the design should be . . . either embellished or adorned or distinguished by its grace or symmetry of form.”<sup>262</sup>

Even if a design patent was granted, an alleged infringer could easily invalidate it. A mid-century lamps case will illustrate the value of a design patent in the twentieth century. In *Baker v. Webb*, an alleged infringer of a design patent for a ceiling light moved for summary judgement arguing that the patent was invalid and not infringed.<sup>263</sup> After stating that square louvers were previously used in light fixtures, and that a central lens was commercially available in other light fixtures, the court summarily concluded that,

Baker designed an attractive light fixture. However, to do this, I do not believe that it required more than the skill of a reasonably competent light fixture designer 'who had, or was chargeable with, knowledge of the prior art.' I am reinforced in my opinion by the fact that the design merely follows well accepted principles employed in all fields of contemporary art.

I find that the patent is invalid on its face. Defendant's motion for a summary judgment is therefore allowed.<sup>264</sup>

Although enactment of the 1952 Patent Act was not intended to alter the law of design patents,

<sup>257</sup> Barbara Plumb, Designers See Dire Need for Legislation to Safeguard Their Original Work Against Plagiarism, NY TIMES, Mar. 23, 1964, at L35.

<sup>258</sup> Act of May 9, 1902, ch. 783, § 4929, 32 Stat. 193 (1902).

<sup>259</sup> Act of May 9, 1902, ch. 783, § 4929, 32 Stat. 193 (1902).

<sup>260</sup> The *Sears, Roebuck & Co. v. Stiffel Co.*<sup>260</sup> case, which will be discussed below illustrates the then high bar for novelty. In it, the design patents for a MCM pole lamp design were invalidated for having been anticipated by an earlier published design for a pole lamp. *Stiffel Co. v. Sears, Roebuck & Co.*, 313 F.2d 115, 118 (7<sup>th</sup> Cir. 1063).

<sup>261</sup> See *Ex parte Barnhart*, 115 Off. Gaz. Pat. Office 247 (1904); *Majestic Electric Dev. Co. v. Westinghouse Electric & Mfg. Co.*, 276 F. 676, 677-78 (9<sup>th</sup> Cir. 1921) (“It requires the exercise of inventive faculty equally in a design as in a utility patent to insure [sic] validity, and the test of invention is the same.”).

<sup>262</sup> *In re Stimpson*, 1928 U.S. App. LEXIS 2228, \*2 (D.C. 1928); *Rose Mfg. Co. v. E. A. Whitehouse Mfg. Co.*, 201 F. 926, 929 (D. N.J. 1913) (“It must exhibit something which appeals to the aesthetic faculty of the observer.”).

<sup>263</sup> 112 F. Supp. 394 (D. Or. 1953).

<sup>264</sup> *Id.* at 395.

the codification of non-obviousness had the effect of removing any discretion a court may have in subjecting design patents to a lower standard.<sup>265</sup> However, design patent law has been greatly expanded since the MCM period. Changes in the law—almost all judge-made—have had a dramatic impact on the value of design patents. Design patents now have lower bars for both novelty<sup>266</sup> and ornamentality,<sup>267</sup> enjoy an extra year of protection,<sup>268</sup> are more difficult to invalidate,<sup>269</sup> have an easier infringement standard,<sup>270</sup> and have intimidating monetary remedies.<sup>271</sup>

However, since all of the design patents that were issued during the MCM period have now since expired, they do not enjoy these new benefits. Due to the novelty requirement, no designs that were released during the MCM period are eligible for a design patent today.

### B. Copyright Law

During the MCM design period, industrial design was predominantly unprotected by copyright law. However, precisely during this period the protection of useful articles by copyright was undergoing a transition. Even after those changes, however, MCM designs for articles such as furniture, lighting, and the like were generally not protectable under copyright law.

Until this period, industrial design was very clearly not protected by copyright. A 1910 Copyright Office regulation narrowed copyright protection to “works of art,” which was defined as “fine art” including “paintings, drawings, and sculpture.”<sup>272</sup> Fine art excluded both applied arts and industrial design. The Copyright Office made clear that “productions of the industrial arts utilitarian in purpose and character are not subject to copyright registration, even if artistically made or ornamented.”<sup>273</sup> These rules had the objective of channeling industrial design protection through design patent law and “prevent[ing] designers and manufacturers from circumventing the strict eligibility requirements for design patent protection by resorting to the less stringent requirements of copyright law.”<sup>274</sup>

But in 1948, the Copyright Office changed the definition of a “work of art” to include “works of artistic craftsmanship, in so far as their form but not their mechanical or utilitarian aspects are concerned, such as artistic jewelry, enamels, glassware and tapestries, as well as all works belonging to the

<sup>265</sup> Jason J. Du Mont, A Non-Obvious Design: Reexamining the Origins of the Design Patent Standard, 45 GONZAGA L. REV. 531, 596 (2009).

<sup>266</sup> See *Int’l Seaway Trading Corp. v. Walgreens Corp.*, 589 F.3d 1233 (Fed. Cir. 2009).

<sup>267</sup> See *L.A. Gear, Inc. v. Thom McAn Shoe Co.*, 988 F.2d 1117 (Fed. Cir. 1993).

<sup>268</sup> Design patent applications filed after May 13, 2015, receive terms of fifteen years from the date of grant. 35 U.S.C. § 173.

<sup>269</sup> See *High Point Design v. Buyers Direct*, 730 F.3d 1301 (Fed. Cir. 2013).

<sup>270</sup> See *Egyptian Goddess, Inc. v. Swisa, Inc.*, 543 F.3d 665 (Fed. Cir. 2008).

<sup>271</sup> See *Samsung Elecs. Co. v. Apple Inc.*, 580 U.S. 53 (2016).

<sup>272</sup> Rules and Regulations for the Registration of Claims to Copyright, Copyright Office Bull. No. 15, 8 (1910).

<sup>273</sup> J.H. Reichman, *Design Protection in Domestic and Foreign Copyright Law: From the Berne Revision of 1948 to The Copyright Act of 1976*, 1983 DUKE L.J. 1143, 1148 (1983) (citing Copyright Office, Rules and Regulations for the Registration of Claims to Copyright, Bull. No. 15, § 12(g) (1910)). According to Reichman, “the practice of the Copyright Office until 1949 was to deny registration to any three-dimensional objects that ‘would fall within the category of multiple commercial production of works of the applied arts.’” *Id.* at 1148 (1983) (citing Walter Derenberg, *Copyright No-Man’s Land: Fringe Rights in Literary and Artistic Property*, 35 J. PAT. OFF. SOC’Y 627, 646 (1953)).

<sup>274</sup> J.H. Reichman, *Design Protection in Domestic and Foreign Copyright Law: From the Berne Revision of 1948 to The Copyright Act of 1976*, 1983 DUKE L.J. 1143, 1148 (1983).

fine arts.”<sup>275</sup> This change enabled the protection of applied art.<sup>276</sup>

Courts, though, were slow to embrace this expansion of copyright subject matter and continued to rule that applied art was unprotected by copyright. Professor Reichman demonstrates courts’ reluctance to follow the new rule with the example of seven decision by courts in the early 1950s with regard to the copyrightability of applied art to lamps, stating that “three had upheld copyrightability and four had not.”<sup>277</sup> One of these seven cases involving the protection of lamp designs caught the Supreme Court’s attention and formalized a change in the law.

A 1954 Supreme Court decision about a lamp design established the protectibility of applied art in U.S. copyright law.<sup>278</sup> *Mazer v. Stein* involved a statuette depicting a dancer that was intended for use as a lamp base. The Court held works of art are protected by copyright even if they may be intended for use in a utilitarian article. Even though the Supreme Court enabled copyright protection for “applied art” in *Mazer v. Stein*, this doctrine was limited. In particular, it could not accommodate the unadorned, minimalist style that characterized MCM design.

1960 Copyright Office Regulations further expanded copyright protection beyond applied art. Under these rules, a shape of a utilitarian article can be protected by copyright if it incorporates features “can be identified separately and are capable of existing independently as a work of art.”<sup>279</sup> This “separability” test was enacted in the 1976 Copyright Act.<sup>280</sup>

The state of the law is much changed today. In 2017, the Supreme Court opened the door to greater reliance on copyright by industrial designers in its decision in *Star Athletica, LLC v. Varsity Brands, Inc.*<sup>281</sup> The new test the Court devised for determining whether a pictorial, graphic, or sculptural work is separable from a useful article enables more useful articles to receive copyright protection. The Court held that to be protectable, an aesthetic feature of a useful article must be perceivable as a work separate from the useful article, and it must be protectable as a pictorial, graphic, or sculptural work on its own, or in another tangible medium, if imagined apart from the useful article.<sup>282</sup> The question for MCM design following this decision is whether George Nelson’s Bubble Lamp can be perceived and would be protectable as a work of sculpture separate from a lamp. As the Supreme Court offered no other guidance, it would not be surprising if a lower court were to find the design covered by copyright law. At least one court has found easy to perceive a lampshade as a sculptural

<sup>275</sup> J.H. Reichman, *Design Protection in Domestic and Foreign Copyright Law: From the Berne Revision of 1948 to The Copyright Act of 1976*, 1983 DUKE L.J. 1143, 1149 (1983) (citing Works of art (Class G), 37 C.F.R. § 202.8(a) (1949)).

<sup>276</sup> J.H. Reichman, *Design Protection in Domestic and Foreign Copyright Law: From the Berne Revision of 1948 to The Copyright Act of 1976*, 1983 DUKE L.J. 1143, 11508 (1983) (“the Copyright Office accepted for registration many three-dimensional works of applied art in the next few years.”).

<sup>277</sup> J.H. Reichman, *Design Protection in Domestic and Foreign Copyright Law: From the Berne Revision of 1948 to The Copyright Act of 1976*, 1983 DUKE L.J. 1143, 1151 n.28 (1983) (citing *Stein v. Expert Lamp Co.*, 96 F. Supp. 97 (N.D. Ill. 1951) (), *Stein v. Benederet*, 96 U.S.P.Q. (BNA) 13 (E.D. Mich. 1952) (), *Stein v. Benederet*, 214 F.2d 822 (6th Cir. 1954) (), *Stein v. Rosenthal*, 205 F.2d 633 (9th Cir. 1953) (copyrightable), 204 F.2d 472 (4th Cir. 1953) (copyrightable)).

<sup>278</sup> 347 U. S. 201 (1954).

<sup>279</sup> 37 C.F.R. 202.10(c) (1960).

<sup>280</sup> Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541; 17 U.S.C. 101 (“the design of a useful article ... shall be considered a pictorial, graphic, or sculptural work 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.”).

<sup>281</sup> 580 U.S. 405 (2017).

<sup>282</sup> *Id.* at 424.

work once the cord and bulb are removed.<sup>283</sup>

### C. Trademark Law

As with design patent and copyright, there was also no effective protection available for industrial designs under trademark law during the MCM design period. Trade dress law did not begin to develop into the robust protection we have today until the 1980s.

A 1964 Supreme Court decision about a lamp design illustrates the then existing limitations in trademark law in protecting industrial design. In *Sears, Roebuck & Co. v. Stiffel Co.*, the lighting company Stiffel, having invented a suspension pole lamp<sup>284</sup> and it made it popular, sued Sear for selling a “slavish”<sup>285</sup> copy at a lower price.<sup>286</sup> Stiffel sued Sears for utility and design patent infringement and unfair competition. The Seventh Circuit Court of Appeals affirmed the district court’s invalidation of both patents and its finding of unfair competition.<sup>287</sup> The Supreme Court, however, rejected Stiffel’s unfair competition claims because it saw them as an end run around the careful balance in federal law that provided for the freedom to copy holding that “[a]n unpatentable article, like an article on which the patent has expired, is in the public domain and may be made and sold by whoever chooses to do so.”<sup>288</sup>

The result was that Stiffel had no protection for the lamp design. According to the complaint, the lamp in question was “an original and unique design,” and “lighting fixtures incorporating said design and configuration have been sold exclusively by Plaintiff” and were “extensively advertised” so that the “distinctive and instantly recognizable appearance” was “recognized as a product of Plaintiff.”<sup>289</sup> Today, that claim would likely be successful as a claim of trade dress infringement.

A companion case, *Compco Corp. v. Day-Brite Lighting, Inc.*, that was also a unanimous decision reversing a conclusion of unfair competition was similar.<sup>290</sup> *Compco* also involved the design of lighting. In that case, in the words of the Supreme Court, the district court found that “the arrangement of the

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<sup>283</sup> *Corinna Warm & Studio Warm LLC v. Innermost Ltd.*, 2022 U.S. Dist. LEXIS 104461, \*7-8 (“It cannot be definitively said that neither of the lampshades has sculptural elements that can be identified separately from the usefulness of the articles and are capable of existing independently of their use as lampshades given the standard set forth by the Supreme Court. See *Star Athletica*, 137 S. Ct. at 1010. The lampshades could be conceptualized to serve as sculptural pieces in an art display instead of lampshades, without any cord or bulb.”).

<sup>284</sup> Stiffel had advertised that the pole lamp was designed for Stiffel by Raymond Lowey, a celebrated industrial and graphic designer. A 1949 *Time* magazine cover story described Lowey as “the dominant figure in [the] field” *Modern Living: Up from the Egg*, *TIME*, Oct. 31, 1949. He is best known for designing the Studebaker, the Lucky Strike package, streamlined locomotives, and Sears’s Coldspot refrigerator. *Id.* In the litigation, Sears maintained that the lamp was not designed by Lowey, but by Theophile Stiffel, as the design patent indicates. Answer, para. 27. Fred Phillips, vice president and sales manager for Stiffel testified that although Lowey had made designs for Stiffel, the pole lamp at issue was not one of them. Instead, he explained, the design was submitted to “the Raymond Lowey organization” for approval, which it provided. Transcript. Today, these lamps are sold as designed by Lowey. See, e.g., Invaluable, <https://www.invaluable.com/auction-lot/raymond-lowey-for-stiffel-3-light-extension-pole--260-c-2204b3c91a> (last visited Jan. 19, 2024).

<sup>285</sup> Complaint, para. 16. The district court found that the Sears lamp was “a substantial exact copy.” 376 U.S. at 226. Likewise, the court of appeals described the similarity as a “remarkable sameness of appearance.” 376 U.S. at 227.

<sup>286</sup> 376 U.S. 225, 226 (1964).

<sup>287</sup> *Stiffel Co. v. Sears, Roebuck & Co.*, 313 F.2d 115 (7<sup>th</sup> Cir. 1963).

<sup>288</sup> *Id.* at 231.

<sup>289</sup> Complaint, para. 13-14.

<sup>290</sup> 376 U.S. 234 (1964).

ribbing had, *like a trademark*, acquired a ‘secondary meaning’ by which that particular design was associated with [plaintiff].”<sup>291</sup> The Court noted that “the appearance of Day-Brites design had ‘the capacity to identify [Day-Brite] in the trade and does in fact so identify [it] to the trade’; that the concurrent sale of the two products was ‘likely to cause confusion in the trade’; and that ‘actual confusion has occurred.’”<sup>292</sup> Again, analyzed under trademark law today, this sounds like a winning case of trade dress infringement. But as in *Sears*, the Court ruled in *Compco* that “if the design is not entitled to a design patent or other federal statutory protection, then it can be copied at will.”<sup>293</sup> This statement makes clear that neither plaintiff, the Supreme Court, or any lower court involved in these cases understood federal trademark law to provide a cause of action in such a case.

The right to copy principle<sup>294</sup> that guided the Court in its decisions in *Sears*, *Roebuck & Co.* and *Compco* seems to have disappeared from intellectual property law. These companion cases are a testament to the then existing “federal policy ... of allowing free access to copy whatever the federal patent and copyright laws leave in the public domain.”<sup>295</sup> These decisions are in line with earlier cases that found a general right to copy in intellectual property law. For example, Judge Learned Hand expressed this foundational understanding of intellectual property law stating that “[t]he defendant . . . may copy the plaintiff’s goods slavishly down to the minutest detail; but he may not represent himself as the plaintiff in their sale.”<sup>296</sup> Likewise, in *Kellogg Co. v. National Biscuit Co.*, a case about the shape of a product, the Supreme Court stated that “[s]haring in the good will of an article unprotected by patent or trade mark is the exercise of a right possessed by all - and in the free exercise of which the consuming public is deeply interested.”<sup>297</sup>

The reactions to the decisions in *Sears*, *Roebuck & Co.* and *Compco* were critical and hyperbolic. For example, a *Time* magazine article said it was “a decision of such broad impact that it overturned unfair competition doctrines in all fifty states and set a precedent that could affect U.S. industry for years to come.”<sup>298</sup> Professor Walter J. Derenberg said the decisions “would send to its demise a vast body of law,”<sup>299</sup> and Professor Milton Handler said the decisions “may portend revolutionary changes.”<sup>300</sup> A student note in the *Columbia Law Review* stated that the decisions appear “to have virtually eliminated state law of product simulation.”<sup>301</sup>

Ultimately, the *Sears-Compco* rule was eroded. The *Sears* Court provided the opening to its undoing when it stated that States “may protect businesses in the use of their trademarks, labels, or distinctive dress in the packaging of goods so as to prevent others, by imitating such markings, from misleading

<sup>291</sup> *Id.* at 238 (emphasis added).

<sup>292</sup> *Id.*

<sup>293</sup> *Id.*

<sup>294</sup> “If the design is not entitled to a design patent or other federal statutory protection, then it can be copied at will.” *Compco Corp.*, 376 at [ ].

<sup>295</sup> 376 U.S. at 231-32.

<sup>296</sup> *Crescent Tool Co. v. Kilborn & Bishop Co.*, 247 F. 299, 301 (2d Cir. 1917).

<sup>297</sup> 305 U.S. 111, [ ] (1938).

<sup>298</sup> *Patents: Knocking Down the Pole*, *TIME*, Mar. 20, 1964, at 86.

<sup>299</sup> Daphne R. Leeds, Milton Handler, Walter J. Derenberg, Ralph S. Brown, and Paul Bender, *Product Simulation: A Right or a Wrong?*, 64 *COLUM. L. REV.* 1178, 1204 (1964).

<sup>300</sup> Daphne R. Leeds, Milton Handler, Walter J. Derenberg, Ralph S. Brown, and Paul Bender, *Product Simulation: A Right or a Wrong?*, 64 *COLUM. L. REV.* 1178, 1184, 1190 (1964).

<sup>301</sup> Note, *Unfair Competition and the Doctrine of Functionality*, 64 *COLUM. L. REV.* 544, 569 (1946).

purchasers as to the source of the goods.”<sup>302</sup> In its 1989 decision in *Bonito Boats v. Thunder Craft Boats*, the Court minimized its holdings in *Sears* and *Compco* as standing for the proposition that “States may not offer *patent-like protection* to intellectual creations which would otherwise remain unprotected as a matter of federal law.”<sup>303</sup> Later, in *Qualitex Co. v. Jacobson Prods. Co.*, the Court pointed to the “functionality” doctrine as adequately providing the buffer between the domains of patent and trademark law.<sup>304</sup> Thereafter, applying the functionality doctrine was the means of addressing the concerns about creating monopoly rights through trademarks that would be denied by patent law.<sup>305</sup> But in these cases, the Court was following the lead of various lower courts that similarly bypassed *Sears-Compco*.

A case involving a modernist design for a desk lamp designed in 1972, *Artemide SpA v. Grandlite Design & Mfg. Co.*, is representative.<sup>306</sup> There, although the court found that the design for the “Tizio” lamp contained both functional and nonfunctional design features, it granted a preliminary injunction because it concluded that protecting only the nonfunctional features as trade dress, it did “not disturb the careful balance struck in the patent laws between society’s desire to encourage new ideas and its desire to promote competition.”<sup>307</sup> The same court granted a permanent injunction two years later in another modernist desk lamp design case. In *PAF S.r.l. v. Lisa Lighting Co.*, the court found that the design of the minimalist “Dove” lamp met the demands of trademark law having nonfunctional features that had acquired secondary meaning that when found in defendant’s products would be likely to cause confusion among the relevant consumers.<sup>308</sup>

Finally, in addition to enjoying robust protections under design patent, copyright, and trademark laws, today design producers can also enjoy overlapping intellectual property rights. Such a scheme not only provides multiple simultaneous protections, but also successive protections. For instance, design patent protection lasts only 15 years today,<sup>309</sup> but trade dress protection can be indefinite.<sup>310</sup> Nevertheless, these MCM designs created in the 1950s are more protected today than when they were created. In fact, because they are very likely to be around and protected 100 years after their creation, the designation “mid-century” may even lead to confusion about which century is being referred to.

#### D. Negative Space

As the previous section demonstrates, during the halcyon days of industrial design in the mid-twentieth century when innovative and creative designs proliferated, U.S. intellectual property law was inhospitable to industrial designers. The cultural and legal situation in the Nordic countries was no

<sup>302</sup> 376 U.S. at 232

<sup>303</sup> 489 U.S. 141, 156 (1989) (emphasis added).

<sup>304</sup> 514 U.S. 159, 164 (1995).

<sup>305</sup> See, e.g., *In re Deister Concentrator Co.*, 289 F.2d 496 (C.C.P.A. 1961) (“as to some words and shapes the courts will never apply the ‘secondary meaning’ doctrine so as to create monopoly rights. The true basis of such holdings is not that they cannot or do not indicate source to the purchasing public but that there is an overriding public policy of preventing their monopolization, of preserving the public right to copy. A certain amount of purchaser confusion may even be tolerated in order to give the public the advantages of free competition.”).

<sup>306</sup> 672 F. Supp. 698 (S.D.N.Y. 1987).

<sup>307</sup> *Id.* at 706-07.

<sup>308</sup> 712 F. Supp. 394 (S.D.N.Y. 1989).

<sup>309</sup>

<sup>310</sup> This is precisely the situation the Supreme Court sought to avoid in *Sears*. *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S., at 232 (“perpetual protection [for] articles too lacking in novelty to merit any patent.”).

different. There too during the period that the design industry surged, intellectual property protection was lacking.<sup>311</sup>

A number of scholars have now observed how particular industries and creative activities have thrived without the encouragement or security of intellectual property.<sup>312</sup> This body of work even suggests that the introduction of intellectual property protection into these “negative spaces” might have a net negative impact on creativity by disturbing norms around apportioning what is shared and what is owned.<sup>313</sup> This project can contribute to that literature. There are several commonalities with other instances of negative spaces in intellectual property. But as in other instances, not of the feature align. For instance, in the case of MCM design, there is no evidence that the presence of knockoffs in the market spurred designers to further innovate to stay ahead, as was seen in the fashion industry.<sup>314</sup>

Another body of literature explores the role intellectual property plays in motivating creators and finds that creators are often not particularly motivated by intellectual property.<sup>315</sup> These companies were successful innovators when there was no protection to be had. With no expectation of protection, Herman Miller hired designers like George Nelson to act as the head of design and paid a cadre of celebrated designers.<sup>316</sup>

In addition to there being significant innovation without the lure of protection, as with other studies of the negative spaces of intellectual property, in the case of MCM design intellectual property

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<sup>311</sup> Stina Teilmann-Lock, *We Wanted More Arne Jacobsen Chairs but All We Got Was Boxes: Experiences from the Protection of Designs in Scandinavia from 1970 till the Directive*, IIC (2016) (explaining that during the height of the Danish Modern movement, Danish copyright law did not apply to forms fit for function, the 1905 Design Act required, as per caselaw, that designs possess an aesthetic effect or have been designed according to aesthetic intentions, and there was no trademark protection for the shape of a product itself.).

<sup>312</sup> See, e.g., Kal Raustiala and Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VIRGINIA L. REV. 1687 (2006); Kal Raustiala and Christopher Sprigman, *The Piracy Paradox Revisited*, 61 STAN. L. REV. 1201 (2009); Christopher J. Buccafusco, *On the Legal Consequences of Sauces: Should Thomas Keller's Recipes Be Per Se Copyrightable?*, 24 CARDOZO ARTS & ENT. L.J. 1121 (2007); Dotan Oliar & Christopher Sprigman, *There's No Free Laugh (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy*, 94 VA. L. REV. 1787 (2008); David Fangundes, *Talk Derby to Me: Emergent Property Norms Governing Roller Derby Pseudonyms*, 90 TEX. L. REV. 1093 (2012); Jacob Loshin, *Secrets Revealed: Protecting Magicians' Intellectual Property Without Law*, in LAW AND MAGIC: A COLLECTION OF ESSAYS 123 (Christine A. Corcos ed., 2010); Katherine J. Strandburg, *Users as Innovators: Implications for Patent Doctrine*, 79 U. Colo. L. Rev. 467 (2008); Elizabeth L. Rosenblatt, *A Theory of IP's Negative Space*, 34 Colum. J.L. & Arts 317 (2011); Kate Darling & Aaron Perzanowski (eds.), *Creativity Without Law: Challenging the Assumptions of Intellectual Property* (2017).

<sup>313</sup> Aaron Perzanowski, *Owning the Body: Creative Norms in the Tattoo Industry*, in CREATIVITY WITHOUT LAW: CHALLENGING THE ASSUMPTIONS OF INTELLECTUAL PROPERTY (Kate Darling & Aaron Perzanowski, eds.) 89 (2017).

<sup>314</sup> Kal Raustiala and Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VIRGINIA L. REV. 1687 (2006); Kal Raustiala and Christopher Sprigman, *The Piracy Paradox Revisited*, 61 STAN. L. REV. 1201 (2009).

<sup>315</sup> Eric E. Johnson, *Intellectual Property and the Incentive Fallacy*, 39 FLA. ST. U. L. REV. 623 (2012); Jeanne C. Fromer, *Expressive Incentives In Intellectual Property*, 98 VA. L. REV. 1745 (2012); Gregory N. Mandel, *To Promote the Creative Process: Intellectual Property Law and the Psychology of Creativity Symposium: Creativity and the Law*, 86 NOTRE DAME L. REV. 1999 (2011); Jessica Silbey, *Harvesting Intellectual Property: Inspired Beginnings and Work-Makes-Work, Two Stages in the Creative Processes of Artists and Innovators Symposium: Creativity and the Law*, 86 NOTRE DAME L. REV. 2091 (2011); ERIC VON HIPPEL, *DEMOCRATIZING INNOVATION* (2005); JESSICA SILBEY, *THE EUREKA MYTH: CREATORS, INNOVATORS, AND EVERYDAY INTELLECTUAL PROPERTY* (2015).

<sup>316</sup> Illustrative of how these firms then behaved, is the story earlier recounted of how artist Harry Bertoia was kept on the Knoll payroll. See *supra* notes 134-36.

was just not a central concern. That is, while intellectual property for industrial designs was unavailable, other intellectual property was available, but not sought.<sup>317</sup> For instance, word mark protection certainly was available. And yet neither George Nelson Associates nor Herman Miller ever applied for registration of the designer's name nor any of the names of his designs.<sup>318</sup> One counterexample is that designer Isamu Noguchi applied for registration of the mark AKARI LAMPS BY ISAMU NOGUCHI and design for lamps in 1953.<sup>319</sup> Noguchi complained about the copying of his lamp designs in the 1950s<sup>320</sup> and appears to have attempted to use the law to protect his designs.<sup>321</sup>

One might have also expected that in the absence of design patent, copyright, and unfair competition protection for industrial design, firms and designers might have turned to utility patents, which do not protect the way the articles appear, but instead the way they work. In contrast to Scandinavian modern designers who worked mostly with wood, leather, and canning, MCM designers in the U.S. often featured newly developed materials and novel fabrication techniques. For instance, Charles and Ray Eames developed a new molded plywood technique, brought the new material of fiberglass from the boat industry to furniture, and connected seats to legs with rubber shock mounts. Similarly, George Nelson inventively stretched a new rubber-like fabric across a wire frame to create the Bubble Lamp. These new applications of new materials for functional purposes could have been protected by utility patents. Moreover, because of the objective of clean lines and clear surfaces, MCM designers often developed ingenious methods for concealing the mechanics. For example, Eero Saarinen contained all of the screws and bolts within the smooth, curved shape of the base of his tulip tables and chairs. Likewise, the connection of the separate pieces of the Eames lounge chair is hidden from view. One might expect these designers to seek to deprive their competitors of having the ability to achieve the same look.

A search of the utility patents associated with MCM designers reveals that only some sought utility patents. Eero Saarinen, for instance, was listed as the inventor on four utility patents for his tulip table

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<sup>317</sup> For instance, Ray Eames's textile designs such as her "Crosspatch" pattern could have been protected by copyright. *See, e.g.,* Peter Pan Fabrics v. Brenda Fabrics, Inc., 169 F. Supp. 142, 143 (S.D.N.Y. 1959) (finding a design printed upon dress fabric to be a proper subject of copyright both as a work of art and as a print.). According to Eames Office, "Ray won an honorable mention and \$50 for Crosspatch. It was exhibited at MoMA in the Printed Textiles for the Home exhibition from March through June of 1947. As promised, the textiles toured to various museum institutions and was distributed by 19 selected retail stores throughout the country." Eames Office, <https://www.eamesoffice.com/the-work/crosspatch-drawings/> (last visited Jan. 19, 2024). Yet no copyright application was made for any of Ray's textile designs until 1999. *See, e.g.,* U.S. Reg. No. VA0001398152 for Eames Dot Pattern, filed by Eames Office, LLC.

<sup>318</sup> Herman Miller did not apply to register EAMES until 1980. U.S. Reg. 1,187,673. Even still, this was much earlier than any of its other trademark applications associated with MCM designs and designers.

<sup>319</sup> Serial No. 71,651,463. He then assigned this registration to Bonniers, Inc., a Swedish home furnishings store in New York City in 1954. U.S. Reg. No. 591,606. Bonniers was likely the store that sold the Swedish lamp that Nelson coveted and later copied to create the Bubble Lamp. *Bonniers, Furnishings Pioneer Expected to Close Next Month*, NY TIMES, Sept. 28, 1974, p. 18.

<sup>320</sup> Noguchi complained about ads for "Noguchi-type Lamps," and said that a plan to have Knoll manufacture his lamp design was scrapped "everybody copied it." ISAMU NOGUCHI, ISAMU NOGUCHI: A SCULPTOR'S WORLD 27 (1968). It seems Knoll did manufacture Noguchi's 1944 three-legged Cylinder Lamp design as he also complained that after it was made available "imitations were all over the place, and I had neglected to patent it." *Id.*

<sup>321</sup> In addition to registering the mark, he also executed a contract with Bonniers, a Swedish design store in New York, granting it the exclusive right to sell his lamps in the U.S. May 1, 1953. <http://architecture-history.org/architects/architects/NOGUCHI/biography.html> (last visited Jan. 19, 2024).



and chairs, and his womb chair.<sup>322</sup> Charles Eames was listed as the inventor on 19 utility patents for furniture designs, more than any other MCM designer.<sup>323</sup> Perhaps Charles naturally turned to utility patents because before using molded plywood in furniture, he used it to produce splints and airplane parts during WWII and secured a utility patent for the production process.<sup>324</sup>

The exclusivity of intellectual property is in contrast to the culture of sharing, lifting, and collaborating that was evident among MCM designers. For example, Charles and Ray Eames are undoubtedly the biggest celebrities in MCM design and their breakout design was the molded plywood chair—the so-called “design of the century.”<sup>325</sup> This design, however, was the culmination of a design Charles first embarked upon in collaboration with Eero Saarinen, which earned them first place in MoMA’s 1941 Organic Furniture Competition.<sup>326</sup>

In another design origin story, George Nelson described the process of designing another iconic design attributed to him: the ball clock. Nelson’s account describes an open spirit of collaboration amongst MCM designers:

[Artist/designer Isamu Noguchi] saw we were working on clocks and he started making doodles. Then [architect/designer Buckminster Fuller] sort of brushed Isamu aside. He said, “This is a good way to do a clock,” and he made some utterly absurd thing. Everybody was taking a crack at this ... pushing each other aside and making scribbles. At some point we left – we were suddenly all tired, and we’d had a little bit too much to drink – and the next morning I came back, and here was this roll [of drafting paper], and Irving [Harper, a designer employed at George Nelson Associates] and I looked at it, and somewhere in this roll there was the ball clock. I don’t know to this day who cooked it up. I know it wasn’t me. It might have been Irving, but he didn’t think so ... [We] both guessed that Isamu had probably done it because [he] has a genius for doing two stupid things and making something extraordinary ... out of the combination ... [Or] it could have been an additive thing, but, anyway, we never knew.<sup>327</sup>

Although Nelson admits that the design was not his, it was ultimately produced and yet no other designer came forward to assert that they, and not Nelson should get the credit for the design.

Design is especially derivative. What makes a design successful functionally and aesthetically may be a seemingly small tweak to a preexisting solution to the same problem. These MCM designers had similar objectives and were working within similar constraints. It would therefore be expected that

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<sup>322</sup> U.S. Patent No. 2,981,578 (filed Mar. 27, 1957); U.S. Patent No. 2,939,517 (filed Mar. 27, 1957); U.S. Patent No. 2,541,835 (filed Dec. 4, 1948); U.S. Patent No. 2,606,601 (filed Dec. 4, 1948).

<sup>323</sup> He thus had more utility patents to his name than design patents. Each of these 19 patents was assigned to Herman Miller.

<sup>324</sup> In 1941, Charles and Ray Eames designed plywood leg splints for use by the U.S. Navy Medical Department. DANIEL OSTROFF (ED.), *AN EAMES ANTHOLOGY ARTICLES, FILM SCRIPTS, INTERVIEWS, LETTERS, NOTES, AND SPEECHES* xvi (2015).

<sup>325</sup> *The Best of the Century*, TIME, Dec. 31, 1999, at 1.

<sup>326</sup> Carlos Montes Serrano, Noelia Galván Desvaux, & Álvaro Moral García, *Working with Scale Models: Eero Saarinen and Charles Eames in the Organic Design Competition, MoMA, 1941*, 24 EXPRESIÓN GRÁFICA ARQUITECTÓNICA 26, 31 (2019).

<sup>327</sup> STANLEY ABERCROMBIE, *GEORGE NELSON: THE DESIGN OF MODERN DESIGN* 111 (1995). Artist and designer Harry Bertioia also contributed the designs Eames and Saarinen submitted. *Id.* at 33.

they would share more general features of designs. For example, MCM designer Adrian Pearsall designed coffee tables with an organically shaped wood base having three points of contact with the floor and three with the organically shaped piece of glass that rests on top of it. These designs resemble designs from both Scandinavian and the U.S.<sup>328</sup> Of course the most famous design of a coffee table with an organically shaped wood base having three points of contact with the floor and three with the organically shaped piece of glass that rests on top of it is Noguchi's "IN-50" table. According to Noguchi, he reworked his first design of this table for designer T. H. Robsjohn-Gibbings in 1939.<sup>329</sup> Noguchi never heard from Robsjohn-Gibbings, but later saw that Robsjohn-Gibbings sold a table that looked like Noguchi's design. When confronted by Noguchi, Robsjohn-Gibbings said simply that everyone was free to make a three-legged table.<sup>330</sup>

While conventional wisdom may hold that one designer is solely responsible for bringing a design into creation, these stories of MCM design demonstrate how the creative process was derivative, collaborative, and above all iterative. These stories reveal that the space between a "new" design and a preexisting design is slight. And while conventional wisdom may hold that there is one rightful owner of a design, these stories show how even some iconic designs may defy and stable sense of ownership of intellectual property in the design.

#### *E. Design Policy*

This case study also provides an illustration of the difficulty in finding the right balance in design protection policy. Focusing on the change from low to high protection for these designs prompts the question of why we protect industrial designs in the first place. The historical uncertainty of the rights to industrial design is likely due in large part to the lack of clarity in the policy underpinnings of the law of design protection. Recognizing that the protection of design has persistently been an intractable legal problem, Professor Jerome Reichman, credited "industrial design" with the distinction of having "posed the intellectual property world's single most complicated puzzle."<sup>331</sup>

After accusing Walmart of selling a knockoff of Noguchi's "IN-50" coffee table, the CEO of

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<sup>328</sup> For example, Pearsall's coffee tables have the same overall look at those designed by his contemporary, designer Vladimir Kagan. Compare Kagan's table: [https://www.1stdibs.com/furniture/tables/coffee-tables-cocktail-tables/vladimir-kagan-tri-symmetric-coffee-table-walnut-glass-usa-1950s/id-f\\_37529482/](https://www.1stdibs.com/furniture/tables/coffee-tables-cocktail-tables/vladimir-kagan-tri-symmetric-coffee-table-walnut-glass-usa-1950s/id-f_37529482/) with Pearsall's: [https://www.1stdibs.com/furniture/tables/coffee-tables-cocktail-tables/adrian-pearsall-craft-associates-mid-century-walnut-jacks-coffee-table/id-f\\_37136212/?utm\\_content=condensed&allowUniversalLink=no&gad\\_source=1&gclid=CjwKCAiA8NKtBhBtEi-wAq5aX2F4s5\\_C2Axo0EfRQocKxE5VmePE-zWmm6X0WCIEkG1HZUdyZkPm7nRoCPWcQAvD\\_BwE&gclsrc=aw.ds](https://www.1stdibs.com/furniture/tables/coffee-tables-cocktail-tables/adrian-pearsall-craft-associates-mid-century-walnut-jacks-coffee-table/id-f_37136212/?utm_content=condensed&allowUniversalLink=no&gad_source=1&gclid=CjwKCAiA8NKtBhBtEi-wAq5aX2F4s5_C2Axo0EfRQocKxE5VmePE-zWmm6X0WCIEkG1HZUdyZkPm7nRoCPWcQAvD_BwE&gclsrc=aw.ds). Nevertheless, Pearsall's coffee tables are highly collectible today. Id.

<sup>329</sup> ISAMU NOGUCHI, ISAMU NOGUCHI: A SCULPTOR'S WORLD 26 (1968) ("I went to Hawaii in 1939 to do an advertisement (with Georgia O'Keefe and Pierre Roy). As a result of this I had met (T.H.) Robsjohn Gibbings, the furniture designer, who had asked me to do a coffee table for him. (I had already done a table for Conger Goodyear.) I designed a small model in plastic and heard no further before I went west.").

<sup>330</sup> ISAMU NOGUCHI, ISAMU NOGUCHI: A SCULPTOR'S WORLD 26 (1968).

<sup>331</sup> J.H. Reichman, *Past and Current Trends in the Evolution of Design Protection Law-A Comment*, 4 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 387, 387 (1993).

DWR and Herman Miller Consumer said, “[Walmart] could be innovators in design.”<sup>332</sup> The suggestion was that if you deny competitors the opportunity to copy, they will be forced to produce new designs instead. This is a strand of the utilitarian theory of intellectual property law. Not only does the promise of protection incentivize the first creator, but it also incentivizes follow on creators because they are forced to design around proprietary designs in order to compete. However, where design protections have the combination of being robust and never-ending, they may instead breed complacency rather than spurring further innovation.<sup>333</sup> Today Knoll and Herman Miller rely aggressively on intellectual property. They secure design patents, trademarks, and trade dress. They send cease and desist letters. And they litigate infringement claims. These activities expend resources of the firm that could otherwise be directed at design innovation. Very few of their top selling home furnishing designs are from this century.<sup>334</sup> Most are seventy years old.

### VIII. AUTHENTICITY AND INTELLECTUAL PROPERTY

When MCM designs first hit the market, they were popular and unprotected. As a result, they were copied, and competing products were offered at a reduced price.<sup>335</sup> Nelson, perhaps exaggerated the situation when he said, “What we designed became best sellers, but they were always made bestsellers by other manufacturers who knocked them off, not by Herman Miller.”<sup>336</sup> To justify their higher price and steer consumers away from the copies, authorized manufacturers emphasized the relationship of the designer to the product and the manufacturer’s relationship with the designer. The relationship the manufacturer had with the designer meant that its products were manufactured with the permission of the designer and that relationship ensured that the product was faithful to the original design.

#### *A. Marketing Authenticity Then and Now*

As a result of the lack of intellectual property protection available for industrial designs, during this heyday of design, the companies that produced and sold these designs were forced to resort to other strategies to compete with the cheaper copies that entered the market. These design companies turned to marketing strategies centered on notions of authenticity.

George Nelson anticipated that Herman Miller’s designs would be copied. He was resigned to that and did not try to fight it. Instead, he promoted the designs sold by Herman Miller as original creations by artist-designers. This strategy can be seen in Herman Miller’s first catalog, conceived, designed, and written by Nelson in 1948. This catalog was to be appreciated as a book on design authored by Nelson.

<sup>332</sup> Patrick Sisson, *Is Walmart Selling Knockoffs of Classic Midcentury Modern Furniture?*, CURBED, Jun. 12, 2018 <https://archive.curbed.com/2018/6/11/17449042/walmart-furniture-midcentury-modern-noguchi> (last visited Jan. 19, 2024).

<sup>333</sup> See Robert P. Merges and Richard R. Nelson, *On the Complex Economics of Patent Scope*, 90 COLUM. L. REV. 839, 872 & n.141 (1990); Andreas Panagopoulos, *The Effect of IP Protection on Radical and Incremental Innovation*, 2 J. KNOWLEDGE ECON. 393, 394-95 (2011) (“lack of competition can lead an innovator to rest on her laurels failing to advance a valuable and radical innovation further”).

<sup>334</sup> Herman Miller’s list of its best sellers includes MCM designs, office furniture, and only a handful of home furnishings from this century. See *Best Sellers*, Herman Miller, [https://store.hermanmiller.com/collection-bestsellers?lang=en\\_US&sz=96&start=0](https://store.hermanmiller.com/collection-bestsellers?lang=en_US&sz=96&start=0) (last visited Jan. 19, 2024).

<sup>335</sup> Rita Reif, *Furniture Makers Go All Out for Modern*, NY TIMES, Apr. 17, 1970, 64.

<sup>336</sup>

It was produced in canvas hardcover with dust jacket—a first in the furniture industry. Employing graphic designers and top architectural photographers, the cost to produce the catalog was an astonishing \$30,000.<sup>337</sup> Also a first, rather than freely distributing the catalogs, Herman Miller sold them for \$3 each.<sup>338</sup> When they sold out, it printed a second edition, which sold for \$10 each.<sup>339</sup> Making it seem even more like a coffee table art book, the back cover of the dust jacket listed all the museums that had exhibited the furniture contained in the catalog.<sup>340</sup> Nelson’s intended audience for what he called “an illustrated record of furniture currently in production”<sup>341</sup> was architects and interior designers. The catalog featured furniture designed by himself, Eames, Noguchi, and Paul Laszlo. In the forward Nelson states “[t]his company today occupies a very solid position as a manufacturer of modern furniture” and that “[d]esign is an integral part of the business.”<sup>342</sup> Nelson boasts, “[t]he furniture lines presented by Herman Miller from 1948 have been called the most influential groups of furniture ever manufactured.”<sup>343</sup> Describing Noguchi’s IN-50 coffee table, Nelson called it “sculpture for use.”

Another famous example is the public launch of the Eames lounge chair in 1956. Herman Miller did a strategic promotion campaign probably because the cost of the chair was higher than other Eames products. The chair’s debut was featured in an episode of the NBC “Home” show. The segment was all about designer Charles Eames and it emphasized the innovations and creativity that were hallmarks of the design. Herman Miller also produced a film artistically depicting the construction of the chair.

The Eameses were in control of overseeing the graphic design and photography used in the advertising of their designs for Herman Miller. They were deliberate about the image of themselves that was projected because they that when someone bought an Eames designed product, they were buying that image. Their 1949 self-designed Case Study House No. 8 was widely promoted and projected their image as the living embodiments of the ideals of MCM design. “Just as the [Eames] house was a showroom, the showroom (designed for Herman Miller) was a house.”<sup>344</sup>

Herman Miller advertised the prominent designers it worked with. For example, “Traveling Men” was an ad designed by George Tscherny in 1954 that featured Eames, Nelson, and Girard and all the “distinctions heaped on” them. A 1963 Herman Miller ad designed Deborah Sussman directly stated, “Beware of Imitations.” With images of Eames designs, its messages were “Beware of Imitations,” “Enjoy the comfort of the real thing,” and “These are the originals! Accept no substitutions.” Even product tags employed beautiful graphics and messages that reinforced what the purchaser was paying for. A 1955 product tag reads “Original George Nelson Design Executed by Herman Miller.”

While initially, this marketing strategy may have been a response to the lack of legal protection for

<sup>337</sup> *The Story of Herman Miller’s 1948 Catalog*, YouTube, [https://www.youtube.com/watch?v=YjluW4S-umM&ab\\_channel=HermanMiller](https://www.youtube.com/watch?v=YjluW4S-umM&ab_channel=HermanMiller) (last visited Aug. 4, 2023).

<sup>338</sup> *The Story of Herman Miller’s 1948 Catalog*, YouTube, [https://www.youtube.com/watch?v=YjluW4S-umM&ab\\_channel=HermanMiller](https://www.youtube.com/watch?v=YjluW4S-umM&ab_channel=HermanMiller) (last visited Aug. 4, 2023).

<sup>339</sup> Cherie Fehrman and Kenneth Fehrman, *Interior Design Innovators 1910-1960* 57 (2009).

<sup>340</sup> THE HERMAN MILLER COLLECTION [I] (1948).

<sup>341</sup> THE HERMAN MILLER COLLECTION 5 (1948).

<sup>342</sup> THE HERMAN MILLER COLLECTION 4 (1948).

<sup>343</sup> THE HERMAN MILLER COLLECTION 4 (1948).

<sup>344</sup> Kurt W. Forster, *Review: The Work of Charles and Ray Eames: A Legacy of Invention*, 57 J. OF THE SOC’Y OF ARCHITECTURAL HISTORIANS 201, 202 (1998) (citing Beatriz Colomina’s essay, at 146, in the accompanying catalogue to Vitra’s 1998 Eames exhibition).

the designs, it still persists today when the proponents are also (mostly successfully) asserting legal rights in the designs. For instance, DWR's CEO says educating consumers about the designer who created what he calls the "authentic product" is key to steering them away from replicas because it "increase[s] the moral shame of it."<sup>345</sup> DWR plays up the designer idea with pages devoted to each designer with photos and bio. Even in its complaints, Herman Miller states that its "furniture have been deemed to be works of art" and mentions "the creative genius of Charles Eames."<sup>346</sup>

### B. *Having the Authority to be Authentic*

The mid-twentieth century marketing strategy for MCM products has now matured into an argument about what authenticity means in design. Authenticity has been appropriated in the context of design and its inaptness is being naturalized through steady use. Professor Amy Adler has powerfully demonstrated how the concept of authenticity is "protean" and at best, "a mutually agreed upon fiction" in the art world.<sup>347</sup> In the context of mass-produced products the concept of authenticity is even more strained. Authenticity may be a concept that applies in art, handcrafted products, and artifacts. The Eames molded plastic side chair produced by Herman Miller today is neither made by hand nor is it a product from the period in which it was designed. And although it can (and should!) be appreciated for its aesthetic qualities, it does not meet most definitions of art. So how can it be said to be authentic?

The concept of authenticity in design is manufactured just like the objects this label is pinned on. While he was Chairman of Vitra, Rolf Fehlbaum expressly acknowledged the difficulty some have with attaching the concept of authenticity to design, but he nevertheless defended its application by articulating the theory of how these products can be authentic. He noted that "[i]n the fine arts, it is clear what is meant by the terms 'original' and 'copy,'" and then proposed that "[w]ith respect to the field of design, however, these words must be redefined."<sup>348</sup> Essentially, he proposes that certain reproductions can be valued as "new originals:" "Early examples of a design from the initial production phase ... are originals, but the products designed by Le Corbusier or the Eames and produced today by their legitimate manufacturers are also originals."<sup>349</sup> This argument has ticked off MCM collectors who charge that MillerKnoll and Vitra "have devalued the vintage originals."<sup>350</sup>

Today, there are only a few companies that have the history of working with MCM designers when these designs were first created. It is unsurprising therefore, that precisely that history is what they rely on to define authenticity in the field of design. According to Fehlbaum a product is an original, "[w]hen

<sup>345</sup> Nathalie Atkinson, *Real or Copycat: The Thorny Issue of Authenticity in Design*, GLOBE & MAIL, Apr. 1, 2015, at [1], <https://www.theglobeandmail.com/life/home-and-garden/decor/real-or-copycat-consumers-battle-authenticity-in-design/article23741602/>.

<sup>346</sup> Complaint, *Herman Miller, Inc. v. Alphaville Design, Inc.*, (N.D. Cal. 2009) Para. [1].

<sup>347</sup> See Amy Adler, *Artificial Authenticity*, 98 NYU L. REV. 706 (2023).

<sup>348</sup> Rolf Fehlbaum, *The Original*, VITRA MAGAZINE, Jan. 2, 2009. <https://www.vitra.com/en-us/magazine/details/the-original> (last visited Jan. 19, 2024).

<sup>349</sup> Rolf Fehlbaum, *The Original*, VITRA MAGAZINE, Jan. 2, 2009. <https://www.vitra.com/en-us/magazine/details/the-original> (last visited Jan. 19, 2024).

<sup>350</sup> Design Addict Forum, <https://designaddict.com/community/main-forum/Ball-clock-authenticity-help12522/#post-102106> (last visited Jan. 19, 2024).

the pertinent legal and relational conditions are met.”<sup>351</sup> He elaborated that these conditions are that the product “was fabricated by the authorised manufacturer in the true spirit of the designer.”<sup>352</sup> This, he states, is what “guarantee[s] its authenticity.”<sup>353</sup> Fehlbaum’s case for Vitra’s products being original adopts the theory applied in the art world to prints. In the world of art, “[w]hether a print is licit or illicit depends upon what relation it bears to the artist,” whether it is “brought into existence with the ... permission of the artist,” or whether it is “lacking the artist’s permission.”<sup>354</sup>

But this concept of authenticity is an inversion of the conventional understanding authenticity. To determine whether Modernica’s Bubble Lamps are authentic, we might question how faithful to the original design and manufacturing process the reproductions are.<sup>355</sup> In the case of the Bubble Lamps and the Eames fiberglass shell chairs, Modernica’s specifications were exact. Modernica did not alter the original Eames designs in any way, used the same materials that had been used, and even used the same machinery.<sup>356</sup> Even Herman Miller acknowledged that Modernica’s lamps were “identical in appearance to lamps designed by the late George Nelson”<sup>357</sup>

In contrast, there are countless examples of the authorized reproductions being updated or redesigned. These designed might be updated to use current technology or fabrics and materials. For example, in 2000, Herman Miller and Vitra created an Eames Shell Chair in Polypropylene.<sup>358</sup> After 62 years, and after the deaths of both Charles and Ray Eames, in 2013 the Eames Molded Side Chair was offered in molded plywood for the first time.<sup>359</sup> These designs had never made in anything other than fiberglass when the Eameses were alive.<sup>360</sup> Fehlbaum acknowledges the derivations that these legitimate manufacturers make in current reproductions: “Models from the early production phase represent an initial solution. Almost without exception, practical usage eventually reveals the need for improvements in specific aspects of a design.”<sup>361</sup> He explains “The dimensions and materials of a product

<sup>351</sup> Rolf Fehlbaum, *The Original*, Vitra Magazine, (Jan. 2, 2009) <https://www.vitra.com/en-us/magazine/details/the-original> (last visited Jan. 19, 2024). And this is true “independent of its production date.” *Id.*

<sup>352</sup> Rolf Fehlbaum, *The Original*, Vitra Magazine, (Jan. 2, 2009) <https://www.vitra.com/en-us/magazine/details/the-original> (last visited Jan. 19, 2024).

<sup>353</sup> Rolf Fehlbaum, *The Original*, Vitra Magazine, (Jan. 2, 2009) <https://www.vitra.com/en-us/magazine/details/the-original> (last visited Jan. 19, 2024).

<sup>354</sup> Christy Mag, *Unlimited Additions to Limited Editions*, 7 CONTEMPORARY AESTHETICS (2009) Permalink: <http://hdl.handle.net/2027/spo.7523862.0007.011> (last visited Jan. 16, 2003)

<sup>355</sup> Sophisticated consumers may have considered Modernica’s reproduction Bubble Lamps to be authentic. For example, comments posted on the Design Addict Forum evidence the subtly and slipperiness of authenticity in some cases. Authentic George Nelson Lamp, Design Addict Forum (Feb. 23, 2010) <https://designaddict.com/community/main-forum/authentic-george-nelson-lamp13745/#>. (“While they are not officially recognized by the Nelson estate, or properly licensed, they are made the same and with the same tooling in the same factory and Modernica is the only ones doing it...So take what you will from that.”).

<sup>356</sup> “Modernica follows strict adherence to the original design in regard to dimensions, frame construction and materials.” CITE

<sup>357</sup> 2013 SDNY Complaint, para. 17 (“The Infringing Lamps are identical in appearance to lamps designed by the late George Nelson decades earlier.”).

<sup>358</sup>

<sup>359</sup> Manufacturing them in molded plywood is only possible now because of the use of new 3-D veneer technology. The designs are being offered by Herman Miller in walnut, white ash and Santos palisander.

<sup>360</sup> Craig Nakano, *Tech Catches Up with Eames Chair*, LA TIMES, Jun. 1, 2013, at E10.

<sup>361</sup> Rolf Fehlbaum, *The Original*, Vitra Magazine, (Jan. 2, 2009) <https://www.vitra.com/en-us/magazine/details/the-original> (last visited Jan. 19, 2024).

were changed, as well as individual parts (like glides, etc), when better solutions were found.”<sup>362</sup> For example, the Eames Lounge Chair is now available in two sizes: the original and the new tall (read large) size, which necessarily changes all of the dimensions.<sup>363</sup> These updates often involve aesthetic and creative choices that strain the label of authentic. For example, Alvar Alto stools were offered with new finishes supplied by a Japanese designer.<sup>364</sup>

Which is more authentic? A 1960s leather and walnut lounge chair and ottoman in the style of the Eames chair, that was produced by Plycraft, which was for a year a subcontractor for Herman Miller, that was designed by George Mulhauser, an esteemed modernist designer in his own right, who actually designed the Coconut chair attributed to Nelson? Or a contemporary reproduction by an unlicensed company that matches the dimensions, mechanics, quality, and materials of the 1959 chair meticulously? Or a contemporary reproduction by Herman Miller that comes in a leather color and type of wood not used during the Eameses lifetime, and has new dimensions to fit American’s larger dimensions?

To answer this question, we have to know what authentic means in this context. Charles Peirce, in his *Philosophy of Signs* explains that authenticity is either indexical or iconic.<sup>365</sup> Indexical authenticity is when an object is perceived to have a link with a time, person, or place, and iconic authenticity is how something looks in relation to the original, or the indexically authentic object. An object is indexically authentic if it is believed to be the real thing. For example, a Picasso-looking painting is indexically authentic if Picasso actually painted it, whereas the painting is iconically authentic if it faithfully accurately replicates a painting actually painted by Picasso.

Applying this idea of authenticity to the three contenders above, we must conclude that the first—the Plycraft product—is indexically authentic. It was manufactured in the right period, by company that was connected to those designs, and it was designed by a MCM designer. The second—the unauthorized current reproduction—is iconically authentic. It closely resembles the chair that was first produced in 1956. Now the difficult question: In what way is the third—the authorized reproduction—authentic? It is neither indexically authentic because it was not produced during the right period, and it is not iconically authentic because it deviates from the original design. Instead, the argument goes, it is authentic because of the it “was fabricated by the authorised manufacturer in the true spirit of the designer.”<sup>366</sup> Here the claim to be authorized refers to a legal right, and the claim to be in the spirit of the designer is a claim to have a history with that designer.

It is important to sort out what is being claimed. As this article has demonstrated, the claim to have a legal right is bogus. It is smoke and mirrors. So that in the end we are left a claim to history. This claim is valuable for marketing, but it should not be the basis of legal rights.

Is intellectual property a certificate of authenticity? Eames Demetrios, grandson of Charles and Ray Eames and director of the Eames Office and chairman of the Eames Foundation, is quoted as saying: “I am often asked if it is hard to tell an authentic Eames chair from a copy. It is not. You look at the label: if it says Vitra or Herman Miller on it, it’s authentic.” Herman Miller claims both indexical

<sup>362</sup> Rolf Fehlbaum, *The Original*, Vitra Magazine, (Jan. 2, 2009) <https://www.vitra.com/en-us/magazine/details/the-original> (last visited Jan. 19, 2024).

<sup>363</sup> In 2008, Herman Miller and Vitra began selling the Eames Lounge Chair in size tall with different dimensions.

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<sup>365</sup> CHARLES PEIRCE, *PHILOSOPHY OF SIGNS* (1998).

<sup>366</sup> Rolf Fehlbaum, *The Original*, Vitra Magazine, (Jan. 2, 2009) <https://www.vitra.com/en-us/magazine/details/the-original> (last visited Jan. 19, 2024).

and iconical authenticity. Its lounge chairs are indexically authentic because of the rights they acquired from the Eames to produce them. Consumers perceive Herman Miller chairs to be authentic because Herman Miller's marketing has taught them that this company has inherited the Eameses indexicality. But their chairs are also iconically authentic because they display the Herman Miller marks, which, through marketing, consumers have come to understand as a visible cue of iconical authenticity. Herman Miller's marketing has also ensured that its updates to the chairs also become the composite photograph of the authentic chair against which consumers measure a reproduction. As a result of Herman Miller's marketing and construction of authenticity in mass-produced design, its chairs are the most authentic both indexically and iconically.

The authentic product thrives on the opposition it posits between the real and the fake. For Herman Miller to claim that only the Bubbles Lamps that it authorizes are authentic at once also declares that all others are inauthentic; they are not what they appear to be. This is critical because the authorized and unauthorized lamps appear to be the same, and they would otherwise have equivalence.

The case study examined reveals a danger in the arguments advanced on behalf of Herman Miller. In its claim of exclusivity to the Bubble Lamp design, the arguments for legal rights and for authenticity are intertwined and mutually constitutive. Herman Miller's non-legal claim of authenticity depends on its legal claim to have an exclusive right, just as its legal claim to a right depends on its claim of authenticity. This case study not only exposes that there's no there there, but it also, and more importantly, illustrates how the claim of intellectual property rights has begun to morph into a claim of authenticity.

## IX. CONCLUSION

This article shows that the current claims of authenticity of MCM products are not only hollow, but nonsensical. The products deemed "authentic" may have been altered over time, not by the designer, but the rights holder. Meanwhile, the products deemed inauthentic, or "fake," may have been produced not only precisely to the original specifications, but also by using the original machinery. And because most of the iconic MCM designs were discontinued in the twentieth century, it was sometimes a company unrelated to the original producer who reintroduced these designs thus making them, for a time, the exclusive provider of these products.

Through this case study we realize that in design authentic instead means authorized. The \$345 Eames chair is authorized, while the nearly identical \$39 chair is not. In other words, the \$345 chair is produced with the authority of the single entity that can bestow such authority. But where does this authority find its origin? The claim is that the authority emanates from the designer who originated the design. Even putting the issues of whether the named designer is truly the creator or whether the design is truly original, this article has demonstrated that the named designer had no authority to bestow. This is because at the time that these designs were created, the law did not bestow any legal rights on the designer. So even if the designer transferred their authority to another, there were no rights to transfer. Although the designer did in many cases execute a document stating that he was assigning all of his rights to the company that produced them, this was an empty promise because the designer had no rights under copyright, trademark, patent, or unfair competition law. Consequently, MillerKnoll and Vitra's present claim that they have acquired this authority and to produce the only authentic products from those designs is also hollow.



Much as MillerKnoll and Vitra would have it otherwise, “original reproduction” is an oxymoron. When it comes to MCM products, they may be vintage early production, licensed replicas, or unlicensed replicas. To call a licensed replica one real and an unlicensed replica fake does not make sense. As this article has demonstrated, claims to the authenticity for the Bubble Lamp cannot be founded on any theory of how that concept may work in design. They are not made by the original manufacturer, they have not been continuously produced, they are not authorized by the designer’s heirs, and they do not provide royalties to designer’s heirs. If they are at all authentic, they are authentic in exactly the same as Modernica’s Bubble Lamps were: they closely resemble the 1952 production and have been similarly manufactured.