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INNOVATIVE DESIGN PROTECTION AND PIRACY PREVENTION ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON
INTELLECTUAL PROPERTY,
COMPETITION, AND THE INTERNET

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

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INNOVATIVE DESIGN PROTECTION AND PIRACY PREVENTION ACT

FRIDAY, JULY 15, 2011

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON INTELLECTUAL PROPERTY,
COMPETITION, AND THE INTERNET,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to call, at 10:08 a.m., in room 2141, Rayburn House Office Building, the Honorable Bob Goodlatte (Chairman of the Subcommittee) presiding.

Present: Representatives Goodlatte, Quayle, Coble, Chabot, Marino, Watt, Conyers, Chu, Lofgren, and Jackson Lee.

Staff Present: (Majority) Blaine Merritt, Subcommittee Chief Counsel; Olivia Lee, Clerk; and Stephanie Moore, Minority Subcommittee Chief Counsel.

Mr. GOODLATTE. Good morning.

The Subcommittee on Intellectual Property, Competition, and the Internet will come to order. I want to welcome our witnesses for this hearing on the "Innovative Design Protection and Piracy Prevention Act."

I am going to submit my opening statement for the record and I believe that the Ranking Member, Mr. Watt, who I believe will be here shortly, and the Ranking Member of the full Committee, Mr. Conyers, have indicated an interest in doing the same in order to get to our witnesses as quickly as possible.

Our reason for doing that is because we are expecting votes around 11. Once they come, they are going to be very lengthy, and we may have to conclude before then. We will gauge that at 11.

[The prepared statement of Mr. Goodlatte follows:]

Prepared Statement of the Honorable Bob Goodlatte, a Representative in Congress from the State of Virginia, and Chairman, Subcommittee on Intellectual Property, Competition, and the Internet

Article I, section 8, of the Constitution lays the framework for our nation's copyright laws. It grants Congress the power to award inventors and creators for limited amounts of time exclusive rights to their inventions and works. The Founding Fathers realized that such an incentive was crucial to ensure that America would become the world's leader in innovation and creativity. This incentive is still necessary to maintain America's position as the world leader in innovation.

Most industrialized nations provide legal protection for fashion designs. However, in the United States, the world's leader in innovation and creativity, fashion designs are not protected by traditional intellectual property regimes. Copyrights are not granted to apparel because articles of clothing, which are both creative and functional, are considered useful articles, as opposed to works of art. Design patents are

intended to protect ornamental designs, but clothing rarely meets the criteria of patentability. Trademarks only protect brand names and logos, not the clothing itself. And the Supreme Court has refused to extend trade dress protection to apparel designs. Thus, a thief violates Federal law when he steals a creator's design, reproduces and sells that article of clothing, and attaches a fake label to the garment for marketing purposes.

But it is perfectly legal for that same thief to steal the design, reproduce the article of clothing, and sell it, provided he does not attach a fake label to the finished product. This loophole allows pirates to cash in on the sweat equity of others and prevents designers in our country from reaping a fair return on their creative investments.

The production lifecycle for fashion designs is very short. Once a design achieves popularity through a fashion show or other event, a designer usually has a limited number of months to produce and market that original design. Further complicating this short-term cycle is the reality that once a design is made public, pirates can immediately offer identical knockoffs on the Internet for distribution.

Again, under current law, this theft is legal unless the thief reproduces a label or trademark. And because these knockoffs are usually of such poor quality, they damage the designer's reputation as well. Common sense dictates that we should inhibit this activity by protecting original fashion works.

Our undertaking is similar to action taken by Congress in 1998 when we wrote Chapter 13 of the Copyright Act, which offers protection for vessel hull designs. The "Innovative Design Protection and Piracy Prevention Act" amends this statutory template to include protections for fashion designs. Because the production lifecycle for fashion designs is very short, this legislation similarly provides a shorter period of protection of three years that suits the industry.

The bill enjoys support among those in the fashion and apparel industries. While concerns have been expressed about the scope of previous versions of this legislation, my office has engaged in discussions through the years with interested parties to ensure that the bill does not prohibit designs that are simply inspired by other designs; rather, the legislation only targets those designs that are "substantially identical" to a protected design. Other provisions, including a "home-sewing" exception and a requirement that a designer alleging infringement plead with particularity, ensure that the bill does not encourage harassing or litigious behavior.

H.R. 2511 is identical to legislation reported by the Senate Judiciary Committee last December. Between this event and the growing coalition of stakeholders coalescing around our bill, I am optimistic that we can enact fashion piracy reform in the 112th Congress.

I look forward to hearing from our witnesses, and I now recognize the Ranking Member from North Carolina for his opening statement.

Mr. GOODLATTE. In the meantime, let me go ahead and welcome our witnesses and introduce them. We have a very distinguished panel of witnesses today.

Each of the witnesses' written statements will be entered into the record in its entirety. I ask that each witness summarize his or her testimony in 5 minutes or less.

To help you stay within that time, there is a timing light on your table. When the light switches from green to yellow, you will have 1 minute to conclude your testimony. When the light turns red, it signals that your 5 minutes have expired.

And it is the custom of this Committee to swear in our witnesses.

So I would ask that the witnesses rise.

[Witnesses sworn.]

Mr. GOODLATTE. Thank you very much. Please be seated.

Our first witness is Lazaro Hernandez, who co-founded Proenza Schouler, a New York-based modern luxury women's wear and accessory label, in 2002. The company has won a number of industry honors from the Council of Fashion Designers of America, including the 2003 Perry Ellis Award for New Talent, the 2004 Vogue Fash-

ion Fund Award, and the 2007 and 2011 Women's Wear Designer of the Year Award.

Proenza Schouler is sold in more than 100 outlets worldwide and has collaborated with Target and J Brand Jeans, among other retailers. The company has also developed working relationships with a number of celebrities such as Kristen Stewart, Sarah Jessica Parker, Gwyneth Paltrow, Kirsten Dunst, and Julianne Moore.

Originally a pre-med student from South Florida, Mr. Hernandez dropped out of the University of Miami and enrolled in the Parsons School of Design, from which he graduated 9 years ago.

Our next witness is Jeannie Suk, professor of law at Harvard Law School. Professor Suk specializes in criminal law and family law, while also teaching art and entertainment law. Prior to her current duties, Professor Suk served as a law clerk for Judge Harry Edwards of the U.S. Court of Appeals for the D.C. Circuit and for Justice David Souter on the United States Supreme Court. She also worked as an Assistant District Attorney in Manhattan and was a fellow at the New York University School of Law.

Professor Suk studied ballet at the School of American Ballet and piano at the Juilliard School before earning her B.A. From Yale, a Doctor of Philosophy from Oxford as a Marshall Scholar, and her law degree from Harvard.

Our next witness is Christopher Sprigman, professor of law at the University of Virginia School of Law. He teaches intellectual property, antitrust, competition policy, and comparative constitutional law. Prior to joining the Virginia faculty in 2005, Professor Sprigman clerked for Judge Steven Reinhardt of the Ninth Circuit Court of Appeals and for Justice Lawrence Ackerman of the Constitutional Court of South Africa. He also taught law in Johannesburg, worked in the Antitrust Division of the U.S. Department of Justice, practiced law in Washington, and served as a residential fellow at the Center for Internet and Society at Stanford Law School. Professor Sprigman earned his B.A. From the University of Pennsylvania and his law degree from Chicago.

Our final witness is Kurt Courtney, manager of government relations at the American Apparel & Footwear Association since 2007. In that capacity, he handles a wide variety of issues affecting the industry. That includes intellectual property, health care, taxes, ports, and government contracts.

Before joining AAFA, Mr. Courtney spent 5 years on Capitol Hill working for Representatives Zack Wamp, Buck McKeon, and Ileana Ros-Lehtinen. A native of Los Angeles, Mr. Courtney graduated from the George Washington University in 2000 with a Bachelor of Arts Degree in International Affairs.

I want to welcome all of you.

Mr. Hernandez, we will begin with you.

TESTIMONY OF LAZARO HERNANDEZ, DESIGNER AND COFOUNDER, PROENZA SCHOULER

Mr. HERNANDEZ. Hello. Good morning, Chairman Goodlatte, Members of the Subcommittee.

I am pleased to be here today to testify in support of H.R. 2511, or the ID3PA, on behalf of the Council of Fashion Designers of America. The CFDA is the leading trade organization representing

the American fashion industry. Over 85 percent of its members are small businesses that are creating jobs across the country, as fashion has grown to a $340 billion industry in the United States.

My design firm, Proenza Schouler, began as a senior project simply at Parsons School of Design. In 1998, I met my design partner, Jack McCollough, who is here today. In our senior year at Parsons, we designed our first collection. And the entire collection was, remarkably, bought by Barney's New York. As a result, at the age of 23, we launched our independent label, Proenza Schouler, which is named after our mother's maiden names.

I would like to thank the Committee for taking up the important issue of fashion piracy in this legislation. The fashion business is already a tough business, and it is getting tougher because of piracy. It takes tens of thousands of dollars to start a business and even more to sustain it. Just one of our collections—and we produce four collections a year—cost about $3.8 million. The cost of a typical show is approximately $320,000. So you can see a significant amount of money has been spent before a designer has received their first order.

As designers, we expect many challenges. And we can handle most of them. However, we are helpless against copyists who prey on our ideas. Established or undiscovered, all designers have been touched by fashion design piracy. Fashion design is intellectual property that deserves protection.

Fashion is different from basic apparel. Our designs are born in our imaginations. We create something from nothing at all. But by far, the majority of apparel is based on garments already in the public domain. Nothing about this proposed legislation will change that. Nobody will ever be able to claim ownership of a T-shirt or something as simple as a pencil skirt.

When designers produce basic garments that complement their original designs in their collection, we know the difference between that and what is new. And so do the design pirates. This bill is intended to protect only those designs that are truly original.

Our PS 1 satchel has been knocked off repeatedly. We have attempted to assure our rights and fight this piracy, but without success, because, unfortunately, it is currently legal under U.S. law to pirate a design that happens to be the key to our business. Every other developed country other than China has a law on the books to protect fashion, except the U.S. As a result, the U.S. has become a haven for copyists who steal designers' ideas and sell them as their own with no fear of consequences. It has also become the weak link of international IP protection and the first if not only market for Chinese exporters of pirated designs. This is completely unacceptable.

The problem is worsening with new technologies. Today, digital images from runway shows in New York or red carpet in Hollywood can be uploaded to the Internet within minutes, viewed at a factory in China, and be copied and offered for sale online within days, which is months before the designer is able to deliver the original garments to stores.

Piracy can wipe out young careers in a single season. The most severe damage from lack of protection falls upon emerging designers, such as ourselves, who everyday lose orders and potentially

our entire businesses. While salvage designers and large corporations with wide recognized trademarks can better afford to absorb these losses caused by copying, very few small businesses can compete with those who steal their intellectual capital. It makes it harder for young designers to start up their own companies. And isn't that the American Dream?

Ever designer must develop their own DNA in order to make a lasting and recognizable impact on consumers. It is like developing their hit song. Imagine if a starting songwriter's first song was stolen and recorded by someone else, with no credit to the songwriter. And worse, it becomes a hit. They hear it on the radio every day, and they are never credited. That is what happens to many young designers whose ideas are stolen and rendered by others. It is very hard to survive when you become the victim of this type of theft.

I thought it would be helpful to talk a little bit about the economics of the industry. Designers don't make a profit selling a small number of high-priced designs, but only after they offer their own more affordable ready-to-wear lines based on their high-end collections. Just like other businesses, they can lower their prices based on volume. Design piracy makes it difficult for a designer to move from higher-priced fashion to developing affordable renditions for a wider audience. It also makes it impossible to sell collections to stores when the clothes have already been knocked off for less. And licensing deals are then no longer an option. In other words, fashion designers should have the chance to knock off their own designs before others do it for them.

Proenza Schouler is an example of successful licensing deals. Several years ago, we designed a collection for Target. There are many more examples of successful partnerships between American designers and large American retailers, including discount retailers. There is no reason that real innovation, rather than knockoffs, shouldn't be available for everyone. The average consumer can wear affordable new designs created by true designers rather than poor copies of the real thing made by pirates in China.

In order for this bright future to happen, we desperately need the ID3PA passed into law. The ID3PA has been narrowed significantly from previous Congresses. Apparel manufacturers had legitimate concerns, so designers began negotiations with the association representing U.S. apparel and footwear manufacturers, the AAFA. We are pleased that the results of those negotiations is the legislation recently introduced.

We will need this bill to be enacted. Our industry is growing opportunities all across the country and many in your districts. We can't compete against the pirates. And piracy is worsening. Without this legislation, this creativity and innovation that has put American fashion in the position of leadership will dry up. We ask you to please pass this legislation quickly. Thank you for your time.

[The prepared statement of Mr. Hernandez follows:]

Prepared Statement of Lazaro Hernandez,
Fashion Designer & Co-Founder, Proenza Shouler

INTRODUCTION

Good morning Chairman Goodlatte, Ranking Member Watt and other Members of the Subcommittee. I am pleased to be here today to testify in support of the Inno-

vative Design Protection and Piracy Prohibition Act, or ID3PA, on behalf of the Council of Fashion Designers of America (CFDA). CFDA is a leading trade organization representing the American fashion industry. Our members are prominent household names and primarily up and coming talent. The vast majority—over 85%—are small businesses. These small businesses are creating jobs across the country as fashion has grown to a $340 billion industry in the U.S. The CFDA also counts among its fashion constituents publishing, communications, retail, manufacturers and production whose success is contingent on the success of designers.

My design firm, Proenza Schouler, began simply as a senior project at Parsons School of Design. It was there that, in 1998, I met my design partner Jack McCollough. For three years we each designed independently. During those years we were fortunate to have our talent cultivated by some of the great names in the fashion industry; Jack was mentored by Marc Jacobs, I by Michael Kors. In our senior year at Parsons, we designed our first collection. It received the Golden Thimble award for best student collection and remarkably, the entire collection was bought by Barneys New York. As a result, at the age of 23, we launched our own independent label, Proenza Schouler, named after our mothers' maiden names.

In just five years, we grew from a company of three people to fifty with total annual operating costs of $15.2 million. Ours is not a typical story and it may sound like success came easily for us. It didn't. Proenza Schouler is the result of tens of thousands of hours of very hard work, a lot of determination, talent and a little luck.

COSTS OF THE FASHION BUSINESS

The fashion business is a tough business. With each new season, designers put their imagination to work, and their resources at risk. It takes tens of thousands of dollars to start a business and even more to grow and create new collections and shows to showcase them. Just one of our collections—and we produce 4 collections a year—costs $3.8 million. The cost of a typical show is approximately $320,000. So, before a designer has even received that first order, they've spent a significant sum of money.

As designers we expected many of the challenges we face; the challenges of securing funding, convincing retailers to carry our collections, meeting deadlines, delivering our clothes in time to stores, finding studio space, attracting talented employees. We can handle all of those. However, we are helpless against copyists who prey on our ideas. Our story of long hours and sacrifice, pinching pennies to grow a business, is the same story told by countless small designers who are working as entrepreneurs to build businesses based on their own intellectual capital. We were fortunate to win awards and gain notoriety early but there are countless, undiscovered small designers across America working in their studios waiting to have someone buy their clothes or accessories. Established or undiscovered—we all have been touched by fashion design piracy. We luckily survived despite its disastrous effects, but many colleagues whose names you will never hear, had to close down.

FASHION, INSPIRATION AND INTELLECTUAL PROPERTY

I thought it might be helpful to describe the fashion design process and how it is so much like other creative pursuits that today enjoy copyright protection. Fashion is not protected under current law because of the general rule exclusion of useful articles from the scope of copyright protection. In other words, we all must wear clothes. While there are other means of protecting various components of intellectual property relative to fashion, the protection of fashion design falls between the cracks: neither trademark (protecting the brand) or trade dress (requiring such recognition as constituting secondary meaning), or design patent (which involves such a lengthy process that it offers no protection against the fast creative fashion cycle) provide adequate protection.

But designing a fashion collection is no different from the intellectual process involved in creating a painting or a song except perhaps its lengthy process. The development of a collection usually begins 10 months before it is launched. We draw inspiration from the world around us. Personally, we do research and development, not in a lab, but through the cultures we observe through travel, the books we read or the music we listen to. For example, work on our fall collection took place in the American West. We spent time in Wyoming, Colorado and New Mexico exploring Native American history and their crafts and were inspired by Navajo textiles. When you look at our designs you won't see knockoffs of Navajo crafts. Instead you will see that we incorporated their feel and some of their elements to create our own originals.

Our designs are born in our imaginations, unlike the production of most basic apparel. While we create something from nothing, by far, the majority of apparel is based on garments already in the public domain. Nothing about the proposed legislation will change that. Nobody will ever be able to claim ownership of the t-shirt or the pencil skirt. When designers produce basic garments to complement the original designs in our collections and create complete outfits, we know the difference between what is new and what is based on a common template—and so do design pirates. The bill is intended to protect only those designs that are truly original.

NEW TECHNOLOGIES & LACK OF A U.S. LAW FUELS PIRACY

In recent years America's fashion designers have become some of the most sought after throughout the world. The level of originality seen on runways each season continues to surpass and surprise. However, with the accolades American designers are receiving comes the devastating blow of fashion piracy.

One of our most popular designs has unfortunately become a typical example of the problem we highlight. Our PS1 satchel is one of the most knocked off designs on the market today. We have attempted to assert our rights and fight this piracy—but without success—because unfortunately it is currently legal under U.S. law.

Current U.S. intellectual property law supports copyists at the expense of original designers, a choice inconsistent with America's position in fields of industry like software, publishing, music, and film. Internationally, design protection is the norm. Every other developed country, other than China, has a law on the books to protect fashion except the U.S. As a result the U.S. has become a haven for copyists who steal designers' ideas and sell them as their own with no fear of consequences. It also has become the weak link of international IP protection and the first, if not only, market for Chinese exporters of pirated designs.

With every passing year, the problem of copying worsens. It is growing with new technologies. Just as the Internet has transformed industries like music, books and motion pictures, and created new opportunities for piracy, it has done the same for fashion. Today, global changes in both the speed with which that information is transferred and the location where the majority of clothing and textiles are produced have resulted in increased pressure on creative designers. Digital photographs from a runway show in New York or a red carpet in Hollywood can be uploaded to the Internet within minutes, the 360 degrees images viewed at a factory in China, and copies offered for sale online within days—months before the designer is able to deliver the original garments to stores.

PIRACY HARMS DESIGNERS

I have heard the argument that somehow fashion piracy doesn't harm the industry, but rather helps it. This is akin to the concept that stealing from legitimate owners encourages them to replace their property and thus boosts the Gross National Product. Those suggesting that it helps designers to have their works knocked off have certainly never stood in my shoes. Far from helping the designer, design piracy can wipe out young careers in a single season. The most severe damage from lack of protection falls upon emerging designers, who every day lose orders, and potentially their businesses, because copyists exploit the loophole in American law. While established designers and large corporations with widely recognized trademarks can better afford to absorb the losses caused by copying, very few small businesses can compete with those who steal their intellectual capital.

Every designer must develop their own DNA in order to make a lasting and recognizable impact on consumers. It's like developing their "hit song" or anthem. Imagine if a starting songwriter's first song was stolen and recorded by someone else with no credit to the songwriter and worse, it becomes a hit. They hear it on the radio every day and they are never credited. That's what happens to many young designers whose ideas are stolen and rendered by others. It's very hard to survive when you become a victim of this type of theft.

THE ECONOMICS OF FASHION—
LICENSING DEALS MAKE FASHION ACCESSIBLE

Some designers make their names in high end collections, where they sell a very small number of rather expensive designs. While the designs can be high priced, the designer never recoups development costs for the designs because he or she sells so few garments. Designers are only able to recoup their investments when they later offer their own affordable ready-to-wear lines based on those high end collections. They then can lower the prices at which their designs are sold because they sell more of them. Just like other businesses—it's dependent on volume. Design piracy makes it difficult for a designer to move from higher priced fashion to developing

affordable renditions for a wider audience. It also makes it impossible to sell collections to stores when the clothes have already been knocked off. Licensing deals are then no longer an option. In other words, fashion designers want the chance to knock off their own designs before others do it for them.

Proenza Schouler is an example of successful licensing deals. Several years ago we designed a capsule collection of clothing and accessories for the Target GO International campaign. To those who argue that protecting fashion will drive up costs, accessibility and ultimately harm consumers, our experience disproves this myth. In the past few years we have seen a proliferation of partnerships between American designers and large American retailers including discount retailers. In addition to us, some other American designers who have collaborated with such retailers are Isaac Mizrahi at Target, Isabel Toledo at Payless, Norma Kamali at Wal-Mart, Mary Kate and Ashley Olsen at JC Penney, Billy Reid at J.Crew, Diane von Furstenberg at Gap and Vera Wang at Kohl's. These stores have all seen the value of making the works of American designers available in their stores through licensing deals so that designers get paid for their innovation and creativity. This proves that the real growth of American fashion is in the lower to mid price range.

This bill will make it easier for all designers, not just the big names, to make their designs available at a variety of prices in a variety of stores. There are some in the industry who have become comfortable with the status quo. They see no need for a new law and fear that they might have to change the way they do business. To those companies I say, talk to all of the small designers put out of business by your current practices and business models.

There is no reason that real innovation, rather than knockoffs, shouldn't be available for everybody. Consumers can have more choices precisely because of innovation. The average consumer can wear new designs, created by true designers rather than poor copies of the real thing made by pirates in China. As I stated before, fashion in America is a $340 billion industry, in n this economic downturn we should encourage growth in this sector. More competition and growth won't occur simply by everybody distributing the identical product around the world because copying isn't illegal. Growth won't occur because somebody can steal a designer's creation and then go sell it for a third of the price. Because innovation is the fuel of the U.S. economy, in the long term, lack of protection will shrink American businesses and provoke the loss of American jobs.

THE ID3PA IS DESPERATELY NEEDED

Congress has passed laws to protect against counterfeits. One in three items seized by U.S. Customs is a fashion counterfeit. Congress has made it illegal to traffic in the labels that are used in counterfeit goods. But a copy of a design is really a counterfeit without the label. If no design piracy existed, there could not be counterfeiting. Both must be addressed or else the small designer with no brand recognition is left defenseless to the devastating problem of piracy, leaving only famous brands and big companies protected.

It is for all these reasons that we are here today to strongly support your efforts to pass the Innovative Design Protection and Piracy Prevention Act.

The legislation will provide three years of protection to designers for original designs. That is far less than the life of the author plus 70 years granted to other copyrighted works. However, because of the unique seasonality of the fashion industry, a shorter term of protection is reasonable. In three years a designer will have time to recoup the work that went into designing the article, develop additional lines, or license lines to retailers.

The CFDA first came to Congress five years ago to ask for a new law. At the time we heard legitimate criticisms from apparel manufacturers who were fearful of the impact of new legislation. Designers began negotiations with the association representing U.S. apparel and footwear manufacturers—the AAFA. We are pleased that the result of those negotiations is the legislation recently introduced by Chairman Goodlatte, and Representatives Nadler, Sensenbrenner, Coble, Sanchez, Issa, Jackson Lee, Waters and others. In short, we:

- Addressed concerns that a new law could encourage needless and expensive litigation by crafting a special pre-trial proceeding—pleading with particularity—during which a plaintiff would have to prove the copied design is protected and that the alleged copyist had the opportunity to have seen the design or an image of it. Designers as well as manufacturers had concerns that they could be on the receiving end of lawsuits and this new procedure provides important protection.
- Included penalties for false representations to deter frivolous lawsuits.

- Protected only unique and original designs. Anything already created by the time of its enactment would be in the public domain and available to copy. It is a high standard to qualify for protection, amounting to originality plus novelty. New and unique designs will qualify for protection, while everything else remains in the public domain.
- Addressed concerns that it is too difficult to tell if something is infringing by limiting the scope to copies that are "substantially identical."
- Included the doctrine of independent creation as a defense to infringement. This makes clear that if someone independently designs an article of apparel that meets the standard for infringement, (without any knowledge of the protected design) no infringement occurs.

I am not a lawyer but we have relied on one who is an expert in fashion law heavily during this process, Professor Susan Scafidi of Fordham, the academic director of the Fashion Law Institute. As she told this subcommittee in 2006, the first version of this bill was "a measured response to the modern problem of fashion design piracy, narrowly tailored to address the industry's need for short-term protection of unique designs while preserving the development of seasonal trends and styles." The lengthy negotiations between the CFDA and the AAFA have resulted in an even more narrowly and precisely tailored way to support the entire American fashion industry.

We need your help to get back to the business of designing. We're all entrepreneurs who create our fashion with the hope of designing something that will catch on and capture the imagination of U.S. consumers. Success that starts in our individual design studios grows opportunities all across the country for fabric manufacturers, printers, pattern makers, the shippers and truckers who transport the merchandise, design teams, fabric cutters, tailors, models, seamstresses, sales people, merchandising people, advertising people, publicists, and those who work for retailers. This is a big employment business today. We are creating jobs across this country.

However, we can't compete against piracy. Without this legislation, the creativity and innovation that has put American fashion in a leadership position will dry up. Innovation is an investment but we can't innovate without protection and urge you to quickly pass this legislation. Thank you for your time.

Mr. GOODLATTE. Thank you, Mr. Hernandez.

Before we go on to Professor Suk, I want to acknowledge the presence of the Ranking Member. The gentleman from North Carolina, Mr. Watt—the Ranking Member of the full Committee and I have submitted our testimony for the record.

If you are satisfied with that, we will proceed to the next witness.

[The prepared statement of Mr. Watt follows:]

Statement of Rep. Melvin L. Watt
Ranking Member
Committee on the Judiciary
Subcommittee on Intellectual Property, Competition and the Internet
Hearing on
H.R. 2511, the "Innovative Design Protection and Piracy Prevention Act"
Friday, July 15, 2011

Thank you, Mr. Chairman.

Let me say at the outset, that at present I have no position on H.R. 2511. It is my hope that this hearing can shed light on an industry with which I confess to have more unfamiliarity than familiarity, and that the testimony will also identify the scope of the problem as well as the nexus between the problem and the legislative solution proposed by this bill.

It is clear that under current law, there exists a gap in the law that results in a lack of protection for "knock-offs". The question is whether this gap is detrimental to intellectual property rights or whether the existing framework provides all of the protection that is necessary to meet the Constitutional goal to stimulate and promote innovation within the fashion industry.

There are those who argue that the fashion industry is flourishing and has operated for decades without the need for legislative intervention to

prevent duplication of one's work. For those, not only is "imitation the highest form of flattery," it is the driving force behind the success and vibrancy of the fashion industry. On the other end are those who recognize that apparel inspired by an original is one thing, but flat out copying is another---it is theft-- theft that undercuts the small, independent or emerging designer and stifles innovation. They emphasize that modern technology has exacerbated the impact of design theft by making it increasingly easy to steal, copy and mass produce replicas of a designers work with amazing speed.

Within our intellectual property framework, a fashion designer's most useful tool for combating unauthorized copies of his design is trademark law. But trademark law does not provide legal protection against "knock-offs"; trademarks only protect brand names and logos, not the clothing itself.

In general, I believe theft of intellectual property produces a drain on our economy and an injustice to American innovators. The implications of that in the fashion industry and for this proposed legislation are a lot less clear, however.

I am hopeful that this hearing will shed some light on the following:

- How widespread is the problem?
- Does the threat come more internationally?

- What is the projected immediate impact of this legislation on jobs in this country?
- Are there industry standards in place that would govern licensing negotiations between newly empowered upstart designers and the manufacturers and retailers such that the consumer will continue to have affordable options?
- How will young designers who are ill-equipped and financed to compete with the knockoff artists afford the resources necessary to enforce their rights under this bill?

I hope that the witnesses will address, either in their testimony or during questions and answers (Q&A), some of the questions I have raised and supply any available data. This will enable us to be confident that H.R. 2511 is targeted to the precise harm that afflicts the industry and that its provisions do not do more harm than good to the intended beneficiaries.

I thank the witnesses in advance and yield back the balance of my time.

Mr. CONYERS. Mr. Chairman, can we recognize the presence of Judy Chu as well?

Mr. GOODLATTE. We absolutely welcome her and the other gentlewoman from California, Ms. Lofgren.

And the gentleman from Ohio, Mr. Chabot.

We will now turn to Professor Suk.

Welcome.

TESTIMONY OF JEANNIE SUK, PROFESSOR OF LAW, HARVARD LAW SCHOOL

Ms. SUK. Chairman Goodlatte, Ranking Member Watt, and Members of the Subcommittee, thank you for holding this hearing and for inviting me to speak to you today.

I am Jeannie Suk, professor at Harvard Law School, where I conduct research on law and innovation in the fashion industry. My testimony today is based on my scholarly work with Professor Scott Hemphill of Columbia Law School, and I have submitted our article, "The Law, Culture, and Economics of Fashion," which was published in the Stanford Law Review. I have submitted that along with my written testimony.

Like all of the arts, fashion design involves borrowing and influence from existing works and themes in our culture. Even the most original creation in the arts is indebted to prior work. And so, appropriately, Federal copyright law does not consider most of the similarity or even copying in the arts to be copyright infringement.

When there is a trend in fashion, just as in movies, books, music, and culture, many people are converging on similar ideas through conscious and unconscious influence by work from the past and the present.

But these common forms of borrowing do not require blatant replication of another's work product, a practice that takes profits from the original producer and thus undermines the incentive to create that Federal copyright law aims to foster.

The ID3PA protects the incentive to create but also safeguards designers' ability to use a large domain of creative influences and to participate in fashion trends. Deviating from the ordinary copyright infringement standard with a much narrower substantially identical standard for infringement, the Act allows plenty of room for designers to draw inspiration from others, much more room than producers of books, movies, and music currently have. At the same time, it prohibits copyists from selling near exact copies of original designs. In short, the ID3PA strikes an effective balance between the significant public interest in incentivizing the creation of original design and the equally important public interest in leaving designs largely available for free use.

A key distinction to recognize is the distinction between products that are inspired by a designer's work and products that replicate or knock off a designer's work without any effort at modification. For simplicity, I am going to call these "inspired-bys" and "knockoffs."

If you have difficulty telling the difference between two designs, you are looking at a copyist's

Knockoff, not an inspired-by. This is a crucial difference as a matter of innovation policy because knockoffs cannot plausibly claim to be forms of innovation, whereas inspired-bys can. Knockoffs directly undermine the market for the original designs and reduce the designer's incentive to innovate in ways that inspired-bys do not.

The ID3PA is therefore a highly moderate bill that only targets businesses that produce and sell knockoffs of original designs. The

vast majority of the apparel industry will not be affected. If retailers are not selling knockoffs, they have nothing to fear from this bill. And even if they are, they are still safe if the design that they knock off is in the public domain or is not itself original, or if they are unaware that the items that they sell are knockoffs. And even if the copied design is original, knockoff sellers can simply wait 3 years for the copyright term on a particular original design to end.

The ID3PA reflects a judgment that knockoffs are not necessary to the business model of high-volume sellers of

on-trend clothing at a low price point. This judgment is correct. Current knockoff sellers would need to adapt their businesses to focus on selling inspired-bys instead. They would have to innovate and invest somewhat in design rather than only replicate others' work in full.

Does this mean consumers would no longer have low-price access to designs by great designers? No. Many extremely talented designers, such as Mr. Hernandez and his colleagues, have partnered with high-volume retailers, such as Target and H&M, to offer their designs in large numbers at a low price. The ID3PA encourages this kind of partnership because this allows designers to profit from the creative labor they invest in their original designs. If retailers wish to sell these designs with minimal or no modification, under the Act, they would have to reach an arrangement with the designer to do so, or face liability.

Our current intellectual property system unintentionally creates an unfortunate bias in favor of the most established famous fashion firms and against smaller emerging designers who have the most potential for innovation in design. Established firms like Louis Vuitton have the benefit of trademark and trade dress protection. Their advertising promotes and protects their brand image, as does the use of high-end materials and workmanship that are very difficult to copy at a low cost. They have a clientele that does not often overlap with the discount shoppers. And all of this means that the established luxury firms suffer comparatively less from the design knockoffs than their smaller, not as established counterparts.

Emerging designers do not have the advantages just described. Their products are not well enough recognized to qualify for trademark or trade dress protection, nor do they have the money to advertise and reinforce their brand image. But what these designers do have to offer consumers is their innovative designs. They cannot command the same prices as the famous luxury firms. Thus, emerging designers are more likely to be in competition with their copyists as their consumer bases are more likely to overlap. A design that retails for hundreds instead of thousands is within the reach of many consumers who might well opt for the still less expensive knockoff. Thus, knockoffs are particularly devastating for emerging and mid-range designers who face significant entry barriers and struggle to stay in business.

This act helps level the playing field, which is currently skewed to the protection of luxury and brands rather than innovation in design. The ID3PA strikes an appropriate balance between giving incentives to create and leaving designers free to draw upon influences. If enacted, it would serve its purpose to push the fashion in-

dustry toward innovation rather than substantially identical copying. It represents a wisely balanced and a carefully tailored response to the problems of this industry.

Thank you, and I look forward to your questions.

[The prepared statement of Ms. Suk follows:]

Prepared Statement of Jeannie Suk, Professor of Law, Harvard Law School

Chairman Goodlatte, Ranking Member Watt, and Members of the Subcommittee, I am Jeannie Suk, Professor of Law at Harvard Law School. Thank you for this opportunity to testify about the Innovative Design Protection and Piracy Prevention Act ("IDPPPA"). My remarks draw on my ongoing research with Professor Scott Hemphill of Columbia Law School on law and innovation in the fashion industry.[1] Along with my testimony, I submit our Stanford Law Review article, *The Law, Culture and Economics of Fashion.* We have also written on the Act's predecessors: two iterations of the Design Piracy Prohibition Act,[2] and the Innovative Design Protection and Piracy Prevention Act introduced in the Senate last Term.[3] I submit one of these articles, published in the *Wall Street Journal.*

Like all of the arts, fashion design inevitably involves degrees of borrowing and influence from both specific existing works and general themes in our culture. Even the most original creative work in the arts has important debts to prior work. Appropriately, federal copyright law does not consider most of the borrowing and similarity that occurs in the course of creative production to be copyright infringement. A trend in fashion—just as in movies, books, music, and culture—is the convergence on similar themes by many different producers who are consciously and unconsciously influenced and inspired by other work from the past and the present. But these common forms of borrowing in the arts do not require blatant replication of another's work, a practice that most directly takes profits from the original producer and thus most undermines the incentive to create that federal copyright law aims to foster.

The goal of a law addressing copying in fashion design should indeed be to give an incentive to create, but also to safeguard designers' ability to draw upon a large domain of creative design influences and to participate in fashion trends. The IDPPPA, in its current form, achieves this goal. By deviating from the ordinary copyright infringement standard with the much narrower "substantially identical" standard for infringement, it allows plenty of room for designers to innovate by drawing inspiration from others—much more room than producers of books, music, and film currently have. At the same time, it prohibits copyists from making exact or near-exact copies of original designs. It rewards designers who produce original work with legal protection against copyists, but limits frivolous litigation through heightened pleading requirements. It protects creative designers' ability to profit from their original work, but maintains, or even expands, consumer choice. In short, the IDPPPA strikes an effective balance between the significant public interest in incentivizing the creation of original design and the significant public interest in making existing design vocabularies largely available for free use.

EFFECTS ON RETAILERS

A key distinction that must frame an analysis of the IDPPPA is the difference between products that are inspired by a designer's work and products that replicate a designer's work without effort at modification. The IDPPPA most squarely affects clothing producers and sellers known as "fast fashion" firms. Many simply think of these firms as blind copiers of the latest trendy designs, but fast fashion firms actually fall into two distinct categories: designers and copyists. Fast fashion designers, like H&M and Zara, usually take the latest trends and adapt or interpret them. The result is a relatively inexpensive product that is clearly inspired by, but not iden-

[1] C. Scott Hemphill & Jeannie Suk, *The Law, Culture, and Economics of Fashion,* 61 STAN. L. REV. 1147 (2009); C. Scott Hemphill & Jeannie Suk, *Reply: Remix and Cultural Production,* 61 STAN. L. REV. 1227 (2009); C. Scott Hemphill & Jeannie Suk, *The Squint Test, How to Protect Designers like Jason Wu from Forever 21 Knockoffs,* SLATE, May 13, 2009, http://www.slate.com/id/2218281/(last visited Jul. 10, 2011); C. Scott Hemphill & Jeannie Suk, *Schumer's Project Runway,* WALL STREET JOURNAL, Aug. 24, 2010, *available at* http://online.wsj.com/article/SB10001424052748704504204575445651720989576.html (last visited Jul 10, 2011).

[2] Design Piracy Prohibition Act, S. 1957, 110th Cong. (2007); Design Piracy Prohibition Act, H.R. 2033, 110th Cong. (2007)

[3] Innovative Design Protection and Piracy Prevention Act, S. 3728, 111th Cong. (2010).

tical to, other designers' products. By contrast, fast fashion copyists, like Forever 21, choose particular designs to copy, and replicate those specific designs as best they can. These firms make no effort to modify the original design.

I am going to call fast fashion designers' products "inspired-bys," and fast fashion copyists' products "knockoffs." Put simply, if you have difficulty telling the difference between two designs, you are looking at a copyist's knockoff, not a designer's inspired-by. The difference between inspired-bys and knockoffs is crucial. It is a distinction that can be easily grasped by designers, retailers, and consumers. We need to allow the inspired-bys while stopping the knockoffs, which directly undermine the market for the original designs that copyists target and which reduce the incentive to innovate. The IDPPPA's narrow infringement standard is designed to do just that—to distinguish between those who engage in interpretation of others' work and participate in a fashion trend, and those who slavishly copy a particular original design.

Retailers who sell clothing that is on trend but not an exact copy need not fear this Act. But the IDPPPA would undoubtedly harm those retailers whose businesses rely upon selling exact knockoffs of particular designs. This is what the Act is intended to do. Those retailers would no longer be able to avoid design costs by freely taking another's design in its entirety. Current retailers of copyists would have to adapt to the IDPPPA's requirements. They could do so in several ways. First, knocking off is not necessary to the business model of high-volume sellers of on-trend clothing at a lower price point. Sellers of knockoffs could become sellers of inspired-bys. They could employ designers—or direct the designers they currently employ—to engage and modify other designers' original designs. Such work would not be infringing, as it would not be "substantially identical" to a protected original design. And even where the copies are substantially identical, the copied design may not meet the high standard for originality that is needed for protection under the IDPPPA. Second, fast fashion firms could partner with designers, and sell the resulting products inexpensively. Fast fashion firms do engage in many such partnerships already. The IDPPPA would bring the sellers of knockoffs into the fold such that they would need the designers' authorization to make knockoffs of original designs.

While our current intellectual property regime does not provide protection for fashion design, it does provide protection for fashion firms' trademark and trade dress. Large, well-known firms like Louis Vuitton and Chanel have the benefit of trademark and trade dress protection. Their advertising promotes and protects their brand-image, as does the use of high-end materials and workmanship that are difficult to copy at low cost. They also have a wealthy clientele that does not often overlap with the shoppers at Forever 21. All this means that established luxury firms suffer comparatively less from the practice of knocking off than their smaller, not as famous counterparts. Young and emerging designers do not have all the advantages just described. Young designers' products are generally not well enough recognized to qualify for trademark or trade dress protection. Nor do they have the money to advertise and reinforce their brand image. They cannot command the same premium for their products as the famous high-end luxury firms. Thus emerging designers are more likely to be in direct competition with their copyists, as their customer bases overlap. A designer's dress that retails for $300 instead of $3000 is within the reach of many consumers who might well opt for the still less expensive knockoff. Thus, knockoffs are particularly devastating for emerging designers, who face significant entry barriers and struggle to stay in business. This Act would help level the playing field with respect to protection from copyists and allow more such designers to enter the market, create, and flourish. Such an increase in emerging and smaller designer market participation would ultimately benefit retailers who sell the smaller designers' products, such as department stores.

That many less-established designers may lack resources to hire lawyers and sue copyists does not change this analysis. First, even under current law, smaller designers already do file suit against copyists, attempting to cobble together some semblance of protection against design copying by relying on currently existing intellectual property protections in trademark and copyright. There is little reason to doubt that small designers would utilize protection for design, which is after all what they are really after in the lawsuits they currently file. Second, litigation by large fashion firms against copyists making knockoffs could have positive collateral consequences for small designers. For instance, if Forever 21 had to change its business model because it could no longer create replicas of products by Louis Vuitton—which does have the resources to litigate under the IDPPPA—that change in the culture and norms of fashion design would also work to small designers' benefit. Such enforcement by larger plaintiffs, in other words, may produce systemic changes that would work to smaller entities' advantage. Finally, while small design-

ers often lack the resources to hire lawyers on an hourly basis, nothing in the Act prohibits contingent fee arrangements. Such arrangements would allow small designers to vindicate their rights, even if they could not afford to pay a lawyer's usual hourly fees.

EFFECTS ON CONSUMER CHOICE

Unquestionably the IDPPPA would change the consumer's playing field. Because fast fashion copyists could no longer sell inexpensive knockoffs without authorization, consumers may lose the low-price alternative knockoffs now offered. In an IDPPPA regime, such consumers may not have access to those exact designs at the knockoff price. For some, this will seem a significant limitation, especially since the customer who shops for the knockoff of a Louis Vuitton item is not the same customer who would buy the genuine article.

This limitation, however, is not as substantial as it may appear. First, the IDPPPA's protections would move fast-fashion designers to engage with those designs—that is, innovate—rather than simply replicate them. Indeed, the modifications copyists would be required to make under the IDPPPA would serve to *expand* consumer choice as high-volume sellers shifted their efforts toward inspired-bys and away from knockoffs. The increase in the variety of inspired-by designs would more than offset the loss of choice from prohibiting knockoffs.

Second, many high-end designers have partnered with higher-volume discount retailers such as Target and H&M to offer their goods at a lower price point. The IDPPPA encourages this kind of partnership. Under the Act, discount retailers would have even more incentive to pair with designers if they wished to sell others' designs with minimal or no modification.

Therefore, while the IDPPPA would restrict consumer choice in terms of easy availability of unauthorized knockoffs at a low price, it would increase consumer choice in terms of selection of goods. Fast-fashion copyists would have to become fast fashion designers who engage with designers' output, and thereby produce new options for consumers.

EFFECTS ON LITIGATION

Last Term, when the Senate Judiciary Committee considered a version of the IDPPPA identical to this Act, one Member raised the concern that the IDPPPA might produce a flood of litigation.[4] The Member pointed to two elements of the Act in support of this concern. First, the Act gives designers the ability to protect their designs, without any registration requirement. Hence, any designer could claim that any design was protected, and so could attempt to litigate under the statute. Second, some of the statute's language—specifically the "substantially identical" and "non-trivial" requirements—may require significant judicial interpretation. Hence, designers and copyists alike would have an incentive to litigate, in an effort to define their rights and liabilities under the statute. Combined, the Member suggested, these factors might lead to a flood of litigation in the already busy federal courts.

This concern is overstated. First, the Act requires that plaintiffs plead each element of a design infringement claim with particularity. This requirement will curtail many frivolous lawsuits before they begin, and will cull others out at an early stage. Second, the Act's "substantially identical" standard for infringement is a high bar, as is the Act's stringent standard for originality. Litigation under the Act will be concentrated around knockoffs, leaving inspired-bys relatively untouched. Even under the current intellectual property regime, we see far greater numbers of lawsuits by designers against sellers of knockoffs than against sellers of inspired-bys. From 2003 to 2008, at least fifty-three lawsuits alleging trademark and copyright infringement were filed against Forever 21.[5] By contrast, two were filed against H&M and none were filed against Zara.[6] Under the IDPPPA, we could similarly expect to see sellers of inspired-bys remain relatively untouched, and the sellers of knockoffs would either have to adapt their business strategy or face liability.

Nor is it likely that large fashion firms, recognizing less-established designers as competition, would succeed in driving those designers out of business by saddling them with litigation costs through baseless suits. IDPPPA plaintiffs must plead with particularity that the allegedly infringing article is "substantially identical in overall visual appearance to . . . the original elements of a protected design," or is not "the

[4] UNITED STATES SENATE, COMMITTEE ON THE JUDICIARY, *Executive Business Meeting* 53:14 (Dec. 1, 2010), http://judiciary.senate.gov/hearings/hearing.cfm?id=e655f9e2809e5476862f735da165262f (last visited Jul. 10, 2011) (comments of Senator John Cornyn).

[5] *The Law, Culture, and Economics of Fashion, supra* note 1, at 1173.

[6] *Id.*

result of independent creation." To plead with particularity that a copy is "substantially identical" when the allegedly offending garment is not easily mistaken for the original would be extremely difficult. A baseless suit would be subject to early dismissal. Moreover, a suit filed simply to harass or lacking the requisite particular facts, might lead to sanctions against the firm and its lawyers.[7] These factors—the "substantially identical" standard, the heightened pleading requirement, and the prospect of sanctions—create a strong deterrent against suits meant to drive upstart designers out of business by imposing litigation costs.

Of course, there would be litigation under the IDPPPA, and courts would have to interpret the language in the Act and sometimes draw difficult lines. But this is the natural consequence of Congress's passing any law. The IDPPPA's internal controls on litigation would discourage litigiousness and stem the flood of litigation that some fear.

The IDPPPA strikes an appropriate balance between giving incentives to create original designs and leaving designers free to draw upon influences, inspirations, and trends. If enacted, it would serve its purpose, to push the fashion industry toward innovation rather than substantially identical copying. The new law would harm fast fashion copyists but not retailers as a whole—and even then, only by compelling firms to change their businesses in ways consistent with Act's purpose. It would increase consumers' choice of designs that are inspired by other designs and that participate in trends, while limiting their ability to buy exact knockoffs of designs. It would not promote unnecessary litigation, but to the contrary, represents a wisely balanced and carefully tailored response to the problems of a distinctive industry.

Thank you for the opportunity to discuss this important Act with the Subcommittee. I look forward to your questions.

Published works submitted:

C. Scott Hemphill & Jeannie Suk, *The Law, Culture, and Economics of Fashion,* 61 STAN. L. REV. 1147 (2009), http://papers.ssrn.com/sol3/papers.cfm?abstract__id=1323487

C. Scott Hemphill & Jeannie Suk, *Schumer's Project Runway,* WALL STREET JOURNAL, Aug. 24, 2010, http://online.wsj.com/article/SB10001424052748704504204575445651720989576.html

[7] *See* Fed. R. Civ. P. 11(b)(1), (c) (imposing sanctions for complaints presented for an improper purpose).

ATTACHMENT 1

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Stanford Law Review

THE LAW, CULTURE, AND ECONOMICS OF FASHION

C. Scott Hemphill & Jeannie Suk

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THE LAW, CULTURE, AND ECONOMICS OF FASHION

C. Scott Hemphill* & Jeannie Suk**

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INTRODUCTION

Fashion is one of the world's most important creative industries. It is the major output of a global business with annual U.S. sales of more than $200 billion—larger than those of books, movies, and music combined.[1] Everyone wears clothing and inevitably participates in fashion to some degree. Fashion is also a subject of periodically rediscovered fascination in virtually all the social sciences and the humanities.[2] It has provided economic thought with a canonical example in theorizing about consumption and conformity.[3] Social

1. U.S. apparel sales reached $196 billion in 2007. *The U.S. Apparel Market 2007 Dresses Up . . . Way Up*, BUS. WIRE, Mar. 18, 2008 (reporting estimate by the NPD Group). Among fashion accessories, considering just one category, handbags, adds another $5 billion in sales. Tanya Krim, *There's Nothing "Trivial" About the Purse-suit of the Perfect Bag*, BRANDWEEK, Mar. 29, 2007 (reporting U.S. sales exceeding $5 billion in 2005). For comparison, U.S. publishers had net sales of $25 billion in 2007. Press Release, Ass'n of Am. Publishers, AAP Reports Book Sales Rose to $25 Billion in 2007 (Mar. 31, 2008), http://www.publishers.org/main/IndustryStats/indStats_02.htm. The motion picture and video industry had estimated revenues of $64 billion in 2003. U.S. CENSUS BUREAU, 2003 SERVICE ANNUAL SURVEY, INFORMATION SECTOR SERVICES (NAICS 51)—ESTIMATED REVENUE FOR EMPLOYER FIRMS: 1998 THROUGH 2003, at 1 tbl.3.0.1, *available at* http://www.census.gov/svsd/www/sas51-1.pdf; *see also* MOTION PICTURE ASS'N OF AM., INC., ENTERTAINMENT INDUSTRY MARKET STATISTICS 2007, at 3, *available at* http://www.mpaa.org/USEntertainmentIndustryMarketStats.pdf (reporting U.S. box office sales of nearly $10 billion in 2007). The music industry had U.S. revenue, measured at retail, of about $10 billion in 2007. RECORDING INDUS. ASS'N OF AM., 2007 YEAR-END SHIPMENT STATISTICS, *available at* http://www.riaa.com/keystatistics.php. Thus fashion is comparable in importance to other core creative industries even if, as seems plausible, some apparel has a lower intellectual property content.

2. *See, e.g.*, LARS SVENDSEN, FASHION: A PHILOSOPHY 7 (John Irons trans., Reaktion 2006) ("Fashion has been one of the most influential phenomena in Western civilization since the Renaissance.").

3. *See, e.g.*, Harvey Leibenstein, *Bandwagon, Snob, and Veblen Effects in the Theory of Consumers' Demand*, 64 Q.J. ECON. 183 (1950); *see also, e.g.*, Sushil Bikhchandani et al., *A Theory of Fads, Fashion, Custom, and Cultural Change as Informational Cascades*, 100 J.

thinkers have long treated fashion as a window upon social class and social change.[4] Cultural theorists have focused on fashion to reflect on symbolic meaning and social ideals.[5] Fashion has also been seen to embody representative characteristics of modernity, and even of culture itself.[6]

Indeed, it is hard to imagine a locus of social life—whether in the arts, the sciences, politics, academia, entertainment, business, or even law or morality—that does not exhibit fashion in some way.[7] People flock to ideas, styles, methods, and practices that seem new and exciting, and then eventually the intensity of that collective fascination subsides, when the newer and hence more exciting emerge on the scene. Participants of social practices that value innovation are driven to partake of what is "original," "cutting edge," "fresh," "leading," or "hot." But with time, those qualities are attributed to others, and another trend takes shape. This is fashion. The desire to be "in fashion"—most

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POL. ECON. 992 (1992); Philip R.P. Coelho & James E. McClure, *Toward an Economic Theory of Fashion*, 31 ECON. INQUIRY 595 (1993); Wolfgang Pesendorfer, *Design Innovation and Fashion Cycles*, 85 AM. ECON. REV. 771 (1995); Dwight E. Robinson, *The Economics of Fashion Demand*, 75 Q.J. ECON. 376 (1961); George J. Stigler & Gary S. Becker, *De Gustibus Non Est Disputandum*, 67 AM. ECON. REV. 76, 76 (1977).

4. *See, e.g.*, THORSTEIN VEBLEN, THE THEORY OF THE LEISURE CLASS (Dover Publ'n 1994) (1899); Georg Simmel, *Fashion*, 10 INT'L Q. 130 (1904), *reprinted in* 62 AM. J. SOC. 541 (1957); *see also, e.g.*, QUENTIN BELL, ON HUMAN FINERY (Shocken Books 1976) (1949); PIERRE BOURDIEU, DISTINCTION: A SOCIAL CRITIQUE OF THE JUDGEMENT OF TASTE (Richard Nice trans., Harvard Univ. Press 1984) (1979); DIANA CRANE, FASHION AND ITS SOCIAL AGENDAS (2000); KURT LANG & GLADYS ENGEL LANG, COLLECTIVE DYNAMICS 465-88 (1961); PHILIPPE PERROT, FASHIONING THE BOURGEOISIE: A HISTORY OF CLOTHING IN THE NINETEENTH CENTURY (Richard Bienvenue trans., Princeton Univ. Press 1994) (1981); JOHN RAE, THE SOCIOLOGICAL THEORY OF CAPITAL 218-36, 245-76 (Charles Whitney Mixter ed., Macmillan Co. 1905) (1834); Bernard Barber & Lyle S. Lobel, *"Fashion" in Women's Clothes and the American Social System*, 31 SOC. FORCES 124 (1952).

5. *See, e.g.*, ROLAND BARTHES, THE FASHION SYSTEM (Matthew Ward & Richard Howard trans., Farrar, Straus & Giroux 1983) (1967); JENNIFER CRAIK, THE FACE OF FASHION: CULTURAL STUDIES IN FASHION (1994); FRED DAVIS, FASHION, CULTURE, AND IDENTITY (1992); Edward Sapir, *Fashion*, *in* 6 ENCYCLOPAEDIA OF THE SOCIAL SCIENCES 139, 139-44 (Edwin R.A. Seligman ed., 1931).

6. *See, e.g.*, JEAN BAUDRILLARD, FOR A CRITIQUE OF THE POLITICAL ECONOMY OF THE SIGN 78 (1981); FASHION AND MODERNITY (Christopher Breward & Caroline Evans eds., 2005); Herbert Blumer, *Fashion: From Class Differentiation to Collective Selection*, 10 SOC. Q. 275 (1969); A.L. Kroeber, *On the Principle of Order in Civilization as Exemplified by Changes of Fashion*, 21 AM. ANTHROPOLOGIST 235 (1919).

7. *See, e.g.*, ADAM SMITH, THE THEORY OF MORAL SENTIMENTS 283 (Augustus M. Kelley 1966) (1759) ("[T]he influence of custom and fashion over dress and furniture is not more absolute than over architecture, poetry, and music."); Jeff Biddle, *A Bandwagon Effect in Personalized License Plates?*, 29 ECON. INQUIRY 375 (1991); Bikhchandani et al., *supra* note 3, at 1010-14; John F. Burnum, *Medical Practice à la Mode: How Medical Fashions Determine Medical Care*, 317 NEW ENG. J. MED. 1220 (1987); B. Peter Pashigian et al., *Fashion, Styling, and the Within-Season Decline in Automobile Prices*, 38 J.L. & ECON. 281 (1995); Stigler & Becker, *supra* note 3, at 87; Cass R. Sunstein, *Foreword: On Academic Fads and Fashions*, 99 MICH. L. REV. 1251 (2001); *cf.* Lawrence v. Texas, 539 U.S. 558, 598 (2003) (Scalia, J., dissenting) ("[T]his Court . . . should not impose foreign moods, fads, or fashions on Americans." (quoting Foster v. Florida, 537 U.S. 990 (2002) (Thomas, J., concurring))).

visibly manifested in the practice of dress—captures a significant aspect of social life, characterized by both the pull of continuity with others and the push of innovation toward the new.

In the legal realm, this social dynamic of innovation and continuity is most directly engaged by the law of intellectual property. At this moment, fashion itself has the attention of federal policymakers, as Congress considers whether to provide copyright protection for fashion design,[8] a debate that is sure to continue in the face of fashion designers' many complaints of harm by design copyists.[9] Despite being the core of fashion and legally protected in Europe, fashion design lacks protection against copying under U.S. intellectual property law.[10] Thus it has seemed sensible to posit that fashion design is relevantly different from literature, music, and art, where legal protection from copying is thought to be necessary to provide producers an incentive to create.[11] Indeed,

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8. *See* Design Piracy Prohibition Act, S. 1957, 110th Cong. § 2(a), (d) (2007); Design Piracy Prohibition Act, H.R. 2033, 110th Cong. § 2(a), (d) (2007); ABA Section of Intellectual Prop. Law, Proposed Resolution 2008 Council-1A (approved Aug. 9, 2008), *available at* http://www.abanet.org/intelprop/annual2008/business-session/2008Council1A.pdf ("Resolved, that the Section of Intellectual Property Law, believing that there is sufficient need for greater intellectual property protection than is now available for fashion designs, supports, in principle, enactment of federal legislation to provide a new limited copyright-like protection for such designs; and now therefore, the Section supports enactment of H.R. 2033 . . . or similar legislation."); *see also* Eric Wilson, *When Imitation's Unflattering*, N.Y. TIMES, Mar. 13, 2008, at G4 (describing designers' efforts to secure copyright protection).

9. For example, an industry-sponsored website collects quotations from designers Oscar de la Renta, Dayna Foley, Phillip Lim, Nicole Miller, Zac Posen, Narciso Rodriguez, and Diane von Furstenberg, and a video posted to the site quotes top executives at Armani, Chanel, Dior, Ferragamo, Hermes, and Marc Jacobs, among others. *See* Stop Fashion Piracy, The Industry Speaks Out, http://www.stopfashionpiracy.com/theindustryspeaks.php (last visited Jan. 31, 2009).

10. Garments are "useful articles" not protected by copyright, except to the extent that an article's expressive component is "separable" from its utility. See *infra* Part IV.A for an explanation and critique of the current copyright regime as applied to fashion. Trademark law protects fashion firms' logos against infringement and counterfeiting. For a discussion of trademarks and counterfeiting, see Jonathan M. Barnett, *Shopping for Gucci on Canal Street: Reflections on Status Consumption, Intellectual Property, and the Incentive Thesis*, 91 VA. L. REV. 1381 (2005). Design patents provide protection in a few cases, but their demanding standards for protection and long lead time make them of limited use for most fashion articles. For a useful overview of the law and history of intellectual property protection and fashion design, see Susan Scafidi, *Intellectual Property and Fashion Design*, *in* 1 INTELLECTUAL PROPERTY AND INFORMATION WEALTH: COPYRIGHT AND RELATED RIGHTS 115 (Peter K. Yu ed., 2006). For a comparative discussion of European copyright for fashion design, see Matthew S. Miller, *Piracy in Our Backyard: A Comparative Analysis of the Implications of Fashion Copying in the United States for the International Copyright Community*, 2 J. INT'L MEDIA & ENT. L. 133, 141-44 (2008).

11. *See* Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687 (2006); *see also Design Piracy Prohibition Act: Hearing on H.R. 5055 Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 109th Cong. (2006) (statement of David Wolfe, Creative Director, Doneger Group), 2006 WL 2127241; Sarah J. Kaufman, Note, *Trend Forecast: Imitation is a Legal Form of Flattery*—Louis Vuitton Malletier v.

some commentators even suggest that perhaps fashion design is *so* different from other arts that its vitality, or even survival, paradoxically *depends* on the existence of the opposite kind of regime—a culture of tolerated rampant copying.[12]

This Article enters the debate about intellectual property protection and fashion design[13]—a debate in which the fashion industry finds itself divided[14]—and argues for a limited right against design copying. We set the legal policy debate within a reflection on the cultural dynamics of innovation as a social practice. Fashion in the realm of dress is a version of a ubiquitous phenomenon, the ebb and flow of trends wherein the new ineluctably becomes old and then leads into the new. Fashion is commonly thought to express individuality, and simultaneously to exemplify conformity. The dynamics of fashion lend insight into the dynamics of innovation more broadly.

Our motivation here is threefold. First, as the most immediate visible marker of self-presentation, fashion communicates meanings that have individual and social significance. Innovation in fashion creates vocabularies for self-expression that relate individuals to social worlds. As with other creative goods, intellectual property law plays a role in shaping the quantity and the direction of innovation produced by the fashion industry and made available for consumption by people who wear clothing—that is, everyone—a group larger than those who consume art, music, or books. Second, the fashion

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Dooney & Bourke, Inc., 23 CARDOZO ARTS & ENT. L.J. 531, 532-35 (2005).

12. *See* Kal Raustiala & Christopher Sprigman, *Fashion Victims: How Copyright Law Could Kill the Fashion Industry*, NEW REPUBLIC ONLINE, Aug. 14, 2007, *available at* http://www.law.ucla.edu/home/News/Detail.aspx?recordid=1188; *see also* James Surowiecki, *The Piracy Paradox*, NEW YORKER, Sept. 24, 2007, at 90. *But see* Julie P. Tsai, Comment, *Fashioning Protection: A Note on the Protection of Fashion Designs in the United States*, 9 LEWIS & CLARK L. REV. 447 (2005); Diane von Furstenberg, Letter to the Editor, *Fashion Police*, NEW YORKER, Oct. 22, 2007, at 16.

13. A recent efflorescence of law review commentary features debate on the merits and scope of copyright protection for fashion design, in view of the proposed Design Piracy Prohibition Act. *See, e.g.*, Shelly C. Sackel, *Art Is in the Eye of the Beholder: A Recommendation for Tailoring Design Piracy Legislation to Protect Fashion Design and the Public Domain*, 35 AIPLA Q.J. 473 (2007); Lynsey Blackmon, Comment, *The Devil Wears Prado: A Look at the Design Piracy Prohibition Act and the Extension of Copyright Protection to the World of Fashion*, 35 PEPP. L. REV. 107 (2007); Emily S. Day, Comment, *Double-Edged Scissor: Legal Protection for Fashion Design*, 86 N.C. L. REV. 237 (2007); Lisa J. Hedrick, Note, *Tearing Fashion Design Protection Apart at the Seams*, 65 WASH. & LEE L. REV. 215 (2008); Lauren Howard, Note, *An Uningenious Paradox: Intellectual Property Protections for Fashion Designs*, 32 COLUM. J.L. & ARTS (forthcoming 2009); Elizabeth F. Johnson, Note, *Interpreting the Scope of the Design Piracy Prohibition Act*, 73 BROOK. L. REV. 729 (2008); Laura C. Marshall, Note, *Catwalk Copycats: Why Congress Should Adopt a Modified Version of the Design Piracy Prohibition Act*, 14 J. INTELL. PROP. L. 305 (2007); Brandon Scruggs, Comment, *Should Fashion Design Be Copyrightable?*, 6 NW. J. TECH. & INTELL. PROP. 122 (2007); Megan Williams, Comment, *Fashioning a New Idea: How the Design Piracy Prohibition Act Is a Reasonable Solution to the Fashion Design Problem*, 10 TUL. J. TECH. & INTELL. PROP. 303 (2007).

14. *See, e.g.*, Wilson, *supra* note 8 (noting the "fashion industry's ongoing debate about knockoffs").

industry has huge economic importance.[15] Getting the economics of this industry right is an important challenge that must inform an inquiry into its regulation by intellectual property law. Third, the debate over legal protection for fashion design connects to a larger debate about how much intellectual property protection we want to have.[16]

The question of legal protection for fashion design poses the central question of intellectual property: the optimal balance between, on the one hand, providing an incentive to create new works, and on the other hand, promoting the two goals of making existing works available to consumers and making material available for use by subsequent innovators. We treat fashion as a laboratory to ask this question anew. The fashion trend is a particularly vivid manifestation of a general innovation pattern wherein those engaged in innovation continually seek after the new and different while, at the same time, converging with others on similar ideas. Fashion conspicuously exhibits the challenge of providing incentives for individuals to innovate while preserving the benefits to innovation of moving in a direction with others.

This Article offers a new model of consumer and producer behavior derived from cultural analysis in an area where consumptive choices are also expressive. In fashion we observe simultaneously the participation in collective trends and the expression of individuality. Consumers have a taste for trends—that is, for goods that enable them to move in step with other people. But even in fulfilling that taste, they desire goods that differentiate them from other individuals. Fashion goods tend to share a trend component, and also to have features that differentiate them from other goods within the trend. Consumption and production of fashion must be understood with respect to *both* the trend features and the differentiating features. Formalizing these cultural observations, we call these two coexisting tastes "flocking" and "differentiation." Fashion puts into relief people's tendency to flock while also differentiating from each other.

Individual differentiation within flocking is our account of fashion behavior. But we can observe versions of this dynamic too in other areas of innovation, for example, the production and consumption of books, music, film, and other arts. Where innovation is a site of both self-expression and social expression, we can see producers and consumers of creative goods

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15. See the statistics cited *supra* note 1. Fashion is the third-largest employer in New York, after health care and finance. *Rags and Riches*, ECONOMIST, Mar. 6, 2004, at 75.

16. While other analysts have associated fashion with relatively marginal or exceptional forms of creativity, such as cuisine, magic, and stand-up comedy, *see* Raustiala & Sprigman, *supra* note 11, at 1765-74 (discussing fashion as a model for understanding the work of chefs and magicians); Daniel B. Smith, *Creative Vigilantes: Magicians, Chefs, and Stand-Up Comics Protect Their Creations Without the Law*, BOSTON GLOBE, Dec. 23, 2007, at 1E (same, for chefs, magicians, and stand-up comics), we see the dynamics of fashion innovation as exemplifying those of more paradigmatic creative industries, such as art, literature, and music.

flocking to themes in common, but differentiating themselves within that flocking activity.

The model makes visible an important analytic distinction that is useful for thinking about creative goods—the distinction between close copying on one hand and participation in common trends on the other hand. Design copying must be distinguished from other forms of relation between two designs, which may go by any number of names including inspiration, adaptation, homage, referencing, or remixing. Our analysis resists elision of close copies and myriad other activities that produce, enable, and comprise trends. Goods that are part of the same trend are not necessarily close copies or substitutes. Rather, they may be efforts to meet the need of consumers for individual differentiation within flocking. The well-known fact that "borrowing" is common in fashion,[17] and might be valuable to fashion innovation, does not itself provide support for the permissibility of close copying in fashion design.

Our theory leads us to favor a legal protection against close copying of fashion designs. The proliferation of close copies of a design is not innovation—it serves flocking but not differentiation. It is importantly distinct from the proliferation of on-trend designs that share common elements, inspirations, or references but are nevertheless saliently different from each other. With respect to close copies, there is no reason to reject the standard justification for intellectual property, that permissive copying reduces incentives to create. But this effect must be distinguished from the effects of other trend-joining activities, which enable differentiation within flocking. They foster and constitute innovation in ways that close copying does not. Thus we argue in favor of a legal right that would protect original fashion designs from close copies.

Some readers will no doubt bristle at the implication that Prada, say, ought to enjoy better protection for its wares. That reaction misunderstands the project. Because the current legal regime denies design protection while providing trademark and trade dress protection, the primary threat to innovation currently is not to the major fashion conglomerates. As we explain, these luxury firms are already well protected by the existing trademark and trade dress legal regime, brand investments, and the relatively small overlap between markets for the original and for the copy. The main threat posed by copyists is to innovation by smaller, less established, independent designers who are less protected along all of these dimensions. Affording design protection would level the playing field with respect to protection from copyists and allow more such designers to enter, create, and be profitable. Relative to the current regime, we would expect the resulting distribution of innovation to feature increased differentiation and range of expression. It would also push fashion producers toward investment in design innovation and

17. Venessa Lau, *Can I Borrow That? When Designer "Inspiration" Jumps the Fence to Full-On Derivation, the Critics' Claws Pop Out*, W MAG., Feb. 2008, at 100 (providing examples of derivation among top designers).

away from proliferation of brand logos by established firms making use of what legal protection is available.

Fashion highlights a social dynamic to which intellectual property law inevitably attends: the relation between the individual and the collective in the production and consumption of creative work. The interplay of individuality and commonality with others poses a constant tension in innovation and its regulation. The distinction we emphasize—essentially between copying and remixing—runs through intellectual property.[18] The idea that innovation—in the form of interpretation, adaptation, and remixing—is not harmed but benefited by legal protection against close copying suggests a need to attend to this often elided conceptual distinction in conducting the debate about how much intellectual property protection we want to have, not only in fashion, but elsewhere.

This Article works between two modes of analysis: law and economics, and cultural theory. We use each set of lenses together.[19] Law engages culture through a system of regulation and distribution. Economic analysis of law, for its part, endeavors to design legal regulation that induces optimal private choices, given a set of criteria about what is desirable.[20] This instrumental project can benefit from a cultural account that identifies a set of features to be optimized. The ambition here is to generate insights that deepen understanding of both culture and economics while blurring their boundaries, to clarify the goals and consequences of legal regulation. Culture-oriented readers may perceive the cultural insights here to subsume economic ones, while at the same time, economically oriented readers may perceive the economic insights to subsume culture. This is a not altogether unintended result of an approach that we might call "cultural law and economics," and on which we hope to elaborate in the future.[21] Though our own fuller excursus on the approach is beyond the scope here, it is arguably both a new method of boundary-crossing

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18. *See* LAWRENCE LESSIG, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY (2008); *cf.* Jeannie Suk, Note, *Originality*, 115 HARV. L. REV. 1988, 1993 (2002) (exploring literary rewritings, which "revise texts that are part of our shared cultural vocabulary," and observing that "[w]hen certain texts have shaped our means of talking and thinking about important ideas, riffing on those texts in new literary works is a powerful way to refashion our language, worldview, and aesthetic").

19. By way of comparison, the field of cultural economics applies economics to "the production, distribution and consumption of all cultural goods and services." RUTH TOWSE, *Introduction* to A HANDBOOK OF CULTURAL ECONOMICS 1 (Ruth Towse ed., 2003); *cf.* BRUNO S. FREY, ARTS AND ECONOMICS: ANALYSIS AND CULTURAL POLICY (2000); 1 HANDBOOK OF THE ECONOMICS OF ART AND CULTURE (Victor A. Ginsburgh & David Throsby eds., 2006); JAMES HEILBRUN & CHARLES M. GRAY, THE ECONOMICS OF ART AND CULTURE (2001); RECENT DEVELOPMENTS IN CULTURAL ECONOMICS (Ruth Towse ed., 2007); DAVID THROSBY, ECONOMICS AND CULTURE (2001).

20. *See, e.g.*, LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE (2002).

21. Future work may offer a programmatic treatment. *Cf.* Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998). This Article is satisfied to develop the approach through application.

that demands development, and one that nuanced scholars of law, culture, and economics have engaged all along.

The Article proceeds as follows: Part I begins by discussing two major theories of fashion based on status and zeitgeist, which will become important to our ensuing analysis. It then offers the key distinction between copying and trends, which we argue is necessary for accurate understanding of fashion innovation. Finally, this Part briefly discusses the normative question whether fashion is a desirable site of innovation. Part II theorizes the culture of fashion as the simultaneous operation of two phenomena that we call "differentiation" and "flocking." It models fashion consumption as the simultaneous adoption of a trend feature combined with differentiating features of a good, and explains how designers come to offer products that appeal to both differentiation and flocking at once.

Part III explains the threat to innovation posed by a recent, important change in industry structure—namely, new "fast-fashion" manufacturers and retailers that engage in unregulated copying on a large scale. This Part shows how fast-fashion copyists both reduce innovation and affect its direction. In response, Part IV proposes a new intellectual property right that grows out of our analysis. The new right would protect original designs, but only from close copies. Our proposal takes an intermediate stand between permitting free copying of fashion designs and creating a broad right of exclusion. The Conclusion underscores the broad implications of the social dynamics of innovation explored here for the field of intellectual property generally.

I. WHAT IS FASHION?

Fashions change. Styles emerge, become fashionable, and are eventually replaced by new fashionable styles.[22] What is obvious is that the demand for new fashions is not reducible simply to material or physical needs. Though one may need a replacement pair of jeans when an old pair gets holes from wear, or a warmer coat when the weather gets cold, for most people across the socio-economic spectrum, the purchase of clothing is far from limited to these kinds of situations. Nearly all of us inevitably participate in fashion, even if we do not try to follow it.

Fashion change is an elusive phenomenon, in need of cultural explanation. Thinkers in a range of fields have reflected on what fashion is, and in particular what accounts for fashion, the movement from introduction to adoption to decline of particular styles. We begin by discussing two principal theories of fashion that will become important in our ensuing analysis.

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22. *See, e.g.*, George B. Sproles, *Analyzing Fashion Life Cycles: Principles and Perspectives*, 45 J. MARKETING 116, 116 (1981).

A. *Status*

The most influential and widely held theory posits fashion as a site of struggle over social status. This is a view most concretely articulated in terms of social class at the turn of the century by Georg Simmel, the German sociologist, who was in turn influenced by Thorstein Veblen's classic work, *The Theory of the Leisure Class*.[23]

According to this view, fashion is adopted by social elites for the purpose of demarcating themselves as a group from the lower classes. The lower classes inevitably admire and emulate the upper classes. Thereupon, the upper classes flee in favor of a new fashion in a new attempt to set themselves apart collectively. This trickle-down process, moving from the highest to the lowest class, is characterized by the desire for group distinction on the part of the higher classes, and the attempt to efface external class markers through imitation on the part of the lower classes.[24] Change in fashion is thus endlessly propelled by the drive to social stratification on the one hand and to social mobility on the other.

When the magazine *Vogue* was founded in 1892, its first published pages presented the editorial goal as the representation of the lifestyle of New York high society, "the establishment of a dignified authentic journal of society, fashion and the ceremonial side of life."[25] According to a recent history of the magazine, at the turn of the century, the social context of *Vogue*'s origin was one in which the most privileged families of New York "felt invaded by parvenus who, with little lineage but plenty of money, attempted to join in its aristocratic activities."[26] From the beginning, *Vogue*'s representations of the fashions of the upper class were accompanied by those of the homes and parties of prominent families, as well as articles on social etiquette.[27]

This feature has stayed constant throughout the last century, as *Vogue* has been the most visible and important U.S. publication devoted to fashion.[28] The magazine exerts tremendous influence on consumers and the fashion industry,[29] and continues today to feature prominently the link between

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23. *See* VEBLEN, *supra* note 4; Simmel, *supra* note 4.

24. *See* GRANT MCCRACKEN, CULTURE AND CONSUMPTION 94 (Indiana Univ. Press 1990) (1988) (characterizing fashion as an upward "chase and flight" pattern rather than a trickle-down process).

25. Arthur B. Turnure, *Statement*, *reprinted in* VOGUE VOLUME I NOS. 1-28, at 16, 16 (N.Y., The Fashion Co. 1893).

26. NORBERTO ANGELETTI & ALBERTO OLIVA, IN VOGUE 2 (2006).

27. *Id.*

28. *Id.*

29. *See, e.g.*, Xazmin Garza, *The Making of Style*, LAS VEGAS REV.-J., June 13, 2008, at 13CC (citing "the fashion equivalent of the bible, Vogue magazine"); Karen Thomas, *"Men's Vogue" Goes for the Sophisticated Guy*, USA TODAY, Aug. 24, 2005, at 2D (describing *Vogue* as "a 100-year-old women's fashion bible"); Emily Wax, *For India's "Brand Freaks," Gucci Trumps Gandhi*, WASH. POST, Feb. 11, 2008, at A10 (reporting launch of Indian edition of "Vogue magazine, the bible of high-end fashion").

fashion, high society, and wealth. It functions as an arbiter of taste and style, representing fashion trends and contributing to their creation. The images of the lifestyles presented are unabashedly those of elites—wealthy socialites, celebrities, and occasionally people associated with high culture. But these images are not intended only for the wealthy. The dominant reach of *Vogue* depends on circulation outside of the social elite and among the many other readers. It aims at aspiring middle-class consumers as well as affluent upper-middle-class and upper-class women.[30]

Though the social class account has been criticized as too simplistic and one-dimensional,[31] the broad influence of status is still in abundant evidence today. Fashion trends reach many consumers via observation of the ways of the wealthy and other high-status people. Within that project of cultural dissemination there is self-conscious openness about the trickle-down aspect of fashion trends. Fashion magazines, for example, sometimes juxtapose images of new high-priced fashion items, unaffordable by a long stretch for most of the readership, with pictures of similar, lower-priced items and information about where to obtain them.[32] The drive of the ordinary consumer to emulate those who can afford the most expensive fashion is assumed and indeed promoted in the popular discourse of fashion.

B. *Zeitgeist*

The other major theory of fashion sometimes goes by the term "collective selection," associated with the sociologist Herbert Blumer.[33] On this theory, fashion emerges from a collective process wherein many people, through their individual choices among many competing styles, come to form collective tastes that are expressed in fashion trends. The process of trend formation begins vaguely and then sharpens until a particular fashion is established.[34] The themes of the trend reflect the spirit of the times in which we are living.

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30. *See* MEDIAMARK RESEARCH & INTELLIGENCE GROUP, 2008 SURVEY OF THE AMERICAN CONSUMER (2008). *Vogue* has a circulation of 1.2 million and a total audience of 10.6 million people, and median household income of readers is $64,640. *Id.* Its mission statement describes the magazine as:

> America's cultural barometer, putting fashion in the context of the larger world we live in—how we dress, live, socialize; what we eat, listen to, watch; who leads and inspires us. . . . Vogue's story is the story of . . . what's worth knowing and seeing, of individuality and grace, and of the steady power of earned influence.

Vogue Mission Statement, *reprinted in* Condé Nast Media Kit, http://condenastmediakit.com/vog (last visited Feb. 18, 2009).

31. *See, e.g.*, DAVIS, *supra* note 5; Blumer, *supra* note 6.

32. *See, e.g.*, Raustiala & Sprigman, *supra* note 11, at 1705-11 (describing the "Splurge vs. Steal" feature of *Marie Claire* magazine).

33. Blumer, *supra* note 6; *see also* ORRIN E. KLAPP, COLLECTIVE SEARCH FOR IDENTITY (1969); LANG & LANG, *supra* note 4; Dwight E. Robinson, *Style Changes: Cyclical, Inexorable, and Foreseeable*, 53 HARV. BUS. REV. 121 (1975).

34. Blumer, *supra* note 6, at 282.

This theory arises as a direct critique of the trickle-down theory. The driver of fashion is not necessarily imitation of high-status people per se. Rather, people follow fashion because they desire to be *in fashion*. That is, people want to associate themselves with things that are new, innovative, and state of the art. They want to keep pace with change. If a particular fashion starts in a certain group, then other people join, not simply out of desire to emulate that group, but because being in fashion is desirable.[35]

As a means of signaling and communicating about oneself, and of perceiving messages about others,[36] dress has a symbolic function and is even considered by some social theorists to be a code or a language that provides visual cues and signifiers of identity, personality, values, or other social meanings.[37] Consumers choose among many possible options that are available in the market, and select the styles that they will wear, not merely based on their size and physical needs. They often think of their fashion choices as expressions of individuality and personal style. At the same time that the selections so operate at the individual level, they also aggregate into collective tastes.[38]

Through the process of selection and aggregation of tastes, the fashion trend that emerges reflects the zeitgeist. This movement happens through individual choices, but it has a collective character that implicates society. For example, September 11 was widely thought to have affected fashion.[39] A fashion for military looks may arise when the country is at war.[40] Styles—not just sales—may refer to an economic downturn.[41] A style sported by a particular public figure may capture the zeitgeist or inspire a trend.[42]

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35. *Id.*

36. *See* Morris B. Holbrook & Glenn Dixon, *Mapping the Market for Fashion: Complementarity in Consumer Preferences*, *in* THE PSYCHOLOGY OF FASHION 109 (Michael R. Solomon ed., 1985); *see also* ERVING GOFFMAN, THE PRESENTATION OF SELF IN EVERYDAY LIFE 24 (1959).

37. *See, e.g.*, BARTHES, *supra* note 5, at 59; CRANE, *supra* note 4.

38. Blumer, *supra* note 6, at 282.

39. *See, e.g.*, Amy M. Spindler, *Best of the Collections; Clothes of Quiet Inspiration*, N.Y. TIMES, Jan. 20, 2002, at E37 (interpreting some designers' collections after September 11 as suggesting American iconography); Guy Trebay, *Waiting for Takeoff: Designers Offer a Peek of Spring*, N.Y. TIMES, Sept. 10, 2002, at B11 ("Many American designers, in the season shown after 9/11 . . . were moved to express . . . the anxiety that had crept into most corners of American life.").

40. *See, e.g.*, Cathy Horyn, *Macho America Storms Europe's Runways*, N.Y. TIMES, July 3, 2003, at A1 (detailing the prevalence of such Iraq War-inspired fashion as "an image that symbolized the virile Texas cowboy in boots and broad hat" and "battle jackets and cartridge belts fashioned from banker's broadcloth" on the runways of Milan).

41. *See, e.g.*, David Colman, *When Fashion Goes for Broke*, N.Y. TIMES, Sept. 3, 2008, at G6 ("'Whenever the economy gets tough, fashion responds by playing it safe,' said Jim Moore, the creative director of GQ . . . ."); Eric Wilson, *Combating the Gloom? Child's Play*, N.Y. TIMES, Oct. 23, 2008, at E4 (interpreting a particular trend in 2008 as designers' efforts to "cope with the consumer gloom in the only way they know—that is, by channeling the mind-set of their inner children. It may be just a coincidence, but children's books and a

The symbolic function of fashion depends on the interplay of individual and social meanings. Fashion features the tension between the desire to be distinct as an individual and the desire to connect with a collectivity. Another way of saying this is that the fashion process imposes social constraints and parameters within which individual choices of communication and expression are shaped and directed. Fashion is then driven forward as a combination of individual differentiation and collective identification, and of the personal and the social impulses.

Without necessarily denying the importance of status or imitation in the explanation of fashion trends, what we are calling the zeitgeist theory is in effect a critique of a status account in which fashion trends essentially consist of imitation of high-status people. The zeitgeist theory views trends as the collective aggregation of individual choices throughout society. These choices, which are both expressive and consumptive, converge on themes that reflect the milieu and social context of the times.

C. *Copies Versus Trends*

In each of these theories, consumers desire, and producers provide, articles that are on trend. Some observers assume that the trendy articles are copies: either the exact same article purchased from the same producer, or else a close copy of most elements of the original's design. But such copies play only a limited role in the rise and fall of trends. Participation in a trend—by a consumer or a designer—does not necessarily or usually entail copying.

First, one individual may seek to imitate another—as the status theory suggests—but without necessarily copying her dress. One can imitate another's style by consciously or unconsciously being influenced to wear clothes in that style. Copying is a more literal and direct process in which one targets the original for replication. For example, a consumer can imitate the length of a

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color palette by Crayola have emerged as a pop cultural theme in art and fashion with surprising alacrity, as if in anticipation of a need for more simplistic comforts"); *see also* Suzy Menkes, *Bulls, Bears and the Bellwether Hemline*, N.Y. TIMES, July 17, 2008, http://www.nytimes.com/2008/07/17/fashion/15jolie.html (published online) (discussing the history of fashion's response to recession, focusing on plummeting hemlines).

42. *See, e.g.*, Teri Agins, *Over-40 Finds a Muse: Designers for the Middle-Aged Pin Hopes on Mrs. Obama*, WALL ST. J., Dec. 6, 2008, at W4 (reporting on Michelle Obama's influence on fashion and quoting a magazine editor describing her as "represent[ing] the post-feminist generation—a woman who can wear a sheath dress and show her arms—and women are responding to her ability to be feminine, sexy and still powerful."); Ray A. Smith, *Pulling Off the Obama Look*, WALL ST. J., June 9, 2007, at P1 ("With the suit-and-no-tie look gaining prominence lately—presidential hopeful Barack Obama has drawn attention for sporting a version of the approach, and Microsoft's Steve Ballmer and Boeing CEO Jim McNerney have done it, too—more men are trying it out themselves."); Eric Wilson, *Merrily They Dress*, N.Y. TIMES, Nov. 20, 2008, at E1 ("Ever since the Obamas appeared on election night as a coordinated fashion tableau, as if they had just stepped out of a holiday greeting card portrait, sales of red dresses have been terrific, said Kay Unger, who makes party frocks.").

skirt without necessarily purchasing a copy of that skirt. Copying, in other words, is only a subset of a wide range of imitative practices.

Second, consumers may join trends without an imitative motive. The zeitgeist theory emphasizes not imitation, but rather an individual's distinct desire to be in fashion. People can want to be in fashion without necessarily having as their object the emulation of the lifestyle, values, or status associated with a particular group that first sported the style. They may instead—or also—seek to join a collective moment. Such convergence does not require a copy of what others are wearing.

Third, designers may furnish on-trend articles without closely copying one another. Instead, they may engage in interpretation, or "referencing."[43] They may quote, comment upon, and refer to prior work.[44] Unlike much close copying, such interpretation does not pass off the work as the work that is being copied. Instead, it marks awareness of the difference between the two works as it looks to the prior work as a source of influence, or even a precursor. Even where the influence is not completely conscious or direct, the latter work draws on the meaning of the earlier work, rather than being simply a copy of it. For example, the look of a Chanel knit jacket has been interpreted repeatedly in other designers' styles, so that it has become a classic style drawing on the spirit of the look without purporting to be a Chanel product. Another Chanel classic, the quilted handbag, has been similarly reinterpreted.

This practice, by which designers draw freely upon ideas, themes, and styles available in the general culture, and refer back to others' prior designs, has led to the widespread but incorrect view that there is no real originality in fashion design.[45] This view is no more correct than the analogous complaint about music: that homage and pastiche somehow deny any claim of originality to new works. The important point is that interpretations are different from copies in their goals and effects. Close copies can substitute for and reduce the value of the original, thereby reducing the incentive to create, to a greater extent. Rather than being substitutes, interpretations may even be complements for other on-trend articles.[46]

A status theory of fashion might lend to the view that trend-joining is essentially copying. Accordingly, the fashion trend rises as a form of

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43. *See* Raustiala & Sprigman, *supra* note 11, at 1700 ("reference"); *id.* at 1728 ("referencing").

44. For example, Proenza Schouler's spring 2008 collection was widely understood to draw upon the previous work of Balenciaga designer Nicolas Ghesquiere. Lau, *supra* note 17. There are many such examples every season. *Id.*

45. *See, e.g.*, Amy Kover, *That Looks Familiar. Didn't I Design It?*, N.Y. TIMES, June 19, 2005, § 3, at 34 ("Mr. Schwartz of A.B.S. has some advice for newcomers: Stop whining. 'When you are talking about fashion, lose the word original,' he said. 'Ask the small designers where they got their inspiration. They pull their inspiration from others. It's in the air. You don't sit by the window and wait for it to materialize.'").

46. For further discussion of complementarity, see *infra* Part II.B. For further discussion of substitution, see *infra* Part III.B.

emulation, and then declines when elites or early adopters feel the need to distinguish themselves from the copying masses and adopt a new style as a means to do so. If one thus equates trend-joining with copying, then one might reasonably conclude that fashion is driven by copying.[47]

But it is important to see that status does not exhaust the motivations for fashion. Under a zeitgeist theory, fashion is not just imitation of elites or early adopters, and is not reducible to copying. Fashion choices are expressions of individuality that combine into collective tastes. Fashion reflects the desire for the new, for movement with the collectivity, for contact with the spirit of the times. This theory leads us to disaggregate fashion trends from copying, and see that fashion moves not necessarily as the result of a market's saturation with copies. Copies may play a role in fashion change, but they are not the engine without which innovation in fashion would slow and stagnate.

D. *Why Promote Innovation in Fashion?*

Before further developing and applying these distinctions between copying and trends, we first pause with readers who may wonder whether fashion is worth promoting. After all, one might well agree with our account of the features of fashion, but consider fashion innovation to be undesirable. Everyone takes part in apparel fashion on some level. Everyone inevitably expresses themselves through the clothes they wear (even if to communicate that they are too serious to care about fashion). But some may consider fashion frivolous or wasteful. They may believe that we would be better off if fashion did not exist and if clothing were used only for the literal purpose of covering the body or keeping warm.

This set of intuitions lies behind the Anglo-American and European history of sumptuary laws, which, until the eighteenth century, purported to limit the expenditures people could make on clothing, to protect against the vice of wasteful spending for personal appearance and ostentatious display, including for purposes of following fashions.[48] Moral disapproval of expenditure on fashion is traditional. Normative regulation of fashion goes back to the Greeks and the Bible.[49] The moral stance found, albeit incompletely enforced, in many

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47. *See* Raustiala & Sprigman, *supra* note 11.

48. *See* ALAN HUNT, GOVERNANCE OF THE CONSUMING PASSIONS: A HISTORY OF SUMPTUARY LAW (1996).

49. Solon, the legendary lawgiver of ancient Athens, created some of the first sumptuary laws, regulating conspicuous consumption at funerals—including how many shawls a widow could wear. *See* Anne Theodore Briggs, *Hung Out To Dry: Clothing Design Protection Pitfalls in United States Law*, 24 HASTINGS COMM. & ENT. L.J. 169, 204 (2002). *Deuteronomy* 22:5 says that "[t]he woman shall not wear that which pertaineth unto a man, neither shall a man put on a woman's garment: for all that do so are abomination unto the Lord thy God." 1 *Corinthians* 11 sets out guidelines about head covering while praying.

religious traditions from Christianity to Buddhism, rejects luxury spending on garments and promotes plain garb.[50]

Another reason for looking askance at fashion may be concern about visible markers of status hierarchy. Many historical sumptuary laws actually imposed hierarchical dress codes, granting privileges to wear certain garments to the upper class or prohibiting the lower class from wearing certain garments.[51] Perhaps fashion is normatively undesirable because it is a way in which class and wealth disparities can easily be shown. Chairman Mao, in the pursuit of egalitarianism and Marxist rejection of surplus value, dictated that a billion people should wear an identical unadorned outfit, and for some decades they did so,[52] notwithstanding China's rich history of fashion and its contemporary unabashed re-embrace of consumer capitalism.[53]

With respect to the morality of expenditures or the issue of wastefulness, for the purposes of this Article, we treat fashion consumption the same way we would ordinarily treat the consumption of other nonharmful goods that have creative and expressive components, such as books, music, films, and art. (To varying degrees, fashion is present in those areas as well. For example, there may be a trend of memoirs about addiction, films about Iraq, biographies of presidents, or novels about ancient biblical secrets.) It is difficult to see how the argument about wastefulness or immorality of spending on a coveted suit or dress would be different in kind from paying a sum for a work by a highly regarded painter. We assume that if consumers are prepared to pay for fashion in its various forms, regulation ought to be set to promote innovation and allow consumers a variety of options.[54]

Some readers may resist this set of assumptions in various ways. First, the idea that the measure of the value of fashion is akin to the measure of the value of books, music, and art may strike some as absurd.[55] Even though fashion is not widely regarded as one of the "fine arts," it is undeniably a creative good that has expressive features. It is no more logical to denigrate the value fashion choices confer upon consumers than to denigrate the value of the best-selling thriller many are reading or the hit song many are listening to. We may of

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50. Well-known examples include the highly regulated attire among the Puritans, the Amish, Catholic nuns, Buddhist monks, and Ultra-Orthodox Jews.

51. *See* HUNT, *supra* note 48, at 172.

52. *See, e.g.*, PATRICIA BUCKLEY EBREY, THE CAMBRIDGE ILLUSTRATED HISTORY OF CHINA 294 (1996) (noting the Communist Party's early efforts to rid Chinese cities "of what they saw as decadence—flashy clothes and provocative hairstyles").

53. For detailed discussion of China's ancient and complex history with issues of intellectual property, see generally WILLIAM P. ALFORD, TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION (1995).

54. This is a common assumption in economic models about fashion. Gene M. Grossman & Carl Shapiro, *Foreign Counterfeiting of Status Goods*, 103 Q.J. ECON. 79, 89 (1988).

55. This has been a strong intuition of some colleagues with whom we have discussed this project.

course engage in value judgments about, say, the artistic value of Grisham relative to Proust, of pop music relative to Bach—and of fashion relative to literature and music. But that kind of hierarchical value distinction among cultural products is not to be confused with the notion of value on which we rely here. The choice to purchase these goods is, on our welfare account, evidence of value, and that is unrelated to the quality or merits of particular cultural products or genres of cultural production. Indeed it is the only evidence that can be measured, short of a separate normative assessment of whether people are wise to desire the things they do. Here we assume the desirability of investments in creative goods and in fashion as a creative good.

Second, some may view fashion consumption as a product of social pressure (i.e., to look "cool" or at least not to look like a "dork"),[56] and therefore unable to confer meaningful welfare gains on its consumers. Participation in fashion seems to be freely chosen by consumers. For the purposes of this Article, we assume that, especially when it comes to economic choices that are not necessary for human survival, adults' decisions may be construed as voluntary and therefore as a desirable pursuit of their life plans.

Finally, there may be concerns about negative positional externalities of fashion. These concerns pertain to status signals generated by fashion as a means of displaying wealth or other markers of status. For example, if fashion serves to distinguish some from others,[57] the satisfaction some people receive from signaling their high status through fashion may be offset by the disutility of others. On this view, participation in fashion trends is spending to reduce that disutility. This expenditure is wasteful. It would be better if nobody spent in this way. Accordingly, if fashion were eliminated (à la Mao, or school uniforms), social welfare would improve; increasing fashion innovation cannot be seen as a gain in welfare.

This is a plausible view of negative externalities that corresponds to a theory of fashion as driven by status. But if the centrality of such status seeking is displaced with what we have been calling the zeitgeist theory, the status signal is not the dominant aspect of fashion. As we have explained above, the desire to be "in fashion" involves more than signals about status. It is a means of individual expression through which people partake in collective movement and the spirit of the times. Fashion enables this expressive process, and as such has benefits much like those associated with other consumptive goods that are also expressive. Signals of status are undeniably present in all these goods (just think of the high-end art market, high-brow literary fiction, or opera performance), but so too—and more importantly—are means of expression. Our view that innovation in fashion is socially desirable rests on assumptions

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56. *Cf., e.g.*, Vanessa O'Connell, *Fashion Bullies Attack—In Middle School*, WALL ST. J., Oct. 25, 2007, at D1 ("Teen and adolescent girls have long used fashion as a social weapon. . . . But today, guidance counselors and psychologists say, fashion bullying is reaching a new level of intensity as more designers launch collections targeted at kids.").

57. *See supra* Part I.A.

that are shared with the assumption that in general the creation of new novels and new songs is socially desirable.

II. A MODEL OF TREND ADOPTION AND PRODUCTION

This Part reflects on fashion as a cultural phenomenon and identifies features of fashion that may be engaged by legal regulation. The aim is to distill the features we have discussed above under the rubric of the zeitgeist theory, which points us to two conditions that exist simultaneously and in relation to one another. We call them "differentiation" and "flocking."

A. *Differentiation and Flocking*

Through fashion, people communicate and express themselves. Fashionable individuals' personal style is often described as "unique" or "inimitable."[58] If consumers use fashion to express themselves as distinctive individuals, then it is valuable to have available a large range of different identifiers. Fashion goods provide a vocabulary. What consumers might value in fashion then is the availability of a variety of goods to choose from, a proliferation of the number of meanings that can be made. The availability of a variety of different goods enlarges the vocabulary and the meanings that can be communicated.

If consumers have a taste for differentiation of identity through fashion, then individual differentiation becomes an identifiable desired feature, for the purpose of intellectual property regulation of fashion. We posit that "differentiation" is a key feature of the consumption and production of fashion.

But fashion would not be fashion were it not for its basically collective character. Even as individuals strive to differentiate themselves through fashion choices, fashion is a means of participating in group movement. We call this "flocking."

Consumers tend to engage in flocking in buying new clothes, not because they need them, but because their existing clothes seem outdated. They want to be "in fashion." Flocking among consumers is again not necessarily a function of imitation or copying of any particular groups or individuals, though it may be. It can be a manifestation of a desire to partake of the collective moment, to be in step with society, or to be in touch with the present. It may be pleasurable for people to move in a collective direction, joined by others in expressive

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58. *See, e.g.*, Arienne Thompson & Erin O'Neill, *Brotherly Style Sense*, USA TODAY, Aug. 12, 2008, at B14 ("The Jonas Brothers may be burning up the music charts, but their unique sense of style is also getting them noticed in the fashion world."); Bruce Weber, *Diane Keaton Reflects on Keeping 'Em Laughing*, N.Y. TIMES, Mar. 17, 2004, at E1 ("Her famously unique wardrobe (for the interview she wore a black business suit, jacket and skirt, over a pair of blue jeans) is the fashion equivalent of philosophical Berra one-liners.").

endeavor. There may be pleasure in a convergence, in participation in similar themes and ideas that reflect the times that all are experiencing.

Fashion is simultaneously characterized by differentiation and flocking—two phenomena that might appear to be in tension. On the one hand, the expressive and communicative aspects of fashion choices seem to benefit from a distribution of innovation that produces goods that are differentiated from each other. Thus we identify differentiation as a desired goal in fashion. On the other hand, we also notice benefits of moving in a common direction and partaking of the same trend. Thus we also identify flocking as desirable. The idea is well captured by Anna Wintour, editor of *Vogue*, who noted that what is laudable in fashionable people is at once "looking on-trend and beyond trend and totally themselves."[59]

Our theory then is that in fashion we observe the interaction of the tastes for differentiation and for flocking, or differentiation within flocking. The *relation* between differentiation and flocking is the key dynamic. People want to engage in flocking in a way that allows individual differentiation within it. They want to be part of a trend, but not be a replica of others who also join the trend. It would not be fashion if only flocking behavior were present. A world in which exactly one design of suit exists, due to demand or fiat, could be said to have apparel but not fashion. Nor would it be fashion if only individual differentiation were present. A world in which no collective patterns could be discerned could not be said to have fashion either. Fashion consists of both human desires, to flock and to differentiate, in relation to each other.

It might be feasible to posit a more exact relationship between differentiation and flocking—for example, to specify a utility function that captures the relationship between the two preferences. One source of complexity is that tastes for differentiation and flocking will vary across consumers. One could in theory posit a person at one extreme who overwhelmingly values differentiation and thus avoids trendiness or any similarity to what others are doing. One could also posit a person at the other extreme who wishes to appear exactly the same as others. But the key point of the differentiation-flocking model is that the tastes of consumers are not at these particular extremes but rather express measures of both differentiation and flocking. The precise relationship between the two varies with the consumer, or even for the same consumer under different circumstances. For example, the same person might favor conservative suits (flocking) and extreme neckties (differentiation). The relationship between differentiation and flocking can also vary with the particular fashion trend or the particular item of fashion.[60] Furthermore, a consumer's utility from a particular configuration of differentiation and flocking may depend on how much differentiation versus flocking others are engaging in. Much complexity accompanies the attempt to

59. Anna Wintour, *Editor's Letter*, VOGUE, Aug. 2008, at 70.

60. See, for example, our comparison of handbags and apparel in Part II.B.

pin down the exact relationship. A key element of our theory is that the tastes for differentiation and flocking exist together in a dynamic relationship.

Finally, notice that the relation between flocking and differentiation maps on to the relation between copying and innovation. Just as direct reproduction of an existing novel is not innovation, if fashion were all about producing exact copies of existing articles, it would not be a practice of *innovation*. The impulse to flock in fashion is expressed in the aspects of fashion that draw on and sometimes copy existing works, but what makes the field a creative endeavor is the drive to differentiate—to reinterpret, change, remix, and transform, and as such, resist the sheer replication of existing works even while incorporating them. That is the creative impulse. In other words, differentiation constitutes innovation in fashion. Without the differentiation component, fashion would not be a form of innovation. Our favoring of differentiation in fashion then is an outgrowth of our assumption of the theory of incentives underlying intellectual property law about the effects of copying on creators' incentives.

B. *Trend Adoption*

The process of trend adoption reflects differentiation and flocking. Think of a fashion item as having two kinds of attributes, a trend feature (around which consumers flock) and various differentiating features. The trend feature is some shared, recognizable design element such as a wrap dress, a fitted fringed jacket, a driving shoe, or a floral print.[61] The differentiating features are all design elements other than the trend feature that make the items within the trend nevertheless different from each other. Consumers are able to identify a trend feature, factoring it out from the other features. Their recognition process may be simple—seeing many items with the trend feature in stores or on the street—or it may be enhanced by advertising or magazine articles that identify the trend feature.

Many consumers prefer new items that are part of a trend. A consumer does not care solely about the presence of a trend, however. In addition, the consumer has a taste for differentiation in the article's other features, and preferences that vary according to body shape, aesthetics, or personal style. Fashion-conscious people generally do not seek to wear precisely the same outfit as someone else.[62] Rather the consumer seeks goods that contain the trend feature but are differentiated.

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61. Bright florals were a trend for spring 2008. Hilary Alexander, *Paris Round-up*, DAILY TELEGRAPH, Oct. 8, 2007, at 20 (noting floral theme across many shows, with the specific implementation varying greatly).

62. *See, e.g.*, Amy Odell, *Internet Saves Inaugural-Ball Attendees from Wearing the Same Dress*, N.Y. MAG., Jan. 2, 2009 (describing a new website, DressRegistry.com, "that allows women to register the dresses they're wearing to big events like the inaugural balls so they don't end up wearing the same thing as someone else"). The social anxiety that attaches to this phenomenon has, for decades, been a recurring target of popular parody. *See, e.g.*, *I Love Lucy: Lucy and Ethel Buy the Same Dress* (CBS television broadcast Oct. 19, 1953).

How does a trend catch on? Suppose designers in one season produce, say, an unusually large number of designs with floral prints. Consumers recognize the floral print as the feature that is part of the potential trend, by seeing the prints in stores and on other consumers. The trend takes off, provided that enough consumers conclude two things—first, that enough other people are buying items with the trend feature that a trend will occur; second, that the consumer's idiosyncratic preferences are well-enough served by a particular item that the consumer buys it. To take off, the trend must offer something sufficiently new. After all, new clothing is not an essential good in this context, and the new trend is competing with a closet full of existing clothes. Put differently, a new trend exhibits a network effect in consumption: individuals buy if enough others are buying or can be expected to buy—for example, because articles with the same trend feature appear in many shops at the same time. If multiple vendors offer the same new trend element at the same time, together with the differentiating details also necessary to satisfy consumer demand for differentiation, this is more likely to produce a successful new trend.

Consumers, ever on the lookout for something new, identify a new trend feature, not much present in the previous season's items, as a fresh basis for asserting commonality. The feature could be as simple as the introduction of a loose fit in jeans after a period when skinny jeans were everywhere. But among the looser jeans available there can be a nearly infinite variety of combinations of cut, color, fabric, texture, wash, and rise.

Our flocking-differentiation model is distinct from some status models of trend adoption in which a fashion good is a repository of status, and individuals who purchase goods convey their status by displaying the item.[63] A high-end "it" bag is the paradigmatic case. As a particular handbag obtains "it" status, for example, there might develop a long waitlist for the desired bags, which are sparingly doled out by stores, with priority given to customers of high status.[64] Even outside of the narrow band of "it" bags, high-end designer handbags often have status-conveying functions. When a high-end designer bag becomes trendy, many want precisely the same bag, making it a particularly good exemplar of the status model.

If the status model applies best to a subset of designer handbags, the present flocking-differentiation model better captures consumers' attitudes toward apparel, where consumers seek to be on trend but also have a taste for differentiation. Thus, arguments made in favor of permitting counterfeit bags,

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63. *See, e.g.*, Raustiala & Sprigman, *supra* note 11, at 1718 (basing the "induced obsolescence" model on the proposition that "[c]lothing is a status-conferring good").

64. *See, e.g.*, MICHAEL TONELLO, BRINGING HOME THE BIRKIN: MY LIFE IN HOT PURSUIT OF THE WORLD'S MOST COVETED HANDBAG (2008) (describing one man's effort to circumvent the legendary waiting list for a Birkin bag); *cf. Sex and the City: Coulda, Woulda, Shoulda* (HBO television broadcast Aug. 5, 2001) (showcasing a New York fashionista's desperate attempt to secure a Birkin bag of her own—and the comic humiliation that ensued).

so as to thwart the ability of wealthy consumers to convey status through them, do not apply in precisely the same way to apparel.

The foregoing suggests three preconditions for the success of a trend. First, the new trend feature must be sufficiently uncommon among previously available articles. Second, the new trend feature must be sufficiently prevalent. And third, there must be a sufficient differentiation of items that contain the trend feature so as to satisfy demand for differentiation and help to achieve a critical mass of consumers.

C. *Trend Production*

Designers, too, engage in a process of differentiation and flocking. In any given season, they flock to similar hemlines, dress shapes, and tailoring. They converge on similar or related styles and themes. Yet the precise result reached by each producer is different.[65]

Flocking results, in part, from shared influences. If images of war fill the news, military-inspired styles may enter multiple collections.[66] If a celebrity or a new film gains acclaim for a distinctive style, that style may be incorporated into the work of several different designers.[67] Forecasting services furnish a common input to some designers, particularly the followers.[68] Designers and other personnel move from fashion house to fashion house, making their imprint on multiple brands.[69] Common pressures in the real world—women's entry into the professional workplace in unprecedented numbers, for example—can lead to a "convergent evolution" of independently derived, parallel innovation.[70] New technological possibilities, such as a novel fabric, can produce commonalities in collections as well.[71]

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65. This is shown in the "runway reports" offered by fashion magazines. *See generally, e.g.*, *Runway Report: Fall's New Looks*, HARPER'S BAZAAR, June 1, 2008, at 182 (assembling trends from fall collection in a special edition of magazine).

66. *See, e.g.*, Horyn, *supra* note 40.

67. *See, e.g.*, Ruth La Ferla, *Forget Gossip, Girl, the Buzz Is About the Clothes*, N.Y. TIMES, July 8, 2008, at A1 (describing the "'Gossip Girl' influence" on designer collections).

68. *See, e.g.*, Vanessa O'Connell, *How Fashion Makes Its Way from the Runway to the Rack*, WALL ST. J., Feb. 8, 2007, at D1 (describing use of such services by J.C. Penney and others).

69. *See, e.g.*, Lau, *supra* note 17 (collecting examples of designers and consultants whose moves—between Helmut Lang and Calvin Klein, Marni and Chloé, and Tom Ford and Burberry Prorsum—contributed to a shared style at each pair of firms).

70. Convergent evolution is "the recurrent tendency of biological organization to arrive at the same 'solution' to a particular 'need.'" SIMON CONWAY MORRIS, LIFE'S SOLUTION: INEVITABLE HUMANS IN A LONELY UNIVERSE, at xii (2003).

71. *See, e.g.*, Michele Loyer, *Brave New World of "Techno" Fabric*, INT'L HERALD TRIB., Oct. 11, 1996, at 24 ("Two years ago, fashion designers like Calvin Klein, Donna Karan and Giorgio Armani started using technical fabrics, until then restricted to industrial use (fire-proofing) or motorcycling, in their sportswear lines."); Heesun Wee, *Spandex Market Expected to Stretch*, GLOBE & MAIL (Toronto), Oct. 13, 1999, at B7 (describing incorporation of Lycra and similar materials, once limited to athletic attire, in street-wear

Flocking also results from mutual influences and inspiration among designers. They and their assistants attend fabric and other trade shows, where they learn from suppliers what other designers have planned—sometimes with the suppliers' active encouragement.[72] Stylists, magazine editors, and buyers travel from designer to designer, cross-pollinating as they move.[73] The shows are not quite simultaneous, extending across several weeks and cities, and last-minute tinkering can incorporate the influence of designers who have had earlier shows.

These shared influences promote convergence around a trend, but not identical articles. For one thing, the shared influences are usually too general to produce identical articles. Moreover, each producer has substantial incentives to produce a differentiated product. A producer, faced with differentiated demand, will tend to seek out a differentiated niche to satisfy, rather than occupy the exact same space as another producer.[74] Some producers are better suited for some niches than others—they may understand one segment of the market (teenagers, say, or Californians) better than another, and focus accordingly. Offering an on-trend, distinctive good may be a source of benefit to some producers, since it offers the opportunity to work with and be in communication with others on a similar problem.[75] And choosing a differentiated product, rather than the exact same good offered by another producer, raises the probability that a trend supported by differentiation within flocking will get off the ground in the first place.[76]

The differentiation-flocking model of production, like that of consumption, has limits. It may not apply to "it" handbags, for example. Where consumers are uninterested in differentiation—where they do not even have idiosyncratic physical needs (due to body shape or coloration), but simply want the status signaled by the item—the model may not apply. There may be apparel items

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collections).

72. According to one insider, "fabric salesmen have only to whisper, 'let me show you the fabrics that Saint Laurent is ordering,' and the stampede is on." Teri Agins, *Copy Shops: Fashion Knockoffs Hit Stores Before Originals as Designers Seethe*, WALL ST. J., Aug. 8, 1994, at A1. As the same piece explains, "[p]erhaps fake fur [an important trend one season] was merely 'in the air,' as designers like to say when such coincidences occur. But most of them can sense which way the fashion winds are blowing by attending the big textile shows held each year in Paris and Milan." *Id.*; *see also* Jonathan M. Barnett et al., *The Fashion Lottery: Cooperative Innovation in Stochastic Markets* 31-35 (USC Ctr. in Law, Econ. and Org., Working Paper No. C08-17, 2008), *available at* http://ssrn.com/abstract=1241005 (emphasizing the importance of trade shows as a communication tool).

73. Christina Binkley, *Runway to Rack: Finding Looks That Will Sell*, WALL ST. J., Mar. 6, 2008, at D1 (noting that most sales come from pre-collections sold prior to the runway shows).

74. *See, e.g.*, Harold Hotelling, *Stability in Competition*, 39 ECON. J. 41 (1929).

75. *Cf.* YOCHAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM 91-99 (2006) (discussing nonmonetary motivations for social production).

76. For a different model that also predicts similar but differentiated products, see Barnett et al., *supra* note 72, at 31 (characterizing imitation as a form of insurance).

that are like "it" handbags. But for most apparel, there are idiosyncratic preferences, and a taste for differentiation, that make the differentiation-flocking model applicable.

The economic imperative to both differentiate and flock resembles the innovative production of more technologically intensive goods. Similar limited cooperation takes place in the development of a new computer operating system or DVD player, in which producers jointly struggle to get a new "standard" or "platform" off the ground.[77] There, too, it is a variety of differentiated products—"launch titles"—that contribute to the success of the shared feature by providing confidence about sufficient adoption that the platform will be a success.

III. HOW UNREGULATED COPYING THREATENS INNOVATION

Our model of trend production has two key features: a trend component that is shared by market players, and a second, differentiating component that varies for each designer. The model explains how producers collectively produce a trend: the common component fosters the sale of a diverse array of new, on-trend goods, which meet consumers' simultaneous desire for on-trend and differentiated goods.

A recent, important change in industry structure—"fast-fashion" manufacturers and retailers—threatens innovation in fashion. In this Part, we explain what is new about fast fashion and why it matters. We distinguish two types of fast-fashion firms, designers and copyists, and their disparate roles. Fast-fashion designers challenge but also enhance the fashion innovation process. Fast-fashion copying, by contrast, threatens the amount of innovation and pulls the direction of innovation toward fashion's status conferral aspects and away from its expressive aspects.

A. *Fast-Fashion Copyists*

Copying in fashion is not a new problem. U.S. designers in the early twentieth century—and, before that, French couturiers—were plagued by competitors who made sketches at shows or measured the seams of procured originals to discern their patterns, and then used local labor to make the copies.[78] Often, these copies could be accomplished quickly, and the copies reached the market before the original.[79]

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77. *See* Timothy F. Bresnahan & Shane Greenstein, *Technological Competition and the Structure of the Computer Industry*, 47 J. INDUS. ECON. 1 (1999).

78. Sara B. Marcketti & Jean L. Parsons, *Design Piracy and Self-Regulation: The Fashion Originators' Guild of America, 1932-1941*, 24 CLOTHING & TEXTILES RES. J. 214, 215-17 (2006); Mary Lynn Stewart, *Copying and Copyrighting Haute Couture: Democratizing Fashion, 1900-1930s*, 28 FRENCH HIST. STUD. 103, 108-13 (2005).

79. Stewart, *supra* note 78, at 108-09.

What has changed is not the fact or speed of copying, but the large scale and low cost at which rapid copies can be made. (For comparison, just think of music, where rapid copying has long been feasible, while large-scale, low-cost rapid copying is a new phenomenon.) Today, a pattern can be based upon an Internet broadcast of the runway show and transmitted electronically to a low-cost contract manufacturer overseas.[80] A gradual easing in import quotas, begun in 1995,[81] has increased scale and thereby lowered overseas manufacturing costs. Electronic communications and express shipping ensure that prototypes and finished articles can be brought to market quickly. As a result, thousands of inexpensive copies of a new design can be produced, from start to finish, in six weeks or less.[82]

The most striking consequence of low-cost, high-scale, rapid copying is not in beating an original to market, but in the ability to wait and see which designs succeed, and copy only those. Copyists can choose a target after retailers have made their buying decisions, or even after the product reaches stores, and customers have begun to buy.[83] Such copyists can reach market well before the relevant trend has ended.

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80. *See, e.g.*, Kover, *supra* note 45 ("Large discounters like Target and H&M have signed major designers and can deliver fashionable clothing at cheap prices by manufacturing in countries like India and China and flying clothes to stores in the West. Computer systems can track inventories and replace sold-out items within a few days."); Fashion TV, http://www.ftv.com (last visited Jan. 31, 2009) (telecasting runway shows live); Fashion Week Daily Runway, http://www.fashionweekdaily.com/runway (last visited Jan. 31, 2009) (providing photographs of collections); New York Magazine, Fashion, http://video.nymag.com (last visited Oct. 4, 2008) (providing video of runway shows).

81. The 1994 Agreement on Textiles and Clothing, part of the Uruguay Round of world trade negotiations, dismantled quotas imposed by an earlier agreement, the Multifibre Arrangement of 1974. The Agreement removed some quotas immediately, and subjected the rest to a ten-year phaseout. World Trade Organization, A Summary of the Final Act of the Uruguay Round ("Agreement on Textiles and Clothing"), http://www.wto.org/english/docs_e/legal_e/ursum_e.htm#cAgreement (last visited Feb. 18, 2009). The phaseout is limited by "safeguards" that permit importers to temporarily limit the increase in quotas. *Id.*

82. One copyist, Forever 21, needs six weeks. Ruth La Ferla, *Faster Fashion, Cheaper Chic*, N.Y. TIMES, May 10, 2007, at G1 [hereinafter La Ferla, *Faster Fashion*]. Oscar knock-off dresses take two to four weeks to reach consumers, as of 2006, compared to twice that time just five years before. Ruth La Ferla, *Night of a Thousand Knockoffs*, N.Y. TIMES, Mar. 9, 2006, at G11 [hereinafter La Ferla, *Thousand Knockoffs*].

Raustiala and Sprigman argue that little has changed—that for the past twenty-five years, copying has been "easy and fast," and the increase in speed over that period "does not appear large." *See* Raustiala & Sprigman, *supra* note 11, at 1759-60. Elsewhere, however, they acknowledge a variety of factors that, in their view, increase copying speed, including "[d]igital photography, digital design platforms, the Internet, global outsourcing of manufacture, more flexible manufacturing technologies, and lower textile tariffs." *Id.* at 1714-15. In our view, the factors they identify are directed not only to speed—indeed, some (such as tariffs) likely have no effect on speed—but to greater scale, lower costs, and higher quality of rapid copying.

83. *Cf.* Agins, *supra* note 72 ("The brisk market in ideas has even given rise to the 'knockoff consultant.' . . . Carole Ledesma and Nathalie Jonqua . . . pose as ordinary shoppers while scouting boutiques in London, Paris and Milan. Each month, they mail 100

Retailers and manufacturers exploit the resulting opportunity. They sell copies at a discount to the original—necessarily, given the lower quality[84]—but earn a profit thanks to lower unit costs and the avoided expense of design.[85] The most notorious copyist retailer is Forever 21,[86] though copying also extends to a wide range of department stores and specialty clothing retailers.[87] The retailers are supplied by manufacturers who, for the most part, remain anonymous. An exception is A.B.S., a prominent copyist of dresses worn to the Oscars awards ceremony and other red-carpet events.[88] The Appendix contains two representative examples of close copying by Forever 21.

Copying is not a necessary element of the fast-fashion business model. Even retailers that sell copies do not sell only copies. And some fast-fashion firms eschew exact or close copies. For example, the two leading fast-fashion firms, Zara and H&M, avoid close copying.[89] Although Zara and H&M may have become conflated with Forever 21 in the public mind,[90] their strategies

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photos of the hottest designs to 55 American clients.").

84. Fast-fashion products, it is said, are made to be worn just ten times. Pankaj Ghemawat & José Luis Nueno, *ZARA: Fast Fashion* 13 (HBS Case Study 9-703-497, rev. Dec. 2006) (making this point about Zara, a fast-fashion designer).

85. *Cf. Design Piracy Act Could Hit China*, WOMEN'S WEAR DAILY, Oct. 29, 2007 (suggesting that China would be affected by the proposed Design Piracy Prohibition Act because "fast-fashion companies . . . stand to lose quite a bit, as they will no longer be able to ride on the shoulders of upstream designers").

86. Forever 21 makes frequent appearances at fashion websites that catalog copies. One such site, Fashionista, http://www.fashionista.com (last visited Feb. 18, 2009), lists Forever 21 copies of a Marc Jacobs shirt, a Marni handbag, and dresses by Foley & Corinna, Jonathan Saunders, and Phillip Lim. The extent of copying can be gleaned from trademark and copyright suits brought against the retailer. For examples, see Liza Casabona, *Retailer Forever 21 Facing a Slew of Design Lawsuits*, WOMEN'S WEAR DAILY, July 23, 2007, at 12, and the suits summarized *infra* Table 1.

87. *See, e.g.*, Eric Wilson, *Before Models Can Turn Around, Knockoffs Fly*, N.Y. TIMES, Sept. 4, 2007, at A1 (describing one copyist's sales to Macy's and Bloomingdales, among others); Ben Winograd & Cheryl Lu-Lien Tan, *Can Fashion Be Copyrighted?*, WALL ST. J., Sept. 11, 2006, at B1 (describing canceled wholesale orders for Ananas handbag, once copyists produced versions for "between 10% and 50% of her $285 price"). On specialty retailers, see, for example, Kover, *supra* note 45 (describing Abercrombie & Fitch copy of bag by designer Nicole Dreyfuss); Susan Scafidi, *Karmic Relief*, COUNTERFEIT CHIC, May 10, 2007, http://www.counterfeitchic.com/2007/05/karmic_relief.php (last visited Feb. 18, 2009) (describing Forth & Towne copy of Narciso Rodriguez dress); Wilson, *supra* (describing $130 Bebe copy of $1700 Versace dress).

88. A.B.S., "[t]he uncontested champion of red-carpet knockoffs," sells to leading department stores. La Ferla, *Thousand Knockoffs*, *supra* note 82. By 2006, the Oscar-knockoff business involved more than a hundred companies, with annual sales of $300 million. *Id.*

89. Keith Naughton, *H&M's Material Girls: The Retailer Speeds Ahead with Fast Fashions*, NEWSWEEK WEB EXCLUSIVE, June 10, 2007, http://www.newsweek.com/id/33983 (quoting H&M's chief designer: "We don't copy the catwalks. . . . We take inspiration from what's happening in the culture, with celebrities and on the catwalks.").

90. Lau, *supra* note 17 ("We've all heard the fashion knockoff tales. On one hand, there's the down-market riffing on designer motifs that ranges from the H&Ms and Forever

are different. Like the copyists, they move product to market very quickly.[91] But their on-trend product, reactive though it is to the latest offerings of top designers, is not a precise copy. Instead, it is an adaptation or interpretation, developed by in-house designers.

The firms' difference in design practice is reflected vividly in their relative frequency of suit. We searched Westlaw and the Stanford IP Litigation Clearinghouse for copyright or trademark suits against Forever 21, H&M, and Zara between 2003 and 2008. Forever 21 was a defendant in fifty-three suits during this period, compared to two for H&M and none for Zara.[92] A review of the complaints in those cases shows that most of the Forever 21 suits alleged close copying, compared to at most one close copying complaint against H&M.[93] As a research tool for scholars and other interested parties, we have collected the complaints, and those brought against several other alleged copyists, and made them available online.[94] A selection of infringement suits against Forever 21, limited to the years 2007 and 2008, is summarized in Table 1 below.[95]

21s of the world to counterfeit duds channeled through Chinatown dens.").

91. Zara takes four to five weeks to move from conception through delivery. Ghemawat & Nueno, *supra* note 84, at 9. Modifications or restocking of existing designs takes just two weeks. *Id.*

92. *See* Stanford IP Litigation Clearinghouse, http://lexmachina.stanford.edu (last visited Feb. 18, 2009), and Westlaw's DOCK-FED-ALL file. The search terms included both H&M and Hennes and Mauritz, and both Zara and its corporate parent Inditex. Complaints were retrieved directly from each district court's electronic case filing system or clerk's office.

93. *See* Complaint at 3-4, Tokidoki, LLC v. H & M Hennes & Mauritz LP, No. 07-cv-1565 (C.D. Cal. Mar. 9, 2007) (alleging infringement of plaintiff's heart and crossbones trademark). The second suit arose from H&M's collaboration with designer Elio Fiorucci. The "Fiorucci" trademark had been acquired by a third party, which sued H&M for allegedly using the Fiorucci name when it promoted the collaboration. *See* Complaint, Edwin Co. v. H&M Hennes & Mauritz LP, No. 05-cv-4435 (S.D.N.Y. May 5, 2005).

94. *See* Berkman Center for Internet and Society, Harvard Law School, http://hub.law.harvard.edu/fashion (last visited Feb. 18, 2009).

95. Additional evidence comes from websites such as Fashionista, http://www.fashionista.com (last visited Feb. 18, 2009), which contain frequent examples of close copying by Forever 21, but not H&M or Zara. Nor, in several dozen interviews on the subject with a wide range of industry stakeholders, did we hear any specific complaints of close copying by either firm. For an exceptional, though general, allegation of close copying by H&M, see Winograd & Tan, *supra* note 87, at B1 ("Designer Catherine Malandrino . . . says she has seen almost identical versions of her blouses and sweaters in such stores as H&M and Esprit.").

Table 1. Selected U.S. Litigation Against Forever 21, 2007-2008[96]

Plaintiff	Articles at Issue
Anna Sui	Seventeen articles
Anthropologie	Ten articles
Bebe Stores	Twenty-eight articles
Carole Hochman	Nightgown with "Marilyn Monrose" fabric design
Diane von Furstenberg	Four wrap dresses and one blouse
Harajuku Lovers	Clothing with "Heart and Heart/Box design" print
Harkham Industries	Dress with "Shadow Fern" design
Trovata	Six articles

Fast-fashion copyists can have a beneficial effect upon trend adoption, since they reach customers at a lower price point who would otherwise not be reached by high-end designers.[97] But this benefit can be even better supplied by fast-fashion designers, who not only offer the on-trend product at a lower price but also supply differentiating details.

B. *The Threat to Innovation*

Mass copyists undermine the market for the copied good. Copies reduce the profitability of originals, thus reducing the prospective incentive to develop new designs in the first place. The predicted result, a reduced *amount* of innovation, is familiar from copying in other creative industries, such as file sharing of copyrighted music and films.

96. The information in this table is drawn from First Amended Complaint at 7, Anna Sui Corp. v. Forever 21, Inc., No. 07-cv-3235 (S.D.N.Y. June 26, 2007); Complaint at 5-6, Anthropologie, Inc. v. Forever 21, Inc., No. 07-cv-7873 (S.D.N.Y. Sept. 6, 2007); Amended Complaint at 3-13, Bebe Stores, Inc. v. Forever 21, Inc., No. 07-cv-35 (N.D. Cal. June 7, 2007); Complaint at 3-4, Carole Hochman Design Group, Inc. v. Forever 21, Inc., No. 07-cv-7699 (S.D.N.Y. Aug. 20, 2007); First Amended Complaint at 5-7, Diane von Furstenberg Studio, LP v. Forever 21, Inc., No. 07-cv-2413 (S.D.N.Y. Apr. 12, 2007); Complaint at 2-3, Harajuku Lovers, LLC v. Forever 21, Inc., No. 07-cv-3881 (C.D. Cal. June 14, 2007); Complaint at 4-5, Harkham Industries, Inc. v. Forever 21, Inc., No. 08-cv-3308 (C.D. Cal. May 19, 2008); Complaint at 6-9, Trovata, Inc. v. Forever 21, Inc., No. 07-cv-1196 (C.D. Cal. Oct. 8, 2007).

97. The designer can reach cost-conscious customers to some extent through bridge lines, *see* Sally Weller, Fashion's Influence on Garment Mass Production: Knowledge, Commodities and the Capture of Value 129-30 (Oct. 2003) (unpublished Ph.D. dissertation, Victoria University), *available at* http://wallaby.vu.edu.au/adt-VVUT/public/adt-VVUT20050201.101459/index.html, albeit usually not close copies, but a fast-fashion copy is a still lower price. It is therefore no surprise that designers have issued small "capsule" collections through fast-fashion firms in many instances. *See* Eric Wilson, *The Big Brand Theory*, N.Y. TIMES, Sept. 9, 2007, § 6 (Magazine), at 74.

Fashion copying is different from file sharing, however, in an important respect. File sharing provides access to essentially every musical work. Fashion copyists, by contrast, are selective. They have a business to run and costs to recoup, and so only the most profitable designs are copied. Moreover, not all copies reduce producer profits. Some are relatively harmless.

The selectivity of copyists, combined with the uneven effects on producer profitability, reduce the incentives of some producers—and the incentive to produce some products—more than others. Thus, mass copying can be expected to affect the *direction* of innovation as well, as we explain below.

1. *Harmful copying*

Copyists target designs that are technically and legally easy to copy. Consider, for example, a floral-patterned dress introduced by designers Dana Foley and Anna Corinna (F&C).[98] As a technical matter, the dress was easy to copy. It contained no exotic fabrics, complicated tailoring, or delicate embellishments that would make accurate outsourcing difficult.[99] It lacked any exterior brand logo that would subject a copyist to trademark liability. Its shape and exterior details did not so powerfully call to mind F&C's identity that trade dress protection would be available. These facts made the dress a good target for copyists.[100] The Appendix contains photographs of the original and a copy by Forever 21.

Moreover, for a midrange designer such as F&C, the sales of the copy substitute for and hence reduce sales of the original.[101] The original dress sold for hundreds, not thousands of dollars, which is within the reach of copyists' customers.[102] Sometimes the substitution is made by an aggressive retailer,

98. *See* La Ferla, *Faster Fashion, supra* note 82 (describing dress).

99. Difficult-to-copy details are not an absolute bar because the copyist could omit or alter them. But such changes are costly and risky, since the copyist cannot tell, without incurring substantial cost, whether the detail is essential to the design's appeal. Moreover, accuracy may be important to those consumers or retailers who know of the original and explicitly seek a close copy.

100. La Ferla, *Faster Fashion, supra* note 82 (noting that the original and copy were "almost identical," "[f]rom their fluid cut and noodle straps to the floral panel running down their fronts"). The floral print, assuming it satisfies copyright's originality requirement, provides a possible basis for a legal claim against Forever 21.

101. Kover, *supra* note 45 (describing accessory designer's drop in monthly revenue from $50,000 to $10,000, following imitation); Eric Wilson, *Simply Irresistible*, N.Y. TIMES, May 21, 2008, § SPG, at 1 (noting return of F&C dress by customers who saw the copy); *see also* William Filene's Sons Co. v. Fashion Originators' Guild of Am., Inc., 90 F.2d 556, 558 (1st Cir. 1937) ("A customer who . . . sees a copy . . . at another store at a lower price is quite likely to think that the retailer from whom she bought the dress lacks ability to select distinctive models and that she has been overcharged. Dresses are returned and customers are lost.").

102. Even customers of modest means might "trade up." For a discussion of this phenomenon, see MICHAEL J. SILVERSTEIN ET AL., TRADING UP: THE NEW AMERICAN LUXURY 23-25 (2003).

rather than the final consumer.[103] Either way, the profits of the original designer can be much reduced.

The extent of targeting, combined with the degree of substitution, explain why midrange designers account for most anecdotal complaints of design copying.[104] They also bring most of the lawsuits that attempt to circumvent the lack of design protection by alleging copyright or trade dress violations under existing law, against Forever 21 and other fast-fashion copyists.[105]

In addition to replacing sales, the prevalence of cheaper copies also may reduce demand for the original design. This "snob" effect[106] may reflect a consumer's desire for distinction from lower-status consumers or from other consumers more generally. It is a negative externality of overuse with analogies in trademark and copyright.[107] The effect is amplified, moreover, when the same shopper visits different stores—or different floors of the same department store—selling a particular design in its original and copied forms.[108]

2. *Distorting innovation*

The reduced profits can be expected to have a negative effect on the amount of innovation; this is a standard result of economic theory. But in addition, there is a second effect. The lack of protection against design copying, combined with the existence of trademark, trade dress, and other protections, also distorts the direction of innovation. Designers unprotected against design copying see a disproportionate effect on their profitability, and hence are discouraged from innovating—indeed, from entering in the first place. Designers who are protected by trademark and trade dress innovate in ways that play to these legal advantages. The resulting effect on the direction of innovation is to favor innovation by designers who already enjoy existing

103. *See, e.g.*, Winograd & Tan, *supra* note 87 (describing cancelled wholesale orders for Ananas bag); Felix Salmon, *Market Movers: Susan Scafidi on Copyrighting Fashion*, PORTFOLIO, Sept. 19, 2007, http://www.portfolio.com/views/blogs/market-movers/2007/09/19/susan-scafidi-on-copyrighting-fashion (listing examples in which initial or subsequent orders went to a copyist rather than the original designer).

104. *See, e.g.*, Kover, *supra* note 45 (describing designer's experience of learning that a nearly identical version of her necklace was selling for much less at a local accessories distributor); La Ferla, *Faster Fashion*, *supra* note 82 (describing F&C designer's discovery of a Forever 21 copy of her dress alongside the original on a fashion blog); Winograd & Tan, *supra* note 87 (describing canceled retail orders for Ananas bag after other companies provided similar, cheaper designs).

105. The pattern of suits is an imperfect proxy, because they are design piracy cases undertaken as copyright or trademark suits, the only available tools. The data do not account for instances of copying where the originator did not or could not sue. The suits tend to highlight that copying which is costliest for originators—copying costly enough to induce a suit with uncertain prospects.

106. *See* Leibenstein, *supra* note 3, at 189.

107. *See, e.g.*, William M. Landes & Richard A. Posner, *Indefinitely Renewable Copyright*, 70 U. CHI. L. REV. 471, 485-86 (2003).

108. *See supra* note 101.

protection by other aspects of intellectual property law, over innovation by designers—particularly small, new designers—who are not thus protected.[109] The existence of some kinds of intellectual property protection combined with the absence of design protection also gives designers the incentive to create some kinds of products over others.

Consider, for example, trade dress, which protects features of product design that serve as a source identifier, such as the distinctive hardware of a Coach handbag.[110] In two cases, the Supreme Court considered whether trade dress protection requires a showing that consumers have come to identify the feature with its maker, so-called "secondary meaning," or instead can rely upon the inherent distinctiveness of the feature. In the first case, outside the context of fashion designs, the Court ruled that secondary meaning was not necessary, in part because it recognized that such a requirement would place "particular burdens on the startup of small companies,"[111] because established firms are better positioned to imbue their products with secondary meaning. However, it later ruled that secondary meaning is required for trade dress in apparel and other product designs.[112] The result is to favor those incumbents with the resources to invest in the creation of secondary meaning.[113]

Trademark reinforces the incumbency bias in a powerful way. Brand logos provide strong protection against copying by legitimate producers. Designers understand the value of logos as an anticopying device.[114] Trademark protection accompanied by a lack of design protection thereby favors those firms that have strong trademarks and disproportionately encourages production of trademark-protected goods, such as articles with logos.[115] After all, if Gucci can prohibit copies of designs that employ its trademark interlocked "G's," but not a similar work that lacks the logos, it has an incentive to employ the logo. It also encourages the production of types of items, such as handbags, for which logos (and trade dress) are highly

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109. As Karl Lagerfeld put it, copying "can be very damaging for small firms, though for a house like Chanel, it means a lot less." Godfrey Deeny, *Lauren Fined by Paris Court, and So Is Berge*, WOMEN'S WEAR DAILY, May 19, 1994, at 1.

110. Coach, Inc. v. We Care Trading Co., 67 F. App'x. 626, 627 (2d Cir. 2002) (per curiam).

111. Two Pesos, Inc. v. Taco Cabana, Inc., 505 U.S. 763, 775 (1992); *see also id.* at 774 (rejecting a secondary meaning requirement out of concern for its "anticompetitive effects").

112. Wal-Mart Stores, Inc. v. Samara Bros., Inc., 529 U.S. 205, 215-16 (2000). The *Samara Brothers* Court did not address its earlier *Two Pesos* dicta.

113. *See, e.g.*, Complaint, Louis Vuitton v. Limited Brands, No. 05-cv-3980 (S.D.N.Y. Apr. 13, 2005) (asserting trade dress in a new line of bags); Scafidi, *supra* note 10, at 121.

114. *See, e.g.*, RENATA MOLHO, BEING ARMANI: A BIOGRAPHY 92 (2007) (quoting Giorgio Armani, who had been skeptical about monograms as an exterior decorative element, but acceded to an eagle logo for Emporio Armani to deter copiers, "even if it did not constitute a foolproof deterrent").

115. Scafidi, *supra* note 10, at 121-22; *cf.* Raustiala & Sprigman, *supra* note 11, at 1723 (acknowledging that trademark may be deployed to limit design copying).

complementary. Such "logoification" affects the communicative vocabulary that fashion provides, pulling fashion toward a status-conferring function and away from the communication of diverse messages.[116]

Incumbents that produce luxury goods have several further advantages. Many high-end articles are hard to copy with low-cost outsourcing[117] because they use expensive and distinctive materials and finishes.[118] Investments in brand image provide an additional source of protection, and hence a further source of innovation distortion. A luxury image and retail buying experience insulate some high-end products from harmful copying. Brand image cements customer loyalty, a pampering in-store experience is pleasurable, and some customers value the authenticity of purchasing an original.[119] These effects reduce substitution when copying occurs.[120] They may also discourage copying, as they leave a copyist uncertain whether an item's appeal comes from its design, or instead from the inimitable purchase experience. Large incumbents are better able to apply that investment across high volumes and a wide variety of items.[121] The F&Cs of the design world—less-established designers who are not large incumbents—are again at a disadvantage.[122]

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116. Copyright introduces a secondary distortion. Copyright protects distinctive fabric patterns and physically separable ornaments, thus encouraging a designer to favor patterns over solids or investments to develop a new design.

117. Bespoke copying, with high-cost manufacture and close fidelity, is still feasible.

118. *See, e.g.*, Binkley, *supra* note 73 (noting designers' increasing use of embroidery and other embellishments as a way to maintain a differentiated product); Reena Jana, *Put a Patent on That Pleat*, BUS. WK., Mar. 31, 2008, at 65 (describing Stuart Weitzman's use of titanium-reinforced heels, which are hard to copy because the heels will snap if copied using a cheaper material); *see also* Anna Van Praagh et al., *One of These Bags Cost £23,000, The Other's a Snip at £114*, MAIL ON SUNDAY (London), Mar. 11, 2007, at 68 (describing the £23,484 Louis Vuitton Tribute Patchwork bag, made from fifteen different Louis Vuitton bags, partly to deter counterfeiters).

119. Some consumers' valuation of a bag's authenticity may not be affected negatively by the existence of copies. Even if the copies look so good as to fool even a Louis Vuitton salesperson, and many will not know whether the bag is a copy, the purchaser of the Louis Vuitton handbag may take pleasure in knowledge of its authenticity. This is similar to a preference for an authentic piece of antique furniture over an identical-looking, well-made modern reproduction—the inner valuation of authenticity. Some classics of fashion might rise to take on this elusive aura in the face of existing knockoffs, but most items of fashion do not.

120. Consider, for example, a much-admired Christian Dior dress worn by actress Charlize Theron to the Oscars ceremony a few years ago. Copyist A.B.S. made a copy that was sold in department stores to promgoers. *Oscar Dress Knock-Offs and More*, CBS NEWS, Mar. 2, 2005, http://www.cbsnews.com/stories/2005/03/02/earlyshow/living/beauty/main677562.shtml (comparing original, "estimated to cost between $15,000 to $20,000," with A.B.S. copy selling for $200 to $300). There is no substitution here. No buyer of the copy could afford the original, and buyers of the original avoided the copy, given its lesser quality and price signal.

121. For some large incumbents, such as Christian Dior, the ready-to-wear collection is an advertisement that keeps the brand in the public eye, thereby permitting sales of profitable handbags and perfume whose sales depend upon brand image. For such firms, a decline in appropriability might push designers toward provocative but unwearable designs.

A common normative response against the idea of intellectual property protection for fashion design grows out of the assumption that fashion is a visible marker of status. On this theory, making it more difficult to copy fashion may seem undesirable because it would promote the ability of wealthy people to enjoy and signal their status through apparel that only they can have, and thwart those who want to purchase cheaper knockoffs of those goods. After all, if rampant copying makes available cheaper knockoffs, that may disrupt the ability of the wealthy to distinguish themselves as a group through the signal of fashion. On this view, perhaps permission to copy effectively softens the socially stratifying effects of fashion, while legal restrictions on copying would reinforce them.

But there is much more to fashion than signals about status. In light of the broader and more varied communicative and expressive aspects of fashion, status is only one of a wide variety of signals that fashion makes possible. Fashion has the potential to afford a broad vocabulary for the expression of a vast range of possible messages. Conscious or not, people's fashion choices signify and communicate, with meaningful individual and collective valences. We have identified this dynamic between differentiation and flocking as the key to the experience of fashion in social life. People use fashion to signal individual differences while also partaking in common movement with the collectivity. This model has informed our analysis of the formation and function of fashion trends among producers and consumers.

The current intellectual property regime, in which legal protection from design copying is lacking, tends, if anything, to push fashion consumption and production in the direction of status and luxury rather than more polyvalent innovation. In sum, we have noted two distortions. The first is toward the creation of designs that are legally more difficult to copy. Trademark and trade dress already protect the most salient status-signaling items in fashion, those adorned with logos of high-end brands. Therefore, those who want to enable effective status signal-jamming should be critical of trademark protection, and not necessarily resist copyright protection for fashion design. The second distortion is toward the creation of goods that are naturally (as opposed to legally) more difficult to copy, or goods that are more difficult for design copying to harm—for example, goods involving unusual or expensive materials or difficult workmanship.

For an example, see Cathy Horyn, *Offstage, Paris Fusses About Dior*, N.Y. TIMES, Jan. 23, 2000, § 9, at 1 (describing a Dior show by designer John Galliano that was "[d]rawn from a nether world of tramps and mental patients, . . . which had models draped eccentrically in newsprint-patterned silk and straitjackets"). A similar opportunity is unavailable to small, independent designers.

122. "Perhaps because Ms. Foley and Ms. Corinna have been content to remain just under the radar, companies that specialize in making cheap copies of designer fashion have been bold in appropriating their designs." Wilson, *supra* note 101.

The result of these distortions is to push creators toward the high-end realm of status and luxury, and away from devoting creative resources to design innovation. In a regime that protected original designs from copying, we would expect to see a shift in resources from developing brand-name or luxury goods or attempting close copies of designs toward developing a richer, more polycentric language of fashion that draws on and reinvents available inspirations and influences. We would expect to see greater range and variety in fashion innovation that would enlarge the vocabulary and the set of symbols with which we may produce meaning.

At bottom, though, the main reason not to accommodate the lovers of cheap fashion knockoffs is more basic. It is the same reason that we do not have a legal regime that permits people freely to make and sell photocopies of another author's book and retain the profits. It is the theory of incentives. Obviously, people always want to purchase inexpensive copies of creative works or have them for free. The reason to disallow it is not to deprive them of that benefit but rather to provide creators with an incentive to create. That is no less true in fashion.

C. *Is Piracy Really Beneficial?*

The analysis so far shows that copyists reduce the amount of innovation and distort its direction. In an influential article, Kal Raustiala and Chris Sprigman (RS) have advanced the counterintuitive argument that in the fashion industry, "piracy paradoxically benefits designers."[123] Some observers have found their argument persuasive.[124] Here we explain why we disagree with their argument.

RS start from the premise that derivation, inspiration, and borrowing are valuable and central to fashion and innovation. This general point is one that we too emphasize. But this does not make fashion relevantly different from music and film, where the same processes are important engines of innovation.[125] In order to conclude, as they do, that "[w]hat works to protect the creative process in film and music will have the opposite effect on the runway,"[126] more is needed.

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123. Raustiala & Sprigman, *supra* note 11, at 1722 ("[P]iracy paradoxically benefits designers by inducing more rapid turnover and additional sales."); *see also id.* at 1727 ("Our core claim is that piracy is paradoxically beneficial for the fashion industry, or at least piracy is not very harmful.").

124. *E.g.*, Orit Fischman Afori, *Reconceptualizing Property in Designs*, 25 CARDOZO ARTS & ENT. L.J. 1105 (2008); Surowiecki, *supra* note 12; Hal R. Varian, *Why That Hoodie Your Son Wears Isn't Trademarked*, N.Y. TIMES, Apr. 5, 2007, at C3; Patti Waldmeir, *Why Knock-Offs Are Good for Fashion*, FIN. TIMES, Sept. 12, 2007, at 12.

125. *See, e.g.*, LAWRENCE LESSIG, THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD 8-9 (2001).

126. Raustiala & Sprigman, *supra* note 12.

RS argue that the proliferation of copies of a style reduces the value of the style and renders it obsolete, which, in turn, causes consumers and hence producers to move on to new designs and trends.[127] At first, producer profits are high. Then the copyists come in, and snob effects reduce the value of the good in the hands of existing users and would-be new users. New sales grind to a halt, and existing users become dissatisfied with the goods that they have. That, in turn, provides a new opportunity to sell new goods.[128] RS call this "induced obsolescence."[129] Because the opportunity to sell new goods is profitable, and entails additional innovation, RS argue that copying benefits designers and innovation. Hence the "piracy paradox." In light of this benefit, RS conclude it is a bad idea to protect designers from piracy.[130] This type of argument has long played a role in debates over design protection.[131]

RS's analysis does not distinguish close copies from other relationships between fashion designs, such as interpretation, adaptation, homage, or remixing. In arguing that "growth and creativity in the fashion industry depend upon copying,"[132] the "piracy" part of the "piracy paradox" is seemingly meant to include both close copies and the full range of remixing and trend-joining activities.[133]

RS treat close copying and shared trends as indistinguishable for their purposes, referring to both phenomena as "copies."[134] We have explained

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127. Raustiala & Sprigman, *supra* note 11, at 1722 ("[T]he absence of protection . . . speeds diffusion and induces more rapid obsolescence.").

128. *Id.* at 1721-22.

129. The practical importance of "induced obsolescence" is uncertain because obsolescence has causes other than copying, including the passage of the seasons, a change in the spirit of the times that made the item salient, desire for the new, and the innovative product of other designers. These effects may be more important sources of obsolescence of fashion designs than the proliferation of copies. Even with respect to the example of induced obsolescence that RS provide, *see id.* at 1720-21 ("widely copied" Ugg boots), the explanation that copying by others destroyed the trend does not seem more likely than alternative explanations.

130. Raustiala & Sprigman, *supra* note 12 ("[G]rowth and creativity in the fashion industry depend upon copying.").

131. One close observer of the fashion industry in the 1930s, rehearsing the contrary positions in the debate, summarized the argument thusly: "On the other hand, it is pointed out that imitation means the rapid obsolescence of design which stimulates invention, assures to the designer a market, and brings to the industry accelerated business all along the line." Helen Everett Meiklejohn, *Dresses—The Impact of Fashion on a Business*, *in* PRICE AND PRICE POLICIES 299, 338-39 (Walton Hamilton ed., 1938).

132. Raustiala & Sprigman, *supra* note 12.

133. *See, e.g.*, Raustiala & Sprigman, *supra* note 11, at 1715 (concluding, after a discussion of variations on a driving shoe, that "[f]rom the perspective of the music or motion picture industries, this is called 'piracy'").

134. *See, e.g.*, *id.* at 1700 (treating "slavish copies" and "loose copies" in a like manner); *id.* at 1724 (similar); Raustiala & Sprigman, *supra* note 12 ("When [designers] see something that they like, they copy it—or, in the argot of the industry, they 'reference' it."). The term "copy," "copying," or its variants, has a variety of usages in technical copyright settings. *See, e.g.*, 17 U.S.C. § 101 (2006) (defining "copies" as "material objects, other than

above that it is important to disaggregate the phenomenon of close copying from the phenomenon of trends.[135] Doing so helps make visible the effects on innovation of close copying as distinct from the effects of interpretation, inspiration, or homage.[136] As we have also explained, there are also important differences among fast-fashion firms—differences between fellow designers such as Zara and H&M and copyists such as Forever 21—and their contrasting effects upon innovation.[137] To be complete, an analysis must attend to the distinctive effect of close copyists. To consider an analogy, the argument that a broad remixing right for music benefits subsequent innovators tells us little about whether to prohibit exact copies.[138]

RS's "induced obsolescence" account emphasizes the increased profitability of faster cycles of new fashion trends spurred by unchecked copying. The assumption of profitability calls to mind Dr. Seuss's famous fable of the Sneetches.[139] There, the seller offered a new fashion article—stars to adorn the chest of each Sneetch. When too many Sneetches bought the stars,

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phonorecords, in which a work is fixed . . . and from which the work can be perceived, reproduced, or otherwise communicated"); *id.* ("The term 'copies' includes the material object . . . in which the work is first fixed."); Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991) (using "copying" in two distinct senses, neither corresponding to the statutory definition of "copies"). As the Supreme Court explained in *Feist*, "Not all copying, however, is copyright infringement. To establish infringement, two elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original." *Id.* In the quoted passage, the first use of "copying" pertains to factual copying. One can engage in such "copying" without any actionable similarity. The second use of "copying" in *Feist* pertains to actionable copying. Notably, it is "constituent elements" that are subject to "copying" in this second sense, rather than the work itself.

135. *See supra* Part I.C.

136. RS do acknowledge that "copying may cause harm to particular originators," Raustiala & Sprigman, *supra* note 11, at 1727, but here, too, they mean "copying" to denote interpretation and other forms of reworking. They argue that this harm is unimportant, because a designer is "shrouded within a Rawlsian veil of ignorance," *id.*, and does not know in advance whether she will be a net borrower or lender of new material. That uncertainty does not plausibly extend to close copies, where the designers targeted for such copying are not also engaged in copying. *See also* Posting of Randy Picker to The University of Chicago Law School Faculty Blog, http://uchicagolaw.typepad.com/faculty/2006/11/understanding_t.html (Nov. 14, 2006, 10:56 EST) (suggesting that a firm knows whether it is mainly a target, rather than a perpetrator, of "vertical copying").

137. *Compare supra* Part III.A, *with Design Piracy Prohibition Act: Hearing on H.R. 2033 Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 109th Cong. 10 (2006) (testimony of Prof. Christopher Sprigman), 2006 WL 2127110 (F.D.C.H.) ("[S]ome of the biggest copyists are European: H&M, Zara and Topshop, these retailers, and European fashion firms that copy and that reinterpret and that recontextualize and that create derivative works and do all the things that fashion firms do."), *and* Raustiala & Sprigman, *supra* note 11, at 1737 (singling out H&M and Zara as "two of the major fashion copyists"), *and id.* at 1759 (similar).

138. *See, e.g.*, LESSIG, *supra* note 18, at 144 ("I fight for 'free culture.' My position is weakened by kids who think all culture should be free."). Lessig supports narrow copyright protection where "creativity would be hindered by the absence of this special privilege." *Id.* at 85.

139. DR. SEUSS, THE SNEETCHES AND OTHER STORIES (Random House 1961) (1953).

devaluing them, the seller provided a new service: star removal. These cycles continued, with the seller profiting from each cycle, until the Sneetches ran out of money.

This account, focused upon copies as the spur to the new, neglects the ex ante effect of the fashion cycle. What made star conferral and removal so profitable was that each Sneetch failed to recognize just how short-lived his fashion success would be, and to plan accordingly. Sneetches are not lifecycle pricers, in other words. But many fashion buyers are. If copying increases, and hence the fashion lifespan of the item falls, a consumer will recognize that fact and lower her willingness to pay. In the limiting case, producers' revenue is unchanged, as consumers make unchanged periodic payments for fashion, and profits fall due to higher (because more frequently incurred) design, materials, and other costs of production. Close copies make matters worse, reducing designer profits in the meantime by reducing sales.[140]

The adverse effects of copying explain why many designers oppose copying, just as they oppose counterfeiting of handbags. (RS's piracy paradox argument, if correct, ought to apply to fashion trademarks and copyrights as well.) RS pitch their paradox as an explanation for the otherwise puzzling equanimity with which designers greet copyists.[141] But that premise is faulty. In fact, many designers are vocal advocates against copying,[142] and, as Table 1 suggests, make use of the currently limited legal tools available to curb copyists.[143]

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140. This is not to say that life-cycle pricing will always undo a determined effort to profit from a deliberately short product lifespan. There is a substantial literature on "planned obsolescence" that shows how such efforts can succeed. *See, e.g.*, Jeremy Bulow, *An Economic Theory of Planned Obsolescence*, 101 Q.J. ECON. 729 (1986). Under some conditions, these models predict deliberately low durability; under others, producers choose high durability in order to discourage other firms from entering the market. The induced obsolescence account does not lay out why the conditions for optimal low durability are met here, and if they are, why producers do not take advantage of other instruments for decreasing durability, such as product design.

141. *See* Raustiala & Sprigman, *supra* note 11, at 1755-58 (contending that designers have great political power, and therefore the absence of design protection suggests that designers don't really want it); *cf.* Posting of Chris Sprigman to Public Knowledge, http://www.publicknowledge.org/blog/1653 (Feb. 20, 2008, 18:41 EST) (describing proposed bill as "the CFDA's little vanity project").

142. *See supra* note 9 (referring to collected quotations from designers and fashion executives). To be sure, on occasion, "[d]esigners admit to a certain pride that they are being copied. But their corporate backers are not so relaxed: piracy means an inferior product that too many may mistake for the real thing." *Business Sense*, ECONOMIST, Mar. 6, 2004, at 6 (survey). That sense of validation—and the desire to be provocative—explain why, while Marc Jacobs the firm opposes copying, Marc Jacobs the designer (and Louis Vuitton creative director) declares not only design piracy but even counterfeiting to be "fantastic." DANA THOMAS, DELUXE: HOW LUXURY LOST ITS LUSTER 276 (2007).

143. *See also* Barnett et al., *supra* note 72, at 29 (compiling infringement suits reported by *Women's Wear Daily*). Further evidence comes from European practice, where designers use the relatively strong protection available there to curb close copies. *See infra* notes 173-85 and accompanying text.

Vigorous designer opposition to copyists is not new. Designers cared so much in the 1930s that they set up an enormous, costly, and successful private system of self-help, the Fashion Originators' Guild of America, which boycotted retailers that did business with copyists, until it was enjoined as a violation of antitrust law.[144] Their decades-long lobbying effort for stronger protection has been unsuccessful, not because designers are not harmed, but because they are not sufficiently powerful.[145]

The induced obsolescence account has a further evidentiary limitation. If designers did profit from "induced obsolescence" of their products, they could induce the obsolescence themselves by taking a lax approach to counterfeits, or by engineering products designed to fall apart quickly.[146] That they do not do so where it is currently feasible suggests that inducing obsolescence is not what fashion designers are engaged in. Even with protection, designers interested in an induced-obsolescence strategy could implement it by disclaiming protection against copying, or by burning out the trend more profitably on their own, without any help from copyists.[147] Moreover, since, as we have explained, fashion trends do not depend on copying, designers would not need to induce obsolescence through copies in order to ensure the robust trends that comprise fashion.

IV. TAILORED PROTECTION FOR ORIGINAL DESIGNS

The analysis up to this point explains how the increased ease of copying disrupts innovation. It reduces the amount and shifts the direction. That, in turn, undermines the formation of differentiated communicative tools. Our proposed policy response aims to preserve differentiated innovation. Our distinctive goal is to prohibit close copies while preserving flocking and differentiation in its varied forms of inspiration, homage, referencing, and quotation. The guiding principle throughout is to avoid the hypertrophy or thicket of rights that is threatened by excessive, multiple rightsholders.[148]

The proposal that thus grows out of our analysis is a narrow new right that protects designers against close copies of their designs but does not protect against looser forms of similarity that may arise as designers commonly

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144. *See* Marcketti & Parsons, *supra* note 78, at 226.

145. In particular, many manufacturers and retailers, including department stores, benefit from copying.

146. For a discussion of such strategies, see Barak Y. Orbach, *The Durapolist Puzzle: Monopoly Power in Durable-Goods Markets*, 21 YALE. J. ON REG. 67, 91-92 (2004).

147. RS suggest that designers' bridge lines accomplish this, *see* Raustiala & Sprigman, *supra* note 11, at 1724-25, but their example, Armani, seems inapt at least as applied to close copying, since Armani's five lines—Giorgio Armani, Armani Collezioni, Armani Jeans, Emporio Armani, and Armani Exchange—each echo the Armani style, but do not offer the same design at a lower price point. Self-protectiveness about brand image may limit the extent of self-cannibalization. *See* Barnett, *supra* note 10, at 1406-07.

148. *See* MICHAEL HELLER, THE GRIDLOCK ECONOMY (2008).

participate in fashion trends. In recommending tailored protection for the fashion industry, we join other scholars who have urged industry-specific solutions to the regulation of innovation.[149]

Part IV.A describes the scope of the proposed new right. Part IV.B considers some objections to our proposal.

A. *The Scope of the Right*

The proposed right has two components. First, it provides copyright protection to original works of apparel, even though these useful articles are currently not copyrightable. Second, it denies copyright protection where the later work, though arguably "substantially similar"—the usual standard for copyright liability—is also substantially different.

The Copyright Act accords protection to "useful articles"—articles, such as apparel, that have "an intrinsic utilitarian function"[150]—only to the extent that protected features "can be identified separately from, and are capable of existing independently of," the utilitarian aspects.[151] This latter statutory requirement goes by the name of "separability." The exclusion of apparel results from a particular interpretation of separability for works that have both a functional and an expressive component, such as an item of apparel or an architectural work.

Separability can take a physical or conceptual form. Physical separability is present when the article, minus the protectable element, suffers no loss of utility, and the separated element can stand alone as a work of art.[152] Physical separability suffices to protect an appliqué sewn onto a sweater, but not the cut, color, and appearance of an article of apparel.

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149. *See, e.g.*, Dan L. Burk & Mark A. Lemley, *Policy Levers in Patent Law*, 89 VA. L. REV. 1575 (2003) (advocating industry-specific judicial interpretation of patent doctrines); C. Scott Hemphill, *Paying for Delay: Pharmaceutical Patent Settlement as a Regulatory Design Problem*, 81 N.Y.U. L. REV. 1553 (2006) (offering an industry-specific approach to antitrust law); William Fisher, *The Disaggregation of Intellectual Property*, HARV. L. BULL., Summer 2004 (offering a cautious endorsement of industry-specific intellectual property rules).

150. 17 U.S.C. § 101 (2006) (defining a "useful article" as "an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information").

151. *Id.* For a historical account of this state of affairs, see 1 WILLIAM F. PATRY, COPYRIGHT LAW AND PRACTICE 269-70 (1994).

152. 1 PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 2.5.3 (3d ed. 2005 & 2008 Supp.).

Most courts also recognize the possibility of conceptual separability.[153] Defining its boundaries is a notoriously difficult task, and courts and commentators have reached a wide range of views as to the proper breadth of the doctrine.[154] An expansive understanding of conceptual separability would be one way to provide protection for many designs, without the need for statutory change. That is, courts could potentially deem design aspects of a garment to be conceptually separable from a garment's usefulness, and hence protected by current copyright law. The difficulty, however, is that, as with creative works of architecture, for example, design features often are treated as inseparable from a work's function.

The statutory alternative, and a more complete solution, is to take original fashion designs outside the domain of the separability regime, by adding them as a new and distinct type of copyrightable subject matter. This is a familiar part of copyright policymaking. In 1990, Congress took that step with respect to architectural works.[155] We suggest that fashion designs receive copyright

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153. *Compare* Pivot Point Int'l, Inc. v. Charlene Prods., Inc., 372 F.3d 913, 931 (7th Cir. 2004) (en banc) (recognizing conceptual separability), *and* Kieselstein-Cord v. Accessories by Pearl, Inc., 632 F.2d 989, 993 (2d Cir. 1980) (same), *with* Esquire, Inc. v. Ringer, 591 F.2d 796, 803 (D.C. Cir. 1978) (limiting separability to physical separability). *See also* 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.08[B][3] (2008) (concluding that conceptual separability is a valid approach because the legislative history of the 1976 Act relies approvingly upon an earlier case, *Mazer v. Stein*, that found conceptual separability but not physical separability).

154. The Seventh Circuit recently collected six possible tests in *Pivot Point*: [1] where the article's artistic features are "primary" and the utilitarian features are "subsidiary" (following *Kieselstein-Cord*, 632 F.2d 989); [2] where the article "stimulate[s] in the mind of the beholder a concept that is separate from the concept evoked by its utilitarian function," *see* Carol Barnhart Inc. v. Econ. Cover Corp., 773 F.2d 411, 422 (2d Cir. 1985) (Newman, J., dissenting); [3] where the article "would still be marketable to some significant segment of the community simply because of its aesthetic qualities," *see* Galiano v. Harrah's Operating Co., 416 F.3d 411, 421 (5th Cir. 2005); [4] where "the artistic design was not significantly influenced by functional considerations"; [5] where "the feature[] can stand alone as a work of art traditionally conceived," and the article "in which it is embodied would be equally useful without it"; and [6] where "the artistic features are not utilitarian." *Pivot Point*, 372 F.3d at 923. The Seventh Circuit then devised its own test, requiring that separability exists when the article's artistic aspects can be "conceptualized as existing independently of their utilitarian function," a finding informed by "whether the design elements can be identified as reflecting the designer's artistic judgment exercised independently of functional influences." *Id.* at 931; *see also* 1 NIMMER & NIMMER, *supra* note 153, § 2.08[B][3] (canvassing this "fractured field").

155. *See* Architectural Works Copyright Protection Act, Pub. L. No. 101-650 § 703, 104 Stat. 5089, 5133 (1990) (adding "architectural works" to subject matter of copyright); *id.* § 702(a), 104 Stat. at 5133 (adding "architectural work" to the definitions in 17 U.S.C. § 101); *id.* § 704(a), 104 Stat. at 5133 (placing limits on the copyright in an architectural work, including denial of protection for certain pictorial representations); Donald Frederick Evans & Assocs., Inc. v. Cont'l Homes, Inc., 785 F.2d 897, 901 n.7 (11th Cir. 1986); 1 NIMMER & NIMMER, *supra* note 153, § 2.20 ("United States copyright law prior to [1990] did not accord protection to structures, except those few that served no utilitarian purpose.").

protection that runs parallel to that now granted to buildings and architectural plans.[156]

What counts as infringement is a second crucial question. To begin, standard features of a design—a pinstripe, say, or an A-line silhouette—are not copyrightable features. Their appearance in a latter work would not give rise to an infringement claim. This is a familiar element of copyright law.[157] Beyond that, copyright law provides that, as to protectable elements of the work, "substantial similarity" between the two works amounts to infringement. This rule applies not only to standard copyrighted works such as books, art, film, and music, but also to newly added subject matter such as architectural works.[158] Substantial similarity varies with the circumstances. Where copyright subsists in a compilation of unprotectable parts, the copyright is sometimes said to be "thin," and protects the originator only against relatively close copies.[159] One proposed bill to protect original fashion designs applies a substantial similarity standard.[160]

Our analysis of copying and trends recommends a different and narrower rule. We would prohibit only close copies, in order to support differentiation amidst flocking. If a designer copies protectable expression from an earlier work, yet also makes significant changes, the designer is no longer liable. To the extent a thin compilation copyright does not narrow substantial similarity to

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156. The architectural amendment was made, in part, to comply with the Berne Convention. *See* 1 NIMMER & NIMMER, *supra* note 153, § 2.20. Arguably, the change proposed here is necessary to comply with TRIPS requirements as to industrial design. The TRIPS component of the Uruguay Round Agreement requires members to "provide for the protection of independently created industrial designs that are new or original." Agreement on Trade-Related Aspects of Intellectual Property Rights art. 25, Annex 1C, Apr. 15, 1994, 33 I.L.M. 1197, 1207 (1994). United States design patents provide protection for industrial designs that are "new," but the TRIPS agreement's use of "or" suggests that designs that are original, but not new, must also receive protection. *See* Jerome H. Reichman, *Universal Minimum Standards of Intellectual Property Protection Under the TRIPS Component of the WTO Agreement*, 29 INT'L LAW. 345, 376 (1995). Extension of copyright would afford protection to originality even without novelty.

157. 17 U.S.C. §§ 101-102 (2006).

158. *Id.* § 101 (including definition for "architectural works," and extending "pictorial, graphic, and sculptural works" to include architectural plans); *id.* § 102 (including "architectural works" in the coverage of copyright).

159. *See, e.g.*, 4 NIMMER & NIMMER *supra* note 153, § 13.03 (noting that where protection is thin, the degree of required similarity required to satisfy "substantial similarity" increases); Intervest Constr., Inc. v. Canterbury Estate Homes, Inc., No. 07-12596, 2008 WL 5274274 (11th Cir. Dec. 22, 2008) (concluding, in light of thinness of copyright in a floor plan, that differences in protectable expression were significant enough to justify conclusion that works were not substantially similar).

160. *See, e.g.*, Design Piracy Prohibition Act, H.R. 2033, 110th Cong. §§ 2(a), (d) (2007) (adding fashion designs to types of design protected without altering "substantial similarity" infringement standard). *But see* Design Piracy Prohibition Act, S. 1957, 110th Cong. § 2(d) (2007) (altering applicable infringement standard to embrace only designs which are "closely and substantially similar in overall visual appearance to a protected design").

protection against only close copies, our proposal departs from the adage offered by Judge Learned Hand that "it is enough that substantial parts were lifted; no plagiarist can excuse the wrong by showing how much of his work he did not pirate."[161] Under our proposed rule, showing a substantial difference does indeed excuse the wrong.[162]

This is not a radical step, either. In 1984, an analogous right was enacted as to another copyright misfit, namely the designs of semiconductor chips, and in particular the stencil-like "mask works" used in chip production. Protection extends to reproduction, importation and distribution of the mask work in question, and to a product embodying it.[163] Substantially similar products are not subject to the prohibition. There is no broad control over the path of future innovation. We propose a similar standard here.

The difference has important consequences. A designer is free to join a trend once it has begun, adopting the trend feature but altering the details to satisfy particular demand for differentiation. The test we propose would ask whether an ordinary observer could discern the copy from the original.[164] This would be a test of "substantial dissimilarity." If the two works were substantially dissimilar, no infringement would be found.

Like other intellectual property standards that require subjective comparison of two works, our substantial dissimilarity test can raise difficult line-drawing problems. Consider, for example, Yves Saint Laurent's famous suit against Ralph Lauren, brought under French copyright law, alleging infringement of a black tuxedo dress designed by Saint Laurent.[165] Although the two articles differed in fabric (silk rather than wool), pockets (YSL's had none), lapel width, and the substitution of black buttons for gold, the court

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161. Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 56 (2d Cir. 1936).

162. Nor do we propose any right to control the preparation of derivative works. That right "substantially overlaps the scope of the reproduction right," 2 GOLDSTEIN, *supra* note 152, § 7.3.1, though the degree of overlap is open to dispute. The ordinary case of a protected article that "borrows expressive elements from the original, but adds expressive elements of its own," would arguably implicate the reproduction right, rather than the derivative works right. *Id.* We do not mean to enter that debate. The point here is that we intend a right narrower than the usual copyright.

163. 17 U.S.C. § 905 (2006).

164. Tim Gunn, former chair of fashion design at Parsons who later gained fame on the television show *Project Runway*, says "I draw a line at something that, if you squint your eyes, you really can't discern it from the original." Serena French, *Knock It Off!—Fashion Fights Back at Year of the Copycat; Counterfeit Counterattack*, N.Y. POST, May 1, 2007, at 41.

165. Société Yves Saint Laurent Couture S.A. v. Société Louis Dreyfus Retail Mgmt. S.A., [1994] E.C.C. 512, 514 (Trib. Comm. (Paris)). Yves Saint Laurent's version sold for $15,000, Ralph Lauren's for $1000. Yves Saint Laurent sued after seeing the Ralph Lauren dress in a French fashion magazine. The dress was shown as part of a larger editorial spread featuring women's fashion inspired by the tuxedo (in French, *le smoking*), see *Femmes en smoking*, JOURS DE FRANCE, Dec. 7, 1992, at 138-43—a nice example of differentiation amidst flocking.

imposed liability.[166] The Appendix contains photographs of both dresses. On our standard, the substantial differences would suffice to avoid liability, but we concede that the question is a close one. That said, these problems seem no more severe than those in ordinary copyright, trademark, or patent infringement cases.

Why not go further and grant a broader right? Why not provide protection for "the cut of a dress or the sleeve of a blouse"[167]—and in essence, grant a single firm control over the exploitation of a trend? This possibility, sometimes described by intellectual property scholars as the granting of a "prospect," raises some familiar problems that are likely to be particularly acute in the fashion context. Here, as in many areas of creative endeavor, good ideas are dispersed.[168] Ideas for differentiated products that participate in the trend are scattered among many designers, and a single firm that controls the trend is less likely to get it off the ground. Identifying and negotiating with those designers who would use the feature is likely to be very costly. Moreover, many products would likely infringe multiple features, compounding the negotiation problem.

At the same time, the granting of a broad right would provide no valuable incentive to upstream development. Unlike, say, a blockbuster movie or basic technology that forms the basis for downstream products, a trend feature is not the result of a single creator's deep thinking or heavy investment. Rather, trend features arise in the collective way we described in Part II. Legal control is not needed to elicit these ideas, and a legal entitlement would likely create difficult disputes over ownership, given the often simultaneous or near-simultaneous processes by which multiple designers flock to a particular idea.

What should be the appropriate duration of protection? Ordinary copyright lasts for the life of the author plus seventy years.[169] Recent fashion proposals considered by Congress provide for three years of protection.[170] In our view, this is plenty of time. Most fashion articles have only a brief opportunity to recoup the cost of design in any event. A short lifespan has the additional virtue of limiting the set of articles that a new design might possibly infringe.

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166. Deeny, *supra* note 109; Michele Ingrassia, *A Not-So-Little Black Dress*, NEWSWEEK, June 6, 1994, at 72. The judgment was $383,000. Agins, *supra* note 72. The presiding judge added that the Saint Laurent dress, "I must say[,] is more beautiful—though, of course, that will not influence my decision." Deeny, *supra* note 109, at 11.

167. Jessica Litman, *The Exclusive Right to Read*, 13 CARDOZO ARTS & ENT. L.J. 29, 44 (1994).

168. *See, e.g.*, SUZANNE SCOTCHMER, INNOVATION AND INCENTIVES 38 (2004); C. Scott Hemphill, *Network Neutrality and the False Promise of Zero-Price Regulation*, 25 YALE J. ON REG. 135, 174 (2008).

169. 17 U.S.C. § 302(a) (2006). The term is ninety-five years for anonymous works, pseudonymous works, and works made for hire. *Id.* § 302(c).

170. Design Piracy Prohibition Act, H.R. 2033, 110th Cong. § 2(c) (2007); Design Piracy Prohibition Act, S. 1957, 110th Cong. § 2(c) (2007).

Some proposals incorporate fashion within an expansion of Chapter 13 of the Copyright Act, which was set up as a catchall for other design rights.[171] Should we take this opportunity to add other design rights such as furniture? That analysis is beyond the scope of this Article. We have not considered whether furniture or other design-intensive industries, which also lack protection, have a similar equilibrium of flocking and differentiation to preserve. Much seems different, including the role of trends, and the extent to which a trend feature coexists with differentiation. Seasonality is absent; fast fashion, too. The dynamics of furniture and other design-intensive industries await future research.

B. *Considering Objections*

This Subpart evaluates challenges to our argument that narrow copyright protection reduces copying, that reduced copying leads to more innovation, and that increased innovation is desirable.

First, will new protection in the United States have any effect upon copying, given existing protection in Europe (among other jurisdictions[172])? The European design right protects the features and overall appearance of an article.[173] Although there is a registration system, the strong protection granted to unregistered designs makes registration unnecessary.[174] Individual states

171. Chapter 13 of the Copyright Act has the grand title "Protection of Original Designs," and protects, in seemingly general terms, "useful articles." 17 U.S.C. § 1301(a) (2006). But "useful articles" is defined therein as a "vessel hull, including a plug or mold." *Id.* § 1301(b)(2). The proposed Design Piracy Protection Act expands "useful articles" to include apparel, handbags, belts, and eyeglass frames. Design Piracy Prohibition Act, H.R. 2033, 110th Cong. § 2(a) (2007).

172. Although we focus upon European protection, it is notable that other jurisdictions also protect original designs. For example, Japan's industrial design right protects the "form, pattern, or color of an object or a combination of these, which appeals visually to the viewer's sense of aesthetics." Japan External Trade Organization, Investing in Japan § 5.7.1, http://www.jetro.go.jp/en/invest/setting_up/laws/section5/page7.html (last visited Feb. 18, 2009). In addition, unfair competition law applies to original designs. *Id.* § 5.7.2; *see also* Interview with Shigekazu Yamada, Nat'l Ctr. for Indus. Prop. Info. & Training, Japan Patent Office, in Tokyo, Japan (May 21, 2008) (describing seizure of counterfeit Hermes purses for violating unfair competition law).

173. Council Regulation 6/2002, art. 3, 2002 O.J. (L 3) 1, 4 (EC) (protecting "appearance of the whole or a part of a product resulting from the features of, in particular, the lines, contours, colours, shape, texture and/or materials of the product itself and/or its ornamentation").

174. Unregistered designs are protected from copying for three years. *Id.*, art. 19 (L 3) 7 (scope of protection); *id.*, art. 11 (L 3) 5 (duration of protection). Registration extends the duration to twenty-five years, if renewed every five years, *id.*, art. 12 (L 3) 5, and adds a protection against independent invention. *Id.*, art. 19 (L 3) 7. Designers enjoy a one-year grace period after the design's public debut before registration is necessary. *Id.*, art. 7(2) (L 3) 5; *see also* Hedrick, *supra* note 13, at 251; OFFICE FOR HARMONIZATION IN THE INTERNAL MARKET, FREQUENTLY ASKED QUESTIONS ABOUT THE COMMUNITY DESIGN: GENERAL QUESTIONS, http://oami.europa.eu/ows/rw/pages/RCD/FAQ/RCD1.ed.do (last visited Jan.

provide additional protection.[175] Cease-and-desist letters do much of the work of enforcement,[176] but litigation is significant too. Table 2 summarizes a few recent cases.

Table 2. Selected European Litigation, 2005-2008

Case	Articles at Issue
Hennes & Mauritz AB v. Primark Stores	"[A] Chinese-style dragon and flame pattern, a target-style design, a graffiti pattern, a . . . badge design and a floral print"[177]
Monsoon v. Primark Stores	Two skirts, swimwear, trousers, a scarf, and patterned socks[178]
Chloé v. Kookaï	Handbag[179]
J. Choo Ltd. v. Towerstone Ltd.	Handbag[180]
Chanel v. Camille & Lucie	Jewelry[181]

31, 2009).

175. For example, French law includes fashion explicitly in copyrightable subject matter. CODE DE LA PROPRIÉTÉ INTELLECTUELLE art. L112-2 (1994), *available at* http://www.legifrance.gouv.fr/html/codes_traduits/cpialtext.htm (including, among the "works of the mind" covered by copyright law, "creations of the seasonal industries of dress and articles of fashion," that is, "industries which, by reason of the demands of fashion, frequently renew the form of their products," and naming a long list of articles, fabrics, and other products).

176. Susan Scafidi, *No, No, Naf Naf*, COUNTERFEIT CHIC, July 21, 2008, http://www.counterfeitchic.com/2008/07/no_no_naf_naf.php (last visited Feb. 18, 2009) (asserting that European companies "regularly settle" rather than litigate); *see also* Telephone Interview with Nathalie Moullé-Berteaux, Intellectual Prop. Dir., LVMH Fashion Group (Nov. 21, 2008) (noting firm's vigorous cease-and-desist practice against infringers); *cf.* Video: Stop Fashion Piracy, http://www.stopfashionpiracy.com/theindustryspeaks.php (last visited Oct. 4, 2008) (quoting Robert Triefus, EVP Communications, Armani, that European protections have a substantial effect).

177. Jim Armitage, *H&M Seeks Redress from Primark over "Copycat" Designs Row*, EVENING STANDARD (London), Mar. 8, 2005, at 35. H&M alleged damages of £100,000. *Id.*

178. Lucy Farndon, *Monsoon Sees Red*, DAILY MAIL (London), Apr. 19, 2005, at 68 (noting that Monsoon claims £200,000 in damages); Laura Peek, *Copycat or Coincidence? Stores Face Court Clash*, TIMES (London), Apr. 19, 2005, at 5. This case, like the H&M case against Primark, later settled. Lauren Veevers & Danny Fortson, *Primark Chic*, INDEPENDENT ON SUNDAY (London), Nov. 5, 2006, at 24.

179. Hadley Freeman, *Bag Snatchers: High Street Copies Taken to Court*, GUARDIAN (London), July 23, 2005, at 10. The suit proceeded under both European and UK design protection. For an earlier case under the UK design right, see Lambretta Clothing Co. v. Teddy Smith Ltd., [2004] EWCA Civ. 886 (Eng.), *available at* http://www.bailii.org/ew/cases/EWCA/Civ/2004/886.html (track suit with same arrangement of colors).

180. J. Choo Ltd. v. Towerstone Ltd., [2008] EWHC 346 (Eng.), *available at* http://oami.europa.eu/pdf/design/cdcourts/Handbags.pdf. Jimmy Choo has brought multiple suits asserting European design protection. *See, e.g.*, *New Look Withdraws 1,000 Shoes to Settle Copying Case*, TIMES (London), Sept. 13, 2006, at 56 (noting that "the designer had used relatively new European legislation").

Case	Articles at Issue
Isabel Marant v. Naf Naf	Little black dress[182]
Karen Millen Ltd. v. Dunnes Stores	Two striped shirts and a knit top[183]

European protection has a limited effect upon the U.S. market. Fast-fashion firms based in Europe, such as Zara and H&M, are subject to design protection. We would therefore expect them to avoid close copying as to products sold in Europe. If these firms sell the same products in both Europe and the United States, then we should expect relatively few close copies in the United States as well. As discussed above, that is indeed what we observe.[184]

By contrast, Forever 21 is based in the United States, and has no stores in Europe.[185] For it and other U.S.-focused copyists, European protection has no effect upon the production of close copies. Meanwhile, for U.S. designers who lack a substantial non-U.S. business, the entire market is subject to copyists. Thus, existing European protection does relatively little to help many U.S. designers.

Second, will our proposed protection really reduce copying? Louis Vuitton has the resources to sue, but do smaller firms? We think the answer is yes. Under existing law, small designers already file suit. In the Forever 21 suits summarized in Table 1, many are by small designers. We see no reason to doubt they would take advantage of expanded protection. In this respect, fashion is no different from other areas of copyright, patent, and trademark, in which small plaintiffs are able to invoke their rights,[186] sometimes with the assistance of counsel retained on a contingency basis.[187]

181. Katya Foreman & Emilie Marsh, *Hermès, Dior Notch Counterfeit Wins*, WOMEN'S WEAR DAILY, Apr. 9, 2008, at 2. Chanel was joined in this suit by Givenchy, Van Cleef & Arpels, Boucheron and Cartier; the total fine was 700,000 euros, or about $1.1 million. *Id.* In a separate suit filed by Christian Dior Couture, a further 150,000-euro ($230,000) fine was imposed. *Id.*

182. *In Brief: Penalty for Copying*, WOMEN'S WEAR DAILY, July 18, 2008, at 2; *Condamnation pour copie: Naf Naf ne trouve pas cela "Marant,"* AGORAVOX, July 22, 2008, http://www.agoravox.fr/article.php3?id_article=42446. Naf Naf had sold a 70-euro copy of a dress that retails for 250 euros. The court imposed damages of 75,000 euros.

183. Karen Millen Ltd. v. Dunnes Stores, [2007] IEHC 449 (Ir.).

184. Raustiala and Sprigman draw the opposite conclusion from a single global product: that it shows that Zara and H&M operate with impunity in Europe. Raustiala & Sprigman, *supra* note 11, at 1737.

185. *See* Forever 21, Store Locator, http://www.forever21.com/store/storelocator.asp (last visited Jan. 31, 2009). In addition to Forever 21, the other copyists discussed *supra*, such as A.B.S. and unbranded manufacturers that sell to U.S. department stores, are focused upon the U.S. market.

186. *See, e.g.*, Rogers v. Koons, 960 F.2d 301 (2d Cir. 1992) (copyright); Big O Tire Dealers, Inc. v. Goodyear Tire & Rubber Co., 561 F.2d 1365 (10th Cir. 1977) (trademark); Kearns v. Ford Motor Co., 726 F. Supp. 159 (E.D. Mich. 1989) (patent).

187. This arrangement is common in patent cases. For an example in trademark and

The designer will sue only if she expects a positive return on her litigation investment. Again, the existence of suits under the current regime shows that sometimes the stakes are large enough. Even where copyist manufacturers are judgment-proof, copyist retailers, generally speaking, are not. To be sure, where damages are small or difficult to calculate, deterrence is weakened, as in other areas of intellectual property. Damages here can be augmented by statutory damages[188] and awards of attorney's fees.[189]

One way to strengthen deterrence is to consider mechanisms by which designers might band together. Economies of scale in enforcement are familiar from musical collective rights organizations such as ASCAP, and from the original Fashion Originators' Guild. Like these organizations, a modern-day Guild could monitor and thereby deter unlicensed use. The new Guild, backed by law rather than the threat of boycott, would provide a credible enforcement commitment in situations where individual designers found enforcement too expensive to be worthwhile.[190]

A related objection is that a new right will be an effective weapon only in the hands of established designers, and will be used not against copyists, but against the very designers most in need of protection. This objection has greatest force as applied to broad design protection. It seems unlikely to pose much trouble for the narrow right against close copies that we propose here.

Third, does reduced copying lead to more innovation? After all, it is sometimes argued, there is a lot of innovation already. As we have explained, that innovation is increasingly under threat, particularly innovation not already protected by trademark or investments in brand image. But there is a more basic point. The level of existing innovation, high or low, tells us little about the incremental effect of a policy change. The fact that music sales are large, despite illegal copying, hardly demonstrates that copying is good or even neutral for creators of new music. As we have explained, fashion is relevantly similar to other areas of creative production, and we expect designers to respond to economic incentives in the usual way.

Strong real-world evidence that protection reduces copying, which in turn increases innovation, comes from our single national experiment with

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copyright, see *JCW Invs., Inc. v. Novelty, Inc.*, 482 F.3d 910 (7th Cir. 2007).

188. *See, e.g.*, 17 U.S.C. § 504 (2006) ($30,000 for copyright infringement, or $150,000 in the case of willful infringement).

189. *See* 15 U.S.C. § 1117(a) (2006) (trademark); 17 U.S.C. § 505 (2006) (copyright); 35 U.S.C. § 285 (2006) (patent).

190. In this respect, our Guild proposal resembles intellectual property enforcement insurance, which covers the insured's litigation expenses in case of a dispute. For an example, see Intellectual Property Insurance Services Corporation, IP Abatement Insurance, http://www.ipisc.com/products/insurance-policies/abatement (last visited Feb. 18, 2009). Such insurance serves to commit a rightsholder to pursue a claim. For a formal explanation, see Gerard Llobet & Javier Suarez, Patent Litigation and the Role of Enforcement Insurance (Feb. 2008) (unpublished manuscript, *available at* http://www.cemfi.es/~llobet/PI_paper.pdf).

protection for original designs. During the heyday of the Fashion Originators' Guild, the Guild's privately enforced protection reduced copying greatly.[191] Moreover, contemporaneous observers understood that the prohibition of piracy caused manufacturers to shift production from copying to original design.[192]

A fourth type of objection views substantial existing innovation as an argument against protection, not because protection won't increase innovation, but because it will. In particular, increased innovation might be thought undesirable if it leads to excessive product differentiation. This possibility—a kind of over-entry, in which additional entry incurs social costs but does little to better satisfy consumer wants—has long been contemplated by a large theoretical literature in economics.[193] Despite this theoretical possibility, we see no reason to conclude that it is unusually severe in fashion compared to other areas of creative production. Absent such a reason, either fashion should enjoy the higher protection of other types of creative production, or these other areas should also be denied copyright protection out of fear of excessive differentiation.[194]

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191. *See, e.g.*, *Guild's Work Good in Upper Brackets*, N.Y. TIMES, Feb. 23, 1936, at 17 (noting general agreement among observers that the Guild's program cut piracy by 75 percent for higher-end dresses, and by 40 to 50 percent for midrange dresses).

192. *See, e.g.*, *Complete Text of Master's Report That Upholds FOGA's Style Protection as No Monopoly*, WOMEN'S WEAR DAILY, Nov. 10, 1936, at 8, 10, 39 (reprinting special master's finding, in rejecting a private antitrust challenge to the Guild, that the Guild caused some copyists to shift to origination); *Fashion Guild Policy Held Aid to Industry*, N.Y. TIMES, June 4, 1936, at 34 (reporting testimony that the Guild had caused many former copyists to change policy without going out of business); *see also Dress Trade Urged To Curb "Unethical,"* N.Y. TIMES, June 3, 1936, at 32 (similar); *Dress War*, TIME, Mar. 23, 1936, at 72 (Guild caused manufacturers of high-end dresses to begin "to do their own designing, confident that style piracy had been effectively outlawed"; moreover, as retailers returned copied dresses in a lower price range, "a number of manufacturers of these dresses, hitherto generally committed to copying higher priced dresses for a good proportion of their styles, decided that it was time to originate," and became Guild affiliates). For an earlier suggestion that the Guild offers a valuable natural experiment in evaluating design protection for fashion, see Randal C. Picker, *Of Pirates and Puffy Shirts*, VA. L. REV. IN BRIEF (2007), http://virginialawreview.org/inbrief.php?s=inbrief&p=2007/01/22/picker.

193. For exemplary analyses, see EDWARD H. CHAMBERLIN, THE THEORY OF MONOPOLISTIC COMPETITION (1933); Avinash K. Dixit & Joseph E. Stiglitz, *Monopolistic Competition and Optimum Product Diversity*, 67 AM. ECON. REV. 297 (1977); A. Michael Spence, *Product Differentiation and Welfare*, 66 AM. ECON. REV. 407 (1976); *see also* N. Gregory Mankiw & Michael D. Whinston, *Free Entry and Social Inefficiency*, 17 RAND J. ECON. 48 (1986) (making the excess entry point without relying upon product differentiation).

194. For an argument along these lines, see Michael Abramowicz, *An Industrial Organization Approach to Copyright Law*, 46 WM. & MARY L. REV. 33, 35-45 (2004); Michael J. Meurer, *Copyright Law and Price Discrimination*, 23 CARDOZO L. REV. 55, 96-97 (2001) (noting "over-harvesting" and "distraction" costs from production of close substitutes); *see also* Christopher S. Yoo, *Copyright and Product Differentiation*, 79 N.Y.U. L. REV. 212, 260-64 (2004).

A final critique of fashion to revisit is that, assuming fashion is a status-seeking quest, then actions that further its spread might also raise its cost, by leaving an individual to choose between the disutility of falling behind and the social waste that accompanies catching up.[195] This concern about the status function of fashion actually supports our proposal. The primary markers of status—trademark and brand image—will exist with or without design protection. Our proposal gives protection to designs that may lack a strong status component, thereby facilitating the shift of fashion away from the status function and toward the diverse innovation we value in other creative industries.

CONCLUSION

The amount and kind of innovation in fashion is directly connected to its meaning-making function. We have thus directed our analysis to the role that intellectual property law can play in shaping that process through regulation of an important industry whose products are some of the most immediate means whereby people create and communicate meaning, about themselves and society. Our proposed design right would extend protection against close copies but not against looser forms of borrowing or similarity. It aims to promote innovation by allowing fashion producers and consumers to fully engage these complementary values of distinctiveness and belonging.

These coexisting poles provide a key to the social dynamic of innovation. What is basic to all innovation is the constant tension and interplay between individual distinctiveness embodied in creative work and the relation of that work to others, past and present. Whether in books, music, or films, a core social dynamic of innovation is the proliferation of difference in deep interaction with the impulse to commonality. Especially visible in fashion, this dynamic pervades all areas of innovation and is instructive for intellectual property.

Our analysis of fashion puts into relief the contours of an important fight in innovation policy. New copying technology alters the dynamics of innovation. In recent years, we have seen how digital file sharing of copyrighted music has changed the economics of that industry. The same is increasingly true of movies and other video content. In fashion, as in other industries, we see rapid copying becoming cheaper and more effective, and tools that enable remixing and reuse are becoming more widespread.

The broad conceptual problem is that the two phenomena of copying and remixing have been conflated in the public mind, and proponents of a remix culture are reflexively associated with a permissive attitude toward copying.[196]

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195. For an account that emphasizes such waste, understanding fashion as a quest for the attainment of personal relative advantage, see ROBERT FRANK, LUXURY FEVER: WHY MONEY FAILS TO SATISFY IN AN ERA OF EXCESS 158, 196 (2001).

196. *Compare* Lawrence Lessig, Essay, *In Defense of Piracy*, WALL ST. J., Oct. 11,

In part this is because content owners often oppose both kinds of permission—that is, they oppose both exact copies and subsequent interpretation, homage, and mash-up. And to be sure, some scholars and advocates favor both remix and free copying.

Our analysis of fashion here highlights the need for conceptual distinction between the two phenomena in the debate about how much intellectual property protection we want to have. There is no necessary confluence or equation between a broad freedom to engage in reinterpretation and remixing, and free rein to make close copies. Here we have emphasized that such remixing is important to innovation, and that innovation is enhanced—not stymied—by protection against close copies. We believe that the line between close copying and remixing, supported by the theory of their differential effects on creators' incentives, represents an often underappreciated but most promising and urgent direction for intellectual property today.

The dynamics of innovation in fashion design is a window to this important aspect of innovation generally. Our work here is intended to help ensure that free interpretation is preserved, even if free copying is not.

2008, at W3 (arguing in favor of a robust remix right for music and video), *with* Lessig Blog http://lessig.org/blog/2008/10/news_flash_i_dont_defend_pirac.html (Oct. 13, 2008, 16:14 EST) ("News Flash: I don't 'defen[d] piracy'"; "Sorry to disappoint, but my new book, Remix, is not 'A Defense of Piracy,' whatever the Wall Street Journal's headline writers may think."). Lessig may have been taken for a defender of piracy not only because of his support of remixing, but also because he proposes to legalize file sharing and compensate creators by alternate means, such as a government levy on file sharing devices and services. *See* LESSIG, *supra* note 18, at 271-72. For a full analysis of one such proposal, see WILLIAM W. FISHER, PROMISES TO KEEP: TECHNOLOGY, LAW AND THE FUTURE OF ENTERTAINMENT ch. 6 (2004) (proposing compensation system whereby users buy the right to freely share files, and artists are compensated through a blanket licensing procedure).

APPENDIX

Figure 1. Foley & Corinna and Forever 21[197]

197. *Adventures in Copyright Infringement, Part Six*, FASHIONISTA, Apr. 12, 2007, http://fashionista.com/2007/04/ adventures_in_copyright_infrin_3.php (Foley & Corinna and Forever 21 comparison).

Figure 2. Jonathan Saunders and Forever 21[198]

198. Dorielle Hammonds, *We Love: Forever 21*, LA2DAY, Aug 12, 2008, http://www.la2day.com/fashion/we_love_forever_21 (Jonathan Saunders and Forever 21 comparison).

Figure 3. Yves Saint Laurent and Ralph Lauren[199]

199. *Profils d'hiver*, L'OFFICIEL DE LA MODE, Sept. 1992, at 210, 211 (Yves Saint Laurent, left); and *Femmes en smoking*, *supra* note 165, at 138 (Ralph Lauren, right).

ATTACHMENT 2

THE WALL STREET JOURNAL.
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Schumer's Project Runway

It's illegal to copy books and paintings. Why should fashion designs be any different?

By C. SCOTT HEMPHILL AND JEANNIE SUK

For two centuries U.S. law has recognized that allowing unauthorized copying of creative works—books, painting, photography, film, music—dampens the incentives of creators. Federal law has therefore prohibited copies that are "substantially similar" to the original. But the legal system has not extended this protection to "useful articles" such as clothing and shoe designs.

Especially for designers who are not household names, this can be devastating. Apparel makers can rip off their best designs, robbing them of the chance to profit from their creative work. With improved technologies, copies can be made quickly, sometimes just as the originals are being released. And because the copies are often a fraction of the price, many consumers buy the knockoff instead.

To be sure, a few prominent designers enjoy limited protection through trademark. But unlike a handbag marked with Gucci's interlocking G's, most fashion items do not bear a trademarked logo.

Some designers have claimed in court that copyists infringed their "trade dress," which protects certain product designs, such as the curvy shape of a Coca-Cola bottle. But to win a trade dress case, the designer would have to convince a court that when people see the copied product, they think of the maker of the original. This is difficult because even original fashion designs often lack the heavy publicity needed for the public to associate a design with a specific designer.

This hurts talented but not yet well-known designers the most. Mass-produced knockoffs can put them out of business before they have fully emerged in the market.

Congress has for several years considered adding fashion design to the copyright laws. But previous bills were thought to protect too much—failing to acknowledge that almost all fashion designs, whether classic or cutting edge, are inspired to some degree by the works of other designers. A law prohibiting similarity in fashion would be like banning fashion itself.

Sen. Charles Schumer (D., N.Y.) introduced a bill earlier this month that attempts to get around this problem. It prohibits only design copies that are substantially identical. In layman's terms, a good way to tell if a copy should be allowed is to ask whether it fails the "squint test": If you

need to squint to see the difference between two designs, then one is an infringing copy of the other.

A knockoff would fail this test if it's difficult to tell it apart from the original. That means changing barely noticeable details, like moving a button, or using a different thread in some stitching, won't do the trick. But designs that are merely inspired by prior designs would pass the test and remain legal. The very worst offenders would be caught or deterred. Designers would be left free to riff on—but not rip off—each other's work.

Mr. Schumer's bill goes to great lengths to make sure that designers are free to make clothes or shoes that are part of the same fashion trend as the original. For example, the bill doesn't protect a run of the mill T-shirt—only truly unique designs. And to guard against the possibility that great minds simply thought alike, the copying victim must show specifically that his original design was available—for example, that the design was featured on a runway—such that someone would have been able to copy it.

Opponents of fashion design protection argue that it would hurt the industry. They imagine a world in which Brooks Brothers monopolizes the pinstripe, or Diane von Furstenberg controls the wrap dress. But that catwalk of horribles has nothing to do with the new fashion bill, which is carefully limited to substantially identical copies of a particular original design.

Some consumers may regret not being able to buy knockoffs that are essentially replicas of desired items. In the long run, though, as with books and movies, the expectation is that consumers will benefit from the wide variety of creative works to which this sensibly narrow copying prohibition gives breathing space. In this case, what is good for American producers is also good for American consumers.

Mr. Hemphill is a law professor at Columbia Law School. Ms. Suk is a law professor at Harvard Law School.

Mr. GOODLATTE. Thank you, Professor Suk.

Professor Sprigman, welcome.

TESTIMONY OF CHRISTOPHER SPRIGMAN, PROFESSOR OF LAW, UNIVERSITY OF VIRGINIA SCHOOL OF LAW

Mr. SPRIGMAN. Thank you.

I want to start by thanking the Subcommittee and especially Chairman Goodlatte and Ranking Member Watt for inviting me today. For the past 6 years, along with my friend and colleague Kal

Raustiala from the UCLA Law School, I have studied innovation and competition in the fashion industry. Professor Raustiala and I have written an academic article on the topic entitled, "The Piracy Paradox: Innovation and Intellectual Property in Fashion Design," and a followup article, "The Piracy Paradox Revisited." I have also given testimony on this issue before this submitted before back in 2006. I testified in a predecessor to the current ID3PA.

So I have some new data for you, but before I get

there—and I have some slides—I want to talk about a bit of history. The issue of protection for fashion design is not new. Since the end of World War II, Congress has considered providing some sort of copyright protection for fashion designs on about a dozen occasions. And each time they declined to do so, I believe there was wisdom in that.

The U.S. fashion industry has grown and thrived over the past half century—and it continues to do so today. Sales of apparel and shoes have registered virtually uninterrupted annual increases since 1945, growing during this period more than twentyfold. The fashion industry in the U.S. is a leader in the world. It produces a huge variety of apparel. Innovation occurs at a pace that is unheard of in other industries. Styles change rapidly. Goods are produced for consumers at every conceivable price point. In short, the fashion industry looks exactly as we would expect a healthy, competitive, creative industry to look.

The important point here is that all of the fashion industry's growth and innovation has occurred without any intellectual property protection in the U.S. for its designs. Indeed, never in our history has Congress granted legal protections for designs of fashion goods. The fashion industry enjoys trademark protection for brands. It enjoys copyright protection for its fabric designs. But the shape, the cut, the style of a garment is not protected by copyright law or any other form of IP in this country.

But unlike in the music or film or publishing industries, copying of fashion designs has never emerged as a threat to the survival of the fashion industry. And why is that? Well, it is because of something we all know instinctively about fashion. And Shakespeare, as usual, put it best: The fashion wears out more apparel than the man. That is, many people buy new clothes not because they need them but because they want to keep up with the latest style. And this simple truth lies at the foundation of the fashion industry. It makes copying an integral part of that industry's success.

So why is that? Well, without copyright restrictions, designers are free to rework an appealing design. The result is fashion's most sacred concept: The trend. Copying creates trends. And trends are what sell fashion. Every season, we see designers take inspiration from others. Trends catch on. They become overexposed. And then they die. New designs take their place. This cycle is familiar. But what is rarely recognized is that the cycle is accelerated by the freedom to copy.

In our articles, Professor Raustiala and I explain how copying and creativity actually work together in the fashion industry. For fashion, copying does not deter innovation. It speeds it up.

Now I want to take a look at some new data that we have uncovered that supports our views.

Can I have the first slide?

So I have been working data from the Consumer Price Index, our government's official measure of inflation. We have been looking to see if the changes over time in the prices of apparel suggest any significant effect on the fashion industry from the copying of fashion designs. To do this, we collected data on the prices of women's dresses from 1998 to the present. This is hundreds of thousands of observations of prices. We then divided the dresses into 10 categories—we created 10 categories ranging from the cheapest 10 percent of dresses, like apparel on discount racks, to the most expensive 10 percent, like for example, Mr. Hernandez' designs.

Here is a graph illustrating what we found. What you see is price stability over the entire period for every category except one, the top category, the most expensive women's dresses. What happened there? The average price of the most expensive 10 percent of women's dresses went up substantially over the data period. Now, actually, the ninth decile, which isn't shown here, behaved the same way as the tenth—the most expensive 20 percent of women's dresses have gotten much more expensive since 1998. Everything else has gotten cheaper or stayed the same.

And what does this mean? Well, if cheap fashion copies were competing with the more expensive garments they are imitating, we would expect to see some effect on the prices of high-end garments. In short, competition from cheap copies would tend to depress the prices paid for the high-end origins. But that is not happening. The high-end originals are the only garments that have any price growth during this period. And the price growth of the segments is very healthy.

This is particularly impressive when you look at this next graph. This is in percentage terms. We have a 250 percent price growth over the period for the most expensive garments. The second decile, the second tenth, behaves about the same. That means that for the top designers as well as for the entry designers in high-level fashion, prices are very robust.

So the takeaway from this is I don't think the ID3PA is necessary. We have a healthy competitive industry. During the question period, I would like to explain, so I don't take too much time, why I think the ID3PA could cause some mischief. It is not only that it is unnecessary, but it could lead to a lot of litigation. This isn't going to create jobs, I think, except for lawyers. I can explain more about that if anyone cares to know.

Thank you very much.

[The prepared statement of Mr. Sprigman follows:]

COMMENTS OF PROF. KAL RAUSTIALA

University of California at Los Angeles School of Law

AND PROF. CHRISTOPHER SPRIGMAN

University of Virginia School of Law

Re: Innovative Design Protection and Piracy Prevention Act

Submitted July 13, 2011 to the Committee on the Judiciary,
U.S. House of Representatives,
Subcommittee on Intellectual Property, Competition and the Internet

As law professors who have studied innovation and competition in the fashion industry, we write in opposition to the Innovative Design Protection and Piracy Prevention Act (IDPPPA), which, if passed, would for the first time in American history extend copyright protections to fashion designs.

The IDPPPA limits the scope of potential liability to garments that are "substantially identical" to original garments protected under the Act. That is a narrower standard than has been proposed in previous bills. We nonetheless think that, on balance, the IDPPPA represents bad policy and may ultimately prove more harmful than helpful.

First, we think the bill is unnecessary. As far back as the 1940s the fashion industry pressed Congress for design protection, arguing that it would suffer grave harm if copyright law was not extended to it. Yet Congress declined to do so, and in the intervening decades the industry grew and prospered. All of the available evidence shows that the American apparel industry as a whole is not hurt by fashion design copying, and indeed may benefit from it.

Second, we think that the IDPPPA, if enacted, is very likely to give rise to serious, unintended, and harmful consequences. The IDPPPA is likely to do little to benefit designers, but will prove a boon for lawyers. It will give rise to many questionable lawsuits against designers, manufacturers, distributors, and retailers. This will act as

a tax on business and an impediment to entrepreneurs. And as a result, the IDPPPA is likely to raise the price that consumers pay for clothes. Even though Congress has restricted the scope of potential liability compared to that found in previous proposals, the uncertainty created by this bill—which creates unprecedented legal standards that will require substantial interpretation by the federal courts—ultimately will cause more problems than the IDPPPA will fix.

We explain our views in detail below.

The Commenters

Kal Raustiala is a Professor at the UCLA School of Law who teaches and writes in the areas of intellectual property and international law.

Christopher Sprigman is a Professor at the University of Virginia School of Law. In his role as a law professor, and before that in his career as a lawyer with the Antitrust Division of the United States Department of Justice and in private practice, Sprigman has focused on how legal rules - especially rules about intellectual property - affect innovation.

Our Research on Innovation in the Fashion Industry

Over the past six years, we have studied the fashion industry's relationship to intellectual property law. We have written an academic article on the topic, entitled *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*. This article, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=878401, as well as the ideas in it, have been discussed in articles in the *New York Times, Wall Street Journal, New Yorker, Financial Times, Washington Post, Los Angeles Times, Boston Globe*, and *Le Monde*.

We have also written a follow-up article, *The Piracy Paradox Revisited*, available at

papers.ssrn.com/sol3/papers.cfm?abstract_id=1404247. The comments we are submitting refer to the findings of these articles.

Why We Oppose The IDPPPA

The Framers gave Congress the power to legislate in the area of intellectual property. But for more than two centuries Congress has not seen the need to extend IP rules to cover fashion designs. During that period the American fashion industry has grown and thrived, and American consumers have enjoyed a wide range of apparel offerings in the marketplace. We are skeptical that Congress ought to begin regulating fashion design now, given the success of the existing system.

According to recent data from the Bureau of Economic Analysis, sales of apparel and shoes have registered uninterrupted annual increases since 1945, growing during this period more than twenty-fold. So we see growth and profit in the fashion industry, and we also see vibrant competition. New designers and companies regularly rise to prominence and compete in the marketplace with innovative new designs. In short, the fashion industry looks exactly as we would expect a healthy and competitive industry to look.

Most importantly, all of this growth and innovation has occurred without any intellectual property protection in the U.S. for apparel designs. Indeed, *never in our history has Congress granted legal protection to fashion designs*. From the industry's beginnings copying has been very common both in the U.S. and abroad. Designers and fashion commentators were talking about design copying back in the 1920s and 1930s. Unsurprisingly, this is not the first time that Congress has considered extending the IP laws to fashion designs. In the 1940s, for instance, some fashion firms pressed Congress for protection, claiming that without it hundreds of thousands of jobs would be lost and the industry destroyed. Yet in the wake of that failed attempt the industry has grown ever larger. Until now, Congress has always refrained from intervening in the market for fashion designs – wisely, in our view. Unlike in the music, film, or

publishing industries, copying of fashion designs has never emerged as a threat to the survival of the fashion industry.

Why is that? Because of something we all know instinctively about fashion. As Shakespeare put it, "The fashion wears out more apparel than the man." That is, many people buy new clothes not because they need them, but only to keep up with the latest style.

Without copyright restrictions, designers are free to rework an appealing design and jump on board what they hope will be a money-making style. The result is the industry's most sacred concept: the trend. Copying creates trends, and trends are what sell fashion. Every season we see designers "take inspiration" from others. Trends catch on, become overexposed and die. Then new designs take their place.

This cycle is familiar. *But what is rarely recognized is that the cycle is accelerated by the freedom to copy.*

In our research, we explain how copying and creativity actually work together in the fashion industry. For fashion, copying does not deter innovation and creativity. *It actually speeds up the rate of innovation.* Copying of popular designs spreads those designs more quickly in the market, and diffuses them to new customers who, often, could not afford to buy the original design. As new trends diffuse in this manner, they whet the appetite of consumers for the next round of new styles. Copying makes an attractive design into a trend. Copying also spreads the trend. Then copying kills the trend by over-exposing it. The fashion industry's entire business cycle is driven forward by consumer demand for the new, and the entire process is fueled by copying.

Copying is thus essential to the creation of trends, but it also helps in other ways. The ability to be copied encourages designers to be more creative, so as to create new designs that capture the attention of consumers. The existing legal rules also help the industry communicate these trends to consumers. In order for trendy consumers to follow trends, the industry has to communicate what the new fashion is each season or year. The industry as a whole does

this by copying and making derivatives that take features of a popular design and add new features – this is one of the important ways in which trends are established.

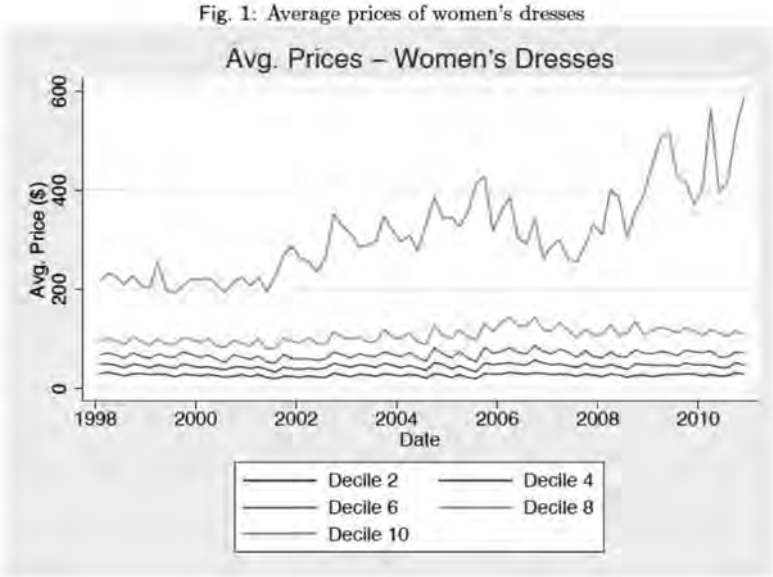
In sum, it is the preference of consumers for change in clothing designs that incentivizes creativity in the fashion industry – not intellectual property rules. Copying simply accelerates this process, intensifying consumers' desire for new styles, and increasing consumers' willingness to spend on the industry's next set of design innovations. Congress does not need to step in to alter the market and protect producers. Indeed, if Congress acts to hinder design copying, it may succeed only in depressing demand for new styles, slowing the industry's growth, enriching lawyers, and raising prices for consumers.

New Data Supporting Our Views

In the last few months we have been able to collect some very interesting new data that suggests that our view of the fashion industry is correct, and that the IDPPPA is unneeded. Over the past few months, one of us (Sprigman) has been working with data at the U.S. Bureau of Labor Statistics in Washington, DC. The BLS is the federal agency that, among other things, assembles the Consumer Price Index, or CPI, our government's official measure of inflation. To do this, BLS employees collect price data every month on hundreds of thousands of goods and services. Among the prices they collect are thousands of monthly observations of apparel prices.

From this dataset we collected data on the prices of women's dresses from 1998 to the present. We then divided the dresses in this dataset into created 10 categories, ranging from the cheapest 10% of women's dresses, like the apparel on the racks at Wal-Mart, to the most expensive 10%, such as Proenza Schouler's latest designs. **Here is a graph illustrating what we found:**

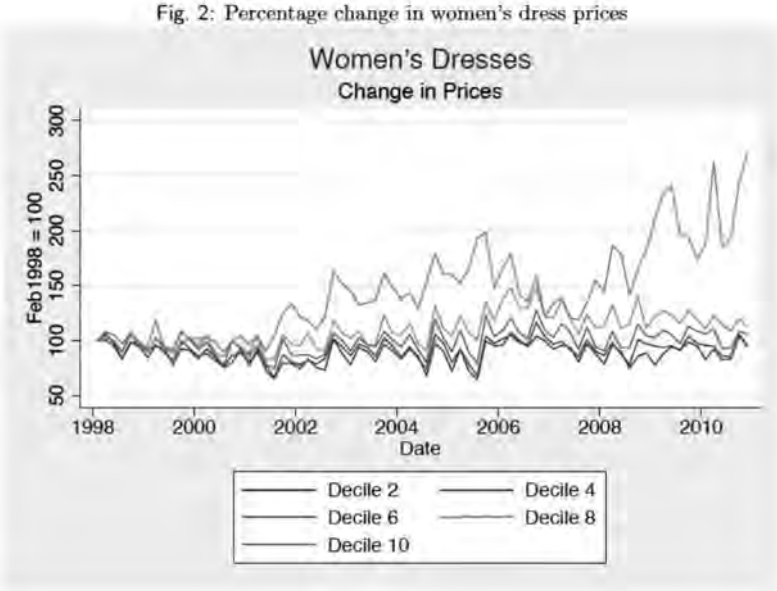
Fig. 1: Average prices of women's dresses



What you see is price stability over the entire period for every decile pictured – except for one – the top decile – i.e., the most expensive women's dresses. What happened there? The average price of the most expensive 10% of women's dresses went up, substantially, over the data period.

Here's another graph, which shows the increase in percentage terms:

Fig. 2: Percentage change in women's dress prices

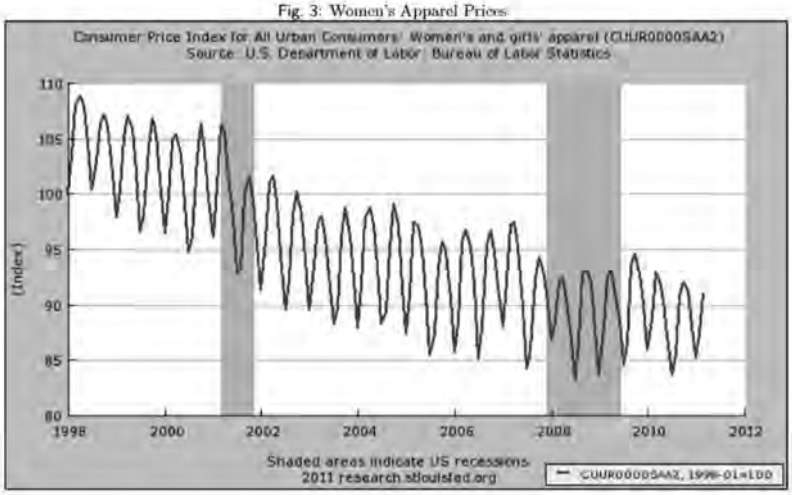


The top decile of dresses increased in price by over 250% over the period. Everything else stood still.

So what's the takeaway? Virtually all fashion copies are cheaper than the authentic garments they are copying. And if they were competing with the high-end garments they are imitating, we would expect to see some effect on the prices of those high-end garments. In short, we should observe competition from cheap copies depressing the prices paid for the high-end originals. But that doesn't appear to be the case. The high-end branded originals are the only garments that have any price growth during the period – and the price growth of this segment is very healthy indeed.

This is particularly impressive when you look at this third graph, which shows the more general trends in women's and girl's apparel – not just dresses – over the same period.

Fig. 3: Women's Apparel Prices



Ladies' apparel has been, as a whole, getting cheaper. And yet high-end ladies' dresses are getting significantly more expensive. This data simply does not support the claim that knock-offs are constraining the price of the originals, and therefore harming the manufacturers of those originals. In fact, it is more consistent with the claim that knockoffs help the industry.

While this result is counterintuitive, it rests on the fact that the market for fashion is not like the market for televisions. Two televisions of a similar size, that produce a similar quality picture, are going to compete in the marketplace. But just because a fashion copy looks like the original, doesn't mean it competes with it for customers. The woman who buys the $50 copy of a Chanel dress is unlikely to spend a thousand dollars on the original. The two garments are in different markets, and the copy does not compete with the original.

Europe as a Model

Evidence from Europe, which has rules prohibiting design copying, provides further support for our observation that copying of fashion designs does not appear to harm, and may help, design originators. While proponents of bills like the IDPPPA have long pointed to France as a model for American copyright law, in fact the evidence does not suggest that Europeans have created a superior regulatory system.

In 1998 the European Union adopted a Directive on the Legal Protection of Designs, which provides extensive protection for apparel designs. E.U. member states, such as France, also have national laws prohibiting design copying. And yet neither the E.U.-wide rules nor their national counterparts seem to have had any appreciable effect on the conduct of the fashion industry, which continues to freely engage in design copying on both sides of the Atlantic.

Some have argued that since Europe has design protection legislation, the U.S. should have regulation too. But the European experience suggests precisely the opposite, for two reasons. First, fashion designers have not used the E.U. law very much. We have looked closely both at instances of fashion design litigation, and at the E.U. registry of designs. There are very few lawsuits, and very few designers have registered their designs. Second, copying of fashion designs is just as common in Europe as it is here in the U.S.

Although we find the E.U. law has had little effect, we fear that a similar law in the U.S. may actually have a *harmful* effect. Unlike most countries in Europe, which have relatively weak civil litigation systems, the United States has a robust and plaintiff-friendly justice system that relies heavily on courts to adjudicate commercial disputes. As a result, the U.S. is a society teeming with lawyers – including a class of litigation entrepreneurs (largely absent in Europe) who turn to the federal courts readily to seek leverage in competitive industries.

Given our significant differences from Europe in this regard, we

fear that the IDPPPA might turn the industry's attention away from innovation and toward litigation. We foresee extensive litigation, for example, over the standard of infringement in the proposed bill, as we will detail in a moment.

The IDPPPA Can Do Harm To the Fashion Industry And To Consumers

We have described why the IDPPPA is unnecessary. The problem with the bill, however, is deeper. If passed, it is, in our view, substantially more likely to harm the fashion industry than help it. And by raising the cost of doing business in the fashion industry and shutting out competition from young and small-scale designers, it may raise the price of apparel and harm consumers. Given that the fashion industry is prospering without copyright protections for its designs, we see no good reason to create these risks.

The IDPPPA's Confusing Standard of Liability. A major problem with the IDPPA is its standard of liability, which limits liability to instances where a defendant's design is "substantially identical" to a plaintiffs. This standard is meant to be narrow. Indeed, some designers and apparel manufacturers believe that every clothing design is a reworking of something done before, and therefore question whether the proposed law will matter in practice. Once the law is in the hands of lawyers and judges, however, there is a substantial risk that it will expand in a way that harms many designers and consumers. Plaintiffs' lawyers will make creative arguments and judges may well interpret the bill's language expansively. This has been the pattern in copyright litigation for decades, and the IDPPPA is drafted in a way that makes this general trend very likely to apply here.

We are concerned in particular about the bill's language defining a "substantially identical" copy as "an article of apparel which is so similar in appearance as to be likely to be mistaken for the protected design, and contains only those differences in construction or design which are merely trivial.'' The standard is confusing. Does it

condemn a design that is likely to be mistaken for the original by the average person shopping for clothes? By some appreciable percentage of the population? By a fashion expert?

If it's the first, then the scope of liability might be very wide – many people are not particularly interested in or attuned to fashion, and so don't notice small details of design, cut, and embellishment. They see a garment that looks substantially similar, and they are likely to hold its designer liable.

If it's the second – i.e., an appreciable number of consumers would mistake the defendant's garment for the plaintiff's -- then we have a "likelihood of confusion" standard that looks like the one used for trademark law. In the trademark context, the likelihood of confusion standard has led to very wide-ranging liability – likely much broader than Congress intends and certainly broader than would be appropriate in the fashion industry.

If it's the third – i.e., whether a fashion expert would be confused -- then we'll have a battle of the hired guns, as plaintiffs and defendants recruit fashion industry insiders, at great expense, to argue for or against liability.

The general point here is that however it is interpreted, the IDPPPA is likely to lead to unpredictable and inconsistent verdicts. And that can benefit only one group – lawyers. It is very unlikely to benefit either designers or consumers.

Any standard of liability, even the most narrow, is likely in our view to create substantial mischief. Fashion designers work in a medium where the scope of creativity is significantly restricted. Clothes – even expensive ones – must fit, and the human body does not change. Accordingly, there is little in fashion that is truly new under the sun. And, as a result, styles of the past are regularly re-introduced, adapted, recast, and transformed.

For these reasons, drawing the line between inspiration and copying in the area of clothing is very difficult and likely to consume substantial judicial resources. But however the lines are drawn, the result will be a chilling effect on the industry. To be prudent, every

designer and every firm will be obliged to clear new designs through a lawyer. Individual designers and small firms will be particularly disadvantaged – they are the least likely to be able to afford the lawyers' fees that will be the new price of admission to the industry.

The Prospect that Manufacturers, Importers, Distributors, and Retailers Will Also Be Held Liable. Liability under the IDPPPA is not limited to a designer who creates a "substantially identical" design. Manufacturers, importers, distributors, and retailers that the infringing designer has dealt with may also be held liable. The prospect of liability for these intermediaries threatens very serious consequences, especially for new and young designers. Faced with a real prospect of large damages, intermediaries are likely to require indemnification as a condition of doing business with a particular designer or design firm. Considering the scale of possible damages under the IDPPPA, only the big players will credibly be able to offer indemnification. This is an anti-competitive result.

The IDPPPA applies the general rules from 17 U.S.C. §1309 to determine the liability of manufacturers, importers, distributors, and retailers. Manufacturers and importers may be held liable if they had knowledge that the design was infringing. The IDPPPA widens the potential liability of manufacturers and importers by allowing claims based on a contention that the intermediary *reasonably should have known* that the design was infringing. This expansion in the potential scope of liability means that manufacturers and importers may well feel compelled to hire lawyers to check, for every design they consider making or importing, whether the design is likely to be infringing. Given that the IDPPPA does not create a registry of protected designs, and given the truly enormous number of designs that the industry produces every year, this is almost certain to be an impossible task. Manufacturers and importers will instead face an incentive to demand that any designer they work with indemnify them in full for potential IDPPPA liability. Major fashion industry players may be able to do this. But new entrants and smaller businesses will be shut out.

Distributors and retailers may also be held liable under the IDPPPA if they "induced or acted in collusion" with any designer, manufacturer, or importer of an infringing fashion design. Again, this is likely to be a confusing and potentially threatening formula if applied to fashion retailing. Retailers and distributors have very deep pockets, and plaintiffs are very likely to join them as defendants in many lawsuits under the IDPPPA. The IDPPPA gives plaintiffs significant leverage to extract settlements from retailers, who will otherwise face expensive litigation over whether they knew that the design was infringing, and were thus, by dealing with a known infringer, inducing or colluding in infringement.

It will be very difficult for questions of a retailer's or distributor's knowledge of potential infringement to be settled on any sort of a preliminary motion. Facing the risk of a full-blown trial on their liability, retailers and distributors are likely to resort to the same defense as manufacturers and importers – they will demand indemnification, which, as described above, will distort the market.

For these reasons, we believe that the end result of the IDPPPA could be less consumer choice, fewer opportunities for young designers and small firms to break into the industry, and reduced prospects for growth in the American fashion industry

Conclusion

The fashion industry thrives by rapidly creating new designs. Via this continuous re-definition of what is "in style," the industry sparks demand by consumers for new apparel. Clothing designs rarely improve over time—they simply change. That simple fact is essential to understanding why the fashion industry can perform so well despite extensive copying. The longstanding American approach of refraining from regulating fashion designs also permits many apparel items to be sold at lower prices than would be possible were copyright extended to apparel designs. To remain healthy, the fashion industry depends on open access to designs and the ability to create trends that interpret these designs. The industry has prospered

for decades despite the lack of design protection; we are very hesitant to interfere with such success.

But we also fear that the IDPPPA may cause harm. Were it necessary to impose design protection rules to protect the American fashion industry, we would support amending the U.S. Code for the first time in our history to include fashion design. But our research suggests that it is not necessary, that we have had the right rule for the past two centuries, and that Congress should be content to leave the industry to get on with the business of creating innovative new fashions.

Thank you.

Prof. Kal Raustiala

Prof. Christopher Sprigman

Mr. GOODLATTE. Thank you, Professor Sprigman.
We will now turn to Mr. Courtney.
Welcome.

TESTIMONY OF KURT COURTNEY, MANAGER, GOVERNMENT RELATIONS, AMERICAN APPAREL & FOOTWEAR ASSOCIATION

Mr. COURTNEY. Thank you, Chairman Goodlatte, Ranking Member Watt, Ranking Member Conyers, and Members of the Subcommittee, for inviting the American Apparel & Footwear Association to testify today in support of the Innovative Design Protection and Piracy Prevention Act.

My name is Kurt Courtney and I am manager of government relations for AAFA, where I work on a range of intellectual property rights issues for the apparel and footwear industry. My written statement goes into further detail about our members. But in summary, AAFA's collective membership represents the largest cross section of the fashion industry across all price points for consumers worldwide. Our industry accounts for more than 1 million U.S. employees and more than $340 billion at retail each year.

Ensuring strong protection of intellectual property has always been a key priority for AAFA and its member companies. Our members fight endlessly to protect their trademarks and brand names in the U.S. And throughout the world. It is with this in mind that we are pleased to appear before you today.

Mr. Chairman, in 2006, you introduced the Design Piracy Prohibition Act, the DPPA, which sought to offer new copyright protection for original fashion designs. As AAFA's legal team evaluated the bill, we wholeheartedly understood the narrow problem the legislation was trying to solve, but we fundamentally disagreed with its overly broad definitions, which industry experts and legal counsel feared would have opened a Pandora's box of litigation that would have been very detrimental to the industry.

At that time, Mr. Chairman, we expressed these concerns to you and you challenged us to help develop a more targeted bill to protect original fashion designs and not increase the prevalence of lawsuits in our industry. So we went to work. In conjunction with the Council of Fashion Designers of America, CFDA, we worked with your office and New York Senator Charles Schumer to develop the ID3PA. This legislation represents a targeted approach that will solve this narrow design piracy problem without exposing any innocent actor in the fashion industry to confusing rules and frivolous legal claims.

Throughout the process, we realize that there were a number of misconceptions that had to be dismissed.

First, many in the media, academia, and even in the industry continue to believe that the ID3PA addresses the much larger and more virulent problem of trademark counterfeiting. It does not. By copying both trademarks and their associated designs, whether those designs are original or not, trademark counterfeiters attempt to profit on the good names and reputations that our members have spent decades building with their customers. This practice is illegal worldwide and leads to billions of dollars in losses each years. It represents a major enforcement priority of the United States Government, as Customs and Border Protection recently reported that footwear, apparel, and fashion accessories—like handbags—were the first, third, and fourth most seized counterfeit items by value at our borders last year.

The second misconception arose concerning the relationship between AAFA and CFDA. With our association's initial opposition to the CFDA-supported DPPA, it lead many to believe that AAFA was protecting the copyists. As we have explained previously, CFDA and AAFA have many of the same members, and in many instances, CFDA designers often work directly with or license their brand name to one or more of our members. Neither association wanted to back legislation that would make it harder to design apparel and footwear or give lawyers a hand in the design process.

Third, there remains a deep misconception about the scope of this legislation. And I want to be very clear on this point. The ID3PA will not cover everything in the fashion world. In fact, it will only cover those original articles which are so truly unique that they come closer to art than functionality. To put even a finer point on this, by definition, the bill states that nothing in the public domain, which is the collective works of thousands of years of fashion history, can be protected under this bill.

Fourth, very few companies will have to worry about possible accusations of infringements. To infringe an article must, among other things, be substantially identical to an original article. The substantially identical standard is tighter than what had appeared in the ID3PA and is defined as so close in appearance that it would likely be mistaken for the original. While the substantially identical standard may be easily met for basic garments—the blue jeans or underwear in your dresser—it is a very high threshold when compared against never-before-seen fashion articles discussed above.

We address a fifth misconception, that the new legislation will lead to frivolous lawsuits. The ID3PA includes a heightened pleading process where the burden falls entirely on the plaintiff to plead with particularity before any legal action can commence. And in that pleading, the plaintiff must show, number one, facts that his or her design is original; number two, that the potential defendant's design is substantially identical to his or her design; and number three, facts showing that the defendant had some access to the design and must have seen it before making the infringing design.

In closing, AAFA believes the ID3PA provides a targeted fix to the narrow design piracy problem. The legislation provides designers with a clear and easily understandable framework so they can enforce their own original designs. At the same time, it contains multiple protections to ensure that those same designers can seek inspiration and harness fashion trends without the chilling effect of frivolous lawsuits.

I want to thank you again for the opportunity for allowing me to testimony today, and I look forward to answering any questions.

[The prepared statement of Mr. Courtney follows:]

Prepared Statement of Kurt Courtney, Manager, Government Relations, American Apparel & Footwear Association

Thank you, Chairman Goodlatte, Ranking Member Watt and members of the subcommittee for inviting the American Apparel & Footwear Association (AAFA) to testify today in support of the *Innovative Design Protection and Piracy Prevention Act or ID3PA.*

My name is Kurt Courtney, and I am Manager of Government Relations for AAFA, where I work on a range of intellectual property rights issues for the apparel and footwear industry.

Our membership includes some of the most recognizable apparel and footwear brands serving virtually every market segment—ranging from haute couture to mass market. Our membership includes a diverse group, including some of the largest and some of the smallest companies in the industry. They are located in many states, including a number of traditional manufacturing hubs in New York, Los Angeles, the North East and the Southeast. Our members employ thousands of designers across the United States. Collectively, AAFA's membership represents the largest cross section of the fashion industry across all price points for consumers worldwide. Our industry accounts for more than one million U.S. employees and more than $340 billion at retail each year.

Ensuring strong protection of intellectual property has always been a key priority for AAFA and its membership. Our members fight endlessly to protect their trademarks and brand names in the U.S. and throughout the world. It is with this in mind that we are pleased to appear before you today.

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At that time, Mr. Chairman, we expressed these concerns to you and you challenged us to help develop a more targeted bill to protect original fashion designs and not increase the prevalence of lawsuits in our industry. So we went to work. In conjunction with the Council of Fashion Designers of America (CFDA), we worked with your office and New York Senator Chuck Schumer to develop the *Innovative Design Protection and Piracy Prevention Act.* This legislation represents a targeted approach that will solve this narrow design piracy problem without exposing any innocent actor in the fashion industry to confusing rules and frivolous legal claims.

Throughout the process, we realized that there were a number of misconceptions that had to be dismissed.

First, many in the media, academia and even in the industry continue to believe that the ID3PA addresses the much larger, and more virulent problem of counterfeiting. It does not. By copying both trademarks and their associated designs (whether original or not), counterfeiters attempt to profit on the good names and reputations that our members have spent decades building with their customers. This practice is illegal worldwide and leads to billions of dollars in losses each year. It represents a major enforcement priority of the U.S Government, as Customs and Border Protection recently reported that footwear, apparel and accessories like handbags were the first, third and fourth most seized counterfeited items by value at our borders last year.

I would note that the so-called "rogue website" legislation currently before the Senate and being separately developed in the House will help address one of the more onerous ways counterfeiters steal from legitimate companies—by establishing fake websites to fool consumers into thinking that they are buying legitimate products. As we move forward on ID3PA, we look forward to continue working with you and your staff on this very important issue and other ways to combat counterfeiting.

The second misconception arose concerning the relationship between AAFA and CFDA. With our association's initial opposition to the CFDA-supported DPPA, it led many to believe that AAFA was protecting the copyists. As we have explained previously, CFDA and AAFA have many of the same members and in many instances CFDA designers often work directly with or license their brand name to one or more of our members. Neither association wanted to back legislation that would make it harder to design apparel and footwear or give lawyers a hand in the design process.

Third, there remains a deep misconception about the scope of the legislation. I want to be very clear on this point. ID3PA will **not** cover *everything* in the fashion world. In fact, it will cover only those original articles, which are so truly unique that they come closer to art than functionality. To put an even finer point on this, by definition, the bill states that nothing in the public domain—the collective works of thousands of years of fashion history—can be protected under this bill.

Fourth, very few companies will have to worry about possible accusations of infringements. To infringe, an article must, among other things, be substantially identical to an original article. The "substantially identical" standard is tighter than what had appeared in the DPPA and is defined as so close in appearance that it

would be likely mistaken for the original. While this "substantially identical" standard may be easily met for many basic garments—the blue jeans or underwear in your dresser—it is a very high threshold when compared against never-before-seen fashion articles discussed above.

We address a fifth misconception—that the new legislation will lead to frivolous lawsuits. ID3PA includes a heightened pleading process where the burden falls entirely on the plaintiff to plead with particularity before legal action can commence. In that pleading, the plaintiff must show:

1) Facts that his/her design is original
2) The potential defendant's design is "substantially identical" to his/her design
3) Facts stating that the defendant had some access to the design to have seen it, before making the infringing design

A sixth misconception revolves around the lack of a searchable database. Frankly, we felt that a database—especially with the well documented problems associated with the Copyright Office—would only cause confusion. Searchable databases in use in other countries reveal registration for common items like plain white t-shirts. Designers can still assert originality by including a symbol on the article and can work to enforce those claims, but only if they can meet the high threshold established by the three-part pleading process.

In closing, AAFA believes the ID3PA provides a targeted fix to the narrow design piracy problem. The legislation provides designers with a clear and easily understandable framework so they can enforce their own original designs. At the same time, it contains multiple protections to ensure that those same designers can seek inspiration and harness fashion trends without the chilling effect of frivolous lawsuits.

Thanks again for allowing me this opportunity to speak and I look forward to answering any questions.

Mr. GOODLATTE. Thank you, Mr. Courtney, for your very helpful testimony. We have since been advised that we may be extremely short of time. Votes may be called in a matter of 5 or 10 minutes. As a result of that, Ranking Member Watt and I have agreed to defer our questions. We'll either submit them to you in writing, or if there is time at the end, we'll come back to those.

In light of that, we'll recognize Members for 3 minutes a piece and see how many we can get through. We'll begin the Vice-chairman of the Committee, the gentleman from Arizona, Mr. Quayle.

Mr. QUAYLE. Thank you, Mr. Chairman.

Professor Sprigman, I was just trying to—in your testimony, you were talking about back in the 1920's and 1930's, there has always been copying, and there has always been complaining about copying, yet the design community has continued to thrive. And trends become trends because of the copying.

Now, in Mr. Hernandez' testimony, he also stated that if you have, right now, because of the Internet and because of digital photography, that within minutes or within hours after a runway show or a red carpet in Hollywood, that that design can actually be put into production overseas within a matter of hours and actually make it to the streets prior to the designer being able to get his or her design out there. So do you think that now is the time to be able to put that forth because of the changing with the technology so that the designers can actually profit from their own designs?

Mr. SPRIGMAN. I think speed of copying hasn't really changed very much in 20 years. So I think the fax machine really changed speed of copying. You could take a photograph at a runway show and you could fax it. I think the Internet makes photos from fash-

ion shows a bit more available. But within the industry—Women's Wear Daily runs a lot of photos. These things have been available.

The industry has a 6-month lead time. All right. So they have shows in the fall for apparel that's going to hit the stores in the spring, and shows in the spring for apparel that's going to hit the stores in the fall. If the speed of copying was really a worry, we would see some pressure on that 6-month lead time that the industry has. We don't see it. The 6-month lead time has stayed.

Can I have the slides up again? I would like to have the last slide up.

Mr. QUAYLE. Actually, one other question. Mr. Courtney was stating that he believes that the concise definition in the new bill is actually very concise and won't lead to frivolous lawsuits. But do you agree or disagree with that? Because in your opening statement, you were stating that you believe this is going to increase litigation.

Mr. SPRIGMAN. I disagree. Before I became an academic, I spent a long time as a lawyer. And I litigated a lot of intellectual property cases. The question in this bill is whether the garment that is the defendant's garment is likely to be mistaken for the plaintiff's garment. Most people who would be on a jury, most Federal judges, are not particularly attuned to fashion, not particularly interested in it. If a garment looks generally alike, I think in the run of cases likely to condemn it, we'll get inconsistent verdicts. We'll get lawsuits being threatened. We'll get cease-and-desist letters. That is all going to, I think, redound to the detriment of the young designer, the new designer, who doesn't have the money to fight this.

Wells Fargo Bank recently, which loans a lot of money to the fashion industry, said in a statement a couple of weeks ago that they are worried about this bill because if this becomes law, they are going to have to check twice, they are going to have to check three times before they lend to a design firm that can't indemnify them. And it is the small fry that can't indemnify. So this will create barriers.

Mr. QUAYLE. Thank you.

Thank you, Mr. Chairman.

Mr. GOODLATTE. The Ranking Member of the full Committee, Mr. Conyers, is recognized for 3 minutes.

Mr. CONYERS. I want to beginning by thanking both you and Mr. Watt, Mr. Chairman, for your expediency in allowing us to question our witnesses. This is fascinating stuff here.

The passion of Mr. Hernandez can't be undervalued.

I don't agree with you, but you are very impressive in your testimony.

What I am trying to find out is things are really going along. This is a booming industry right now. And I just want to ask Professor Sprigman, what other mischief might inadvertently be produced if this bill were to become law, sir?

Mr. SPRIGMAN. I want to show you an example. Could I have a picture of those handbags up, please? It is a slide with two handbags on it. This is the mischief that I am worried about.

So on the left, you have the Proenza Schouler PS 1 bag. This is the bag Mr. Hernandez talked about. On the right, you have the

Mulberry Alexa. The Mulberry Alexa appeared on the market before the Proenza Schouler PS 1. So, Mr. Hernandez says, Well, I create out of nothing. No. No one in the fashion industry creates out of nothing. People in the fashion industry create out of what happened in the past.

The Proenza Schouler PS 1 has some substantial similarities to the Mulberry Alexa. I think in a world in which the ID3PA had been law, when the Proenza Schouler PS 1 came out, I think Mr. Hernandez could have found himself on the receiving end of a cease-and-desist letter. This is what I worry about.

When I look at these bags, I see differences. I see a lovely bag being made by Proenza Schouler that was hot because it was very attractive. But a copyright plaintiff's lawyer is going to see a potential settlement. And this is what I worry about.

There's some wedding dresses as well. Could you show those wedding dresses?

Mr. CONYERS. As they say in our community, I get your drift.

Mr. SPRIGMAN. I'll leave it there.

Mr. CONYERS. I am with you.

I want to compliment Professor Suk for her testimony.

We are always glad, of course, to see Mr. Courtney.

I yield back.

Mr. GOODLATTE. The gentleman from Pennsylvania, Mr. Marino, is recognized for 3 minutes.

Mr. MARINO. I have no questions.

Mr. GOODLATTE. Thank you.

The gentlewoman from California, Ms. Lofgren, is recognized for 3 minutes.

Ms. LOFGREN. Just one additional question for Professor Sprigman. You have been very clear about the amount of litigation that could result. And what we want to do is take steps to promote a healthy economy and creativity and the like. So we want to get this right. I am from Silicon Valley, and one of the issues that has been of concern there—if you are an IP, you know this—is the issue of trolls, where you have got rights that are assigned and the only—really, the only thing that some of these firms do is they buy it so they can litigate. Do you see the potential for that in this arena?

Mr. SPRIGMAN. I think the unfortunate truth here that is the ID3PA is going to give rise to copyright trolls. So think about it if you are a retailer. You can be held liable if you reasonably should have known that you are dealing in infringing garments. So the fashion industry puts out so many thousands of designs every year. This bill doesn't create any kind of registry as a precondition for claiming protection. I could imagine a law firm going into business as a copyright troll, basically buying the right to litigate designs against department stores. And if you think about the department stores' reaction to this, the idea of receiving a whole bunch of cease-and-desist letters every season, the department store's reaction is going to be, I want indemnification.

The big guys can live in that world. The little guys are going to be the ones that suffer in that world. That is what I am worried about—just raising the cost of doing business. If I thought that it was necessary to do this in order to get innovation in fashion, I

would say, Go for it. But we see a fashion industry that is about as innovative as it could be, and we see people at the high end of the industry raising their prices, profiting. There's nothing to fix that I can see.

Ms. LOFGREN. It seems to me, and then I'll stop, that there is a legitimate trademark issue, because if somebody thinks they are buying a high-end product that is really a cheap knockoff, that is a completely different issue than this one.

Mr. SPRIGMAN. That is fraud.

Ms. LOFGREN. That is fraud.

Mr. SPRIGMAN. We have a trademark law that helps in that case and, you know, enforce that. If people are defrauded, go after them.

Ms. LOFGREN. Thank you, Mr. Chairman. I will yield back.

Mr. GOODLATTE. Professor Suk, did you want to respond that that point about how this affects smaller designers?

Ms. SUK. Yes, I did. Yes, thank you. I think that, for one thing, the new data that Professor Sprigman presented—first of all, everything is in the interpretation. And I believe that Christopher Sprigman's interpretation of that data is incorrect.

I would have an alternative explanation. When you are seeing high prices at the high end going up, why are rising prices at the high end considered signs of health rather than signs of splitting consumers so that you have the midrange designers in direct competition with the lower-end companies? And so, therefore, those midrange companies are less able to compete, and so then you have got the higher-end designers raising their prices.

So if you have a $500 dress that is going away because of competition from copyists, then what is left is the higher-priced dresses. And in many ways, if you see just the high end going up like that, it can be interpreted as a sign of producer desperation rather than a sign of health by those designers. So I think that the interpretation is definitely up for grabs. I think it would be really helpful to have Professor Sprigman's data rather than just his interpretation.

Mr. GOODLATTE. Go ahead.

Ms. SUK. As for the idea of different bags having similar looks and there being trolls, for many people who don't know classical music, the difference between Bach and Handel, one piece of Baroque music is much like any other. It is true that for some people, whatever the industry, whether it is painting, whether it is books, poetry, you are going to have a problem that if you are not that attuned, you might think that it is all the same. But that is not unique to the fashion industry. There are meaningful differences between products that may look similar to some people. And it is because we care about innovation within this industry at the level of detail that the industry actually produces that we would have a law that says "substantially identical."

Mr. GOODLATTE. Thank you.

I want to get to the gentlewoman from Texas, Ms. Jackson Lee, for 3 minutes.

Ms. JACKSON LEE. Thank you very much, Mr. Chairman.

And thank you to the Ranking Member for your courtesies extended.

Mr. Hernandez—and thank you, I was delayed in another meeting on debt ceiling issues. But I come to this Subcommittee with a great passion about creating jobs.

Tell me how important and how do you define your work as a property right, as something to be protected so that you can create jobs and you can have a product that is protected?

Mr. HERNANDEZ. Well, we employ about 50 designers at the moment, who sort of design products all day, every day. We are having the problem at the moment where a lot of our designs are being copied on a much more accessible price point level. And I think an interesting thing, interesting point that is being brought up today is this whole point of designers raising their prices really high. That is not so much a function of margins as it is a function of us having to keep on pushing the design level and pushing further and further and kind of pushing design and getting a little more experimental and having to kind of push the design level further and further and that brings the price point up.

Ms. JACKSON LEE. And that's because your product is stolen or redone or copied.

I only have a short period of time. So I want to go to Professor Sprigman and just say that when we started out this in country, we copyrighted books and maps and charts. But we've moved progressively on, for example, into technology and otherwise. So what would be the aversion to, as this property is being demeaned, to not move in that direction if we had protections for those very entities of which you have just spoken? It is a valuable asset that fashion designers have.

Mr. SPRIGMAN. It's a valuable asset. My only argument and I think it's the argument that the Framers of our Constitution made, we have copyright, we have patent to promote the progress of useful arts and sciences.

The fashion industry has been promoting progress in beautifully clothing Americans for a long time without any copyright protections for its designs. Progress is being promoted through free competition.

For reasons I explain in my academic work, the fashion industry doesn't depend on property rights as the engine of innovation.

Ms. JACKSON LEE. But change has come about, has it not? Paintings now are protected, and otherwise.

Mr. Chairman, I'm going to yield back and just simply say I think we have a good product here, but I think we need take a great interest in the points the professor has made in protecting other elements.

But we need to protect you, Mr. Hernandez. We want you to produce, produce, produce, create jobs, and be successful as an industry.

I yield back.

Mr. GOODLATTE. I thank the gentlewoman.

We have about 5 minutes remaining in the vote that has been called. Does the gentleman—well, I'll just ask one question.

Mr. Hernandez, critics of fashion design protection argue that all fashion is derivative of something that came before it. They believe that unfettered copying actually drives fashion cycles and results in more creativity. So, two questions. Is that how it works? And to

the extent that it is, is that fair? And tell us how that connects to your own——

Mr. HERNANDEZ. I think, historically, most artists and designers are obviously inspired by history and things that have happened before that. I don't think anyone is sort of speaking about that being a problem. I think that is a normal thing that happens amongst artists and designers.

I think the problem is in someone copying, stitch for stitch, what you have already created. There is a difference and a very big difference between being inspired by something and copying something. And I think what has happened in the modern world is the advent of the Internet, as opposed the advent of the fax machine, for example, is that there's Web sites now where you get a runway show, and they can literally zoom in to the garment front and back, copy stitch for stitch, and pretty much print it and make it in a couple days flat and ship it before we ourselves can even take orders on the product.

And I think that's something that's happened in the last 10 years that has changed the game 100 percent. The protection hasn't caught up to the level of technology. There's been sort of a disconnect there. Before, it was a little more—we were a little bit more protected in terms of the product wasn't as visible to so many people from such an early stage. Now it is.

Mr. GOODLATTE. Thank you. Mr. Courtney, you believe that this bill has been substantially changed and improved to address it in the manner that Mr. Hernandez describes, maybe not literally stitch for stitch, but very close to that, in order to get the protection of the bill, as opposed to just general ideas and general trends.

Mr. COURTNEY. Yes, thank you, Mr. Chairman.

The thing to remember, as I said in my testimony, this is not intended to cover that anything that anyone is wearing right now in this room or anything that exists up until enactment of this bill. But we have to give designers the opportunity once this bill becomes law to, if they can meet the very tight definitions that are in the bill of originality, that is going to spur innovation. That is going to enable designers to come up with something that really is truly unique. If they are able to do that, then absolutely they should be able to get protection for that for 3 years. That is the reason why we are supporting this bill. We have eliminated as far as——

Mr. GOODLATTE. I am going to cut you short because I want to give the gentleman from North Carolina the last word.

Mr. WATT. Thank you, Mr. Chairman.

Let me apologize to the witnesses and to the Chairman for being late. I got consumed with this debt ceiling stuff that we were involved in and just lost track of time. So I apologize because I feel responsible for holding—getting us in the time bind that we are in.

Ms. Suk, Professor Suk, I think you probably won't be able to respond to this, except in writing. I practiced law for a long time before I got here, 22 years, and I am just trying to conceive of a set of jury instructions that you would give to 12 people sitting on a jury that defines clearly the distinction between inspired by—that is one term you used—and substantially identical. That is the other term you used. Could you give some thought to that at some point

and perhaps give me a written set of jury instructions? Because I think if we are going to respond to Professor Sprigman's concern about increasing litigation, which could be a substantial deterrent to innovation—and I see that deterrence acting between small people like you, Mr. Hernandez, and large people who are already out there. I don't want you tied up in protracted litigation against Louis Vuitton or whoever you are competing against. I guess you don't compete against Louis Vuitton. Maybe you do. I don't know. I don't know enough about this industry.

But that illustrates a point that I'm making because 12 people sitting on a jury are not going to know a darn thing about this industry either. You know the distinctions, and the proof in a case is going to rely on 12 uneducated, unsophisticated design people making those kinds of distinctions. And unless that can clearly be drawn, you're just going to have endless litigation about this. And that's the concern I have. And that litigation will be more—could be more of a deterrent to innovation or bringing things to the market because you'll be just afraid that you're going to get into the middle of litigation about these things.

So this can't be resolved right now. Maybe I should ask both the professors to think about that and give me their thoughts about it in writing. That would be very helpful.

Mr. GOODLATTE. I thank the gentleman. And I thank all of the witnesses for their valuable testimony today.

I apologize also for the Committee for the tightness of the time here, but we don't control the action on the floor.

Without objection, all Members will have 5 legislative days to submit to the Chair additional written questions for the witnesses, which we will forward and ask the witnesses to respond as promptly as they can so that their answers may be made a part of the record. Without objection, all Members will have 5 legislative days to submit any additional materials for inclusion in the record.

With that, again, I thank the witnesses and the hearing is adjourned.

[Whereupon, at 11 a.m., the Subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

Response to Post-Hearing Questions from Lazaro Hernandez,
Designer and Co-Founder, Proenza Schouler

Questions of Chairman Bob Goodlatte

1. H.R. 2511 requires that a copy be "substantially identical" to a protected design, and the bill defines this term as "so similar in appearance as to be likely to be mistaken for the protected design, and contains only those differences in construction or design which are merely trivial."

   - Does this definition provide clarity to the courts and designers on what constitutes a design infringement? And how would a designer interpret this definition?

     I believe that it does provide clarity. The conjunction of the words "overall visual appearance" (to what it applies), "substantially identical" (how to define a copy) and "not merely trivial" (how to avoid that pirates get around the definition) could hardly be clearer.

   - Does the discretion required to determine if a fashion design has been copied differ from the discretion courts use to decide whether paintings, songs, or other protected works have been copied?

     I do not know enough about laws surrounding other fields to give an educated answer to this question.

2. In his testimony, Professor Sprigman argues that the cycle of innovation in fashion is "accelerated by the freedom to copy." H.R. 2511 would only protect a garment's "appearance as a whole," not specific elements like the shape of a button or the use of a floral applique. Is it necessary for apparel manufacturers to copy designs "stitch-for-stitch" to fuel the cycle of innovation? How does H.R. 2511 allow for borrowing and inspiration? As a designer, how would you go about borrowing popular elements within the parameters established by H.R. 2511?

   It is absolutely not necessary to copy items stitch for stitch because that is not fueling innovation – that is theft. Thought is fueled and advanced by influence and inspiration, not parroting. One should consider where we would be with science, politics, and art if we only copied what others did and called it our own. The advancement of thought, creativity, and society benefits from creating something new from what already exists.

   As a designer, we are influenced by everything that we encounter in a sensory experience. We take those inspirations and create new based on our vision and perspective. If we were to take an existing idea and mimic it, we would be cheating ourselves, our craft, our peers, and our customers. If I may, I would add that the argument that stealing is good for the country because by way of purchasing replacement it has a positive effect on consumption is both absurd and immoral.

Questions of Ranking Member Mel Watt

3. Do new technologies such as high-resolution photography, the Internet, and manufacturing practices exacerbate the financial threat copying poses to the industry today? Are there other technologies that make design piracy more problematic today than in the past? Has the fashion market itself changed in ways that increase the need for design protection?

   The internet has forever changed the way society communicates, receives and delivers information, and understands others. Regarding fashion, historically magazines were the first to release images of new collections only a month or so before product was available in stores providing some protection of designs. Now, shows are broadcast in real time with close ups in high resolution with still images shortly following. Sites are dedicated to detailed zoomable imagery providing every detail to the public. This allows "copy cats" immediate access to designs and many of these "copy cats" are huge companies with very sophisticated resources. In many cases, they are able to have their unoriginal product in store before the actual original designs have arrived.

   Often times, these copies are not being sold to the targeted customer of the original designs; however, the uniqueness has now been defiled and the product becomes common place and no longer is appealing. That product no longer warrants the original price tag. Example: mother buys a designer bag and daughter buys the knock off version. Mother no longer wants to buy another designer bag from that company. Sales are expected to set off sizeable development costs. These "copy cats" have circumvented all development costs adding to their profits while depriving designers the ability to recoup their costs.

4. Professor Sprigman argues that the cycle of innovation in fashion is "accelerated by the freedom to copy." IDPPPA would only protect a garment's "appearance as a whole," not specific elements like the shape of a button or the use of a floral applique. Is it necessary for apparel manufacturers to copy designs "stitch-for-stitch" to fuel the cycle of innovation? How does the IDPPPA allow for borrowing and inspiration? How, as a designer, would you go about borrowing popular elements within the parameters established in IDPPPA?

   (same answer as question 2)

5. If H.R. 2511 becomes law, are there industry standards in place that would govern licensing negotiations between newly empowered upstart designers and the manufacturers and retailers such that the consumer will continue to have affordable options?

   There are no laws currently in place to protect designers from "copy cats." If a "copy cat" company is interested in issuing a designer's product at a lower price, many designers would be more than happy to license the rights for production. Such contractual licensing agreements do exist today, although they aren't required by law, because many retailers want to do the right thing and license original fashion from designers. These arrangements can certainly serve as models for developing contractual agreements between designers, manufacturers and retailers.

6. Will H.R. 2511 effectively address the threat from international thieves who copy and exploit the designs of young, emerging fashion designers?

   HR 2511 is the first step to protecting designers. I am not familiar with International Law to an extent allowing me to understand how, for example, the Chinese copy cat websites would be handled.

7. The Retail Industry Leaders Association maintains that most major footwear and accessory retailers purchase much of the merchandise they sell from foreign sources and or import it themselves." What is the projected immediate impact of this legislation on jobs in this country?

   I believe HR 2511 would create more jobs in the US market because we would now be compelled to support local designers. These designers would be able to benefit economically from their efforts, thus growing their businesses enabling them to create jobs in the US.

Response to Post-Hearing Questions from Jeannie Suk, Professor of Law, Harvard Law School

Response to Questions for the Record

Jeannie Suk, Professor of Law, Harvard Law School and
Scott Hemphill, Professor of Law, Columbia Law School

House Committee on the Judiciary
Subcommittee on Intellectual Property, Competition, and the Internet

Hearing on H.R. 2511, the Innovative Design Protection and Piracy Prevention Act

August 15, 2011

We would like to thank Chairman Goodlatte, Ranking Member Watt, and the Subcommittee for posing these Questions for the Record, and we are grateful for the opportunity to respond.

We note that the answers provided below rely on research that we presented in C. Scott Hemphill & Jeannie Suk, *The Law, Culture, and Economics of Fashion*, 61 Stanford Law Review 1147 (2009), which Professor Suk submitted for the record along with her written testimony for the Hearing on H.R. 2511 on July 15, 2011. The full article can be accessed at http://ssrn.com/abstract=1323487.

Question #1

In his testimony, Mr. Hernandez pointed out that 85% of CFDA members are small businesses. How does the current legal system, devoid of enhanced intellectual property protection, affect them? How can enhanced intellectual property protection, such as H.R. 2511, help small businesses grow and create more jobs?

Response

Small businesses are in a weak position under the current regime for several reasons. They usually do not have recognizable trademarks, nor do they qualify for trade dress protection. More important, many small businesses sell their products at a moderate rather than high price point. This makes them vulnerable to copyists because the consumer who might be able to reach for the moderate price of the product may opt for the less inexpensive knockoff instead. Luxury firms are already protected by the existing trademark and trade dress legal regime, brand investments, and the relatively small overlap between markets for the original and for the copy. Copyists' products are therefore more likely to function as market substitutes for small designers' products than for famous designers' more expensive products.

Enhanced intellectual property protection for fashion design gives the smaller firms, which are more vulnerable for the reasons mentioned above, a fighting chance.

That, in turn, is likely to conduce to the growth of small businesses. Though we are not in a position to estimate the number of jobs that may be created, we see no reason to think it would harm employment. In his testimony, Mr. Hernandez described how his own design firm, Proenza Schouler, was fortunate enough to grow from a company of three to a company of fifty in only five years, but also noted that this success is the exception rather than the rule, describing his numerous colleagues who fell victim to the harmful effects of design piracy.[1] H.R. 2511 would increase the chance that more small businesses that produce innovative designs will grow rather than perish, creating more jobs in the industry.

Question #2

H.R. 2511 applies to "unique, distinguishable, non-trivial and non-utilitarian variation[s] over prior designs for similar types of articles." In your opinion, how common are such designs? How much of the merchandise at an average retail chain fits this description?

Response

A small minority of merchandise currently on the market constitutes "unique, distinguishable, non-trivial and non-utilitarian variation[s] over prior designs," and thus would be designs eligible for copyright protection under H.R 2511. It is important to note, however, that protection applies only to designs that are made available after the bill's enactment, not to merchandise currently available. The reward of copyright protection for designs that meet the Act's standard would likely spur some innovative designers to attempt to meet that standard with some of their designs. These attempts in response to the new law may increase the percentage of such designs in the market, and thus increase the percentage of designs eligible for copyright protection. This would be a desirable result, as it would in effect mean an increase of design innovation in the fashion industry. Nevertheless, the standard under H.R. 2511 is demanding. This fact, combined with the apparel industry's usual tendency toward utility renders it unlikely that H.R. 2511's protections would ever be afforded to more than a selective minority of merchandise on the market. This is indeed the purpose of H.R. 2511, to protect only those designs that are truly unique, and only from those copies that are true knockoffs.

Question #3

H.R. 2511 requires that a copy be "substantially identical" to a protected design, and the bill defines this term as "so similar in appearance as to be likely to be mistaken for the protected design, and contains only those differences in construction or design which are merely trivial."

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[1] Innovative Design Protection and Piracy Prevention Act: Hearing on H.R. 2511 Before the Subcomm. on Intellectual Property, Competition, and the Internet of the H. Comm. on the Judiciary, 112th Cong. 1 (2011) (statement of Lazaro Hernandez, Fashion Designer and Co-Founder, Proenza Schouler).

Does this definition provide clarity to the courts and designers on what constitutes a design infringement? And how would a designer interpret this definition?

Does the discretion required to determine if a fashion design has been copied differ from the discretion courts use to decide whether paintings, songs, or other protected works have been copied?

Response

The "substantially identical" standard provides clarity to designers, would-be copyists, and courts. The definition of "substantially identical" in H.R. 2511 makes clear that a copy is infringing only if it is difficult to tell two designs apart in a side-by-side comparison. This is significantly more intuitive than the usual copyright infringement standard of substantial similarity. Thus we expect that designers will have less difficulty knowing what constitutes infringement than do their counterparts in the other arts. No written standard can provide perfect clarity, in advance, in all cases. This is a familiar problem in intellectual property, and indeed in all of law. The problem is analogous to the issues that arise as to substantial similarity in copyright law, or likelihood of confusion in trademark law. The level of clarity is certainly no worse with "substantially identical," and indeed it is likely to be better.

The infringement standard under H.R.2511 is significantly narrower and clearer than the existing infringement standard for other works such as paintings, songs, or books. Since this new standard will be applied to a new medium, it will of course need to be interpreted by the courts. The clear definition of the standard in the bill provides a workable standard for courts to interpret and apply. While the standard and the medium will be different, the discretion judges have in deciding infringement cases is comparable. However, because the standard is significantly narrower and clearer, and less ambiguous than substantial similarity, it is possible that judges will have less discretion than they have in current copyright infringement cases.

Question #4

In his written testimony (pages five through eight), Professor Sprigman cites data from the Bureau of Labor Statistics ("BLS") governing the prices of women's dresses and apparel as evidence that H.R. 2511 is unnecessary. Please respond thoroughly to the points Professor Sprigman raises. How do you interpret the BLS data?

Response

Professor Sprigman's analysis does not rely directly on reported BLS price measures, but instead on a novel measure of his own construction that is based on unreported information collected by BLS personnel. Focusing on the prices of the most expensive 10% of women's dresses in each month, from 1998 to the present, Professor Sprigman reports that his top 10% measure has more than doubled during the period, and

he interprets this rise in prices as a sign of health indicating that copyists have not harmed the producers of copied designs.

For several reasons, we do not think this analysis provides significant assistance in evaluating H.R. 2511. The main theoretical claim, that a price rise indicates a lack of competition and absence of harm, is incorrect from the standpoint of economic theory. The empirical evidence, as an analysis of the likely effects of new protection for original designs, is of limited relevance and, at least in the form it has been presented so far, low reliability. We explain these problems in turn.

Economic theory. Professor Sprigman argues that the increase in his top 10% measure demonstrates that copyists have not harmed the producers of copied designs. The underlying claim is that if copyists were harmed, we should not expect a price rise over time in the price of the copied article.[2] However, the claim is incorrect. To the contrary, a price increase is perfectly consistent with increased competition and harm to the copied producer.

To demonstrate, let us suppose a producer often is faced with a range of customers. To simplify, let us assume there are two types of customers. Type 1 is willing to pay up to $200. Type 2 is willing to pay a higher price. Sometimes the producer finds a way to charge a different, higher price to the type 2 customers, but often this is impossible. In that event, particularly if there are relatively many type 1 customers, the producer may select the low price, $200, which allows it to serve both types of customers.

But now let us imagine that a copyist charging an even lower price takes some of the business of the type 1 customers. In that case, the producer's incentive to provide a low price is reduced, because some type 1 customers have split off and gone to the copyist. The producer might as well charge a high price, since it is primarily the type 2 customers who are left to buy his products. The profits are lower, however, because volume is significantly less.

This pattern occurs in the prescription drug industry. When generic drugs enter the market with a competing version of a brand-name drug, the brand-name firm actually raises its price. This price increase is not because the brand-name firm is benefitting from the entry of generics in the market. Far from it. The low-price generics are taking a substantial share of the market. The remaining brand-loyal customers, who are still willing to pay a high price, can be charged a high price. In other words, observing a price rise can be a sign of producer desperation, not health.

Thus, we may see the producer charging the higher price, but not because the producer is flourishing. It may instead be that the producer is not doing as well as when

[2] This conclusion seems inconsistent with Professor Sprigman's theoretical account of the fashion industry, which relies on the presence of profit-reducing competition as a way, in his view, to spur designers to make even more new designs than they otherwise would.

he charged $200 and served more customers. Thus, from the standpoint of economic theory, the key theoretical claim Professor Sprigman makes is unsupported.

Relevance of the empirical measure. The top 10% measure is of limited interest for an analysis of H.R. 2511, because it is under-inclusive and over-inclusive, relative to the articles that H.R. 2511 aims to protect.

The top 10% measure is under-inclusive. It contains the most expensive dresses, but the promotion of the most expensive dresses is not the object of H.R. 2511. The bill aims to protect original design, at all price points. We are interested not only in the top 10%, but also the next 10%—a group that is omitted from Professor Sprigman's figures—and the deciles below that. An analysis suggesting that expensive dresses are profitable, or more or less so over time, does not provide much assistance in understanding how designers at a variety of price points are faring under the status quo, or, more important, how they would respond to increased protection. In other words, Professor Sprigman's analysis simply misses many of the producers or products that are of greatest interest.

The top 10% measure is also over-inclusive. It contains an indeterminate mix of relevant and irrelevant products. A policy analysis of H.R. 2511 properly focuses on those articles that currently lack protection from copyists, but would be protected if H.R. 2511 is enacted. As discussed above, these are articles that lack protection from copying by other means, such as trademark or trade dress, brand image, and luxury materials. Some top 10% dresses fit these criteria, but many do not. Many top 10% dresses are luxury products that have little to fear from copyists. Thus, the top 10% measure to a substantial degree simply measures luxury articles, rather than original designs, and so changes in that measure are not very informative about the latter.

Reliability of the empirical measure. The over-inclusion also raises doubts about the reliability of the top 10% measure. The fraction of irrelevant products in the top 10% may have changed during the period under consideration, undercutting any effort to meaningfully interpret any price change over time. Put another way, the composition of the top 10% measure may have changed in ways not considered or accounted for in Professor Sprigman's testimony.

To demonstrate, let us suppose that in 1998 there were $200 dresses in the top 10%, but by 2010 competition from copyists selling knockoffs destroyed many businesses producing $200 dresses. Then suppose that over the same period, $600 dresses—different dresses less vulnerable to market-destroying copies—increasingly made up the top 10%. We would observe the same pattern in the data that Professor Sprigman finds, but the underlying reality and the implications would be quite different. That is, the same top 10% dresses are not increasing in price over time, but rather, different and higher-price dresses have taken their place in the top 10%. Our claim is not that this is what happened, but rather that the data analysis performed so far does not rule out alternative stories.

The construction of the top 10% measure makes it particularly likely that top 10% dresses in 1998 and top 10% dresses in 2011 are not comparable. It is unclear whether the top 10% category follows the changing prices of the same set of dresses over time, or simply reflects whatever the most expensive 10% of dresses happen to be at a particular time. The difference here is key. If the answer is the latter, Professor Sprigman simply divided all the prices in a given period into ten buckets, then did the same thing for the next period, and so on. If that is what happened, then the top 10% in 1998 is not comparable to the top 10% in 2011. In that case, comparisons of the top 10% would be meaningless or misleading, because they would not be comparisons of the same things.

The reliability of the analysis is also undercut by the absence of the usual elements of a full economic analysis. For example, the construction of the data has not been fully described, or subjected to the methodological evaluation of economically trained peers. No explanation has been offered for why one might expect a more than doubling in price. Nor has Professor Sprigman addressed basic issues with the use of BLS data, such as complications that arise when individual goods in the BLS dataset have a short lifespan, necessitating their replacement by BLS personnel with non-identical and often non-comparable substitutes. See Craig Brown & Anya Stockburger, Item Replacement and Quality Change in Apparel Price Indexes, Monthly Labor Review, Dec. 2006, pp. 35–45. To fully evaluate the claims, it would be necessary to have access, from Professor Sprigman or BLS, to the underlying "microdata" from which the top 10% measure and other deciles were constructed, in order to facilitate replication and evaluation of the results.

In summary, there is reason for serious doubt about Professor Sprigman's claims in the form they have been presented thus far. The theoretical account contains significant errors and omissions. The empirical measure is highly under- and over-inclusive, and appears to be unreliable in its present form. We would caution Members not to rely on these results in evaluating H.R. 2511.

Question 5

Do new technologies such as high-resolution photography, the internet, and manufacturing practices exacerbate the financial threat copying poses to the industry today? Are there other technologies that make design piracy more problematic today than in the past? Has the fashion market itself changed in ways that increase the need for design protection?

Response

Design copying is not a new problem for U.S. designers. What has changed is not only the speed of copying, but the large scale and low cost at which rapid copies can be made. Today, a pattern can be based upon an Internet broadcast of a runway show and transmitted electronically to a low-cost contract manufacturer overseas. A gradual easing in import quotas, begun in 1995, has increased scale and thereby lowered overseas

manufacturing costs. Electronic communications and express shipping ensure that prototypes and finished articles can be brought to market quickly. As a result, thousands of inexpensive copies of a new design can be produced, from start to finish, in weeks.

The most striking consequence of low-cost, high-scale, rapid copying is not in beating an original to market, but in the ability to wait and see which designs succeed, and copy only those. Copyists can choose a target after retailers have made their buying decisions, or even after the product reaches stores, and customers have begun to buy the designs. Retailers and manufacturers exploit the resulting opportunity by selling copies at a discount to the original, but earn a profit thanks to lower unit costs and the avoided expense of design. New technologies including rapidity enabled by the Internet and low-cost, high-scale manufacturing, clearly do exacerbate the financial threat copying poses to designers, and make copying more harmful to designers than it was in the past.

The recent emergence of "fast fashion" businesses that offer mass-produced on-trend clothing at low cost also increases the need for design protection. Fast-fashion businesses that engage in knocking off designs work to the detriment of newer designers who are often in direct competition with their copyists. A luxury product that retails for thousands rather than hundreds of dollars is usually not in competition with a cheap knockoff sold at Forever 21. On the other hand, a new designer's several hundred dollar product may be within the reach of many fast-fashion consumers who might well opt for the cheaper knockoff, if given the option. This direct competition from fast fashion copyists creates the most harm for new designers who sell products that are less expensive than their luxury counterparts. The current lack of design protection leads to a skew toward incumbents, luxury, and brands, rather than toward design innovation in the fashion industry. Design protection would help lower the hurdles fast fashion copyists place in a new designer's path.

Finally, the proliferation of the online marketplace increases opportunities for copyists, as detailed images and descriptions of products available for purchase can be copied directly from retailers' websites. The shift in retail fashion businesses to online sales increases the ease of copyists' access to original designs. It also makes competition by copyists, who make knockoffs available for sale online, more effective and difficult for designers of originals to overcome. The consumer can now just as easily shop for the knockoff as for the original and decide to purchase the cheaper product, without the trouble of leaving his desk. In a world of increasingly online shopping, knockoffs pose a more serious competitive threat to designers than in the past.

Question #6

If H.R. 2511 becomes law, are there industry standards in place that would govern licensing agreements between newly empowered upstart designers and the manufacturers and retailers such that the consumer would continue to have affordable options?

Response

The consumer's access to affordable clothing options that do not knock off other designers' work would remain unchanged. If H.R. 2511 becomes law, upstart designers would be newly empowered against copyists. Those who want to make and sell substantially identical copies of their original designs under the three-year copyright term would need to obtain licenses. Although currently such licenses are not required, industry practices in place now operate to enable manufacturers and retailers to contract with designers whose designs and services they want to use. Most manufacturers and retailers, most of the time, work with designers without unauthorized copying of their work. Licensing arrangements currently operating, for example between famous designers and low-cost retailers, would serve as ready templates for licensing arrangements between newly empowered upstart designers and low-cost retailers. H.R. 2511 would encourage such licensing arrangements, and result in the affordable availability of upstart designers' designs.

There is no reason to think such licensing arrangements would not be routinely reached under H.R. 2511, or that H.R. 2511 would pose obstacles to such licensing arrangements. Professor Sprigman speculated in his testimony that retailers and manufacturers entering such licensing contracts will always require designers to indemnify them against liability that H.R. 2511 makes possible, that only established designers will be able to afford to indemnify, and that as a result, licensing deals between retailers and upstart designers would not be reached, making upstart designers worse off. To evaluate this claim, we must ask whether in other industries (music, movies, books) in which creative work is currently protected by copyright law and distributors of infringing copies are potentially liable, upstart artists and creators are systematically crushed by distributors' demands of indemnification. We are aware of no evidence that protecting those creative artists with copyright law has had this particular effect on upstart artists' ability to enter licensing agreements with distributors of their work. Nor have we seen evidence that the existence of copyright protection has disadvantaged newer artists relative to established ones in this particular way. We observe that the distributor's interest in indemnification does not routinely outweigh the distributor's interest in obtaining licenses from creators of original work. There is no reason to assume that retailers and manufacturers of fashion designs would behave differently.

To the contrary, H.R. 2511 levels the playing field between upstart and established designers by creating the need for retailers and manufacturers to obtain licenses from upstart designers before making and selling infringing copies of original designs. Currently, upstart designers are at a severe disadvantage relative to established designers who have the benefit of trademark protection and advertising that promotes their brand image. Upstart designers have only their designs, which are currently unprotected from copying. Empowering designers with copyright protection for their original designs *improves* upstart designers' bargaining position rather than weakens it.

Question #7

Will H.R. 2511 effectively address the threat from international thieves who copy and exploit the designs of young, emerging fashion designers?

Response

H.R. 2511 prevents the sale and distribution of illegal copies in the U.S. market. It imposes liability for selling, offering to sell, advertising, making, having made, or importing any infringing article. This liability means that, even if a foreign business infringed a designer's work, no one could import the resulting product or sell it in the U.S. without incurring liability under the Act. Thus H.R. 2511 offers protection against international copyists by prohibiting the importing of infringing copies, wherever made, in the U.S. market.

Of course, U.S. consumers could buy knockoffs in countries where fashion design is not given intellectual property protection. This particular threat, though, is limited.

H.R. 2511 could not prevent foreign businesses from selling infringing copies of designs in a country that lacks design protection laws. Such territorial limitation is a shortcoming of all intellectual property laws.

Question #8

Please provide a sample jury instruction detailing how a jury would determine whether a product is "substantially identical" and thus covered under this bill.

Response

Below we provide a sample jury instruction that would detail how a jury would determine whether an alleged copy is "substantially identical" and thus infringes a protected design. The instruction is adapted from American Bar Association, Model Jury Instructions: Copyright, Trademark, and Trade Dress Litigation (Todd S. Holbrook & Alan Nathan Harris eds., 2008), which contains jury instructions for ordinary copyright infringement.

We believe it will be far easier for juries to grasp copyright infringement of a fashion design than infringement in current copyright and other intellectual property contexts. Juries are routinely asked to determine infringement in cases involving complicated or specialized sciences and arts in which they often do not have knowledge or experience. Fashion, however, is a context in which every juror has some knowledge and experience, because every person shops for, chooses, and wears clothing. Fashion is therefore more universal and accessible to an ordinary person's experience and judgment than many other intellectual property matters that jurors are expected to evaluate. For this reason, along with the narrowness and clarity of the "substantially identical"

standard, we expect that juries will be more comfortable determining infringement of fashion designs than, say, novels, symphonies, or drug patents.

Sample Jury Instruction:

If you conclude that plaintiff has proven, whether by direct or circumstantial evidence, that defendant has copied matter from plaintiff's fashion design, you must then determine whether the matter copied is sufficient to constitute infringement. You should find infringement if the overall visual appearance of defendant's design as a whole, as viewed by an ordinary reasonable observer, is "substantially identical" to plaintiff's design. You should not find infringement if matter from plaintiff's work has been copied but the resulting design is not substantially identical.

You should determine that defendant's design is "substantially identical" if you find that it is "so similar in appearance as to be likely to be mistaken for the protected design, and contains only those differences in construction or design which are merely trivial." If you think an ordinary reasonable observer would likely mistake one design for the other when the two are side-by-side, then you should find the two items are substantially identical. Even if there are similarities in appearance between the two, you should not find they are "substantially identical" if an ordinary reasonable observer is unlikely to mistake one design for the other.

Substantially identical does not mean actually identical. In order for you to find infringement, it is not necessary to find that the two items are actually identical. If you notice differences in construction or design between the two items, you should find the items are "substantially identical" if those differences are merely trivial. If, however, the differences you notice are not merely trivial, you should find that the two items are not substantially identical. It is a defense to infringement that defendant's work contains non-trivial differences.

You should determine that the differences between the items are trivial if they do not affect the likelihood that an ordinary reasonable observer would mistake one design for the other.

Question #9

The Retail Industry Leaders Association maintains that "most major apparel, footwear and accessory retailers purchase much of the merchandise they sell from foreign sources and/or import it themselves." What is the projected immediate impact of this legislation on jobs in this country?

Response

We do not see reason to expect a large shift in employment as a result of enactment of H.R. 2511. As discussed above, the enactment of H.R. 2511 would be a

positive development for the nurturing of small businesses, widely thought to be a key driver of employment growth in the United States. It is possible to anticipate that more protection for new design might afford increased employment opportunities for designers. As for manufacturing, the large share of manufacturing that currently takes place overseas is likely to remain so, although we lack a basis for confident prediction on this point.

Response to Post-Hearing Questions from Christopher Sprigman, Professor of Law, University of Virginia School of Law

COMMENTS OF PROF. KAL RAUSTIALA

University of California at Los Angeles School of Law

AND PROF. CHRISTOPHER SPRIGMAN

University of Virginia School of Law

Re: Innovative Design Protection and Piracy Prevention Act

Submitted Aug. 16, 2011 to the Committee on the Judiciary,
U.S. House of Representatives,
Subcommittee on Intellectual Property, Competition and the Internet

In Response to the

Questions for the Record Submitted by Ranking Member Mel Watt

We submit this document in response to the Questions for the Record submitted by Ranking Member Mel Watt. For the reader's convenience, we have reproduced each of Rep. Watt's questions, followed by our response. If any of the Committee's members have additional questions, we would be pleased to respond to them. Thank you.

Question No. 1

Prof. Sprigman, you argue that the cycle of innovation in fashion is "accelerated by the freedom to copy." IDPPPA would only protect a garment's "appearance as a whole," not specific elements like the shape of a button or the use of a floral appliqué. Is it necessary for apparel manufacturers to copy designs "stitch-for-stitch" in order to fuel the cycle of innovation? How does the IDPPPA allow for borrowing and inspiration? If you were a designer, would you go about borrowing popular elements within the parameters established in IDPPPA?

Response

We cannot know for sure, but we do not believe it is necessary for designs to be copied stitch-by-stitch for imitation to fuel the cycle of innovation. It is vital, however, that designers be able to mimic overall designs so that a) trends can emerge and b) those trends and designs can spread and then, eventually, fall out of fashion. These processes create the incentive to innovate in the fashion industry that works so well today.

The proponents of the IDPPPA say that they are banning only "stitch-by-stitch" copies. We disagree with this characterization as a practical matter; in our view, it ignores the reality of American-style litigation and the disparity of resources between large and small players in the fashion industry. We have little doubt that, if enacted, the IDPPPA will have a chilling effect on the industry that will discourage not just stitch-by-stitch copying, but a wide range of appropriation that currently helps the industry thrive. This is so for at least two reasons.

First, the IDPPPA's proposed "substantially identical" standard of liability does not clearly ban only stitch-by-stitch copies. The wording of the standard allows for the possibility – and, in our view, the strong likelihood – that liability may be extended to garments that are similar in the way that "inspired-by" designs typically are, even if the degree of similarly falls well short of "stitch-by-stitch." More importantly, although Congress may intend to enact a very narrow standard of liability, once the IDPPPA reaches the courts, that standard will almost certainly expand to reach a range of "inspired-by" designs that Congress never intended to ban.

For evidence supporting our view, one needs to look no further than the law of trademark, where an analogous standard of liability, intended by Congress to be narrow, has expanded markedly in the courts. Current U.S. trademark law limits *criminal* trademark liability to the use of marks that are "identical with, or substantially indistinguishable from", a registered trademark. See 18 U.S.C. § 2320 (e)(1)(a)(ii). This standard is similar to that proposed in the IDPPPA. And yet, defendants have been charged – and indeed have been convicted and sent to prison – in cases involving the use of marks that appear to be quite different from the registered marks that defendants are said to have counterfeited.

One recent example is U.S. v. Lam.[1] In that case, defendants were charged with counterfeiting Louis Vuitton's famous "LV" mark. Defendant's "LY" mark was, however, readily distinguishable – not least (but not only) *because it used a different letter*, and there was no evidence that defendant's "LY" was likely to be mistaken for Louis Vuitton's "LV".

The jury in U.S. v. Lam acquitted defendants on the "LY" mark. They convicted them, however, on the "Marco Plaid", which, prosecutors charged, was "identical with, or substantially indistinguishable from" Burberry's registered "classic plaid" mark. And yet in this instance as well, the two marks were very different. The Burberry classic plaid has white stripes in both the vertical and horizontal direction. But the Marco plaid has no vertical white stripe. And the Marco plaid included a picture, repeated at regular intervals, of a knight on a horse. There was no such figure on Burberry's registered plaid. The jury nonetheless convicted defendants of criminally counterfeiting this mark, finding that the very different mark produced and distributed by defendants on handbags and other accessories was "identical with, or substantially indistinguishable from" the registered Burberry mark.

Cases like U.S. v. Lam should caution Congress against the IDPPPA. The lesson is that no matter how carefully Congress attempts to limit liability for fashion copies – no matter how hard Congress works to focus the statute's prohibition on stitch-by-stitch copies and not "inspired-by" designs – litigants, courts and juries will tend to ignore these limitations and will instead apply their (very different) intuitions about what is fair and unfair in the fashion industry. This all suggests that in the context of the IDPPPA, Congress cannot depend on precisely-delimited standards to limit liability. Legal standards are only words on a page. They do not enforce themselves, and, in this context, experience strongly suggests they are unlikely to survive the crucible of litigants, juries and judges. The test of "substantially identical" is therefore likely, in practice, to result in condemnation of designs that are merely similar. This is exactly what the proponents of the IDPPPA claim they don't want.[2]

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[1] One of us (Sprigman) served as an expert witness for defendants in that case.

[2] U.S. v. Lam provides another example of how Congress's attempts to constrain liability through the use of narrowly-crafted definitions can be circumvented in the

There is a second reason why the IDPPPA's "substantially identical" standard will deter much more than "stitch-by-stitch" copying. No matter how Congress attempts to narrow liability, Congress cannot control the ways in which some fashion firms – especially the wealthier ones – will use the IDPPPA to threaten rivals. Designers with the means to do so will hire skilled lawyers to send cease-and-desist letters. The IDPPPA does not guarantee – and it could not – that lawyers will threaten suit only in instances where there is a "substantially identical" copy. In many cases, even where an ultimate finding of liability seems unlikely, the IDPPPA will simply be used as a weapon – with anti-competitive results. Introducing more legal rules and expensive lawyers into the fashion industry's innovation process will, almost inevitably, give larger firms a weapon to use against upstart rivals. The mere ability to threaten suit – and to force those targeted to spend a lot of money if they want to defend themselves – will empower large firms to use their wealth and size against competitors. That cannot be good for young designers, small fashion firms, competition, or consumers.

For these reasons, we believe that the IDPPPA is very likely to interfere with the fashion industry's well-functioning culture of borrowing,

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process of litigation. In the statute establishing criminal penalties for trademark counterfeiting, Congress made clear that liability is limited to instances where the government proves beyond a reasonable doubt that the defendant has used a "spurious" mark that is "identical with, or substantially indistinguishable from" a registered mark, 18 U.S.C. § 2320(c), *and* that the defendant's use of the identical or substantially indistinguishable mark "is likely to cause confusion, to cause mistake, or to deceive." 18 U.S.C. § 2320(a). The statute makes clear that these are separate elements of the criminal charge (they are located in separate subsections of the statute), and that the government must prove both. Despite this, in several recent counterfeiting cases including U.S. v. Lam, the government has argued – successfully – that once it proves that the defendant has used a spurious mark, courts and juries may *presume* that consumers will be deceived, and therefore it need offer no independent proof that consumers actually *were* deceived. Under this theory, a defendant could be jailed for selling a wallet that uses a registered mark – say the Gucci Square G – even if the wallet has the word "FAKE" stitched into it in large, clearly visible letters spread over the entire article. This is clearly not what Congress intended – the statute explicitly limits criminal liability to instances where the government can show some likelihood of consumer confusion – but courts have accepted the government's argument. Congress's careful limitation of criminal trademark liability has thereby been, to a great extent, subverted.

inspiration, and innovation in a way that will create more harm than good. Designers, manufacturers, distributors, and retailers will attempt to deal with the risk of liability under the IDPPPA by hiring lawyers – this is an expense which the larger players will be far better placed to bear, which tilts the playing field against young designers and small firms and will also raise the cost of production. In sum, we foresee no benefits to designers, manufacturers, retailers, distributors, or consumers. (We do see a benefit to one group – lawyers.) The IDPPPA will slow the industry's innovation cycle, and oblige consumers to pay more for clothes.

Question No. 2

If H.R. 2511 becomes law, are there industry standards in place that would govern licensing negotiations between newly empowered upstart designers and the manufacturers and retailers such that the consumer will continue to have affordable options?

Response

We are not aware of any industry standards that would help facilitate licensing transactions, and indeed we doubt that any such standards would arise. The fashion industry is huge, with many hundreds of firms competing in every segment of the U.S. and global market. Industry standards arise more readily in settings where a relatively small number of powerful firms are able to set rules that govern some form of "standardized" business dealing. But there is, at present, no small group of leading firms in the fashion industry that appears to have the power to set standards for the industry as a whole. (This is a good thing – the fashion industry is vigorously competitive, which benefits consumers in terms of both the diversity of clothing on offer and its relatively low, and generally declining, price.) Additionally, licensing transactions in the fashion industry are unlikely, in our view, ever to be standardized. The features sought to be licensed, and their likely value over the broad range of different types of garments at different price points, would vary so substantially that agreement on a generally-applicable schedule of licensing fees would be, in our view, nearly impossible.

For these reasons, we think it is risky for Congress to count on voluntary licensing transactions to soften the harmful effects of the IDPPPA.

Question No. 3

Please provide a sample jury instruction detailing how a jury would determine whether a product is "substantially identical" and thus covered under this bill.

Response

For a jury instruction to be helpful in this context, it must educate the jury about the meaning of the IDPPPA's governing legal standards and how to apply them, all without undue risk of confusing or misleading a group of citizens who are expert neither in the law or the business of fashion. In the case of the IDPPPA, we are unable to formulate any jury instruction which, in our view, is likely to achieve both goals. In particular, we do not believe that a jury could be instructed in a way that would ensure that only "stitch-by-stitch" copies would provide a basis for liability. In our view, any instruction sufficient to advise a jury of the properly narrow basis for liability would be so complex as to pose an unreasonable risk of jury confusion.

To understand why we believe that an effective but non-confusing jury instruction would be so difficult or even impossible to craft, it is helpful to consider what a jury instruction would have to do in order to provide enough information to the jury to avoid the obvious dangers of abuse that the IDPPPA presents. Any jury instruction, to be effective, must at least advise the jury with regard to the following crucial factors:

***First**, that the jury cannot find for the plaintiff unless the plaintiff proves by a preponderance of the evidence that his or her design is truly original – that is, that it is different than anything seen before in fashion.*

The IDPPPA attempts to limit liability to cases where a plaintiff presents a truly "original" design, but originality does not prove or disprove itself. The danger is that a plaintiff will simply *claim* originality, and that it will be left to the defendant to *disprove* it. It is important to

ensure that the *plaintiff* carries the burden of proof on this point, and that the plaintiff must therefore come forward with adequate evidence, in the form of credible expert testimony, establishing this element of the claim. If this instruction is not given, the jury will tend to shift the burden onto the defendant, who will be expected to offer evidence of some pre-existing similar design, and is likely to be condemned if he fails to offer such evidence. And such an outcome would raise the pressure on potential defendants to settle claims – even meritless ones – rather than spend the money necessary to defend against these claims in court.

But there is a deeper problem. Even if the jury is properly instructed on the plaintiff's burden of proof, it is still at sea with regard to what constitutes "originality" in fashion design. There is no agreement on the meaning of this term within the fashion community – and that is not surprising, since so much of fashion creativity involves the appropriation and recontextualization of the past, and indeed, of the present. There is also no agreed-upon database that defines the "prior art" in fashion, and therefore no agreed-upon yardstick for measuring the newness of any current design. If the fashion community cannot agree on standards for defining what's original, juries will be left without guidance. They will also be left without a meaningful way to assess the value of expert opinions on the question of originality. At its very core, the IDPPPA deploys a concept – "originality" – that in the fashion context will be confounding to a jury.

***Second**, that the jury cannot find for the plaintiff unless the plaintiff proves by a preponderance of the evidence that the defendant has copied from the plaintiff, and not merely produced a similar-appearing design independently.*

The IDPPPA limits liability to cases where the plaintiff proves that the defendant copied – no one intends to outlaw independent creation of a similar-looking design -- but again, the statute does not tell juries how to decide if the defendant actually *did* copy. The statute provides that a defendant's design may be "deemed" to have been copied if it is substantially identical in overall appearance to the plaintiff's design, but this formulation is unhelpful, and, in fact, is likely to mislead. In the context of fashion design, evidence of copying cannot simply be inferred from the designs' similar appearance. The range of creativity in the fashion industry is significantly restricted by the need to fit with both

current trends and the human form. And because designers who are not copying from one another are nonetheless responding to the same influences and trends, it's not surprising that they produce similar-looking garments every day. Accordingly, even in cases where the defendant's design looks very much like the plaintiff's, a proper jury instruction should make clear that the plaintiff must produce some direct or circumstantial evidence of copying that is not based in mere similarity of appearance. That said, we strongly suspect that when presented with two very similar-looking designs, juries will listen to their (in this case misleading) intuitions, and will determine that the defendant copied. We doubt that any jury instruction, no matter how carefully drawn or emphatically given, will have the power to prevent this.

***Third**, that the jury cannot find for the plaintiff unless the two designs are either identical, in the literal sense of that word, or manifest only those differences that are so entirely trivial that they would escape notice even upon close inspection.*

Without an instruction of this sort, juries will fall prey to the plaintiffs' arguments that the defendants must be held liable if a *typical shopper*, who does not examine the garments closely, might mistake the defendant's design for the plaintiff's – even if the defendant's design appears, on any close examination, quite different.

We see this problem already in trademark cases involving fashion goods. In U.S. v. Lam, for example, prosecutors argued that the defendant should be held criminally liable if an average shopper, who might examine the goods only at a distance, was likely to mistake the defendant's marks for the plaintiff's. The judge cautioned the prosecutors against such an argument, and when they persisted, they were eventually admonished. That said, we suspect that in the context of the IDPPPA, plaintiffs are likely to succeed with arguments like these.

These are three necessary elements for any adequate jury charge in a case under the IDPPPA. There are other elements that we think are important if not necessary, but at this point we believe the point is made that any jury instruction that captures even the three points we've made would be too complex to be relied upon. And for that reason, we don't believe that we could formulate an instruction that includes all these

elements, but is simple enough for a jury to follow faithfully. In any litigation under the IDPPPA, we anticipate that resources – the ability to spend on lawyers and witnesses – will have as much or even more to do with a litigant's chance of success as the underlying merits of the plaintiff's claim. This is a formula that is likely to harm the fashion industry, not help it.

Question No. 4

The Retail Industry Leaders Association maintains that "most major apparel, footwear and accessory retailers purchase much of the merchandise they sell from foreign sources and/or import it themselves." What is the projected immediate impact of this legislation on jobs in this country?

Response

There are still substantial numbers of US-based jobs involved in the production of apparel. In California, for example, there are over 100,000 jobs in the apparel and textile field. Recent reporting in California Apparel News suggests that apparel job numbers in California are actually rising as the cost of labor in offshore locations rises (making higher-quality American labor more competitive). There are many jobs related to the design and marketing of fashion based in the US as well. The risk posed by the IDPPPA is that by introducing copyright protection to apparel, the fashion cycle will slow down and costs will rise as legal fees and legal risks pervade the market. The likely result from both of these effects is that fewer garments will be sold—and that means fewer jobs.

Response to Post-Hearing Questions from Kurt Courtney,
Manager, Government Relations, American Apparel & Footwear Association

United States House of Representatives
Committee on the Judiciary
Subcommittee on Intellectual Property, Competition and the Internet

Questions for the Record for Mr. Kurt Courtney

Hearing on:
H.R. 2511, the "Innovative Design Protection and Piracy Prevention Act"

Friday, July 15, 2011
10:00 a.m.
2141 Rayburn House Office Building

Chairman Bob Goodlatte

Question #1: In his testimony, Mr. Hernandez pointed out that 85% of CFDA members are small businesses. How does the current legal system, devoid of enhanced intellectual property protection, affect them? How can enhanced intellectual property protection, such as H.R. 2511, help small businesses grow and create more jobs?

Question #2: H.R. 2511 applies to "unique, distinguishable, non-trivial and non-trivial variation[s] over prior designs for similar types of articles." In your opinion, how common are such designs? How much of the merchandise at an average retail chain fits this description?

Question #3: H.R. 2511 requires that a copy be "substantially identical" to a protected design, and the bill defines this term as "so similar in appearance as to be likely to be mistaken for the protected design, and contains only those differences in construction or design which are merely trivial."

- Does this definition provide clarity to the courts and designers on what constitutes a design infringement? And how would a designer interpret this definition?
- Does the discretion required to determine if a fashion design has been copied differ from the discretion courts use to decide whether paintings, songs, or other protected works have been copied?

Ranking Member Mel Watt

Question #4: If H.R. 2511 becomes law, are there industry standards in place that would govern licensing negotiations between newly empowered upstart designers and the manufacturers and retailers such that the consumer will continue to have affordable options?

Question #5: The Retail Industry Leaders Association maintains that "most major apparel, footwear and accessory retailers purchase much of the merchandise they sell from foreign sources and/or import it themselves." What is the projected immediate impact of this legislation on jobs in this country?

Representative Ted Poe

Question #6: Your testimony stated that AAFA, which I understand has over 400 members, supports the Innovative Design Protection and Piracy Prevention Act (IDP3A). Your testimony further states that AAFA's membership represents the largest cross section of the fashion industry across all price points for consumers worldwide -- ranging from haute couture to mass market...including some of the largest and some of the smallest companies in the industry.

I assume that when an association publicly endorses a piece of legislation a vote must be taken by the entire membership. I would like to know if the vote, by the entire membership, was unanimous in its endorsement of H.R. 2511. If the vote was not unanimous I would like to know the percentage of the AAFA membership that voted against the endorsement of the legislation, the names of the companies and the concerns of those members that voted against the endorsement of H.R. 2511.

If a vote of the entire membership was not taken, I would like to know who at AAFA authorized the association's endorsement. If authorization was given by the association's board of directors, I would like to know what percentage of the directors voted against endorsement, the names of the companies those directors represented and the concerns of those companies.

August 16, 2010

AAFA Responses to House Judiciary Committee Written Questions

Testimony by Kurt Courtney, Manager, Government Relations
Hearing on the Innovative Design Protection and Piracy Prevention Act
Subcommittee on Intellectual Property, Competition and the Interne
House Judiciary Committee

Answers to Chairman Bob Goodlatte

#1

Under today's intellectual property rights structure for fashion, our members predominantly utilize trademarks to protect their brandnames. In this regard, you will often find apparel and footwear companies incorporating their trademark into the overall design of the article. This practice has and continues to be the most effective method to protect a company's brandname and the overall design of the article.

The industry has also relied on copyright for fabric designs, patents (including design patents) for functional innovations to garments and trade dress. Under these laws, the industry has seen many cases of legal intimidation that seek to extract settlements from innocent companies due to the high costs associated with defending oneself in court. Further, some lawyers attempt to improperly use these laws to bring suits on questions of design piracy, when none of them appropriately address the problem. In this environment, small businesses are often the most harmed, since they lack the financial resources to defend themselves against accusations.

H.R. 2511 solves this specific problem under the Copyright Act by protecting only the aesthetic elements of an article of fashion. The legislation will eliminate the confusion that surrounds our industry today and enable forward-thinking designers to be able to protect a fashion design if it meets the very tight standards of originality. Small businesses can feel safe from frivolous lawsuits by understanding that the plaintiff must show evidence to the court before he can seek any damages from any innocent small designer just opening its doors. At the same time, if that small business creates a truly unique design under the criteria set forth in the bill, he has a clearly understandable process in order to move forward with protecting that original creation.

If H.R. 2511 were to become law, businesses of all sizes would be able to preserve their delicate financial resources to create more jobs by eliminating the possibility of frivolous lawsuits on matters of design piracy.

#2

Overall, original fashion designs are not very common, since most apparel and footwear companies reuse, recast and reformat older designs for new collections, especially in the mass market. However, the owner of an original design (as defined by H.R. 2511) should have the opportunity to protect that design from pirates. Given the narrow definition of originality in the legislation, the bill provides a framework that will spur innovation by inspiring designers to think beyond what has already been done in the past.

I do not envision that you would find an original article of clothing or footwear (again, using the definition in HR 2511) in a big retail establishment. I would expect most original items to be found in smaller boutique stores. I will also reiterate that the bill ensures that generic designs cannot gain protection or be accused of infringement.

#3

The first iteration of design piracy legislation, the Design Piracy Prohibition Act, utilized a very broad infringement standard of "substantially similar." In our discussions with the Council of Fashion Designers of America (CFDA) and our examination of the problem, we concluded that tightening this standard would ultimately provide the strong solution needed to address the design piracy problem, while simultaneously preventing frivolous lawsuits. AAFA believes that the legislation's more narrow definitions provide the correct framework for designers and the courts to be able to efficiently and effectively determine an infringement.

Yes, given that H.R. 2511 establishes a tighter infringement standard than found anywhere elsewhere in the Copyright Act, the courts should not rely on previous cases in art, music or movies and institute new standards for fashion.

Answers to Ranking Member Mel Watt

#4

Passage of H.R. 2511 will not affect the ability of the industry to continue to offer consumers affordable clothing and footwear options. As I stated earlier, generic fashion articles, such as t-shirts, pleated pants and button-down collared shirts will not be considered as original or as infringing, since they are very well-documented items that have been seen in fashion for decades.

#5

While production of much of our clothing and footwear occurs offshore, design for most of those articles occurs in the United States. Once passed, the legislation will enable apparel and footwear companies to maintain the jobs that are in the United States and provide up-and-coming designers with the opportunities they need to develop their brands. Further, with the clear cut standards set forth in the legislation, companies will be able to ensure that their financial resources are spent hiring more people and not used

trying to defend themselves in a frivolous suit. At the same time, a designer could also utilize these financial resources to protect his original design and, with a successful pleading, be able to obtain justice from those pirates who attempted to steal his original work.

Answer to Rep. Ted Poe

#6

AAFA repeatedly sought and secured advice and input from general membership, its Brand Protection Council (BPC) and its Board of Directors, including a special task force that was appointed by the Board and drawn from general membership, as it developed positions on the design piracy legislation. AAFA does not publicly release the results of internal polling with Board or general membership.

Letter from Stephanie Lester, Vice President, International Trade, Retail Industry Leaders Association

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July 22, 2011

The Honorable Robert Goodlatte
Chairman
House Judiciary Subcommittee on Intellectual Property, Competition and the Internet
2138 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Goodlatte:

The Retail Industry Leaders Association (RILA) appreciates the opportunity to comment on H.R. 2511, the Innovative Design Protection and Piracy Prevention Act. While RILA appreciates the concern to protect truly new and innovative fashion designs, RILA nevertheless has serious concerns that the bill would result in costly and frivolous litigation that would disrupt a thriving and innovative industry, limit the availability of fashionable apparel at affordable prices, and curtail new designs.

By way of background, RILA is the trade association of the world's largest and most innovative retail companies. RILA members include more than 200 retailers, product manufacturers, and service suppliers, which together account for more than $1.5 trillion in annual sales, millions of American jobs and more than 100,000 stores, manufacturing facilities and distribution centers domestically and abroad.

RILA is concerned that the uncertainty created by this legislation would restrict our members' ability to offer their customers a wide range of the latest styles and trends at affordable prices. We are also concerned this legislation will spawn frivolous lawsuits and stifle the creativity and innovation that have made the United States fashion industry more successful each year.

More specifically:

- **The so-called "heightened" pleading requirements would not prevent lawsuits/trials.** A designer convinced of the "originality" of his design, with a competent lawyer, would be able to articulate in a pleading why his design is a unique, distinguishable, non-trivial, non-utilitarian variation over prior design for similar articles sufficiently enough to raise fact issues that must be decided at trial whether the claim is valid or not. This would mean lengthy discovery, trials, motions, and appeals--unless, of course, a defendant weighing the cost of litigation were to decide to settle. A new species of non-practicing entity, the "copyright troll," would likely emerge.
- **The designer would not have to offer any proof of originality** to claim that he has created "a unique, distinguishable, non-trivial and non-utilitarian variation

over prior designs for similar types of articles." Asking judges and juries unfamiliar with fashion design to determine whether a design is original and whether the allegedly infringing design is "substantially identical" will result in many confusing and conflicting decisions exacerbating the litigation explosion and creating a new forum-shopping problem.

- **The exception for sellers and distributors under existing law would not apply to retailers who import the merchandise they sell**. The proponents argue that the law would exempt retailers from liability. However, most major apparel, footwear and accessory retailers purchase much of the merchandise they sell from foreign sources and/or import it themselves. The exception that exists for sellers and distributors within existing copyright law does not extend to importers.
- **Even sellers and distributors who do not import would be at risk.** Most major apparel, footwear, and accessories retailers also have a hand in the design process on many of the products they purchase, including, but not limited to, products bearing the brands they own or license. Even minor involvement in the design process would likely trigger claims that the retailer induced its supplier to produce the allegedly infringing product.
- **H.R. 2511 is a solution in search of a problem.** To this point, no one has been able to articulate realistic, specific examples of what would be protectable under H.R. 2511 that is not protectable under current law. When pressed for examples from the past, the proponents refer to Lady Gaga's "meat dress," a "three-armed trench coat" and a "lobster claw shoe," each of which was a one-off creation protected under traditional intellectual property concepts.
- **H.R. 2511 would put both jobs and designers at risk.** The vast majority of U.S. designers are much more likely to be defendants under this legislation than plaintiffs, whether for infringement, false marking, or false representation. The true beneficiaries of H.R. 2511 will be the lawyers who prosecute these claims, the lawyers retained to defend against these claims, and a small cadre of high-end designers who can afford to litigate these claims. We fear the designers employed by our member companies and their suppliers, as well as small, new designers attempting to make their mark, will be the hardest impacted by this legislation. Retailers would potentially have to devote significant time, costs and research to ensure that each product they sell would not infringe upon a protected design -- not only at the time of design, but again when the garments are imported and sold (which generally occurs several months later). As a result, the bill is expected to raise the cost of doing business in retail which would result in higher prices and fewer jobs in the industry at a time when the U.S. economy needs just the opposite.
- **Manufacturers would have difficulty obtaining financing.** Enactment of this legislation would force banks, when considering a loan to an apparel manufacturer, to try to determine whether or not the manufacturer's designs are distinct enough so as not to infringe on other designs, making such loans even more precarious than under current conditions. If an apparel manufacturer cannot

obtain credit, its ability to conduct business and maintain jobs is put in jeopardy. Smaller companies with fewer resources would be particularly affected.

In conclusion, RILA has significant concerns with H.R. 2511, and we oppose further action on the bill. If you have any questions or concerns, please contact Stephanie Lester, Vice President, International Trade at (stephanie.lester@rila.org) or 703.600.2046.

Sincerely,

Stephanie Lester
Vice President, International Trade

cc: The Honorable Melvin Watt, Ranking Member
Members of the Subcommittee on Intellectual Property, Competition and the Internet

I

112TH CONGRESS
1ST SESSION

H. R. 2511

To amend title 17, United States Code, to extend protection to fashion design, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JULY 13, 2011

Mr. GOODLATTE (for himself, Mr. NADLER, Mr. SENSENBRENNER, Mrs. MALONEY, Ms. LINDA T. SÁNCHEZ of California, Mr. COBLE, Mr. SCHIFF, Ms. JACKSON LEE of Texas, Ms. WATERS, Mr. ISSA, and Mr. RANGEL) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To amend title 17, United States Code, to extend protection to fashion design, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Innovative Design Protection and Piracy Prevention Act".

SEC. 2. AMENDMENTS TO TITLE 17, UNITED STATES CODE.

(a) DESIGNS PROTECTED.—Section 1301 of title 17, United States Code, is amended—

(1) in subsection (a), by adding at the end the following:

"(4) FASHION DESIGN.—A fashion design is subject to protection under this chapter.";

(2) in subsection (b)—

(A) in paragraph (2), by inserting ", or an article of apparel," after "plug or mold"; and

(B) by adding at the end the following:

"(7) A 'fashion design'—

"(A) is the appearance as a whole of an article of apparel, including its ornamentation; and

"(B) includes original elements of the article of apparel or the original arrangement or placement of original or non-original elements as incorporated in the overall appearance of the article of apparel that—

"(i) are the result of a designer's own creative endeavor; and

"(ii) provide a unique, distinguishable, non-trivial and non-utilitarian variation over prior designs for similar types of articles.

"(8) The term 'design' includes fashion design, except to the extent expressly limited to the design of a vessel.

"(9) The term 'apparel' means—

"(A) an article of men's, women's, or children's clothing, including undergarments, outerwear, gloves, footwear, and headgear;

"(B) handbags, purses, wallets, tote bags, and belts; and

"(C) eyeglass frames.

"(10) In the case of a fashion design, the term 'substantially identical' means an article of apparel which is so similar in appearance as to be likely to be mistaken for the protected design, and contains only those differences in construction or design which are merely trivial."; and

(3) by adding at the end the following:

"(e) RULE OF CONSTRUCTION.—In the case of a fashion design under this chapter, those differences or variations which are considered non-trivial for the purposes of establishing that a design is subject to protection under subsection (b)(7) shall be considered non-trivial for the purposes of establishing that a defendant's design is not substantially identical under subsection (b)(10) and section 1309(e).".

(b) DESIGNS NOT SUBJECT TO PROTECTION.—Section 1302(5) of title 17, United States Code, is amended—

(1) by striking "(5)" and inserting "(5)(A) in the case of a design of a vessel hull,";

(2) by striking the period and inserting "; or"; and

(3) by adding at the end the following:

"(B) in the case of a fashion design, embodied in a useful article that was made public by the designer or owner in the United States or a foreign country before the date of enactment of this chapter or more than 3 years before the date upon which protection of the design is asserted under this chapter.".

(c) REVISIONS, ADAPTATIONS, AND REARRANGEMENTS.—Section 1303 of title 17, United States Code, is amended by adding at the end the following: "The presence or absence of a particular color or colors or of a pictorial or graphic work imprinted on fabric shall not be considered in determining the protection of a fashion design under section 1301 or 1302 or in determining infringement under section 1309.".

(d) TERM OF PROTECTION.—Section 1305(a) of title 17, United States Code, is amended to read as follows:

"(a) IN GENERAL.—Subject to subsection (b), the protection provided under this chapter—

"(1) for a design of a vessel hull, shall continue for a term of 10 years beginning on the date of the commencement of protection under section 1304; and

"(2) for a fashion design, shall continue for a term of 3 years beginning on the date of the commencement of protection under section 1304.".

(e) INFRINGEMENT.—Section 1309 of title 17, United States Code, is amended—

(1) in subsection (c)—

(A) by inserting "offer for sale, advertise," after "sell,"; and

(B) by inserting "either actual or reasonably inferred from the totality of the circumstances," after "created without knowledge";

(2) by amending subsection (e) to read as follows:

"(e) INFRINGING ARTICLE DEFINED.—

"(1) IN GENERAL.—As used in this section, an 'infringing article' is any article the design of which has been copied from a design protected under this chapter, or from an image thereof, without the con-

sent of the owner of the protected design. An infringing article is not an illustration or picture of a protected design in an advertisement, book, periodical, newspaper, photograph, broadcast, motion picture, or similar medium.

"(2) VESSEL HULL DESIGN.—In the case of a design of a vessel hull, a design shall not be deemed to have been copied from a protected design if it is original and not substantially similar in appearance to a protected design.

"(3) FASHION DESIGN.—In the case of a fashion design, a design shall not be deemed to have been copied from a protected design if that design—

"(A) is not substantially identical in overall visual appearance to and as to the original elements of a protected design; or

"(B) is the result of independent creation."; and

(3) by adding at the end the following:

"(h) HOME SEWING EXCEPTION.—

"(1) IN GENERAL.—It is not an infringement of the exclusive rights of a design owner for a person to produce a single copy of a protected design for personal use or for the use of an immediate family

member, if that copy is not offered for sale or use in trade during the period of protection.

"(2) RULE OF CONSTRUCTION.—Nothing in this subsection shall be construed to permit the publication or distribution of instructions or patterns for the copying of a protected design.".

(f) APPLICATION FOR REGISTRATION.—Section 1310(a) of title 17, United States Code, is amended—

(1) by striking "Protection under this chapter" and inserting "In the case of a design of a vessel hull, protection under this chapter"; and

(2) by adding "Registration shall not apply to fashion designs." after "first made public.".

(g) REMEDY FOR INFRINGEMENT.—Section 1321 of title 17, United States Code, is amended—

(1) by striking subsection (a) and inserting the following:

"(a) IN GENERAL.—

"(1) VESSEL HULL.—In the case of a vessel hull, the owner of a design is entitled, after issuance of a certificate of registration of the design under this chapter, to institute an action for any infringement of the design.

"(2) FASHION DESIGN.—In the case of a fashion design, the owner of a design is entitled to insti-

tute an action for any infringement of the design after the design is made public under the terms of section 1310(b) of this chapter."; and

(2) by adding at the end the following:

"(c) PLEADING REQUIREMENT FOR FASHION DESIGNS.—

"(1) IN GENERAL.—In the case of a fashion design, a claimant in an action for infringement shall plead with particularity facts establishing that—

"(A) the design of the claimant is a fashion design within the meaning of section 1301(a)(7) of this title and thus entitled to protection under this chapter;

"(B) the design of the defendant infringes upon the protected design as described under section 1309(e); and

"(C) the protected design or an image thereof was available in such location or locations, in such a manner, and for such duration that it can be reasonably inferred from the totality of the surrounding facts and circumstances that the defendant saw or otherwise had knowledge of the protected design.

"(2) CONSIDERATIONS.—In considering whether a claim for infringement has been adequately

pleaded, the court shall consider the totality of the circumstances.".

(h) PENALTY FOR FALSE REPRESENTATION.—Section 1327 of title 17, United States Code, is amended—

(1) by inserting "or for purposes of obtaining recovery based on a claim of infringement under this chapter" after "registration of a design under this chapter";

(2) by striking "$500" and inserting "$5,000"; and

(3) by striking "$1,000" and inserting "$10,000".

(i) NONAPPLICABILITY OF ENFORCEMENT BY TREASURY AND POSTAL SERVICE.—Section 1328 of title 17, United States Code, is amended—

(1) in subsection (a), in the first sentence, by striking "The Secretary" and inserting "In the case of designs of vessel hulls protected under this chapter, the Secretary";

(2) in subsection (b), in the first sentence, by striking "Articles" and inserting "In the case of designs of vessel hulls protected under this chapter, articles"; and

(3) by adding at the end the following:

"(c) NONAPPLICABILITY.—This section shall not apply to fashion designs protected under this chapter.".

(j) COMMON LAW AND OTHER RIGHTS UNAFFECTED.—Section 1330 of title 17, United States Code, is amended—

(1) in paragraph (1), by striking "or" after the semicolon;

(2) in paragraph (2), by striking the period and inserting "; or"; and

(3) by adding at the end the following:

"(3) any rights that may exist under provisions of this title other than this chapter.".

SEC. 3. EFFECTIVE DATE.

This Act and the amendments made by this Act shall take effect on the date of enactment of this Act.

○