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Opening Statement on H.R. 5055
presented to
Subcommittee on Courts, the Internet, and Intellectual Property
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-Good morning, and thanks to Chairman Smith, Representative Berman, Representative Delahunt, and all of the members of the Subcommittee for inviting me to speak to you about intellectual property and fashion design.

-Fashion designer Coco Chanel is sometimes quoted as having said, "Protecting the seasonal arts is childish." However, most people who repeat that statement seem to ignore the fact that in the 1930s Chanel herself joined fellow designers as a plaintiff in a landmark French lawsuit that shut down a notorious copyist and helped the designer to establish the famous house that still bears her name. In other words, Chanel was a smart businesswoman who knew how to tell the public what it wanted to hear, while using the law to protect her intellectual capital.

-This is the Constitutional intent of copyright law – to promote and protect the development of creative industries, by ensuring that creators are the ones who receive the benefit of their own intellectual investment.

-Of course fashion designers create without the benefit of copyright law – but so would poets and songwriters if there were no copyright. It's what humans do. It is also the case that trends and fashions exist in every creative industry, including those supported by copyright.

-The problem today is that, as in other industries like music and film, the digital era has made pursuing a creative business without copyright protection even more difficult. Even Mr. Sprigman just admitted that technology changes things. A digital photograph of a new design can be uploaded to the internet and sent to a knockoff artist halfway around the world before the model even reaches the end of the runway, as Mr. Banks pointed out. It used to take months to copy a new style; now it takes mere hours. That ecosystem [mentioned by Mr. Wolfe] has already been upset.

-Creative design at *all* price levels is vulnerable to copying. H&M, a popularly priced chain that distributes trends to the mass market and is sometimes cited as an example of indifference to copying, was itself knocked off and brought action last year under EU unregistered design protection.

-The United States should no longer be a pirate nation with respect to IP, as we were in our early years. We are a global superpower and have worked with fellow members of the G8 group, the WTO, the World Intellectual Property Organization, and through bilateral trade negotiations to promote IP protection – except in the area of fashion design. This is particularly surprising in light of those concerns that Representative Goodlatte mentioned about counterfeit trademarks – after all, these fake trademarks have to be affixed to something, often goods created through design piracy.

-At this point in our history, America should not be a safe haven for copyists. The failure to protect fashion design is both inconsistent with our international policy and a disadvantage to our

own creative designers – especially the young designers who represent the future of the American industry and who are particularly vulnerable to copying.

-Consider the example of Ananas, a 3-year-old handbag label. Its co-founder, a young wife and mother working from home here in the Washington suburbs, has been successful in promoting her handbags, which retail between \$200 and \$400. Earlier this year, however, she received a telephone call canceling a wholesale order. When she asked why, the buyer told her that she'd found virtually identical copies of the bags at a lower price. Shortly thereafter, the designer discovered a post on an internet message board from a potential customer who had seen one of her bags in a major department store. Before buying, the customer looked online and found a cheap, lookalike copy of the Ananas bag in lower quality materials, which she not only bought but recommended to others. Ananas is still in business at present, but this loss of both wholesale and retail sale is a significant blow to a small business.

-As a law professor with a particular interest in unprotected areas of creativity, I have kept a file on IP and fashion design for almost a decade, and I have a website (as Chairman Smith mentioned, thank you) dedicated to the subject. I also frequently speak with young designers who have been copied or would like to proactively protect their work. One of the most difficult things to explain to them is that U.S. law does not consider fashion design sufficiently creative to be worthy of protection. I hope that instead they will one day have the law behind them, to deter copying in the first place, and to protect them against design piracy when the need arises.

-H.R. 5055, with its short-term, narrowly tailored protection for the fashion industry, is a groundbreaking example of how copyright law can be carefully designed to serve both creators and the public interest. In fact, this kind of short-term protection is exactly the model of copyright suggested by some law professors who have opposed this subcommittee's actions on other bills. I am surprised and disappointed that those individuals don't believe that the fashion industry deserves even a minimal amount of protection when compared with other forms of creative expression.

-I would like to thank and congratulate the subcommittee on taking the issue of fashion design protection seriously and holding this hearing, and I look forward to your questions.