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Written Statement on H.R. 5055, "The Design Piracy Prohibition Act"

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Chairman Smith, Representative Berman, and members of the Subcommittee, thank you for this opportunity to address the issue of intellectual property (IP) protection and fashion design.

Introduction and Executive Summary

Historically, American law has ignored the fashion industry. While trademark law protects designer logos and patent law occasionally applies to innovative design elements, the Copyright Office has held that clothing design in general is not subject to protection. As a result of this legal and cultural choice, the United States has been a safe haven for design piracy. Creative fashion designers over the past century have been forced to rely instead on social norms and makeshift means of defending themselves against copyists.

Today, global changes in both the speed of information transfer and the locus of clothing and textile production have resulted in increased pressure on creative designers at all levels, from haute couture to mass market. Digital photographs from a runway show in New York or a red carpet in Los Angeles can be uploaded to the internet within minutes, the 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. Similarly, e-commerce is both an opportunity and a danger for designers, who must battle knockoff artists with ready access to detailed photographs and descriptions of their works. Young designers who have not yet achieved significant trademark recognition, and must instead rely on the unique quality of their designs to generate sales, are particularly vulnerable to such theft.

Despite America's role in promoting the international harmonization of intellectual property protection, the U.S. has not joined other nations in addressing the issue of design piracy and its effects on the fashion industry. The U.S.T.R. has repeatedly targeted the rising global trade in counterfeit trademarked goods, including apparel, but copies of a garment rather than its label remain beyond the reach of American law. H.R. 5055 is 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.

I. Historical Lack of Protection and Changed Circumstances

The lack of protection for fashion design under U.S. law is an anomaly among mature industries that involve creative expression. This exclusion of fashion from the realm of copyright was not inevitable, but was instead the result of deliberate policy choices. Examining the historical and cultural reasons for the differential treatment of fashion design is thus important to understanding the changed circumstances that indicate a greater need for some form of protection today.

A. Theory and Reality: The Historical IP/Fashion Divide

1. Fashion design is part of the logical subject matter of copyright.

While in the early days of U.S. copyright only books and maps were eligible for registration, the scope of protection has since increased to include painting, sculpture, textile patterns, and even jewelry design – but not clothing.

Why has clothing been excluded from protection? The problem lies in a reductionistic view of fashion as solely utilitarian. Current U.S. law understands clothing only in terms of its usefulness as a means of covering the body, regardless of how original it might be. Surface decoration aside, the plainest T-shirt and the most fanciful item of apparel receive exactly the same treatment under copyright law. In fact, a T-shirt with a simple drawing on the front would receive *more* protection than an elaborate ball gown that is the product of dozens of preliminary sketches, hours of fittings, and days of detailed stitching and adjustment before it is finally complete. The legal fiction that even the most conceptual clothing design is merely functional prevents the protection of original designs.

Fashion, however, is not just about covering the body – it is about creative expression, which is exactly what copyright is supposed to protect. Historians and other scholars make an important distinction between clothing and fashion. "Clothing" is a general term for "articles of dress that cover the body," while "fashion" is a form of creative expression.[1] In other words, a garment may be just another item of clothing – like that plain T-shirt – or it may be the tangible expression of a new idea, the core subject matter of copyright.

Copyright law, of course, has a mechanism for dealing with creations that are both functional and expressive, although it has not been consistently applied to fashion designs. It is conceivable – and perhaps inevitable in the absence of specifically tailored legislation – that a court could invoke the doctrine of "conceptual separability" to distinguish between the artistic elements of a new fashion design and its basic function of covering the human body. Recent judicial treatment of a Halloween costume design follows essentially this course, noting that elements of a costume like a head or tail are at least in theory separable from the main body of the garment and thus potentially subject to copyright protection.[2] It would require only a small step to find that the uniquely sculptural shape of Charles James' famous 1953 "four-leaf clover gown" or Zac Posen's 2006 umbrella-sleeve blouse are conceptually independent of the human forms beneath them and thus copyrightable. Visual artists, too, have blurred the distinction between art and fashion by designing unique works of art in the shape of clothing.[3]

In short, fashion design is a creative medium that is not driven solely by utility or function. If it were, we could all simply wear our clothes until they fell apart or no longer fit. Instead, the range of new clothing designs available each season to cover the relatively unchanging human body – and the production of specific, recognizable copies – demonstrates that designers are engaged in the creation of original works.

From the perspective of theoretical consistency, then, the relationship between copyright law and fashion design is ripe for change. However, relying on the courts to take this step would be a lengthy and uncertain process, one that might ultimately require a Supreme Court decision to sort through conflicting precedents. The judiciary, moreover, does not have the authority to tailor intellectual property law to the specific needs of the fashion industry and the public, as would H.R. 5055 (discussed further in Section IV infra), but can only apply existing law. The most efficient and reflective way to secure copyright protection for the creators of fashion designs would be an act of Congress.

2. *U.S. law does not support the economic development of the fashion industry.*

Despite the importance of creative fashion design to the global economy, and to many local economies within the United States, it still operates without the benefits of modern intellectual property protection.

In historical terms, the pattern of industrial development in the U.S. and more recent emerging economies often commences with a period of initial piracy, during which a new industry takes root by means of copying. This results in the rapid accumulation of both capital and expertise. Eventually the country develops its own creative sector in the industry, which in turn leads to enactment of intellectual property protection to further promote its growth. This was the pattern followed in the music and publishing industries, in which the U.S. was once a notorious pirate nation but is now a promoter of IP enforcement.

In the case of the American fashion industry, however, the usual pattern of unrestrained copying followed by steadily increasing legal protection is not present. This situation has led to multiple inefficiencies in the development of the U.S. fashion industry. In the legal realm alone, creative designers have borne the costs of a decades-long effort to craft protection equivalent to copyright from other areas of IP law, particularly by pressing the boundaries of trademark, trade dress and patent law. While each of these areas of intellectual property law offers protection to some aspects of fashion design, most notably logos used as design elements and famous designs that have developed sufficient secondary meaning to qualify for trade dress protection, the majority of original clothing designs remain unprotected. Even design patents, which can in theory protect the ornamental features of an otherwise functional object, are seldom useful in a seasonal medium like fashion. The result is a legal pastiche that is confusing, expensive to apply, and ultimately unable to protect the core creativity of fashion design.

Current U.S. IP law thus 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. The most severe damage from this legal vacuum 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 rampant plagiarism in the U.S. market, very few small businesses can compete with those who steal their intellectual capital. In fashion, America is still a pirate nation; the future direction of the industry will be directly influenced by the absence or presence of intellectual property protection.

B. Cultural Explanations and Changed Circumstances

The differential treatment of fashion relative to other creative industries with extensive legal protection is the result of specific cultural perceptions and historical circumstances, many of which have now changed. While it is beyond the scope of this testimony to address the entire cultural history of the fashion industry, several recent developments are particularly important to understanding why a change in the law is appropriate at this time.

1. <u>Fashion design is now recognized as a form of creative expression</u>.

The origins of copyright law date back to the Enlightenment era, a period that also articulated the Western distinction between art and craft. As copyright developed and extended to include various forms of literary and artistic works, it continued to maintain the division between legally protected, high status "fine art" and mere "decorative arts" or handicrafts. The design and manufacture of clothing, which for most families was a household task, did not rise to the level of creative expression in the eyes of the law.

Even after fashion design became increasingly professionalized during the nineteenth century, with the development of both haute couture and ready-to-wear sectors, the U.S. failed to recognize its creative status. Contributing to this low valuation was fashion's association with women rather than men, a shift influenced by the Industrial Revolution. By the end of the nineteenth century, American sociologist Thorstein Veblen famously linked fashion with "conspicuous consumption," concluding that the role of the female was "to consume for the [male] head of the household; and her apparel is contrived with this object in view."[4] Both the feminizing of fashion and the intellectual attention to consumption rather than production prevented the legal recognition of fashion as a serious creative industry.

Modern attitudes toward fashion design as a creative medium, however, have changed dramatically. Institutions from the Smithsonian to Sotheby's take fashion seriously, and organizations like the National Arts Club and the Cooper-Hewitt National Design Museum have recently added fashion designers to their annual categories of honorees. Even a Pulitzer Prize for criticism was awarded for the first time this year to a fashion writer, Robin Givhan of the *Washington Post*. It is inconsistent with this cultural shift for copyright law to deny fashion's role as an artistic form.

2. <u>Creative design now exists at all price levels</u>.

For most of the history of the fashion industry, a small group of elite, Parisian fashion designers dictated seasonal trends, and the rest of the world followed as best they could. The privileged few were measured for couture originals, the relatively affluent bought licensed copies, and the majority settled for inexpensive knockoffs or sewed their own garments at home.

With the recent democratization of style, creative design originates from many sources and at all price levels. Fashion is now as likely to flow up from the streets as down from the haute couture, and reasonable prices are no guarantee against copyists. Some of the most aggressively copied designs are popularly priced; consider this summer's popular Crocs "Beach" style shoe at $29.99 and its battle with copies sold for as little as $10.00.

In addition, within the past few years high-end designers have shown an increasing desire to reach a wider audience and to collaborate with mass-market producers. Fashion houses are seeking to experiment with new ideas in their runway collections, then to provide customers with affordable versions in their diffusion lines, and finally to adapt the looks for a broad range of consumer needs and budgets. This trickle promises to become a flood, as Isaac Mizrahi's designs for Target are joined by Chanel designer Karl Lagerfeld's line for H&M, Mark Eisen's sportswear for Wal-Mart, and many others.

As a result of these changes, it is no longer necessary for the general public to turn to knockoffs in order to purchase fashionable apparel, as it might have been in past decades. Some creative work is simply affordable; in addition, creators of more expensive designs are now finding ways to enter the mass market as well. A change in copyright law to incorporate fashion would facilitate designers' ability to disseminate their own new ideas throughout the market, much the way copyright law allows book publishers to first release hardcover copies and then, if the book is successful, to print paperbacks.

3. The internet era calls for new strategies to protect creativity.

Creative fashion designers in earlier periods fought copyists by relying on strategic measures like speed and secrecy, the social norms of the industry, and perhaps patterns of consumer behavior. In the absence of copyright protection under U.S. law, these extralegal mechanisms were an important part of the fashion business.

Today, however, the same speed and accuracy of information transfer that affects the music and film industries is also having an impact on fashion. Would-be copyists no longer have to smuggle sketch artists into fashion shows and send the results to clients along with descriptions of color and fabrication. Instead, high-quality digital photos of a runway look can be uploaded to the internet and sent to copyists anywhere in the world even before the show is finished, and knockoffs can be offered for sale within days – long before the original garments are scheduled to appear in stores. Fifty years ago, design houses may have been able to impose somewhat successful embargoes on the press; now, such efforts are futile.

Similarly, the claim that knockoffs enhance demand for ever-newer luxury goods among status-seeking consumers, an economic argument dating back to at least 1928,[5] fails to take into account the modern speed of production. Once upon a time it may have been that the adoption of a new luxury item by affluent trendsetters was imitated first by wealthy consumers, then by the middle class, and then in form of knockoffs by everyone else, at which point the fashion-forward would abandon the item and demand the next new thing – which producers were happy to provide. Today, however, this "fashion cycle" scenario is rendered obsolete by the fact that poor quality knockoffs can be manufactured and distributed even more quickly than the originals, leaving creative designers little opportunity to recover their investment before the item

is already out of style. Even if the fashion cycle were ever sufficient to support the design industry, that is no longer the case.

As in other areas of creative production, the digital age should provoke a reexamination of the legal protection available to fashion design.

4. *The future of American fashion is in creativity, not low-cost copying*.

Textile and clothing manufacturing have historically played an important role in the American economy, driving the Industrial Revolution and supporting thousands of jobs. With the increased harmonization of global markets and the January 1, 2005, dismantling of import quotas in this sector, however, it has become apparent that the U.S. can no longer compete with China and other centers of low-cost production on price alone. No matter how inexpensively the U.S. can produce knockoffs, other countries can manufacture much cheaper versions.

Instead, the future of the U.S. economy will rest on the ability to develop and protect creative industries, including fashion design. America leads the world in industries like music, film, and computer software, but our history as a pirate nation in the field of fashion has limited our influence in this area. Creative fashion design is a relatively young industry in the U.S., albeit one in which there is growing interest among students choosing their careers. If this industry is to reach its full potential, now is the time to consider the impact of government policies, including intellectual property law.

II. Effects of Design Piracy

The lack of copyright protection for fashion design negatively affects both individual designers whose expressions are copied and the intellectual property system as a whole. As a law professor with a website dedicated to IP and fashion, I frequently receive messages from young designers whose work has been stolen or who hope to prevent the copying of their designs. It is with regret that I must repeatedly explain that while that law can protect designers' trademarks against counterfeiters, in the U.S. the actual designs are fair game for copyists.

A. Impact on Designers

Creativity is an intrinsic part of human nature, not a byproduct of the intellectual property system. Poets would continue to write, musicians to sing, and fashion designers to sew even if all copyright protection were eliminated tomorrow. While the concept of intellectual property is only a few hundred years old, archaeologists have recently discovered 100,000-year-old shell necklaces, which they interpret as the first evidence of human symbolic thinking.

The goal of the IP system, however, is not merely to ensure that authors put pen to paper or needle and thread to fabric, but to encourage and reward individuals so that they can continue to develop their ideas and skills in a productive manner. In other words, intellectual property law ideally serves as a tool for harnessing and directing creativity. For this reason, the Constitution

empowers Congress "[t]o promote the progress of science and useful arts." It is this "progress" over time that is hindered by the lack of legal protection for fashion design.

Young designers attempting to establish themselves are particularly vulnerable to the lack of copyright protection for fashion design, since their names and logos are not yet recognizable to a broad range of consumers. These aspiring creators cannot simply rely on reputation or trademark protection to make up for the absence of copyright. Instead, they struggle each season to promote their work and attract customers before their designs are copied by established competitors.

Over the past century successive waves of American designers have entered the industry, but few fashion houses have endured long enough to leave a lasting impression comparable to the influence of French fashion. While it is difficult to quantify or even identify designers who give up their businesses, particularly for reasons of piracy, there is strong anecdotal evidence that design piracy is harmful to the U.S. fashion industry. Consider just two representative examples, one a historical snapshot from an early attempt to develop American fashion and the other from this year.

In 1938 Elizabeth Hawes wrote a best-selling critique of the fashion industry entitled *Fashion is Spinach.*[6] In it, she chronicled her start working for a French copy house, the only job in the fashion industry available to a young expatriate American in the 1920s; her return to New York to design her own line; and her ultimate disillusionment with the tyranny of mass production and the ubiquity of poor quality knockoffs that undercut her own designs. She ultimately closed her business in 1940, but not before leaving a record of the perils of the industry for a creative designer.

From a legal perspective, little has changed in almost seventy years. Handbag designer Jennifer Baum Lagdameo co-founded the label Ananas approximately three years ago. A young wife and mother working from home, Jennifer 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 inquired as to the reason for the cancellation, she learned that the buyer had found virtually identical copies of her bags at a lower price. Shortly thereafter, Jennifer discovered a post on an internet message board by a potential customer who had admired one of her bags at a major department store. Before buying the customer looked online and found a cheap, line-for-line copy of the Ananas bag in lower quality materials, which she not only bought but recommended to others, further affecting sales of the original. While Ananas continues to produce handbags at present, this loss of both wholesale and retail sales is a significant blow to a small business.

Copying is rampant in the fashion industry, as knockoff artists remain free to skip the time-consuming and expensive process of developing and marketing new products and simply target creative designers' most successful models. The race to the bottom in terms of price and quality is one that experimental designers cannot win. Nearly every designer or even design student seems to have a story about the prevalence of copying, a situation that makes the difficult odds of success in the fashion industry even longer.

B. Design Piracy and Counterfeiting

Not only does the legal copying of fashion designs harm their creators, it also provides manufacturers with a mechanism for circumventing the current campaign against counterfeit trademarks. If U.S. Customs stops a shipping container with fake trademarked apparel or accessories at the boarder, it can impound and destroy those items. If, however, the same items are shipped without labels, they are generally free to enter the country – at which point the distributor can attach counterfeit labels or decorative logos with less chance of detection by law enforcement. I have personally witnessed the application of such counterfeit logos to otherwise legal knockoffs at the point of sale; after the consumer chooses a knockoff item, the seller simply glues on a label corresponding to the copied design. The continued exclusion of fashion designs from copyright protection thus undermines federal policy with respect to trademarks by perpetuating a loophole in the intellectual property law system.

III. Comparative IP Regimes and Fashion Design

While the U.S. has deliberately denied copyright protection to the fashion industry over the past century, other nations have incorporated fashion into their intellectual property systems – and have consequently developed more mature and influential design industries.

France in particular has treated fashion design as the equivalent of other works of the mind for purposes of intellectual property protection. French laws protecting textiles and fashion design date back in their earliest form to the *ancien régime*; these laws were subsequently updated and clarified in the early twentieth century. As a result, Parisian fashion designers have been able over the course of their careers to develop and protect signature design repertoires, which even after the departure of the founding designers can serve as a form of brand DNA for their design houses. The formal recognition of fashion design as an art form has thus helped maintain the preeminence of the French fashion industry and augmented the lasting creative influence of both native designers and those who have chosen to work in France.

The association between strong intellectual property protection and a successful creative industry has not been lost on other countries that sought to support their domestic design industries. As long ago as 1840 a British textile manufacturer wrote, "France has reaped the advantage of her system; and the soundness of her view, and the correctness of her means, are fully proved by the results, which have placed her, as regards industrial art, at the head of all the nations of Europe, in taste, elegance, and refinement."[7]

While modern French law still offers the most extensive protection to fashion design, Japan, India, and many other countries have incorporated both registered and unregistered design protection into their domestic laws. In addition, E.U. law has since 2002 provided for both three years of unregistered design protection and up to 25 years of registered design protection, measured in five-year terms.

The global legal trend toward fashion design protection has rendered the U.S. an outlier among nations that actively support intellectual property protection, a position that is both

politically inconsistent and contrary to the economic health of the domestic fashion industry. Congress should take these factors into account when considering a reasonable level of legal protection for fashion design.

IV. The Role of H.R. 5055

When analyzed in light of the goals of the intellectual property law system, current challenges to the U.S. fashion industry, and international legal developments, H.R. 5055 is a carefully crafted legal remedy to the inequities resulting from the exclusion of fashion design from copyright law. The bill is narrowly tailored to achieve a balance between protection of innovative designs and the preservation of the extensive public domain of fashion as an inspiration for future creativity. Perhaps most importantly, it is a forward-looking measure that lays the groundwork for the future development of a robust, creative American fashion industry.

The fashion industry's decision not to seek full copyright protection, but instead to request only a limited three-year term, is particularly appropriate to the seasonal nature of the industry. This period will allow designers time to develop their ideas in consultation with influential editors and buyers prior to displaying the work to the general public, followed by a year of exclusive sales as part of the designer's experimental signature line, and another year to develop diffusion lines or other mass-market sales. While many legal scholars have aptly criticized the full term of copyright protection as excessive when viewed solely in light of an incentive-based rationale, a three-year term chosen after careful analysis of the relevant industry is exactly the sort of scheme that "low protectionist" activists have endorsed for copyright as a whole. Such a short term of protection will simultaneously encourage designers to facilitate affordable access to cutting-edge design and contribute to the ongoing enrichment of the public domain.

The choice to amend the Copyright Act, rather than to modify the design patent system or devise a sui generis scheme involving prior review, is also well suited to the needs of the fashion industry. The bill appropriately recognizes that the short lifespan of new fashions is inconsistent with burdensome legal formalities. Indeed, I would suggest that unregistered protection would be even more consistent with the U.S. copyright system, existing European design protection, and the needs of the industry, particularly inexperienced designers. Nevertheless, the establishment of registered design protection is an improvement over the current state of the law.

The language of H.R. 5055, particularly if amended to clarify that only "closely and substantially similar" copies will be considered to infringe upon registered designs, is likewise well crafted to both promote innovation and preserve the development of trends. As with other forms of literary and artistic work, copyright law is clearly capable of protecting specific expressions while allowing trends and styles to form. From a legal perspective, a fashion trend is much like a genre of literature. Granting copyright to a John Grisham novel does not halt the publication of many similar legal thrillers, nor does the protection of Dan Brown's *DaVinci Code* prevent a spate of novels involving Mary Magdalene or the Knights Templar from appearing in bookstores. When an author writes a bestseller, imitators of his or her style tend to follow – but they are not permitted to plagiarize the original. Copyright in this sense is merely a legal

framework that supports an existing social norm; neither reputable authors nor creative fashion designers engage in literal copying of one another.

The level of generality at which fashion trends exist, moreover, is far too broad to be affected by the proposed bill. To paraphrase next month's *Vogue* magazine, currently on the newsstand, red will still be the new black following the passage of H.R. 5055. In the same way, common trends such as wide neckties in the 1970s or casual Fridays in the late 1990s were not dependent on the presence or absence of design protection, nor would such nonspecific ideas ever be subject to intellectual property protection.

In addition to the protective benefits of H.R. 5055, the legislation may have a beneficial effect on creativity in the industry as a whole. Former copy houses, no longer able to legally replicate other designers' work, will be forced to innovate or at least transform their work so that it no longer substantially resembles the original products. This in turn can be expected to lead to more jobs for design professionals and more reasonably priced choices for consumers.

At present, the bulk of design-related litigation tends to invoke federal trademark and trade dress as well as state unfair competition claims in order to mimic the protections that would be offered by H.R. 5055, with limited success. To the extent that fact-based disputes regarding copying continue to arise, the new legislation will permit parties to engage in more straightforward, simpler litigation. Not only will this avoid the unnecessary distortion of trademark and trade dress law, but it will also clarify the parameters of what constitutes protected design. As in other creative industries governed by intellectual property law, an equilibrium will arise and manufacturers will find it in their best interests to offer retailers innovative rather than infringing work.

H.R. 5055 promises to remedy a historical and theoretical imbalance in the copyright system and to offer protection to the many young American designers whose work is currently vulnerable to knockoff artists. For these reasons, I encourage you to seriously consider this reform.

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[1] Joanne B. Eicher, *Clothing, Costume and Dress* in 1 ENCYCLOPEDIA CLOTHING AND FASHION 270 (2005);Valerie Steele, *Fashion*, in 2 ENCYCLOPEDIA OF CLOTHING AND FASHION 12 (2005).
[2] Chosun Int'l., Inc. v. Chrisha Creations, Ltd., 413 F.3d 324 (2d Cir. 2005).
[3] *See, e.g.,* Poe v. Missing Persons, 745 F.2d 1238 (2d Cir. 1984).
[4] Thorstein Veblen, THE THEORY OF THE LEISURE CLASS 132 (1899; Random House 2001 ed.)
[5] *See* Paul H. Nystrom, ECONOMICS OF FASHION 18-54 (1928).
[6] Elizabeth Hawes, FASHION IS SPINACH (1938).
[7] James Thomson, *quoted in* J. Emerson Tennent, A Treatise on the Copyright of Designs for Printed Fabrics (1841).