

Testimony of Christopher Sprigman
Associate Professor,
University of Virginia School of Law
Re: H.R. 5055

Given July 27, 2006, before the
Committee on the Judiciary,
U.S. House of Representatives,
Subcommittee on Courts, the Internet, and
Intellectual Property

My name is Christopher Sprigman; I am an Associate Professor at the University of Virginia School of Law. In my role as a law professor, and before that in my career as a lawyer with the Antitrust Division of the United States Department of Justice and in private practice, I have focused on how legal rules – especially rules about intellectual property – affect innovation. Over the past two years, along with Professor Kal Raustiala of the UCLA School of Law, I have spent a considerable amount of time studying the fashion industry's relationship to intellectual property law. Professor Raustiala and I have written an academic article on the topic, entitled *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*. This article, which I am submitting along with my written testimony, will be published in December in the Virginia Law Review. The comments I'll make here today will refer to the findings of that article.

In brief, for reasons I will explain, Professor Raustiala and I are opposed to H.R. 5055. The Framers gave Congress the power to legislate in the area of intellectual property. But for 217 years 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.

We oppose H.R. 5055 for 3 principal reasons:

- 1) The fashion industry is not like the music, motion picture, book, or pharmaceutical industries. Over a long period of time, it has been both creative and profitable without any IP rules protecting its

original designs. Unlike in many other creative industries, copying does not appear to cause harm to the fashion industry as a whole.

2) Fashion design protection has been tried in Europe and has had little effect. Design firms across the Atlantic copy others' designs just the way they do here in the U.S.

3) We fear that a primary effect of H.R. 5055 will be extensive and costly litigation over what constitutes infringement. As such, H.R. 5055 is a lawyer-employment bill, not a fashion-industry protection bill.

In my brief time here let me expand on these 3 points.

Our first point is that this bill is an unnecessary and unwise intervention in the marketplace. The American fashion industry has become a powerhouse in the decades since World War II. The industry does business in excess of \$180 billion per year, and U.S. firms play a substantial role in a global fashion industry worth almost \$1 trillion annually. In 2005, the fashion industry grew more quickly than the economy as a whole, and the industry's strong recent growth reflects its robust long-term performance. According to recent data from the Bureau of Economic Analysis, sales of apparel and shoes have registered uninterrupted annual increases between 1945 and 2004, 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 for the public's attention with innovative new designs. The fashion industry produces a huge variety of apparel, and innovation occurs at such a pace that styles change rapidly and goods are produced for consumers at every conceivable price point. In short, the fashion industry looks exactly as we would expect a healthy 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 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. But Congress has always refrained from making this change to our tradition – 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 industry.

Why is that? In our article, Professor Raustiala and I explain how copying and creativity actually work together in the fashion industry. This argument is grounded in the fact that fashion is cyclical and driven by popular trends. Styles come and go quickly as many consumers seek out new looks well before their clothes wear out. This is not new: as Shakespeare put it in *Much Ado About Nothing*, “The fashion wears out more

apparel than the man.” But the result is that 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 that, 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. The ability to be copied encourages designers to be more creative, so as to create new trends 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, and raising prices for consumers.

Our second point pertains to the E.U.’s experience, which suggests that design protection does not affect copying. In 1998 the European Union adopted a Directive on the Legal Protection of Designs. European law provides extensive protection for apparel designs, but the law does not appear to have had any appreciable effect on the conduct of the fashion industry, which continues to freely engage in design copying.

Some may argue 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 at the E.U. registry of designs, and very few designers and design firms have registered their designs – an act that is a prerequisite for protection under the E.U. law, and would also be required for protection under H.R. 5055. Second, copying of fashion designs is just as common in Europe as it is here in the U.S. Indeed, many large fashion copyists, including large retail firms such as H & M, Zara, and Topshop, are European. The law in Europe has had little or no effect on copying, or on innovation in the industry. While the E.U. prohibits fashion design copying, the industry continues to behave as it always has – copying and making derivative works.

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. This brings me to our third and final point.

Our third point is that while H.R. 5055 is unlikely to do much good, it potentially could cause significant harm. Unlike most countries in Europe, which have relatively weak civil litigation systems, we Americans are, for better or worse, accustomed to resolving disputes through the courts. As a result, the U.S. is a society

teeming with lawyers – including, unlike in Europe, a class of litigation entrepreneurs 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 H.R. 5055 might turn the industry’s attention away from innovation and toward litigation. We foresee extensive litigation over the standard of infringement in the proposed bill. Drawing the line between inspiration and copying in the area of clothing is very, 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. 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. Over time, the fashion industry might begin to look more like the music and motion picture industries – i.e., dominated by a few large firms. It is hard to imagine an industry re-configured in this way producing the same rich variety of new designs that today’s healthy, competitive fashion industry yields. We believe that the end result of H.R. 5055 could be less consumer choice, fewer opportunities for young designers and small firms to break into the industry, and reduced consumption across the board of fashion goods.

In 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. This process results in consumption of fashion goods at a level above what would otherwise occur. It also permits many apparel items to be sold at lower prices than would be possible were fashion design protected by the intellectual property laws. To remain healthy, the fashion industry depends on open access to designs and the ability to create new designs that are derivative of them. The industry has thrived despite the lack of design protection; we are very hesitant to interfere with such success.

But we also fear that H.R. 5055 may cause harm. In sum, 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 217 years, and that Congress should be content to leave the industry to get on with the business of creating innovative new fashions.