Statement of

American Apparel & Footwear Association

Hearing on: the "*Innovative Design Protection and Piracy Prevention Act*"

Before the Subcommittee on Intellectual Property, Competition, and the Internet

House Judiciary Committee

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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.

Mr. Chairman, in 2006, you introduced the *Design Piracy Prohibition Act* (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 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 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.