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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

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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.

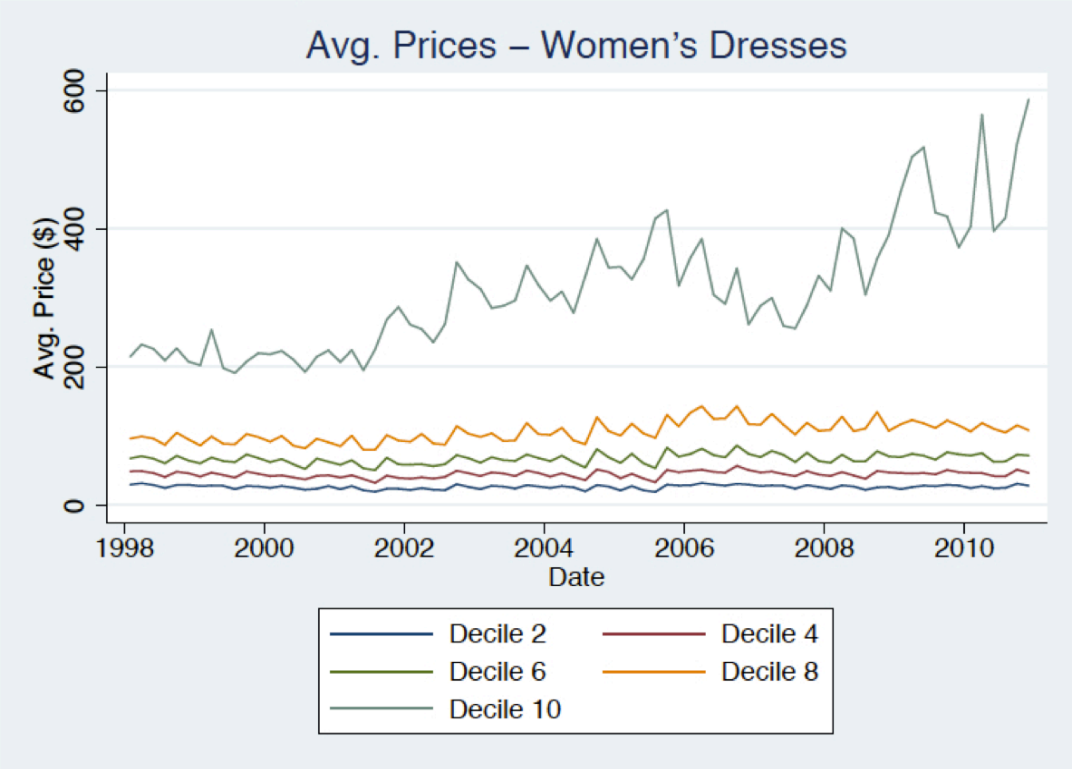
In sum, it is the preference of consumers for change in clothing designs that incentivizes creativity in the fashion industry – not intellectual property rules. Copying simply accelerates this process, intensifying consumers' desire for new styles, and increasing consumers' willingness to spend on the 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:**

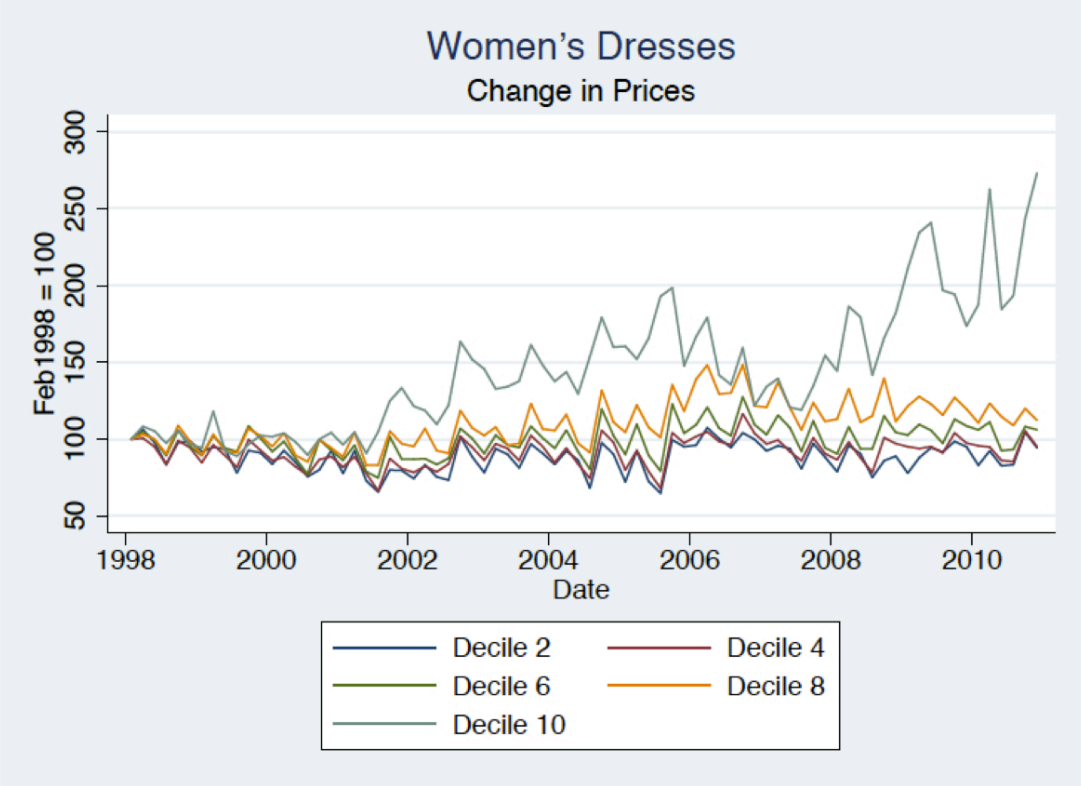
Fig. 1: Average prices of women's dresses



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

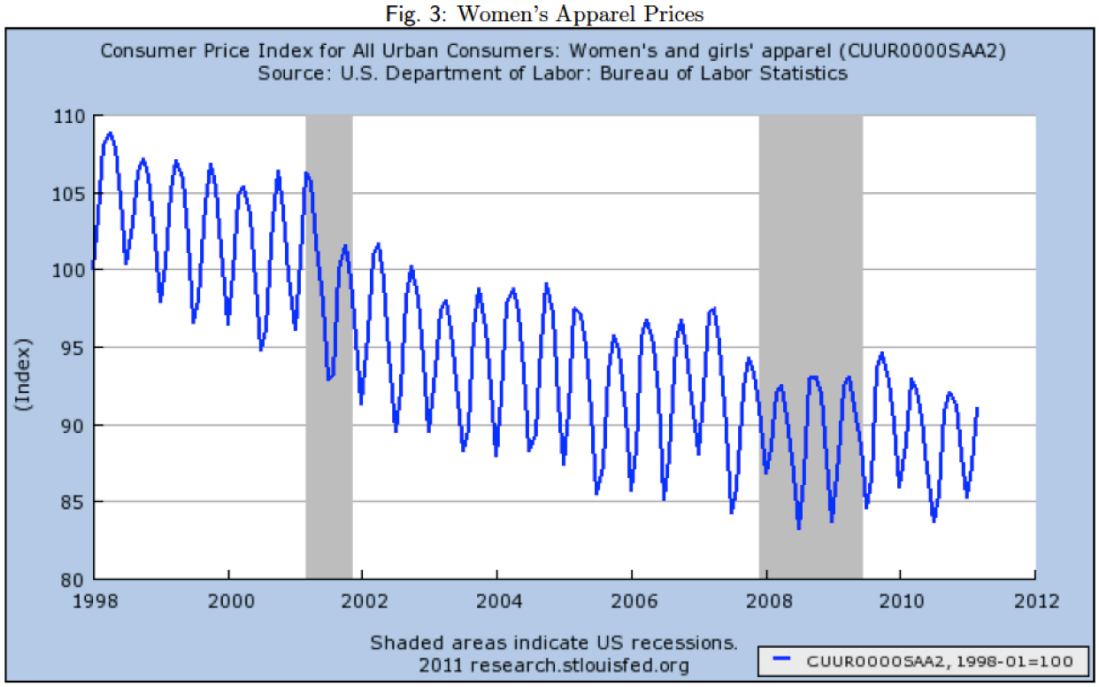


The top decile of dresses increased in price by over 250% over the period. Everything else stood still.

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