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House Committee on the Judiciary
Subcommittee on Intellectual Property, Competition, and the Internet

Hearing on H.R. 2511, the Innovative Design Protection and Piracy Prevention Act

July 15, 2011

Chairman Goodlatte, Ranking Member Watt, and Members of the Subcommittee, I am Jeannie Suk, Professor of Law at Harvard Law School. Thank you for this opportunity to testify about the Innovative Design Protection and Piracy Prevention Act ("IDPPPA"). My remarks draw on my ongoing research with Professor Scott Hemphill of Columbia Law School on law and innovation in the fashion industry.[1] Along with my testimony, I submit our Stanford Law Review article, *The Law, Culture and Economics of Fashion*. We have also written on the Act's predecessors: two iterations of the Design Piracy Prohibition Act,[2] and the Innovative Design Protection and Piracy Prevention Act introduced in the Senate last Term.[3] I submit one of these articles, published in the *Wall Street Journal*.

Like all of the arts, fashion design inevitably involves degrees of borrowing and influence from both specific existing works and general themes in our culture. Even the

[1] C. Scott Hemphill & Jeannie Suk, *The Law, Culture, and Economics of Fashion*, 61 STAN. L. REV. 1147 (2009); C. Scott Hemphill & Jeannie Suk, *Reply: Remix and Cultural Production*, 61 STAN. L. REV. 1227 (2009); C. Scott Hemphill & Jeannie Suk, *The Squint Test, How to Protect Designers like Jason Wu from Forever 21 Knockoffs*, SLATE, May 13, 2009, http://www.slate.com/id/2218281/ (last visited Jul. 10, 2011); C. Scott Hemphill & Jeannie Suk, *Schumer's Project Runway*, WALL STREET JOURNAL, Aug. 24, 2010, *available at* http://online.wsj.com/article/SB10001424052748704504204575445651720989576.html (last visited Jul 10, 2011).

[2] Design Piracy Prohibition Act, S. 1957, 110th Cong. (2007); Design Piracy Prohibition Act, H.R. 2033, 110th Cong. (2007)

[3] Innovative Design Protection and Piracy Prevention Act, S. 3728, 111th Cong. (2010).

most original creative work in the arts has important debts to prior work. Appropriately, federal copyright law does not consider most of the borrowing and similarity that occurs in the course of creative production to be copyright infringement. A trend in fashion – just as in movies, books, music, and culture – is the convergence on similar themes by many different producers who are consciously and unconsciously influenced and inspired by other work from the past and the present. But these common forms of borrowing in the arts do not require blatant replication of another's work, a practice that most directly takes profits from the original producer and thus most undermines the incentive to create that federal copyright law aims to foster.

The goal of a law addressing copying in fashion design should indeed be to give an incentive to create, but also to safeguard designers' ability to draw upon a large domain of creative design influences and to participate in fashion trends. The IDPPPA, in its current form, achieves this goal. By deviating from the ordinary copyright infringement standard with the much narrower "substantially identical" standard for infringement, it allows plenty of room for designers to innovate by drawing inspiration from others – much more room than producers of books, music, and film currently have. At the same time, it prohibits copyists from making exact or near-exact copies of original designs. It rewards designers who produce original work with legal protection against copyists, but limits frivolous litigation through heightened pleading requirements. It protects creative designers' ability to profit from their original work, but maintains, or even expands, consumer choice. In short, the IDPPPA strikes an effective balance between the significant public interest in incentivizing the creation of original design and

the significant public interest in making existing design vocabularies largely available for free use.

Effects on Retailers

A key distinction that must frame an analysis of the IDPPPA is the difference between products that are inspired by a designer's work and products that replicate a designer's work without effort at modification. The IDPPPA most squarely affects clothing producers and sellers known as "fast fashion" firms. Many simply think of these firms as blind copiers of the latest trendy designs, but fast fashion firms actually fall into two distinct categories: designers and copyists. Fast fashion designers, like H&M and Zara, usually take the latest trends and adapt or interpret them. The result is a relatively inexpensive product that is clearly inspired by, but not identical to, other designers' products. By contrast, fast fashion copyists, like Forever 21, choose particular designs to copy, and replicate those specific designs as best they can. These firms make no effort to modify the original design. Forever 21 operates in the United States, but not Europe, where it would be subject to existing European design protection law, just like H&M and Zara, which are based in Europe.

I am going to call fast fashion designers' products "inspired-bys," and fast fashion copyists' products "knockoffs." Put simply, if you have difficulty telling the difference between two designs, you are looking at a copyist's knockoff, not a designer's inspired-by. The difference between inspired-bys and knockoffs is crucial. It is a distinction that can be easily grasped by designers, retailers, and consumers. We need to allow the inspired-bys while stopping the knockoffs, which directly undermine the market for the

original designs that copyists target and which reduce the incentive to innovate. The IDPPPA's narrow infringement standard is designed to do just that – to distinguish between those who engage in interpretation of others' work and participate in a fashion trend, and those who slavishly copy a particular original design.

Retailers who sell clothing that is on trend but not an exact copy need not fear this Act. But the IDPPPA would undoubtedly harm those retailers whose businesses rely upon selling exact knockoffs of particular designs. This is what the Act is intended to do. Those retailers would no longer be able to avoid design costs by freely taking another's design in its entirety. Current retailers of copyists would have to adapt to the IDPPPA's requirements. They could do so in several ways. First, knocking off is not necessary to the business model of high-volume sellers of on-trend clothing at a lower price point. Sellers of knockoffs could become sellers of inspired-bys. They could employ designers – or direct the designers they currently employ – to engage and modify other designers' original designs. Such work would not be infringing, as it would not be "substantially identical" to a protected original design. And even where the copies are substantially identical, the copied design may not meet the high standard for originality that is needed for protection under the IDPPPA. Second, fast fashion firms could partner with designers, and sell the resulting products inexpensively. Fast fashion firms do engage in many such partnerships already. The IDPPPA would bring the sellers of knockoffs into the fold such that they would need the designers' authorization to make knockoffs of original designs.

While our current intellectual property regime does not provide protection for fashion design, it does provide protection for fashion firms' trademark and trade dress.

Large, well-known firms like Louis Vuitton and Chanel have the benefit of trademark and trade dress protection. Their advertising promotes and protects their brand-image, as does the use of high-end materials and workmanship that are difficult to copy at low cost. They also have a wealthy clientele that does not often overlap with the shoppers at Forever 21. All this means that established luxury firms suffer comparatively less from the practice of knocking off than their smaller, not as famous counterparts. Young and emerging designers do not have all the advantages just described. Young designers' products are generally not well enough recognized to qualify for trademark or trade dress protection. Nor do they have the money to advertise and reinforce their brand image. They cannot command the same premium for their products as the famous high-end luxury firms. Thus emerging designers are more likely to be in direct competition with their copyists, as their customer bases overlap. A designer's dress that retails for $300 instead of $3000 is within the reach of many consumers who might well opt for the still less expensive knockoff. Thus, knockoffs are particularly devastating for emerging designers, who face significant entry barriers and struggle to stay in business. This Act would help level the playing field with respect to protection from copyists and allow more such designers to enter the market, create, and flourish. Such an increase in emerging and smaller designer market participation would ultimately benefit retailers who sell the smaller designers' products, such as department stores.

That many less-established designers may lack resources to hire lawyers and sue copyists does not change this analysis. First, even under current law, smaller designers already do file suit against copyists, attempting to cobble together some semblance of protection against design copying by relying on currently existing intellectual property

protections in trademark and copyright. There is little reason to doubt that small designers would utilize protection for design, which is after all what they are really after in the lawsuits they currently file. Second, litigation by large fashion firms against copyists making knockoffs could have positive collateral consequences for small designers. For instance, if Forever 21 had to change its business model because it could no longer create replicas of products by Louis Vuitton – which does have the resources to litigate under the IDPPPA – that change in the culture and norms of fashion design would also work to small designers' benefit. Such enforcement by larger plaintiffs, in other words, may produce systemic changes that would work to smaller entities' advantage. Finally, while small designers often lack the resources to hire lawyers on an hourly basis, nothing in the Act prohibits contingent fee arrangements. Such arrangements would allow small designers to vindicate their rights, even if they could not afford to pay a lawyer's usual hourly fees.

Effects on Consumer Choice

Unquestionably the IDPPPA would change the consumer's playing field. Because fast fashion copyists could no longer sell inexpensive knockoffs without authorization, consumers may lose the low-price alternative knockoffs now offered. In an IDPPPA regime, such consumers may not have access to those exact designs at the knockoff price. For some, this will seem a significant limitation, especially since the customer who shops for the knockoff of a Louis Vuitton item is not the same customer who would buy the genuine article.

This limitation, however, is not as substantial as it may appear. First, the IDPPPA's protections would move fast-fashion designers to engage with those designs – that is, innovate – rather than simply replicate them. Indeed, the modifications copyists would be required to make under the IDPPPA would serve to *expand* consumer choice as high-volume sellers shifted their efforts toward inspired-bys and away from knockoffs. The increase in the variety of inspired-by designs would more than offset the loss of choice from prohibiting knockoffs.

Second, many high-end designers have partnered with higher-volume discount retailers such as Target and H&M to offer their goods at a lower price point. The IDPPPA encourages this kind of partnership. Under the Act, discount retailers would have even more incentive to pair with designers if they wished to sell others' designs with minimal or no modification.

Therefore, while the IDPPPA would restrict consumer choice in terms of easy availability of unauthorized knockoffs at a low price, it would increase consumer choice in terms of selection of goods. Fast-fashion copyists would have to become fast fashion designers who engage with designers' output, and thereby produce new options for consumers.

Effects on Litigation

Last Term, when the Senate Judiciary Committee considered a version of the IDPPPA identical to this Act, one Member raised the concern that the IDPPPA might

produce a flood of litigation.[4] The Member pointed to two elements of the Act in support of this concern. First, the Act gives designers the ability to protect their designs, without any registration requirement. Hence, any designer could claim that any design was protected, and so could attempt to litigate under the statute. Second, some of the statute's language – specifically the "substantially identical" and "non-trivial" requirements – may require significant judicial interpretation. Hence, designers and copyists alike would have an incentive to litigate, in an effort to define their rights and liabilities under the statute. Combined, the Member suggested, these factors might lead to a flood of litigation in the already busy federal courts.

This concern is overstated. First, the Act requires that plaintiffs plead each element of a design infringement claim with particularity. This requirement will curtail many frivolous lawsuits before they begin, and will cull others out at an early stage. Second, the Act's "substantially identical" standard for infringement is a high bar, as is the Act's stringent standard for originality. Litigation under the Act will be concentrated around knockoffs, leaving inspired-bys relatively untouched. Even under the current intellectual property regime, we see far greater numbers of lawsuits by designers against sellers of knockoffs than against sellers of inspired-bys. From 2003 to 2008, at least fifty-three lawsuits alleging trademark and copyright infringement were filed against Forever 21.[5] By contrast, two were filed against H&M and none were filed against Zara.[6] Under the IDPPPA, we could similarly expect to see sellers of inspired-bys remain relatively

[4] UNITED STATES SENATE, COMMITTEE ON THE JUDICIARY, *Executive Business Meeting* 53:14 (Dec. 1, 2010), http://judiciary.senate.gov/hearings/hearing.cfm?id=e655f9e2809e5476862f735da165262f (last visited Jul. 10, 2011) (comments of Senator John Cornyn).

[5] *The Law, Culture, and Economics of Fashion*, *supra* note 1, at 1173.

[6] *Id*.

untouched, and the sellers of knockoffs would either have to adapt their business strategy or face liability.

Nor is it likely that large fashion firms, recognizing less-established designers as competition, would succeed in driving those designers out of business by saddling them with litigation costs through baseless suits. IDPPPA plaintiffs must plead with particularity that the allegedly infringing article is "substantially identical in overall visual appearance to . . . the original elements of a protected design," or is not "the result of independent creation." To plead with particularity that a copy is "substantially identical" when the allegedly offending garment is not easily mistaken for the original would be extremely difficult. A baseless suit would be subject to early dismissal. Moreover, a suit filed simply to harass or lacking the requisite particular facts, might lead to sanctions against the firm and its lawyers.[7] These factors – the "substantially identical" standard, the heightened pleading requirement, and the prospect of sanctions – create a strong deterrent against suits meant to drive upstart designers out of business by imposing litigation costs.

Of course, there would be litigation under the IDPPPA, and courts would have to interpret the language in the Act and sometimes draw difficult lines. But this is the natural consequence of Congress's passing any law. The IDPPPA's internal controls on litigation would discourage litigiousness and stem the flood of litigation that some fear.

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[7] *See* Fed. R. Civ. P. 11(b)(1), (c) (imposing sanctions for complaints presented for an improper purpose).

The IDPPPA strikes an appropriate balance between giving incentives to create original designs and leaving designers free to draw upon influences, inspirations, and trends. If enacted, it would serve its purpose, to push the fashion industry toward innovation rather than substantially identical copying. The new law would harm fast fashion copyists but not retailers as a whole – and even then, only by compelling firms to change their businesses in ways consistent with Act's purpose. It would increase consumers' choice of designs that are inspired by other designs and that participate in trends, while limiting their ability to buy exact knockoffs of designs. It would not promote unnecessary litigation, but to the contrary, represents a wisely balanced and carefully tailored response to the problems of a distinctive industry.

Thank you for the opportunity to discuss this important Act with the Subcommittee. I look forward to your questions.

Published works submitted:

C. Scott Hemphill & Jeannie Suk, *The Law, Culture, and Economics of Fashion*, 61 STAN. L. REV. 1147 (2009), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1323487

C. Scott Hemphill & Jeannie Suk, *Schumer's Project Runway*, WALL STREET JOURNAL, Aug. 24, 2010, http://online.wsj.com/article/SB10001424052748704504204575445651720989576.html