

DESIGN LAW—ARE SPECIAL PROVISIONS NEEDED TO PROTECT UNIQUE INDUSTRIES?

HEARING BEFORE THE SUBCOMMITTEE ON COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY OF THE COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES ONE HUNDRED TENTH CONGRESS SECOND SESSION

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DESIGN LAW—ARE SPECIAL PROVISIONS NEEDED TO PROTECT UNIQUE INDUSTRIES?

THURSDAY, FEBRUARY 14, 2008

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, THE INTERNET,
AND INTELLECTUAL PROPERTY,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 2:14 p.m., in Room 2237, Rayburn House Office Building, the Honorable Howard Berman (Chairman of the Subcommittee) presiding.

Present: Representatives Conyers, Berman, Delahunt, Sherman, Schiff, Coble, Smith, Goodlatte, and Issa.

Staff present: Christal Sheppard, Majority Counsel; Eric Garduno, Majority Counsel, Rosalind Jackson, Professional Staff Member.

Mr. BERMAN. The hearing of the Subcommittee on Courts, the Internet, and Intellectual Property will come to order, if Congressman Russo is okay with that?

I would like to begin by welcoming everyone to this hearing, entitled, "Design Law—Are Special Provisions Needed to Protect Unique Industries?" We are not sure what the schedule is like, but the situation is this. One party in this place did something. The other party is mad about it. We are not clear whether the strategy coming up is lots of motions on the House floor or passive resistance, so we are not quite clear about how much uninterrupted time we will have before we have to go for votes.

So what we decided to do, the Ranking Member and I, is to dispense with our opening statements, to include them in the record. Is everybody else on the Subcommittee okay with that? Then that is what we will do. But first, just for a few comments, I will turn it over to the Ranking Member, Mr. Coble.

[The prepared statement of Mr. Berman follows:]

PREPARED STATEMENT OF THE HONORABLE HOWARD L. BERMAN, A REPRESENTATIVE
IN CONGRESS FROM THE STATE OF CALIFORNIA, AND CHAIRMAN, SUBCOMMITTEE ON
COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY

Our hearing today is about design rights. I must profess I am no expert in the art of design—however, design rights are a longstanding and fundamental area of intellectual property law. Like patents and copyrights, design protection fosters the creation of original designs by providing exclusive rights in a design to its creator.

In the United States, while trade dress and copyright can in some cases provide protection for unique designs, the chief means of protecting designs is through patents. Design patents, like other patents, must pass a substantive examination by the United States Patent and Trademark Office before being granted. The subject

matter of a design patent must be novel, non-obvious, original, ornamental, and applied to an article of manufacture for it to qualify for protection. Design patents have existed since 1842 and have a well developed jurisprudence, though there may be changes in the near future. The Federal Circuit has agreed to review *en banc* the Egyptian Goddess case, which could lead to some significant changes in how design patent infringement will be analyzed. Nevertheless, design patents are widely used by various industries. According to the latest statistics, almost 21,000 design patents were granted in 2006 and companies like Sony, Nike, and Black & Decker were among the top recipients.

However, some argue that design patents are ineffective, either because the hurdles to securing design patents are too onerous, or because it takes too long to get a design patent. Since at least the 1970's there has been a policy debate in Congress as to whether to expand design protection beyond design patents. The record leading up to the 1976 Copyright Act shows that Congress seriously considered establishing a broad, *sui generis* design right. After multiple attempts, a limited design right in the form of the Vessel Hull Design Protection Act was passed in 1998.

The Vessel Hull Design Protection Act protects *only* original vessel hull designs. Unlike design patents, the Copyright Office administers registrations and there is no substantive examination to ensure applications meet the originality requirement. Instead, originality is left to be determined at trial by a court. Additionally, vessel hull design protection lasts 10 years while design patents may last up to 14 years.

So today, we have a number of mechanisms which provide design protection—design patents, vessel hull design protection, trade dress and copyright. Each sets out different standards in order to qualify for protection, a different scope of protection, and a different term of protection. Given this backdrop, there are a number of questions I'd like to cover today.

The language of the Vessel Hull Design Protection Act was “designed” to accommodate additional subject matter should Congress decide it was necessary. Therefore, if we are to consider the Act as the starting point for a broad design right, we must ask whether it has been effective for vessel hulls. Are vessel hull makers using the protection? Is the protection adequate? Are the amendments made by S. 1640 necessary? How have courts dealt with determining originality and infringement? And, are there other ways to improve the Act?

Depending on the answer to these questions, we may consider if and how to expand design rights under the Vessel Hull Design Protection Act to fashion designs. Coming from the Los Angeles area, I am particularly interested in what impact it may have on the local fashion industry. According to the California Fashion Association, in Los Angeles County alone, there are over 68,000 jobs in apparel manufacturing and it constitutes the largest manufacturing sector in the county. There are also over a 1000 independent fashion designers in the region.

Therefore we need to ask some general questions: Do fashion designers need design protection to be motivated to produce new designs? What impact would extending protection to fashion designs have on the apparel companies, designers and retailers of the Los Angeles area and throughout the country? And then some specific questions which can also be asked about H.R. 2033: How similar must a design be before you can enforce the design right? How does a court determine whether placement of the zipper on the left vs. the right is an original idea?

Finally, other industries may want to consider making use of the Vessel Hull Design Protection Act. At one time car makers were interested in including exterior car parts within the scope of the Act because they feared that their design patents would not stand up to the scrutiny of a trial. However, it seems that a recent decision by the International Trade Commission has increased their confidence in design patents as a means to protect car parts. This decision has led to a backlash by generic part manufacturers, insurance companies and consumer advocacy groups. They recommend instituting a repair clause exception that would prevent a design patent holder from enforcing the patent against generic replacement auto parts. However, what is the cost of such an exception to the intellectual property system? Is there a solution which allows for robust patent protection while maintaining an adequate secondary market? And, more fundamentally, are design patents the right mechanism for protecting auto parts? Should auto parts be protected under the Vessel Hull Design Protection Act?

There must be careful consideration given to the balance inherent in intellectual property rights. On one hand, we want to encourage innovation and creativity. On the other, we do not want to stifle the free flow of ideas nor place burdens so great that the public does not benefit from the innovation and creativity we hope to inspire. Finding the right balance is never easy. But, I believe that the testimony of our witnesses today will aid us in crafting that balance for design rights in vessel hulls, fashion and auto parts.

Mr. COBLE. I think you pretty well said it, Mr. Chairman. The future is nervously uncertain right now procedurally. I am pleased that you and I will waive our opening statements. I have no problem with that at all. Thank you, Mr. Chairman.

[The prepared statement of Mr. Coble follows:]

PREPARED STATEMENT OF THE HONORABLE HOWARD COBLE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NORTH CAROLINA, AND RANKING MEMBER, SUBCOMMITTEE ON COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY

**Honorable Howard Coble
Statement
Committee on the Judiciary
Subcommittee on Court, the Internet, and Intellectual Property
2237 Rayburn
*** 2:00 p.m. *****

The intellectual property world is generally divided into three substantive categories – patents, copyrights, and trademarks. Design Law incorporates all three of these categories and represents a new genre of challenges to our intellectual property laws. Undoubtedly, some of these issues will be resolved by the courts, others however, may require our attention.

I have been sympathetic to clothing designers and have cosponsored H.R. 2033 the Design Piracy Prohibition Act. That said, I understand that extending exclusive protection to clothing designers could have a number of consequences which I hope will be discussed during today's testimony. As many of you know, the textile industry was once one of the great North Carolina's greatest prides but has been decimated by foreign trade. Although I know that H.R. 2033 will not be the savior for the textile

flourish once again. I am looking forward to learning more about benefits and possible problems that may be created by H.R. 2033.

I, along with many other members of the subcommittee, have worked extensively on the Vessel Hull Design Protection Act and I understand that this good law may not be as effective in federal court as we had hoped and may require a minor tweak to improve its application in the vessel manufacturing industry. I look forward to learning about how we may make this good law a little better.

Finally, I'm also concerned about the impact of Design Law in the auto parts market. Auto manufacturers have successfully pursued a design patent infringement case before the International Trade Commission against competitive suppliers for several crash replacement parts. This is not good news for many of my constituents who cannot afford brand name parts and rely on after market auto parts.

The Europeans have implemented an exception to design protection, known as the “design clause,” I cannot say right now whether this exception to Design Law would be appropriate but expect that today’s panel will help us better understand the ins and outs of Design Law in the auto parts market.

Once again, Mr. Chairman, I have concluded my remarks before the red light has illuminated. I’m looking forward to the witnesses’ testimony and hope that we will have time cover each of these issues during today’s hearings.

I yield back the balance of my time.

Mr. BERMAN. All right. Five of the six witnesses are here. The other one I think is voting on the House floor, and that is Congressman Delahunt. So when he gets in, we will introduce him. But let me start in terms of the order of testimony.

William Fryer is a professor of law at the University of Baltimore, where he teaches several courses on intellectual property law. He has been a patent examiner, a patent attorney, and a Professor of Law at three other institutions. Professor Fryer has chaired the Industrial Design Committee of the ABA's Intellectual Property Law Section, and he played an important advisory role in the crafting of the Vessel Hull Design Protection Act.

Narcisco Rodriguez is an acclaimed fashion designer and a Member of the Board of Directors of the Council of Fashion Designers of America. After graduating from the Parsons School of Design, in my area, he worked for several of the biggest names in the fashion industry before launching his own label in 1998. He was the first designer ever to win back-to-back CFDA awards for outstanding achievement in fashion, and he also holds a Vogue VH1 Fashion Rocks award for best designer.

Steve Maiman is a co-owner of Stony Apparel, an apparel design and manufacturing firm based in Los Angeles, California. Stony Apparel employs about 140 people and designs, manufactures and distributes women's and children's apparel to Sears, J.C. Penney, Dillard's and others. Mr. Maiman has worked in the fashion business for more than 30 years.

Carl Olsen is Director of Ark Design, an industrial design firm based in Detroit, Michigan. Mr. Olsen's work for the last 13 years has been exclusively in vehicle design, though throughout his career he has worked on designing a variety of capital and consumer goods. Mr. Olsen has won several international awards for his auto designs. For 14 years, Mr. Olsen also served as chair of Transportation Design at the College for Creative Studies.

Jack Gillis is director of public affairs for the Consumer Federation of America, the Nation's largest consumer advocacy organization. He is the author, coauthor or editor of over 60 books, including "The Car Book," "The Car Repair Book," and "The Armchair Mechanic." Mr. Gillis has served as a contributing consumer correspondent for the Today Show. He also serves as the executive director of the Certified Automotive Parts Association, a nonprofit organization that sets standards and certifies the quality of automobile body parts.

I think we will start with the panel. All of your entire statements will be included in the record in their entirety. We would ask you to try to limit your comments to about 5 minutes, and then after all of you have finished, the Committee will bring questions to you.

Mr. Fryer?

**TESTIMONY OF WILLIAM T. FRYER, III, PROFESSOR OF LAW,
UNIVERSITY OF BALTIMORE SCHOOL OF LAW, BALTIMORE,
MD**

Mr. FRYER. Thank you, Mr. Chairman. I will try to be efficient. I know you have time constraints.

My job is to bring you up to date on the basic laws related to designs. That is the first part. The second part is to discuss briefly

the Vessel Hull Design Protection Act in general, and specifically as to its amendment. Then I will discuss the fashion design bill that is pending. Finally, I will look ahead to see what is going on around the world in related events.

My introduction to design law in the United States is fairly simple. We have design patents which take time to obtain. They don't protect things right away, and they are expensive usually. We have trademarks that do not usually protect designs, and certainly they take time to get the protection. We have copyright, which actually has some significant specific areas of design protection that are useful, but it has built into it separability that you can not have protection for designs that are associated with the functional parts of products. This requirement pretty much eliminates copyright protection.

Congress in its wisdom decided to set up two separate *sui generis*, or independent laws. They are not copyright. They are not trademark. They are not patent. The first one was the Semiconductor Chip Act. I do not know whether you remember that law. The industry came to Congress and said, "We really have a tremendous economic value here in this country for our chip design." Basically these chips were images. They were images of the chip layers. They used the design concept to protect them.

As far as I know, it has been very successful. The basic idea was that once you make it, you put it on the market and it was protected. Then after it was in the market within 2 years you had to file an application for registration, which just basically showed the design and then the Copyright Office, which is a very efficient administrative agency, would just look to see that it was within the statute and then register it in a few months.

They had a very efficient law that was working. Then when the next industry came to them, the boating industry—and I have to confess I have a boat, and I am Coast Guard crew-trained, auxiliary member, so I have knowledge in that area. The boat industry has the problem of the molding processes that made it so easy to copy the design of the boat.

Congressman Coble was the leading person on this legislation, and he and others were able to put together a bill. Actually, they just took the same bill that the chip bill used and added the specifics for the boat hull. The word "hull" is a little confusing. We think of deck and hull. The statute had it written out, but the traditional uses of these words were a little bit confusing, and that is one of the problems.

But the statute worked. A boat design owner would go and file within 2 years, and register, and get the protection for up to 10 years. So it was essentially like the chip law. And that chip law actually went back to legislation that had not passed, but had been considered and that was basically what was the structure of the vessel hull law.

So now we are here today. Why are we here? We are basically looking at a very small amendment to clarify what is a hull, what is a deck, and basically provide clarity that boat manufacturers can get protection for the hull separately. They can get protection for the upper part of the boat, the super-structure included. It is almost a procedural point that we have to kind of clarify. So that is

where we are today. Believe it or not, I have finished with the vessel hull part.

The next part to address is the design for fashion that came along recently. All these industries have their unique concerns. Some people ask, well, why do we do it industry-by-industry? Well, they have significant concerns and they come to Congress with these concerns. The fashion design people have been inundated with copying, piracy and so forth. So they said, well, what could we do?

What they did was to take the same legal structure more or less that the Chip Act had and the Vessel Hull Act had, but they set up a structure which was flexible or limited—not as much protection. They have 3 months to file their application, but while the design is in the market, at the beginning, it is protected. This point is the important thing. The pirates cannot come in and basically rip them off, so the fashion design legislation uses the same concepts of the other two laws: chip and boat.

Basically that is the picture we are looking at now. They have up to 2 years protection. I know that I probably should finish at this point, but I just want to say that I have written an article and other things about the fact that this design protection—protection when you go into the market, the entry-level protection, is really a trend across the world that countries are using. The European Union has put it in its community design.

For that reason, I will not go through my conclusions. I will just end at that point.

Thank you.

[The prepared statement of Mr. Fryer follows:]

PREPARED STATEMENT OF WILLIAM T. FRYER, III

U.S. HOUSE OF REPRESENTATIVES

COMMITTEE ON THE JUDICIARY

SUBCOMMITTEE ON COURTS, THE INTERNET AND

INTELLECTUAL PROPERTY

HEARING ON DESIGN LAW – ARE SPECIAL
PROVISIONS NEEDED TO PROTECT UNIQUE
INDUSTRIES

STATEMENT OF

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FEBRUARY 14, 2008

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I. U. S. Product Appearance Design Protection

A. Introduction

Product market success includes improvements in how a product works and how it looks. The look of a product is very important in product marketing, as consumers like to have their products appeal to their visual senses. Product appearance creation is the work of industrial designers who combine art and function to make the products we want to buy (*See the web site of the Industrial Designers Society of American at URL: <http://www.idsa.org>*). It is clear that a successful company and national economy must encourage product design. The U.S. has several laws that protect product appearance design, also called here product design or industrial design.

There is serious concern about product piracy, and to stop it there needs to be immediate and simplified protection systems to provide a level of protection in an efficient way. Where there is need for registration, the administrative procedures need to be relatively simply for the users and the registration office and the process should be relatively quick..

B. Traditional U.S. laws that Protect Product Design

1. Design Patents. The design patent is the principle form of design protection (35 U.S.C. §§ 171-173). Similar national systems were established as far back as the 1800s, to provide a network of laws linked under the Paris Convention for the Protection of Industrial Property (text available on the WIPO web site at URL: <http://www.wipo.int>). In addition, many of these national laws are part of the Hague Agreement Concerning the International Registration of Industrial designs treaty that provides simplified filing for protection in member countries (The U.S. Senate recently ratified the Hague Agreement Geneva). Design patent application are subject to detailed substantive examination and there is significant delay in granting rights.

2. Trademarks. Federal trademarks have limited use in protecting product designs (15 U.S.C. §§ 1051-1141). Under existing law a product

design trademark must have significant recognition as a mark, delaying any protection for a significant time.

3. Copyright Law. There are some product designs that are protected by copyright law (17 U.S.C. §§ 101 - 805). Protection is immediate upon creation of the design, but the statutory requirements are very strict. A protected product design must be separable from any functional features, usually, so that most product design cannot be protected by copyright law.

C. Sui Generis (industry based) U.S. Statutes Protecting Product Designs

1. Introduction. There are two major sui generis product design protection laws that stand alone, effectively. They are limited to industries where market conditions have demonstrated a need for immediate protection upon the entry of a product into a market, referred to here as market entry protection. These statutes included delayed administration, so that the user can file the necessary papers after use begins. These laws have been aimed at product piracy situations in industries that have demonstrated significant impact. They are unique statutes, not patent, trademark or copyright law. They provide a special form of protection. The industries that have this protection are computer chip companies and boat manufacturing companies. Each of these statutes will be described briefly, before the legislation related to the boat industry protection is analyzed in more detail.

2. The Semiconductor Chip Act (1984). The Chip Act was enacted to reduce the extensive copying of U.S. computer chips (17 U.S.C. 901-914). It prevented copying for two years of the images that made the chip layer designs, including the functional features. Protection was immediate when the product was put on the market, and the no application for protection had to be made initially. The application had to be filed within two years of the first market use, to obtain protection for the rest of the 10 year term. The application review was relatively simple, without substantive examination. The Copyright Office administered the law, because it was familiar with similar copyright registration that was prompt and efficient. The Chip Act

has served its purpose in development of U.S. technology.

3. Vessel Hull Design Protection Act (VHDP Act) (1998). The VHDP Act was enacted to prevent copying of vessel hull designs (17 U.S. §§ 1301-1332). The ease of new technology molding techniques was one big reason for enacting this law. These techniques allowed competitors to quickly copy the boat structure that took significant investment to develop.

The VHDP Act protected a vessel that was ready for the market, and there was no need to file for a registration immediately. A two year period of unregistered protection was provided. Before that the two years ended the registration application had to be filed, to obtain the remaining 8 years of protection. There were extensive provisions that prevented innocent persons from becoming infringers and protecting the legitimate rights to use vessel designs. This author testified before the House Judiciary Committee Subcommittee on the VHDP Act legislation (*See* testimony on this author's professional web site, URL:<http://www.fryer.com>, Newsletters 6, June 5, 2003, and Newsletter 7, March 9, 2005).

It is apparent that the same form of protection was used for the Chip Act and the VHDP Act, except the latter law did not protect merely functional features, leaving that protection to utility patents. Also if a design patent was obtained on the same design, the VHDP Act ended. The reason for the common features of the Chip Act and the VHDP Act was because their content was essentially the same as legislation that had been pending in the 1990s and did not pass. This author participated in the review of this earlier legislation as a member of the American Bar Association, Section of Intellectual Property Law Industrial Designs Committee. For a more detailed review of earlier legislation history, See William T. Fryer III, *Industrial Design Protection in the United States of America – Present Situation and Plans for Revision*, J. Pat. Trademark Off. Soc'y 820-846 (1988).

A five year review of the VHDP Act, with industry and other participants, was held by the Copyright Office and the Patent and Trademark Office (PTO). The report was completed in 2007, and it favored retaining the law (See U.S. Copyright Office web site for a copy of the review report and submitted statements, URL: <http://www.copyright.gov>). This author participated in this review, and links to the VHDP Act review report and

documents on earlier history of that law can be found on the author's professional web site, URL <http://www.fryer.com>, Newsletters 6, June 5, 2003) and Newsletter 7, March 9, 2005).

There has been one court decision involving the VHDP Act, *Maverick Boat Company v. American Marine Holdings, Inc.*, 2004 U.S. Dist. S.Fla., 2004 U.S. Dist. Lexis 9412, 70 U.S.P.Q. 2d (BNA) 1493. The District Court decision denied protection and found no infringement. This decision was reviewed by the 11th Circuit Court of Appeals and affirmed on the no protection holding, and it did not review the infringement holding, *Maverick Boat Company v. American Marine Holdings, Inc.*, 418 F.3d 1186 (2005)

This litigation raised concerns in the boating industry that a vessel lower structure could not be separately protected apart from the deck including the upper structure. The terms hull and deck used in the VHDP Act and in the industry created some confusion. Legislation pending before this Committee, S.1640 (110th Cong. 1st Sess.), and one of the subjects for this hearing to amend the VHDP Act. For that reason, a more detailed analysis of the pending legislation will be given below.

II. Comments on VHDP Act Proposed Amendment, S.1640 (110th Cong. 1st Sess.)

A. This legislation will clarify the VHDP Act. In the Act's current form, if the entire boat design is submitted for registration, the design reviewed for protection will be the entire vessel shown in the application for registration. The applicant needs to be able to select the lower or upper parts of the boat, or all of the boat design for protection. Each of these parts can have important designs to protect. The pending legislation provides clear definitions of what the vessel hull is and what the deck includes. Under the current law the registration applicant has the option to alter the application entire boat design, by using broken lines to remove features from protection. This technique is familiar to design attorneys, but design owners that often file the applications need a simpler format for identifying what is to be protected. The legislation will allow the Copyright Office to make the changes in the current regulations and allow either option for identifying the

protecting design.

III. Comments on Fashion Design Legislation, H.R. 2033 (110th Cong., 1st Sess.)

A. The fashion design industry has proposed legislation, The Fashion Piracy Prohibition Act (FPPA), that uses the same basic approach as the Chip Act and the VHDP Act to protect selected product designs. As with the VHDP Act, the FPPA does not protect merely functional features. The FPPA adds a category to the basic protection of the VHDP Act, which is a convenient approach. The basic provisions remain the same, except for a few changes mentioned below. Chapter 13 of Title 17 is set up, under the heading “Protection of Original Designs to accommodate the addition.

B. The FPPA selection of products to protect is very broad, but the extent of protection in terms of how long protection is given is much shorter than the VHDP Act. This difference represents the needs of the industrial, and it is apparent that they are minimum needs to stop piracy. The FPPA provides protection when the products go on the market for three months, and a registration application has to be file within that three months to continue protection. The design owners will have to make a quick decision on what to protect, as the registration application is needed to continue the protection. The total protection term is three years.

C. Other changes in Title 17, Chapter 13, that affect both the VHDP Act and the FPPA have to be consider by both the fashion industry and the boat manufacturing industry. The FPPA does not change the basic protection for vessel designs. The boat manufacturers should retain the protection they negotiated with Congress and any changes that may occur from the pending VHDP Act legislation. The FPPA does change a few provision common to vessel protection. These provisions should be reviewed carefully. In particular, the following provisions should be considered

1. Section 1309 of the proposed legislation was revised. It appears to be a

justifiable extension of the infringement right, based on the fact that a person has had a reasonable ground to know that a design was protected under the Act. The burden to prove the basis for the liability is on the design owner.

2. Another change created by the FPPA adds secondary liability, based on a reference to the Copyright statute, Title 17, Chapter 5. A review of this chapter did not identify clearly any specific provision on this topic, which probably indicates case law is involved. This provision would appear to need clarification.

3. The FPPA increases the recovery for statutory infringement, based on number of infringing copies. The change is clear. It will benefit the fashion design industry and the boat manufacturers, and it is one of the ways now used to discourage piracy.

4. There is a change in § 1330 that adds a provision stating copyright protection is not excluded when there is protection under the FPPA or the VHDP Act provisions. The change is a clarification and should have been in the original law, as there was no intention to this author's knowledge to exclude copyright protection.

IV. Comments on International Trend in Unregistered Protection Like the VHDP Act

A. There is clear evidence of a international trend to create market entry, unregistered protection, similar to the approach in the Chip Act, the VHDP Act and the FPPA. A comprehensive review of this trend was made in 1999 by this author (See William T. Fryer III, *The Evolution of Market Entry Industrial Design Protection: An International Comparative Analysis*, 21 *European Intellectual Property Review* 618 (1999). The trend has continued, with the approval of the EU Community Design Registration (See text and general information of EU web site a URL: [Http://www.ohmi.eu.int/en/design/default.htm](http://www.ohmi.eu.int/en/design/default.htm)). The international need to prevent piracy is one reason for the trend. Another reason is that design

patents in most countries take time to obtain and while they are not as expensive as in the U.S., the large number of countries where protection is needed makes the total cost significant. The combination of shorter term unregistered protection followed by a longer term after registration has been widely accepted around the world. It is an idea that the U.S. should aggressively consider.

V. Conclusions

A. Product design laws are an important form of intellectual property protection. They are needed particularly where there is product piracy due to technology that makes copying easier.

B. Unregistered product design protection is a worthwhile approach, at least in certain industries. The limitations for that protection can be tailored to meet the justified needs of an industry. The fact that the Chip Act and the VHDP Act have not created extensive litigation is a blessing, and the VHDP Act appears to have had an effect in reducing copying in the boat manufacturing industry according to the 5 year review report. It is good news when a law appears to be respected and litigation is not necessary.

C. The VHDP Act has been shown, through its five year review, to be a useful form of protection, and it can benefit from the clarification provided by S. 1640 (110th Cong., 1st Sess.). The Copyright Office has administered the VHDP Act effectively, and it is receptive to make registration procedures that are more user friendly.

D. The international trend to reduce design piracy by providing unregistered design protection supports the favorable consideration of the FPPA bill H.R. 2033 (110th cong., 1st Sess.), with appropriate review of the changes that affect both the vessel design protection and the fashion design industry, including clarification of the secondary liability provision.

E. One question that needs to be answered, each time an industry requests sui

generis legislation, is whether a broad based unregistered design protection system for useful article designs would be a more realistic and a sounder economic approach. The answer is likely to be that industry based and justified is the best way to go for now.

The history of design protection in the U.S. has shown that product design copiers have strong interests and political influence. The inevitable political battle is best fought from the high ground, where there is a strong industry need. Otherwise, no U.S. industry at this important time will be able to benefit from market entry protection against piracy of product designs in the U.S, even though this form of protection is now accepted in a large part of the world.

There is no harm in trying to obtain a broad scope market entry design protection system to proceed design patent protection. The combination makes sense.

F. It has been an honor to present this Statement to the House Judiciary Committee, Subcommittee on Courts, Internet and Intellectual Property. The author wishes to thank the Chairman for the opportunity to testify on these important subjects. Since this Statement was best provided in brief form, it could not provide extensive references on many of the topics. If there is any topic on which more details are needed, it would be the author's privilege to provide the information.

Mr. BERMAN. Thank you.

We have a quorum call up. My guess is we will be around here during that time.

Mr. ISSA. I suggest we pair and stay here, Mr. Chairman. [Laughter.]

Mr. BERMAN. This is one case where the pairing concept doesn't quite work. [Laughter.]

Okay. So we are going to have to recess. Maybe we can hear Congressman Delahunt. I am going to skip the introduction of Congressman Delahunt. I am just going to say it is probably better than the introduction I would give if I were giving one. [Laughter.]

Mr. DELAHUNT. I am sure it is. I will achieve brevity here. I have a rather lengthy statement—

Mr. BERMAN. It will be entered in the record.

STATEMENT OF THE HONORABLE WILLIAM D. DELAHUNT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MASSACHUSETTS

Mr. DELAHUNT [continuing]. That I will submit for the record. I will waive my oral testimony. It is self-explanatory. Let me just say that the issue facing the fashion design industry now is critical. We hear much about the economy. The debate as to whether we are in recession or on the cusp of recession is ongoing. Whatever it is, if we don't take steps now to protect intellectual property and deal with the issue of piracy, we are putting our entire national economy at risk.

Clearly, in the area of intellectual property concerns, it is that segment of our national economy that produces a surplus in terms of trade balance. The estimate of piracy in terms of the issue that is the subject of one of the bills before us today amounts to \$12 billion. For us to have passed a stimulus package and not recognize that we need to further protect those sectors that are producing a surplus for us is absurd and doesn't make sense.

With that, I will yield back.

[The prepared statement of Mr. Delahunt follows:]

PREPARED STATEMENT OF THE HONORABLE WILLIAM D. DELAHUNT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MASSACHUSETTS

Chairman Berman, Ranking Member Coble, Members of the Subcommittee—thank you for holding this hearing today and for inviting me to testify in support of H.R. 2033, the Design Piracy Prohibition Act, introduced by Congressman Goodlatte and myself.

Yesterday, Congress and the President enacted into law a significant piece of legislation—the economic stimulus package. Notwithstanding some disagreement over what constitutes an effective stimulus, this legislation represents a consensus—a consensus that our nation's economy is in trouble and that Congress has a vital role in stemming the tide. In this effort, we must take seriously the protection and promotion of America's competitiveness, both in its traditional and emerging industries. To this end, it is critical that we lend our attention, and promptly, I would argue, to strengthening our nation's intellectual property laws to protect some of the most important emerging innovators in America today—fashion designers.

The Chamber of Commerce, in its recent report, "Economic Analysis of the Proposed CACP Anti-Counterfeiting and Piracy Initiative", reminds us that "the health of the US economy depends on a wide range of industries that rely on intellectual property to create and produce state-of-the-art products, and how . . . counterfeiting and piracy, therefore, serve to undermine the long-run competitiveness of the US economy." According to the Chamber, counterfeiting and piracy cost U.S. businesses

\$225 billion in revenue each year; of that, fashion and apparel piracy and counterfeiting account for a minimum of \$12 billion.

We have laws against counterfeiting apparel and footwear brands and pirating fabric designs; however, within these laws, a glaring hole exists which is putting at risk the very innovation we seek to encourage: we must enact laws against pirating fashion designs, which after all, is counterfeiting without the label.

America has become the world leader in fashion design. This is not just an LA / NY phenomena, it's happening across America.

Fashion design businesses are proliferating and growing. As they grow, so do the manufacturing, transportation, marketing, and publishing industries that support fashion design. This is not even including the television shows, cable networks, and internet sites devoted entirely to fashion, and most importantly, the innovations and creative works of American designers. I have even read that it's even reviving real estate values in areas where garment manufacturing businesses lost their jobs to Asian competitors.

In my home state of Massachusetts, the Massachusetts College of Art and Design (MassArt) is now offering a bachelor's degree in Fashion Design to 4-year students. Some of these students have even gone on to win scholarships and recognition from the Council of Fashion Designers of America's merit-based Scholarship Program. Massachusetts' schools are not alone in recognizing the countless numbers of American students who strive to pursue fashion design as an academic and professional career.

But of course—as we know from experience in other important areas of American intellectual property—when we lead the world in a creative industry, it soon will become the world's leading counterfeit and piracy victim.

FBI, Justice and Commerce Departments report that China is growing an industry based on copying and exporting American fashion designs. This job drain is fostered by the speed with which a 3D picture can be sent across the globe to machines that can take a picture and perfectly copy the pattern, the DNA of the design.

Sadly, the growth of the Chinese fashion piracy industry is also spurred by our lack of laws against it. It's legal!

I read in the Wall Street Journal that in China, one city is devoted to making socks, another—kids' clothes, etc. We need to make sure we don't wake-up to find a Garment Knock-off City! They can create infrastructure in minutes.

We are in tough economic times, as we were reminded during the holidays. Retail is a closely-watched barometer of the country's economic health. This January was the worst January for retail sales since 1969 (the year the International Council of Shopping Centers started keeping track of such). Though, as *Women's Wear Daily* reports, retailers are looking to designers to create unique and exciting designs to bring them out of the slump or otherwise improve their numbers, as they have in the past.

So we really must ask ourselves: here we are with a real and proven growth opportunity for new jobs in America, new exports—all based on the kind of intellectual property that has always advantaged our balance of trade. Why aren't we protecting it in the same way we protect and promote our other creative industries that are so important to our economy?

Europe, Japan and India have protection for 15–25 years for registered designs and we have nothing. Clearly, it has fueled their success; one doesn't have to be a fashion expert to know that the European fashion industries are robust industries that play important roles in their economies.

And in Europe (where in some countries they've had protection for over 100 years), their 15–25 year copyright protection for registered designs has spurred negligible litigation. According to the EU, out of some 308 appeal cases concerning infringements of protected Designs in 2005, only 10 out of 308 related to registered designs in the fashion category.

The U.S. fashion industry is vibrant, but it is young. We cannot just stand by and watch yet another industry migrate out of the U.S. We need to pass H.R. 2033 to prevent others from growing an industry that Americans create.

As this committee proceeds to beef up the enforcement of our counterfeiting regimes, we should take the time to plug this loophole in our anti-counterfeiting regime.

As reported in the media, law enforcement is being thwarted in its apparel anti-counterfeiting efforts because the pirates are taking clever advantage of the fact that we don't have laws against design piracy. To circumvent crackdowns on smuggling by customs, counterfeiters have taken to openly and legally importing goods with pirated designs—"blanks"—only to put on the label that makes a blank an official counterfeit either at the point of sale or in clandestine operations here in the U.S.

Last April, a storage unit raid in Massachusetts netted nearly 20,000 counterfeit handbags and wallets, plus more than 17,000 generic handbags and wallets, and enough counterfeit labels and medallions to convert more than 50,000 generic handbags and wallets into counterfeits. Clearly, storage units are not easy to find. Harder yet (or impossible) would be having an FBI agent at each sale. This bill proposes an easier way to prohibit design piracy and thwart counterfeiting.

I'd like to quickly highlight another aspect of counterfeiting that is less discussed but deserves serious attention, and that is its link to organized crime and terrorism. Newsweek contributor Dana Thomas succinctly summed up the issue in an August, 2007 New York Times Op-Ed; "Most people think that buying an imitation handbag or wallet is harmless, a victimless crime. But the counterfeiting rackets are run by crime syndicates that also deal in narcotics, weapons, child prostitution, human trafficking and terrorism. Ronald K. Noble, the secretary general of Interpol, told the House of Representatives Committee on International Relations that profits from the sale of counterfeit goods have gone to groups associated with Hezbollah, the Shiite terrorist group, paramilitary organizations in Northern Ireland and FARC, the Revolutionary Armed Forces of Colombia."

This bill introduced by myself and Congressman Goodlatte and several colleagues on the Committee, provides a framework for more comprehensive and seamless intellectual property enforcement. It would provide three years of copyright protection for fashion designs—not those that staple, standard or prevalent, but rather only those designs that truly unique. The protective time period is a fraction of that provided by other nations, but would serve as an important first step toward putting our young designers on equal footing with those abroad.

I am aware that there have been fruitful negotiations with those who want to improve the bill, and I would hope, Mr. Chairman, that we can soon sit down to connect the ideas that have been proffered. However, I also believe that we must move expeditiously toward providing America's artists and entrepreneurs with the tools they need to build their future and, in turn, America.

Mr. BERMAN. Thank you.

I think we still have time here for at least one of the witnesses before the two of us have to leave for a while. We will be back.

Mr. Rodriguez?

TESTIMONY OF NARCISO RODRIGUEZ, DESIGNER, ON BEHALF OF THE COUNCIL OF FASHION DESIGNERS OF AMERICA, NEW YORK, NY

Mr. RODRIGUEZ. Good afternoon, Chairman Berman, Ranking Member Coble, and other Members of the Subcommittee. I am pleased to be here today on behalf of the Council of Fashion Designers of America. I am currently serving on the board.

First, I would like to thank——

Mr. BERMAN. Let me interrupt you here.

Mr. RODRIGUEZ. Yes?

Mr. BERMAN. Only because I was given some wrong information. This isn't a quorum call. It is a motion to suspend the rules. There are eight of those. My guess is the ones that follow will be 5 minutes each. So this is going to mean about close to an hour that we are going to have to go. It looks to me like everyone is participating in this vote.

So I hate to do it, but talk among yourselves. [Laughter.]

I am going to recess. We will be back. Thank you.

[Recess.]

Mr. BERMAN. The Committee will come to order.

We have only finished four of those eight votes I told you about, but there was a privileged motion for which there can be an hour of debate. We don't know if there will be, so we decided let us move ahead in the meantime. But at any moment, those bells could go off and we will have to recess again.

Well, we can do one or two. We can certainly do one witness now. So, Mr. Rodriguez?

Mr. RODRIGUEZ. Okay, I will continue. I am going to cut out the first part where I thanked you for having us here. I feel very welcomed here by everyone, and again thank you.

I have a few things to say. The more acclaimed America's fashion designs become, the more they are copied. The Chamber of Commerce estimates the lost revenues due to the counterfeiting and piracy in the fashion and apparel industry to be \$12 billion annually. They also indicate that they believe it may be higher due to the fact that design piracy is not outlawed. Every counterfeit garment starts as a pirated design. It is a big problem and it is growing.

I am an American designer with a unique story. I am the son of Cuban immigrants. I grew up in north New Jersey. From the time I was a teen, I dreamed of being a great American designer. It took a lot for me to become a designer. To train me, it took a lot of hard work. I borrowed a lot of money to go to school, and I worked very hard to get my business open, which was opened in 1998.

I also want to add that when I work, I not only design garments, I design fabrics. I design materials. I get very into the design process—new construction, inspiration from architecture, photographs, daily life—the way a city breathes, moves, lives. All that is filtered into my work.

Often my work is compared to architects, to painters, to sculptures. I am always very flattered by that comparison because it makes my work all the more unique. It makes it separate from everything else that is out there. It takes a great deal of capital to finance a collection and fabricate 125 pieces that I would show twice a year. That is 250 pieces a year, not inclusive of \$800,000 to stage a fashion show, \$800,000 in fabric, pattern-makers, sewers, manufacturers here in the United States that we work with. It is our way of creating each collection.

Back in 1996, I designed a dress for a very good friend who I loved very much. Her name was Carolyn Bissette Kennedy. She had asked me to design her wedding dress for John F. Kennedy, Jr. I designed something with great love for the most important person in my life. That dress spawned somewhere in the 7 million to 8 million copies. I got to sell 40 of those dresses.

You know, it was a very personal thing for me, that dress, so I never looked at it like something was stolen from me because I would have made that dress anyway. But all that publicity and the knockoffs didn't pay my bills or get me to where I am today.

Unfortunately, the piracy story is not unique. There is no way under the current legal system in the U.S. for designers to beat the pirates to market. Other developed countries such as Europe, Japan and India all provide 15 to 20 years of protection for fashion designs. Since there is no protection in the U.S., companies have emerged with piracy as their business model. It is like the guy who takes a shortcut at the race. We all start at the beginning, but he cheats and is the first to walk across the finish line.

With no human or capital investments to make when pirates copy, they spend nothing. They can afford to make the copy in such quantities and low price levels that just one of my 125 styles, they could recoup what I make on my entire collection. Some designers

have created diffusion lines—a mass market line using their own designs with machine-sewing and less expensive fabrics. Isaac Mizrahi has licensed a line at Target. Nicole Miller has one at J.C. Penney. I have been pirated so much that my brand is already diffused.

Mr. BERMAN. Mr. Rodriguez, the 5 minutes has expired, but if you would just wrap it up because we are going to have to go vote.

Mr. RODRIGUEZ. Sure.

Really, we need your help to pass this bill because there are a lot of young, emerging talents here in the United States that need to be protected. I was lucky enough to survive and have a partner now that will protect me, but there are a lot of young people, truly talented, gifted designers that will not have that opportunity if this bill does not pass.

Thank you.

[The prepared statement of Mr. Rodriguez follows:]

Testimony of Fashion Designer Narciso Rodriguez

Before the

Subcommittee on Courts, the Internet and Intellectual Property
Committee on the Judiciary
U.S. House of Representatives

Hearing On

Design Law - Are Special Provisions Needed to Protect Unique Industries
February 14, 2008

Good afternoon Chairman Berman, Ranking Member Coble and other Members of the Subcommittee. I am pleased to be here today on behalf of the Council of Fashion Designers of America, of which I currently serve on board of directors. The CFDA is a not-for-profit trade association of America's fashion and accessory designers. The CFDA works to advance the status of fashion design as a branch of American art and culture and to help elevate this important American industry.

First I would like to thank Congressmen Delahunt and Goodlatte for introducing HR 2033, the Design Piracy Prohibition Act which protects for a period of three years, fashion designs that are deemed unique and original and registered with the copyright office. This is the number one legislative priority of the CFDA and our president Diane von Furstenberg and we hope it will become law very soon.

It is appropriate that this hearing falls on Valentine's Day, which marks the conclusion of fashion week in New York. Both events serve to highlight the importance of the more than \$350 billion U.S. clothing and accessory industry. More and more young Americans are going into fashion, and America now leads the world in fashion design.

Fashion designers and their stores are all over America. In addition to the jobs directly related to the manufacturing of apparel and fabric, the fashion industry creates jobs in many sectors: printing, trucking, distribution, magazine publishing, advertising, publicity, merchandising, and retail.

The more acclaimed America's fashion designs become, the more they're copied. While the U.S. Chamber of Commerce estimates the lost revenues due to counterfeiting and piracy in the fashion and apparel industry (for 2006) to be \$12 billion annually, they also indicate that they believe it may be higher due to the fact that design piracy is not outlawed.

As every counterfeit garment starts as a pirated design, we know the \$12 billion worth of counterfeit garments is \$12 billion of design piracy. Clearly that's only

garments seized, a baseline estimate; as design piracy is not illegal, there are no garments seized and therefore no counting is done. But it's a big problem and it's growing.

I am an American designer with a uniquely American story. As the only son of Cuban immigrants, I grew up in Newark, NJ. My father was a longshoreman who dreamed that I would become a doctor, lawyer or dentist. But from the time I was a teen, I dreamed of being the next Donna Karan, Calvin Klein or Ralph Lauren.

Becoming one took much more than just suddenly having a brilliant idea, sketching it and meeting success.

- It took training. Fashion design is an art that must be learned, just like painting, sculpting, or writing. It took nearly \$50,000 in loans and three years to get my degree from the Parsons School of Design in New York. My parents couldn't afford my tuition, so I took out school loans to pay the \$15,000 a year. Today Tuition is \$32,000. After graduating, fashion designers usually train as apprentices. I trained under Donna Karan at Anne Klein, as a design assistant at Calvin Klein and as the designer of the Cerruti label in Paris.
- It took hard work. After years as an apprentice and designing for someone else, I started my own company in 1998. Ever since then, I'm always traveling to collect ideas, to see new fabrics, develop unusual yarns and fabrics, and to get inspiration from architecture and different cultures and to sell my designs. A signature of my work is the texture and dimension of the fabric of the garment incorporated into the overall design; we create it much like a painter or sculptor creates.
- It took financial capital. To design and fabricate my 250 piece collection it takes six to twelve months. The fall and spring runway shows cost on average \$800,000 to stage. The fabric another \$800,000, the work room that develops the patterns and garments another \$ 1,500,000. The travel budget for design and fabric development is \$ 350,000 and marketing is another \$2,500,000 There are so many aspects of a fashion business that make it risky in the best of circumstances, and the pirates are only making it riskier.

The story I'm about to tell you is one of the reasons that I am before this subcommittee today urging that you pass a law to prohibit piracy of fashion designs. Back in 1996 one particular dress put me on the fashion map. My good friend Carolyn Bessette (whom I met while working at Calvin Klein), asked me to design her dress for her marriage to John F. Kennedy, Jr. That dress became the most copied silhouette of the past decade. The pirates sold around 7 million or 8 million copies. I sold 40.

I used a special technique to complete that look and it is part of my signature style that I had been developing since I was quite young. There was a lot of construction and special placement of seams involved even though it looks quite simple. It's a technique that fellow designers have learned from. The first group of copies the pirates released weren't sophisticated, but then, a magazine reprinted the correct sketch of the dress and far superior copies were produced. Those dresses were sold using my name, and using the Kennedy name. Some may say that I benefited from the publicity; publicity with no sales does not pay the bills.

Unfortunately, this piracy story is not unique. I have many more and so do most designers. Years ago I made a signature handbag. It was knocked off by a manufacturer, and walking down the street before I could sell it. Now that I have the financial backing to create the infrastructure that would be required to put a piece like my signature bag into production - everybody already has it. At 21st and Park in New York a guy stands on the corner and sells copies of it every day. I would love to know where that money is going and what it funds.

The same thing happened with my signature shoes – we call them the Sarah Jessica shoe because Sarah Jessica Parker wore them on Sex and the City. I was finally at a point in my career where I was able to take a signature look I had worked on for years and produce it for my client. I'd been sketching those shoes, and evolving them since I was a teen. Then the design was knocked off by a manufacturer. There is no way, under the current legal system in the U.S for designers to beat the pirates to market.

Why can't designers beat the pirates? Since there is no protection for fashion design in the U.S., companies have emerged with piracy as their business model. These companies are built for the sole purpose of copying. They have lots of money to warehouse cheap materials in every color of the rainbow. If I show a black dress in crepe with a turquoise bra in satin, then they immediately cut it in similar fabrics and put it into their stores. Pirates don't have to sell it – they just put it in their stores. It's like the guy who takes the shortcut at the race – we all start at the beginning but he cheats and is the first to walk across the finish line.

With no human or capital investments to make, when pirates copy they spend nothing; they can afford to make the copy in such quantities and low price levels that on just one of my 250 styles they could recoup what I might make on my entire collection. I can't even do a diffusion line, which is a mass market line. It is when a designer takes their own designs and produces them at higher volumes using machine sewing and less expensive fabrics. Designers Isaac Mizrahi has licensed a line at Target. So has Proenza Schouler, among others – but that only happens when retailers want the designer name as well as the design, which they can steal without paying. People have already taken my DNA

and diffused it. The pirates are the only ones who can make lower priced versions of my designs.

If the pirate enterprises were forced to hire real designers to work there would be more designers, more jobs, and it would elevate real and original design choices for all consumers. Instead, they are creating jobs in sweatshops in Asia where the copies are manufactured.

Sadly, the U.S. doesn't treat designers as well as we are treated in other developed countries with strong fashion industries, such as Europe, Japan or India - all provide 15-25 years of protection for registered fashion designs. Unlike photographers, sculptors, jewelry designers, and yes, even boat hull designers, fashion designers are not protected at all.

Please take a look at the images before you. Do these designs look any more utilitarian than a piece of beautiful jewelry or a gleaming vessel hull?

- This design is one of my own from this season's collection...
- This design was created by Rodarte, a small CA company formed by two women designers who stitch everything by hand. They are the up and comers. They are only at a point now where they can make clothes that are affordable and sellable. They are so fresh – their work will be so copied.
- This is the work of Brooklyn Designer Maria Cornejo. This is a great example of someone I have greatest respect for. She is a true original.

Fashion designers aren't working with stones or fiberglass, rather our craft is done with beautiful silks, leathers and wools and yes, even metal. Our work can be as whimsical and imaginative as any other – and copied just as fast as any that already has the protection we seek. I heard there is technology today in China that allows a dress to be made from a photo in record time. Perhaps this explains why the pirated merchandise hits the stores not weeks, but months before mine reaches my outlets.

A century ago the U.S. made a determination that clothing was functional and shouldn't be granted protection. Much has changed in the industry since then. As the slides I showed you illustrate, today, fashion design has become an art form. We don't think that Congress should protect all apparel. Some of it isn't original or unique. But when a designer creates that look that is special, so special that everybody wants to copy it, he or she should have a small window of protection – we're asking for three years – in which they can develop their idea and get it into the marketplace themselves.

To address some of the concerns we've heard raised about the bill:

- We don't want to prevent anyone from picking up a look. A designer's ability to create a trend is often his mark of success. HR 2033 wouldn't cover any design that had ever been publicly available prior to enactment. There will be a gigantic public domain of designs that we can all use for inspiration. However, I shouldn't have to experience walking down a NY street and seeing my original in the store window of a department store and a cheap imitation in the window of another, a dozen blocks down.
- Design piracy protection does not drain the market of accessibly-priced garments; it just assures that the creator of the original design which will serve as the basis for an accessibly-priced garment is the one with the opportunity to manufacture or license that line, not the pirates.
- There is no cause of action created against consumers who buy pirated designs in this bill. The only people who can be sued in a civil action are those who make, made or import, for sale or use in trade, or sell or distribute for sale or use in trade pirated designs. Even then the person must have knowledge, or reasonable grounds to know, that the design was protected and was copied.
- We have identified solutions to the problems of fraudulent registrations and frivolous lawsuits, two of the most frequent objections to the bill as introduced.
- We have clarified the scope of what is protected and developed a more narrow and clear definition of originality.

The American International Property Law Association (AIPLA) has called on Congress to address the problem of fashion piracy. In October the AIPLA Board passed a Resolution in support of the HR 2033 and S1957, the House and Senate Design Piracy Prohibition Acts with some minor changes to which we have agreed.

Manufacturers have also expressed some concerns about the bill. Apparel and accessory manufacturers told us they were concerned about the scope of the legislation and the risk of encouraging litigation and to a lesser extent, so were designers. The CFDA has had extensive discussions with the American Apparel and Footwear Association in an attempt to reach a consensus to address concerns we shared. We are hopeful that within the next month, we will be able to jointly present to you the negotiated language. We are grateful to Representatives Delahunt, Goodlatte, Coble, Weiner and Issa for your patience in allowing us to make improvements to the bill that you introduced and cosponsored. While these changes are important, the underlying structure of the bill has not changed.

Today's hearing is about overall design protection. Other industries may deserve protection, I'm only an expert on fashion. I do know that the fashion industry has been working on fashion design protection legislation for over 3 years. We have worked with others in the industry to develop unified support for a bill. We've done the hard work. We are hopeful that once we have this agreement we won't

have to wait for other sectors of business to fall behind protection. We're ready – they aren't. We would ask that the subcommittee move the Design Piracy Prohibition Act this year.

Mr. BERMAN. Thank you very much.

Mr. Maiman, we are going to have to vote and come back. We have four more 5-minute votes, I think. If we insult more of our colleagues, we will have a few more questions of privilege.

[Recess.]

Mr. BERMAN. The hearing will come back to order. I think we are to be uninterrupted now.

Mr. Maiman?

**TESTIMONY OF STEVE MAIMAN, PROPRIETOR,
STONY APPAREL, LOS ANGELES, CA**

Mr. MAIMAN. Our company designs, manufacturers and distributes women's and children's apparel to department stores and major specialty chain stores nationwide. Extending the copyright laws to the fashion industry is thoroughly a bad idea. This bill is misguided and unnecessary for several reasons.

Over many years, the fashion industry has done very well. It has grown into a huge, competitive, innovative and vibrant industry, all without the help or interference from this particular type of copyright law. From my perspective, nothing new has occurred in the recent past to cause there to suddenly be a need for copyright protection of the design of a garment.

Designer clothes are still selling for hundreds and even thousands of dollars. The big-name designers are not cutting their prices to respond to the so-called copyists. If anything, prices people are willing to pay for the top designers are going up. There really is no problem here to fix.

This proposal will harm the fashion industry, reduce designers' creativity, hurt consumers and the economy as well. This bill also threatens our firm and the rest of the industry because the bill will stifle creativity and innovation in fashion design, which I believe is the opposite of its intent.

The law already protects against the copying of print and artwork, but it is impossible to determine the originality of a design because all designs are inspired by existing designs and trends. Under this bill, every time a designer wants to work with a current trend, they will be afraid that such a new look is somehow owned or monopolized by another designer. What is clear to me is that if this bill passes, we have an upcoming nightmare of litigation, including bogus claims that would have to be defended and most likely settled out of court in order to avoid massive legal bills.

It will become very difficult for a manufacturer to obtain financing. When the manufacturer sells merchandise that is alleged to be infringing, the retailer will be forced to return it no matter what the truth. Retailers will refuse to do business unless a manufacturer will be able to provide effective indemnification against potential infringement, which many firms—especially new ones—are unable to do.

This bill will create uncertainty and raise costs across the garment industry. Every designer, manufacturer and retailer will be worried about liability. This proposal will benefit a handful of rich, well-established designers at the expense of others. The rich, big-name designers have the money to pay for the legal support to create a copyrighted line of products. Most other designers won't be

able to afford to do that, or more importantly, to defend themselves against claims of infringement. If this bill passes, the fashion industry could lose a generation of young designers with fresh ideas.

Retailers just had the worst January in 40 years, and given the state of the economy right now, this is no time to be passing laws that will raise the price of clothing and layer on legal expenses. The fashion industry is very competitive and competition encourages lower prices, better looks, which of course benefits the American consumer. If this bill passes, we could see a future where only the wealthy will look up-to-date in the very latest fashions.

The legislation threatens to split Americans into two classes of people: those with the money who can buy copyrighted designs, and those who can't quite afford them. If we turn the fashion industry over to the lawyers and the courts, as this bill will do, firms like ours are going to slowly, but surely, disappear. The average manufacturers are the backbone of this industry.

We are in this business to make cute garments at a fair price for the average American, not to sit in depositions and copyright lawsuits arguing with lawyers over who invented an original particular style of a kid's top for \$14.99 retail, and that is before it even goes on sale. If that is the way the business is going to be, we and many others like us are going to be forced out and thousands of jobs will be lost in the process.

I personally can't think of any reason why Congress or the American people would want that to occur.

Thank you.

[The prepared statement of Mr. Maiman follows:]

PREPARED STATEMENT OF STEVE MAIMAN

1. My name is Steve Maiman. I am the co-owner of Stony Apparel, an apparel design and manufacturing firm based in Los Angeles, California. I have worked in the fashion business for more than 30 years. We employ 140 people designing, manufacturing, and distributing womens and children's apparel to many of the stores in which Americans shop—Sears, J.C. Penney, Dillard's, Belk, and many other retailers. I know this business—it is my life. And I am here today to tell you that extending the copyright laws to the fashion industry is a thoroughly bad idea. I oppose H.R. 2033, which proposes to do just that. This bill is misguided, for several reasons.

2. First, the proposed legislation is unnecessary. Over many years, the fashion industry has done very well—it has grown into a huge industry, a competitive industry, an innovative and vibrant industry—all without any help—or interference—from copyright law. The clothing business is currently thriving in the United States, and from my perspective, nothing new has occurred in the recent past to cause there to suddenly be a need for copyright protection of the design of apparel. Unlike the music industry or the movie business, digital improvements in communications have not contributed to any revolutionary changes in the way apparel is designed, distributed or marketed. The internet is not destroying my business, or anyone else's in this industry. You can see this for yourself. Come visit my business. You will see people working hard to put affordable apparel in the department stores. And then go take a look at a fancy boutique—there you will see designer clothes selling for hundreds and even thousands of dollars. I don't see them cutting their prices to respond to the so-called "copyists"—if anything, the prices people are willing to pay for the top designers is going up. There is no problem to fix.

3. Second, and very importantly, I know—based on my experience—that the proposal will harm the fashion industry, reduce designers' creativity, and hurt consumers and the economy. This bill threatens my firm and the entire fashion industry in several ways:

a. First, this bill will make it very difficult for firms like mine to obtain financing. When a manufacturer sells merchandise that later is alleged to be infringing, retailers will return it, no matter what the truth. Manufacturers' invoices for that mer-

chandise, which serve as collateral for loans most fashion firms rely on (factoring), will be rendered valueless. This will undermine the value of invoices as collateral and make financing of apparel companies much more difficult. Additionally, if this bill should pass, when a designer or manufacturer sells apparel through to a retailer, that retailer is going to demand indemnification—because the bill, as I understand it, also says that retailers can be liable. Given the millions of dollars in damages that are possible in cases of copyright infringement—damages which, as I understand it, this bill seeks to raise further for fashion designs—retailers will refuse to do business unless a firm like mine can provide effective indemnification. This demand for indemnification will create a large and difficult-to-finance risk for designers and manufacturers. It will impose an additional layer of risk on the industry as a whole and make it even more difficult and costly for fashion firms to obtain financing—because my financial backers and everyone else's in this industry will have to reckon with the possibility of frivolous lawsuits, injunctions, and ruinous damages.

b. Second, this bill will raise uncertainty and costs across the fashion industry. Every designer, every manufacturer, every distributor, every retailer, will be worried that he or she is going to get sued because there is no way of knowing reliably what design has and hasn't been copyrighted. The technology for computer searches for visual objects like fashion designs is not at a point where the industry can rely on the copyright registry that is supposed to be established under this bill. And even if the technology were to improve in the future, everyone in the industry will be forced, before approving any design, to hire lawyers to interpret whether the proposed design is likely to violate any one of potentially millions of new designs claimed to be copyrighted. If a designer wanted to avoid copyright infringement, how would he/she do it? Will the Copyright Office create a system that enables a person to look up “sheath dresses” or “wrap dresses”? A firm like mine may consider hundreds of designs a year. Any registry, to be practical, would have to allow a designer—or, more likely, the designer's lawyer—to find the relevant needle in a potentially gigantic haystack, and to do so quickly and cheaply. Just exactly how is that going to work? What will it cost to create this system, if it can even be created? Who will pay for it? How long will it take to implement? How will that designer access the system and at what cost? If Congress wants to load search and legal costs onto the fashion industry, if Congress wants to raise the costs of apparel for consumers, if Congress wants to put the brakes on growth and innovation in the fashion industry, and cost the taxpayers more money, it should pass this bill. Otherwise, it should leave well enough alone.

c. Third, this bill will interfere with one of the most important sources of innovation in the fashion industry—the practice of designers interpreting a trend. Every time a designer wants to work with a current trend, she will be afraid that such a new look is somehow “owned” by another designer. (Would every fraction of an inch of a lower hemline belong to a different designer?) And as I understand the law, even designs that were created before the new law aren't entirely safe. My understanding is that someone could claim a copyright even in a design that's been around a while—they'll just claim that they didn't copy it from the pre-existing design but re-invented it themselves! What's clear to me is that if this bill passes we've got a looming litigation nightmare in the fashion industry. And—very importantly—if designers are prohibited from interpreting trends—or are too afraid to do so—we cut off one of the most important ways in which the fashion industry appeals to customers and gets them to buy clothes.

d. Fourth, this proposal will benefit rich, well-established designers at the expense of new designers. The rich designers have the money to pay for the legal support to create a copyrighted line of products. The young and poor designers won't be able to afford to do that, or, more importantly, to defend themselves against claims of infringement. Additionally, the rich designers and large design firms will be better able to deal with retailers' demands for indemnity. The young and poor designers won't. I have heard some people who support this bill claim that it will help young, new, and small designers. Exactly the opposite is true—this bill will hurt young and small designers and manufacturers the most. If this bill passes, the fashion industry could lose a generation of young designers with fresh ideas. And the fashion manufacturing business that's left in this country could move out to China and elsewhere.

e. Fifth, but no less importantly, this bill will hit consumers right in the pocket—and given the state of the economy right now, in my opinion this is no time to be passing laws that will raise the price of clothing. New fashions have been interpreted by companies such as Stony Apparel to enable ordinary middle-class and working-class Americans to dress in up-to-date styles. The fashion industry is competitive, and competition encourages lower prices and better quality. The big point here is that competition in the fashion industry benefits consumers. We can meas-

ure those benefits in dollars saved by shoppers, but there's more to it than that. The availability of inexpensive but fashionable clothing allows every American to feel worthy, hip, and stylish. It's a matter of pride and the clothes produced by firms like mine give people with a limited budget a sense of self-worth. But if this bill passes, we could see a future where only the wealthy will look up to date. This legislation threatens to split America into two classes of people: those with money who can buy copyrighted designs, and those who can't afford them.

At this point the problems with this bill should be clear. Extending the copyright laws to the fashion industry is unnecessary. It also threatens real harm. Fashion copyright will hurt designers. It will hurt manufacturers. It will hurt distributors, retailers, and consumers. There's only one group I can think of that's going to win out of this—and that's the lawyers. If we turn the fashion industry over to the lawyers—and that's what this bill will do—firms like mine are going to slowly but surely disappear. Firms like mine are the backbone of this industry. We are in this business to make good clothes, and sell those clothes for a fair price that people can afford to pay, and hopefully make some money in the process. If this bill passes, that hope will also dwindle. I'm not in this business to sit in depositions in copyright lawsuits arguing with lawyers over who invented a particular design of a kids shirt for \$14.99 retail before it goes on sale. If that's the way the business is going to be, I and many others like me are going to be forced out. And thousands and thousands of jobs will be lost in the process. Many designers will lose their jobs, not because they are bad designers, but because they are good designers, knowing what the American consumer wants next.

I can't think of any reason why Congress and the American people would want that to occur.

Thank you.

Mr. BERMAN. Thank you very much.

Mr. Olsen?

**TESTIMONY OF CARL L. OLSEN, PRESIDENT, ARK DESIGN, ON
BEHALF OF THE ALLIANCE OF AUTOMOBILE MANUFACTURERS,
WASHINGTON, DC**

Mr. OLSEN. Good afternoon. My name is Carl Olsen. I am testifying on behalf of the Alliance of Automobile Manufacturers. The Alliance is the auto industry's leading trade association, representing 10 auto manufacturers.

When a product becomes easier to make than it is to sell, design or style, if you like, assumes paramount importance. Bang and Olufsen, the trendsetting Danish audiovisual product manufacturer, could not exist if it were not for their innovative refined design. Apple's success grows not only because of their technical innovation, but also their design policy, which is the coolest in the industry, covering products, advertising, retail outlets and packaging.

The second-generation Prius is sleek and aerodynamic, with a strong identity. In 2007, it had impressive U.S. sales of 181,221 vehicles. Other hybrid-powered vehicles—those based on existing sedans and SUVs—had only modest sales. The reason? Their designs did not express their technical innovation, thus the price premium necessary on these hybrid vehicles was not apparent to the customer.

The 2004 Chrysler 300, with its radical exterior appearance, has been a runaway success. About 6 percent of the 300 sales were captured from prestigious brands like Mercedes Benz, BMW, and Lexus. Strong innovative design with details that express high quality spearheaded this unparalleled success story.

Designing a new vehicle is not cheap. It requires a team of well-trained designers working in competition with each other, proposing a large number of creative solutions. Each part—from headlamps to door handles—receives tender-loving care. This meth-

odology assists management to make rational decisions on the final appearance of a new vehicle. It costs hundreds of millions of dollars to create unique, distinctive exterior designs for vehicles.

Ford Motor Company estimates the overall cost of a typical new vehicle program to be between \$500 million to \$1 billion. These investments translate into desirable jobs. Based on recent studies in Europe, it has been reported that the loss of exterior automotive design protection alone would cost upwards of 50,000 jobs. Ford recently obtained an exclusion order from the International Trade Commission protecting seven exterior parts of the F-150 pickup truck, the largest-selling vehicle in America.

This shows that a recognized right to protect the intellectual property embodied in exterior vehicle components exists. The ITC ruled that seven of the ten Ford patents were valid and infringed, thus allowing Ford to block the importation of copycat parts from overseas manufacturers. This victory for Ford further demonstrates the focused nature of this problem and the limitations of the patent design solution.

Industrial design protection for the auto industry protects numerous high-paying design and manufacturing jobs, and also the automobile industry's huge investment in the United States. It is consistent with the underlying policy goals of the U.S. intellectual property law and it mirrors the intellectual property rights protection provided to auto manufacturers in Brazil, France, Germany, Japan and other countries.

Respecting intellectual property rights does not limit consumer choice. Consumers are encouraged to use re-manufactured parts, salvage parts and even new parts having their own unique designs. Protecting the exterior appearance of a vehicle does not affect customizers or after-market companies offering products of their own design as substitutes for OEM parts. In fact, OEMs encourage such customizing because it increases consumer loyalty to the brand itself.

Those seeking to weaken American IP protection do not create their own designs. They exist only to make exact copies of parts of designs they did not create.

In conclusion, there is a confluence of developments that makes it imperative to have more effective protection for exterior automobile designs. Technology has made it easy and inexpensive for counterfeiters to make knockoff products. A migration of the copycat industry almost entirely overseas, where cheap labor prevails, has further reduced the cost of intellectual piracy. Without protection, we are likely to see rapid growth in this immoral activity.

There is a demand that we enforce our property rights abroad, and this argues for us to strengthen and enforce them here at home in the U.S. America's manufacturing sector is under serious threat. Without IPR protection, American manufacturers are caught in a race to the bottom with copycat producers from low-cost countries.

Can the U.S. manufacturing sector continue to survive such an exodus? Is it something we want to encourage, or do we want to take steps to discourage the blatant copying of American design and American-made products? Congress must not waiver in its re-

solve and obligation to protect the intellectual property rights that exist in exterior automotive design.

Thank you.

[The prepared statement of Mr. Olsen follows:]

PREPARED STATEMENT OF CARL L. OLSEN

Good afternoon. My name is Carl Olsen and I am testifying on behalf of the Alliance of Automobile Manufacturers. The Alliance is the auto industry's leading trade association representing ten manufacturers including BMW, Chrysler, Ford Motor Company, General Motors, Mazda, Mercedes Benz USA, Mitsubishi, Porsche, Toyota and Volkswagen.

When a product becomes easier to make than it is to sell, design (or style if you like) assumes paramount importance.

Bang and Olufsen, the trend-setting Danish audio/visual product manufacturers could not exist if it were not for their innovative, refined designs. Apple's success grows not only because of their technical innovations but also their design policy, which is the 'coolest' in the industry covering products, advertising, retail outlets and packaging.

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Designing a new vehicle is not cheap! It requires a team of well-trained talented designers working in competition, proposing a large number of creative solutions.

Each part, from headlamps to door handles, receives tender-loving-care. This methodology assists management to make rational decisions on the final appearance of a new vehicle. It costs hundreds of millions of dollars to create unique distinctive exterior designs for vehicles.

Ford Motor Company estimates the overall cost of a typical new vehicle program to be between \$500 million to \$1 billion. These investments translate into desirable jobs. Based on recent studies in Europe, it has been reported that the loss of exterior automotive design protection alone would cost upwards of 50,000 jobs.

Ford recently obtained an exclusion order from the International Trade Commission protecting seven exterior parts of the F150 pickup truck, the largest selling vehicle in America, from copy-cat foreign imports. This shows that a recognized right to protect the intellectual property embodied in exterior vehicle components exists! The ITC ruled that 7 of the 10 Ford patents were valid and infringed, thus allowing Ford to block the importation of 'copy-cat' parts from overseas manufacturers. This victory for Ford further demonstrates the focused nature of this problem and the limitations of the patent design solution.

Industrial design protection for the auto industry protects numerous high-paying design and manufacturing jobs and also the automobile industry's huge investment in the United States; is consistent with the underlying policy goals of U.S. intellectual property law; and mirrors the intellectual property rights protection provided to auto manufacturers in Brazil, France, Germany, Japan and other countries.

Respecting intellectual property rights does not limit consumer choice. Consumers are encouraged to use re-manufactured parts, salvaged parts and even new parts having their own unique designs. Protecting the exterior appearance of a vehicle does not affect 'customizers' or after market companies offering products of their own designs as substitutes for OEM parts—for the simple reason that these are not exact copies of the original parts. In fact OEMs encourage such customizing because it increases consumer loyalty to the brand itself. Those seeking to weaken American IP protection do not create their own designs. They exist only to make exact copies parts of designs they did not create.

IN CONCLUSION

There is a confluence of developments that makes it imperative to have more effective protection for exterior automotive designs. Technology has made it easy and inexpensive for counterfeiters to make 'knock-off' products. The migration of the copy-cat industry almost entirely overseas, where cheap labor prevails, has further

reduced the cost of intellectual piracy. Without protection, we are likely to see rapid growth in this immoral activity.

There is a demand that we enforce our property rights abroad; this argues for us to strengthen and enforce them here at home in the U.S. America's manufacturing sector is under serious threat. Without IPR protection, American manufacturers are caught in a race to the bottom against with copycat producers from low cost markets.

Can the U.S. manufacturing sector continue to survive such an exodus? Is it something that we want to encourage or do we want to take steps to discourage the blatant copying of America-designed and American-made products? Congress must not waiver in its resolve/obligation to protect the Intellectual Property Rights that exist in exterior automotive design.

I would like to close with a simple example of the double standard that some are seeking to force onto the U.S. auto industry. Let us assume a vehicle collision has occurred. Its front fenders must be replaced, its CD player and its CDs are destroyed, and a book inside the car is also lost.

Which of these items does a consumer have a right to a copy for a replacement? The answer should be none. We must be careful to ensure that IP continues to mean intellectual property—not intellectual piracy—for the American auto industry.

Mr. BERMAN. Thank you very much, Mr. Olsen.
Mr. Gillis?

**TESTIMONY OF JACK GILLIS, DIRECTOR OF PUBLIC AFFAIRS,
CONSUMER FEDERATION OF AMERICA, WASHINGTON, DC**

Mr. GILLIS. Mr. Chairman, Mr. Coble, Members of the Committee, I am Jack Gillis, director of public affairs for the Consumer Federation of America. I am also here representing the Advocates for Highway and Auto Safety, Public Citizen, Consumers Union, and the Center for Auto Safety. We all are grateful for this invitation to appear before this Committee on a subject of incredible importance to the American consumer, and that is the repair and maintenance of our automobiles.

Consider the following experiences, which many of you have had. You back into a pole at a shopping mall or someone stops short in front of you and your bumpers collide. Fortunately, few of those fender-benders result in serious injuries, but they often result in totally shocking effects on our pocketbooks.

Why are these repair bills for these minor accidents so high? One reason is the cost of the parts that we need to get these repairs done. For example, Ford charges the same price for a simple sheet-metal fender as Dell charges for a computer with a flat screen monitor. An unpainted door from Chrysler costs the same as a Sears refrigerator. And amazingly, with a Sears refrigerator, you not only get one door, you get two doors that are both painted and installed. The fact is, computers and refrigerators are cheaper and better today for one simple reason: competition.

In the early 1990's, the car companies came to Congress and asked you for special design copyright protection on these replacement parts, and Congress said no. Our concern today is that the car companies are now using design patents not for the important and legitimate protection of the overall design of their vehicles, but to prevent competition when it comes to getting the parts that we need to get our cars repaired.

Over the past several years, there has been an enormous spike in the number of design patents on crash parts obtained by companies like Honda, Toyota and Ford. In December of 2005, Ford actually filed a case at the ITC for alleged infringement on design pat-

ents for parts for their 150 pickup. The result? The ITC banned the importation of these parts and eliminated competition for seven needed repair items.

Now, there are hundreds and thousands of owners of F-150 pickups who have no choice other than Ford when it comes to replacing a headlight or any of the other six parts. Ford can now charge consumers whatever they want in the absence of competition.

What is particularly disturbing about this new business strategy is that the car companies are only selectively putting design patents on those parts where competition, albeit limited, is available. So what does this mean for consumers? First of all, there is the cost. High repair costs will lead to more cars being totaled. Consumers who owe more on a car than it is worth will be left with debt payments on a non-existent car. More totals means fewer jobs for body shops, and needlessly totaled vehicles can harm our environment.

However, the most tragic irony in the lack of competition is what I call the automaker's double-whammy. Not only will the lack of competition allow the car companies to charge whatever they want for the parts that we need to fix our cars, but when they charge so much that the car is totaled, our only recourse is to go back to them and buy another one of their products.

High repair costs will also lead to higher insurance premiums, and then there is the safety factor. As the cost of needed repair parts rises, many consumers will be forced to forego or delay replacing a headlight, a side mirror, or a brake light, leaving them with a vehicle that may not offer the needed safety.

I am not surprised to hear that the car companies come before you today and say they don't want competition. First of all, the mere presence of competition reduces the price that they charge us for the parts that we need. The elimination of competition from the independent-brand crash repair parts would add an estimated \$1 billion a year to their coffers. And guess who will be paying that \$1 billion?

There is a solution, and we are asking for congressional leadership to keep the market open to competition by providing a repair clause in design patent law. Such a repair clause would establish a narrow, practical exemption to the design patent law so that the car company receives a design patent on a product. Independent companies could still make competing parts for the sole purpose of repairing that vehicle.

Such an exemption to the design patent law would not, and rightly should not, interfere with an automaker's right to prevent competing car companies from using their patented vehicle and part designs. We understand that design does play an important role in a consumer's original choice of cars. However, when we plunk down our hard-earned dollars for a new car, we are doing just that—buying a car, not a lifetime of indenture to the car companies to buy their parts.

Finally, other markets have successfully addressed and solved this problem. Nine European countries, the European parliament, and Australia have enacted laws that specify that making a matched exterior auto part to repair an automobile is not an act

of infringement, even though the original part is patented. The American consumers deserve no less.

Thank you very much.

[The prepared statement of Mr. Gillis follows:]

PREPARED STATEMENT OF JACK GILLIS

Statement of Jack Gillis, Director of Public Affairs,
Consumer Federation of America

on behalf of

Consumer Federation of America
Advocates for Auto and Highway Safety
Center for Auto Safety
Consumers Union and
Public Citizen

Before the House Judiciary Committee
Subcommittee on Courts, the Internet and Intellectual Property

Hearing on Design Law –
Are Special Provisions Needed to Protect Unique Industries?

February 14, 2008

Chairman Berman, Ranking Member Coble, and members of the Subcommittee, my name is Jack Gillis, and I am Director of Public Affairs for the Consumer Federation of America. In addition to the Consumer Federation of America, I also am testifying today on behalf of Advocates for Highway and Auto Safety, the Center for Auto Safety, Consumers Union, and Public Citizen. We are grateful for your invitation to appear today on an issue of tremendous importance to the safety and budgets of millions of American families – the maintenance and repair of automobiles.

Consider any of the following experiences which happen thousands of times nearly every hour of every day: You accidentally back into a pole at a shopping mall; someone in front of you stops suddenly and your bumpers collide, or you inadvertently sideswipe your car in a cramped parking lot. These types of crashes happen every day to hundreds of thousands of Americans. Fortunately, few of these “fender-benders” result in injuries, but they often result in costly damages to your car. Most of us, after experiencing these common crashes are totally shocked at the resulting repair bill.

For example, Ford charges the same price for a fender as Dell charges for a high speed computer, flat screen monitor and color printer. A simple grill for your Toyota costs the same as a combination flat screen TV and DVD player. A Sears two-door, refrigerator/freezer with an icemaker is the same price as an unpainted door skin from Chrysler. And, by the way, the Sears refrigerator comes with two doors, already painted and installed. General Motors charges the same price for a flimsy rubber bumper cover as Garmin charges for a full color, audio, GPS system, programmed with directions and maps to anywhere in the United States. The fact is, computers, TVs, refrigerators, and GPS systems are cheaper and more advanced today than five years ago and the reason is simple – “competition”.

In the early 1990s, the car companies came to Congress and asked for special design copyright protection on these parts and Congress said no. Our concern today is that the car companies are now using design patents, not for the important and legitimate protection of the overall design of their vehicles, but to prevent competition when it comes to getting the parts we need to repair our vehicles. This lack of competition will seriously harm consumers who will end up paying excessive and exorbitant prices. This is money better spent on health care, food, clothing, and education instead of minor repairs at major costs.

The lack of competition for repair parts will result in several problems for consumers. For example, high repair costs will lead to more vehicles being “totaled” because the price of repairing the damage exceeds the value of the vehicle. High repair costs will lead to higher insurance premiums. Furthermore, when faced with expensive repairs and a limited budget, consumers may forego important car repairs such as replacing a head light or a broken side mirror, items essential for safe driving. Unless Congress addresses the automakers’ use of design patents on their crash parts, the American public will be faced with mounting repair bills, more ‘totaled’ vehicles, increasing insurance costs, and deferring necessary repairs affecting safety.

It is time for congressional leadership to keep the market open to competitively priced, high-quality alternatives to the expensive car company brand parts that consumers need to get

cars repaired at affordable prices. By providing a “repair clause” in the design Patent Law, Congress will be providing consumer choice and protecting an open and competitive market, while enabling the car companies to retain the design patent protection on the overall vehicle.

Automakers are Obtaining Design Patents on Crash Parts: A Disturbing New Trend Which Eliminates Competition, Drives Up the Cost of Auto Repairs and Harms Consumers.

Over the past several years, there has been an enormous spike in the number of design patents on crash parts which companies like Honda, Toyota, and Ford have received on their external crash parts. (See attached chart.) Historically, while car companies have understandably received design patents on the overall design of a car, only recently have they begun to get patents on the individual replacement crash parts.

In December 2005, Ford filed a “Section 337” case at the International Trade Commission (ITC) against suppliers of competitive crash parts for allegedly infringing design patents held by Ford on various crash parts for the Ford F-150 pick-up truck. While a number of the patents were held invalid, seven were held valid and on August 6, 2007, the ITC banned the importation of those parts. As a result, the consumer’s right to competitive choices for these seven needed repair parts has been eliminated. In fact, there are hundreds of thousands of Americans who own F-150 pickups for which there is no alternative, other than Ford, when it comes to replacing a headlight or any of the six other parts. Ford can now charge consumers whatever they want in the absence of competition.

This type of design patent enforcement action seems to be a new business strategy for automakers. Given how the automakers have significantly ramped-up their design patents on crash parts in the past 5 years, the possibility of many additional design patent enforcement actions being brought at the ITC (or federal courts) is very real. The cost of defending such cases is enormous. Even defending just a small number of such cases could easily drive competitors out of business altogether, regardless of whether they ultimately were to win or lose on the merits.

What is particularly disturbing about the action taken by the car companies is that they are only selectively putting design patents on those parts where competition, albeit limited, is available.

Consumer Groups Strongly Support Competition in the Crash Parts Market to Bring Prices Down and Reduce Costly Repairs.

For over 25 years, consumers have benefited from the limited competition between car company brand replacement parts and independently branded parts. Moreover, many such competitive parts have lifetime warranties, something the car company parts lack.

Competition between car company brand crash parts and independent brand parts has produced high quality, fairly price alternatives, and given consumers a choice. Today, car companies still have an 80% market share, competitive suppliers have 15%, and the remaining 5% comes from salvage. Without congressional intervention this barely competitive marketplace for collision repair parts will result in automakers capturing nearly the entire market and consumers will pay the price.

It's no surprise the car companies don't want competition. The mere presence of competition in the market reduces the price of car company brand replacement crash parts. Competitive replacement crash parts are, on average, 34% - 83%¹ less expensive than the car company brand parts, and often the price difference is much greater. Right now, the elimination of competition from independent brand crash repair parts would cost automobile owners more than \$1billion a year.²

Eliminating Competition Will Increase Insurance Premiums for Consumers.

¹ Letter from the American Insurance Association, Automotive Aftermarket Industry Association, Automotive Body Parts Association, Coalition for Repair Equity, National Association of Mutual Insurance Companies, and the Property Casualty Insurers Association of America to Hon. Susan Schwab, U.S. Trade Representative (July 31, 2007), p. 3.

² *Id* at p.4.

If the automakers succeed in using design patents to eliminate competition for crash parts, it will not only result in higher repair costs, but also higher auto insurance premiums. This will have a disproportionate impact on low and fixed income consumers.

While the average price difference between car company brand parts and quality independent parts is significant, these cost savings do not tell the full story. When collision repair crash parts cost more, insurers will have no choice but to pass those cost increases on to their policy holders in the form of higher rates. In addition, in the face of already rising insurance premiums, many consumers are opting for higher deductibles. That means that more of these exorbitant crash repair costs will be coming directly out of our pockets.

Eliminating Competition Will Result in More “Totals” and Put Consumers at Greater Risk of Becoming “Upside Down” on Auto Loans.

Higher repair costs due to less competition among the parts needed to repair our cars will likely force insurers to “total” more vehicles because the cost of repairing otherwise repairable vehicles no longer makes economic sense. Consumers typically lose when a vehicle is totaled. First of all, those consumers who may owe more on the car than it is worth will be left with debt payments for a loan on a non-existent car. In addition, not only do total losses hurt the body shop industry by providing fewer vehicles to repair, but a needlessly ‘totaled’ vehicle can harm the environment. And the most tragic irony is what I call the automakers “double whammy.” Not only does the lack of competition allow car companies to charge whatever they want for the parts we need to fix our cars but, when they charge so much that the car is ‘totaled,’ our only recourse is to go out and buy another one of their products. If automakers succeed in eliminating competition, the cost to the consumer would be profound.

Eliminating Competition in Crash Parts Could Affect Safety.

On the safety side, tragically, as the cost of needed repair parts rises, many consumers will be forced to forgo or delay needed repairs, leaving them with a vehicle which may not offer needed safety. Delaying or ignoring the need to replace a head light, a side mirror, or a brake light could have serious safety implications. Consumers with low incomes, seniors on fixed

incomes and those consumers who pay for crash repairs out of their own pockets may not be able to afford needed repairs.

Congress Can Preserve Consumer Access to Affordable, Competitive and Quality Crash Parts by Adopting a “Repair Clause” in the Design Patent Law.

The solution to this increasingly unfair, unacceptable, and unnecessary mess is for Congress to adopt a “repair clause” in the design patent law that would preserve the consumer’s access to a competitive marketplace for quality alternative crash parts. Such a repair clause would establish a very narrow, practical exception to the design patent law so that if a car company does receive a design patent on a replacement part, independent companies could still make and distribute competing parts for the sole purpose of repairing the vehicle. Such a very narrow practical exception to the design patent law would not – and rightly should not – interfere with an automaker’s right to prevent competing car companies from using their patented vehicle and part designs.

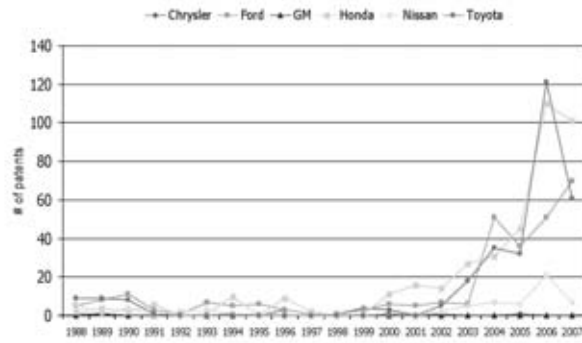
Design plays an important role in consumers’ original choice of a car. After the purchase, however, consumers need the flexibility to repair and maintain their vehicles with the maximum number of choices possible that will “fit” and “match” the other parts. It is simply not fair for consumers to be forced to pay monopolistic prices for needed crash repair parts.

Other markets have successfully addressed and solved this problem. Nine European countries and Australia have enacted laws which specify that the making and use of a matching exterior auto part to repair an automobile is not an act of infringement, even though the original part is patented. In addition, this past December, the European Parliament approved a similar law which would apply to the entire European Union, and ratification by the Council of Ministers is expected in the first half of this year. American consumers deserve no less.

Consumer Federation of America, the Advocates for Highway and Auto Safety, the Center for Auto Safety, Consumers Union and Public Citizen believe that the competitive crash parts marketplace which has evolved over the past couple of decades has served consumers. On behalf of these groups, I strongly urge Congress to adopt a repair clause to the design patent law.

American consumers will thank you for ensuring a competitive market resulting in high quality, fairly priced alternatives to expensive car company brand parts. Again, thank you for providing me the opportunity to discuss this important issue with you today.

Crash Parts Design Patents Granted



Note 1: The term "crash parts" includes body, bumper covers, deck lids, door shells, fenders, fascias, front/rear grilles, header panels, headlamps, high-mounted brake lights, hoods, pickup beds, pickup box sides, quarter panels, radiator supports, side markers, side moldings, tailgates, taillamps, and wheel houses as defined by the Certified Automotive Parts Association at <http://www.capa-certified.org/whatparts.asp>.

Note 2: Figures shown for 2007 are annualized based on the number of design patents granted through September 30, 2007.

Mr. BERMAN. Thank you very much, Mr. Gillis.

I am going to recognize the Ranking Member initially for 5 minutes.

Mr. COBLE. Thank you, Mr. Chairman.

Gentlemen, good to have you all with us.

Mr. Rodriguez and Mr. Maiman, I am told that fashion groups are attempting to negotiate a compromise. What is the status of this exercise and what are the parameters?

Mr. RODRIGUEZ. As I understand, there has been a negotiation over the past 1½ years. I am hopeful that something could be worked out within the next month.

Mr. COBLE. That is encouraging. I am glad to hear that.

Mr. RODRIGUEZ. Yes. I am very excited about that.

Mr. COBLE. Mr. Maiman, do you want to weigh in on it?

Mr. MAIMAN. I think there may be something in the area of compromise on this bill. I just wonder what it is that can be done to avoid a litany of litigation in a business that in the last 5 years has had more litigation than ever.

Mr. COBLE. Well, hopefully maybe that can be resolved as the compromise progresses. I am the eternal optimist. Mr. Berman I think is as well.

Mr. Gillis?

Mr. GILLIS. Yes?

Mr. COBLE. I am told that there was a significant spike or increase in the number of design patents on crash parts obtained by the major auto marketers, I think beginning in 2003 and I believe continuing today. Why all of a sudden the increase in 2003, (A), and is it possible that the ITC, the International Trade Commission, may have had an impact. If so, what was it?

Mr. GILLIS. I think there are two things, Mr. Coble. First of all, the car companies are desperate to keep competition out of the market. They suddenly discovered with the recent ITC case, when Ford filed that case, which was around 2002 or 2003, that this had the potential for keeping other companies from competing in the marketplace. So there is no question that there is a relationship between the ITC decision, which was very, very damaging to the American consumer, and the fact that car companies are seeing an opportunity here to prevent competition by what I consider hijacking design patent laws.

Mr. COBLE. Mr. Olsen, do you want equal time?

Mr. OLSEN [continuing]. The ITC case, because the vehicle didn't come out until 2004, so the dates of the ITC case I think was 2006. I don't know why patents were spiked in 2003, as you allege. I have no idea. I am a designer, not a lawyer. I represented Ford in the ITC case and found that—well, for me, the single most important ingredient is art or design is an activity that needs protecting. The cost of developing these products is in excess of \$100 million just for the design patent end of the work. Just let me complete with one—

Mr. COBLE. Thank you, Mr. Olsen. Let me go to my friend the professor, who was with us, Mr. Chairman, some years ago. Mr. Fryer, it is good to see you.

Professor, it is obvious that expanding protection to automotive or fashion designs benefits individuals who work within the con-

finer of these industries. What is the impact on businesses and workers who compete against these brand designers? What about the impact on consumers? Many consumers—they don't like this idea at all.

I see more good than bad in it—but what do you think?

Mr. FRYER. It is a tough call. You have friends on both sides.

Mr. COBLE. And so do we.

Mr. FRYER. Yes. Well, as a consumer myself, I see the impact, but the intellectual property law has many purposes, and for limited periods of time it is to prevent the unfair business practices that might give a certain advantage to people who actually have access to the tools and equipment to make low-cost products. That gives them really a distinct advantage and discourages people from innovating and creating. So on balance, I think you have to give some respect to both sides.

Could I make a comment about the ITC?

Mr. COBLE. If you hurry, because I want to beat that red light before the Chairman admonishes me, but go ahead.

Mr. FRYER. Okay. ITC is a procedure. Basically it follows the same laws. What they do is allow you to essentially approach the litigation collectively and deal with it swiftly. So it really is not any change. The increase shows ITC activity on designs. There are more imports and more copies coming in. This fact is why the ITC court has been successful.

Mr. COBLE. Thank you, sir.

Let me come back to Mr. Gillis with a final question, Mr. Chairman.

Mr. Gillis, I have heard it said by several observers: Why don't manufacturers of non-OEM or non-name brand crash parts simply modify their designs to hopefully avoid infringement? What do you say to that?

Mr. GILLIS. Well, the problem, Mr. Coble, is the fact that we consumers want that part to look exactly the same. We want the car to look the same, to perform the same, and have the same quality characteristics. You wouldn't want to put a Ford headlight, a different type of headlight, in the Ford F-150 that doesn't look like the original headlight.

Mr. COBLE. Thank you, sir.

Mr. Chairman, do you award credit? I just barely beat the red light. [Laughter.]

Mr. BERMAN. For you, Mr. Coble, always. You would be the last person I would ever admonish. [Laughter.]

Mr. COBLE. Thank you, sir.

Mr. BERMAN. I will recognize myself for 5 minutes.

Maybe this is sort of between Mr. Rodriguez and Mr. Maiman. This whole notion—I mean, Mr. Rodriguez, in your testimony, you talk about your traveling to get ideas and inspiration for your designs. You are affected by what you see out there. My guess is you are not out there to copy what somebody else has done. For you, it is like so much else, I am sure. Previously written music affects new music, but it is not copied.

Mr. Maiman, you talk about—well, let me ask you. In your business, do you sell products which you have essentially, "I saw this

hot design out there; we are going to sell this”—my designers go out and basically copy that design because we think this will sell.

Mr. MAIMAN. What we do is——

Mr. BERMAN. If I could just get both of you engaging on this whole notion of where is the line between inspiration and copy.

Mr. MAIMAN. Well, we do what most other designers do, and even the high-end designers. We send a staff to Europe five times a year. They go to Japan. We subscribe to fashion reports out of Europe and trend services. Trend services is similar to this, where they send pictures of runway reports from Europe and sketches of the trends that are running in Europe.

I think we all go to Europe right about at the same time. We all rush back to our design rooms and we take these trends and interpret them into what we think is next. We are not trying to interpret them into what is happening today, but we have to figure out what is next.

So we are all doing it the exact same way. All design inspiration is not internal, but it comes external. Personally, I don't think anything is truly original. It is just an interpretation of something. At our company particularly, we don't interpret things exactly because we are on to what the next phase is anyway.

Mr. BERMAN. Mr. Rodriguez?

Mr. RODRIGUEZ. Well, I know what it feels like to design something truly from a voyage to Asia and scouting temples, not scouting stores. I don't subscribe to any of those services which basically show my clothes to people who have—maybe not designers who can create things that are original, but want to be in the swing of things.

I want to clarify something. I think there are two issues that I don't know if Mr. Maiman knows about or not. One is a trend. One is something that is a feeling. We all feel things. All the designers, whether it is at a high level or a low level, we want floral prints for spring, and everybody does them because everybody feels them wherever we saw it. That is a trend. That is fine.

For me, it is a bigger problem when you buy my dress and you take it apart and copy the pattern pieces and sell it exactly the way that I made it, because it took me a long time to create that dress. That to me is theft.

Mr. BERMAN. “Pattern piece” means something different than a print, I take it.

Mr. RODRIGUEZ. Yes. I am sorry. A pattern piece is like the actual bits and pieces that you cut to put it together. That to me is theft. I have seen it. I am not talking about inspiration. People draw inspiration in very different ways. For me, the inspiration is more ethereal, and I can create something completely new, even though it is still a skirt.

Mr. BERMAN. You don't call xeroxing an inspirational act?

Mr. RODRIGUEZ. No. [Laughter.]

Or when the manufacturer that you have entrusted to make your shoes, makes two copies—one with your label in it and one with his label in it. His is in his store before yours is ever shipped to the United States. That is bad. We are now protected against anything like that.

Mr. BERMAN. My time has expired.

Mr. Schiff?

Mr. SCHIFF. Thank you, Mr. Chairman.

Whoever designed this podium didn't design it with these chairs in mind. I feel like I have lost several inches in height. I know nobody at this table would be responsible for that.

It seems to me that what we are really debating—and I want to focus, I guess, on the outmoded design issues or more of the technology than the fashion, at least for the moment—is a balance. We want to encourage innovative design on the one hand, and not discourage it by allowing people to copy the design and undermine the creative effort that went into it.

On the other hand, where there isn't a substantial design component, or the design is of a far less significance than the function, we don't want to undermine the ability of people to supply a useful part and bring about that competition in price. The question I have is, it seems to me that we have had a patent system that was rarely used in this field until recently.

Is the standard that is out there striking the right balance? Is it not striking the right balance because of the increased prevalence of design patent litigation? I think the ultimate question is how do we maximize this for the consumers, but that doesn't necessarily mean that you allow every copy, because you don't want to undermine the design process.

So I guess the question is, how do we set up a standard for our patent judges to apply, or the patent examiners? Do we have the right standard? How do we encourage that kind of innovation? At the same time, how do we keep costs reasonable where the design component, the style component, is really of far less significance than the functional component.

So I would open up anyone who would care to comment.

Mr. OLSEN. Could I just come back to this. I got cut off and I was——

Mr. SCHIFF. As long as it won't be on my time.

Mr. OLSEN [continuing]. This august Committee.

No, it is great to say that the automobile industry is abusing the privilege of the design patents by charging exorbitant prices, when the copycatters have not paid any development costs. They are working in low labor-cost countries, so naturally they have a built-in price advantage.

If anything is going to discourage innovation, it is the fact that the automobile manufacturer can't get a reasonable return to reinvest in new product.

Mr. SCHIFF. Of course, I haven't framed the issue that way at all. I am asking you, what is the proper standard to be applied? Does the law today set up enough guidance where we maximize the consumer benefit, both from encouraging innovation and also allowing competition? Or are we too skewed in one direction or the other? That is really, at least for me, the question that I am wrestling with.

Mr. GILLIS. Well, Mr. Schiff, if I may, Consumer Federation of America and the other consumer groups really believe that the design patent laws provide very important consumer protection. It is important to protect the designers of a car from keeping another

automobile manufacturer from copying that car. That is a very important design protection that needs to be preserved.

What we are calling for is something slightly different in that when the European Community looked at this problem and they saw these carmakers charging outrageous prices for small components of the car, they said, well, let us allow consumers some choice in terms of shopping around for those parts, but still protect the design that Mr. Olsen, for example, has worked on. That is an important protection.

Mr. SCHIFF. But is it all or nothing? Is it an issue where you can design and patent a car, but not any part of the car? Are there some components of the car that are far more design-oriented than functional, and in fact may not have a functional component at all? They may be completely a design attribute.

Mr. GILLIS. I think again it is important to allow the carmakers to patent parts of a car as well. For example, Ford needs to patent certain parts of its car to keep General Motors from copying those parts of its car. What we think is important is that we as consumers need the right for choice when it comes to repair that car. That is the beauty of a repair clause. It allows the carmakers to patent the car. It allow them to patent the individual parts, but keeps the market open for competing manufacturers for the simple repair parts that we need and gives consumers choice on those simple repair parts.

Mr. SCHIFF. Are you saying that the current law doesn't permit you, because of the way the courts have recently been interpreting design patents, doesn't allow you to provide replacement parts?

Mr. GILLIS. Well, the recent decision by the ITC has caused a great deal of consternation among those limited competitors that there are right now. What the ITC has essentially done is inhibited the importation of these parts so consumers have no choice.

Mr. SCHIFF. Can I ask one last question, Mr. Chairman?

Mr. SHERMAN. [Presiding.] One more.

Mr. SCHIFF. Thank you, Mr. Chairman. The Chairman has changed.

Mr. SHERMAN. They have been confusing Berman and Sherman for so long, I am surprised you were able to notice the difference.

Mr. SCHIFF. The Chairman is now better looking. The Chairman is more astute. The Chairman is more generous with the time for his Committee Members. [Laughter.]

That will buy me about 45 seconds.

Should there be a different legal standard for a repair shop or a parts manufacturer that is different in kind than a different automotive manufacturer? Why should the standard for the Acme Repair Company and its ability to produce a part, be different than the rival GM Company's ability to produce that part?

Mr. GILLIS. Primarily because they are two totally different functions. The function that we want to keep open is our ability to have choice in getting our cars repaired where we want, when we want, and with whatever parts we want. When we don't have those choices, then the cost of car repair is going to go up.

On the other hand, the carmakers themselves need protection from their competitors—that is, other carmakers from copying the

designs that they have invested, as Mr. Olsen said, enormous amounts of money in.

Mr. SCHIFF. Of course, they consider you one of their competitors—not you, but the people you are advocating for.

Do you want a chance to answer?

Mr. OLSEN. I would like a chance, yes, because the total cost—I mean, Mr. Gillis has used the word “repair.” If he is going to be more accurate, it is “replace.” “Repairing” means putting a bit of Bondo on a fender or polishing a headlamp lens. The point I would like to make is that the cost of the part after an accident, relative to the overall cost of the repair, is relatively small. It is the labor costs, the finishing of the part, that adds the cost up. So the differential between what the companies charge and the foreign copy-cat rip-offs charge is relatively small in terms of the overall cost of a typical body repair.

One more point I would like to make. J.D. Power did research on automobile repairs after accidents, and 62 percent of all the people who had the accident want OEM parts. They don’t want knockoff parts. People feel they have been ripped off by having knockoff parts installed. For the insurance company, they are likely to lose renewal business, and the job shop who has done the job is likely to lose any new business they are going to get from them because they feel cheated they don’t have OEM parts.

Mr. SCHIFF. Thank you, Mr. Chairman.

Mr. SHERMAN. Thank you.

The gentleman from Virginia?

Mr. GOODLATTE. Thank you, Mr. Chairman.

Mr. Chairman, I have an opening statement I would ask be submitted for the record.

Mr. SHERMAN. Without objection, it will be entered in the record. [The prepared statement of Mr. Goodlatte follows:]

PREPARED STATEMENT OF THE HONORABLE BOB GOODLATTE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF VIRGINIA, AND MEMBER, SUBCOMMITTEE ON COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY

Mr. Chairman, thank you for holding this important hearing on design protection.

Article I Section 8 of our Constitution lays the framework for our nation’s copyright laws. It grants Congress the power to award inventors and creators, for limited amounts of time, exclusive rights to their inventions and works. The founding fathers realized that this type of incentive was crucial to ensure that America would become the world’s leader in innovation and creativity. This incentive is still necessary to maintain America’s position as the world leader in innovation. However, most types of designs do not enjoy this protection.

The specific area I would like to focus on today is fashion designs. Most industrialized nations provide legal protection for fashion designs. However, in the United States—the world’s leader in innovation and creativity—fashion designs are not protected by traditional intellectual property protections. Copyrights are not granted to apparel because articles of clothing, which are both creative and functional, are considered “useful articles,” as opposed to works of art. Design patents are intended to protect ornamental designs, but clothing rarely meets the criteria of patentability. Trademarks only protect brand names and logos, not the clothing itself, and the Supreme Court has refused to extend trade dress protection to apparel designs.

Thus, if a thief steals a creator’s design, reproduces and sells that article of clothing, and attaches a fake label to the garment to market it, he would be violating federal law. However under current law it is perfectly legal for that same thief to steal that same design, reproduce and sell the article of clothing if he does not attach a fake label to it. This loophole allows pirates to cash in on others’ efforts and prevents designers in our country from reaping a fair return on their creative investments.

Furthermore, the production life cycle for fashion designs is very short. Once a design gains popularity through a fashion show or other event, a designer usually has only a limited number of months to effectively produce and market that original design. Further complicating this short-term cycle is the fact that once a design is made public, pirates can now virtually immediately offer an identical knock-off piece on the Internet for distribution. Again, under current law this theft is legal unless the thief also reproduces a label or trademark. Because these knock-offs are usually of such poor quality, these reproductions not only steal the designer's profits, but also damage his or her reputation. It is simply common sense that these creators' works be protected.

Chapter 13 of the Copyright Act offers protection for the designs of vessel hulls. I have introduced, along with my friend Representative Bill Delahunt, H.R. 2033, the Design Piracy Prohibition Act, which protects designers by amending Chapter 13 of the Copyright Act to include protections for fashion designs. Because the production life cycle for fashion designs is very short, this legislation similarly provides a shorter period of protection that suits the industry—three years. This legislation further establishes damages for infringing a fashion design at the greater of \$250,000 or \$5 per copy.

A hearing was held on this legislation last Congress and it has broad support among those in the fashion and apparel industries. However, constructive criticism has been expressed by some fashion manufacturers, and I am pleased to report that negotiations are ongoing to address those concerns. Indeed, I am hopeful that that an agreement may be reached in the next few weeks to address many of the concerns of those manufacturers.

While I agree that the Subcommittee is right to examine the design protection issue in general, it is my hope that the Subcommittee would move forward with consideration of H.R. 2033, which is the product of almost three years of discussion and debate, and is a modest effort to help protect a creative, developing industry in the U.S.

As America's fashion design industry continues to grow, America's designers deserve and need the type of legal protections that are already available in other countries. The Design Piracy Prohibition Act establishes these protections.

Thank you again for holding this important hearing. I look forward to hearing from our expert witnesses today.

Mr. GOODLATTE. I welcome all the witnesses. This is a very interesting hearing, but I feel like it is a bifurcated hearing almost. The issue is quite different between fashion design and automobile parts design. I am very interested in what you have been discussing, but I would say that over here in the fashion design industry, there is not the same consideration. There is not, to my knowledge, any significant after-market for shirtsleeves or pants legs that would be replacement parts to go on a designer piece of clothing.

As many of you know, I have joined my friend Bill Delahunt in reintroducing the Design Piracy Prohibition Act, which protects fashion designers by amending chapter 13 of the Copyright Act to include protection for fashion designs. This Subcommittee has held a hearing on this legislation.

There has been constructive criticism expressed by some fashion manufacturers. I am pleased that those negotiations are going forward, and I am hopeful that an agreement may be reached in a few weeks that would address many of those concerns. I hope that that will allow this Subcommittee to move forward on the legislation that Congressman Delahunt has introduced, because I think this is an important issue dealing with the question of piracy.

In that regard, I would like to turn to a few questions. First, Mr. Maiman, you stated in your testimony that creating new copyright protection for fashion designs threatens to split America into two classes of people—those with money who can buy copyrighted designs and those who can't afford them. I wonder, you have noted

that much of the information about new designs—you showed us the magazines and so on—came from Europe.

Have you seen evidence of this splitting into two classes in Europe, the Europeans, where there is protection for fashion designs, have good choices when it comes to fashion? Or is the European market a one-size-fits-all market that is dull when it comes to new fashion designs?

Mr. MAIMAN. The European market surely is not dull. And no, in Europe I have not seen any evidence of that. But I think over here, what is going to happen is when you have to copyright your designs, and you will probably have to copyright every one of them just as a matter of course when you design a garment, you have to copyright it, and to do the research.

What we are questioning in our company is how do we determine if a design that we come out with is copyrightable. Even if, let us say, we have never actually bought a garment, taken someone else's garment apart, put it back together with our fabrics—

Mr. GOODLATTE. But in answer to my question, the consequence has not occurred in Europe, where they do have fashion design protection.

Mr. MAIMAN. Not to my knowledge, no.

Mr. GOODLATTE. Mr. Rodriguez, would you be interested in answering that?

Mr. RODRIGUEZ. You know, I think it has actually helped because the lower markets in Europe have great design integrity. So a person who is following the trends and wants to look fashionable can go to whatever store she shops at, buy beautifully made, good quality, inexpensive stylish clothes.

Mr. GOODLATTE. I was going to say, we are starting to see that in the United States, too, where you have fashion design labels—

Mr. RODRIGUEZ. Yes, it is happening here.

Mr. GOODLATTE [continuing]. In Wal-Mart and Target and other department stores that appeal to a broader cross-section of the population. So I am not of the opinion that attempting to protect these original designs would yield the result that you describe.

Mr. Maiman, let me follow up on that. Do you believe that manufacturers should be able to make exact copies of a fashion design for profit without obtaining the permission of the original designer—an exact copy? I know you talked about trends and whether you could see what was coming next, but I also know that you can go online virtually the day after the Academy Awards and order an exact copy of some of the designs that went right down the runway. I wonder if you would think that that should be prohibited—that exact copy?

Mr. MAIMAN. Well, it is hard to say because what you have to do is you have to wonder where the inspiration for that Academy Award design came from. Did that person just wake up and create it in their mind? Or did they look at someone else's—

Mr. GOODLATTE. Well, let us assume we had a system where that designer would be accountable to somebody else for that. But the person who is now making an exact copy of the design that came down the runway, and assuming it was an original that didn't violate somebody else's rights—an exact copy—would we be well advised to prohibit that?

Mr. MAIMAN. Well, I think an exact copy of a dress—let us say it is a dress we are talking about—would most assuredly end up in a different market segment than the people who can afford to pay for the original design. So I would not be against copying designs that are out there.

Mr. GOODLATTE. So you would say that being able to do that, which is perfectly legal today and which is why we have introduced this legislation—you wouldn't prohibit even an exact copy?

Mr. MAIMAN. I would not. No, sir.

Mr. GOODLATTE. Mr. Rodriguez, do you want to respond to that?

Mr. RODRIGUEZ. I am appalled. I mean, that is appalling. I mean, that is theft. You know, I do wake up and I do work on a mannequin, as do many other creators. They create original garments and those garments do go down red carpets or wedding aisles. They are copied the next day, before I can commercialize that gown and put it on my collection and sell it at a better price, at a lower price, or at a very high price, it has already flooded the market.

So to steal something, to copy it, whatever you want to call it, to copy my DNA and diffuse it into a lot of prints—I mean, I think it is just completely wrong. I think it is very honorable that companies like Target have hired creators to create good product and sell them in mass quantities.

Mr. GOODLATTE. And in most of the other developed countries of the world, particularly Europe, you could take steps to protect that.

Mr. RODRIGUEZ. Everywhere. Nothing gives me greater pleasure than to go to Spain and buy cheap underwear at the big chain store there because their quality, their design is far superior to some of the most expensive underwear in Europe.

Mr. GOODLATTE. And it is protected under the law.

Mr. RODRIGUEZ. And it is protected under the law. It is unique. It is wonderful. It is not to say someone else can't make a great white plain T-shirt, and I am not going to buy it from them, for more money or less money. It is a plain white T-shirt. But that particular one is fantastic and it is respected and not copied by anyone.

Mr. GOODLATTE. Thank you.

Thank you, Mr. Chairman.

Mr. SHERMAN. I will now turn to the Chair of the full Committee, Mr. Conyers.

Mr. CONYERS. Thank you very much.

I apologize for not being here. I had committed myself to Liz Robins to be here from the very opening of the first witness. The previous Chairman and I had business on the floor. We stayed until the end. I apologize.

I see our former Illinois colleague Marty Russo. I don't know what part of the industry he is in now, but he championed the universal single payer health care bill for many years when he represented his state of Illinois so ably. I am glad that he is here.

Thus far we have received mixed reaction on this proposed legislation. Part of the automobile industry is not that keen on it. People representing the consumers I think, not having heard your testimony, don't seem to be that keen on it either.

Have I reached too quick of an assumption about what is happening here?

Mr. GILLIS. Well, Mr. Chairman, from the Consumer Federation of America's perspective, we are really not commenting on the fashion design issue. As Mr. Goodlatte said, these are two pretty different issues and pretty distinct issues. Our concern is simply from the consumer perspective in that we really believe the car companies have the right to copyright their cars or to design-right their cars, to the design of certain parts, but we just think the consumers need the choice in the marketplace to shop around for different parts.

The best example of this is really in the mechanical parts arena. Thank goodness we have the choice of Midas muffler versus Chrysler mufflers, or certain types of shock absorbers. These choices provide not only consumers with fair prices, but they establish competition and they get these manufacturers to start competing against each other, and the quality ends up better. We would like to see that same competition in the area of fenders and hoods and the things that we need after a crash.

Mr. CONYERS. Well, are you in agreement, Mr. Olsen?

Mr. OLSEN. Not at all.

Mr. CONYERS. Not at all. Okay. Explain yourself.

Mr. OLSEN. I think that we are dealing with a competitive situation that is untenable for the OEMs. The people who are making the parts, which as I already have mentioned, in terms of the total costs of a crash repair, they are a relatively small part of it. So the advantage or disadvantage of having OEM in financial terms is relatively small.

I got lost on my point here. Excuse me. I will rest there.

Mr. CONYERS. Okay.

It seems, Mr. Rodriguez, that there is some unanimity around the fashion aspect of this legislation. I want to commend you for that.

Mr. Maiman, do you have anything positive to say about this legislation?

Mr. MAIMAN. Well, one of my main things about this legislation is that I think it might stifle some of the creativity that is coming out of, maybe not the designers at Mr. Rodriguez's level, but certainly a lot of the designers that are coming into the industry and selling to middle America.

Mr. Rodriguez is higher in the design industry, and probably accounts for less than 5 percent of the annual American volume spent on clothing. Everybody else does get—most of the styles do trickle down. They don't trickle up. The higher-end designers are not going to go to Target stores, Macy's, Dillard's, Kohl's and Sears and Penney's to get their inspiration. It all works from the top down.

Mr. CONYERS. Let me just get a reaction from Mr. Rodriguez before my time is expired.

Mr. RODRIGUEZ. A reaction? Well, you know, I do not agree with that at all because the young talent in the United States that is emerging would be hurt if they didn't have a bill like this in place. They are creating new things. I myself have had a struggling company for 10 years, until recently, and I have big partners now who can protect me.

But the young designers in America need this bill more than the big designers in America—not the wealthy designers. They are creating and they are bringing freshness and newness to middle America. They are inspiring us bigger companies to do new things and think of things, and think of our work differently. That is fantastic. That is a trend. That is inspiration.

What happens is with the new emerging talent that Mr. Maiman may have misunderstood, what happens is the companies come in and cannibalize them, cannibalize their aesthetic, their design ethic, their everything—their look—and sell it, manufacture it overseas.

Jobs are lost and two talents, three talents, many talents are lost and never have an opportunity. I have seen it with a really, really talented denim manufacturer, a couple of artists who lived and worked in L.A. They lost the most beautiful denim line I ever saw. It was stolen from them. It was stolen from their dryers and they couldn't work anymore. Now, they have to work for someone else.

I don't want that to happen anymore. It is too painful to create something and see it mass produced for \$14 by someone else, and your career is gone. So that is a very heartfelt answer to your question.

Mr. CONYERS. Well, thank you so much.

I thank all the witnesses.

Thank you, Mr. Chairman.

Mr. SHERMAN. Thank you.

I recognize the gentleman from North Carolina.

Mr. COBLE. I have already been heard, Mr. Chairman.

Mr. SHERMAN. You have already been heard? Okay.

Mr. Rodriguez, and I will also ask Mr. Maiman. I am trying to get a feel for where we draw the line between original designing, which is of course influenced by everyone else. I mean, I see Mr. Rodriguez is wearing black. Other people have worn black. It has been done.

So let us go back to Levi Strauss. The story is that he was the first man to take canvas and make pants. He made them blue, and he had a particular design. Let us say we had good laws in this country and it was back at the Gold Rush, and he filed for the appropriate protection.

Should we allow somebody else to make canvas pants? Should somebody else be allowed to make blue canvas pants? Should somebody else be allowed to make blue canvas pants that were indistinguishable by a lay person from Levi's own design? Assuming everything Levi did was unique, what do we let the next person do?

Yes, Mr. Rodriguez?

Mr. RODRIGUEZ. I was dying to answer that. I have traveled quite a bit and worked with many different mills in South America, in Europe, and seen—

Mr. SHERMAN. I will ask you to give the abbreviated version.

Mr. RODRIGUEZ. Yes, I know. I have seen that blue canvas, which was made for decades by everyone.

Mr. SHERMAN. I am going to ask you to think back as if you were right there at the Gold Rush. You have never seen blue canvas pants before.

Mr. RODRIGUEZ. Should he be the only one allowed to make it?

Mr. SHERMAN. Yes.

Mr. RODRIGUEZ. No. Blue canvas is fabric. Blue canvas was out there. He just chose to make a certain style of pants out of it.

Mr. SHERMAN. But no one else had ever used that fabric for pants, so it would be okay to do blue canvas pants. If somebody comes up with the first idea of using blue canvas pants, now he had a particular stitching on the pocket. Would you allow somebody else to use that same stitching?

Mr. RODRIGUEZ. Maybe not if it had my name on it.

Mr. SHERMAN. Well, obviously, if you are able to integrate your trade name into your physical good, you are going to get the maximum possible protection. But assume it is just a geometric design on blue canvas. Nobody had ever made blue canvas pants before. Nobody had ever used that design before. What do we let the next person do?

Mr. RODRIGUEZ. Whatever they want. If they are inspired by blue canvas pants, they can make blue canvas pants. You respect Mr.——

Mr. SHERMAN. They use the exact same design—the pocket exactly as wide, the stitching the same squares and circles interlocking, or whatever? I am making that up. Levi didn't do that.

Mr. RODRIGUEZ. Well, the design——

Mr. SHERMAN. One of your handlers is trying to correct your answer. While you take a look at your notes, I will ask Mr. Maiman.

Mr. MAIMAN. I do believe one of Levi's—— [Laughter.]

Mr. SHERMAN. Perhaps we need the lobbyist testifying. Go on. Go ahead.

Mr. MAIMAN. I am sorry. Was it not my turn?

Mr. SHERMAN. It is your turn. Go ahead.

Mr. MAIMAN. Okay. What I do believe as far as it applies to Levi Strauss, he was probably the first one to come out with—you are talking about blue denim, the canvas.

Mr. SHERMAN. Yes.

Mr. MAIMAN. Everybody, everybody, everybody does blue denim, and we know that. Levi Strauss, if we come out with a five-pocket western, which Levi was the first to come out with, with the four pockets and the little coin pocket, the five-pocket western has been the mainstay of the industry and Levi did invent it. Should we all—and I don't make denim jeans so I am just talking about the rest of the business—should the denim manufacturers have to pay a royalty, or be subject to litigation from the Levi Strauss estate when they make a five-pocket western? Should he have been able to copyright that?

Mr. SHERMAN. You are doing a good job of asking the questions, but we are elected to do that.

Mr. MAIMAN. Okay.

Mr. SHERMAN. I need some answers, or at least your own opinion, obviously.

Mr. MAIMAN. The opinion is, fashion always regenerates itself and people will do versions of the Levi pant. I agree that it should be entirely illegal and protected by trademark and copyright to put a tag on there that resembles Levi or resembles Guess With the little triangle, because then it will create a likelihood of confusion between who made the product. But as far as the fabric, the shape

of the garment, the fit of the garment, I think it is fair game in the world, not just the United States.

Mr. SHERMAN. Okay. Let me ask Mr. Gillis, if I go buy a car and they tell me a lot about the car. There is a sticker on the car. One of the things they don't tell me is, we have a monopoly right to make the replacement hood panel on this car. So if you dent this car and you need a new hood, be prepared to pay monopoly prices for the replacement.

Should we require that those who are selling cars to inform consumers when they are using our intellectual property laws to give themselves monopoly power and monopoly pricing over replacement parts, and some idea as to which replacement parts there isn't going to be a competitive market for?

Mr. GILLIS. Absolutely. But the better solution, Mr. Sherman, is to simply allow the competition to exist, as this country is well known for. That would solve the problem. Again, they have a right—

Mr. SHERMAN. So you are saying, for replacement parts, allow—but you don't draw the same line with regard to newly manufactured cars. In other words, you can make the argument, you know, if we only got rid of these design patents, Sherman can replace his dented bumper cheaper, which is moderately important to me. But if we took it all the way, we would say, well, get rid of all the patents, then I could buy a car cheaper. Why allow some rival company to give me a cheaper hood, but not to give me a cheaper car?

Mr. GILLIS. Because fundamentally, design patents are very, very important corporate protections, and as a result, consumer protections. That creates competition between General Motors, Ford, Toyota and Honda. And that competition is good for consumers and consumer depend on those different designs in order to pick a car. So it is not right to allow Honda to copy Toyota's overall design.

The problem, though, is if we had a repair clause, you wouldn't have to have the disclosure that you are talking about because then there could be competition on simply the parts we need to repair the car, not the car itself.

Mr. SHERMAN. Well, I would like to save 80 bucks on a replacement hood, but if I could get something that looks like a Bentley and only pay \$30,000 for it, that would be even better. I know Chrysler comes close.

Mr. GILLIS. Well, interestingly enough, Mr. Chairman, if you ever looked at the cars today, it is pretty hard to tell one from the other, so that design difference is kind of melding together, but that is the choice of the carmakers to have those cars look very similar.

Mr. SHERMAN. Why don't I yield—

Mr. OLSEN. Can I respond to that?

Mr. SHERMAN. My time has expired. We are going to hear from the gentleman from North Carolina, and then I will ask a couple more questions, then we will adjourn.

Mr. COBLE. Thank you for your generosity, Mr. Chairman. I just failed to mention this earlier. I want to revisit Mr. Gillis and Mr. Olsen.

The Europeans have implemented an exemption to the design protection known as design clause. Now, I don't know whether that

would be appropriate or not, but what do you two say about the design clause feature, maybe to better understand the ins and outs of design law in the auto parts market?

Mr. GILLIS. Well, I have to say at the outset that I am not a design patent attorney. I am a consumer advocate. However, all we are asking for is actually a repair clause. Design patents are fine. We just want consumers to be able to have choices when it comes to repair those cars, and Mr. Sherman's dented bumper. If he has two choices, not only will he get a fairer price, but those two companies will compete with each other and produce a better quality product.

Mr. COBLE. Do you want to be heard, Mr. Olsen?

Mr. OLSEN. Yes, I would like to make two points.

Mr. COBLE. Thank you, Mr. Gillis.

Mr. GILLIS. Thank you.

Mr. OLSEN. The European Automobile Manufacturers Association did costs on replacement parts for the Volkswagen Golf, the largest-selling car in Europe. They have the prices from countries like Britain, which don't subscribe to design protection in their country, and Germany and France. The interesting thing is that the lowest cost parts for the Volkswagen Golf come from the countries that are protected, and not from the countries that are not protected.

Another point I would like to make is that when you design a car, and you are in the clay model stage and you are in a design studio trying to get out a car, you know what this car is going to retail for. The corporation brings in their insurance lawyers, adjusters, to look at that design, analyze it, and project what will be the repair costs on that car.

If the insurance man—the person representing the insurance industry analyzing the design—gives a price which is higher than the class the manufacturer wants to be in, then design staff are obliged to change that design and get it into a situation where the costs meet the requirements to have the proper insurance rating.

Mr. COBLE. Thank you, Mr. Olsen.

I see Mr. Gillis is writing rapidly. Do you want to be heard, Mr. Gillis?

Mr. GILLIS. Thank you, Mr. Coble.

I just want to say that for the car companies to say that to give them a monopoly would assure consumers the lower prices and high quality simply flies in the face of any economic logic theory that I have ever heard of. Competition is the consumer's best friend, and that is what we are calling for.

Mr. SHERMAN [continuing]. Car manufacturing business expects to get a certain profit from selling the car and a certain profit from selling the parts. They have certain design rights with regard to selling the car and they expect a certain profit. And then they will know that I am going to dent the thing, and then they expect certain profits there. All those profits to into designing the car, and one wonders whether we want to tell them, okay, go ahead and you get intellectual property protection for when you sell the car, and you can make your profit there, but you have to make a smaller profit when you sell the replacement parts.

I am just beginning to learn these issues. One thing I do know and should announce is that we are going to keep the record of this

hearing open through the close of business Wednesday for submissions by both witnesses and Members. Perhaps there are even others that would make submissions, but that would be at the discretion of the Chair who, as Mr. Schiff has pointed, is almost as good looking as I am.

Mr. Fryer, I am glad you haven't fallen asleep. We haven't asked you any questions yet, but with Mr. Coble's permission, I will ask a couple.

Mr. COBLE. Sure.

Mr. SHERMAN. Regarding vessel hull designs, how do you foresee applicants applying for protection under the Senate amendment? Will one be able to secure protection for a hull, a deck, a hull and deck, all in one application? Is this your understanding? Will applicants have to do something to indicate that they want protection for each of these elements? Or do they want them only as they fit together? What is your understanding?

Mr. FRYER. Mr. Chairman, this vessel hull law is administered by the Copyright Office. It is a separate statute. The regulatory part will be determined by them. My vision—I think I put it in my statement—was that to make it simple for the person who is applying. The people applying are the boat companies. Usually, they are not attorneys, sophisticated design patent attorneys. So my suggestion would be to have a choice, if you want the bottom part or you want the upper part, which is now the hull or the deck, or both. So you can choose. And that is exactly what the statute now provides, and it would be supported by the statute.

In the alternative, the present regulation says that you can show the whole design and then use what is called a "broken line" technique. They use it in trademarks and design and patent, and you can actually show what you don't want to protect, kind of like a white-out thing. That would then give them an option. That would be the patent attorney or someone who is skilled in that an option. But I would give them both options. This approach would be my advice.

Mr. SHERMAN. Thank you. You mention that there has been little litigation over vessel hull design protection. My question is, is that relevant to determining how much litigation we would see if we provided protection for fashion designs?

Mr. FRYER. That is an excellent question. I feel like I am in the classroom with you, as my professor. It is a nice change.

The point is, I think all these questions that you have asked about various industry concerns are important. They have to focus on is what does the statute really say. There are absolutely minimum limits of what can be protected. You can not protect common design. You can not protect purely functional features.

By the time you go through analysis, you get to a design that is distinctive—something that you can recognize. I think a lot of this discussion is operating down in the lower level where frankly these features are not going to be protected. As is true for fashion, since they all basically have a common mother—you know, the origin of the Chip Act and the Vessel Hull Act. They all came from the same cut. And so what we are looking at now is the standard is substantially the same.

When you are thinking about that, I suggest what you are saying is that an infringing design looks the same. You say "identical." I say "similar." But what I am really saying is, it is the same. It is like Mr. Rodriguez—I couldn't do it better—he said, you know, you are going to take my dress apart and you are going to lay it out and you are going to make a copy and reproduce it. I mean, that is identical, but it is a visual kind of an observation.

It is very easy to work with designs because you can kind of visually see it is the same. There is really not much doubt. You don't really have to go through the Patent Office delay problem. That led to the other question, that I wanted to answer, which is why are we having trouble with the design patent system? Why do we need something more? The fact is that design patents do not protect anything until the patent issues.

Right now in the Patent Office, we have a lot of backlog. It is all part of the same system. You don't have a separate window you go to to buy your design protection. You go to one office, one filing system. You do not have protection for maybe 2 years. We really need something in between or before, I guess is what I am saying.

Mr. SHERMAN. Thank you.

I will just make a closing comment. I think the professor is right, that anything we do in the fashion industry has got to have immediate effect before government review, as do copyright, for example. Because I think there will be a lot of people who will want to buy a copy of whatever is worn on the red carpet at this coming Academy Award. But I don't know anybody who is scurrying around trying to find a copy of what was worn two red carpets ago.

The other thing I will point out is that if we wanted to provide an absolute minimum level of protection, because it is hard for me to say what is inspired by going to Spain and looking how people are dressed, versus what is a copy of a particular original item, that there are at least two indications that something is a dead-ringer copy. One is, if you sell it that way. If you are up on the Internet saying, "this is a copy of what Britney—no, somebody else—wore, or this is a copy of—"

The other thing that would indicate it is if you put the garment next to the other garment and a lay person could not point to a design difference. The harder part will be what if somebody takes a dress and they make it just like some of the other dress, but they put one tassel in a different place, or they make a pair of pants without belt loops and the original had belt loops.

I don't want to put our courts or our administrative agencies in a position to try to say, well yes, I can tell the difference between this and that, but they are damned similar. It is clear that whoever made that was looking at this.

I will allow a comment from any witness on that, who has a real strong desire, because all fashion is inspired by other fashion. All fashion mimics other fashion. If you can tell the difference between two garments, but it is clear that one was highly inspired by the other, should we prohibit that?

I see Steve has a question. Yes?

Mr. MAIMAN. Well, I was just going to say that I think we are getting into very nebulous territory to try and establish what is substantially similar, versus what is sort of similar. Like you say,

sure, we could see the inspiration, but at what point can the law actually quantify what is “substantial.”

Mr. SHERMAN. Right. I think “substantially similar,” you are going to need brighter people than me to know where to draw that line. Indistinguishable by a lay person or claiming to be a replica—those are two tough legal standards. If we are going to go beyond that, we are going to need some really clever legal draftsmanship from people that we will have to hear at another hearing because this hearing is over.

Thank you.

[Whereupon, at 5:19 p.m., the Subcommittee was adjourned.]

A P P E N D I X

MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF THE HONORABLE SHEILA JACKSON LEE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS, AND MEMBER, SUBCOMMITTEE ON COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY

Thank you, Mr. Chairman, for your leadership in convening today's very important hearing on intellectual property. I would also like to thank the ranking member, the Honorable Coble, and welcome our panelists. I look forward to their testimony.

The subject of today's hearing is "Are Special Provisions Needed to Protect Unique Industries?" It will focus upon whether the current means of protecting designs are adequate for industries that make significant use of new designs to attract customers and whether the scope of vessel hull design protection should be expanded to include other subject matter like auto parts and apparel.

This hearing could not be more timely, Mr. Chairman.

This hearing will explore the necessity of comprehensive intellectual property reform to minimize piracy and counterfeiting, and will address whether inadequacies in the current intellectual property system hamper innovation and hurt the American economy. Deficiencies in the current system have the ability to erode the innovation and competitiveness of U.S. designers and manufacturers, whose newest and most original creations are imitated and duplicated within hours of first being presented to the public.

The Constitution mandates that we "promote the progress of science and the useful arts . . . by securing for limited times to . . . inventors the exclusive right to their . . . discoveries." In order to fulfill the Constitution's mandate, we must examine the system periodically to determine whether there may be flaws in the system that may hamper innovation and competitiveness, including the problems described as decreased quality, prevalence of knock-offs and counterfeit merchandise, and increased litigation.

Europe is more advanced in its intellectual property protections, and specifically in its protection of fashion design, than the United States. International obligations to establish industrial design protection were called for in the 1887 Paris Convention on Industrial Property. In the U.S. intellectual property system, we have the following protections: design patents, trade dress or trademarks, copyright and vessel hull design protection. None of these types of protections apply to fashion design.

Fashion design is not protected under current U.S. law because of the general rule of exclusion of "useful articles" from the scope of Copyright protection. Generally, industrial designs are applied to, found on, or otherwise part of useful articles to make them more attractive or appealing. However, copyright is meant to protect artistic and literary expressions, not useful articles. As such, the Copyright Act prohibits the use of copyrights in protecting useful articles. This is done by requiring the work of authorship to be physically or conceptually separable from the article on which it is found. For instance, copyright protection can be used to protect an artistic silkscreen image on a t-shirt (i.e., a picture of a rose), but if the work is the physical design of the t-shirt (i.e., the t-shirt has a unique cut, sleeves, etc.), copyright protection may not apply.

While there are many ways in which industrial designs may be protected in the United States, groups have argued that the products of their industry often cannot be effectively protected by the available mechanisms. This argument has been made by automakers, furniture makers, and more recently fashion designers.

In spite of the general rule excluding copyright of "useful articles," in 1998 Congress passed an amendment to the Copyright Act to provide limited statutory protection for useful articles. The first design enumerated for this protection was the design of a vessel hull. In the 110th Congress, the Design Piracy Prohibition Act,

HR 2033, was introduced and amends the underlying vessel-hull language to extend the protection it provides to unique and original articles to apparel. The bill is intended to protect only those original designs that are unique and it bars third parties from manufacturing or importing for sale or use in trade protected designs. The bill provides exclusions for sellers and distributors who act without knowledge and for reproduction for teaching or analysis. In addition, there are other broad exclusions for acts without general knowledge. The bill has features which provide for frivolous lawsuits, such as the exclusion from protection of commonplace designs like button-down shirts or bell-bottom pants, which are commonplace, lacking in originality, and part of the public domain.

I laud the principles underlying this bill. I believe that there should be an end to piracy of intellectual property, especially in the areas of fashion and apparel. I would like to bring an end to knock-offs, counterfeiting, and the importation of pirated designs in apparel, where after importation in the United States, a label is affixed to the apparel, and the good is subsequently sold. I like fashion and the absence of such protections is not good for American creativity, innovation, or the economy. I believe that there is room for improvement in our design protection laws.

Mr. Chairman, if these improvements are properly implemented, they would bring the American intellectual property protections up to speed for the twenty-first century and may also bring American law into a closer harmony with that of foreign countries. Instead of remaining a hindrance to innovation and economic growth, the U.S. intellectual property system should work for innovators and with competitive market-forces, ensuring America's intellectual property protection will be one of the best in the world and prevents risks to innovation.

Again, thank you Mr. Chairman for holding this hearing. I look forward to hearing from our distinguished panel of witnesses. I yield back my time.

PREPARED STATEMENT OF THE HONORABLE LAMAR SMITH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS, RANKING MEMBER, COMMITTEE ON THE JUDICIARY, AND MEMBER, SUBCOMMITTEE ON COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY

Today we revisit design protection to determine whether the Subcommittee should expand existing law to help the fashion and automotive industries.

Proponents of greater protection argue that current law provides insufficient help for innovators who want to prevent the misuse of their designs.

For example, Chapter 16 of the Patent Act allows an inventor to earn a design patent for any new, original, and ornamental design for an article of manufacture.

However, the chief limitation on the patentability of designs is that they must be primarily ornamental in character.

If the design is dictated by the performance of the article, then it is judged primarily functional and ineligible for protection.

Combined with the high cost of patenting, this reality explains why some inventors, such as automobile companies, file for relatively few design patents.

In addition, Chapter 13 of the Copyright Act provides 10-year term protection for the owner of an original design that makes a useful article attractive or distinctive.

The law defines "useful article" as a "vessel hull." This was done in 1998 to combat "hull splashing," a method by which copycat manufacturers would attempt to duplicate the hull designs of luxury yachts.

The statute is nonetheless a template—it can be easily amended to include design protection for other useful articles.

And both the fashion and automobile designers want the vessel hull law amended to cover their industries.

In fact, one bill, H.R. 2033, the "Design Piracy Prohibition Act," has been introduced at the behest of fashion designers.

Fashion designers claim that apparel and footwear anti-counterfeiting costs them billions in lost sales each year.

They believe their creativity, labor, and risk-taking go unrewarded.

Similarly, auto manufacturers assert that automotive suppliers lose upwards of \$12 billion annually to counterfeit products.

And at least one prominent car company invests \$100 million or more in the design of each new car line.

Like the fashion designers, car manufacturers want a higher return on their investments.

But the legislative process is like Newton's Third Law of Motion: for every action there is an equal and opposite reaction.

Amending either the Copyright or Patent Act invites opposition from others who work in the fashion world and automotive after-parts industry.

We heard from the fashion critics at a Subcommittee hearing in 2006.

They maintain no one can define originality in the fashion world because current fashion is the product of generations of designers refining and redeveloping the same items and ideas over and over.

This is the ultimate intellectual property paradox: they argue that design protection would inhibit innovation since the fashion world is driven by unfettered access to styles and trends that are later reinterpreted.

Likewise, garage owners who are not affiliated with the auto makers fear they will go out of business if Chapter 13 of the Copyright Act is extended to auto designs.

They represent only 15% of the after-parts market; enhanced design protection has the potential to put them out of business, granting a monopoly to the auto makers.

The Subcommittee must therefore weigh these competing interests and the consequences of establishing such a precedent.

All of us understand the Constitutional mandate to protect the intellectual property rights of American citizens and those who fairly deserve to reap the benefits of their creative contributions.

At the same time, we must also ensure that our legislative efforts do not have an adverse impact on economic growth for other segments of the economy.

When we allow goods to be taken out of the marketplace and assign ownership rights to one individual or company, we should examine the fairness of doing so and the impact it will have on the market.

We must explore the economic impact of expanding designer protection for the fashion and automotive industries and the related burdens placed on the Copyright Office and the federal court system.

I remain open-minded on this issue and look forward to the testimony we will receive.

Thank you, Mr. Chairman.



SUPPLEMENTAL STATEMENT

OF

CARL OLSEN

BEFORE THE:

**U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON JUDICIARY**

**SUBCOMMITTEE ON
COURTS, THE INTERNET
AND INTELLECTUAL PROPERTY**

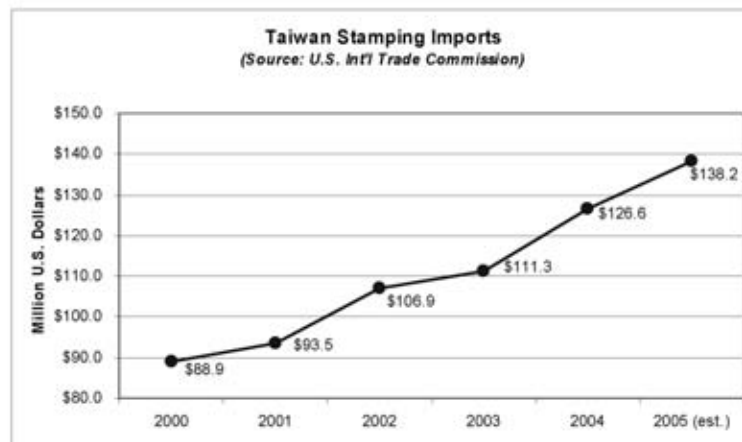
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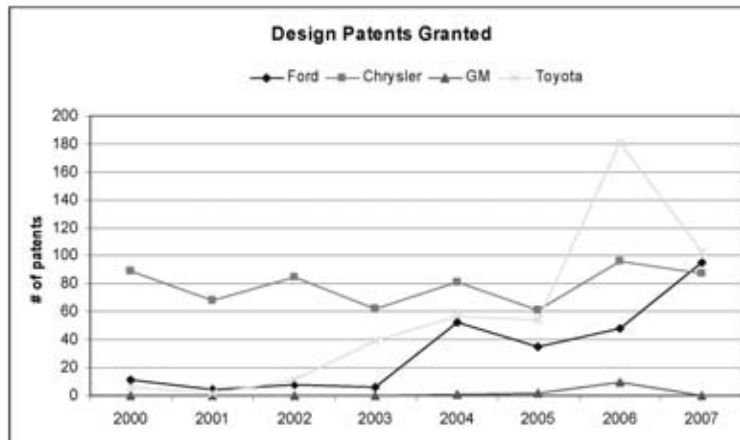
PRESENTED BY:

Carl Olsen
Ark Design

Mr. Gillis repeatedly cited his desire to promote competition in the auto parts industry. In fact, his position promotes unfair competition by denying designers the right to protect their work from copying. Protecting the creative works of designers not only encourages true and fair competition among new original designs, it also provides significant additional benefits to consumers and society.

The reason for the increase in vehicle design patents is due to a surge in the volume and value of pirated auto parts being imported into the US. (See charts below derived using ITC data and USPTO data.) These knock-off parts put Consumers, dealers, auto makers and suppliers at risk, along with the jobs they provide. As the graph below shows, the increased number of patents is the "effect" – the surge of copycat parts is the cause. Every job created overseas by copycat makers destroys one or more US jobs.





Eliminating unfair competition with imported knock-off's will increase the value and demand for salvage parts.

Salvage parts represent an estimated 15% of the repair parts market, and if they did not have to compete with illegal copycat parts, their market share could go much higher. Consumers should realize lower insurance premiums given the increased value and demand for totaled vehicles sold to salvage operators.

On the other hand, if the imported copycat parts continue to flood the market with ultra cheap parts, the market equation for salvage and recycling vehicles could shift dramatically. If it is not profitable to dismantle salvage vehicles, consumers will have to pay end of life fees. Vehicle values will plummet and abandoned vehicles will increase across the US.

Encouraging greater use of salvage parts is the right thing to do now.

At a time when conservation, sustainability and carbon footprint is a paramount concern for Americans, we should be looking at all possible ways to increase the reuse and value of existing parts. Using refurbished, remanufactured and salvage parts eliminates unnecessary consumption of natural resources and energy in their manufacture and transportation. Additionally, the pressure on our landfills is reduced with higher reuse and recycling, all driven by full product life cycle management.

Consumers do really prefer original manufacturer parts.

According to the J.D. Powers and Associates 2002 Collision Repair Customer Satisfaction Index StudySM, consumers overwhelmingly prefer the use of factory-authorized parts by the body shop performing collision repairs. Nor do the arguments of significant consumer savings withstand

scrutiny. A study conducted on behalf of the European Commission suggest that there is not much, if any, consumer savings to be gained. The Allianz Insurance Group, concluded that repairs using non-genuine parts should be rejected due to nominal costs savings, when taking into consideration parts costs, fitting time and painting costs as well as quality and safety issues associated with non-genuine parts.

Should consumers have confidence in the quality and safety of copycat parts?

It is only reasonable that consumers expect repairs be performed with parts having the same quality and safety as the original parts. New vehicle models are tested exhaustively and are required to be certified to specific federal standards. A copycat part only needs to be a copy in appearance. There is no mandatory certification required for copycat parts. Beyond appearance, copycat parts may be made from cheaper materials, with different underlying structures, etc. In the absence of mandatory testing, how can consumers be confident of the quality and safety of these parts? We don't need more defective or unsafe imported products.

Copycat parts trade on consumer deception and confusion.

When a vehicle is repaired with inferior copycat parts, consumers and the public cannot tell based on observing the part as installed as to whether or not it is genuine. If the consumer is a subsequent purchaser of the repaired vehicle, they will reasonably assume the original looking parts are indeed original. However, these consumers will be in for a shock when the inferior copycat parts rust or warp in the heat of the summer sun. This deception not only harms consumers, but it also tarnishes the image and reputation of the OEM. This principle was recognized by the Supreme Court in *Gorham v. White*, 81 U.S. 511 (1871). The Gorham test for determining infringement clearly contemplates the notion of deception of deception to an ordinary observer, such as the subsequent purchaser. That generally accepted test states: "If in the eye of an ordinary observer giving such attention as a purchaser usually gives, two designs are substantially the same, if the resemblance is such as to deceive such an observer, inducing him to purchase one supposing it to be the other, the first one patented is infringed by the other." Clearly OEMs would like to prevent consumers from being deceived in purchasing vehicles having such inferior copycat parts.


The Supreme Court has repeatedly rejected giving copycat parts makers a free ride under our patent laws.

In fact, such a free ride flies in the face of sound intellectual property policy. Our Supreme Court has twice rejected the idea that spare parts and repairs could be made available without regard to patents. This question was first addressed by the Supreme Court in *Union Tool Co. v. Wilson*, 259 U.S. 107 (1922). The court held "[t]here was, consequently, no implied license to use the spare parts in these machines. As such use, unless licensed, clearly constituted an infringement, the sale of the spare parts to be so used violated the injunction." Similarly, the Supreme Court specifically addressed the issue of an owner's right to repair his or her vehicle with copy parts and concluded that there was no such right in *Aro Mfg. Co., Inc. v. Convertible Top Co.*, 377 U.S. 476 (1964).

The Supreme Court has done so because ignoring these patents is tantamount to royalty-free compulsory licensing.

Our country has been opposed to compulsory licensing domestically and internationally. Ignoring a patent owner's rights, as proposed here, would be a violation the World Trade Organization (WTO) agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). Again, further evidence as to why this is bad intellectual property policy and the wrong message to be sending to developing countries, such as Brazil, Russia, India and China.

In summary - Intellectual Property protection has to be about balance. On the one hand, everyone wants the lowest price. But we must ask at what cost? Intellectual property promotes true and fair competition. Design Piracy has serious implications for Jobs, Consumer Preference, Quality, Safety, Natural Resource Conservation, Energy Usage, Environment Sustainability and Carbon Footprint. Taking all of these issues into consideration, our founding fathers had the foresight to provide for intellectual property protection in our Constitution. We should be considering how to strengthen our IP laws and the protection afforded innovative individuals and industries and reject efforts by those who would dilute or eliminate meaningful IP protection.





CONGRESSMAN
JERROLD NADLER

8th Congressional District of New York

Rep. Nadler Welcomes Hearing on Design Law

Urges Adoption of H.R. 2033, the Design Piracy Prohibition Act, to Protect Designers

FOR IMMEDIATE RELEASE: Thursday, February 14, 2008

CONTACT: Shin Inouye, 202-225-5635

WASHINGTON, D.C. -- Congressman Jerrold Nadler (NY-08), Chair of the Judiciary Subcommittee on the Constitution, Civil Rights and Civil Liberties today applauded the Subcommittee on Courts, the Internet, and Intellectual Property for holding a hearing on design law. Rep. Nadler is a co-sponsor of H.R. 2033, *the Design Piracy Prohibition Act*, which would extend copyright protection to fashion designs.

Rep. Nadler's statement follows:

"The fashion industry remains an area where America is active in both innovation and creativity. However, there are too few protections for designers. Under current law, fashion design piracy is completely legal so long as a false label is not attached to the product, even if the counterfeit is an exact replica of the original. A lack of protections only serves to undermine the hard work of those in the fashion design industry.

"In New York City, this issue is especially important. Fashion is one of the largest industries in New York City. Fashion companies in New York generate over \$47 billion in sales yearly. And every knock-off of an original fashion design harms not only the designer, but also costs the city over \$1 billion in lost taxes annually. Many of the companies involved are small businesses -- enterprises that we should be supporting.

"I am proud to be a co-sponsor of H.R. 2033, *the Design Piracy Prohibition Act*, which would add protections for fashion designers. I applaud the Subcommittee for examining this vital issue. If we can demand piracy protections for American movies, music, and books, then we can and must do the same for our other industries."

###

Jerrold Nadler has served in Congress since 1992. He represents New York's 8th Congressional District, which includes parts of Manhattan and Brooklyn.

The Honorable Howard Coble
 United States House of Representatives
 Ranking Member, Committee on the Judiciary, Subcommittee on Courts, the Internet and
 Intellectual Property
 Room 2142 (minority)
 Rayburn House Office Building
 Washington, D.C. 20515

Subject: Designs Protection Hearing, Thursday, February 14, 2008

Dear Representative Howard Coble:

The undersigned associations, coalitions and businesses fully support inclusion of an automotive “repair clause” in United States design patent law, so that the manufacturer and sale of alternative crash parts for the purpose of repairing an automobile is not considered an act of infringement. As a broad group of organizations representing the interests of American consumers, the independent automotive parts industry, the auto repair industry and the insurance industry, we commend your recognition of the importance of this issue as evidenced by the upcoming hearing.

A “repair clause” will ensure freedom of consumer choice and the continued availability of affordable auto body parts simply by maintaining business as usual. On the other hand, a monopoly on replacement parts threatens the future vitality of an entire industry and many thousands of American jobs.

Competition in the auto repair marketplace saves American consumers over \$1.5 billion per year. The car company replacement collision parts your constituents typically need to repair their vehicles after a crash – bumpers, fenders, tail-lights and grilles – cost an average of 8 percent less when a quality alternative replacement part is available, and those alternative parts are approximately 25 percent less than equivalent parts manufactured by the big car companies.

However, as the number of design patents obtained by the big car companies for crash parts skyrockets, so will the price of those parts if they continue to enforce their patents against alternative suppliers of crash parts. Further, without a repair clause, the largest influencer in the decision to use aftermarket parts – the insurance industry – estimates the rise in costs and “total losses” could require \$1 billion or more each year to be passed on to consumers in the form of higher insurance premiums.

For more than 50 years, American consumers have had a choice when repairing a damaged vehicle. A repair clause will maintain this much-needed balance.

Your constituents will applaud your commitment to ensuring access to high-quality, low-cost replacement collision parts in the unfortunate event that they find themselves in a crash or fender bender.

Thank you for consideration in this matter.

A&A Bumper & Fender Ltd.	D-G Custom Chrome
AAACT (Automotive Aftermarket Association of the Carolinas & Tennessee, Inc.)	Eco Automotive Distributors
AAAS (Automotive Aftermarket Association Southeast)	Empire Auto Parts
AAIA (Automotive Aftermarket Industry Association)	FAIA (Florida Automotive Industries Association)
ABPA (Automotive Body Parts Association)	Felder's Collision Parts
Across America Collision Parts	Fond du Lac Bumper Exchange
Action Crash Parts	G&A Bumper Service
Advantage Crash Parts	Genera/TYC
AIA (American Insurance Association)	GP Automotive Parts, LLC
ASAAA (Alliance of State Automotive Aftermarket Associations)	Jerry's Bumper Sales
At Pac Auto Parts, Inc.	K.C. Auto Panel
Atlas Auto Body Parts	K.S.I. Trading Corp.
Auto Parts Industrial	Key Parts Inc.
Auto-Tech Plastics	Keystone Automotive
AutoZone	LKQ Corporation
Best Bumper & Parts	Maximum Auto Industry
Best Fit	Micro Rim/Micro Platers
CABA (Chesapeake Automotive Business Association)	NAMIC (National Association of Mutual Insurance Companies)
CARE (The Coalition for Auto Repair Equality)	National Autobody Warehouse
CAWA (California/Nevada/Arizona Automotive Wholesalers Association)	OVAAA (Ohio Valley Automotive Aftermarket Association)
CHS Industries/Port City Bumper	Premier Flexipac
Collins Collision Products	Property Casualty Insurers Association of America
Collision Parts Network	QPC (Quality Parts Coalition)
Continental Auto Parts	RetireSafe
Cornerstone Automotive	Richmond Bumper
Cross Canada	Roberts Wholesale Body Parts
D.A.R. Collision Parts	Salt Lake Chrome Plating
	San Jose Trading Company
	Superior Collision Part
	TABPA

The Honorable Howard Coble
 United States House of Representatives
 Ranking Member, Committee on the Judiciary, Subcommittee on Courts, the Internet and Intellectual Property
 Room 2468
 Rayburn House Office Building
 Washington, D.C. 20515

Subject: Designs Protection Hearing, Thursday, February 14, 2008

Dear Representative Coble:

Please accept the following information from the Quality Parts Coalition (QPC) as part of the official hearing record for the Thursday, February 14, 2008, Subcommittee on Courts, the Internet, and Intellectual Property's "Hearing on Design Law: Are Special Provisions Needed to Protect Unique Industries?" This information is submitted from a position of support for an automotive "repair clause" in United States design patent law that would ensure the manufacture and sale of alternative crash parts for the purpose of repairing an automobile is not considered an act of infringement.

During the question and answer portion of the hearing, the Automobile Alliance's witness, Carl L. Olsen, referenced a study by the European Automobile Manufacturers' Association (ACEA) that purports to demonstrate that "prices of automotive spare parts are on average 7.3% higher in countries without design protection than in countries with design protection." However, according to analysis done by the European Campaign for the Freedom of the Automotive Parts and Repair Market (ECAR),¹ the ACEA study is flawed and its conclusion is false. Moreover, ECAR believes that, "[o]n average, OE prices in countries without design protection are 3.6% lower than OE prices in countries with design protection."²

The following analysis of the ACEA study was prepared by ECAR:

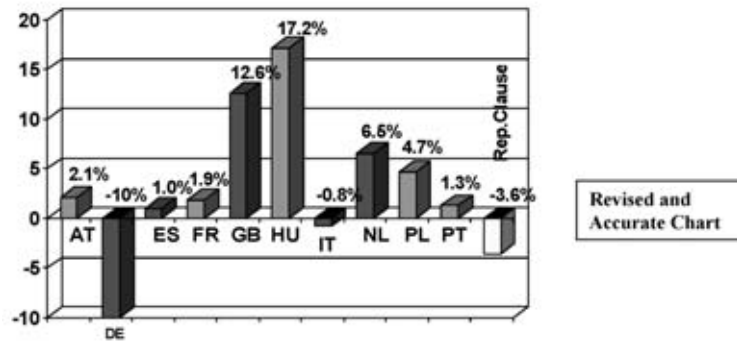
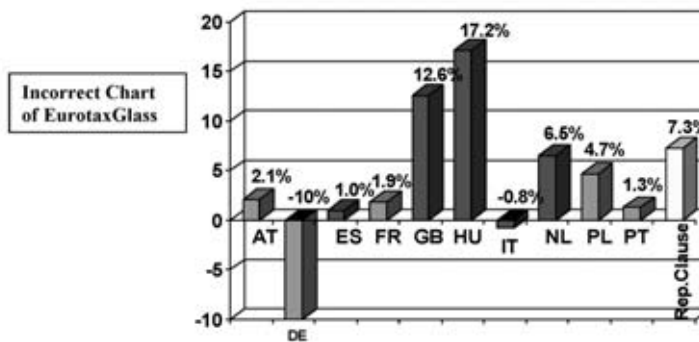
First, the survey is not based on "market" prices. The prices referred to are taken from EurotaxGlass' "spare parts database." The prices referenced in that database are retail prices, or list prices of the car makers or their importers. As many authoritative studies have demonstrated, prices of original equipment manufacturer (OEM) parts differ from the list prices, are typically much lower, and must be taken into account in assessing an average price in a certain market. **A meaningful study would compare market prices – not list prices – of the parts in question.**

Second, the study does not correctly identify the design protection status of the countries examined. The study is based on prices "applicable in 2003-2004." At that time, the situation was different to the one assumed by EurotaxGlass' in two of the ten countries surveyed.

¹ ECAR is an alliance of ten independent EU organizations representing vehicle parts producers, distributors, independent repairers, the European motor insurance industry, a large cross section of small and medium-sized enterprises as well as the 260 million motoring consumers in the European Union. ECAR is very familiar with ACEA study referenced by Mr. Olsen and the markets studied therein.

² Statement of Gerhard Riehle, Chief Executive Officer, ECAR.

- Hungary introduced its Repairs Clause on November 27, 2003. Therefore, the clause could not have had an impact on prices collected in 2003. Nor is it likely to have impacted prices collected early in 2004. The study should therefore have classified Hungary as a “country *with* protection.”
- Germany, on the other hand, should have been classified as a “country *without* protection.” On November 5, 2002, the auto industry provided a formal “assurance” not to exercise (potential) design rights “to hamper competition in the distribution of spare parts³.” This assurance to the German Government “is the inherent basis for maintaining the existing law provisions⁴.” Thus, there was *de facto* free competition in 2003-2004 safeguarded and monitored by the German Government.



³ Letter Verband der Automobilindustrie (VDA) to the Secretary of State and chief of the Chancellor's Office, 11.5.2005.

⁴ Deutscher Bundestag, Drucksache 15/2191 of 10.12.2003.

In conclusion, based on EurotaxGlass' figures (assumed to be correct as such) and following its statistical method while acknowledging its limited merits, the correct conclusion of the study should read:

"On average, OE prices in countries without design protection are 3.6% lower than OE prices in countries with design protection."

The survey, dated February 16, 2005 and entitled "Eurotax price survey January 2005," was carried out by EurotaxGlass. The survey also carries the ACEA logo, leading QPC to believe that it was commissioned by ACEA.

On November 20, 2007, the Legal Affairs Committee of the European Parliament voted unanimously in favor of the commission-proposed Repair Clause. In December of 2007, the European Parliament voted in favor of adopting the repair clause. The Council of Ministers is expected to address the repair clause in early to mid-2008. Adoption of this clause by the Council of Ministers will set a positive precedent for U.S. design patent law and ensure the EU as a whole ascribes to free competition in the replacement automotive parts market.

Thank you for consideration in this matter and please do not hesitate to contact me with any questions.

Sincerely,



Eileen Sottile
Executive Director
Quality Parts Coalition



February 14, 2008

Honorable Howard Berman
House Subcommittee on Courts, the Internet
and Intellectual Property
B-352 Rayburn House Office Building
Washington, DC 20515

Honorable Howard Coble
House Subcommittee on Courts, the Internet
and Intellectual Property
B-352 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Berman and Ranking Member Coble:

We, the undersigned members of the Intellectual Property Enforcement Coalition write to you today to urge you to oppose any legislation which would exempt copy external automobile parts from infringing U.S. Design Patents.

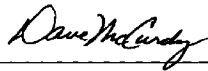
As you well know, design protection encourages innovation. It protects the designer against unfair competition from people or companies who copy without investing in the process or making an effort to innovate. Removing design protection is a license for "free riders" to deprive innovators of any reward for the commercial risk that has been taken. It is also harmful to consumers because it prevents manufacturers from spreading development costs over a number of years' production.

The logic of design protection applies to visible parts as it does to the entire motor vehicle. While only a limited number of vehicle parts are of concern, they typically tend to be exterior body parts such as bumpers, radiator grilles, doors and lights. The design of these parts makes a vital contribution to the safety, identity and appearance of the vehicle that is so important for its commercial success.

Industrial design protection for the auto industry not only protects numerous high-paying design and manufacturing jobs but also protects the automobile industry's huge investment in the United States. For example, Ford Motor Company estimates the overall cost of a typical new vehicle program to be between \$500 million to \$1 billion. An entirely new product could double that cost. These investments translate into desirable jobs. Recent studies in Europe estimate that the loss of exterior automotive design protection alone would cost upwards of 50,000 jobs.

In the new global economy, without intellectual property protection, we are left with nothing more than a race to the bottom against copycat producers. We suggest that any legislation posed before your Committee or in Congress that would allow for the destruction of intellectual property design patents should be strongly opposed in order to protect the livelihood of the auto industry and the jobs that it creates.

Sincerely,



Dave McCurdy
President & CEO
Alliance of Automobile Manufacturers, Inc.



Michael J. Stanton
President & CEO
Association of International Automobile
Manufacturers, Inc.



National Automobile Dealers Association



February 22, 2008

Chairman Howard Berman
House Subcommittee on Courts, the
Internet, and Intellectual Property
B-352 Rayburn House Office Building
Washington, DC 20515

Ranking Member Howard Coble
House Subcommittee on Courts, the
Internet, and Intellectual Property
B-336 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Berman and Ranking Member Coble:

Re: NADA Comments on the *Hearing on Design Law: Are Special Provisions Needed to Protect Unique Industries?*

On behalf of the National Automobile Dealers Association (NADA) and more than 20,000 franchised new car and truck dealerships throughout the nation which sell new and used motor vehicles and engage in service, repair, and parts sales, I urge you to retain strong automobile part patents which protect both legitimate parts manufacturers AND businesses which sell authentic parts. Parts manufacturers, wholesalers, and retailers suffer economic injury when entities unfairly infringe on clearly established patents.

All franchised dealerships wholesale and retail motor vehicle parts to body shops and consumers. In 2006, parts sales were 6.52 percent of a dealership's annual revenue, accounting for \$44.03 billion in sales. Additionally, approximately 41 percent of franchised dealerships operate body shops and those operations generated \$9.3 billion worth of annual sales.

Competition in the automobile industry at the manufacturer and retail level is fierce. Automakers pump millions of dollars into design and research in an attempt to convince consumers to purchase their car or truck rather than the competitor's newest product. Dealers purchase parts from manufacturers and actively compete with each other in the sale of these parts. In addition, dealers also purchase salvage parts when appropriate for the repair of vehicles, so consumers benefit from a competitive marketplace.

Reducing patent protections in the name of the "consumer" would simply accomplish the opposite effect. For example, a company that builds, imports, and sells replacement auto parts pursuant to a license agreements has a strong argument that it was competing fairly in the marketplace. On the other hand, if patents were not sufficiently protected, investments in new technologies would decrease, innovation would be hindered, and ultimately competition between automakers and those who retail these parts would be stifled.

Additionally, the market for auto body repair is dynamic. If an insurance company is "paying for" repairs made to a vehicle in a body shop, it is the insurance company – and not the insured – that generally dictates whether Original Equipment Manufacturer (OEM) parts may be used or whether the body shop must install "aftermarket" parts which were likely to have been reverse

Chairman Berman and Ranking Member Coble
February 22, 2008
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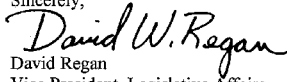
engineered and manufactured overseas. Insurance companies often specify the use of these replacements simply because they generally are cheaper and are, consequently, often of lesser kind and quality (fit and finish, corrosion resistance, metal thickness, etc.).

Interestingly a coalition of overseas aftermarket parts manufacturers supporting so-called "Right to Repair" legislation echoes the same sentiments of the proponents of reducing the scope of existing patent protections on auto parts. This group erroneously argues that independent service technicians require access to patented and proprietary data to service and repair today's motor vehicles. In fact, 75 percent or more of the post-warranty work performed on vehicles is undertaken by independent garages. A vigorously competitive market of franchised dealers, used car dealers, and independent repair facilities is necessary to service the 250 million cars on the road today.

Dealerships welcome competition in the marketplace, as long as that competition is fair and legitimate. Unfortunately, those that seek unfair advantages to reverse engineer parts or obtain them through watered-down patents harm the industry and ultimately harm consumers.

Thank you for the opportunity to submit these comments.

Sincerely,


David Regan
Vice President, Legislative Affairs

Statement by Kevin M. Burke, President and CEO
American Apparel & Footwear Association
 Before the Subcommittee on Courts, the Internet and Intellectual Property
February 14, 2008

I would like to take this opportunity to thank Chairman Howard Berman, Ranking Member Howard Coble and the members of the subcommittee for this chance to provide comments on the issue of extending copyright protection to fashion designs. As you can imagine, the outcomes of this important discussion will have a strong and direct impact to the apparel and footwear industries, the companies that drive them and the designers whose creativity fills department and retail stores with fun, new and trendy clothing options.

As you may know, the American Apparel & Footwear Association (AAFA) is a national trade association, representing the manufacturers, retailers and suppliers of apparel and footwear goods. Our association's mission is to promote and enhance its members' competitiveness, productivity and profitability in the global market by minimizing regulatory, commercial, political and trade restraints – and this includes the protection of intellectual property.

Last year, Congressmen William Delahunt (D-MA) and Bob Goodlatte (R-VA) reintroduced legislation entitled the Design Piracy Prohibition Act, which would provide a three-year copyright on original fashion designs. Spearheaded by the Council of Fashion Designers of America (CFDA), this well-intentioned legislation sent ripples throughout our member companies. While we are strong supporters of intellectual property rights protection, and have played a lead role in seeking better enforcement of intellectual property rights worldwide, we are very strongly opposed to the Design Piracy Prohibition Act as introduced.

In October 2007, AAFA sent a letter to members of Congress, which explained our initial concerns:

“If enacted, these bills would make legitimate companies, and their legitimate designs, vulnerable to a litany of excessive litigation and bogus claims. The inherent subjectivity in both the “substantial similarity” standard for infringement and the “distinguishable variation over prior work” standard for protection would expose footwear and apparel companies, retailers, designers and ultimately the consumer to unneeded costs and uncertainty that could stifle fashion design innovation. Moreover, we believe there are practical logistical considerations that would make such a design registry difficult, if not impossible, to operate.”

Upon Senate introduction of the legislation, Senator Orrin Hatch, the bill's lead Republican cosponsor, also highlighted problems with the current draft of the bill. He said:

“It must be recognized that this bill is not perfect and there are several legitimate concerns with the way this bill attempts to protect designs. I will be working with

my colleagues to make improvements to this bill as it goes through the Senate process. Some areas of the bill that need to be improved are: the standard for liability, the definition of designs in the public domain, and the secondary liability provisions.”

Despite AAFA’s public opposition to the bill as introduced, our association and its members believed that the issue needed further review. As a result, AAFA entered into discussions with the CFDA to see if we could find ways to improve the current draft and create a fashion design right that would offer stronger protection than what is offered under current law. Should we be able to reach a final consensus package with the CFDA, we look forward to briefing the subcommittee on the final outcome.


While it is premature to discuss the status of those discussions, it is important to stress that any outcome should contain key principles.

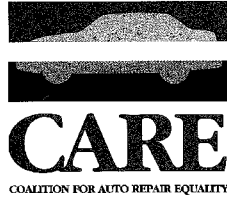
First, any effort to create a new design right should be done in a way that discourages frivolous or excessive litigation.

Second, any new right should ensure that only truly original designs are protected while ensuring that the many legitimate designers, who draw upon each other and trends for inspiration, are not hamstrung by costly and burdensome legal threats and requirements.

Finally, any new right should provide clear and transparent rules, including a fully searchable electronic database of registered original designs.

We would like to again express our gratitude to Chairman Berman and Ranking Member Coble for the opportunity to express AAFA’s and its members’ comments at this hearing and look forward to working with you on this issue in the coming months.





NEWS RELEASE

RELEASE: Immediate

Contact: Sandy Bass-Cors
800-229-5380/703-519-7555 X 2
www.careauto.org

CONSUMERS NEED THE "AUTOMOTIVE REPAIR CLAUSE" ADDED TO CURRENT PATENT LAW

(February 14, 2008. Alexandria, VA): The Coalition for Auto Repair Equality (CARE), a national organization representing companies in the automotive aftermarket, joins numerous pro-consumer organizations, among them: The Consumer Federation of America, Advocates for Highway and Auto Safety, Public Citizen, Consumers Union and the Center for Auto Safety, in its request to have motoring consumers have an unfettered and unintimidated choice in repairs and parts.

"At a time of a looming recession and rising gasoline prices, motoring consumers now need, more than ever, affordable, quality vehicle repairs. One of the ways to bring consumers relief is to have a permanent "Automotive Repair Clause" inserted and accepted into current patent law," stated Sandy Bass-Cors, CARE Executive Director.

"The car companies have attempted to carve out repair and parts monopolies for decades at the consumers' expense. The acceptance of the Automotive Repair Clause will be an economic boost for the economy, as well as allowing consumers to choose the affordable, quality parts they wish to purchase. It's basic competition with the free-market working to everyone's benefit," stated Bass-Cors.

CARE attended the February 14, 2008, hearing in the Subcommittee On Courts, the Internet and Intellectual Property, in support of testimony by the Consumer Federation of America.

"Alternative choices in vehicle repairs and parts will allow consumers to benefit from competition in the automobile repair and parts industry, which saves them approximately \$1.2 Billion a year," stated Bass-Cors. We urge Members of Congress to consider the consumers' financial needs and freedom to choose by inserting the Automotive Repair Clause," concluded Bass-Cors.

-30-

COALITION FOR AUTO REPAIR EQUALITY
119 ORONOCO STREET SUITE 300 ALEXANDRIA, VA 22314-2015
(703) 519-7555 1-800-229-5380 FAX (703) 519-7747
care@careauto.org/www.careauto.org

Comments of Prof. Kal Raustiala
 University of California at Los Angeles School of Law
 and Prof. Christopher Sprigman
 University of Virginia School of Law
 Re: H.R. 2033
 Submitted February 14, 2008 to the
 Committee on the Judiciary,
 U.S. House of Representatives,
 Subcommittee on Courts, the Internet, and
 Intellectual Property

As law professors who have studied the fashion industry and that industry's particular innovation dynamic, we write in opposition to H.R. 2033, which, if passed, would extend copyright protections to fashion designs. Our research suggests that H.R. 2033 is both unnecessary and unwise.

The Commenters

Kal Raustiala is Professor of Law at UCLA Law School and Director of the Burkle Center for International Relations at UCLA. He studies international legal harmonization and the development and extension of international intellectual property rights.

Christopher Sprigman is Associate 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, Chris 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 three years, we have spent a considerable amount of time studying 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 the *New York Times*, *Wall Street Journal*, *New Yorker*, *Washington Post*, *Los Angeles Times*, *Boston Globe*, and *Le Monde*, as well as NPR's *Talk of the Nation* and *Marketplace* programs.

The comments we are submitting will refer to the findings of that article.

Why We Oppose H.R. 2033

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. And in any event we are *certain* that Congress should not regulate without first gaining a deeper understanding of the workings of the fashion industry and the ways in which fashion firms compete in the marketplace.

We oppose H.R. 2033 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 intellectual property 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. In the last year or so, we have seen evidence of more litigation and threats of litigation among fashion firms in the E.U. We have to date, however, seen no evidence that the European industry is altering its practices significantly in response to design regulations.
- 3) In contrast to the situation in the E.U., we fear that a primary effect of *in the United States* of extending copyright to fashion design will be

extensive and costly litigation over what constitutes infringement. As such, H.R. 2033 is a lawyer-employment bill, not a fashion-industry protection bill.

We will first briefly expand on these three 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.

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 with strong intellectual property protection for trademarks and trade dress, but without any intellectual property protection in the U.S. for fashion 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 intellectual property 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, we 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 wealthier 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. We question whether the U.S. ought to automatically assume that E.U. regulations are wiser than American regulations, and that therefore we ought to endeavor to harmonize law across the two jurisdictions. Indeed, 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 and design firms have registered their designs. 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 much 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 us to our third and final point.

Our third point is that while H.R. 2033 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. 2033 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.

For these reasons, we believe that the end result of H.R. 2033 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.

We conclude this first part of our comments by noting again that 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 through government intervention in the marketplace.

In sum, were it necessary to impose design protection rules to protect the creativity of 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, that change now could harm the industry, and that Congress should be content to leave the industry to get on with the business of creating innovative new fashions.

Problems With H.R. 2033 As Currently Drafted

We have reviewed H.R. 2033 carefully. In addition to our overall opposition to the bill, discussed above, we wish briefly to note some of the most serious problems with the bill as now drafted. We do not mean to suggest, by discussing these drafting issues, that Congress should work to improve H.R. 2033 – to be blunt, we do not believe this bill is worth effort or is susceptible to substantial improvement. Nonetheless, below are our comments on three substantial problems with the bill’s current drafting:

(1) The “substantial similarity” standard of liability is inappropriate for the fashion industry. H.R. 2033 exposes fashion firms to copyright liability based on the “substantial similarity” standard that applies generally in copyright law. We do not quibble with the “substantial similarity” standard in general. It is, however, far too broad a standard of liability for fashion goods – indeed, we believe that the substantial similarity

standard – or indeed anything close to it, such as “closely and substantially similar” -- would likely cause great economic harm if applied to the fashion industry.

This is so first because fashion goods are trend-driven. The industry profits by creating fashion trends and inducing consumers to follow them. And the industry produces fashion trends by creating goods that “take inspiration” from currently popular designs. Thus, trend-making by imitation is absolutely vital to the industry’s profitability, as it drives consumption by trend-following consumers.

The substantial similarity standard, applied to the fashion industry, would threaten the entire process of trend-making. As the standard has been applied by the courts, the word “substantial” often is read out of the law; indeed, courts applying the substantial similarity standard have condemned as copyright infringement works that are only passingly similar, and that involve substantial additional creativity that has not been misappropriated. We have explained this in a brief article, entitled *Where IP Isn’t*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=962736. If the standard is applied to fashion, we fear and expect a surge of litigation. Fashion articles that are not “copies” of a popular design, but are nonetheless “inspired” by that design, would be exposed to a high risk of copyright liability.

Second, and perhaps as importantly, 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, fashion designers work in a medium where styles of the past are regularly re-introduced, adapted, recast, and transformed. Fashion designers are creators, but they are also, inevitably, appropriators. In our view, those who profit by appropriating from others have less cause to complain when others appropriate from them. As a consequence, the substantial similarity standard is inappropriate also because it would give to designers a degree of control over subsequent use of their works that they simply do not deserve.

(2) H.R. 2033 will cause further mischief by raising the possibility that designers will be held liable for taking designs from the public domain. It is a basic feature of black-letter copyright law that, for copyright protection to apply, a creative work must be *original*. This not particularly

demanding requirement is met if (1) the author did not copy his work from another, and (2) the work contains at least a minimal level of creativity. It is important to understand that an author is entitled to a copyright even on something that clearly is not new, so long as he has not copied it and it contains some glimmer of creativity. Under U.S. copyright law, an author could copyright a play that is an exact facsimile of *Hamlet*, just so long as he did not copy it from Shakespeare but wrote it himself.

This is of course incredibly unlikely for a complex work like *Hamlet*, and is thus a mostly theoretical possibility for most works currently eligible for copyright. But once the general “originality” standard is applied to fashion goods, a real possibility – indeed, in our view a virtual certainty – arises that designers will seek to copyright works that are closely similar or even identical to works in the public domain. As we pointed out above, fashion creativity is, in important part, an enterprise of reviving and recasting styles from the past. The bill as currently written would permit fashion designers to claim copyright on styles that are not truly “novel”. This means that designers would be able to claim property rights in styles previously in the public domain – they would do so simply by claiming that they had not copied, but had “re-invented” the style themselves.

Whether any particular style were in fact copied or “re-invented” would be a fact question almost impossible for any court to sort out. And the same could be said about a related question directed toward a copyright defendant’s conduct: Did the defendant copy from the plaintiff? Or from the public domain? This is an issue that comes up occasionally in copyright cases generally. But because the fashion industry is engaged so deeply in the re-casting of previously known styles, this issue will be omnipresent if the copyright laws are extended to cover fashion goods.

(3) H.R. 2033’s provision on secondary liability is a minefield for fashion manufacturers, distributors and retailers. The current draft bill contains a short provision on secondary liability, providing that the general copyright law doctrines of contributory and vicarious liability apply. Again, what works for other media will create substantial difficulties if copyright is extended to fashion designs.

Contributory liability. Under generally-applicable copyright principles, one may be found contributorily liable for copyright infringement if (1) one has, or should have, knowledge of the infringing acts, and (2) one

induces, causes, or contributes to the infringement. This is likely to be a confusing and potentially threatening formula if applied to fashion retailing. The current bill requires registration of designs for which protection is sought; accordingly, a court may well hold that a manufacturer, distributor, or retailer who could have informed itself by checking the registry of the possibility that a design it distributes infringes is contributorily liable for failing to detect the infringement in advance. Such a holding would impose substantial costs at every level of the industry. Design firms, manufacturers, distributors, and retailers all deal with hundreds and even thousands of designs every year. For every one of these designs, and at every level of the fashion distribution system, firms will have to hire lawyers to sift through possibly tens of thousands of design registrations in search of possible infringement. The process will impose potentially tremendous costs on the industry, and raise the price and reduce the choice of apparel for consumers.

Vicarious liability. Unlike contributory liability, vicarious liability does not require that the defendant have knowledge (or constructive knowledge) of the underlying infringement. A court may impose vicarious liability if the defendant (1) had the authority and ability to control the infringer's acts, and (2) benefited financially from the infringement. Again, this formulation is threatening to manufacturers, distributors and retailers if copyright is extended to cover fashion goods. Manufacturers, retailers and distributors will often have control over which goods are offered for sale to the public under their auspices. And because intermediaries often benefit financially from each sale of a fashion good, a court may well find that they benefited from the sale of infringing goods. Accordingly, under the current draft manufacturers, retailers and distributors are exposed to a substantial risk of vicarious copyright liability. It does without saying that these intermediaries will often be deep pockets compared to designers and design firms. As a result, the practical effect of H.R. 2033's secondary liability provisions will be to shift the risk of infringement in many cases onto parties who did not actually commit the underlying offense. H.R. 2033 thus imposes an incentive – an unfair, inefficient, and very costly incentive, in our view – for intermediaries to take a much closer supervisory role in determining which designs are offered for sale. As a consequence, we might see a retailing environment burdened by regulation, where fashion goods offered by large firms (i.e., those able to offer meaningful indemnity) gain distribution while those offered by small firms languish. We also would expect the proposed bill to alter the market by inducing large retailers to further develop private lines, and these private lines would increasingly, we

believe, crowd out independent designers—as is already happening to some degree. But the bill would accelerate this process. This is another possible perverse result of the current bill, and another way in which intervention into the market could have grave effects for the industry and unfairly favor certain firms over others.

We offer our observations on these three major points as additional reasons why the Congress should not proceed with H.R. 2033. Again, we believe strongly that the best course here is to leave the current copyright law alone, and allow the fashion industry to compete under the same rules that have served it well since the U.S. industry's inception. The industry has thrived until now in the absence of government intervention. We see no reason to disturb that success by introducing new and untested rights. No one has convincingly demonstrated that the industry in the aggregate is suffering due to insufficient intellectual property protection. Unless that can be shown, there is no reason to tinker with the existing law.

If the Congress decides to move forward with a bill, however, we hope you will move slowly. We have set out in this memo three major issues that any bill must address. And if this moves forward we will have additional input, as will others.

Thank you.

Prof. Kal Raustiala

Prof. Christopher Sprigman

TESTIMONY OF BRYAN P. COLLINS
PRESIDENT
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IN OPPOSITION TO H.R. 2033
U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY,
SUBCOMMITTEE ON COURTS, THE INTERNET,
AND INTELLECTUAL PROPERTY
SUBMITTED ON FEBRUARY 19, 2008

1. My name is Bryan Collins. I am the President of the Topline Corporation, which designs fashionable footwear for all levels of the retail market and is based in Bellevue, Washington. I am here to express my opposition to H.R. 2033.
2. Topline's focus on style, quality, and affordability has earned us the highest reputation and respect of our clients for over 25 years. Seasonal footwear trend presentations are designed for all levels of the retail markets to enable the ultimate consumer to be aware and fashion correct. Creative inspiration is drawn from global sources. Our design team travels the world visiting unique foreign markets and analyzing new trends in order to establish the direction of each season for Topline clients.
3. We oppose H.R. 2033 because it unfairly and unnecessarily expands the rights of top-end fashion designers while depriving the American consumer of the ability to choose between competing fashion designs. The bill will lead to increased litigation and, ultimately, higher prices for consumers.
4. H.R. 2033's stated purpose is to stop piracy of fashion designs. Piracy is a problem for all creators of intellectual property. Those who blatantly steal another's designs or affix another's label or mark to their own inferior products should be held accountable and they are being held accountable under current criminal and civil laws, including the Lanham Act.
5. We agree that piracy and counterfeiting are problems which should be dealt with harshly. For the reasons below, I would argue that H.R. 2033 is not the tool to deal with that problem. In fact, the bill does much more harm than good because it is not really targeted at piracy. It is intended to give fashion designers an entirely new copyright that has nothing to do with piracy.
6. Especially in light of the harm this bill could do to the American consumer as it erects new protections for fashion designers, it is perhaps most important to begin with the observation that America's fashion industry is nearly half a trillion dollars strong and

- other legitimate designers and retailers similarly draw upon existing trends and designs without infringing others' intellectual property rights.
13. H.R. 2033 would change the balance of intellectual property law in favor of those with enough cleverness and financial resources to take unfair advantage of the law. The legislation would render current trends off-limits to most Americans consumers.
 14. The U.S. Copyright Office has previously expressed doubt that legislation of this type is necessary. Continued prosperity in the fashion industry, as well as the growing litigiousness of its members demonstrates blatantly that designers hardly need added protection and that existing trademark laws offer them adequate recourse.
 15. Some have suggested that H.R. 2033 is necessary because current law does not protect against "knock-offs." This is simply not true. Both criminal laws and trademark laws offer protection against the production and sale of duplicates. If high-end designers are losing money, as they claim, because others are stealing their trademarked designs and profiting from them, then perhaps enforcement of the existing laws, not creation of damaging new ones, is the solution.
 16. H.R. 2033 could actually have the perverse effect of damaging the very designers who are advocating for this radical expansion of their rights. The fashion industry prospers precisely because trends follow leading designs. A given design becomes ubiquitous as other designers and retailers draw inspiration from the original and deliver designs in the same trend to the larger public. Consumers inevitably hunger for new fashion ideas. So, designers enjoy a market which is constantly refreshed and eagerly awaiting their newest innovations.
 17. H.R. 2033 would freeze that cycle by preventing anyone from selling an item which might be "substantially similar" to the original design. Of course, all items in a fashion trend are similar by definition. So, H.R. 2033 would have the practical effect of outlawing any trend involving more than one designer's products, which is tantamount to choking-off all fashion trends. Designers and consumers alike would lose. It is worth noting that designers will have no protection against clever entrepreneurs, and their lawyers, who happen to be more adroit at applying for copyrights than the designers themselves.
 18. H.R. 2033 is fundamentally anti-competitive, will spawn costly litigation, and will ultimately harm the American consumer and fashion designers themselves. I urge you to oppose this damaging legislation.

Thank you.

is growing. It is hardly being crippled by the so-called theft of fashion designs. Designers do not need this new and special protection.

7. Among the problems with this bill is that applying for and obtaining a copyright is extremely easy; we think too easy in the context of footwear and apparel designs. The owner of a copyright can prevent others from making or selling a broad range of articles that are *similar* to a copyrighted design. The design of nearly every article of apparel and footwear could be said to be substantially similar to the designs of countless other articles already in existence.
8. Thus, with H.R. 2033, any clever entrepreneur with enough resources could obtain design copyrights and dominate the marketplace by chasing from the competitive playing field, not just pirates, but all other designers and retailers who, in good faith, incorporate similar design elements into their own apparel or footwear. It will simply be far too easy to obtain a fashion design copyright and then allege it has been infringed.
9. For example, anyone could apply for a copyright on a women's shoe with a buckle or a bow affixed to the upper. This is a fairly basic design element and is hardly new. Nevertheless, anyone can file such an application and receive their copyright if they are willing to pay the fee. The owner of the copyright could bring suit against every shoe seller offering women's shoes with buckles or bows. In such a blatant case, the owner might have difficulty establishing in court that his design was unique. But that is precisely the point. This argument of uniqueness is raised and won or lost in the courtroom.
10. The threat of this sort of litigation will cause footwear makers and retailers to react in at least one of two ways. First, they could shy away completely from producing any but the most plain and basic of shoe designs for fear that any design which incorporates fashionable elements might be copyrighted already. Note that the shoemakers and retailers won't have any way of knowing they may have violated a copyrighted design until they get sued. This reaction will result in consumers, at least those who can not afford the most expensive designer brands, being forced to settle for the plainest possible footwear designs. H.R. 2033 will institutionalize a consumer caste system within the world of American fashion.
11. Alternatively, footwear retailers could respond to the constant threat of litigation from copyright owners by incorporating a risk premium into their products. That is, they will simply have to charge more to try to guard against the costs of being sued. In this case also, the consumer loses. Especially in these times of economic stress, a bill which leads to higher prices for goods on the mass market, is a patently bad idea.
12. Companies like mine offer the consumer the latest fashions at affordable prices, in part, by interpreting current design trends. We bring fashion to the majority of Americans by designing and selling private label fashions at widely accessible price points. We do not, however, misappropriate the fashion designs of others. Scores of