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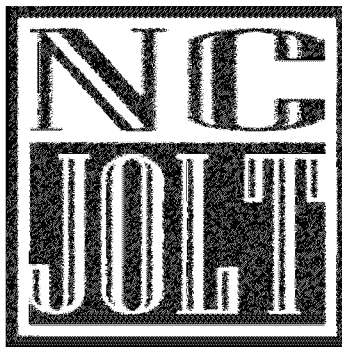
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**Flattery or Fraud: Should Fashion Designs Be Granted
Copyright Protection?**

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I. Introduction

While copying books or music can result in a hefty fine,² copying a fashion design is legal. Copying in the fashion industry is commonplace. However, fashion copycats could find themselves in trouble if Congress passes the bill sponsored by Representative Bob Goodlatte. H.R. 5055, which was introduced on March 30, 2006, would amend the Copyright Act to provide fashion designs a three-year period of copyright protection.³

Although Rep. Goodlatte is motivated by noble intentions, H.R. 5055 is not an adequate solution. Not only would H.R. 5055 fail to alleviate the problems that prompted it, the bill would also have several negative consequences. The legislation is flawed on three levels. First, it is an improper extension of copyright protection that contravenes the basic principles of copyright. Second, the European model of copyright protection for fashion designs, with which H.R. 5055 seeks alignment, would not translate well into the American context and would increase litigation. Third, H.R. 5055 would have a negative impact on the majority of people it affects.

II. Copyright Law and H.R. 5055: A Mismatch

H.R. 5055 contravenes the basic principles of copyright law in several ways. First, providing copyright protection for fashion designs undermines a fundamental principal of copyright, namely that fundamental concepts cannot be copyrighted. The Copyright Act does not protect any “idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.”⁴

Copyright protection is particularly counterproductive in the context of fashion design because it would result in the monopolization of an idea.⁵ For example, if the designer who created the wrap dress was granted copyright protection, no other designer could create a wrap-inspired dress because copyright protects not only against exact replication, but also derivative works.⁶ As a result, a designer would be guilty of infringement if the court determines that one

² See, e.g., *MGM Studios, Inc. v. Grokster, Ltd.*, 125 S. Ct. 2764, 2786 (2005) (holding that file-sharing companies were liable for copyright infringement).

³ H.R. 5055, 109th Cong. (2d Sess. 2006).

⁴ 17 U.S.C. § 102(b) (2005).

⁵ *Id.*

⁶ See 17 U.S.C. § 106(2) (2005). The owner of a copyright has the exclusive right “to prepare derivative works based upon the copyrighted work.” See also 17 U.S.C. § 101 (year) (“A ‘derivative work’ is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgement, condensation, or any other form in which a work may be recast, transformed or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a ‘derivative work’.”).

garment was similar to another copyrighted article.⁷ In fashion, imitation and derivation are the foundation of the creative process.

The second major reason to refuse copyright protection for fashion designs is that clothes are useful articles. While some designs are highly ornamental, garments serve the utilitarian purpose of covering our bodies. Protection for useful articles is generally associated with patents, not copyrights. The Copyright Act provides that “[a] ‘useful article’ is an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information. An article that is normally a part of a useful article is considered a ‘useful article.’”⁸ However, under the “separability doctrine,” some aspects of useful articles may be copyrighted.⁹ To achieve copyrightable status,

the design of a useful article . . . shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from and are capable of existing independently of, the utilitarian aspects of the article.¹⁰

Under this approach, copyrights have been granted to lamps with Balinese dancer statuette bases,¹¹ distinctive belt buckles,¹² and Halloween “nose masks” in the shape of animal noses.¹³ Therefore while aspects of a fashion design may be copyrighted, the piece as a whole cannot because of its utility.

III. European and American Copyright System: One Size Does Not Fit All

H.R. 5055’s supporters stress the importance of harmonizing U.S. copyright protection with that of foreign countries, specifically the European Union. However, according to University of Virginia law professor Chris

⁷ In the recent Sixth Circuit decision *Bridgeport Music, Inc. v. Dimension Films*, the defendant was found guilty of copyright infringement for sampling three notes from a George Clinton guitar riff, even though only two seconds of the song were copied and the pitch was lowered. 410 F.3d 792 (6th Cir. 2005).

⁸ 17 U.S.C. § 101 (2005).

⁹ See *Pivot Point Int’l, Inc. v. Charlene Prod., Inc.*, 372 F.3d 913, 923 (7th Cir. 2004). The Seventh Circuit provides a good historical overview of the different approaches suggested to determine separability: “1) the artistic features are ‘primary’ and the utilitarian features are ‘subsidiary,’; 2) the useful article ‘would still be marketable to some significant segment of the community simply because of its aesthetic qualities,’; 3) the article ‘stimulates[s] in the mind of the beholder a concept that is separate from the concept evoked by its utilitarian function,’; 4) the artistic design was not significantly influenced by functional considerations,; 5) the artistic features ‘can stand alone as a work of art traditionally conceived, and . . . the useful article in which it is embodied would be equally useful without it,’; and 6) the artistic features are not utilitarian.” (citations omitted)).

¹⁰ 17 U.S.C. § 101 (2005).

¹¹ See *Mazer v. Stein*, 347 U.S. 201, 219 (1954).

¹² See *Kieselstein-Cord* at 994.

¹³ These “nose masks” were inspired by the distinctive noses of such animals as pigs and parrots. *Masquerade Novelty, Inc. v. Unique Indus., Inc.* 912 F.2d 663, 671 (3rd Cir. 1990).

Sprigman, the European Union regulation granting copyright protection is largely unused.¹⁴ According to Sprigman, between January 1, 2004, and November 1, 2005, 1,631 garments were registered in the European Union, the majority of which were for “plain T-shirts, jerseys, [and] sweatshirts with either fixed trademarks or pictorial works.”¹⁵ In the United States, these designs would be protected under trademark law, but would receive the added protection of copyright under H.R. 5055.¹⁶

While the European Union has only recently given copyright protection to fashion designs, it is not a novel concept. On the contrary, France has afforded copyright protection to clothing as applied art since 1793.¹⁷ The crucial difference, however, is that French law does not require the element of originality for fashion designs.¹⁸ In the United States, originality is the “touchstone” requirement of copyrightability.¹⁹ The difficulty in distinguishing between a design that copies an original, versus one that was inspired by the same idea, is particularly relevant because the proposed legislation requires that “a court and not the Copyright Office settle disputes over registration of designs”²⁰ In an industry in which new designs are often said to be “inspired by” looks from other periods, determining originality for purposes of copyright protection is likely to be a source of consternation for the courts. The litigious nature of American society, as compared to that of Europe, could cause costly and time-consuming legal battles.²¹

IV. Fashion Victims: the Effect of H.R. 5055

If enacted, H.R. 5055 would most significantly impact four major groups: (1) high-end designers; (2) copycat designers; (3) new and emerging designers; and (4) the public.

High-end designers like Chanel, Louis Vuitton, Gucci and Prada have the most to gain from the proposed legislation. Most trends begin on the runway and

¹⁴ *Fashion Design Piracy Act: Hearing on H.R. 5055 Before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary*, 109th Cong. (2006) [hereinafter *Hearings*] (testimony of Associate Professor Sprigman, Univ. of Virginia School of Law), available at <http://judiciary.house.gov/Hearings.aspx?ID=152> (last visited Oct. 26, 2006).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Olivera Medenica, *Bill Would Protect Fashion Designs*, 27 NAT'L L.J. 52, S14 (2006).

¹⁸ *Id.*

¹⁹ *Feist Pub., Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 353 (1991) (rejecting the “sweat of the brow” rationale used by some courts to justify copyright protection).

²⁰ *Hearings*, *supra* note 14 (testimony of Rep. Smith, Chairman, H. Judiciary Comm.).

²¹ *Id.* (testimony of Associate Professor Springman, Univ. of Virginia School of Law). (“Unlike in Europe where there is a weak civil litigation system, here in the states we have a very powerful civil litigation system and we are a society teeming with lawyers, including obviously a class of litigation entrepreneurs that accesses the federal courts. I fear that they will take a look at H.R. 5055 and then they will take a look at the way the fashion operates, and they will sense a very nice payday coming their way.”).

work their way down to the masses.²² Some designers feel perturbed to see less expensive knockoffs available in department stores shortly after a runway show because they fear their profits will be reduced.²³ Surprisingly, there is no consensus among high-end designers in favor of copyright protection. Whereas designer Tracy Reese's first thought was, "[c]an I sue them for this?"²⁴ when she saw a knockoff of one of her dresses, evening-wear designer Carmen Marc Valvo "shrugs it off" when he comes across imitations of his work, noting: "[f]ashion is more evolutionary than revolutionary—you're always inspired by something else."²⁵

With such divergent opinions, it is not surprising that J. Craig Sherman, Vice President for government affairs of the National Retail Federation commented: "We're staying neutral on the matter. We tend to take a position when there is a consensus in our industry on an issue. There is not a consensus on this issue."²⁶

Copycat designers have much to lose if H.R. 5055 were enacted. The ripple effect of the legislation would extend far beyond the knockoffs being peddled out of the backs of vans, striking at the heart of American commerce: The Mall. American labels like ABS and Banana Republic are just a couple of the likely targets of litigation because designers for these companies have been known to borrow liberally from high-end designs.²⁷ For years these companies have successfully marketed runway-inspired clothing lines to the public.²⁸ H.R. 5055 could effectively shut down how these companies operate.

Moreover, because H.R. 5055 sets statutory fines for infringement at \$250,000.00 or \$5.00 per copy,²⁹ American copycat designers may take their businesses to less restrictive countries, rather than deal with crippling fines. Others, however, may take the risk of continuing to copy, following the lead of European copycat designers, like H&M, Top Shop, and Zara who continue to sell

²² Joel Paris, creator of the web site www.anyknockoff.com, describes the trend cycle: "Let's say Versace does a pair of parachute pants. Then three months later, some other designers do versions of parachute pants, and a year later you go to Costco or Target and you see parachute pants there." Ben Winograd and Cheryl Lu-Lien Tan, *Can Fashion be Copyrighted?*, WALL ST. J., Sept. 11, 2006, at B1.

²³ Hearings, *supra* note 14 (testimony of Associate Professor Scafidi, S. Methodist School of Law).

²⁴ Winograd & Tan, *supra* note 22, at B1.

²⁵ *Id.*; see Eric Wilson, *O.K., Knockoffs, This Is War*, N.Y. TIMES, March 30, 2006, at G1 ("How do you copyright fashion design?" asked the designer Jeffrey Chow, whose \$1,000 blush satin dress was shown next to a \$245 duplicate by ABS in Marie Claire's November 2004 issue. But Chow sees only futility in trying to fight such copying. "It's not like a typeface or a song," he said. "There are no boundaries in fashion.")

²⁶ Wilson, *supra* note 25, at G1.

²⁷ *Id.*

²⁸ As Allen B. Schwartz notes, "My job is to bring trends to the consumers at a fair market price. Few people can spend \$4,000 on a dress." Winograd & Tan, *supra* note 22, at B1.

²⁹ H.R. 5055, 109th Cong. (2d Sess. 2006).

less expensive imitations of runway designs, despite a European Union regulation granting fashion copyright protection.³⁰

The effect of the proposed legislation on new designers may at first look like a boon. In the best case scenario, if a new designer created an “original” design, her work would be protected from being pilfered by a bigger, more renowned design firm. However, it is more likely that copyrighting the design would prevent widespread dissemination, without which a trend cannot occur.³¹ Extending copyright protection would chill original expression because new designers may channel their talents into other pursuits, rather than face statutory fines.

Finally, the public will also be negatively impacted by H.R. 5055. Middle-class customers, who constitute the consumer base for the copycat designs, would have their options significantly limited.³² Consequently, there would be an increase in counterfeiting and knockoffs available on the black market if the demand for luxury look-alikes remains but supplies shrink. Consumers who cannot afford original designs will be penalized along with the copycat designers. As the public domain shrinks, so, too, does the exchange of ideas and “free flow of information.”³³ H.R. 5055 would slow the speed with which “low-end retail outlets” pick up the designs of “high-end designer stores.”³⁴ A three-year waiting period for certain designs would be a vivid illustration of the “haves” and “have-nots” that should not be encouraged. For example, imagine the consequences if a certain suit design was granted copyright protection. A person who could afford the designer suit—along with the connotations of wealth, power, and connection that go with it—would have a decided advantage over someone wearing the three year old suit design. While the fashion elite may gnash their teeth to see average Americans sporting runway styles, the accessibility of fashion to the middle class promotes equality and discourages classism.

V. Conclusion

Fashion designers have enjoyed unfettered access to their fellow designers’ works for over two hundred years in America. As a result, the fashion

³⁰ Winograd & Tan, *supra* note 22, at B1. (“[K]nockoffs are a thriving business in Europe where purveyors of fast fashion [such] as H&M, Zara, and Top Shop freely adapt recent designs from the runway to make inexpensive versions.”)

³¹ *Id.* (“Copying, some argue, propels the fashion cycle forward by creating popular trends that spur designers to move on to the next big idea.”)

³² Wilson, *supra* note 25, at G1. (“Customers who crave inexpensive designer look-alikes like H&M and Zara or close-enoughs at Gap and Banana Republic or line-for-line copies of Oscar gowns by the label ABS may have little empathy for designers who denounce knockoffs.”)

³³ Siva Vaidhyathan, *COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY* 5 (2001). (Arguing “for ‘thin’ copyright protection: just strong enough to encourage and reward aspiring artists, writers, musicians, and entrepreneurs, yet porous enough to allow full and rich democratic speech and the free flow of information.”)

³⁴ Hearings, *supra* note 14 (testimony of Rep. Berman, Ranking Member, H. Judiciary Comm.).

industry is thriving. Therefore, fashion designs should remain in the public domain. Although proponents argue that H.R. 5055 would protect creative designers from unscrupulous copycats, the majority of those who would be affected by H.R. 5055 will be better served by unfettered access to new designs. By leaving fashion designs in the public domain, we will prevent complicated and protracted litigation in which the placement of a button or the hem of a dress could be determinative. We will also ensure the existence of a rich public domain of ideas and access to new designs for upper class and middle class consumers alike. In the case of fashion, imitation may not always be flattering, but it is nonetheless indispensable.