

**TESTIMONY OF LAZARO HERNANDEZ
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BEFORE THE

U.S. HOUSE SUBCOMMITTEE ON INTELLECTUAL PROPERTY, COMPETITION AND THE INTERNET

**LEGISLATIVE HEARING ON
THE INNOVATIVE DESIGN PROTECTION & PIRACY PREVENTION ACT**

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INTRODUCTION

Good morning Chairman Goodlatte, Ranking Member Watt and other Members of the Subcommittee. I am pleased to be here today to testify in support of the Innovative Design Protection and Piracy Prohibition Act, or ID3PA, on behalf of the Council of Fashion Designers of America (CFDA). CFDA is a leading trade organization representing the American fashion industry. Our members are prominent household names and primarily up and coming talent. The vast majority – over 85% - are small businesses. These small businesses are creating jobs across the country as fashion has grown to a \$340 billion industry in the U.S. The CFDA also counts among its fashion constituents publishing, communications, retail, manufacturers and production whose success is contingent on the success of designers.

My design firm, Proenza Schouler, began simply as a senior project at Parsons School of Design. It was there that, in 1998, I met my design partner Jack McCollough. For three years we each designed independently. During those years we were fortunate to have our talent cultivated by some of the great names in the fashion industry; Jack was mentored by Marc Jacobs, I by Michael Kors. In our senior year at Parsons, we designed our first collection. It received the Golden Thimble award for best student collection and remarkably, the entire collection was bought by Barneys New York. As a result, at the age of 23, we launched our own independent label, Proenza Schouler, named after our mothers' maiden names.

In just five years, we grew from a company of three people to fifty with total annual operating costs of \$15.2 million. Ours is not a typical story and it may sound like success came easily for us. It didn't. Proenza Schouler is the result of tens of thousands of hours of very hard work, a lot of determination, talent and a little luck.

COSTS OF THE FASHION BUSINESS

The fashion business is a tough business. With each new season, designers put their imagination to work, and their resources at risk. It takes tens of thousands of dollars to start a business and even more to grow and create new collections and shows to showcase them. Just one of our collections – and we produce 4 collections a year – costs \$3.8 million. The cost of a typical show is approximately \$320,000. So, before a designer has even received that first order, they've spent a significant sum of money.

As designers we expected many of the challenges we face; the challenges of securing funding, convincing retailers to carry our collections, meeting deadlines, delivering our clothes in time to stores, finding studio space, attracting talented employees. We can handle all of those. However, we are helpless against copyists who prey on our ideas. Our story of long hours and sacrifice, pinching pennies to grow a business, is the same story told by countless small designers who are working as entrepreneurs to build businesses based on their own intellectual capital. We were fortunate to win awards and gain notoriety early but there are countless, undiscovered small designers across America working in their studios waiting to have someone buy their clothes or accessories. Established or undiscovered - we all have been touched by fashion design piracy. We luckily survived despite its disastrous effects, but many colleagues whose names you will never hear, had to close down.

FASHION, INSPIRATION AND INTELLECTUAL PROPERTY

I thought it might be helpful to describe the fashion design process and how it is so much like other creative pursuits that today enjoy copyright protection. Fashion is not protected under current law because of the general rule exclusion of useful articles from the scope of copyright protection. In other words, we all must wear clothes. While there are other means of protecting various components of intellectual property relative to fashion, the protection of fashion design falls between the cracks: neither trademark (protecting the brand) or trade dress (requiring such recognition as constituting secondary meaning), or design patent (which involves such a lengthy process that it offers no protection against the fast creative fashion cycle) provide adequate protection.

But designing a fashion collection is no different from the intellectual process involved in creating a painting or a song except perhaps its lengthy process. The development of a collection usually begins 10 months before it is launched. We draw inspiration from the world around us. Personally, we do research and development, not in a lab, but through the cultures we observe through travel, the books we read or the music we listen to. For example, work on our fall collection took place in the American West. We spent time in Wyoming, Colorado and New Mexico exploring Native American history and their crafts and were inspired by Navajo

textiles. When you look at our designs you won't see knockoffs of Navajo crafts. Instead you will see that we incorporated their feel and some of their elements to create our own originals.

Our designs are born in our imaginations, unlike the production of most basic apparel. While we create something from nothing, by far, the majority of apparel is based on garments already in the public domain. Nothing about the proposed legislation will change that. Nobody will ever be able to claim ownership of the t-shirt or the pencil skirt. When designers produce basic garments to complement the original designs in our collections and create complete outfits, we know the difference between what is new and what is based on a common template – and so do design pirates. The bill is intended to protect only those designs that are truly original.

NEW TECHNOLOGIES & LACK OF A U.S. LAW FUELS PIRACY

In recent years America's fashion designers have become some of the most sought after throughout the world. The level of originality seen on runways each season continues to surpass and surprise. However, with the accolades American designers are receiving comes the devastating blow of fashion piracy.

One of our most popular designs has unfortunately become a typical example of the problem we highlight. Our PS1 satchel is one of the most knocked off designs on the market today. We have attempted to assert our rights and fight this piracy – but without success - because unfortunately it is currently legal under U.S. law.

Current U.S. intellectual property law supports copyists at the expense of original designers, a choice inconsistent with America's position in fields of industry like software, publishing, music, and film. Internationally, design protection is the norm. Every other developed country, other than China, has a law on the books to protect fashion except the U.S. As a result the U.S. has become a haven for copyists who steal designers' ideas and sell them as their own with no fear of consequences. It also has become the weak link of international IP protection and the first, if not only, market for Chinese exporters of pirated designs.

With every passing year, the problem of copying worsens. It is growing with new technologies. Just as the Internet has transformed industries like music, books and motion pictures, and created new opportunities for piracy, it has done the same for fashion. Today, global changes in both the speed with which that information is transferred and the location where the majority of clothing and textiles are produced have resulted in increased pressure on creative designers. Digital photographs from a runway show in New York or a red carpet in Hollywood can be uploaded to the Internet within minutes, the 360 degrees images viewed at a factory in China, and copies offered for sale online within days - months before the designer is able to deliver the original garments to stores.

PIRACY HARMS DESIGNERS

I have heard the argument that somehow fashion piracy doesn't harm the industry, but rather helps it. This is akin to the concept that stealing from legitimate owners encourages them to replace their property and thus boosts the Gross National Product. Those suggesting that it helps designers to have their works knocked off have certainly never stood in my shoes. Far from helping the designer, design piracy can wipe out young careers in a single season. The most severe damage from lack of protection falls upon emerging designers, who every day lose orders, and potentially their businesses, because copyists exploit the loophole in American law. While established designers and large corporations with widely recognized trademarks can better afford to absorb the losses caused by copying, very few small businesses can compete with those who steal their intellectual capital.

Every designer must develop their own DNA in order to make a lasting and recognizable impact on consumers. It's like developing their "hit song" or anthem. Imagine if a starting songwriter's first song was stolen and recorded by someone else with no credit to the songwriter and worse, it becomes a hit. They hear it on the radio every day and they are never credited. That's what happens to many young designers whose ideas are stolen and rendered by others. It's very hard to survive when you become a victim of this type of theft.

THE ECONOMICS OF FASHION - LICENSING DEALS MAKE FASHION ACCESSIBLE

Some designers make their names in high end collections, where they sell a very small number of rather expensive designs. While the designs can be high priced, the designer never recoups development costs for the designs because he or she sells so few garments. Designers are only able to recoup their investments when they later offer their own affordable ready-to-wear lines based on those high end collections. They then can lower the prices at which their designs are sold because they sell more of them. Just like other businesses - it's dependent on volume. Design piracy makes it difficult for a designer to move from higher priced fashion to developing affordable renditions for a wider audience. It also makes it impossible to sell collections to stores when the clothes have already been knocked off. Licensing deals are then no longer an option. In other words, fashion designers want the chance to knock off their own designs before others do it for them.

Proenza Schouler is an example of successful licensing deals. Several years ago we designed a capsule collection of clothing and accessories for the Target GO International campaign. To those who argue that protecting fashion will drive up costs, accessibility and ultimately harm consumers, our experience disproves this myth. In the past few years we have seen a proliferation of partnerships between American designers and large American retailers including discount retailers. In addition to us, some other American designers who have

collaborated with such retailers are Isaac Mizrahi at Target, Isabel Toledo at Payless, Norma Kamali at Wal-Mart, Mary Kate and Ashley Olsen at JC Penney, Billy Reid at J.Crew, Diane von Furstenberg at Gap and Vera Wang at Kohl's. These stores have all seen the value of making the works of American designers available in their stores through licensing deals so that designers get paid for their innovation and creativity. This proves that the real growth of American fashion is in the lower to mid price range.

This bill will make it easier for all designers, not just the big names, to make their designs available at a variety of prices in a variety of stores. There are some in the industry who have become comfortable with the status quo. They see no need for a new law and fear that they might have to change the way they do business. To those companies I say, talk to all of the small designers put out of business by your current practices and business models.

There is no reason that real innovation, rather than knockoffs, shouldn't be available for everybody. Consumers can have more choices precisely because of innovation. The average consumer can wear new designs, created by true designers rather than poor copies of the real thing made by pirates in China. As I stated before, fashion in America is a \$340 billion industry, in this economic downturn we should encourage growth in this sector. More competition and growth won't occur simply by everybody distributing the identical product around the world because copying isn't illegal. Growth won't occur because somebody can steal a designer's creation and then go sell it for a third of the price. Because innovation is the fuel of the U.S. economy, in the long term, lack of protection will shrink American businesses and provoke the loss of American jobs.

THE ID3PA IS DESPERATELY NEEDED

Congress has passed laws to protect against counterfeits. One in three items seized by U.S. Customs is a fashion counterfeit. Congress has made it illegal to traffic in the labels that are used in counterfeit goods. But a copy of a design is really a counterfeit without the label. If no design piracy existed, there could not be counterfeiting. Both must be addressed or else the small designer with no brand recognition is left defenseless to the devastating problem of piracy, leaving only famous brands and big companies protected.

It is for all these reasons that we are here today to strongly support your efforts to pass the Innovative Design Protection and Piracy Prevention Act.

The legislation will provide three years of protection to designers for original designs. That is far less than the life of the author plus 70 years granted to other copyrighted works. However, because of the unique seasonality of the fashion industry, a shorter term of protection is reasonable. In three years a designer will have time to recoup the work that went into designing the article, develop additional lines, or license lines to retailers.

The CFDA first came to Congress five years ago to ask for a new law. At the time we heard legitimate criticisms from apparel manufacturers who were fearful of the impact of new legislation. Designers began negotiations with the association representing U.S. apparel and footwear manufacturers – the AAFA. We are pleased that the result of those negotiations is the legislation recently introduced by Chairman Goodlatte, and Representatives Nadler, Sensenbrenner, Coble, Sanchez, Issa, Jackson Lee, Waters and others. In short, we:

- Addressed concerns that a new law could encourage needless and expensive litigation by crafting a special pre-trial proceeding – pleading with particularity – during which a plaintiff would have to prove the copied design is protected and that the alleged copyist had the opportunity to have seen the design or an image of it. Designers as well as manufacturers had concerns that they could be on the receiving end of lawsuits and this new procedure provides important protection.
- Included penalties for false representations to deter frivolous lawsuits.
- Protected only unique and original designs. Anything already created by the time of its enactment would be in the public domain and available to copy. It is a high standard to qualify for protection, amounting to originality plus novelty. New and unique designs will qualify for protection, while everything else remains in the public domain.
- Addressed concerns that it is too difficult to tell if something is infringing by limiting the scope to copies that are “substantially identical.”
- Included the doctrine of independent creation as a defense to infringement. This makes clear that if someone independently designs an article of apparel that meets the standard for infringement, (without any knowledge of the protected design) no infringement occurs.

I am not a lawyer but we have relied on one who is an expert in fashion law heavily during this process, Professor Susan Scafidi of Fordham, the academic director of the Fashion Law Institute. As she told this subcommittee in 2006, the first version of this bill was "a measured response to the modern problem of fashion design piracy, narrowly tailored to address the industry's need for short-term protection of unique designs while preserving the development of seasonal trends and styles." The lengthy negotiations between the CFDA and the AAFA have resulted in an even more narrowly and precisely tailored way to support the entire American fashion industry.

We need your help to get back to the business of designing. We're all entrepreneurs who create our fashion with the hope of designing something that will catch on and capture the imagination of U.S. consumers. Success that starts in our individual design studios grows opportunities all across the country for fabric manufacturers, printers, pattern makers, the shippers and truckers who transport the merchandise, design teams, fabric cutters, tailors,

models, seamstresses, sales people, merchandising people, advertising people, publicists, and those who work for retailers. This is a big employment business today. We are creating jobs across this country.

However, we can't compete against piracy. Without this legislation, the creativity and innovation that has put American fashion in a leadership position will dry up. Innovation is an investment but we can't innovate without protection and urge you to quickly pass this legislation. Thank you for your time.