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57–742

1999

COLLECTIONS OF INFORMATION ANTIPIRACY ACT; VESSEL HULL DESIGN PROTECTION ACT; TRADE DRESS PROTECTION ACT; AND INTERNET DOMAIN NAME TRADEMARK PROTECTION

HEARINGS

BEFORE THE

SUBCOMMITTEE ON COURTS AND INTELLECTUAL PROPERTY

OF THE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED FIFTH CONGRESS

FIRST AND SECOND SESSIONS

ON

H.R. 2652, H.R. 2696 AND H.R. 3163

OCTOBER 23, 1997 AND FEBRUARY 12, 1998

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Serial No. 115

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APPENDIX

Material submitted for the hearing

COLLECTIONS OF INFORMATION ANTIPIRACY ACT; VESSEL HULL DESIGN PROTECTION ACT; TRADE DRESS PROTECTION ACT; AND INTERNET DOMAIN NAME TRADEMARK PROTECTION
PART I

THURSDAY, OCTOBER 23, 1997

House of Representatives,
Subcommittee on Courts and
Intellectual Property,
Committee on the Judiciary,
Washington, DC.

The Subcommittee met, pursuant to notice, at 9:30 a.m., in room 2226, Rayburn House Office Building, Hon. Howard Coble (chairman of the subcommittee) presiding.

Present: Representatives Howard Coble, Bob Goodlatte, Edward A. Pease, Chris Cannon, Barney Frank, Zoe Lofgren, and William D. Delahunt.

Also present: Mitch Glazier, chief counsel; Blaine Merritt, counsel; Vince Garlock, counsel; Veronica L. Eligan, staff assistant, and Robert Raben, minority counsel.

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OPENING STATEMENT OF CHAIRMAN COBLE

Mr. **COBLE** [presiding]. The subcommittee on Courts and Intellectual Property will come to order. Today the subcommittee is conducting legislative hearing on two bills: H.R. 2696, the Vessel Hull Design Protection Act, and H.R. 2652, the Collections of Information Antipiracy Act.

First, we will turn our attention to the Vessel Hull Design Protection Act. This bill in large part

represents a legislative response to the case of *Bonito Boats* v. *Thundercraft Boats,* decided in 1989. In *Bonito Boats,* the Supreme Court ruled that so-called "plug mold" statutes enacted by the States to proscribe the copying of hull designs were unconstitutional. More specifically, the Court held that the States are preempted on this issue pursuant to the supremacy clause. In fact, the Court concluded its opinion by noting that, "It is for Congress to determine if the present system of design and utility patents is ineffectual in promoting the useful art in the context of industrial design." I, for one, believe the system of design and utility patent is inadequate, and I furthermore believe that the we need this bill to protect those designers within the marine manufacturing industry from having their creative talents misappropriated from those who invest no time, energy, or financial resources into the original design of vessel hulls.

Next we will direct our attention to H.R. 2652, the Collections of Information Antipiracy Act. This bill strikes a balance as the information age arrives. The balance provides adequate protection to ensure there is incentive for companies to invest in the development of collections of information without inhibiting members of the scientific, library, and research communities from carrying on their work.

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This bill, as a complement to the copyright law, relies on unfair competition principles to prevent a party from misappropriating another's collection of information. In the event a person misappropriates a substantial portion of another's collection of information to the extent it will harm or damage the original collector's ability to compete, the misappropriation would be subject to injunction and damages.

At this point I want to address an issue which has exploded since the introduction of this legislation. I have become aware of a flurry of misinformation and rumor-mongering on the Internet, and elsewhere, which has succeeded in needlessly whipping up the emotions of some interested in the collection of information antipiracy bill. This city, folks as you all know, is anxiety-driven. It is bad enough under normal condition; but, when you lace it generously with misinformation, it compounds the problem. Such irresponsible activity does no one any good, serves no good purpose, and runs against how this subcommittee does business.

The rumors state that this will be the only hearing, that this bill is on a fast track, and that our staff are lying, as in one charge, about our true intentions regarding this legislation. As I have said from the outset, this hearing is a starting point for discussion. At this time I intend to conduct at least one other hearing on this issue some time early next calendar year. Our staff and I have already met with dozens of parties on both sides of these issues and we will continue to do so in the future. We work very diligently to gather and incorporate as many suggestions in the introduction of this bill as we felt appropriate. There is nothing sinister or nefarious or below-board going on here. And as far as fast track, we're driving the train and it's not going to be driven too rapidly. Now, having cleared all that up and I hope you all have not been barraged with this information, but I'm sure some of you have.

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Let me introduce our first witnesses: Mr. William T. Fryer, III, who is on a short leash, as you must return imminently to Baltimore I am told, Professor, to teach a class. That's the main reason why we're starting at 9:30 to accommodate your schedule. Professor Fryer is a registered patent attorney whose experience includes over 20 years of active patent practice and 13 years as corporate counsel. Prior to joining the faculty of the Baltimore School of Law in 1980, he taught for 5 years as an adjunct professor at Capital University of Columbus, Ohio, then as a full-time professor for 5 years at the University of

South Dakota Law School in Vermillion, I think. Is that right Professor?

Professor **FRYER.** Yes, sir.

Mr. **COBLE.** His other recent activities include participating in the World Intellectual Property Organization, WIPO, on patent law harmonization and revision of the Hague Agreement on Industrial Designs.

Our other witness on this panel is a stranger to none in the room. The Honorable Marybeth Peters is the Register of Copyrights for the United States. She has also served as active General Counsel of the Copyright Office and as Chief both of Examining and Information and Reference Division. She has served as consultant on copyright law to the World Intellectual Property Organization and authored "The General Guide of the Copyright Law of 1976."

We are delighted to have each of you here. Professor, Ms. Peters knows this, but we try to work within the 5-minute rule here. When the red light illuminates, that is your signal that your 5 minutes have elapsed. We will not keel-haul you if you don't conclude within 5 minutes, but in the interest of time—and I see the room is packed, that we have three panels today. So I would urge all the witnesses to comply with the 5-minute rule.

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Professor, you may proceed.

STATEMENT OF WILLIAM T. FRYER, III, PROFESSOR, BALTIMORE SCHOOL OF LAW

Mr. **FRYER.** Thank you Mr. Chairman. It's my honor to be here today to try to contribute something to the beginning discussion of this important bill. My background I'll leave to my C.V. But, I will say that I have been involved in the development of the Design Protection Act that was proposed for a number of years here. You remember, H.R. 1790 (102d Cong., 1st Sess. My experience, in part at least, is in connection with that legislation and also in connection with the Semiconductor Chip Act. I think my main value added here is to give you a little bit of history, at least from my perspective.

History is very important in trying to develop an appropriate design protection bill. Of course, we have existing protection for designs in our present intellectual property design law.

We have the protection of trademark for the shape of the Coke bottle and for the word, of course. And we have protection from copyrights limited to some extent for such things as toys: toy sail boats, models, and things like that.

We don't really protect boat hulls by trademarks usually. We don't protect them by copyright usually. And so we have the design patent. You've heard a lot about patents, I'm sure, on this committee. A design patent generally only protects the ornamental part of it, what you might call that which is separate to some extent from what has to be there for the boat to function. Also, the design patent takes a long time to get, about 2 years, roughly under normal circumstances. So as a practical matter for boat hull people, you don't really get immediate protection for your design.

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Now, the utility patent will help them and will allow them to protect the interactive functional parts of a boat. You already have in place several different types of intellectual property forms of protection. And the question is: Do you need another one?

So historically, the design legislation that was in H.R. 1790 in 1991, and in previous years protected primarily the ornamental aspects of the design. In other words, the protection under that legislation was essentially similar to the type of protection you get from design patents, but it was immediate. When you put this boat, if you'll allow me to use this little model, into the marketplace, you were protected from day one. And that was what I call entry-level market protection. That seems to be what a number of industries want.

Now, as you probably know, the design legislation hit some snags. And I'm not going to go into detail.

Then we had the Semiconductor Chip Act. The Semiconductor Chip Act was actually a bill specifically designed for industry in terms of how a particular product was made. The Semiconductor Chip Act took the design bill, the general design bill, and actually the basic language is very similar, and then they narrowed it down to chips and the process for making the mass work design. The Semi-Conductor Chip Act bill went through in about 2 years.

What I found from my analysis and my living with history, is that broad-based design bills are not easy to pass. Narrowly focus design bills are easier to pass. So my first general comment is that design legislation is not easy to pass, but narrow versions are a lot easier to pass.

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As I look at this bill now, it is more similar to the chip law, which means it's focused, it's narrow, it's directed to industry. So from an historical point of view, I think you have a reasonable chance of having a good debate on this legislation. It is a focused bill. And then the question is: What will it protect?

My evaluation of the bill as it stands now is that it will protect both the appearance of the bill as it is ornamental in the sense of a pleasing and distinctive appearance, but also it protects the functional part of the boat hull.

I guess my time is——

Mr. **COBLE.** Whatever you need to wrap up.

Mr. **FRYER.** In a sense the time goes fast and when professors start to talk, it's hard to know when to stop.

Mr. **COBLE.** Well, if you have eager students awaiting your return to Baltimore, too. [Laughter]

Mr. **FRYER.** Yes. They voted for me to stay here as long as I could. So, I can say that. [Laughter]

I guess, in terms of what I'm trying to say here, the basic two points are: look at the history, and this is all written up in my paper; and, two, focus this bill as narrowly as possible; and the third point that I haven't mentioned yet is that you have to ask this industry to make the case. The chip industry made their case. The semiconductor chip people made their case for protection of computer chips.

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And the question that is for you to decide is whether the boat industry people can make their case and keep the bill limited and focused. And the other comment I have is you have put in this bill provisions which essentially are similar to the original design bill and to the chip bill. These provisions protect the innocent infringer and protect the others from abuse of this particular right.

So, what I'm telling you is, in my opinion, you have some pretty good provisions in here that have been worked over really hard in these other bills and the chip law. Therefore, you have a running start. You have a little bit of a lead in your race here to get this bill through. They still have to make the case. The boat industry still has to make their case and you have to keep the bill focused. Those in general are my comments.

[The prepared statement of Mr. Fryer follows:]

PREPARED STATEMENT OF WILLIAM T. FRYER, III., PROFESSOR, BALTIMORE SCHOOL OF LAW

SUMMARY

The Vessel Hull Design Protection Act legislation (current legislation) must be evaluated in the context of historical developments and fundamental provisions of industrial design protection. The current legislation incorporates features from the general industrial design legislation, represented by H.R. 1790 (102d Cong., 1st Sess.), that was reviewed extensively by Congress in 1991 to 1992 and not enacted. The current legislation also has a close relation to the Semiconductor Chip Protection Act of 1984 (Chip Act) that was derived from the general industrial design legislation.

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This heritage reveals several important points:

1. General design legislation, as represented by H.R. 1790, is difficult to enact, due in part to its broad subject matter scope and the difficulty in reaching a compromise in certain industries;

2. Specific design legislation, like the Chip Act and the current legislation, can be enacted, if the industry involved demonstrates a need for the protection, and the legislation is tailored to achieve the needed results and balance with the public interest.

3. The current legislation utilizes market entry protection, prompt registration, limited novelty requirements and short protection term. These features are found in the Chip Act. The current legislation incorporates many of the safeguards that have appeared acceptable for the Chip Act and for H.R. 1790, to protect the innocent infringer and prevent misuse of the design right.

4. The current legislation would protect vessel hull appearance, both the ornamental and purely utilitarian features..

5. The Several countries have found the market entry protection, without or before registration, very attractive and this feature, in various forms, has been incorporated into their laws.

I. TESTIMONY

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A. Introduction

Mr. Chairman, it is my honor to participate in this hearing, the first one on the Vessel Hull Design Protection Act legislation. I hope my testimony will provide a useful background for evaluating this legislation.

I have been involved in design protection research and writing for almost 20 years, as a law professor. I have served, at different times, as chair of the American Bar Association, Section of Intellectual Property Law, Industrial Designs Committee and the American Intellectual Property Law Association Industrial Design Committee. Recently, I have been working with the World Intellectual Property Organization (WIPO) and the U.S. government in connection with revision of an industrial design treaty that will help the U.S. obtain improved international protection of industrial designs. I will let enclosed Curriculum Vitae introduce my writings and other activities.

The Vessel Hull Protection Act legislation must be reviewed in the historical context of U.S. design protection. My testimony will begin with a review of the relevant history and fundamentals for design protection. I will analyze the legislation and compare it with related intellectual property protection, making several suggestions on topics that need to be studied further. Finally, I will review the legislation in relation to relevant international intellectual property developments.

B. Historical and Fundamental Context of the Legislation

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This testimony can only outline some of the prior developments relevant to the legislation. A review of this history is very important in evaluating the likely effectiveness, public interest and political aspects of this type of legislation. There have been prior attempts to protect vessel hulls, using state laws. Several current forms of intellectual property will provide protection for features of a vessel hull, with certain limitations.

The primary starting point for this review is to recognize the legislation would protect the shape of a vessel hull from copying. It will not provide exclusive rights against independent creation. One who infringes the design right under this legislation must use the vessel hull of another person and make a copy from it, or from the plug or mold related to the hull manufacture. I am not an expert in hull construction. I owned a sailboat for several years, and I am familiar, generally, with construction of a fiberglass type boat.

C. Current Forms of Intellectual Property Protection Applicable to Vessel Hulls(see footnote 1)

The Coke bottle shape is a famous design that is protected by trademark law. Its shape presents a distinctive appearance that makes customers think of the drink's source, the Coca Cola Company. Federal trademark law(see footnote 2) does not provide protection for product shapes that are primarily functional, i.e. serve a utilitarian purpose that must be used to compete effectively.(see footnote 3) For example, the shape of a shower head in the *Teledyne* case was found to be unprotectable as a trademark, since the presumption was that its features were primarily to facilitate the operation of the device. A trademark is a perpetual right, existing as long as the design remains a mark. Trademark infringement

does not depend on whether the alleged infringer copies the mark or innocently infringes. Either act is prohibited.

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Vessel hulls may be trademarks, but they must stand up to a rather difficult test concerning the issue of whether the features are distinctive as a mark and their utilitarian role.

U.S. copyright has provided some protection for product shape for certain items. Lamp bases, animal foot like shoes and toys are some examples. Generally, if a product shape is part of the functional operating features, copyright protection will not be provided for that shape, unless there is a conceptually separable design that can stand apart as an artistic work. This result is due to the statutory provision for separability of the copyrighted design from the useful article.(see footnote 4) Copyright infringement requires copying, with proof required of the copier's access to the copyright product. The term of a copyright can be up to the life of the design plus 50 years,

It is doubtful that a vessel hull could be protected by copyright, except in a model form.

U.S. design patent law is based on the same general principles that apply to utility and plant patents, with certain exceptions.(see footnote 5) The design patent rights are exclusive, preventing independent creation as well as copying. Design patent protection is limited to the ornamental features of a product. (see footnote 6) The design patent term is 14 years from the issuance of the patent.

With the Coke bottle example, a design patent could protect the bottle shape, since there are many other shapes that could be used to carry out the same function of holding the liquid. In this respect, the trademark and design patent law have essentially the same requirement, that purely functional features cannot be protected.

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It takes about two years to obtain a design patent, under regular procedures. There is no protection until the patent issues. Additional standards that must be met are novelty and non-obvious and statutory bars that must be avoided, caused by failing to file the application within a certain period after public use or on sale in this country.

Design patents have been obtained on the shape of vessel hulls.

Utility patents protect inventions that perform a useful result, mainly due to the functional interaction of parts or materials. The average time for obtaining a utility patent is about 19 months, and the term is 20 years from the U.S. filing date. The exclusive right protects against independent creation and copying. There is no protection until the patent issues.

The utilitarian features of a vessel hull may be protected if the patent standards.

D. Prior State Legislative Efforts to Protect Vessel Hulls

States statutes have been used unsuccessfully to protect vessel hulls from copying by prohibiting molding an existing hull shape. A statute in Florida, for example, applied just to vessel hulls ,while one in California, for example, the applied also to molding other products. These statutes were held

preempted by the federal patent law in the U.S. Supreme Court case of *Bonito Boats Inc* v. *Thunder Craft Boats Inc.*(see footnote 7)

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While these state statutes were preempted, the Bonito Boats case left undecided whether a federal statute, such as this legislation, could be drafted to protect vessel hulls without conflict with the patent law. The present legislation raises the issue of patent law preemption at the federal level. It is doubtful that such a preemption conflict exists, because no conflict has been found in connection with the Semiconductor Chip Protection Act of 1984 discussed below.

E. General Industrial Design Protection Legislation Applicable to Vessel Hull Protection

In 1991, H.R. 1790 (102d Cong., 1st Sess.) was pending and strongly supported by many design related industries.(see footnote 8) It was an attempt to improve industrial design protection, with some of the features the same as the ones in the Vessel Hull Design Protection Act legislation. The Supreme Court in Bonito Boats referred to legislation, like H.R. 1790, as pending at the time of the decision and the fact that Congress was under some criticism for not enacting it.(see footnote 9) This legislation provided protection for product shape and excluded certain products due to political concerns. It specifically excluded protection for the purely functional (utility patent type features).(see footnote 10)

The H.R. 1790 legislation was closely aligned with design patent type scope of protection, but it had several new features. Under H.R. 1790 product shapes, and other designs, could be protected upon introduction to the marketplace, when protection was most needed. The legislation provided a procedure for registration within one year after such use began, followed by protection after registration for a total of ten years from the first market introduction.

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The early marketing protection feature of H.R. 1790 became very attractive and later, as described below in connection with the Semiconductor Chip Act of 1984, it was use there to protect computer chips manufactured in accordance with a specific process.

The general industrial design legislation, represented by H.R. 1790, was not enacted by Congress, due largely to a special issue concerning copying of original automobile parts to make replacement parts. The opposing interest groups could not reach a compromise. Unfortunately the need for this protection remains in many industries.

The Vessel Hull Design Protection Act legislation is modeled after H.R. 1790, using several of its operating features, including early protection, registration and the 10 year maximum term of protection. The safeguards carefully developed for innocent infringers and against abuse of the design right are now in the new legislation. They are workable provisions and created no serious controversy when H.R. 1790 was proposed.

F. Semiconductor Chip Protection Act of 1984

In 1981, approximately, the computer chip industry came to Congress with a request for improved protection of chips. This industry demonstrated that it needed immediate protection upon introduction of its products, and it could not wait two or three years later for a utility patent right to begin. Since Congress was considering the general industrial design legislation, like H.R. 1790 discussed above,

Congress responded by accepting a narrowed down version of the general design legislation limited to computer chips manufactured by a mask utilization process.(see footnote 11) The Semiconductor Chip Act of 1984 (Chip Act) was enacted promptly, after several hearings. Its history is well documented in the literature.(see footnote 12)

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Some say the Chip Act was not needed or successful. Only one case was decided under this law.(see footnote 13) On the other hand, it seems that a more logical explanation is that the law did its job, protecting a specific area of technology with the proper balance included to make it workable.

The Chip Act was unique in one other respect, in its treatment of product functionality. This law protected product appearance and function, both distinctive ornamental features and purely functional features. The Chip Act prevented copying of whatever was seen on the chip layers, as built up from the mask works that shaped the surface design, regardless of whether the features were ornamental or only functional. It was necessary to give this protection to have a simple, one-stop chip protection system upon entry of the product into the market.

It is the early protection and what you see is what you protect features of the Chip Act that the Vessel Hull Design Protection Act legislation has utilized. Several procedural provisions used in the Chip Act are part of the Vessel Hull Protection Act legislation. This fact is not surprising when it is recognized that the Chip Act and the Vessel Hull Design Protection Act are children, essentially of H.R. 1790, as discussed above.

G. Preliminary Analysis of the Vessel Hull Protection Act Legislation

The proceeding historical and fundamental review of intellectual property protection for product shape has identified several topics that need to be considered in connection with the Vessel Hull Design Protection Act legislation (current Legislation). This history suggests that general, broad based, industrial design protection legislation is hard to enact, but given a specific industry demonstrated need, design protection legislation can be enacted relative quickly. The H.R. 1790 legislative experience demonstrates how difficult it is on a broad scope of subject matter protection to obtain agreement between opposing groups.

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The current legislation is more similar to the Chip Act than the H.R. 1790 legislation. The Vessel Hull Design Protection Act legislation focuses on a particular product and manufacturing process, just as the Chip Act did. While the current legislation does not specifically state it protects purely functional features, I interpret it that way, based on its absence of any exclusion of such subject matter and other language in the legislation, discussed below. The Chip Act did protect function and appearance, and the need for the same kind of protection appears to exist for vessel hulls.

Several features of the Vessel Hull Design Protection Act legislation will be discussed now, with reference to the general industrial design legislation represented by H.R. 1790 and the Chip Act.

In §1001 the current legislation states the design protected has to be "original". This term is well accepted in other intellectual property laws, as meaning that the designer created the work independently, not copied it from someone else. This provision states the design "provides a

distinguishable variation over prior work". I interpret this provision as meaning that the design adds something to what is known by the designer. It is not a general novelty test, which is found elsewhere in the legislation. H.R. 1790 has the same type of provision on originality(see footnote 14) The Chip Act did not define the term "originality", but it was stated to be a requirement for the protected design.(see footnote 15)

The current legislation protects a design that is part of three related parts used in a manufacturing process—the hull is the final product, made from a mold, and the mold is manufactured from the plug. The plug transfers the design shape to the mold, in a concave form, and the mold transfers the design to a hull with the usual convex vessel hull shape. These parts are interrelated, as I understand the process and have the same design, essentially.

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The definitions of mold and plug in the legislation(see footnote 16) indicates that the device includes purely function features in the design, when it states "regardless of whether the device or model has an intrinsic utilitarian function". Perhaps this language should be added to the definition of the hull, and a general statement added that the legislation protection includes purely functional features.

There is no clearly stated "non-obvious standard, as required in the design patent law,(see footnote 17) but several novelty requirements are in the legislation before a protected design can be obtained.(see footnote 18) These requirements are essentially the same as in H.R. 1790, and they did not present a problem during the legislative debate as far as novelty was concerned. It is clearly a lower novelty standard than the one applied to design patents, in some respects, but in another respect it is a much higher standard. There is no limit on where the novelty event can occur in the current legislation, while in the patent law certain novelty defeating events can occur only in the U.S.

The Chip Act has essentially the same novelty standard as the current legislation, expressed in a more compact form.(see footnote 19) There is a provision that novelty can exist in substantially new combinations of old features,(see footnote 20) and this provision was in H.R. 1790,(see footnote 21) but it was not in the Chip Act. It merely clarifies what would be proper legal interpretation even under the Chip Act.

The current legislation contrasts with H.R. 1790 in protecting both the ornamental appearance and utilitarian function of the vessel hull, mold and plug. H.R. 1790 excluded from protection features that were "dictated solely by a utilitarian function of the article that embodies it"(see footnote 22) As mentioned above, the mold and plug definitions in the current legislation includes utilitarian features. Since it is possible to obtain a utility patent on the same features, I suggest adding to §1229 of the current legislation that the issue of a utility patent on a design protected under the Act would terminate protection under the Act.

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A one-year time limits is set for filing an application for registration of a design protected under this legislation.(see footnote 23) This time length corresponds to the H.R. 1790 legislation provision(see footnote 24) It forces prompt registration. The Chip Act allowed two years to register(see footnote 25) Perhaps the two year period is a more reasonable time to decide if registration is necessary to obtain the rest of the ten year protection term.

Most of the current legislation procedural provisions, such as safeguards for potential infringers, the notice provisions, infringement rights registration procedures, benefit of foreign filing date, are the same as in H.R. 1790 and similar to the Chip Act. This fact is not surprising when the heritage of the current legislation is identified, as discussed above.

In summary, the current legislation gives vessel hull designers the right to prevent copying of the hull shape, the mold and plug used to make that design. Innocent infringers are protected. The experience with H.R. 1790 and the Chip Act provides a good resource for evaluating whether the current legislation has the needed balance to be effective.

H. Input Needed to Determine if Vessel Hull, Mold and Plug Protection is in the Public Interest

The history of H.R. 1790 and the Chip Act suggests the boat industry must make a strong case for needing vessel hull design protection upon market entry. The case was made for semiconductor chips, resulting in passage of the Chip Act. The general industrial design legislation, H.R. 1790, was so broadly based that certain industries could not agree on whether such protection was needed, and Congress would not take a stand for protection of innovation and creative work, that would have forced a compromise.

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The door is open for the Vessel Hull Design Protection Act legislation to be the second of a design law series for protection of designs in specific industries. In this way the public interest will be served by carefully tailoring the protection to the needs of the public and industry, to maintain a competitive and fair market that encourages innovation, not destructive copying.

I. INTERNATIONAL PERSPECTIVE

The basic feature of the current legislation, protection against copying when a product is introduced in the market, is a principle that has attracted interest in several countries. It has been incorporated, essentially, in several new design laws or proposals. For example, the European Union has proposed essentially the same principle for it new Community Design.(see footnote 26)

Japan recently enacted an unfair competition law that prevents slavish copying of product shapes and other design features that would appear to provide protection similar to the current legislation.(see footnote 27)

Germany, and several other countries have very broad unfair competition laws that prevent copying of product designs and other related business interests.(see footnote 28)

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Several countries provide utility model protection, essentially a short term, reduced requirements type of utility patent. It fills a gap for relatively cheap and quick protection. The utility model does not give market entry protection that was found essential for the Chip Act. The utility model must be examined or at least registered before protection begins.

II. WITNESS STATEMENT CONCERNING FEDERAL GRANT, CONTRACT AND SUBCONTRACT

In 1995, 1996 and 1997 I have received no federal grant, contract or subcontract. I do not represent any entity in presenting my testimony at this hearing.

III. THE WITNESS' MAIL ADDRESS, TELEPHONE NUMBER, FAX NUMBER AND E–MAIL ADDRESS ARE:

WILLIAM T. FRYER, III

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IV. CURRICULUM VITAE (OCTOBER 21, 1997) (INCLUDING SELECTED PUBLICATION LIST)

William T. Fryer, III Professor,

University of Baltimore School of Law
1420 North Charles Street

Baltimore, Maryland 21201

Telephone Office—(410) 837–4553

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Academic Education

B.S. in Electronics Engineering, Lafayette College, 1955, Easton, Pennsylvania; Tau Beta Pi (honorary engineering fraternity) and Institute of Electronic and Electrical Engineers award.

Juris Doctor (with Honors), George Washington University Law School, 1960, Washington, D.C.; law review staff.

Page 33 PREV PAGE TOP OF DOC Segment 1 Of 2

Teaching Experience and Other Employment

Professor, 1980 to present, University of Baltimore School of Law, Baltimore, Maryland.

Law School Courses Taught Regularly:

Patent, Trademark, and Technology Law (3 credits), day and evening sections,

Patent, Copyright, and Trademark Law Seminar (3 credits), and

Business Planning (start-up high technology 3 credits)

Law School Courses Taught Frequently:

Agency and Partnership

Corporations

Antitrust

Business School Courses taught jointly 1992–1994, and consulting role to present:

Page 34 PREV PAGE TOP OF DOC Segment 1 Of 2

Entrepreneurship—Opportunity Analysis

Entrepreneurship—Commercialization Planning

Entrepreneurship—Commercialization Start-up

Expert Witness in intellectual property cases.

Lecturer in Patent Law, 1981 to 1988 for foreign patent attorneys studying in Washington, D.C.; Oblon, Fisher, et al law firm sponsored.

Professor, 1975–1978, 1979–1980, University of South Dakota School of Law, Vermillion, South Dakota.

Visiting Professor, 1978–1979, Pepperdine University Law School, Malibu, California.

Adjunct Professor, 1970–1975, Capitol University School of Law, Columbus, Ohio.

Patent Department Head, 1967–1974, Industrial Nucleonics Corp., Columbus, Ohio. Industrial controls, computer system products, highly dependent on new technology and patent protection; major world-wide marketing operation. Managed patent program in U.S. and several foreign countries, including patent application work, patent infringement analysis, litigation evaluation, licensing review, and intellectual property aspects of mergers and acquisition. Managed world-wide trademark protection program. Developed policies and procedures on disclosing and processing inventions, employee agreements on inventions, publication review, and trademark use.

Page 35 PREV PAGE TOP OF DOC Segment 1 Of 2

Patent Attorney (registration no. 19173), since 1960; 1963–1967, Industrial Nucleonics Corp. Patent preparation, prosecution, infringement and validity studies on mechanical, electronic devices, and computer systems. Assisted in major patent and trade secret litigation challenging company's basic patent. Handled world-wide trademark registration work.

Patent Attorney, 1961–1963, Private Practice, Arnold and Roylance, Houston, Texas. Intellectual property law practice, including patent application, prosecution, interferences, and litigation.

Patent Attorney and Patent, 1957–1961, Office of Assistant General Counsel for Patents, U.S.Atomic Energy Commission, Germantown, Md. Invention patent searching and evaluation in electronic, physics, and nuclear technology, government contract developments. Handled interviews and related prosecution of patent applications with U.S. Patent and Trademark Office in these fields. Patent compensation awards claims evaluation, including work on federal appellate court briefs, assisting Department of Justice.

Patent Examiner, 1955–1957, U.S. Patent Office. Examined patent applications in electronic device and systems technology.

Current Academic Responsibilities

Consultant to International Center for International and Comparative Law.

Advisor, Patent Law Moot Court Team (Giles Rich Competition—American Intellectual Property Law Association) [AIPLA].

Page 36 PREV PAGE TOP OF DOC Segment 1 Of 2

Coordinator of Brands Names Foundation Moot Court Team, with assistance of adjunct professor advisor.

Advisor, Intellectual Property Law Society (student organization).

Senior Advisor to University of Baltimore Intellectual Property Law Journal.

Coordinator of University of Baltimore School of Law Intellectual Property Attorney Alumni Association, publishing directory and periodic newsletters for intellectual property practitioners who graduated from the University.

Advisor to the Business School Lab to Market program.

Professional Activities

Represented the American Bar Association, Section on Intellectual Property Law, at the 6th Meeting of Experts on revision of the Hague Agreement on the International Deposit of Industrial Designs, held in at the World Intellectual Property Organization, Geneva, Switzerland, November 3–8, 1996

Organized National Conference on Industrial Design Protection, held October 23, 1996, Washington, D.C., sponsored by the American Intellectual Property Law Association (AIPLA), Industrial Designers Society of American and University of Baltimore School of Law. Presented paper on The 21st Century Design Patent System.

Page 37 PREV PAGE TOP OF DOC Segment 1 Of 2

Consultant to U.S. Agency for International Development conference held September-November 1996, at University of Baltimore School of Law, based on $100,000 grant, on Enforcement of Intellectual Property Rights in the U.S. and China, involving U.S. and Chinese practitioners, professors and judges.

Received 1996 award for outstanding education program from Maryland Association on Higher Education, with two other recipients, for developing the Lab to Market (Technology Transfer) courses at the University of Baltimore

Organized and co-taught UN mission course in Indonesia, on intellectual property law to Indonesian law professors; program held July 8 to 26, 1996, in Jakarta, Indonesia, under direction of the World Intellectual Property Organization, Geneva, Switzerland.

Presented talk to the AIPLA Electronics and Computer Committee and Industrial Designs Committee on computer-generated icon protection by design patent at the AIPLA Midwinter Institute on Computer Law, La Quinta, CA (1/14/96).

Submitted written comments to Patent and Trademark Office (PTO) on proposed Interim Guidelines Concerning Computer-Generated Icon Design Patent Applications (12/4/95). Coordinated preparation of AIPLA position on design patent protection of computer-generated icons, and prepared comments submitted by AIPLA president.

Present paper at American Bar Association, Section of Intellectual Property Law (ABA, IPL Section), Use of Utility and Design Patent to Protect the Same Product: A Strategy for Success (6/23/95).

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Testified at public hearing concerning the publication of patents at 18 months from U.S. filing date, particularly on the publication of design patents (2/15/95), and presented written comments.

Consulting continues with the Japanese government in their review of changes for protection of designs and revision of their design patent law.

Assisted Australian government in international study of design protection developments, and on preparation of proposed revision of their design laws.

Attended meeting of experts on the Hague Agreement Concerning the International Deposit of Industrial Designs, held 1991, 1992, 1993, 1994, and 1995 at WIPO, Geneva, Switzerland, coordinating with U.S. government and representing the AIPLA and the American Bar Association (Developing a revised treaty for adherence by more countries).

Speaker at ABA, IPL Section Continuing Education Program, Colorado Springs, Colorado, June 22, 1995; Topic: The Use of Utility Patents and Designs Patents to Protect the Same Product: A Strategy for Success.

Chairman of ABA, IPL Section Committee on the Hague Agreement Concerning the International Deposit of Industrial Designs, 1991-present

Chairman of AIPLA Special Committee on Industrial Designs, now the Industrial Designs Committee, 1994-present; organized programs and moderated several meetings.

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Comments on 18 Months Publication of Patent Applications, Public Hearing Statement, February 14, 1995, published by the U.S. Patent and Trademark Office, on Internet and as part of the hearing record.

Lectured in Japan on design patent law and practice concerning computer-generated icon protection, and other topics, at a series of international conferences organized by Japanese Patent Office and other organizations, November 3–21, 1994.

Papers presented at meeting of Association for the Advancement of Teaching and Research of Intellectual Property Law, Stockholm, Sweden, July 1993; topics: (abbreviated) Qualifications and examination of person to become patent attorneys in the U.S.; Cooperation between Business and Law School at University of Baltimore in the Lab to Market program

Presented paper on revision of the Hague Agreement Concerning the International Deposit of Industrial designs at Fordham University School of Law conference on European Community and U.S. Intellectual Property law, April 1993.

Paper presented at meeting of Association for the Advancement of Teaching and Research of Intellectual Property Law, Geneva, Switzerland, July 1992; topic: (abbreviated) University of Baltimore School of Law Technology Transfer Course

Speaker at Federation Internationale des Conseils en Propriete (FICPI) World Congress, Harrogate, England, October 2, 1991; Topic: U.S. and International Industrial Design Developments.

Page 40 PREV PAGE TOP OF DOC Segment 1 Of 2

Member of ABA, IPL Section Committee on Industrial Designs, 1980-present.

Conducted foreign industrial design law research on a fellowship at the Max-Planck-Institute for Foreign and International Patent, Copyright and Competition Protection, February-June 1990.

Participated in the development of a proposal on EC industrial design law at the Max-Planck Institute in the Institute's development and held discussions with the EC on a Community industrial design directive, 1989–1990

Conducted industrial design research on foreign laws and treaties at the World Intellectual Property Organization, Geneva, Switzerland, June and July 1990.

On industrial design law and practice, assisted the Japanese Patent Office in review of alternatives for improving Japanese system, 1990-present.

Conference Participant, attending WIPO 5th meeting of experts, parts I and II, held in June and December 1988, and 8th meeting, Part I, held June 1990, on the patent law harmonization draft treaty, as a representative of ATRIP.

National Industrial Design law and Practice Conference, organized conference and moderated one session at the University of Baltimore School of Law, March 10 and 11, 1989, attended by over 130 persons, including participants from several foreign countries.

Page 41 PREV PAGE TOP OF DOC Segment 1 Of 2

Member of Council, American Bar Association, Patent, Trademark, and Copyright Section (ABA–PTC Section), 1987–1991.

U.S. Patent and Trademark Office Examination Board Member, preparing questions for the agent/attorney patent exam in 1987 to present.

Charter Member and Secretary (1987–1989), International Association for the Advancement of Teaching and Research in Intellectual Property (organization of law professors, supported by the United Nations, World Intellectual Property organization). Organized and moderated part of the 1988 annual meeting held in Washington, D.C. (Member since 1981).

Chairman Patent Law Program, ABA–PTC Section CLE Program, March 1988, in Washington, D.C. Organized and moderated 5.5 hour program.

ABA–PTC Section Committee 305 (Industrial Designs), currently member; 1982–1986, chairman, coordinated education programs for industry on industrial design law and assisted in redrafting of legislation.

Member, Maryland Bar Association, Section on Corporations, Business and Banking, Committee on Partnerships, 1984-present; redrafted part of the Maryland Limited Partnership Act (enacted in 1988); Committee on Intellectual Property since formation in 1990.

PUBLICATIONS (selected list)

Fryer, III, William T., The 21st Century Design Patent System, (paper accepted for American Intellectual Property law Association Quarterly Journal, based on presentation at National Conference on Industrial Design Protection; to be published, approximately, June 1997).

Page 42 PREV PAGE TOP OF DOC Segment 1 Of 2

Fryer, III, William T., Seeking a Benefits Balance in the Industrial Design Treaty Revision (Hague Agreement): Fifth Meeting of Experts, Held June 13–16, 1995, 77 *J. Pat. & Trademark Off. Soc'y* 931–952 (1995).

Fryer, III, William T., Use of Utility and Design Patent to Protect the Same Product: A Strategy for Success, *ABA, IPL Section Summer Conference Proceedings* 75–102 (1995).

Report of the Committee on Industrial Designs, *AIPLA, Bulletin* 338–340 (1995).

Report of Special Committee 351 (Hague Agreement on Industrial Designs), *ABA, Section of Intellectual Property Law Proceedings* (1995).

Comments on 18 Months Publication of Patent Applications, Public Hearing Statement, February 14,

1995, published by the U.S. Patent and Trademark Office, on Internet and as part of the hearing record.

Fryer, III, William T., International Industrial Design Protection Improvement: The Hague Agreement Revision, 2 *U. Balt. Intell. Prop. L. J.* 37 (1993) (published in 1995).

Future of the U.S. Substantive Examination System: Design Patent Law and Practice (52 pages), *Tokyo Design Symposium, Conference Proceedings* (Chuo University, Tokyo, Japan, Nov. 1994).

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Report of the Committee on Industrial Designs, *AIPLA, Bulletin* 128–131 (1994).

Fryer,III, William T., More Bang for Your Design Protection Money: A Report on the Hague Agreement Third Meeting of Experts, 76 *J. Pat. & Trademark Off. Soc'y* 91–115 (1994).

Report of Special Committee 351 (Hague Agreement on Industrial Designs, ABA, *Section of Intellectual Property Law Proceedings* 302–304 (1994).

Fryer, III, William T., Report on Hague Agreement (Industrial Designs) Second Meeting of Experts, WIPO, April 27–30, 1992, 74 *J. Pat. & Trademark Off. Soc'y 923–937 (1992).*

Fryer, III, William T., International Review of Pending U.S. Design Legislation: Is It on the Right Track?, 73 *J. Pat. & Trademark Off. Soc'y* 905–930 (1991).

Fryer, III, William T., Symposium on Industrial Design Law and Practice, organized and assisted in editing Symposium publication; contributed following articles: Introduction to a Symposium, 1–6; A case History of Industrial Design Success: The Dove Lamp, 160–163; and Industrial Design Protection in the United States of America—Present Situation and Plans for Revision, 98– 221, 19 *University of Baltimore Law Review,* No. 1 and No. 2 1989/1990 (published July 1991).

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Fryer, III, William T., Design Users Suggest National Law Changes, EC Approach and Harmonisation Strategy: Federal Republic of Germany Surveys on Design Protection 2–14, *A.I.P.P.I., Journal of the Japanese Group* [Japanese translation of 1990 European Intellectual Property Review (EIPR) article listed next below].

Fryer, III, William T., Design Users Suggest National Law Changes, EC Approach and Harmonisation Strategy: Federal Republic of Germany Surveys on Design Protection, 1990 *EIPR* (UK) 360–368.

Fryer, III, William T., Patent Law Harmonization Treaty Decision is Not Far Off—What Course Should the U.S. Take?: A Review of the Current Situation and Alternatives Available, 30 IDEA—The Journal of Law and Technology 309–354 (1990); the same article was published in the 72 *J. Pat. & Trademark Off. Soc'y,* 242–254 and 298–333 (1990).

Fryer, III, William T., Industrial design Protection in the United States of America—Present Situation and Plans for Revision, WIPO Industrial Property Journal, March 1988, 115–131; the same article was published in the *J. Pat. & Trademark Off. Soc'y* 820–846 (1988).

Fryer, III. William T., An Academic's View on Patent Harmonization Proposals, *Proceedings of the ABA–PTC Section Continuing Legal Education Conference,* held March 24 and 25, 1988, in Washington, D.C.

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Fryer, III, William T., "Where the Action Is", *Patent World,* Jan. 1988, 22–25 (describing the organization and operation of the ABA–PTC Section).

Fryer, III, William T., United States Legislative Activity, *Patent World,* 27 (1987) (related to patent law harmonization).

Congressional testimony, oral and written, on June 23, 1988 before the Subcommittee on Courts . . ., U.S. House of Representatives Judiciary
Next Hearing Segment(2)

(Footnote 1 return)
For a more comprehensive and generally still current review of U.S. design protection, see William T. Fryer, III, Fryer, III, Industrial design Protection in the United States of America—Present Situation and Plans for Revision, *WIPO Industrial Property Journal,* March 1988, 115–131; the same article was published in the *J. Pat. & Trademark Off. Soc'y* 820–846 (1988). Current information on several aspects of industrial design protection and research can be obtain from Professor Fryer's Web Site at the following address: http://www.fryer.com--.

(Footnote 2 return)
15 U.S.C. §1051–1127 (1996).

(Footnote 3 return)
In re Teledyne, 217 U.S.P.Q. 11 (C,C.P.A. 1981)

(Footnote 4 return)
17 U.S.C. §101 (definitions of "pictorial, graphic and sculptural works", "useful article", and 113 (1996).

(Footnote 5 return)
35 U.S.C. §171, para. 2 (1996).

(Footnote 6 return)
35 U.S.C. 171 (1996).

(Footnote 7 return)
9 U.S.P.Q. 2d 1848 (U.S.S.C. 1989); see for example, K. David Crockett, The Salvaged Dissents of Bonito Boats v. Thunder Craft, *George Mason University Law Review* 27 (1990); David E. Shipley, Refusing to Rock the Boat: The Sears/Compco preemption Doctrine Applied to *Bonito Boats* v. *Thunder Craft, Wake Forest Law Review* 385 (1990); David W. Carstens, Preemption of Direct Molding Statutes: *Bonito Boats* v. *Thunder Craft Boats, Harvard Journal of Law & Technology* 167 (1990); Alex Devience Jr., John Marshall Law Review 209 (1990).

(Footnote 8 return)
See supra note 1, Fryer, for a review of legislation essentially the same as H.R. 1790.

(Footnote 9 return)
Bonito Boats, 9 U.S.P.Q. at 1859

(Footnote 10 return)
H.R. 1790 (102d Cong., 1st Sess.) §1002(4).

(Footnote 11 return)
17 U.S.C. §901–914 (1996).

(Footnote 12 return)
See for example, James P. Chesser, Semiconductor Chip Protection: Changing Roles for Copyright and Competition, *Virginia Law Review* 249 (1985); John G. Rauch, The Realities of Our Times: The Semiconductor Chip Protection Act of 1984 and the Evolution of the Semiconductor Industry, 75 *J. Pat. & Trademark Off. Soc'y* 93 ((1993); ; Robert L. Risberg, Jr., Five Years without Infringement Litigation under the Semiconductor Chip Protection Act: unmasking the Spectre of Chip Piracy in an Era of Diverse and Incompatible Process Technologies, *Wisconsin Law Review* 241 (1990); Charles R. McManis, International Protection for Semiconductor Chip Designs and the Standard of Judicial Review of Presidential Proclamations Issued Pursuant tot he Semiconductor Chip Act of 1984, 22 *George Washington Journal of International Law and Economics* 331 (1988); Kenneth J. Burchfiel, The Constitutional Intellectual Property Power: Progress of the Useful Arts and the Legal Protection of Semiconductor Technology, 28 *Santa Clara Law Review* 473 (1988); James T. Carmichael, Protection of United States Semiconductor Designs in Foreign Countries under the Semiconductor Chip Protection Act of 1984, 12 *Rutgers Computer & Technology Law Journal* 433 (1987); A major symposium issue on many aspects of the Semiconductor Chip Protection Act of 1984 was published in 70 *Minnesota law Review* (1985); Robert W. Kastenmeier and Michael J. Remington, The Semiconductor Chip Protection Act of 1984: A Swamp or firm Ground?, 33 *Journal of the Copyright Society of the U.S.A.* 110 (1986) (Congressman Kastenmeier was chair of the subcommittee primarily responsible for this legislation and Mr. Remington was his chief counsel; each of them had a strong influence on the final version of the legislation).

(Footnote 13 return)
Brooktree Corp. v. *Advanced Micro Devices, Inc.,* 18 U.S.P.Q. 2d (BNA) 1692 (D.C. S. CA 1990).

(Footnote 14 return)
H.R. 1790 (102d Cong., 1st Sess.) §1001(b)(1).

(Footnote 15 return)
17 U.S.C. §902(b)(1) (1996).

(Footnote 16 return)
§1201(b)(5) [plug] and (6) [mold].

(Footnote 17 return)
35 U.S.C. §103 (1996).

(Footnote 18 return)
Vessel Hull Design Protection Act §1202 (2) and (3).

(Footnote 19 return)
17 U.S.C. §902(b)(2).

(Footnote 20 return)
Vessel Hull Design Protection Act §1203.

(Footnote 21 return)
H.R. 1790 (102d Cong., 1st Sess.) §1003.

(Footnote 22 return)
H.R. 1790 (102d Cong., 1st Sess.) §1002(4).

(Footnote 23 return)
Vessel Hull Design Protection Act §1202(4).

(Footnote 24 return)
H.R. 1790 (102d Cong., 1st Sess.) §1002(5).

(Footnote 25 return)
17 U.S.C. §908(a) (1996).

(Footnote 26 return)
See for example, Audrey A. Horton, Industrial Design Law: The Future of Europe, 12 *E.I.P.R.* 422 (1991), Peter Brownlow, The European Commission's Proposed Design Directive and Regulation, 40 *Copyright World* 29 (1994).

(Footnote 27 return)
See 7 World Intellectual Property Report (BNA) 262 (1993).

(Footnote 28 return)
See for example, Protection Against Unfair Competition, *WIPO Publication No. 725(E)* (1994).