



## Fourth Time's the Charm: Fashion Designs May Soon Receive Copyright Protection

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by Jasmine Davis, [Trademark Attorney](#)

On December 1, 2010, the fashion industry came a little closer to specialty copyright protection for fashion designs. The Innovative Design Protection and Piracy Prevention Act ("IDPPPA") was unanimously passed by the Senate Committee on the Judiciary. The bill, introduced by New York Senator Charles Schumer, is the fashion industry's fourth attempt to gain protection against knockoffs. Previously, Senator Schumer had introduced three versions of the Design Piracy Prohibition Act ("DPPA"), which all faced criticism from both Congress and some members of the fashion industry. The IDPPPA, a substantial shift from the DPPA, has the support of fashion heavyweights such as Diane von Furstenberg and the Council of Fashion Designers of America, as well as organizations that previously opposed the DPPA, such as the American Apparel and Footwear Association. Originally, the American Apparel and Footwear Association opposed the DPPA because it allowed designers to seek legal action against designs that were substantially similar to the registered designs. The organization changed its stance and now supports the IDPPPA due to its "substantially identical" language, heightened pleading standard, and lack of a formal registration process for fashion designs.

The IDPPPA would extend copyright protection to fashion designs as an amendment to Chapter 13 of the Copyright Act, which currently protects the design of vessel hulls. Under the bill, fashion designs are defined as the appearance of an article of apparel (including ornamentation) and its arrangement of original or non-original elements. The article of clothing must be the designer's own creative work and "provide a unique, distinguishable, non-trivial and non-utilitarian variation over prior designs for similar types of articles." Accessories, including purses, belts, and eyeglasses, are included within this definition of fashion design.

If a design falls within the above definition, it automatically receives protection under the IDPPPA. Unlike the DPPA, no registration is necessary under the bill. Protection begins when the fashion



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design, "embodied in a useful article," is made public, and it ends once the article has been on the market for three years. During that three year period, the design is protected from any infringing articles of apparel that copy the protected design.

To prove liability, the original designer must show that the infringing article is "substantially identical in overall visual appearance to and as to the original elements of a protected design" or that it is not "the result of independent creation." In addition, the designer must prove that the infringing article was made with knowledge, actual or inferred, of the original design. In an action for infringement, the designer must plead, with particularity, that the protection, infringement, and knowledge requirements were met. The IDPPA also increases the penalties for false representation from \$500 and \$1000 to \$5,000 and \$10,000, respectively.

One important distinction from the DPPA is that the new bill does not extend liability to home crafters. For example, if someone creates a knockoff of a Marc Jacobs dress on a home sewing machine for her own personal enjoyment, she is free to wear that dress without fear of being sued for copyright infringement. The same protection applies if that crafter gives the dress to a member of her immediate family. However, if she starts providing that knockoff dress to a retailer, both she and the retailer (under a theory of secondary liability) would be liable for copyright infringement.

At the time of our last commentary on the protection offered fashion designs (<http://blog.pattishall.com/2009/08/17/is-that-bag-prada-or-prado-protecting-fashion-industry-intellectual-property>), the third iteration of the DPPA was languishing in committee. With its broad industry support, the IDPPA may in some final form actually offer significant intellectual property rights to fashion designers in their original designs.

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