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POINT OF VIEW

A WELL-TAILORED REMEDY

A partner at Paul, Weiss argues that fashion design is deserving of copyright protection.
By Lynn Bayard and Timothy Martin

Fashion designers who show us what's new—through season after season of innovation—are celebrated for their creative vision and cultural contribution. But in the United States—where fashion is a $350 billion industry—fashion designers are denied copyright protection.

Efforts are again under way to change that. In August, Senator Charles Schumer of New York introduced Senate bill S. 1957, the Design Piracy Prohibition Act, to provide copyright protection for fashion designs. (Versions of the bill were introduced previously in the House in 2006 and 2007.) If passed, fashion designs will be protected by copyright law for the first time. The bill's introduction has sparked debate over whether fashion designers need and deserve this protection, and whether courts are equipped to adjudicate fashion copyright claims.

The basis for the bill—advanced by the Council of Fashion Designers of America (CFDA)—is simple. Nearly every other creator of an original work—from authors to composers to photographers to sculptors—enjoys long-term copyright protection under the Copyright Act of 1976. And in numerous other countries, including France, the creations of fashion designers are equally subject to the protection of the copyright laws.

American designers want equal standing, for good reason. Speaking

Granting even **just three years of protection** would allow the original designers more opportunity to **leverage runway collections** into lower-priced lines.

OTTO STEININGER

at a congressional hearing on behalf of the CFDA, designer Jeffrey Banks said that, thanks to new technology, "[fashion] designs are stolen before the [runway show] applause has faded; software programs develop patterns from photographs . . . and automated machines cut and then stitch perfect copies of a designer's work." Fashion designers require copyright protection to recoup the significant personal and financial investment necessary to design clothes and to have remedies for the monetary and reputational harm caused by copycat designs, many of which arrive in stores before the originals do. "Design piracy can wipe out young careers in a single season," Banks stated.

Critics nevertheless claim that copyright protection for fashion will stifle inspiration, harm consumers by denying them affordable knockoffs, and confront courts with questions too complex to be answered. But the Design Piracy Prohibition Act appears to address both the needs of designers and the fears of the act's detractors.

First, the term of the protection is limited to the bare minimum: three years for original designs registered with the Copyright Office within three months of first being made public. This period of protection—far less than the term of life of the author plus 70 years granted to most other copyrighted works—allows designers a limited but sufficient time to recoup their research and development costs and to commercially exploit their designs safe from knockoffs. Designers will also be able to leverage the designs they create for the runway (for example, Proenza Schouler's collection for Barney's) into lower-priced collections aimed at a different customer (Proenza Schouler's collection for Target), a diversification that gives consumers access to stylish but less-expensive clothes.

Second, courts have long grappled with difficult copyright questions, and are well-versed in parsing and deciding infringement cases—including the issue of what constitutes original and protectible expression in a creative work. The bill is consistent with the robust body of copyright precedent that carefully balances the rights of creators and users. Thus, the bill protects "original" designs that constitute "a distinguishable variation over prior work pertaining to similar articles which is more than merely trivial and has not been copied from another source" and provides that only "substantially similar" designs will be infringing.

In determining whether a fashion design is subject to copyright protection, courts—as they do when considering books, screenplays, photographs, and other creative works—will rely on the guiding principle of copyright law, the idea/expression dichotomy. That principle provides that copyright protects only the creative expression of an idea, not the idea itself, thereby ensuring that the copyright monopoly does not foreclose the use of ideas by others. For fashion, this likely means that the overall style of an article of clothing (for example, bell-bottomed pants), or the fact that a design is military-inspired, would not be copyrightable, while a designer's particular, original expression of those styles and trends would be protected.

Moreover, courts have crafted numerous tests to evaluate whether an allegedly infringing work is substantially similar. For example, courts have used the "ordinary observer test," which considers the total concept and feel of a work, and the "more discerning" ordinary observer test—used in comparing works that are not wholly original, but combine protectible and unprotectible elements—which sets aside the unprotectible elements of competing works (i.e., those taken from the public domain) and analyzes similarities in the original, protectible elements only. These tests will guide courts in remedying fashion design infringement, while preserving the broadest possible use of ideas and nonprotectible elements, just as courts have done in analyzing claims relating to fabric and jewelry designs, works of fiction (including books and motion pictures), photographs, and artwork such as sculpture.

In sum, against the backdrop of long-settled copyright law, the Design Piracy Prohibition Act is a well-tailored remedy that deserves to be enacted.

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