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Fashion Law

New Protections Pending for Designers

Terrence A. Oved, Esq. and Darren Oved, Esq.

Over the past several years, some of the most powerful names in the fashion industry have been working with the government in Washington to develop a practical and comprehensive solution to the growing problem of fashion piracy.

With the support of the Council of Fashion Designers of America (CFDA), the American Apparel and Footwear Association (AAFA), and celebrity designers such as *Project Runway's* Tim Gunn, fashion houses and designers may soon receive the protection they seek, as a new bill headed to Congress aims to increase and extend copyright protection to original fashion designs. If passed, the aptly titled Innovative Design Protection and Piracy Prevention Act (the IDPPPA) will have a profound and immediate effect on the fashion industry, powerfully changing the way designers protect their designs, create innovative style trends and prevent against knockoffs.

Currently, American designers can only receive copyright protection for the elements of their designs that are purely decorative, aesthetic, and wholly separable from the functional and utilitarian elements present in all clothing. For example, one may be able to protect a unique pattern of stripes and characters printed on a polo shirt, whereas the silhouette and cut of the shirt cannot be protected. As a result, few fashion designs have received substantive copyright protection, as it is often



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difficult, if not impossible, to separate the creative, aesthetic elements of a design from its fundamental and utilitarian elements. In fact, it is common practice for designers to base their allegedly original designs on other designers' previous works and current trends.

In response to these concerns, the IDPPPA specifically extends copyright protection to 'fashion designs,' presently defined as 'the appearance as a whole of an article of apparel, including its ornamentation.' In particular, the IDPPPA protects designs containing 'unique, distinguishable, non-trivial and non-utilitarian variation[s] over prior designs,' and prohibits designs that are 'substantially identical' to protected works. Protectable designs include clothing such as shirts, pants, jackets and shoes, as well as wallets, bags, and other accessories.

The current version of the IDPPPA represents a compromise amongst fashion industry trade groups, many of whom opposed previous design protection bills such as the Design Piracy Protection Act (DPPA), which was perceived as overly restrictive and unfair to independent designers. However, even with industry support, designers and fashion insiders continue to debate whether the IDPPPA will do more harm than good. Proponents hope that the IDPPPA will promote creativity in the fashion industry, as designers will no longer be permitted to slavishly copy the previous designs of other designers and will instead be forced to create completely original works. Those who oppose the IDPPPA fear the potential for baseless claims and exposure to liability will stifle originality and chill creativity, as working off of existing designs is an integral aspect of the fashion industry.

Our European counterparts are a bit more advanced. In 2002, the European Union enacted legislation akin to the proposed IDPPPA providing protection to all original 'community designs' defined as 'the appearance of the whole or a part of a product resulting from the features of, in particular, the lines, contours, colors, shape, texture and/or materials of the product itself and/or its ornamentation.'

Under the Council Regulation on Community Designs (CRCD), designs are protected if they are novel, and if an informed observer would find the design different from other, existing designs. Of note, the CRCD is not limited to fashion designs, and is applicable to all original works that meet the definition of an original 'community design.' Prior to its enactment, opponents of the CRCD believed the regulation would have a severe, negative impact on the creative design field. However, such an impact has not yet been felt, and design creativity has not been significantly stifled in the European Union. Whether the IDPPPA would have a similar effect in the United States remains to be seen.

In addition, the IDPPPA also represents a change in the way copyright infringement claims are brought and litigated. While typically copyright infringement claims may only be made if the work has been registered with the United States

**INNOVATIVE DESIGN
PROTECTION
PIRACY
PREVENTION ACT**



Copyright Office, the IDPPPA has no such registration requirement. Under the IDPPPA, original designs are automatically afforded copyright protection for three years commencing on the date the design is first made public. Practically, this will make it easier for designers to bring infringement claims.

Should the IDPPPA become law, courts will undoubtedly struggle to adjudicate the initial cases of infringement, as it will be challenging to apply the requisite 'substantially identical' standard. While 'substantially identical' may be interpreted narrowly, affording protection to only a few exceptionally unique designs, courts may take a more broad view and allow an abundance of designs to receive copyright protection. Therefore, fashion houses and designers who wish to protect their original designs and prosecute infringers will need to carefully navigate this new and complex law. In addition, designers may have to change their practices to ensure compliance, and may themselves have to defend against copyright infringement claims brought under the IDPPPA. □

Terrence A. Oved, Esq. and Darren Oved, Esq. are partners at the New York City law firm of Oved & Oved LLP. The firm concentrates on fashion, linguistics, corporate, real estate and entertainment law and advises numerous fashion designers, owners, manufacturers, wholesalers, retailers, importers and exporters.