

1-1-2010

Copyrights and the Fashion Industry: A Love-Hate Relationship?

Ashlee Hodge

Follow this and additional works at: <http://digitalcommons.wcl.american.edu/ipbrief>



Part of the [Intellectual Property Commons](#)

Recommended Citation

Hodge, Ashlee. "Copyrights and the Fashion Industry: A Love-Hate Relationship?" American University Intellectual Property Brief, Summer 2010, 26-27.

This Featured Column is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in Intellectual Property Brief by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact fbrown@wcl.american.edu.

Copyrights and the Fashion Industry: A Love-Hate Relationship?

Keywords

Copyright, Fashion industry, Innovative Design Protection and Piracy Prevention Act, Fashion industry law

Copyrights and the Fashion Industry: A Love-Hate Relationship?

By Ashlee Hodge

This piece was originally featured as a column at www.ipbrief.net. Columns explore various intellectual property law issues in a journalistic format, providing a detailed overview of the subject.

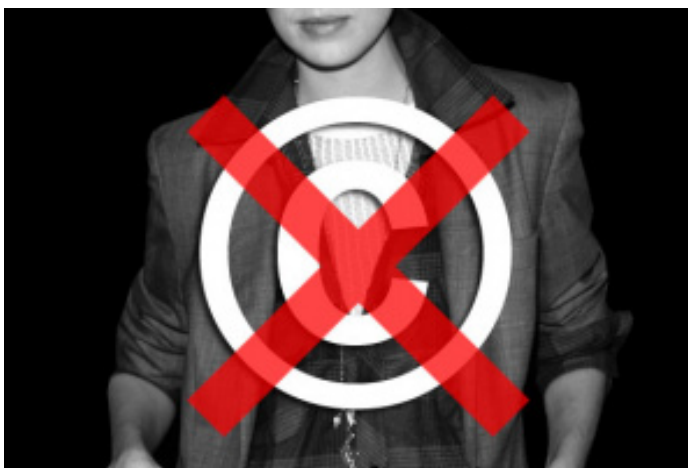
Earlier this month, Senator Charles Schumer (a Democrat unsurprisingly from fashion-capital New York) introduced the Innovative Design Protection and Piracy Prevention Act (S. 3728) to the delight of many fashion industry players and the dismay of some fashion industry law and economic theorists and skeptics.

This proposed bill, the newest draft of a plethora of preceding failed bills, has created quite a stir in the fashion industry due to the lack of any copyright law in the American fashion industry to date. While its immediate predecessor, the Design Piracy Protection Act, would have reportedly destroyed up to 90% of design business,¹ the new and improved IDPPPA has successfully pleased two chief organizations in the industry, the AAFA (American Apparel and Footwear Association) and the CFDA (Council of Fashion Designers of America) by increasing the bill's specificity, more narrowly tailoring the scope of protection, and raising the bar for plaintiffs bringing a copyright infringement lawsuit.

For example, under the bill a plaintiff has a three-pronged burden of proof in order for a case to go to trial. First, the plaintiff must prove that their design is “a unique, distinguishable, non-trivial and non-utilitarian variation over prior designs,” and that it is an entirely new concept that had not previously existed. Second,

the plaintiff must show that the defendant's design is “substantially identical,” such that a purchaser could easily mistake the defendant's design for the original. Third, the defendant must have had the opportunity to have seen the original design before the alleged copy was released for distribution.

Furthermore, other stipulations in the IDPPPA demonstrate its narrower scope. The bill grants only a short three-year term of protection beginning from the point at which the item is publicly displayed, and every design created before the enactment of this bill will remain in the public domain. Retailers and consumers cannot be liable for buying or selling illegal copies without knowledge of their illegality, and there is also a provision that allows home sewers to copy a protected design for private use by themselves or a family member.



While the IDPPPA's numerous and detailed conditions seem to have been made in consideration of many different sides of the fashion industry, some commentators have expressed skepticism when applying the IDPPPA to the bigger fashion industry picture. Kal Raustiala and Chris Sprigman, professors at UCLA Law School and UVA Law School, respectively, assert that the philosophy behind intellectual property law actually demands looking at the big picture rather than focusing in on a solely protectionist agenda. They state that there must be evidence of systematic harm throughout any industry looking to protect its intellectual property, and in the case of the fashion industry, there simply isn't enough

1. Proposed law to destroy 90% of design businesses. <http://www.fashion-incubator.com/archive/proposed-law-to-destroy-90-of-design-businesses/>

harm across the board.

Not only is there a supposed lack of harm, but Raustiala and Sprigman have argued that the fashion industry in the United States has in fact thrived specifically in part because of its lack of intellectual property regulations, and that the ability to copy work directly adds to the industry's economic success. Earlier this year, the two wrote in a New York Times article stating, "The interesting effect of copying is to generate more demand for new designs, since the old designs—the ones that have been copied—are no longer special. The overall result is greater sales of apparel. We call this surprising effect the 'piracy paradox.'"

An item of clothing, for example, is often deemed fashionable precisely because of its high rate of copying, or "trending," to put it in a less IP-offensive way. Fashion designers constantly borrow ideas they see in other designers' works and build off of one another for inspiration. And because there are constantly the Forever 21-type stores and Uggs imitations, designers are pushed forward into creating new trend cycles, ultimately renewing the industry over and over again on a much faster scale than with other regulation-heavy industries.

Secondly, consumers have an immense benefit to a fashion industry unregulated by intellectual property provisions. The latest fashion trends are not limited to only the wealthy when copying is allowed. Raustiala and Sprigman go so far as to state, "copying has played a major role in democratizing fashion."

As pointed out in a TED Talk specifically on the fashion industry's ability to flourish without copyright, from an economic perspective, the large majority of the clientele for "knock-off" purses is distinct from the customers who are able to make significant contributions to the labels who produce the originals. Should the knock-offs be outlawed, labels like Gucci and Fendi would unlikely have a noteworthy gain in customers.

The same TED Talk goes on to give credence to the industries and art forms that similarly lack copyright

protection. Fashion designers and comedians alike have designed many of their products and jokes so that they simply don't work when produced by someone else. An intricate Vera Wang bridal dress is as difficult to perfectly recreate as a Larry David joke—a duplicate just isn't quite the same as when it comes from the original.

The IDPPPA does have much stricter rules on what constitutes a copy than its predecessors, but this has critics wondering if the bill will have much of any real, noticeable impact. However, Raustiala and Sprigman have pointed out that regardless of what the bill itself says, simply putting a law like this in the hands of lawyers and judges is a dangerous concept. They note patterns in copyright law indicating that plaintiffs' lawyers are fully capable of making creative arguments which often induce or allow judges to interpret the language in certain bills quite expansively.

A major concern is the likelihood of those independent designers, truly in need of copyright protection, ultimately going up against the more powerful giants who can easily afford the best IP attorneys money has to offer. And instead of a specialized federal agency making the determination (as the case is for patent infringement) this bill will call for judges to assess fashion designs, who, bless their hearts, have little knowledge or interest in keeping up with fashion trends. (This of course does not account for the obvious exception.)

One of the main concepts behind the implementation of copyright law is the relationship between ownership and incentive to innovate. But in such a richly creative industry where the high competition to innovate has produced a constantly evolving palate for consumers who happily participate, is it really a good idea to get the very complicated and often unfair process of copyright involved?

