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INTELLECTUAL PROPERTY

Fashion Designers a Step Closer to Copyright Protection

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Special to the Legal

Fashion designers have long lamented the lack of copyright protection for their designers in the United States, but that may be about to change. The Senate Judiciary Committee has unanimously adopted a bill to amend U.S. Copyright laws that would extend copyright protection to clothing, handbags, eyeglass frames and related articles.

Known as the Innovative Design Protection and Piracy Prohibition Act (IDPPPA) or Senate Bill 3728, this is the first bill extending copyright protection to the work of fashion designers to make it out of committee. The bill was introduced by U.S. Sen. Charles Schumer, D-N.Y., in August 2009, and is the successor to the broader and ill-fated Design Privacy Protection Act (DPPA), which never made it into law.

Under the bill's current provisions, fashion designers would be given a three-year window of protection for work that is "the result of a designer's own creative endeavor" and "provide a unique, distinguishable, non-trivial and non-utilitarian variation over prior designs." Colors and graphics imprinted on an article would not be considered in the determination of an article's protection, and all non-unique designs would remain in the public domain.

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This is a tough standard to meet, and a designer would have the burden of proving both his or her entitlement to protection as well as infringement. Moreover, claimants for infringement must plead their causes of action with particularity. That is, they must establish that (a) the design is protected; (b) the defendant infringes upon the protected design; and (c) the protected design or an image thereof was available at a particular location, in a particular manner and for a particular duration from which it can be reasonably inferred from the totality of the facts and circumstances that the defendant saw or otherwise had knowledge of the protected design.

Unlike most copyrights, however, there is no current requirement that a fashion design be registered with the U.S. Copyright Office prior to the filing of suit. Rather, the owner of the design is automatically entitled to institute an action for any infringement of the design at any time within three years after the design is first made public.

Infringement under the new bill uses the "substantially identical" test. In other words, if an article is not substantially identical in overall appearance as the protected design,

no infringement will be found. The doctrines of secondary infringement and secondary liability are not applicable to actions related to the protected designs, which means that downstream consumers of infringing products would not be liable for infringement.

There are also a number of defenses which seem catered to amateur or smaller designers, including the "independent creation" defense, whereby an accused infringer who has independently created a substantially identical design would not be liable for infringement. This defense uses either the accused's lack of actual knowledge of the protected design or a reasonable inference from the totality of the circumstances in its determination, and acknowledges that independent creation of unique designs is a distinct possibility. There are high penalties for false representation under this provision.

In addition, under the "home sewing" exception, it is entirely permissible for a person to produce a single copy of a protected design for personal use or for the use of an immediate family member, so long as said copy is not offered for sale. This provision is akin to the concept of "fair use" in the general copyright setting.

Proponents of the bill, including Counsel for Fashion Designers of America (CFD) and the American Apparel and Footware Association (AAFA) — which had reservations with earlier proposals — have argued that federal protection for the fashion industry is long overdue, and that the IDPPPA offers a just balance between the promotion of innovation and protection against knock-offs. However, others disagree, including groups like the California Fashion Association, which see the proposed legislation as superfluous to existing trademark and patent design protections, a burden to the buying public unable to afford name-brand designs and an unhealthy form of protectionism for established corporations.

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As it stands, the IDPPPA's narrow scope, strict standards and available defenses do have bipartisan support, as well as the support of industry groups such as CFD and AAFA, and may represent the fashion industry's closest chance of federal copyright protection to date. Next, the bill will move to the Senate floor for possible hearings, and a vote. As of press time, no dates had been set. •