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Is copyright protection for fashion designs a windfall for designers?

By Melissa K. Dagodag

Conventional copyright and trademark wisdom would dictate that the way for a fashion company to stay ahead of the curve is to constantly keep its designs fresh and new, so that the company is the originator with cache in the marketplace. Other companies can copy the originator's designs, but they are followers and lack the same cool factor. The same wisdom dictates that the strongest form of protection for a typical fashion house is generally in its trademarks. The money spent on marketing a brand pays off in creating goodwill among a company's customers that endures as long as the trademarks are used. So, keeping a tight, well-policed trademark portfolio is one of the best things a fashion company can do for itself.

On July 13, however, a modified version of the Innovative Design Protection and Piracy Prevention Act called "HR 2511" was introduced by Rep. Robert Goodlatte (R-Va). This is a bill that may potentially stir up the pot of conventional intellectual property law wisdom. Right now, fashion designs do not receive copyright protection in the U.S. due to the "useful articles" doctrine. The gist of the Act is that certain "fashion designs" would become eligible for copyright protection for a three-year, non-renewable term. The bill defines a "fashion design" as the "appearance as a whole of an article of apparel."

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At first glance, the bill appears to offer a broad safe haven for designers by protecting not only apparel items, but also accessories such as shoes, hats and purses. However, a closer analysis of the bill reveals a high water mark fashion designers must meet in order for their designs to receive protection from the Act, if it becomes a law. So, such protection may not be that easy to secure.

The proposed standard for what is considered to be infringement is much more stringent than under current copyright law for other types of works. In order for a book or movie to be considered infringing, generally, one must prove the alleged infringing work is "substantially similar" to the original work. In contrast, fashion designers will be required to prove the copycat clothes are "substantially identical." The Act defines "substantially identical" as "so similar in appearance as likely be mistaken for the protected design and contains only those differences in construction or design which are merely trivial." This standard may prove to be quite difficult to apply. A patch here, a zipper there, a different pattern on the pocket elsewhere? At what point do two articles of clothing cease to be "substantially identical"? These questions may prove too challenging to make the bill effective if it is passed.

Another challenge to implementing the proposed Act may be a flood of new fashion-related copyright infringement suits. Most attorneys are familiar with the clogged up court system in the state of California due to budget cutbacks. Perhaps similar budget cutbacks on the federal level, plus the effects of this proposed bill, will congest the already burdened federal courts.

Proponents of the Act argue that the bill's scope is narrow due to its pleading requirements and definition of infringement, and that frivolous litigation will be stifled. Regardless of how the proposed law is interpreted by the courts, it is reasonably foreseeable that there will be a spike in copyright litigation.

Moreover, the Act has been promoted as a law that will protect designers' original ideas and creations. What if supporters are not clearly highlighting that this law may favor larger companies and push small to mid-size designers out of business? Big companies with big litigation budgets could potentially have a new litigation tool. Smaller fashion companies without the same dollar power may not be able to adequately defend themselves, which could force them out of business.

There is also a viable argument that large fashion companies are the last group that needs protection because such large companies actually benefit from other designers being inspired by their designs. The fact that cheap knockoffs, created by large fashion companies, are being sold and worn by consumers publicizes the expensive original designs, and arguably generates more sales of the original designs *and* more sales of the knockoffs. (Remember the old adage that any PR is good PR.) Therefore, currently, the lack of fashion copyright protection may create a win-win situation for the manufacturers of both the more expensive original designs and the cheap knockoffs.

Unlike earlier versions of the bill (there were several other iterations previously), this version lacks a registration requirement. Designers benefit because it is one less hoop through which they must jump. In addition, the U.S. Copyright Office will not have to combat a surge of new applications.

Overall, the Innovative Design Protection and Piracy Prevention Act offers some promise but also a whole lot of potential problems. At this point, the reception of the Act (if it becomes law) may be warm among the biggest apparel manufacturers and at best, lukewarm, among the smaller companies.

The author thanks UCLA School of Law student, Sean Sullivan, for his assistance with this article.

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