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Reintroduction of the Innovative Design Protection and Piracy Prohibition Act (IDPPPA) Refuels the Debate on Expanding the Scope of Copyright Protection in Fashion Design

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The United States House of Representatives has reignited the debate regarding the extension of copyright protection to fashion design, through the introduction of the Innovative Design Protection and Piracy Prohibition Act (IDPPPA). Policymakers are being urged to pass legislation by sectors of the fashion industry seeking additional tools to enforce intellectual property rights against copyists and counterfeiters. The reintroduction of this bill has put a controversial debate in copyright law back into the spotlight. Supporters of the IDPPPA posit that its proposed expansion of the scope of copyright protection will foster innovation and creativity in the fashion industry without limiting consumer access to fashion. The bill's critics believe, much to the contrary, that it will hinder innovation, restrict access to fashion design to only those consumers with the greatest resources, and ultimately increase the costs and risks shouldered by legitimate manufacturers and retailers who are in the business of making and selling on-trend fashions.

Designers and manufacturers in the fashion industry currently have a number of tools at their disposal to enforce intellectual property rights in their original designs. Any original surface patterns and prints are entitled to copyright protection, and trademark and trade dress protection extends to any names, symbols, logos, and distinctive designs that are indicators of source. In some cases, designers may also secure design patent protection of their original designs. However, at present, copyright protection typically does not extend to an entire article of apparel or fashion accessory.

The proposed legislation would create a three year term of copyright protection for an entire garment, accessory, or unique element of an original design.¹ A designer would own both the overall appearance of the protected work, as well as the currently uncopyrightable basic silhouette. Whereas the term of copyright protection of literary and other artistic works is generally the life of the author plus seventy years, the shorter term proposed in the IDPPPA is rooted in the theory that “the unique seasonality of the fashion industry,” with its often

fleeting trends, warrants a more restrictive approach to copyright protection.² This three-year term of protection will apply only to original designs created following ratification of the bill; anything created prior to its enactment will remain in the public domain.³

This bill represents the most recent development in a series of widely criticized bills that sought to enlarge the scope of copyright protection to include fashion designs. In some ways, the proposed legislation does address some of the criticisms of its predecessors. Among the most controversial deviations from earlier iterations of the bill is the IDPPPA's limitation of the scope of infringement to designs that are “substantially identical” to a copyrighted apparel item, meaning “an article of apparel which is so similar in appearance to be likely to be mistaken for the protected design, and contains only those differences in construction or design which are

THE IDPPPA IN A NUTSHELL

- > 3-year term of protection for entire garment or unique design element.
- > No registration requirement.
- > Designer would own overall appearance and basic silhouette.
- > Would apply only to original designs created after ratification of the bill.
- > Scope of infringement would capture “substantially identical” designs.
- > Would require a plaintiff to “plead with particularity” the facts underlying its infringement claim.
- > Statutory penalty for infringement would range from \$5000 to \$10,000.

merely trivial.”⁴ Moreover, the bill includes a pleading requirement that obliges plaintiffs seeking to enforce their rights to plead each element of a design infringement claim with particularity.⁵ Other ways in which the IDPPPA diverges include that it would not require registration as a prerequisite of protection; that it would limit the range of protectable designs by recognizing a broader scope of designs as falling into the public domain; that it would

impose a greater evidentiary burden on a plaintiff seeking to enforce its rights; and that it would provide for approximately one-fifth the maximum damages proposed in earlier bills.

However, while supporters of the IDPPPA contend that the proposed legislation will serve as a tool to curb design piracy in the fashion industry, many others believe that ratification of the bill may have far reaching unintended adverse consequences. Both sides of the debate were strongly represented in congressional testimony following the bill's introduction.⁶ Lazaro Hernandez, fashion designer and co-founder of Proenza Schouler, testified on behalf of the Council of Fashion Designers of America (CFDA) in support of the IDPPPA. Hernandez spoke of economic consequences that befall small fashion companies as a result of design piracy.⁷ Hernandez contends that by "exploit[ing] the loophole in American law," counterfeiters render fashion designers "helpless against copyists who prey on [their] ideas."⁸ Hernandez asserts that design piracy primarily targets smaller companies that do not have the strong trademarks of established designers who, he argued, can absorb losses arising from counterfeiting.⁹

According to Hernandez, the scope of existing copyright protection available to fashion designers discourages economic growth in the fashion industry.¹⁰ Hernandez testified:

Design piracy makes it difficult for a designer to move from higher priced fashion to developing affordable renditions for a wider audience. It also makes it impossible to sell collections to stores when the clothes have already been knocked off In other words, fashion designers want the chance to knock off their own designs before others do it for them.¹¹

Proponents argue that the bill will give designers greater latitude in licensing deals to

make fashion more accessible to consumers at a variety of price points and retailers.¹² Hernandez contends that consumers will have more choices in fashion as a result of greater innovation that he believes will result from expanded protection of fashion designs.¹³

Opponents to the bill believe that the bill will be detrimental to the fashion industry. Professor Kal Raustiala of University of California at Los Angeles School of Law and Professor Christopher Sprigman of University of Virginia School of Law testified against ratification of the bill. Raustiala and Sprigman first noted that the introduction of the IDPPPA was unnecessary, citing historical evidence that the fashion industry has continued to grow and prosper with the existing range of tools available to protect and enforce their intellectual property rights.¹⁴

Raustiala and Sprigman described the economic mechanisms through which copying encourages growth in the fashion industry and speeds up the rate of innovation.¹⁵ The professors explained:

Without copyright restrictions, designers are free to rework an appealing design and jump on board what they hope will be a money-making style. The result is the industry's most sacred concept: the trend. Copying creates trends, and trends are what sell fashion. Every season we see designers "take inspiration" from others...what is rarely recognized is that the cycle is accelerated by the freedom to copy The fashion industry's entire business cycle is driven forward by consumer demand for the new, and the entire process is fueled by copying.¹⁶

Banning this crucial incentive for innovation, opponents argue, will raise the price of apparel and harm consumers.¹⁷

Moreover, Raustiala and Sprigman testified that the unclear standard of liability included in the bill will require substantial interpretation by federal courts and overwhelm the litigation process for both designers and intermediaries.¹⁸ The phrase “substantially identical,” even if intended to be narrow, could be broadly interpreted in the judicial system, undermining the limited intentions of the bill.¹⁹

The testimony of the bill's opponents echoes the criticisms of many stakeholders in the fashion industry. Many retailers are said to oppose the bill due to concerns that they will be held responsible for unintentionally infringing designs.²⁰ The California Fashion Association (CFA), which represents thousands of garment designers and manufacturers, believes that the proposed legislation stands to benefit only the biggest name designers in the fashion industry.²¹ According to the CFA, the designers with the greatest resources would be able to enforce their rights under the IDPPPA to the detriment not only of pirates and counterfeiters, but also of smaller independent designers and manufacturers who lack the resources necessary to effect fair resolution of such legal disputes. In essence, the CFA warns that increased evidentiary requirements, ostensibly intended to limit the scope of available protection, would instead create a system in which rights are available only to designers who can afford to enforce them. Without meaningful limits on the legitimacy of the defendants against which such rights may be enforced, critics argue that the economic requirements of the IDPPPA may bar the entry of small designers without significant resources and newcomers to the fashion industry. And costs of litigation tend to increase costs to the ultimate consumer.

On October 12, 2011, the United States Chamber of Commerce released a letter in support of the IDPPPA.²² The letter praised the bill, calling it “a practical, narrowly tailored, approach to secure important yet limited intellectual property (IP) protection for truly unique, innovative, and original fashion designs.” The Chamber of Commerce was optimistic about the IDPPPA in its letter,

predicting that it “would incentivize the creativity of American designers and stimulate innovation in the fashion and apparel industry,” and that it “would deter rampant counterfeiting and piracy.” However, this support from the Chamber of Commerce was not without reservation, cautioning also that it would be “of paramount importance to ensure that legislation is carefully crafted so that it does not present compliance burdens or expose companies to the threat of frivolous law suits.”

The debate over the IDPPPA continues. In the coming months, Congress will have to decide whether to maintain the existing range of intellectual property protection available to fashion designers or to expand the scope of copyright protection as proposed in this highly controversial bill.

¹ See *The Innovative Design Protection & Piracy Prevention Act: Hearing on H.R. 2511 Before the Subcomm. on Intellectual Prop., Competition and the Internet*, 112th Cong., 1 (2011) (statement of Lazaro Hernandez, Fashion Designer & Co-Founder, Proenza Schouler).

² See *id.* at 5.

³ See *Innovative Design Protection and Piracy Prohibition Act (IDPPPA)*, H.R. 2511, 112th Cong. §2(b)(3)(B) (2011). See also *id.*

⁴ See IDPPPA, H.R. 2511, 112th Cong. §2(a)(10)(2011).

⁵ See *id.* at §2(e); *The Innovative Design Protection & Piracy Prevention Act: Hearing on H.R. 2511 Before the Subcomm. on Intellectual Prop., Competition and the Internet*, 112th Cong., 5 (2011) (statement of Jeannie Suk, Professor of Law, Harvard Law School).

⁶ See *Innovative Design Protection & Piracy Prevention Act: Hearing on H.R. 2511 Before the Subcomm. on Intellectual Prop., Competition and the Internet*, 112th Cong., at 2; Leonie Barrie, *US: Apparel firms back bill to combat design piracy*, Just-Style, Jul. 18, 2011, www.just-style.com/news/apparel-firms-back-bill-to-combat-design-piracy_id111625.aspx.

⁷ See *supra* note 1, at 2–3.

⁸ See *id.* at 2.

⁹ See *id.* at 2–4.

¹⁰ See *id.* at 4–5.

¹¹ See *id.* at 4.

¹² See *id.* at 5.

¹³ See *id.*

¹⁴ See *The Innovative Design Protection & Piracy Prevention Act: Hearing on H.R. 2511 Before the Subcomm. on Intellectual Prop., Competition and the Internet*, 112th Cong., 3–7 (2011) (statement of Kal Raustiala, Professor of Law, University of California at Los Angeles School of Law, and Christopher Sprigman, Professor of Law, University of Virginia School of Law).

¹⁵ See *id.* at 4.

¹⁶ See *id.*

¹⁷ See *id.* at 3–4.

¹⁸ See *supra* note 16, at 10–11.

¹⁹ See *id.*

²⁰ Karen Bolipata, *Retailer Concerns Threaten US Fashion Design Bill*, *Managing Copyright*, October 14, 2011.

²¹ Ryan Vaillancourt, *A Fashion Fight Over Knockoffs: Players Battle a Proposed Anti-Piracy Bill*, *Los Angeles Downtown News*, May 16, 2011.

²² Letter from R. Bruce Josten, Executive Vice President of Government Affairs, U.S. Chamber of Commerce, to Bob Goodlatte, Chairman of the Subcommittee on Intellectual Property, Competition and the Internet, U.S. House of Representatives (Oct. 12, 2011).