

## Will Fashion Designs Finally Be Clothed In “Copyright” Protection?

**For additional information or assistance, please contact your Vorys lawyer, or contact:**

**Cory M. Amron**  
cmamron@vorys.com  
202.467.8810

**William H. Oldach III**  
wholdach@vorys.com  
202.467.8880

**Richard S. Donnell**  
rsdonnell@vorys.com  
202.467.8856

**Christopher M. Ott**  
cmott@vorys.com  
202.467.8909

After many attempts, it appears that clothing designs may finally gain protection in the United States.

In 2010, Senator Charles Schumer introduced the Innovative Design Protection and Piracy Prevention Act (“IDPPPA”) to provide quasi-copyright protection to “*fashion designs*.” This is Senator Schumer’s fifth attempt to protect clothing designs, but it is the first time that such a bill has made it out of committee. A version of the bill has also been introduced in the House on July 13, 2011 by Representative Goodlatte with bipartisan co-sponsorship. Should Senator Schumer re-introduce a similar version of the bill in the Senate this term, it may also garner the bipartisan support necessary to pass, as well as the support of the American Apparel and Footwear Association, the Intellectual Property Owners Association, and the Council of Fashion Designers of America that it received last term. Many European countries already recognize property rights in fashion design, and this bill would bring the United States closer to providing the same type of protection.

### *Scope and Protection*

IDPPPA provides quasi-copyright protection to “*fashion designs*” for a non-renewable three-year term. “**Fashion design**” is defined as “*the appearance as a whole of an article of apparel, including its ornamentation*” and “**Apparel**” is defined as “*articles of men’s, women’s, or children’s clothing, including undergarments, outerwear, gloves,*

*footwear, and headgear; handbags, purses, wallets, tote bags, and belts; and eyeglass frames.*”

The design must include “*original elements of the article of apparel or the original arrangement or placement of original or non-original elements as incorporated in the overall appearance of the article of apparel,*” and must be the “*result of a designer’s own creative endeavor.*” The design must also provide a “*unique, distinguishable, non-trivial and non-utilitarian variation over prior designs for similar types of articles.*”

Currently, U.S. copyright law protects some design elements that are separable from the functional or utilitarian aspects of the article (for example, fabric designs and artwork on clothing can be protected). But IDPPPA’s standards of originality are more stringent and it will probably be more difficult to protect fashion designs against infringement than works currently covered under copyright law. If passed, the IDPPPA will not provide retroactive protection; thus any fashion designs previously introduced to the public will not be covered. Finally, there is no provision to register a fashion design and protection under this bill would begin the day a design is first made public.

### *Infringement*

An “**infringing article**” must be “*substantially identical in overall visual appearance to and as to the original elements of a protected*

*design.*” This is a much higher standard than under traditional copyright law, which states that an infringement may occur if the work is “*substantially similar.*” Note that if any article is created independently (in other words, the designer had no access to the other designer’s work and did not see it), it is not an infringing article. “**Substantially identical**” is defined as “an article of apparel which is so similar in appearance as *likely to be mistaken* for the protected design, and contains only those *differences in construction or design which are merely trivial.*” By requiring a likelihood of mistake, this definition injects the perspective of the customer into the analysis, much like in a trademark infringement. Also, we note that the most recent version of the bill removed a “secondary liability” clause for sellers of infringing clothing, implying that mere sellers of infringed articles who have not created, manufactured or imported, but merely purchased the fashion designs, will not be held liable.

While we do not know how the facts of individual cases might be interpreted if this bill passes, we can predict that the IDPPPA will change the landscape for designers and those who copy their designs.

### ***Highlights of the IDPPPA***

If the IDPPPA is enacted into law:

- Fashion designs will have non-renewable protection for three years.
- Protection extends to:
  - » articles of men’s, women’s, or children’s clothing (like undergarments, outerwear, gloves, footwear, and headgear);
  - » handbags, purses, wallets, tote bags, and belts; and
  - » eyeglass frames.
- Designs must be:
  - » the result of a designer’s own creative endeavor; and
  - » unique, distinguishable, non-trivial and non-utilitarian.
- All prior designs remain in the public domain.
- Accused designs must be “substantially identical” to protected designs to be found infringing.
- Claims must be pled with particularity and must establish:
  - » The infringed design is protected by this act;
  - » The defendant’s design infringes the protected design; and
  - » The protected design was publicized in such a way that it is reasonable to infer the defendant knew of its existence.

---

This client alert is for general information purposes and should not be regarded as legal advice.