

# Design Piracy Prohibition Act: The Proponents' View

*The recently proposed law extending copyright protection to fashion clothing and accessories will, if passed, give designers a means to protect themselves from pirated—or knockoff—copies of their work.*

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Today more than ever, it is innovation—not production—that fuels the American economy. At a time when the American fashion industry has become a world leader, the lack of protection of fashion designs is eroding innovation and hampering the competitiveness of American fashion designers, whose creations are daily and openly knocked off.

The development of new technologies in the last few years has made it considerably worse. Via the Internet, counterfeiters and pirates in China and in undeveloped low-wage countries have immediate access to all fashion creations the minute they are viewed by the American public. As a result of these new technologies, knock-off garments are now often marketed weeks before the originals.

Under our present law, the copyright of a fabric design is well-established and well-protected. Even though the design of a dress or a handbag entails similar artistic creation, in the United States, unlike in Europe or Japan, the law does not give any protection to fashion designers.

Furthermore, although counterfeits—pirated designs with a fake label—are prohibited, millions of pirated goods are allowed to enter this country every year without the label, only to have fake labels affixed later in the United States. Thus piracy constitutes the linchpin of counterfeiting—it is counterfeiting without the label—and our country stands alone as the Trojan Horse of global counterfeiting.

## The proposed law

The bill addresses the following issues:

- It adopts what, in 1998, Congress provided in the statutory protection of “useful designs” except that it only seeks three years’ protection instead of 10. (By way of comparison, Europe protects registered fashion designs for 25 years.)

- It applies exclusively to those original designs that are truly unique, and it recognizes the fact that inspiration and trends are part of the industry’s creative process. The law reads: “A design cannot be granted protection if it is staple or commonplace, standard, prevalent or ordinary, or different only in insignificant details or elements.”

- It will not protect any design that has been made public prior to the law’s enactment. Thus, it will prevent designers from claiming copyrights over styles and features invented by others.

- Its protection provides exclusions for sellers and distributors who act without knowledge, and there are other broad general exclusions for acts without general knowledge.

## The impact of the legislation

Opponents of this bill have raised the specter of a proliferation of lawsuits. Naturally no area of intellectual property has a bright line rule that distinguishes between what is a copy and what is not. In the case of fashion design, it is no different from a song or a book. That being said, there are several features of the bill that will avoid frivolous lawsuits, such as the exclusion of design lacking in originality, which will be made part of the public domain. The best answer to those afraid of a proliferation of lawsuits is to refer to what happens in Europe. The level of litigation there is extremely low because the highly protective legislation acts as a deterrent, and very few cases are brought to court.

Opponents of the bill have also argued that this new protection would stifle the growth of the U.S. industry. There is nothing further from the truth as demonstrated by the unique

level of creativity and prosperity of the fashion industry in France, Italy and Japan, where protection has been so strong for decades. It is also evident in this country; the design of jewelry has been protected for more than 50 years and that industry is thriving.

The theory that copying actually promotes innovation of designer clothing—because the more common a look becomes, the more the fashion-conscious seek out the next thing—is an insult to common sense as well as to the most elementary decency. To claim that piracy accelerates the fashion cycle is like saying that theft should be encouraged because, by necessity of replacement, it would increase the nation’s industrial output.

Some opponents of the bill have also claimed that this bill would have the effect of stifling the access of a large segment of consumers to lower-priced garments. In fact, great American fashion design is available at every price point. Mass retailers are increasingly licensing designers to create collections for their stores. This protects designers while making fashion available at affordable prices to consumers. The bill encourages this trend and seeks to balance the scales for us all.

Pirates, on the other hand, steal American designs, make low-quality copies in foreign factories with cheap labor and import them into the United States to compete with original American fashion. This is currently legal under U.S. law. The lack of protective laws in our country has made it a haven for piracy.

Piracy is counterfeiting without the label, and counterfeiting is a breeding ground for organized crime, while relying on child labor and funding terrorism. This, more than anything else, is why it is crucial to close this criminal loophole.

This bill must be enacted to protect our fashion industry, to promote American design, to harmonize U.S. law with that of our closest trade partners and to fight against counterfeiting. ■

*Alain Coblenca is the founder of the New York- and Paris-based law firm Coblenca & Associates and is counsel to the Council of Fashion Designers of America, which represents more than 300 designers of clothing and accessories. He helped draft the Design Piracy Prohibition Act. Comments and questions can be sent to [a.coblenca@coblenca.com](mailto:a.coblenca@coblenca.com) or (212) 593-9191.*