

The Design Piracy Prohibition Act, H.R. 5055

The Council of Fashion Designers of America has been leading efforts to change existing copyright laws to give greater protection to designers (along the line of what is provided in the European Union and in Japan).

Most industrialized nations provide legal protection for fashion designs. However, in the United States – the world’s leader in innovation and creativity – fashion designs are not protected by traditional intellectual property protections. Copyrights are not granted to apparel because articles of clothing, while both creative and functional, are considered “useful” as opposed to “artistic”. Design patents are intended to protect ornamental designs, but clothing rarely meets the criteria of patentability. Trademarks only protect brand names and logos, not the clothing itself.

Both young and renowned, American fashion designers suffer significantly from this lack of protection, as their newest and most original creations are imitated and duplicated literally hours after being presented to the public for the first time. As the chances of being rewarded for originality decline, young and emerging designers are discouraged from maximizing their creative efforts. Today’s digital flow of information facilitates these pirate actions more than ever. Trade cooperation with Europe is also affected; the EU is calling for equal protection of design in the United States.

The Design Piracy Prohibition Act protects designers by amending the Copyright Act to also include protections for fashion designs. Because the production life cycle for fashion designs is very short, this legislation similarly provides a very short period of protection that suits the industry – three years. This legislation further establishes damages for infringing a fashion design at the greater of \$250,000 or \$5 per copy.

Specific Language in HR 5055 is intended to make clear that in the case of fashion design, in order to infringe another design must be "closely and substantially similar in overall visual appearance" to a protected design. This means that it is not sufficient to constitute infringement if two designs are similar only in the inspiration of a common idea, or in general concept such as a fashion trend, or in particular elements to which protection is precluded because they are “staple or commonplace”. Moreover, the similarities must be in overall visual appearance; similarities in isolated components are not sufficient.

Trivial or minor differences in particulars will not suffice to avoid infringement; however, it is not necessary that the offending article be identical or near identical in order to infringe. A similarity in overall visual appearance that is not identical or near identical but that is both "close" and "substantially" similar will be infringing. A close and substantial similarity is one that so resembles the overall visual appearance of the protected design that it is readily recognizable as having been an appropriation of the protected design in its entirety. Of course, infringement by 'close and substantial' similarity will not be avoided by then adding features or other adaptations to the appropriated design."

After several trips by CFDA members to Washington and a recent hearing in which the Copyright Subcommittee of the House discussed the merits of H.R. 5055, there appears to be positive movement in favor of this legislation passing. The CFDA will continue to champion protection for fashion design.