

# Copyright of Fashion

by Maggie Armstrong, JD

## Are Fashion Designs protected under Copyright?

**No.** Under current law, the US Copyright Act does not protect fashion designs. There are certain elements of fashion design that can earn copyright protection, such as ornamental designs that could be considered sculptural or architectural works, or fabric patterns that could earn protection as a visual works. Additionally, fashion designers can trademark logos and designs, such as the overlapped “C”s of Chanel or the green-red-green stripe of Gucci. However, clothing and accessory designs are not eligible for copyright protection.

**Why not?** Thus far, Congress has not been convinced that fashion designs require copyright protection. In 1998, the **Digital Millennium Copyright Act** introduced copyright protection for designs, but limited it to the design of vessel hulls. Lawmakers were not persuaded that fashion designers are harmed by design knock-offs to the extent that they would benefit from, much less require, copyright protection.

## Will Fashion Designs ever be protected under Copyright?

**Maybe.** Since 2006, there have been five bills proposed in Congress to amend the Copyright Act to protect fashion designs. The most recent version, called the Innovative Design Protection Act (IDPA), introduced to the Senate on September 10, 2012 by Senator Charles Schumer (D-NY), is a companion bill to the Innovative Design Protection and Piracy Prevention Act, which was introduced into the House of Representatives in July of 2011.

These bills call for a **three-year protection term over new designs**, and would require proof that a copy is **substantially identical** to a protected design to prove infringement. Additionally, the IDPA would require a **21-day written notice** to a potential infringer before commencement of an infringement action. These bills and their predecessors have not had much luck getting past the House and Senate floors, and are not likely to become law, despite fervent advocacy from big-name fashion designers.

The IDPA was placed on the Senate Legislative Calendar under General Orders in December of 2012, which was the end of the 112<sup>th</sup> Congress. This means that it must be re-introduced in the new 113<sup>th</sup> Congress in order to be once again considered for passage into law.



## What will it take to convince Congress to protect fashion designs?

Congress currently believes that fashion designs are based mostly on functional concepts, which do not embody enough creativity or originality to earn copyright protection. If designers and members of the fashion industry can convince lawmakers that the rampant copying of fashion designs actually hurts designers, or that fashion design itself constitutes original creative expression, the Copyright Act may be amended to protect fashion designs.

## So, what if someone copies my designs?

Unfortunately, under current law, there isn't much you can do. Knocking off designer duds is a billion dollar industry that thrives on the copying of fashion designs (which is an economic argument against the aforementioned bills).

Call or write your US Senator and encourage them to support the Innovative Design Protection Act!

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