

Fashion Apparel Law Blog

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[The Innovative Design Protection and Privacy Prevention Act: Will Design Protection Be In Vogue in Congress?](#)

On August 6, 2010 Senator Charles Schumer (D-NY), introduced a bill entitled the [Innovative Design Protection and Piracy Prevention Act \("IDPPPA"\) \(S. 3728\)](#), which represents a compromise between the American Apparel & Footwear Association ("AAFA") and the Council of Fashion Designers of America ("CFDA") in an effort to afford protection to American designers for new and original fashion designs.^[1]

The new bill, which protects apparel, accessory designs and eyeglass frames, does not require registration of each design, as was the case with the previously unsuccessful Design Piracy Protection Act ("DPPA").^[2] The IDPPPA provides for a three-year term of protection to new and original fashion designs. Designs created prior to the enactment of the bill would be dedicated to the public domain. Designers have the burden of pleading the facts underlying the claim with particularity and must establish before trial that the design is wholly original and a "unique, distinguishable, non-trivial and non-utilitarian variation over prior designs." The designer also must establish that: (a) the accused design is "substantially identical;" (b) the defendant's accused design is so similar it is likely to be mistaken with the original protected design and "contains only those differences in construction or design which are merely trivial"; and (c) the defendant had the opportunity to have seen the design before it was released for public distribution. The presence or absence of color or colors or of a pictorial or graphic work imprinted on fabric shall not be considered by the finder of fact in determining whether a particular design is protectable or whether an infringement has occurred. The proposed law limits damages to a maximum fine of \$50,000 in the aggregate and \$1.00 per copy.

Neither consumers nor retailers may be held liable for inadvertently purchasing or selling unlawful copies. In addition, as with copyright law in general, the independent creation defense affords defendants a complete defense if the defendant can show the design was created independently. In addition, there is an exception for individuals who sew clothing or accessories for personal use or the use of a family member. These changes and modifications to the prior bills introduced were an attempt by Senator Schumer to forge a compromise and balance between advocates for the protection for American designers and retailers and manufacturers which voiced concerns that the previous DPPA would result in an outbreak of costly litigation and a multiplicity of design claims being asserted by competitors. Some argued that the DPPA ultimately would harm competition and make it more difficult for designers to create and protect

their original fashion designs.

It remains to be seen how this proposed legislation will fare in Congress and whether the IDPPPA will become a new effective law that protects American fashion designers.

[1] [See Link](#) for copy of S. 3728.

[2] [See Link](#) for August 10, 2007, "Senator Goes Forward With Latest Version of Design Privacy Prohibition Act."