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Fashion Designers: Legally Naked?

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With New York's Fashion Week upon us, the time is appropriate to examine the intellectual property protections available to some of the most prominent artists in popular culture: fashion designers. No one would seriously question the great artistic talents of many designers. Their imaginative, inventive, and daring creations and their lasting legacies have pushed artistic limits of the fashion world for decades. And yet, despite being undoubtedly artists in their craft, fashion designers do not enjoy the same protection in their work under current U.S. intellectual property laws that their artistic peers enjoy in the worlds of visual arts, film, music and dance.

Fashion designs do not fit neatly into a traditional intellectual property realm. Copyrights generally are not granted to apparel because articles of clothing are considered functional "useful articles," as opposed to non-utilitarian works of art. Design patents are intended to protect ornamental designs, but clothing rarely meets the demanding requirements of "novelty" and "non-obviousness" for patentability. Trademark law, while useful to protect brand names and logos, generally does not protect the clothing itself, and the Supreme Court has refused to extend trade dress protection to apparel designs.

This lack of copyright protection for fashion designers has in part created the phenomenon of "red carpet copycats": companies that hurriedly create and sell copies of the glamorous or bold garments worn by celebrities at red-carpet events. Knockoff goods are a huge part of the fashion industry, and have become common practice. The instantaneous nature of the internet and mobile camera phones has made fashion designs even more susceptible to immediate widespread display and copying.

Over the decades, Congress has gradually expanded the subject scope and duration (currently life plus 70 years) of federal copyright protection. However, Congress has not yet elected to include fashion products in the categories of works entitled to copyright protection. On December 1, 2010, the Senate Judiciary Committee passed a bill called the Innovative Design Protection and Piracy Prevention Act (IDPPPA), aimed at giving copyright protection to clothing designs. The bill was an updated version of the 2006 Design Piracy Prohibition Act, which had stalled in Congress. Unfortunately for designers, and despite strong support from groups like the Council of Fashion Designers of America and the American Apparel and Footwear Association, the IDPPPA bill is currently still pending in Congress. Further, the scope of its protection may not be as wide and strong as many fashion designers would like. Observers note that the bill is very narrow; it protects only truly new designs and the proposed "substantially identical" standard, similar to the definition of a trademark counterfeit, may potentially be circumvented by slight modifications in order to avoid infringement.

Given the limited intellectual property protections available to the fashion world, fashion designers have often attempted to expand the protections they do enjoy. The most recent and prominent example of this is being played out in the case of *Christian Louboutin S.A. vs. Yves Saint Laurent America Holding, Inc.*, currently pending in the U.S. Court of Appeals for the Second Circuit in New York City.

In this case, Louboutin has alleged that some of YSL's all-red shoes infringe Louboutin's trademark in the U.S. for his all-red lacquered "signature soles." What makes the *Louboutin* case particularly interesting is the artistic hook to the trademark. The district court's opinion denied Louboutin a preliminary injunction and seriously doubted whether a color should be trademarked in the fashion industry. The district court explained that color has a rather unique aesthetic functionality to the world of fashion, in that fashion designers use particular colors on their products not as a source indicator, but as an enhancing or attractive quality of the product. Comparing Louboutin's exclusive use of the color red on shoe soles to Picasso garnering a monopoly on the use of the color blue based on his "trademark" blue period, the district court concluded that the industry needs to use colors on outsoles without restriction to permit designers to make artistic choices in creating their designs. Relevant to the district court's opinion were Louboutin's apparent past admissions that he chose the red sole not purely as a source identifier, but also because of its eye-catching and seductive qualities.

The *Louboutin* case highlights the odd reality of intellectual property law and the pressure on fashion designers to frame their aesthetic or artistic choices, for which they are known and celebrated, merely as brand identifiers in order to secure intellectual property protection in their products. The ultimate outcome of the case will undoubtedly have great effect on both the fashion and legal worlds, and fashion designers are quite tuned in. For example, Louboutin was accompanied in the Second Circuit courtroom by Diane Von Furstenberg, renowned designer and president of the Council of Fashion Designers of America, a major advocate for stronger laws against copyright infringement in the fashion world.

If nothing else, the *Louboutin* case holds in balance the legal protection that they may either gain or lose as a result. It also underscores a need for more defined laws in fashion branding and design in the legislative arena, as opposed to the courts. Given the case's national prominence and the various recent congressional hearings regarding the IDPPA, that legislative change may soon be arriving.