

PRACTICAL ADVICE

FROM THE FASHION LAW PRACTICE GROUP



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Can “Fashion” Be Copyrighted? Why (and How) You Should Copyright Your Work

What Copyright Currently Protects

Copyright protects original, non-useful works of authorship fixed in a tangible medium of expression. The main obstacle for the fashion industry when seeking copyright registration is the “useful article” doctrine, which prohibits copyright protection for anything with a functional purpose. Because clothing is considered “inherently functional,” it cannot be given protection, no matter how un-functional you may feel four-inch stilettos may be. Under the useful article doctrine, only the “separable aesthetic and non-utilitarian aspect” of the clothing or fabric is given protection. Therefore, currently, there is only limited protection for purely non-functional fabric and clothing designs. These aesthetic elements, such as artwork applied to clothing, fabric and lace designs, are typically protected under the category of “Visual Arts.”

It is important to grasp that protection extends only to the expression of ideas, not the ideas themselves, because to allow the copyrighting of “useful” articles or ideas would hinder development and creativity. Because clothes are “useful articles” with intrinsic utilitarian function, clothing itself is not copyrightable. In contrast, fabric designs such as the artwork on a piece of clothing can be copyrighted if they are considered an original expression of an idea. It is the design embossed or imprinted on textiles or fabrics, as opposed to the style, shape or pattern of the finished garment itself, that is entitled to copyright protection. This means that designs or elements of a fashion may be copyrightable to the extent that the element can be conceptually or physically separated from the utilitarian nature of the article.

What Else Is Not Copyrightable?

In addition to utilitarian elements, familiar symbols, designs, common stripes or colors are not protected by copyright law because they lack originality. If complex enough, however, stripes may be considered original and creative enough for copyright protection. For example, a copyright registration was approved for a woven fabric with complex stripes made up of a variety of yarn sizes, types and colors that were then arranged to form parallel stripes of random widths, colors, bulk and texture creating a unique rich, three-dimensional quality.

Some examples of items recently found to be protected by copyright include:

- Fabric designs such as artwork on clothing
- Designs that can be considered a “writing”
- Fabric designer’s arrangement of stylized designed elements against a complex background in fabric design pattern
- Design elements that reflect the designer’s artistic judgment
- An ornate belt buckle design

Why Secure a Copyright? The Benefits of Copyright Protection

Under U.S. copyright law, an individual who creates a copyrightable work owns the copyright in that work from the moment of its creation. It is not necessary to prepare a government filing or application to invoke this right. As soon as an original, copyrighted work is “fixed” in a tangible medium, the work is protected by federal copyright law, and the owner can claim a copyright in the work. It is necessary, however, to have federal

copyright registration in order to sue someone for infringing your copyright. Owning a copyrightable work that has not been registered is like having an unenforceable right. Copyright law therefore provides a number of incentives, including the right to sue for infringement, to encourage you to register your copyright.

Advantages of Registering Your Copyright:

- It creates and establishes a searchable public record of the facts of the copyright (which protects against infringement and also provides an avenue for those interested in obtaining a license to easily determine the copyright’s owner).
- It is a requirement for bringing an infringement suit for work originating in the U.S. (with certain exceptions).
- It is a requirement for obtaining statutory damages. Works registered within three months after publication are eligible for statutory damages and attorney’s fees in successful litigation. (Otherwise, only an award of actual damages and profits is available to the copyright owner, and actual damages or the infringer’s profits can be difficult to prove.) Thus, registration may be the only means of recovering monetary damages.
- It shifts payment of your attorney’s fees incurred in bringing the infringement suit to the infringer, provided registration is made within three months after publication.
- It creates a presumption of validity. If registration occurs within five years of publication, it is considered prima facie evidence of the validity of the copyright facts in a court of law.

- It provides protection against importation of infringing copies. Registration allows the owner of the copyright to record the registration with the U.S. Customs Service for protection against the importation of infringing copies.
- It is useful for commercial purposes. Registering provides a certificate of registration to the copyright owner, which is sometimes required in licensing and other business transactions. Additionally, a registration may be considered an asset that increases the value of the company that owns it. It may add commercial value to ongoing business relationships and to the sale of assets.
- It provides a negotiating tool. If the copyright owner attempts to negotiate with an infringer before filing suit, providing a copy of the registration certificate will demonstrate that the owner is in a position to immediately file suit to enforce their copyright and thus strengthens the owner's bargaining position and providing valuable leverage.

What New Legislation Being Considered Before Congress Suggests

On April 30, 2009, the Design Piracy Protection Act (DPPA) was introduced into the Senate. This new bill seeks to expand a recent amendment to the Copyright Act that provided three-year protection to "vessel hull designs." Similar to fashion design, which exists "in" a utilitarian article of clothing, the (vessel hull) amendment provided copyright protection to a design embodied "in" a useful article, a boat. Proponents of the copyright protection for fashion design rely on this analogy to support their argument for protection of fashion design. If this passes, fashion designs will enjoy much greater protection, and the risk of infringing others' designs will also be greater.

How To Secure a Copyright

Procedure

If a registration is to be enforced, it is important that the copyright application be filled out correctly. There are several potential pitfalls, so it is advisable to seek legal advice in setting up a copyright

registration program. The Copyright Office (www.copyright.gov) web site is also a valuable resource.

Submit the Following:

- A properly completed application Form VA;
- The filing fee; and
- A "deposit" of identifying material to:
Library of Congress
Copyright Office
101 Independence Avenue, S.E.
Washington, DC 20559-6000

Requirements for Deposit of Identifying Material

The deposit of artwork for clothing (such as embroidery designs, heat transfers or decals) should consist of reproductions or renderings of the work in the form of photographic prints, transparencies, photocopies or drawings that show the complete copyrightable content of the work being registered.

The deposit of **fabric and textiles** that have been "published" should consist of one complete copy or swatch showing the design repeat and the copyright notice, if any. If the fabric has not been "published," in addition to the above, the deposit may consist of a two-dimensional reproduction or rendering of the work in the form of photographic prints, transparencies, photocopies or drawings that show the complete copyrightable content of the work being registered.

Cost

A basic application costs \$35, if filed online via the Electronic Copyright Office (ECO); \$50 if filed using Form CO which utilizes 2-D bar scanning technology; or \$65 if filed with a traditional paper form. Fees may change so visit www.copyright.gov for the latest information.

Time

Your copyright registration becomes effective the day the Copyright Office receives your application in acceptable form. It takes six to eight months from

filing of application to the issuance of registration, but the registration is effective as of the date the Copyright Office receives all the required elements in acceptable form.

Length of Protection

In general, if the work was created after Jan. 1, 1978, the copyright lasts for 70 years after the author's death. When there are joint authors, it is 70 years after the last author's death. For works for hire, the copyright lasts 95 years from publication, or 120 years from creation, whichever is shorter.

How To Enforce Your Copyright

The only meaningful way to enforce your copyright against infringement may be to bring or threaten to bring a lawsuit. Otherwise, the copyright is "without teeth." Threatening suit may give you leverage to demand the infringer cease and desist the infringement and may bring the parties to the table to negotiate a compromise or settlement before heading to litigation. If the infringer refuses to stop copying your protected item and refuses to negotiate a compromise such as a licensing agreement, initiating litigation may be your best and only option. Legal advice should be sought before initiating any contact with an infringer, however, because a recipient of a cease and desist letter could commence litigation seeking a declaration on non-infringement. A law firm with experience in enforcing intellectual property rights can help you weigh your options and initiate communications with the other side.

How To Avoid Infringing Others

With design inspiration said to be in the air and design adaptation common industry practice, it is easy to see how a designer may be accused of copying the design of another. While options are limited and differ for each designer, some affirmative steps include: documenting the source of your inspiration, licensing, showing the new and original piece to a lay person or obtaining insurance. Additionally, a well-educated design staff is helpful in reducing your risk.

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