

CALIFORNIA FASHION ASSOCIATION

444 South Flower Street, 34th Floor, Los Angeles, CA 90071 213.688.6288 fax 213.688.6290

Email: info@calfashion.org Website: www.californiafashionassoc.org

June, 2007

SUMMARY: *Can Fashion Be Copyrighted?*

The California Fashion Association implemented two sessions of the Apparel Industry Speakers Platform featuring panel discussions addressing the copyright issue for the apparel and textile industry, and the potential effects of HR 2033, currently in the U.S. House of Representatives sub-committee.

The discussions focused on analyzing the debate over what is copyrightable and what can be done to protect a company from copyright infringement. There is a clear legal difference between trademark and copyright. Trademark covers brand names, labels and distinctive patterns such as logos, while Copyright covers original works of authorship and creativity.

Currently, garment design *cannot* be protected as it is considered “useful”. However, the actual art work of a design can be copyrighted, even before the garment has been made.

Legislation is now being brought to government committees by members of New York industry associations, trying to protect garment design.

Current law leaves the “ordinary observer” or lay person as the designator of guilt or innocence in deciding if one design looks like another or if there is “consumer confusion”. Most IPR law suits are settled out of court, for reasons of adverse publicity, time, and the lack of clarity of existing laws. At this time, if a case does go to trial and the judge sides with the plaintiff, the defendant must also pick up the costs for lawyer’s fees on both sides as well as the cost of the settlement. The current court judgments are based on three criteria: (i) Is there a dilution of the brand, (ii) damage to the plaintiff’s sales, and (iii) can the consumer be confused by the copy.

Various methods to protect a company from litigation include:

- Document the source of design materials purchased from another entity
- Apply for an in-house copyright on designs you used
- Sufficient oversight on the current marketplace; know what is ‘around’
- Have contracts that indemnify the manufacturer/user
- Buy an insurance policy that covers costs for litigation and settlements
- Show the new and original piece to a lay person

Effects of the industry: As one of L.A.’s foremost designers states, “ My business is manufacturing clothing and spending my time on the next collection; I shouldn’t have to be worrying about where I get my inspiration”.

Unfortunately, the current legal framework is such that more and more time is spent documenting ‘originality’, and protecting one’s business from unwarranted and unnecessary litigation. It will be getting worse before it gets better if current U.S. lawmakers continue to listen to some NY and EU designers who are proponents of ‘total’ design protection, begging the question of defining ‘inspiration vs. originality”.

In the “piracy paradox” copying makes trends saturate the market quickly, driving fashion to search out newer looks. If copying were illegal, the fashion cycle would occur very slowly, if at all. Copying can harm individual designers, but Congress should protect industries only when piracy stymies - rather than encourages - innovation.”