
The New REPUBLIC

HOW COPYRIGHT LAW COULD KILL THE FASHION INDUSTRY.

Fashion Victims

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Not too long ago the world's fashion capital was Paris, and a small group of Parisian designers set trends for well-dressed people around the globe. Today, however, the locus is New York, and the American fashion industry is widely recognized as a world leader. So it's not surprising that New York Senator Chuck Schumer would take an interest in haute couture.

Just before the congressional recess this month, Schumer introduced a bill that he claims would help the U.S. fashion industry by extending copyright law to cover fashion designs. Copyright law currently protects certain embellishments, and trademark law protects labels as well as logos, such as distinctive pocket stitching on jeans. But design--the cut, shape, or overall appearance of a dress or shirt--is not currently protected. A similar bill, titled the Design Piracy Prohibition Act, is under consideration in the House. Like Schumer's legislation, it would outlaw designs that are "substantially similar" to registered designs.

It may strike many as strange that fashion design is not already covered by copyright law. Many creative industries argue, quite persuasively, that their success requires a certain level of intellectual property protection. Without it, innovation would grind to a halt; creators will not engage in creation if they fear others will steal their work.

But fashion designs never have been protected by intellectual property law and, as it turns out, for good reason. Unlike in the music, film, or publishing industries, copying of fashion designs has never emerged as a threat to the survival of the fashion industry. Indeed, growth and creativity in the fashion industry *depend* on copying.

Why is that? The answer lies in something that we all know instinctively about fashion. As Shakespeare put it in *Much Ado About Nothing*, "The fashion wears out more apparel than the man." That is, people don't buy new clothes

because they need them--they buy them to keep up with the latest style.

The fashion industry responds to our desires by churning out new designs at a rapid clip. But fashion designers don't maroon themselves on a desert island to create their work. Designers pay close attention to the work of their peers, and they love to mine the past for ideas. When they see something that they like, they copy it--or, in the argot of the industry, they "reference" it. That doesn't mean that they copy point-for-point, although sometimes they do. Much more often, designers take an element of an attractive design, work with it, and turn out something that is in the same style but not identical. Flip through any major fashion glossy and you will see what we mean. In the fashion industry's copyright-free zone, designers and fashion firms are free to take a design they like, put their own creative spin on it, and jump on board what they hope will be a money-maker.

The result is the fashion industry's most sacred concept: the trend. Copying makes trends, and trends are what sell fashion. Every season we see fashion firms "taking inspiration" from others' designs. And every season we see trends catch on and have a moment of wide appeal, only soon to become overexposed and then die. This fashion cycle is familiar; what is less commonly recognized is that it is accelerated by longstanding legal rules that allow designers to mimic, play with, and improve upon their competitors' designs.

By allowing the copying of attractive designs, current law fits well with the industry's basic mission--to set new fashion trends and then convince us to chase them. And the trend-driven copying of attractive designs ensures that those designs diffuse rapidly in the marketplace. This, in turn, makes the early adopters want a new style, because nothing is less attractive than seeing your carefully chosen clothes on the backs of the hoi polloi. In short, copying is the engine that drives the fashion cycle.

Schumer's bill would kill that engine. What works to protect the creative process in film and music will have the opposite effect on the runway. Introduce copyright law into the fashion industry's creative process, and you could ruin a good thing.

To understand exactly how the Schumer bill would affect fashion innovation, it helps to review one basic point about copyright law: It does not simply prohibit "exact" copies. Rather, copyright law makes unlawful any use of a copyrighted work that results in a new work that is "substantially similar" to the old. And the standard for substantial similarity is quite low--over many years, in a large number of cases, federal courts have found copyright infringement in the case of books, photographs, music, and other media where no one would mistake the second work for the first.

If Schumer's bill passes, we will see cease-and-desist letters flying about, and even a flurry of expensive, time-consuming lawsuits with designers arguing over who was the originator of every new trend--and more frighteningly, judges and juries deciding who is right. That's not good for creativity; it's just a distraction. And it's an especially silly distraction in the fashion industry, where every new fashion draws inspiration from fashions that came before. The entire industry engages in recycling, recontextualizing, and reinvigorating the past.

Recognition of this fact is one of the reasons fashion design remains, after 218 years of intellectual property law, largely unprotected in the United States. Of the many previous fashion design bills introduced in Congress, not a single one has ever been enacted. And the industry itself is divided on the current bill; while the New York-based Council of Fashion Designers of America is supporting it, the Los Angeles-based California Fashion Association is lobbying against it.

There's no doubt that some apparel designers suffer because of excessive copying. But the industry as a whole is doing terrifically well--it is a \$350 billion a year industry--as Schumer himself noted while promoting the bill. Upsetting the fashion industry's successful model of creativity makes little sense. It's a cure that is worse than the disease.

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