

# Calendar No. 674

111<sup>TH</sup> CONGRESS  
2<sup>D</sup> SESSION

# S. 3728

To amend title 17, United States Code, to extend protection to fashion design, and for other purposes.

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## IN THE SENATE OF THE UNITED STATES

AUGUST 5, 2010

Mr. SCHUMER (for himself, Mr. HATCH, Mr. GRAHAM, Mr. WHITEHOUSE, Mrs. GILLIBRAND, Ms. SNOWE, Mrs. BOXER, Mrs. FEINSTEIN, Mr. CARDIN, Mr. KOHL, and Mrs. HUTCHISON) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

DECEMBER 6, 2010

Reported by Mr. LEAHY, with an amendment

[Strike out all after the enacting clause and insert the part printed in italic]

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## A BILL

To amend title 17, United States Code, to extend protection to fashion design, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Innovative Design Pro-  
5 tection and Piracy Prevention Act”.

1 **SEC. 2. AMENDMENTS TO TITLE 17, UNITED STATES CODE.**

2 (a) **DESIGNS PROTECTED.**—Section 1301 of title 17,  
3 United States Code, is amended—

4 (1) in subsection (a), by adding at the end the  
5 following:

6 “(4) **FASHION DESIGN.**—A fashion design is  
7 subject to protection under this chapter.”;

8 (2) in subsection (b)—

9 (A) in paragraph (2), by inserting “, or an  
10 article of apparel,” after “plug or mold”; and

11 (B) by adding at the end the following:

12 “(7) A ‘fashion design’—

13 “(A) is the appearance as a whole of an  
14 article of apparel, including its ornamentation;  
15 and

16 “(B) includes original elements of the arti-  
17 cle of apparel or the original arrangement or  
18 placement of original or non-original elements  
19 as incorporated in the overall appearance of the  
20 article of apparel that—

21 “(i) are the result of a designer’s own  
22 creative endeavor; and

23 “(ii) provide a unique, distinguishable,  
24 non-trivial and non-utilitarian variation  
25 over prior designs for similar types of arti-  
26 cles.

1           “(8) The term ‘design’ includes fashion design,  
2           except to the extent expressly limited to the design  
3           of a vessel.

4           “(9) The term ‘apparel’ means—

5                   “(A) an article of men’s, women’s, or chil-  
6                   dren’s clothing, including undergarments, outer-  
7                   wear, gloves, footwear, and headgear;

8                   “(B) handbags, purses, wallets, duffel  
9                   bags, suitcases, tote bags, and belts; and

10                   “(C) eyeglass frames.

11           “(10) In the case of a fashion design, the term  
12           ‘substantially identical’ means an article of apparel  
13           which is so similar in appearance as to be likely to  
14           be mistaken for the protected design, and contains  
15           only those differences in construction or design  
16           which are merely trivial.”; and

17           (3) by adding at the end the following:

18           “(e) **RULE OF CONSTRUCTION.**—In the case of a  
19           fashion design under this chapter, those differences or  
20           variations which are considered non-trivial for the pur-  
21           poses of establishing that a design is subject to protection  
22           under subsection (b)(7) shall be considered non-trivial for  
23           the purposes of establishing that a defendant’s design is  
24           not substantially identical under subsection (b)(10) and  
25           section 1309(e).”.

1 (b) DESIGNS NOT SUBJECT TO PROTECTION.—Sec-  
 2 tion 1302(5) of title 17, United States Code, is amend-  
 3 ed—

4 (1) by striking “(5)” and inserting “(5)(A) in  
 5 the case of a design of a vessel hull,”;

6 (2) by striking the period and inserting “; or”;  
 7 and

8 (3) by adding at the end the following:

9 “(B) in the case of a fashion design, embodied  
 10 in a useful article that was made public by the de-  
 11 signer or owner in the United States or a foreign  
 12 country before the date of enactment of this chapter  
 13 or more than 3 years before the date upon which  
 14 protection of the design is asserted under this chap-  
 15 ter.”.

16 (c) REVISIONS, ADAPTATIONS, AND REARRANGE-  
 17 MENTS.—Section 1303 of title 17, United States Code, is  
 18 amended by adding at the end the following: “The pres-  
 19 ence or absence of a particular color or colors or of a pic-  
 20 torial or graphic work imprinted on fabric shall not be con-  
 21 sidered in determining the protection of a fashion design  
 22 under section 1301 or 1302 or in determining infringe-  
 23 ment under section 1309.”.

24 (d) TERM OF PROTECTION.—Section 1305(a) of title  
 25 17, United States Code, is amended to read as follows:

1       “(a) IN GENERAL.—Subject to subsection (b), the  
2 protection provided under this chapter—

3           “(1) for a design of a vessel hull, shall continue  
4 for a term of 10 years beginning on the date of the  
5 commencement of protection under section 1304;  
6 and

7           “(2) for a fashion design, shall continue for a  
8 term of 3 years beginning on the date of the com-  
9 mencement of protection under section 1304.”.

10       (e) INFRINGEMENT.—Section 1309 of title 17,  
11 United States Code, is amended—

12           (1) in subsection (e)—

13               (A) by inserting “offer for sale, advertise,”  
14 after “sell,”; and

15               (B) by inserting “either actual or reason-  
16 ably inferred from the totality of the cir-  
17 cumstances,” after “created without knowl-  
18 edge”;

19           (2) by amending subsection (e) to read as fol-  
20 lows:

21       “(e) INFRINGING ARTICLE DEFINED.—

22           “(1) IN GENERAL.—As used in this section, an  
23 ‘infringing article’ is any article the design of which  
24 has been copied from a design protected under this  
25 chapter, or from an image thereof, without the con-

1 sent of the owner of the protected design. An in-  
 2 fringing article is not an illustration or picture of a  
 3 protected design in an advertisement, book, peri-  
 4 odical, newspaper, photograph, broadcast, motion  
 5 picture, or similar medium.

6 “(2) VESSEL HULL DESIGN.—In the case of a  
 7 design of a vessel hull, a design shall not be deemed  
 8 to have been copied from a protected design if it is  
 9 original and not substantially similar in appearance  
 10 to a protected design.

11 “(3) FASHION DESIGN.—In the case of a fash-  
 12 ion design, a design shall not be deemed to have  
 13 been copied from a protected design if that design—

14 “(A) is not substantially identical in overall  
 15 visual appearance to and as to the original ele-  
 16 ments of a protected design; or

17 “(B) is the result of independent cre-  
 18 ation.”; and

19 (3) by adding at the end the following:

20 “(h) SECONDARY LIABILITY.—The doctrines of sec-  
 21 ondary infringement or secondary liability that are applied  
 22 in actions under chapter 5 of this title apply to the same  
 23 extent to actions under this chapter. Any person who is  
 24 liable under either such doctrine under this chapter is sub-  
 25 ject to all the remedies provided under this chapter, in-

1 eluding those attributable to any underlying or resulting  
2 infringement.

3 “(i) HOME SEWING EXCEPTION.—

4 “(1) IN GENERAL.—It is not an infringement of  
5 the exclusive rights of a design owner for a person  
6 to produce a single copy of a protected design for  
7 personal use or for the use of an immediate family  
8 member, if that copy is not offered for sale or use  
9 in trade during the period of protection.

10 “(2) RULE OF CONSTRUCTION.—Nothing in  
11 this subsection shall be construed to permit the pub-  
12 lication or distribution of instructions or patterns for  
13 the copying of a protected design.”.

14 (f) APPLICATION FOR REGISTRATION.—Section  
15 1310(a) of title 17, United States Code, is amended—

16 (1) by striking “Protection under this chapter”  
17 and inserting “In the case of a design of a vessel  
18 hull, protection under this chapter”; and

19 (2) by adding “Registration shall not apply to  
20 fashion designs.” after “first made public.”.

21 (g) REMEDY FOR INFRINGEMENT.—Section 1321 of  
22 title 17, United States Code, is amended—

23 (1) by striking subsection (a) and inserting the  
24 following:

25 “(a) IN GENERAL.—

1           “(1) VESSEL HULL.—In the case of a vessel  
2 hull, the owner of a design is entitled, after issuance  
3 of a certificate of registration of the design under  
4 this chapter, to institute an action for any infringe-  
5 ment of the design.

6           “(2) FASHION DESIGN.—In the case of a fash-  
7 ion design, the owner of a design is entitled to insti-  
8 tute an action for any infringement of the design  
9 after the design is made public under the terms of  
10 section 1310(b) of this chapter.”; and

11           (2) by adding at the end the following:

12           “(e) PLEADING REQUIREMENT FOR FASHION DE-  
13 SIGNS.—

14           “(1) IN GENERAL.—In the case of a fashion de-  
15 sign, a claimant in an action for infringement shall  
16 plead with particularity facts establishing that—

17                   “(A) the design of the claimant is pro-  
18 tected under this chapter;

19                   “(B) the design of the defendant infringes  
20 upon the protected design as described under  
21 section 1309(e); and

22                   “(C) the protected design or an image  
23 thereof was available in such location or loca-  
24 tions, in such a manner, and for such duration  
25 that it can be reasonably inferred from the to-



1           tality of the surrounding facts and cir-  
 2           cumstances that the defendant saw or otherwise  
 3           had knowledge of the protected design.

4           “(2) CONSIDERATIONS.—In considering wheth-  
 5           er a claim for infringement has been adequately  
 6           pleaded, the court shall consider the totality of the  
 7           circumstances.”.

8           (h) PENALTY FOR FALSE REPRESENTATION.—Sec-  
 9           tion 1327 of title 17, United States Code, is amended—

10           (1) by inserting “or for purposes of obtaining  
 11           recovery based on a claim of infringement under this  
 12           chapter” after “registration of a design under this  
 13           chapter”;

14           (2) by striking “\$500” and inserting “5,000”;  
 15           and

16           (3) by striking “\$1,000” and inserting  
 17           “\$10,000”.

18           (i) NONAPPLICABILITY OF ENFORCEMENT BY  
 19           TREASURY AND POSTAL SERVICE.—Section 1328 of title  
 20           17, United States Code, is amended—

21           (1) in subsection (a), in the first sentence, by  
 22           striking “The Secretary” and inserting “In the case  
 23           of designs of vessel hulls protected under this chap-  
 24           ter, the Secretary”;

1           (2) in subsection (b), in the first sentence, by  
 2           striking “Articles” and inserting “In the case of de-  
 3           signs of vessel hulls protected under this chapter, ar-  
 4           ticles”; and

5           (3) by adding at the end the following:

6           “(e) NONAPPLICABILITY.—This section shall not  
 7           apply to fashion designs protected under this chapter.”.

8           (j) COMMON LAW AND OTHER RIGHTS UNAF-  
 9           PECTED.—Section 1330 of title 17, United States Code,  
 10          is amended—

11           (1) in paragraph (1), by striking “or” after the  
 12          semicolon;

13           (2) in paragraph (2), by striking the period and  
 14          inserting “; or”; and

15           (3) by adding at the end the following:

16           “(3) any rights that may exist under provisions  
 17          of this title other than this chapter.”.

18          **SEC. 3. EFFECTIVE DATE.**

19           This Act and the amendments made by this Act shall  
 20          take effect on the date of enactment of this Act.

21          **SECTION 1. SHORT TITLE.**

22           *This Act may be cited as the “Innovative Design Pro-*  
 23          *tection and Piracy Prevention Act”.*

1 **SEC. 2. AMENDMENTS TO TITLE 17, UNITED STATES CODE.**

2 (a) *DESIGNS PROTECTED.*—Section 1301 of title 17,  
3 *United States Code, is amended—*

4 (1) *in subsection (a), by adding at the end the*  
5 *following:*

6 “(4) *FASHION DESIGN.*—*A fashion design is sub-*  
7 *ject to protection under this chapter.”;*

8 (2) *in subsection (b)—*

9 (A) *in paragraph (2), by inserting “, or an*  
10 *article of apparel,” after “plug or mold”; and*

11 (B) *by adding at the end the following:*

12 “(7) *A ‘fashion design’—*

13 “(A) *is the appearance as a whole of an ar-*  
14 *ticle of apparel, including its ornamentation;*  
15 *and*

16 “(B) *includes original elements of the arti-*  
17 *cle of apparel or the original arrangement or*  
18 *placement of original or non-original elements as*  
19 *incorporated in the overall appearance of the ar-*  
20 *ticle of apparel that—*

21 “(i) *are the result of a designer’s own*  
22 *creative endeavor; and*

23 “(ii) *provide a unique, distinguishable,*  
24 *non-trivial and non-utilitarian variation*  
25 *over prior designs for similar types of arti-*  
26 *cles.*

1           “(8) *The term ‘design’ includes fashion design,*  
2           *except to the extent expressly limited to the design of*  
3           *a vessel.*

4           “(9) *The term ‘apparel’ means—*

5                   “(A) *an article of men’s, women’s, or chil-*  
6                   *dren’s clothing, including undergarments, outer-*  
7                   *wear, gloves, footwear, and headgear;*

8                   “(B) *handbags, purses, wallets, tote bags,*  
9                   *and belts; and*

10                   “(C) *eyeglass frames.*

11           “(10) *In the case of a fashion design, the term*  
12           *‘substantially identical’ means an article of apparel*  
13           *which is so similar in appearance as to be likely to*  
14           *be mistaken for the protected design, and contains*  
15           *only those differences in construction or design which*  
16           *are merely trivial.’; and*

17           (3) *by adding at the end the following:*

18           “(c) *RULE OF CONSTRUCTION.—In the case of a fash-*  
19           *ion design under this chapter, those differences or vari-*  
20           *ations which are considered non-trivial for the purposes of*  
21           *establishing that a design is subject to protection under sub-*  
22           *section (b)(7) shall be considered non-trivial for the pur-*  
23           *poses of establishing that a defendant’s design is not sub-*  
24           *stantially identical under subsection (b)(10) and section*  
25           *1309(e).’.*

1       **(b) DESIGNS NOT SUBJECT TO PROTECTION.**—Section  
2 1302(5) of title 17, United States Code, is amended—

3           (1) by striking “(5)” and inserting “(5)(A) in  
4 the case of a design of a vessel hull,”;

5           (2) by striking the period and inserting “; or”;  
6 and

7           (3) by adding at the end the following:

8           “(B) in the case of a fashion design, embodied in  
9 a useful article that was made public by the designer  
10 or owner in the United States or a foreign country  
11 before the date of enactment of this chapter or more  
12 than 3 years before the date upon which protection of  
13 the design is asserted under this chapter.”.

14       **(c) REVISIONS, ADAPTATIONS, AND REARRANGE-**  
15 **MENTS.**—Section 1303 of title 17, United States Code, is  
16 amended by adding at the end the following: “The presence  
17 or absence of a particular color or colors or of a pictorial  
18 or graphic work imprinted on fabric shall not be considered  
19 in determining the protection of a fashion design under sec-  
20 tion 1301 or 1302 or in determining infringement under  
21 section 1309.”.

22       **(d) TERM OF PROTECTION.**—Section 1305(a) of title  
23 17, United States Code, is amended to read as follows:

24       “(a) **IN GENERAL.**—Subject to subsection (b), the pro-  
25 tection provided under this chapter—

1           “(1) for a design of a vessel hull, shall continue  
2 for a term of 10 years beginning on the date of the  
3 commencement of protection under section 1304; and

4           “(2) for a fashion design, shall continue for a  
5 term of 3 years beginning on the date of the com-  
6 mencement of protection under section 1304.”.

7           (e) *INFRINGEMENT*.—Section 1309 of title 17, United  
8 States Code, is amended—

9           (1) in subsection (c)—

10           (A) by inserting “offer for sale, advertise,”  
11 after “sell,”; and

12           (B) by inserting “either actual or reason-  
13 ably inferred from the totality of the cir-  
14 cumstances,” after “created without knowledge”;

15           (2) by amending subsection (e) to read as fol-  
16 lows:

17           “(e) *INFRINGEMENT ARTICLE DEFINED*.—

18           “(1) *IN GENERAL*.—As used in this section, an  
19 ‘infringing article’ is any article the design of which  
20 has been copied from a design protected under this  
21 chapter, or from an image thereof, without the consent  
22 of the owner of the protected design. An infringing ar-  
23 ticle is not an illustration or picture of a protected  
24 design in an advertisement, book, periodical, news-

1     *paper, photograph, broadcast, motion picture, or*  
2     *similar medium.*

3             “(2) *VESSEL HULL DESIGN.*—*In the case of a de-*  
4     *sign of a vessel hull, a design shall not be deemed to*  
5     *have been copied from a protected design if it is origi-*  
6     *nal and not substantially similar in appearance to a*  
7     *protected design.*

8             “(3) *FASHION DESIGN.*—*In the case of a fashion*  
9     *design, a design shall not be deemed to have been cop-*  
10    *ied from a protected design if that design—*

11             *“(A) is not substantially identical in overall*  
12             *visual appearance to and as to the original ele-*  
13             *ments of a protected design; or*

14             *“(B) is the result of independent creation.”;*  
15             *and*

16             *(3) by adding at the end the following:*

17             “(h) *HOME SEWING EXCEPTION.*—

18             *“(1) IN GENERAL.*—*It is not an infringement of*  
19     *the exclusive rights of a design owner for a person to*  
20     *produce a single copy of a protected design for per-*  
21     *sonal use or for the use of an immediate family mem-*  
22     *ber, if that copy is not offered for sale or use in trade*  
23     *during the period of protection.*

24             “(2) *RULE OF CONSTRUCTION.*—*Nothing in this*  
25     *subsection shall be construed to permit the publication*

1        *or distribution of instructions or patterns for the*  
2        *copying of a protected design.”.*

3        (f) *APPLICATION FOR REGISTRATION.*—Section  
4        *1310(a) of title 17, United States Code, is amended—*

5                (1) *by striking “Protection under this chapter”*  
6                *and inserting “In the case of a design of a vessel hull,*  
7                *protection under this chapter”;* and

8                (2) *by adding “Registration shall not apply to*  
9                *fashion designs.” after “first made public.”.*

10        (g) *REMEDY FOR INFRINGEMENT.*—Section 1321 of  
11        *title 17, United States Code, is amended—*

12                (1) *by striking subsection (a) and inserting the*  
13                *following:*

14                “(a) *IN GENERAL.*—

15                        “(1) *VESSEL HULL.*—*In the case of a vessel hull,*  
16                        *the owner of a design is entitled, after issuance of a*  
17                        *certificate of registration of the design under this*  
18                        *chapter, to institute an action for any infringement*  
19                        *of the design.*

20                        “(2) *FASHION DESIGN.*—*In the case of a fashion*  
21                        *design, the owner of a design is entitled to institute*  
22                        *an action for any infringement of the design after the*  
23                        *design is made public under the terms of section*  
24                        *1310(b) of this chapter.”;* and

25                (2) *by adding at the end the following:*



1       “(e) *PLEADING REQUIREMENT FOR FASHION DE-*  
2 *SIGNS.*—

3               “(1) *IN GENERAL.*—*In the case of a fashion de-*  
4 *sign, a claimant in an action for infringement shall*  
5 *plead with particularity facts establishing that—*

6                       “(A) *the design of the claimant is a fashion*  
7 *design within the meaning of section 1301(a)(7)*  
8 *of this title and thus entitled to protection under*  
9 *this chapter;*

10                      “(B) *the design of the defendant infringes*  
11 *upon the protected design as described under sec-*  
12 *tion 1309(e); and*

13                      “(C) *the protected design or an image there-*  
14 *of was available in such location or locations, in*  
15 *such a manner, and for such duration that it*  
16 *can be reasonably inferred from the totality of*  
17 *the surrounding facts and circumstances that the*  
18 *defendant saw or otherwise had knowledge of the*  
19 *protected design.*

20                      “(2) *CONSIDERATIONS.*—*In considering whether*  
21 *a claim for infringement has been adequately pleaded,*  
22 *the court shall consider the totality of the cir-*  
23 *cumstances.”.*

24       “(h) *PENALTY FOR FALSE REPRESENTATION.*—*Section*  
25 *1327 of title 17, United States Code, is amended—*

1           (1) *by inserting “or for purposes of obtaining re-*  
2 *covery based on a claim of infringement under this*  
3 *chapter” after “registration of a design under this*  
4 *chapter”;*

5           (2) *by striking “\$500” and inserting “5,000”;*  
6 *and*

7           (3) *by striking “\$1,000” and inserting*  
8 *“\$10,000”.*

9           (i) *NONAPPLICABILITY OF ENFORCEMENT BY TREAS-*  
10 *URY AND POSTAL SERVICE.—Section 1328 of title 17,*  
11 *United States Code, is amended—*

12           (1) *in subsection (a), in the first sentence, by*  
13 *striking “The Secretary” and inserting “In the case*  
14 *of designs of vessel hulls protected under this chapter,*  
15 *the Secretary”;*

16           (2) *in subsection (b), in the first sentence, by*  
17 *striking “Articles” and inserting “In the case of de-*  
18 *signs of vessel hulls protected under this chapter, arti-*  
19 *cles”;* *and*

20           (3) *by adding at the end the following:*

21           “(c) *NONAPPLICABILITY.—This section shall not apply*  
22 *to fashion designs protected under this chapter.”.*

23           (j) *COMMON LAW AND OTHER RIGHTS UNAF-*  
24 *FECTED.—Section 1330 of title 17, United States Code, is*  
25 *amended—*

1           (1) *in paragraph (1), by striking “or” after the*  
2           *semicolon;*

3           (2) *in paragraph (2), by striking the period and*  
4           *inserting “; or”; and*

5           (3) *by adding at the end the following:*

6           “*(3) any rights that may exist under provisions*  
7           *of this title other than this chapter.*”.

8   **SEC. 3. EFFECTIVE DATE.**

9           *This Act and the amendments made by this Act shall*  
10          *take effect on the date of enactment of this Act.*

**Calendar No. 674**

11<sup>TH</sup> CONGRESS  
2<sup>D</sup> SESSION

**S. 3728**

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**A BILL**

To amend title 17, United States Code, to extend protection to fashion design, and for other purposes.

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DECEMBER 6, 2010

Reported with an amendment