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# Licensing Markets

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## Fashion Licensing

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### Intellectual Property Protection for Fashion Designs Requires Multi-Faceted Approach

Imagine you're a fashion designer with a unique clothing design. As with any other business, you wish to protect your intellectual property through the standard combination of patents, trademarks, and copyrights. Sounds simple, right?

Wrong! There is no one-stop shop for protecting your intellectual property and, until recently, the law was not completely on your side. Though a single garment may be the result of a single creative process by a designer, multiple mechanisms may be needed to protect the design of that garment. One of those mechanisms—copyright law—historically has presented a significant hurdle to protecting fashion designs. The Supreme Court, however, recently clarified and expanded how copyright law can be leveraged to protect designs, often quickly and relatively inexpensively.

Below is a high-level overview of the various legal forms of protection for the fashion industry and what those legal mechanisms cover:

### Copyright Law: Fabric Patterns and Surface Decorations

Historically, it has been very difficult to protect clothing designs under copyright law. The recent US Supreme Court holding in *Star Athletica, LLC v. Varsity Brands* has disrupted this pattern. The Supreme Court, asked to interpret the Copyright Act and in doing so resolve conflicting legal tests adopted by various regional federal appeals courts for determining whether clothing designs are protectable under copyright law, established a relatively simple test.

Namely, a clothing design is protected under copyright law if it can be imagined as a two-dimensional work appearing independently from the clothing item as a pictorial or sculptural work that itself would qualify for copyright protection. In other words, if the clothing design can be imagined as an expressive work of textile art that you could hang on your wall, then it is protected. It is important to note that the Supreme Court has not opened the door to protecting more functional aspects of fashion design under copyright law, for example, the cut or venting of the garment.

### Trademark Law: Logos and Other Indications of Source

Trademark law provides protection of logos and other indications

of source so that consumers can identify the origins of the products they purchase. Trademark registration is strongly recommended to enhance the available protection. In the interests of avoiding a “merely ornamental” refusal during the registration process, however, we recommend that clothing manufacturers and retailers include a logo in a more traditional trademark manner in addition to a design, for example, on clothing labels and/or on “hang tags” in addition to placing the logo on the garment itself. Trademark protection, however, generally is limited to the logo itself and not the overall design of a garment because it is difficult to characterize clothing designs as having source-identifying significance.

Trademark law additionally provides for legal protection of “product configuration” trade dress, as distinguished from “product design” trade dress discussed in the paragraph immediately above. Product configuration trade dress relates to certain specific aspects of a product that are more functional or structural as opposed to ornamental, but that nevertheless signify for customers the source of the product. Protectable aspects of clothing or clothing accessories can be the use of a certain color, or perhaps particular straps or buckles. Generally, product configuration trade dress is more difficult and more costly to register or assert in court because proving ownership of rights requires demonstrating “secondary meaning” in the minds of the consumers. In other words, it must be shown that consumers have become conditioned to recognize the product configuration elements and associate them with the product source as a result of duration or intensity of product advertising. If this type of protection is sought, it can be advisable to call out

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specific product aspects in advertisements, for example, “Look for the triangular buckle.”

### **Design Patents: Ornamental Designs of Functional Items**

Design patents are another useful tool for securing protection of ornamental or decorative aspects of fashion designs. A design patent affords the patent holder the right to prevent others from making, using, selling, or otherwise copying the ornamental design

elements of a utilitarian product (which can include clothing). One downside to a design patent is the cost and time associated with filing for protection. Generally speaking, copyright registrations are inexpensive, trademark registrations are more expensive than copyrights, and design patents are still more expensive.

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