

FASHION LAW: HOW TO PROTECT YOURSELF FROM KNOCK-OFFS

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FASHION LAW

How to protect yourself from knock-offs



DOUGLAS HAND

One of the biggest issues every designer may end up contending with at some point – especially early in his or her career – is the “knocking off” or copying of one’s design? It can be a heartbreaking moment to see all your hard work being used by another designer. How can it be prevented? What can be done once it happens? Or is it just a fact of life to be dealt with? We posed these questions to noted fashion law expert [Douglas Hand](http://hballp.com/team/douglas-hand/) (<http://hballp.com/team/douglas-hand/>), who shared his thoughts with *MR*.

Q: *What is the difference between trademark, copyright and patent protection, especially as it applies to design?*

A: Trademark law provides protection for names, logos, slogans, or even product designs that serve as source identifiers for fashion products. For example, both the Ralph Lauren name and the polo player logo are trademarks of the Ralph Lauren Corporation and may not be used by any other organization without a license to do so.

Design patents protect the look or ornamental nature of a design, so long as it is novel, non-functional, and non-obvious. It is not uncommon for the designs of handbags, shoes, and jewelry designs to be the subject matter of design patents. Because clothing designs are considered predominantly useful, they typically do not fall within the protections afforded by design patents. For most articles of apparel, and even some accessories, design patents are not a feasible option because of the resources and time required to prosecute the patent before the US Patent and Trademark Office. The process of applying for a design patent can take several years, which exceeds the life expectancy of the market for most designs.

Copyright protection is limited as it does not protect “useful articles” such as clothing. So it only covers limited categories of fashion design, namely: fabric patterns (of sufficient originality); images affixed to garments; some embroidery, beading, and lace; original jewelry; and certain elements of “fanciful” costumes. There is a case in front of the Supreme Court right now (Star Athletica v Varsity Brands – regarding, of all things, cheerleader uniforms) which may add more color to copyright protection for fashion designs.

Q: Is the use of social media as public shaming an effective strategy?

A: Given the limits of current law as well as the costs of engaging competent legal counsel, social media has given brands with fewer resources another viable option: The ability to publicly shame purported copiers. This digital vigilantism has proven effective for several brands and independent artists, if not in getting a damage award for copying, at least in having the offending products withdrawn. Caution should be exercised, however, to be sure that careless tweets or side-by-side Instagram posts do not contain libelous statements (a false statement communicated in writing as fact). Libel can result in a lawsuit for damages which, quite obviously, completely turns the tables on what the digital vigilante sought to accomplish. However, if social media posters simply present the original designs next to the alleged copies and suggests that viewers reach their own conclusions, it would be difficult to base a libel suit on that type of post.

Q: You mentioned the costs of litigation? Can you talk more about when/if suing someone is worth the money?

A: The costs of litigation are typically quite high in this area – with sheepish apologies, a quality attorney, like quality menswear, is not cheap. Moreover, the results for brands that feel they have been knocked off are rarely satisfactory particularly given the amount of time these disputes typically take to play out. Since the cycle of fashion is so swift (i.e., months) and the process of legal adjudication is so slow (i.e., years), the point of the dispute can be rendered moot after a couple of seasons.

Q: Are there situations when being copied can lead to opportunities for collaboration?

A: Indeed, yes. Agreeing to collaborate in the marketing and production of a design represents a sort of moral high road both sides can take when faced with a potential dispute over which party created a certain design or over a trademark dispute. Gucci did this in a way when artist Trevor Andrew made an inventive use of Gucci's trademarked "G" in the now iconic "Gucci Ghost." Instead of getting hit with a lawsuit, Mr. Andrew was approached by Gucci creative director Alessandro Michele to collaborate on a line for Gucci. (Disclosure: my firm was involved in this matter for Mr. Andrew.)

Q: When should I just "let it go" that I've been copied?

A: Unless the item is a core basic that your brand intends to sell for many years to come without modification, the cycle of fashion may render spending time, money and mental energy on chasing every purported copycat a waste. Investing in the brand, the story behind it and the trademark that represents all of that goodwill, is often a more advisable path.

In fact, there is a school of thought that the fashion industry needs, indeed even thrives, on the appropriation of designs. One of my NYU Law colleagues, Professor Chris Sprigman (along UCLA Law's Kal Raustiala) uses this premise as the basis for their analysis of the industry in *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*. Once an item is copied by a lower priced knockoff artist, its desirability decreases and consumers are driven to the next fashion. Piracy, they theorize, actually keeps the cycle of consumption in fashion going.

Douglas Hand is a founding member of the law firm Hand Baldachin Amburgey LLP (HBA) which specializes in the representation of fashion and lifestyle companies. He is a member of the Business Advisory Committee of the CFDA, on the Advisory Board of the CFDA's Incubator and a member of the CFDA Fashion Awards Guild. Mr. Hand is also an adjunct professor of Fashion Law at both NYU School of Law and Cardozo School of Law and is on the Fashion Institute of Technology's Couture Council.

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