

The Shame Game

Online vigilantes are increasingly stepping up to defend designers against knockoffs when their competition gets too close for comfort.

By RACHEL STRUGATZ



Illustration by DAN PAGE

The court of social media public opinion might be just as effective as the legal system when it comes to protecting a designer's creation from copyists. ¶ Or even more effective, since social shaming tends to happen in-season while the fashions are still in play – and can also help rally consumers to a designer's cause. ¶ In a fast-moving market where the lines between acceptable adaptation, unethical knockoff and illegal counterfeit can be blurry and legal cases are long and expensive, a little shaming can go a long way. ¶ “It’s a powerful mechanism that doesn’t involve a court system or lawyers,” said Douglas Hand, an attorney at Hand Baldachin & Amburgey, of the ad-hoc online campaigns. “It’s more viable to many start-up and emerging brands; it’s free, organic and somewhat instantaneous.” ¶ The power of social shaming has become a critical defense for smaller companies in particular, although hopes that fans will send out a flurry of outraged tweets and posts that go viral is an iffy shield for designers at best. ¶ But when it works, it works. ¶ Last month, social media followers of K-Deer, an independent activewear line that’s become known for its ombré-striped pants, started “flaming,” or social shaming, activewear retailer Athleta for leggings that looked nearly identical to a style from K-Deer – and were sold at \$79, or \$9 to \$19 less than K-Deer’s version.

Hand said the prints “weren’t necessarily protectable” by law. But consumers cried foul soon after Athleta’s striped tights hit the Web and hundreds of users posted comments. Some included hashtags such as #IStandWithKDeer and #BoycottAthleta. Within a few weeks, Athleta pulled the three colorways of its “High Rise Bold Stripe Chaturanga Tight.”

Kristine Deer, founder of K-Deer, told WWD that she took no legal action and had “absolutely no contact” with anyone at Athleta, which declined to comment for this article.

On Instagram this month, Deer thanked the brand’s almost 51,000 followers for their “loyal and heartfelt support.”

“I’m so honored to be surrounded by a community of people who respect us and honor the values that our business has been built upon, as reflected in our Signature Stripes,” Deer said in the post, explaining that every colorway is named after an inspiring woman in her life and that a portion of each sale goes to charity. She ended the post by saying that K-Deer has no affiliation or partnership with Athleta or its parent company, Gap Inc.

“I get it – be inspired – but don’t just take. Leave a little room for your designers to do some work,” Deer said. “The part that hit our community is how the stripes are specific to the charities and that’s what stirred up a lot of the emotion for people.”

Even though social media can project brands out to millions of consumers, it also quickly and efficiently puts their designs under the microscope.

Hand said in fashion, copyright laws only protect prints, not the garment itself. The design of the garment can be eligible for a design patent, but the process to obtain one is time-consuming.

But when there isn’t a recognizable print involved, patenting or trademarking a design becomes even tougher. Hand said that “all of those areas tend to fall short in the eyes of most victims because they don’t protect most of the underlying designs.”

Sometimes lawyers get called in anyway.

Hot swimwear brand Kiini had online fans rise to its defense when L Brands Inc.’s Victoria’s Secret division started selling similar looks. Ipek Irgit, founder of New York-based Kiini, said fans started sticking up for the brand and its signature bikinis on Instagram after pictures of a similar-looking Victoria’s Secret suit started making the rounds.

Now the emerging brand is taking the retail giant to court.

Kiini filed a lawsuit in the Central District of California alleging that Victoria’s Secret infringed on its copyright. The company is looking for damages and injunctive relief to redress copyright infringement, trade dress infringement and unfair competition. As plaintiff, Kiini is alleging that Victoria’s Secret copied the designs of its signature style: handmade crochet, elastic and high-tech fabric triangle bikinis that come in vibrant color combinations and retail for \$285.

The Victoria’s Secret version, called “The Crochet-trim Teeny Triangle Top” and “The Crochet-trim Cheeky,” retailed for about \$100 (it’s no longer available for sale on victoriasssecret.com). The suit first came to Irgit’s attention via a picture on Instagram posted by Candice Swanepoel from her account at @angelcandices. Comments from Instagram users ranged from “oh s*** totally kiini knockoff” to “complete rip-off of @kiiniswim.”

The suit reads: “Since its first use by Kiini in early 2013, Kiini has devoted substantial efforts to promote Kiini Trade Dress on social media platforms, including Instagram, and has used it exclusively and prominently in interstate commerce.” Should the judge find copyright infringement, every case will be subject to damages of up to \$150,000.

Irgit declined to comment on the suit, as did Victoria’s Secret.

Kiini has 168,000 followers, so it’s clearly a case of David vs. Goliath.

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Chanel was accused by the online masses of copying the Fair Isle designs of Scottish-based Mati Ventrillon late last year. As photos of the offending designs spread online, the luxury fashion house was quick to address the issue.

A spokeswoman said at the time: “Chanel recognizes that this situation resulted from a dysfunctionality within its teams, and has presented its apologies. Chanel also recognizes the heritage and know-how of Fair Isle. We wish to emphasize that the house is extremely vigilant in terms of its respect for creativity, whether its own or that of others.”

Scafidi said: “Chanel did something far too similar and apologized. Even the mayor of the town [in Scotland] was calling for Chanel to apologize. Chanel was indeed embarrassed, and the only reason it didn’t go broader was because they reacted quickly.”

High-end companies can be more sensitive to the power of social media than a private cease-and-desist letter, she said, adding that more mainstream players may not be as concerned.

Kiini’s swimsuits, for instance, retail for almost \$300, while the similar Victoria’s Secret look cost about \$100.

“The danger is that [Victoria’s Secret] may be concerned about social media pressure to a degree, but they might also see social media as advertising the availability of their cheap knockoffs,” Scafidi said. “It’s a two-edged sword.”

This could have tremendous risk for brands like Kiini. Scafidi said while the swimsuits are sold at luxe retailers, there is a danger of market dilution. If a look is ubiquitous, it can become less attractive to the high-end buyer who’s looking for something more exclusive – and this can seriously affect profits.

Kiini has a good precedent to rely on, according to Scafidi, who outlined a case that took place in August. In *Varsity Brands vs. Star Athletica, Varsity Brands*, a manufacturer of cheerleading uniforms, alleged that Star Athletic was copying its designs. The Sixth Circuit Court of Appeals in Memphis ruled that the designs – consisting of blocks of color, chevrons and stripes – could be the subject of copyright because, similar to fabric prints, they’re “conceptually separable” from the shape of the garment itself and not merely functional. What this means is that a pattern on a garment that consists of colorblocking and lines that isn’t dictated by the shape of the garment itself is potentially subject to copyright protection.

“The question is, is a more abstract color-blocked pattern conceptually separable from the garment? [Kiini] would have to prove this, but the court has said that yes, they see these prints as conceptually separable,” Scafidi said.

“It’s a close call. Mondrian paintings are subject to copyright and when Yves Saint Laurent put the Mondrian on a dress, the pattern didn’t lose its copyright,” Scafidi added. “Just because a work of art is on a garment doesn’t mean it’s not subject to copyright protection. How can you say Mondrian putting color and lines on a canvas is subject to protection and Yves Saint Laurent putting it on a dress isn’t?”

Which is why the world of social media can be particularly helpful in helping designers call “foul” over copies. Fans of a brand might be much more protective of their favorite designers than a judge. ■