

Sharon Givoni

UNPACKS THE LEGAL DANGERS OF SOCIAL MEDIA FOR FASHION LABELS

Some readers may have heard about the recent legal stouche between Seafolly Pty Ltd and White Sands Swimwear over photos and comments posted on Facebook.

The case demonstrates the dangers of using Facebook to talk about competing fashion labels. While you may think your actions are innocent enough at the time, what you say could be misleading or defamatory from a legal perspective and end up being costly.

Let's move on to the case.



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LEAH MADDEN

Leah Madden is Principal of White Sands. She discovered what she thought to be a "rip-off" of some items in her 2009 "Shipwrecked" swimwear collection.

In September 2010, she posted an album on her Facebook page entitled "The most sincere form of flattery?". The postings featured several side-by-side comparison shots of models wearing White Sands and Seafolly swimwear respectively. Just beneath the images Madden inserted descriptions such as: "White Sands 2009-Seafolly 2010".

SHE ADDED COMMENTS:

- "Seriously, almost an entire line-line rip-off of my Shipwrecked collection."
- "I know, the buyer from 'Sunburn' (who, as it turns out, works for seafolly) Came to mysuite at RAFW and photographed every one of these styles."
- "Ripping off is always going to happen, but sending in a dummy 'buyer' to get photos is super sneaky!"



THE RESPONSE FROM THE READERS

The statements were read by many, and elicited quite a reaction. According to the case, feedback on Madden's Facebook page included:

"Nasty! Shame on 'em! Won't be buying Seafolly. WHITESANDS all the way. X"

"seafolly own everything! sunburn, miraclesuit and gottex and they used to own jets but sold it recently! and unfortunately they do rip off everyone, they have copied a design 2 chillies has been doing for years! a little frilly triangle, its so bad!"

"Disgusting! How people look at themselves in the mirror is beyond me."

OUT OF THE MEDIA

Madden then sent emails to media outlets using the same words "The most sincere form of flattery?" in the subject line of each email. The emails led to media commentary and responses from readers included:

"This sort of thing is happening ALL the time. Large corporations no longer have 'designers' but 'product developers' that source indie designs, copy and mass produce them."

"Yeah right Seafolly - you really expect us to believe this garbage?..."

"...WHY did they continue in the same direction upon discovering that White Sands had released an almost identical line. A rat isn't all I smell."

"...Quite embarrassing on Seafolly's behalf I think."

SEAFOLLY'S COMEBACK

Not ready to "drown" in the face of criticism, Seafolly circulated a press release emphatically denying the allegations of copying, stating that:

"Seafolly notes that many of the designs which Ms Madden claims Seafolly has copied were released into the marketplace by Seafolly before White Sands Swimwear released its relevant swimwear garment."

White Sands responded by stating (on Facebook) that it had never specifically accused Seafolly of plagiarism.

However, from Seafolly's perspective the allegation of copying was clearly implied. It needed to set the matter straight.

LEGAL PROCEEDINGS

Seafolly instituted legal proceedings in the Federal Court of Australia alleging:

- misleading and deceptive conduct (in relation to Madden's emails to the press);
- injurious falsehood (namely, that Madden's comments and posts had caused damage to Seafolly's reputation and thus economic loss); and
- copyright infringement (as White Sands had reproduced Seafolly's swimwear photos online without permission).

Madden argued that she had in her view expressed an "opinion" rather than a statement of fact as the reader was left to draw their own conclusions.

The judge disagreed, stating that Madden should have adopted a more cautious approach reminding us that consumers include:

"...the astute and the gullible, the intelligent and the not so intelligent, and the well educated and the poorly educated".

Madden also argued that she was not making the comments in "trade and commerce" so the misleading and deceptive provisions did not apply.

The judge disagreed, as the setting was clearly in a competitive context and found that Madden's comments were **"A SERIOUS ASSAULT ON SEAFOLLY'S BUSINESS INTEGRITY"**.

Seafolly's CEO also had a word to say about this, commenting that in "this day of internet, where things go viral" once things are released into the "public space, no amount of logical reasoning actually matters any more". He said "I couldn't win. Once she put that up there, I was finished anyway... the damage had been done."

NO WINNERS

Ultimately Seafolly succeeded in its arguments concerning misleading and deceptive conduct.

White Sands was ordered to pay Seafolly:

- damages in the sum of \$25,000; and
- Seafolly's costs of the court application.

However, in reality, there was no real winner. The public airing of their "catfight", led to both companies attracting some level of negative publicity.

Remember that when a case goes to court it is publicly on the record. When the media took hold of this one, it led to all sorts of problems.

Headlines included, "Swimwear designer 'malicious' against rival" and "Court slams small designer for falsely accusing bikini maker Seafolly of ripping her off"

Had this matter settled out of court, all of this could have been avoided.



SEAFOLLY'S PTY LTD/
REGISTERED UNTIL 6TH MARCH 2017



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WHAT CAN YOU LEARN FROM THIS?

REGISTER YOUR DESIGNS!

If a particular design is important enough to you, think seriously about design registration.

In Australia, you can gain exclusive rights over the appearance of your fashion designs so long as certain criteria are met, such as that they are "new" and "distinctive" (and not disclosed in the marketplace).

Design registration is relatively inexpensive and lasts 5 years, extendable by a further 5 years.

SEAFOLLY'S DESIGNS

In early 2012 during its dispute with White Sands, Seafolly applied to register a range of its swimwear designs, some of which are featured in the table below.



SEAFOLLY'S PTY LTD/
REGISTERED UNTIL 6TH MARCH 2017



SEAFOLLY'S PTY LTD/
REGISTERED UNTIL 6TH MARCH 2017

Registered designs can be searched on the "Designs section" of the IP Australia website (<http://www.ipaustralia.gov.au/get-the-right-ip/designs/>).

However, it is always recommended that you seek the aid of an experienced IP lawyer. The Design Register is complex and you could otherwise miss important things.

TAKE AWAY TIPS

ALSO:

THINK BEFORE YOU SPEAK (OR AT LEAST THINK BEFORE YOU TYPE).

SECOND, JUST BECAUSE YOU DO NOT EXPRESSLY SAY SOMETHING, IF YOU IMPLY IT THAT CAN BE JUST AS BAD, LEGALLY SPEAKING.

POSTING THINGS ON FACEBOOK MAY BE CONSIDERED "IN TRADE AND COMMERCE", ESPECIALLY IF YOU MENTION YOUR COMPETITORS.

FINALLY, IF YOU HAVE AN IMPORTANT DESIGN THAT IS BRAND NEW, THINK SERIOUSLY ABOUT DESIGN REGISTRATION.

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