



T H E B U T T E R F L Y E F F E C T

Detailed prints are always going to be popular for dresses, but what happens if a label comes up with a design in-house and then finds the same print used by another garment label? This happened to Australian fashion label Ladakh recently when it discovered Quick Fashion Pty Ltd selling similar patterned dresses under its "Sweetacacia" label. Intellectual property lawyer Sharon Givoni analyses the case and its implications.

What happened in the case?

Ladakh and Quick Fashion are both manufacturers and distributors of women's clothing.

Ladakh designed an original butterfly print in-house and claimed to be the copyright owner.

The design was sent on a CD to Ladakh's factory in China, which was then sent to another Chinese factory to produce the fabric in two colour ways and then back to Ladakh to produce the garments.

All straightforward so far... However here's what went wrong...

According to Ladakh, Quick Fashion had copied their butterfly pattern and had it printed in China.

According to Quick Fashion, it did no such thing.

Rather, possibly through a "leakage" of the design, a different Chinese company came into possession of the butterfly fabric and offered it to Quick fashion, who liked it and ordered it for dresses to be sold in Australia under its "Sweetacacia" label.

Ladakh's claim

To stop Quick Fashion, Ladakh instituted legal proceedings in the Federal Magistrate's Court of Australia in 2011, claiming copyright infringement.

Ladakh claimed that Quick Fashion had seen its butterfly print in the retail market and sent it to China to be copied.

Quick Fashion said that it had not purposefully engaged in copyright infringement and therefore no copying had occurred.

Its version of the story was that it was shown a fabric sample, liked it and bought it.

Round 1

In the first instance, the decision was made in favour of Quick Fashion, as Ladakh could not prove that Quick Fashion had knowledge of the copying.

Unsatisfied with this result, Ladakh appealed.

Round 2

Ultimately, it all came down to a question of fact, as these cases so often do.

Even though the Quick Fashion fabric was, on balance, too much of a "remarkable coincidence" not to have been copied, the real question was: Who made the copy?

Quick Fashion argued that an unknown party made the copy, and that its garment manufacturer in China simply bought it ready-made in a Chinese market for fabric.

The judge observed that unfortunately for Ladakh, its case did "not contain a "smoking gun".

Put simply, as there was no direct evidence of copying by Quick Fashion, Ladakh's case was circumstantial and based on inference alone.


Unfortunately for Ladakh, the first decision stood, which left Ladakh with no compensation for what had happened other than being out of pocket for its legal fees.

EXAMPLES OF REGISTERED TRADEMARKS INCORPORATING A BUTTERFLY.




Trade Mark : 1201533

Word:
Image: BUTTERFLY
Lodgement Date: 15-OCT-2007
Registered From: 15-OCT-2007
Date Of Acceptance: 30-OCT-2007
Acceptance advertised: 14-FEB-2008
Registration advertised: 24-JUL-2008
Entered on register: 03-JUL-2008
Renewal due: 15-OCT-2017
Class/es: 14
Status: Registered/Protected
Kind: n/a
Type of mark: Device



Trade Mark : 529788

Word: PAPILLON MANILLE
Image: BUTTERFLY,STYLISTED
Lodgement Date: 02-MAR-1990
Registered From: 02-MAR-1990
Date of Acceptance: 07-MAR-1991
Acceptance Advertised: 18-APR-1991
Registration Advertised: 05-DEC-1991
Entered on Register: 22-NOV-1991
Renewal Due: 02-MAR-2017
Class/es: 25
Status: Registered/Protected
Kind: n/a
Type of Mark: Composite



Trade Mark : 1127278

Word:
Image: BUTTERFLY, STYLISTED
Lodgement Date: 02-AUG-2006
Registered From: 02-AUG-2006
Date of Acceptance: 31-OCT-2006
Acceptance Advertised: 07-DEC-2006
Registration Advertised: 05-APR-2007
Entered on Register: 20-MAR-2007
Renewal Due: 02-AUG-2016
Class/es: 25
Status: Registered/Protected
Kind: n/a
Type of Mark: Device

TAKE AWAY TIPS

Sometimes when similarities are great between fabrics you may think that yours was copied. However before taking legal action you need to have solid grounds to sue; a suspicion of copying will not be enough.

Remember too that copyright law allows for independent creation, which means that if you see something very similar to yours you still have to prove that it was copied. As the facts of the Ladakh case shows, this can be a challenge.

ACTION POINTS:



Review your contracts with your clothing and fabric manufacturers. Are they obliged to keep things confidential? What happens with overruns?



Keep a watchful eye over suppliers and manufacturers who are working overseas as it is more difficult to monitor their actions from Australia.



Closer to home, if you use contractors to assist you with your textile designs, remind them that their drawings need to be entirely original so that you do not copy inadvertently.



If using contractors ensure that they assign their copyright in the works to you so that if someone else copies, you can enforce it in your own name.



Remember too that if you do have a pattern or drawing that you use extensively in your ranges, you may be able to register it as a trade mark, particularly if people have come to associate it with your garments.

Sharon Givoni is an intellectual property lawyer.

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DISCLAIMER

This article is of a general nature only and must not be relied upon as a substitute for tailored legal advice to suit your own circumstances.



What it means for your company to

Make it in Fiji

"FIJI BOASTS A WORLD-CLASS manufacturing base in the Textile, Clothing and Footwear industry. We've successfully produced iconic brand-name products for customers in Australia, New Zealand and elsewhere for over two decades. We offer great value products and our flexibility and "CAN-DO" attitude to customer service makes us the preferred source of supply for a long list of satisfied clients. Manufacturers supporting the "MAKE IT IN FIJI" initiative are committed to sustained excellence through a process of continuous quality improvement to all aspects of their business operations.

So, come on. Take a closer look at what it means for you to Make it in Fiji!

