



THE BUTTERFLY EFFECT

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?

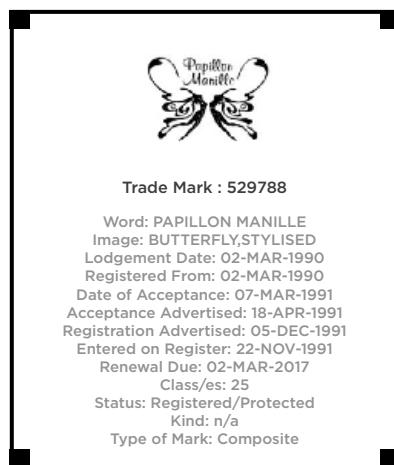
Quick Fashion argued that an unknown party made the copy, and that its garment manufacturer in China simply bought it ready-made in a Chinese market for fabric.

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.



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.

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

