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Hallie Cohen

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Bring “It” Back, but Now Call It “Fast Fashion”

BY [HALLIE COHEN](#)/ ON MARCH 13, 2019

The fashion industry is infamously cyclical—trends come and go. After an item has had its time and is declared no longer “on trend,” rest assured that it will be back again in the future, even if it takes 10 years. The Dior Saddle Bag is the perfect example.^[1] Designed by John Galliano in 1999, the bag originally came in just three variations: camel leather, denim blue, and grey logo.^[2] Within a few years, the Saddle Bag became instantly recognizable, growing in both popularity and style variations.^[3] Everyone had to have it, including celebrities like Paris Hilton and Sienna Miller—until around 2007 when they didn’t, and consumers moved on to whatever the next new trend was.^[4] However, nearly two decades later, the bag made another official “debut” when it returned to stores in July 2018 and appeared on the runway as a part of Dior’s Fall 2018 collection.^[5] Maria Grazia Chiuri, the new designer for Dior, incorporated some slight variations into the modern-day version, including a second size option, bringing the Dior Saddle Bag back on trend.^[6]

The cyclical nature of the fashion industry has given rise to a new type of sub-industry called “Fast Fashion,” comprised of retailers with the ability to manufacture clothing both quickly and cheaply. Intellectual property laws, however, provide very little protection (if any at all) in fashion. Combined with the rise of social media and influencers, designers and fashion brands are left vulnerable to their designs being copied or getting “knocked off” less than 24 hours after making their “debut.”^[9]

On February 17, Kim Kardashian West attended the annual Hollywood Beauty Awards wearing a vintage Thierry Mugler gown from the couturier’s Spring/Summer 1998 collection.^[10] At 9:00 p.m. EST the next night, fast fashion retailer Fashion Nova posted pictures of a replica of the dress to its nearly 15 million Instagram followers, instructing them to search for the “Winning Beauty Cut Out Gown” in order to pre-order a knockoff of Kardashian West’s gown for just \$49.99.^[11] According to a statement given to TMZ, Fashion Nova asserted there was no collaboration among the parties and stressed its capacity to turn over designs “within hours.”^[12]

Ironically, on February 25, Kardashian West filed suit against Missguided, a different fast fashion retailer based in the United Kingdom, for engaging in willful trademark infringement,

unfair competition, and breach of right of publicity for allegedly using her name and likeness to promote their products without her consent.[\[13\]](#) Fashion Nova, which never used Kim Kardashian West's name but did coincidentally post a picture so that the correlation was obvious, remains innocent. As of now, it is not being dragged into court.[\[14\]](#)

Kardashian West's decision to only sue Misguided and not Fashion Nova, coupled with Dior's decision to re-introduce and successfully sell a luxury-priced handbag 10 years after its original run, shines light on the gaping hole in our legal system: Celebrities and public figures have protection from the misappropriation of their persona, but designers and fashion companies have little-to-no protection from fast fashion retailers that replicate and sell their designs for lower prices. This is especially true when it concerns clothing and accessories.[\[15\]](#)

In *Star Athletica, LLC v. Varsity Brands, Inc.*, a 6-2 majority of the Supreme Court held that "to be copyrightable, a design element of a useful article must be able to be identified separately from the article and be capable of existing separately from the article."[\[16\]](#) However, fashion encompasses inherently useful articles—clothing, for example, is functional since its purpose is to be worn and to cover and protect the body—unless the copyright is for a pattern or a print on an article, like the Louis Vuitton logo.[\[17\]](#)

Although patent protection is another option, designers and companies rarely apply for or pursue it.[\[18\]](#) In order to be eligible for a utility patent, an idea needs to be both functional and novel, so the aesthetically-pleasing placement of the straps on a Mugler gown or the buckles on the Dior Saddle Bag would probably not be protected.[\[19\]](#) A design patent, which protects the ornamental design of a functional item, can take around six months to obtain and would therefore not protect against infringement by a company like Fashion Nova that claims to be able to turn over designs "within hours."[\[20\]](#)

Lastly, while trademark protection is the most effective form of intellectual property protection, it is meant to guard only the value that lies in consumer recognition of a brand.[\[21\]](#) When an established, iconic fashion company finds itself knocked off by a retailer trying to capitalize on its logo or brand association, the company can go after it using trademark law.[\[22\]](#) This is where the issue remains.

Aside from the logo appearing on some variations of the Saddle Bag, its unique shape and design make it easily recognizable to consumers and create a strong brand association. Therefore, any superficial variation on the bag would likely not disrupt the relationship between the bag and the brand in the minds of consumers. However, a single gown created by Mugler is different. The dress does not, on its face at least, have any unique identifying characteristics, like a logo, pattern, or print, that would lead a consumer to automatically associate it with the designer.^[23] Additionally, the exposure the gown receives because of its link to a public figure, like Kim Kardashian West, will not provide the dress nor its brand any protection or benefits. Instead, it just becomes the new “it” fast fashion item, mass-produced and sold worldwide. On the other hand, Kim Kardashian West will still have her day in court, having asked for “no less than \$10 million” in monetary damages for the unlawful use of her name and likeness.^[24]

Hallie Cohen is a second-year law student at Benjamin N. Cardozo School of Law. She is a Staff Editor of the Cardozo Arts & Entertainment Law Journal and a Co-President of the Cardozo Fashion Law Society. She is also a student assistant for Professor Barbara Kolsun and the Fashion, Arts, Media & Entertainment (“FAME”) Law Center. Feel free to connect with her at: <https://www.linkedin.com/in/halliecohen/>.

^[1] Dara Prant, *Must Read: LVMH to Develop Luxury Hotel in London, Influencer Marketing as Explained by a 19th Century Economist*, Fashionista (Mar. 1, 2019), <https://fashionista.com/2019/03/lvmh-new-hotel-flagship-london>.

^[2] Dara Prant, *Dior’s Aughts-Era ‘It’ Bag is Back and It’s Bigger Than Ever*, Fashionista (July 19, 2018), <https://fashionista.com/2018/07/dior-saddle-bag-2018-new-styles>.

^[3] *Id.*

^[4] *Id.*

^[5] *Id.*

^[6] *Id.*

^[7] *Id.*

^[8] Patricia Werschulz & Sandra Holtzman, *The Latest Fashion in Fashion Patents*, New York Law Journal (Sept. 5, 2018), <https://www.law.com/newyorklawjournal/2018/09/05/the-latest-fashion-in-fashion-patents>.

[9] *Id.*

[10] Holly Rue, *Kim Kardashian Stepped Out in a Vintage Thierry Mugler Cutout Gown for the Hollywood Beauty Awards Last Night*, *Elle* (Feb. 18, 2019), <https://www.elle.com/fashion/celebrity-style/a26390312/kim-kardashian-vintage-thierry-mugler/>.

[11] Evan Ross Katz, *Is Kim Kardashian West's New Fast Fashion Lawsuit a Distraction From Copycat Allegations?*, *Fashionista* (Feb. 25, 2019), <https://fashionista.com/2019/02/kim-kardashian-misguided-knockoffs-lawsuit>.

[12] *Id.*

[13] *Kim Kardashian is Suing Misguided, Cites Right of Publicity Violations, Trademark Infringement*, *The Fashion Law* (Feb. 20, 2019), <http://www.thefashionlaw.com/home/kim-kardashian-is-suing-misguided-cites-right-of-publicity-violations>.

[14] *See supra* note 11.

[15] Nicole Reifman, *Think Tank: Protecting Fashion Design in the World of Copycats, Fast Fashion*, *Women's Wear Daily* (Mar. 23, 2018), <https://wwd.com/business-news/business-features/think-tank-reifman-1202636700/>.

[16] *Star Athletica, LLC v. Varsity Brands, Inc.*, 137 S.Ct. 1002 (2017).

[17] *See supra* note 15.

[18] *Id.*

[19] *See supra* note 11.

[20] *Id.*; *see also supra* note 15.

[21] Tyler McCall, *Copyright, Trademark, Patent: Your Go-To Primer for Fashion Intellectual Property Law*, *Fashionista* (Dec. 16, 2016), <https://fashionista.com/2016/12/fashion-law-patent-copyright-trademark>.

[22] *See supra* note 15.

[23] *Id.*

[24] *Kimsaprincess, Inc.; and Kim Kardashian West v. Misguided USA (Finance) Inc., and Misguided Limited*, 2:19-cv-01258 (C.D.Cal). *See generally, supra* note 13.