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OPINION

Little Red (Litigious) Shoes

By JEANNIE SUK

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CAN you trademark the color red?



Chris Jackson/Getty Images

This week a federal appellate court will hear arguments in a [case](#) involving this very question. The issue arises in connection with shoes, specifically, the vivid red soles beneath Christian Louboutin shoes. The high-end designer says four separate styles of Yves Saint Laurent shoes infringe its trademarked sole. All four shoes are red all over — including the soles.

Last summer a [federal court](#) denied Louboutin's request that YSL be stopped from selling its red shoes pending resolution of Louboutin's effort to enforce its federally registered Red Sole Mark. (In its opinion, the court said Louboutin's trademark infringement claim was unlikely to succeed.) Now, the shoedown escalates to the appeals court.

The quirky lawsuit dramatizes the law's ambivalence toward fashion. The law does not protect fashion design, but it does recognize the rights inherent in branding. Louboutin's claim spotlights the pressure on fashion designers to frame their aesthetic choices as brand identifiers, and the legal contortions that result.

Those familiar with high-end fashion associate the red underside of a woman's shoe with the Louboutin brand. And for good reason: Louboutin has invested plenty in that red sole and successfully linked the sole's shade with the shoemaker. Since a main purpose of trademark law is to protect one's investment in reputation, Louboutin's sole-saving efforts are understandable.

But red; it's a color. An interlocking LV on a Louis Vuitton handbag or a Nike swoosh on a sneaker is one thing, some say. But monopolizing a color ... just doesn't seem right.

As it turns out, however, the Supreme Court has previously held that a color alone could be a trademark, in a case about a solid green-gold color on pads used in dry cleaning press

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machines, because the color served to identify the maker of the product — and had no other function. Thus an important caveat is that if the color is a useful feature in a product — green for farm equipment or yellow for banana-flavored gum — it can't be a trademark, even if it is source-identifying, because excluding competitors from a useful feature would be anti-competitive. Applying this logic, the judge in the Louboutin case suggested that particularly in fashion, a single color could not be a trademark. The judge reasoned that in fashion, color is always “functional” — meaning that color is a useful aesthetic feature to which all designers should have access.

The red elephant in the room is that though it is the artistic and creative core of the fashion industry, design is not protected qua design, but only as a symbol of who created it. Fashion designers find no comfort in the federal copyright statute, which protects authors and creators, but does not extend to “useful articles,” including apparel and shoes.

A pending Congressional bill may offer some copyright protection for fashion design, but until then, fashion, unlike other visual media such as film and painting, remains a realm in which copying is perfectly legal — unless a design is deemed a trademark, that is. The Burberry plaid design, for example, is legally protected because it identifies Burberry, while the design of a dress the plaid may adorn is not, no matter how artful or original. Hence the pressure to frame design features — like an eye-catching color or a pleasing plaid — as trademarks.

That brings us to the fashion Catch-22 that the red sole throws into relief: Trademark law does not protect design features that are “functional,” the meaning of which, it turns out, encompasses even aesthetic appeal. But in copyright law it is precisely the utilitarian and non-aesthetic aspect of apparel and shoes that leaves fashion design unprotected from copying. Fashion design is caught between opposing demands and exclusions, and snubbed from both ends.

It is unlikely a court will allow Louboutin to monopolize “red,” even if all that is claimed is placement on the sole. A trademark claim on the precise “Chinese Red” that Louboutin uses on its soles might be more palatable, but the company seemingly wants to trademark “red” rather than a particular shade of this color. (YSL’s shoes are not the same shade of red as Louboutin’s.) Still, YSL’s red soles are part of a red-all-over shoe design; arguably Louboutin’s soles are recognizable precisely because of the contrast between shoe and sole color.

It is time for Congress to address directly the fusion of practicality and beauty that makes fashion such a compelling medium of expression and a profitable creative industry, one that merits its own limited industry-specific protections. Otherwise, colorful as they are, lawsuits like the red sole case are likely to compound the uncertainty that results from the absence of statutory delineation of fashion design protection — and invite more lawsuits.

Jeannie Suk is a professor of law at Harvard who testified last summer at a Congressional hearing on the Innovative Design Protection and Piracy Prevention Act.

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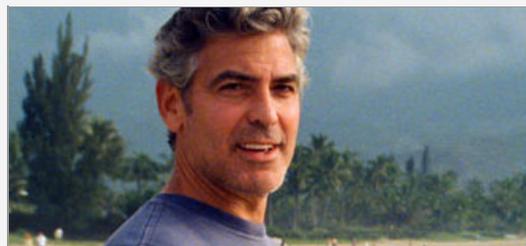
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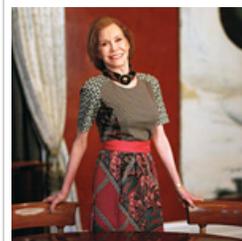
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