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# Wait, *that's mine!*

**K&L Gates** tackles your rights with promotional images.

**M**AKING SURE THAT your latest collection is seen by the widest possible audience is vital for any fashion label seeking to generate buzz for a new range. Whether it's a look book, a catalogue, or photographs displayed on a brand's eCommerce store, fashion houses invest heavily in ensuring that promotional images displaying their collections are just right and that they are shown in the right places.

However, in the current marketplace, where images posted online are freely accessible and can be sourced with the click of a mouse, there is an increasingly common phenomenon of the unauthorised use of a brand's promotional images to offer commentary, advertise a competitor's products and even to promote counterfeit goods. As a result, brands should ensure that ownership of their promotional images is secured at the outset

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of a new campaign to guarantee that they are best placed to take action if their images are misappropriated.

The owner of copyright in a promotional photograph has the ability to seek recourse against unauthorised use, whether by requesting removal of images posted online such as on social media sites (eg Facebook, Instagram, etc) or on eCommerce stores (eg Ali Express, eBay, etc), or by litigating in the Courts.

### Who owns copyright in a promotional photograph?

For copyright purposes, a photograph is an artistic work. Therefore, the general rule is that the person behind the camera with their finger on the shutter button is the owner of copyright in the image taken. However, there



are exceptions to this rule and importantly for fashion labels, if a photograph is taken by a brand's employee in the course of his or her employment, then the employer will own copyright in the photograph.

It is common practice for fashion brands, large and small, to engage independent contractors to take the brand's promotional photographs. Despite the common misconception to the contrary, in such situations copyright in the photographs is owned by the photographer unless otherwise agreed with the photographer or their employer, if the photographer is an employee of a company. If the photographer remains the owner of copyright in the images, a brand could be left with little recourse against a third party using its promotional images without authorisation if the photographer does not want to be involved in a copyright action.

Therefore, when engaging independent photographers to capture upcoming collections, fashion houses should consider negotiating the assignment of copyright in any photographs taken upfront so that the brand can take action if it becomes aware of any unauthorised use once the campaign is launched. Fashion brands should ensure that the photographer assigns all copyright in the photos in a written agreement which is signed by the photographer.

The risks of delaying consideration of copyright ownership

It is possible for copyright in a photograph to be assigned from the photographer at any time. However, there are real risks if the transfer of ownership is delayed and it is later discovered that a third party has reproduced a brand's images without authority.

If the assignment happens after the infringing event, then the fashion house may only be awarded nominal damages as the Court will assess damages at the time of the infringement. If the owner of copyright at the time of the infringement was the photographer then these damages may be limited to the contract price which the fashion house paid for the shoot and is unlikely to include any amount for damage to reputation which the brand may have suffered as a result of the infringement.

Fashion houses are best positioned to take action against the unauthorised use of their images where copyright in those images is assigned to the label before the images are disseminated.

### Key takeaway points

When creating promotional materials for an upcoming campaign launch, fashion labels should bear in mind the issue of who owns copyright in those images from the outset. To be best placed to take action against a third party misusing its images, a fashion brand should be the owner of copyright in the images and ensure that any copyright is assigned by way of a written contract with the photographer or his/her employer if the photographer is employed by a company. If in doubt, fashion labels should seek legal advice prior to engaging any photographers to capture a new collection so as to avoid time and costs down the road when faced with a third party using their promotional images without authorisation. ■

*For legal advice about copyright and other intellectual property matters, please contact Christine Danos, Senior Associate, K&L Gates – 03 9205 2000; christine.danos@klgates.com*