

COLUMNS

Lions, tigers, bears and ‘Wirkins,’ oh my!: The legality of Walmart’s Herms Birkin dupe

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In the movie *The Wizard of Oz* by L. Frank Baum, Dorothy heads down the yellow brick road despite possible encounters with lions, tigers and bears.

Why? To meet Oz so she could return home. She stopped at nothing to get what she wanted most.

In many ways, the quest for a Herms Birkin is similar; would-be purchasers revere the bag and brand so much that they seek the bag during travel and take other measures to vie for the ability to purchase one. Lions, tigers and bears be damned.

Brand protection

Numerous articles discuss fake luxury handbags, but few focus on dupes.

Fake bags impermissibly use a brand’s logo or a logo substantially similar to the brand’s logo and are meant to trick onlookers. Dupes, however, do not have the logo of the company from which the inspiration was taken.

Some dupes have no logo, and others have the logo of the designer who created the dupe. For better or worse, dupes are not illegal if they meet certain requirements.

The protection of brands, including luxury brands, has three elements: the first involves trademarks, such as name and logo, or distinguished design, such as Tiffany Blue or Herms’ Birkin.

Second are design patents, including non-functional unique marks like the Valentino Rockstud. Lastly, copyrights, including photos of the design, fabric prints, advertisements and marketing around the product or brand, are safeguarded.

Dupes and design law

Generally speaking, if someone creates a dupe that does not use protected elements of another’s design, it is permissible.

For example, luxury lipsticks can cost upwards of \$50 each. As long as the dupe utilizes a different name and packaging and does not utilize any protected design elements, the transaction is fully legal.

For example, Prada’s monochrome lipstick in Tonka sells for \$50 and one of its dupes, O FACE Satin Lipstick by affordable makeup and skincare company e.l.f. Cosmetics, sell for \$9.

The Herms Birkin, however, cannot be duplicated without legal implications.

At risk

The Birkin bag is protected in multiple ways. The logo is a registered trademark; the shape of the bag is a registered trademark, and the leathers utilized by Herms have trade dress protections.

Herms holds various design patents as well. Therefore, no one can copy the shape of the Herms Birkin or the texture and feel of Herms leathers without breaking the law.

Walmart is, therefore, putting itself at risk by making these bags available for purchase, and it can face steep financial penalties.

Call it democratization, call it inspiration, call it what you will, some dupes are impermissible. Another impermissible dupe is a shoe, other than a shoe with a red upper, that has a red sole.

A federal appeals court ruled that shoe designer Christian Louboutin can enforce a U.S. trademark of the red-lacquered sole that adorns the designer's footwear when it contrasts with the color of the rest of the shoe.

There are countless examples where selling a dupe can lead to adverse legal action. Time will tell whether Herms will take legal action against Walmart.