



# FROM IMITATION TO REGISTRATION: THE STRATEGIC SIGNIFICANCE OF “LULULEMON DUPE” FOR MALAYSIAN BRANDS

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Recently, Lululemon Athletica Canada Inc. (“Lululemon”) has been engaged in a legal battle with Costco Wholesale Corp. (“Costco”) in the United States District Court for the Central District of California. Legal actions were prompted by Costco’s alleged sale of lookalike athleisure apparel bearing a striking resemblance to Lululemon’s popular designs. Over the years, Lululemon has gained popularity over its chic athletic apparel that prioritises style and comfort. Ranging from lightweight fabrics to stink-proof technologies, Lululemon’s high-quality products were accompanied by premium pricing.<sup>1</sup>

While the dispute plays out before the courts of the United States, the underlying issues resonate strongly in Malaysia, where athleisure brands and online

marketplaces face similar pressures from ‘dupe’ culture and lookalike products marketed to local consumers.

Lululemon has alleged the infringement of trademark, trade dress, and design patent by Costco on the grounds that it has spent significant resources to gain public recognition on their designs. Aside from the forefront innovative athleisure designs, it has also secured patent protection for their designs, namely the *SCUBA* hoodies, sweatshirts, and *DEFINE* jackets. Amongst Costco’s warehouse aisles, shoppers have discovered identical apparel that appeared strikingly similar – if not identical – to Lululemon’s *SCUBA* hoodies, all at much friendlier prices. This discovery created a ripple effect, as Costco’s apparel gained popularity online and eventually caught the eyes of *The Washington Post*<sup>2</sup> and *The New York Times*,<sup>3</sup> as well as Lululemon itself.

<sup>1</sup> ‘Selling Lifestyle: lululemon’s Impact as the Pioneer for Athleisure’ (*Macrom Central*, 18 January 2024) <<https://marcom.com/selling-lifestyle-lululemons-impact-as-the-pioneer-for-athleisure/>>

<sup>2</sup> Ashley Fetters Maloy, ‘Is that hoodie Lululemon or a Costco dupe? No one has to know but you’ (*The Washington Post*, 25 January 2025) <<https://www.washingtonpost.com/style/fashion/2025/01/25/costco-dupe-lululemon-scuba-hoodie-danskin/>>

<sup>3</sup> Alexander Aciman, ‘Are These \$20 Costco Pants a Lululemon Dupe? We Investigated’ (*The New York Times*, 17 April 2025) <<https://www.nytimes.com/wirecutter/reviews/costco-pants-lululemon-abc-dupes/>>

## Dupe Culture

Within the current online ecosystem, the term ‘dupe’ is now widely construed as budget-friendly alternatives to high-end or luxury products.<sup>4</sup> The wave of counterfeit goods has now flooded the market to the extent that luxury brands are urged to go with the flow.<sup>5</sup> Although the concept of counterfeit goods is not novel, the current virtual phenomenon involves consumers openly bragging about their dupe purchases online.<sup>6</sup> The primary concern is that dupe products do not make claims that they are authentic; instead, they leverage marketing by positioning themselves as highly comparable replicas offered at a lower price point.

Brands are now heightening their guards against dupes as fashion designers fear backlash for voicing out against the

mimicry of their original designs at a drastically cheaper price.<sup>7</sup> Nevertheless, a silver lining emerged as Lululemon attracted new customers spurred by the widespread appeal of imitation products resembling its own.<sup>8</sup> In Malaysia, the same dynamics are visible across social media and e-commerce channels, where ‘dupe hauls’ and budget lookalike promotions normalise near-copy products and blur the line between inspiration and imitation in the eyes of local consumers.

## IP Rights in the United States

### (i) Trademark

The brand now claims that Costco has ‘unlawfully traded on its reputation, goodwill, and sweat quality’ through the sale of unauthorised and unlicensed apparel employing knockoff versions of their goods.<sup>9</sup> Furthermore, Lululemon is of

<sup>4</sup> Russell Falcon, ‘What is a ‘dupe’ on TikTok? Here’s the meaning behind the trend’ (KTLA, 9 June 2023) <<https://ktla.com/entertainment/what-is-a-dupe-on-tiktok-heres-the-meaning-behind-the-trend/>>

<sup>5</sup> Amelia Hill, ‘Counterfeit goes cool: high-end brands urged to embrace rise of #dupe’ (*The Guardian*, 20 May 2024) <<https://www.theguardian.com/media/article/2024/may/20/counterfeit-cool-high-end-brands-urged-embrace-dupe>>

<sup>6</sup> Suzanne Kapner, ‘Lululemon ‘Dupes’ Are Just as Cool With the TikTok Crowd’ (*The Wall Street Journal*, 25 August 2025) <<https://www.wsj.com/business/retail/lululemon-dupes-are-just-as-cool-with-the-tiktok-crowd-6ba0e870>>

<sup>7</sup> Joan Kennedy, ‘Is Dupe Culture Out of Control?’ (*The Business of Fashion*, 19 July 2024) <<https://www.businessoffashion.com/articles/retail/is-dupe-culture-out-of-control/>>

<sup>8</sup> Amelia Hill, ‘Counterfeit goes cool: high-end brands urged to embrace the rise of #dupe’ (*The Guardian*, 20 May 2024) <<https://www.theguardian.com/media/article/2024/may/20/counterfeit-cool-high-end-brands-urged-embrace-dupe>>

<sup>9</sup> Pursuant to the lawsuit filed by the Plaintiffs in Lululemon Athletica Canada Inc. and Lululemon USA, Inc v. Costco Wholesale Corporation (2025), para 3.

the view that it has acquired extensive common law rights for the distinctive overall appeal and design of its apparel, particularly as registered under the “SCUBA” mark in the form of trade dress. As a remedy, relief is now being sought in the form of compensation for its lost profits. Hence, to digest the tug of war between the two brands, trademark laws in the United States should first be considered.

In the United States, trademarks are protected by the federal trademark statute, known as the Lanham Act.<sup>10</sup> Based on the legislation, trademarks must be distinctive to distinguish one seller’s goods from another’s. In essence, a sign that is inherently distinctive, non-functional and used in commerce may qualify for trademark protection under the Lanham Act.<sup>11</sup> The umbrella of protection can be branched out into two limbs, namely for registered trademarks and unregistered trademarks. The former form of protection is trademark infringement, whereas the latter may bring forth an action under ‘*false designation of origin*’. Similar to the Malaysian trademark law landscape, trademark infringement entails the unauthorised use of a registered mark that

creates a likelihood of confusion as to the source of the good’s origins.

All in all, the unauthorised use of a trademark essentially revolves around the element of confusion. The courts will magnify the following: -

- whether the infringer intended to deceive the public;
- whether survey data reveals actual confusion; and
- the sophistication of the relevant consumers.

The abovementioned considerations demonstrate the court’s emphasis on the degree of confusion by consumers at large. Furthermore, the courts will also consider the ‘*strength*’ of the trademark. This could be in the form of marketplace recognition and on a scale of fanciful, arbitrary, suggestive, and descriptive marks. It can be observed that there is a high emphasis on the likelihood of confusion by consumers to the extent of being probable and not merely a possibility.<sup>12</sup>

#### **(ii) Trade Dress**

By weighing against the standard of an ‘*ordinary buyer*’, Lululemon also initiated an

<sup>10</sup> 15 U.S.C. §§ 1051–1141n.

<sup>11</sup> Christopher T. Zirpoli, ‘An Introduction to Trademark Law in the United States’ (*Congress*, 7 January 2023) <<https://www.congress.gov/crs-product/IF12456>>

<sup>12</sup> *Cohn v. Petsmart, Inc.*, 281 F.3d 837, 842 (9th Cir. 2002)

action for trade dress infringement and unfair competition under its registered marks given the visual similarities between the apparel.<sup>13</sup> As an overview, trade dress infringement essentially refers to the general visual appearance of a product or the packaging that identifies its source. This includes the product's packaging, design, as well as the business décor and atmosphere. In essence, trade dress is protected under **Section 43(a) of the Lanham Act** if it functions as a source identifier, similar to a trademark, and is inherently distinctive.

### **(iii) Patent Infringement**

On a similar note, Lululemon's allegations of design patent infringement centre on whether Costco's garments are substantially similar in appearance to Lululemon's patented apparel designs in the eyes of an ordinary observer. Patent infringement occurs when a person makes, uses, offers to sell, or sells any patented invention during the term of the patent,<sup>14</sup> and it also includes actively inducing another to infringe.<sup>15</sup> By virtue of this, Lululemon alleges that Costco has infringed its design patents by making, using, selling, offering for sale, and/or

importing products including the *Danskin Half-Zip Pullover* and the *Danskin Half-Zip Hoodie*.

## **The Malaysian Landscape**

### **(i) Trademark**

The general framework of trademark laws in the United States and Malaysia shares common themes, but there is a key structural difference: while US law places primary emphasis on use in commerce, Malaysian trademark protection is principally registration-based under the Trademarks Act 2019, with use remaining important for establishing distinctiveness and for common law passing off claims. Thus, a clear distinction should be drawn from U.S. law: Malaysian legislation does not recognise 'trade dress' as a standalone statutory right. Nevertheless, brand owners may still rely on passing off to protect the overall get-up of their products, including packaging, colour schemes and other visual elements that signify trade origin. Alternatively, infringement of a registered trademark may be established through **Section 54 of the Trademarks Act 2019 ("TMA 2019")**.

<sup>13</sup> 15 U.S.C. § 1051 et seq.

<sup>14</sup> 35 U.S. Code § 271.

<sup>15</sup> Ibid.

As a compass, there are five elements to consider when establishing trademark infringement in line with **Section 54 TMA 2019**:-

- (a) Whether the used mark was identical with or so nearly resembling Lululemon's trademark as is likely to deceive or cause confusion;
- (b) Whether the alleged infringer is the registered proprietor or the registered user of the trademark;
- (c) The alleged infringer was using the offending trademark in the course of trade;
- (d) The offending trademark was used in relation to goods or services within the scope of registration; and
- (e) Whether the offending mark was used in such a manner as to render the use likely to be taken either as use as a trademark, or as importing a reference to the registered proprietor or registered user, or to their goods or services.<sup>16</sup>

In the context of '*dupe*' athleisure products sold on online marketplaces in Malaysia, these elements would be assessed by

looking at whether a seller has used a mark identical with or confusingly similar to the brand owner's registered mark on similar apparel, in the course of trade and in a manner likely to suggest an economic link with the brand owner.

Juxtaposed with the U.S. trademark laws, the local landscape is likewise driven by the likelihood of confusion when determining whether one sign infringes another. Malaysian courts focus on whether a trademark is likely to deceive or cause confusion, rather than on mere resemblance.<sup>17</sup> Hence, Lululemon is of the view that Costco's designs are likely to continue to cause confusion, mistake, and deception among consumers at large as to, *inter alia*, the origin, source, and affiliation of the two brands.

Alternatively, a claim under the tort of passing off may be pursued, where the courts may be inclined to adopt the general recollection test in considering whether a reasonable consumer with an average memory and imperfect recollection is likely to be deceived and/or confused between Lululemon's registered trademark and the alleged infringing mark.<sup>18</sup>

<sup>16</sup> Low Chi Yong (t/a Reynox Fertilizer Industries) v Low Chi Hong & Anor [2018] 1 MLJ 175 [37]

<sup>17</sup> Ortus Expert White Sdn Bhd v Nor Yanni bt Adom & Anor [2021] MLJU 2747

<sup>18</sup> Mi & M Corporation & Anor v A Mohamed Ibrahim [1964] 1 MLJ 392

### Lululemon's Counterpunch

Despite initiating a case against Costco, Lululemon continues to face the global spread of counterfeit products. As one of the most widely counterfeited brands on social media platforms, Lululemon has made various attempts to curb the spread of counterfeit goods, which continue to erode the brand's distinctiveness. One of the brand's notable initiatives was a '*dupe swap*' event hosted in Los Angeles, where shoppers who purchased knock-off goods could exchange them for authentic Lululemon products. Following this event, the brand secured a U.S. trademark registration for the service mark "**DUPE SWAP**" (Registration No. 7908805) in Class 35.<sup>19</sup> However, despite these efforts, the rapid growth of dupe culture, particularly on online platforms, has remained difficult for the brand to control.

In October 2025, Lululemon took a step further and delivered a strategic counterpunch by securing another trademark registration for "**LULULEMON DUPE**" (Registration No. 98884197) as a service mark in Class 35 in relation to retail

and advertising services.<sup>20</sup> This innovative approach not only links dupe products directly to Lululemon's name, but also strategically leverages growing dupe culture to enhance its brand visibility, expand its market reach and capitalise on consumer trends. It thereby reduces the chances of Lululemon's brand being associated with the sale of dupe products and allows Lululemon to exert greater control over the narrative surrounding the quality and reputation of its products. For Malaysian brand owners, Lululemon's strategy illustrates how registering '*dupe*'-related marks for retail and advertising services can be used not only defensively, but as part of a broader plan to reclaim and shape the narrative around lookalike products online.

Brands affected by the growing dupe culture are now following in Lululemon's footsteps by utilising intellectual property rights as a strategic tool to combat and circumvent the proliferation of counterfeit and lookalike products. For instance, Aritzia, another well-known clothing brand, has similarly sought to register the phrase

<sup>19</sup> United States Patent and Trademark Office <[https://tsdr.uspto.gov/#caseNumber=7908805&caseSearchType=US\\_APPLICATION&caseType=DEFAULT&searchType=statusSearch](https://tsdr.uspto.gov/#caseNumber=7908805&caseSearchType=US_APPLICATION&caseType=DEFAULT&searchType=statusSearch)> 6 January 2025.

<sup>20</sup> United States Patent and Trademark Office <[https://tsdr.uspto.gov/#caseNumber=98884197&caseSearchType=US\\_APPLICATION&caseType=DEFAULT&searchType=statusSearch](https://tsdr.uspto.gov/#caseNumber=98884197&caseSearchType=US_APPLICATION&caseType=DEFAULT&searchType=statusSearch)> accessed 6 January 2025.

“ARITZIA DUPE” (Application No. 2383904) as a trademark with the Canadian Trademarks Database in classes 18, 25, and 35.<sup>21</sup> Hence, it is evident that brands are increasingly embracing dupe culture in the digital era and are leveraging it to their advantage when addressing design replication and imitation.

### **Conclusion**

Although trademark registration may help brands shape and police the online discourse around counterfeit and dupe products, the more pressing concern lies in how such marks are actually used to

preserve distinctiveness and support enforcement. From a local perspective, there have, to date, been no reported Malaysian registrations combining the word ‘dupe’ with a brand name, although in principle such marks could be applied for and assessed under the usual distinctiveness and public policy criteria in the Trademarks Act 2019. As dupe culture continues to permeate social media and e-commerce in Malaysia, intellectual property rights are likely to be increasingly weaponised as both shield and sword in the fight against imitation goods.

*This article was written by our Intellectual Property, Media, Sports & Gaming partners, Sri Sarguna Raj, Steven Cheok Hou Cher & Nicole Chong, with the assistance of Soo An Qi, Lim Chaw Zen, Michelle Yap Siew Hui and Emily Ong Wenyen (Managing Associate, Associates & Pupil). It contains general information only. It does not constitute legal advice or an expression of legal opinion and should not be relied upon as such.*

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<sup>21</sup> Canadian Trademark Database <<https://ised-isde.canada.ca/cipo/trademark-search/2383904>> accessed 6 January 2025