LAW À LA MODE

Special Edition – INTA 2017

DLA PIPER

RETAIL SECTOR GROUP

Contents

Editorial

The Belgian editorial team is delighted to bring you this special edition of Law à la Mode, marking the 139th INTA Annual Meeting in Barcelona.

Just some of the focuses for this special edition include the dangers of unused trademarks, following the news in February this year that the Supreme Court of New Zealand has revoked registration of one of the Lacoste crocodile trademarks, on the basis that the brand had not made genuine use of the trademark for over three years (page 5).

Our French team considers how the European Trademark Reform (adopted in late 2015) strengthened the protection of well-known and famous trademarks (page 8). In contrast, at the beginning of this issue, our Australian colleagues provide an insight into the specific issues faced by generic names and marks (page 4).

Native advertising has captivated the attention of the U.S. Federal Trade Commission (FTC) and marketers alike for its ability to blur the lines between editorial and commercial content. Our US colleagues therefore provide 5 tips for navigating native advertising (page 7).

High rents and 24 months of declining retail sales have left retailers in Hong Kong feeling the chill of a severe winter. Many tenants have found themselves tied into leases well above market values, as Hong Kong's notoriously landlord-friendly leases make it hard to renegotiate terms in the event of an economic downturn. Our Hong Kong lawyers are happy to help you find possible solutions (page 9).

We hope you enjoy this edition of Law à la Mode.

If you have any comments or queries, please get in touch with our **retail sector group**.

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WHAT'S IN A NAME? ISSUES FACING GENERIC NAMES AND MARKS

By **Melinda Upton** and **Claire Kermond** (Sydney)

In the retail and fashion industries, names and marks are a key element of the marketing strategies and longevity of brands. Using generic marks or names can land retailers and fashion designers in trouble when it comes to successfully trademarking and protecting their brand.

Generic marks routinely face certain issues when being registered as trademarks. Indeed, marks that are merely descriptive of the goods and services covered by the application are often refused registration. Fashion designers and celebrities can also encounter the same issues when using their name as a brand or to market a product, particularly when their name is already associated with a well known public figure or is a common name and not unique in the eyes of the Trademark Office.

Kylie Jenner faced these issues when applying to register KYLIE JENNER as a mark in the United States. Her application was refused registration by the US Patent and Trademark Office due to a likelihood of confusion with a prior mark for KYLEE. Jenner recently filed an appeal with the Trademark Trial and Appeal Board over the refusal.

This is not the first time Jenner has had issues in successfully trademarking her name. The artist Kylie Minogue, who owns US trademarks for her perfume, Kylie Minogue Darling, and has used the name KYLIE in relation to jewelry, in addition to her entertainment products, was quick to oppose Jenner's application. Minogue argued that consumers were likely to be confused about the source of the goods and services being offered and that Minogue's brand would be damaged if it were associated with Jenner. Ultimately, however, Minogue withdrew her opposition.

When creating a brand identity for a product or a design, retailers and fashion designers should keep in mind that trademarks used in association with their brand should be chosen carefully. For brands and designers who are still garnering reputation this is especially important. The use of a generic mark or a popular name can leave them vulnerable to others using the name for similar products. Strategically selecting a unique name will go a long way in ensuring long-term success of the brand and effective brand management.

LACOSTE LOSES A CROCODILE

THE DANGERS OF UNUSED TRADEMARKS – KEY TAKEAWAYS FOR BRANDS

By **John Hannan** (Auckland)

The Supreme Court of New Zealand has revoked registration of one of the Lacoste crocodile trademarks, on the basis that Lacoste had not made genuine use of the particular trademark for over three years.

This decision, handed down in February 2017, is extremely significant for brand-dependent traders in New Zealand and is a reminder about good practice for traders elsewhere. It sets a high threshold for what counts as "genuine use" of trademarks. It also brings New Zealand in line with UK and EU case law.

THE RISE OF THE CROCODILE

René Lacoste was a famous French tennis player of the 1930s. His nickname, Crocodile, was said to convey the tenacity he displayed on the tennis court. He developed a business distributing shirts embroidered with a crocodile design.

Lacoste is the successor business. Its "crocodile" trademarks are registered in many jurisdictions, among them New Zealand, Australia, Germany, Spain and the United Kingdom.

One of the trademarks it owns is New Zealand trademark 70068:

Crocodile International PTE Ltd, the applicant in the revocation application, is incorporated in Singapore. It produces and sells garments. There are other, originally associated Crocodile companies. Crocodile International and the other Crocodile companies used various crocodile-related trademarks in Asia starting in 1947, including marks identical to New Zealand trademark 70068. These marks are well known in some Asian jurisdictions.

LACOSTE ACQUIRES AND PARKS THE MARK

There have been a number of legal skirmishes between Crocodile companies and Lacoste over branding. Lacoste in 2003 acquired trademark 70068 from Crocodile Garments Ltd, which was not under common control with Crocodile International.

Lacoste never used trademark 70068. Lacoste did use a variety of other registered marks with crocodiles in them, but those marks were visually different from 70068. It had two device marks:

It also had the word mark "CROCODILE".

Crocodile International applied to have mark 70068 revoked for non-use.

IT'S NOT JUST THE CENTRAL IDEA AND MESSAGE

Lacoste accepted that it had never used the particular mark in the exact form that was registered. But it argued that its use of the other crocodile marks was use of 70068 on the basis that its other marks, while differing in elements, did not alter the distinctive character of mark 70068. The central idea and message was "crocodile" and it was using that.

The Supreme Court of New Zealand disagreed. Explaining the test for determining the "distinctive character" of trademarks in relation to their use, it rejected Lacoste's argument that the "central message" of this mark was "crocodile" and that use of other marks which had the central concept or message of "crocodile" was enough to establish use of mark 70068.

The Court said that the marks being used by Lacoste were obviously visually different from mark 70068 in various ways and that in determining whether a mark is being used, one must look more widely than simply the "central idea and message" of the mark. Doing that, the Court said, risked ignoring or downplaying potentially significant visual differences between trademarks.

The "central message" approach would also risk extending too far the protection enjoyed by traders that own trademarks. It would allow a trader to register trademarks for multiple representations of an item or symbol (or in this case an animal), use only one representation, yet retain protection over all of the marks despite not using them.

WHY REVOKE UNUSED MARKS?

The Court discussed the public policy behind not allowing unused marks to remain on the trademarks register. It noted that allowing a single registration to remain, unused, would produce large "no-go" zones, creating a barrier to new market entrants. Furthermore, the economic logic behind trademarks is "reap and sow": a trader's labour in developing recognition of a brand should be rewarded through trademark protection. If there is no use ("sowing") of a trademark leading to building a brand, there are no benefits to "reap" from the trademark. Indeed, New Zealand policy opposes maintaining unused trademarks on the trademarks registry.

The court also ruled that if a mark has not been used, New Zealand courts do not have a general residual discretion to decline to revoke. An unused mark ***must*** be revoked if an application for revocation is made.

WHEN REFRESHING YOUR MARKS: TAKEAWAYS

The central lesson is that regular review, scrutiny and refreshment of your trademark portfolio is vital. For the reasons explained in the *Lacoste* case, if you don't use a trademark for an extended period, you run the risk of revocation.

Businesses that refresh their brands need to ensure they update their trademarks to avoid the risk of old marks being revoked for non-use. It's easy to overlook this.

It is not good enough to use a freshened mark that is similar to the old mark but uses only some of its elements. Ensure that the marks you use include elements which fully retain the distinctive character of the trademark as registered.

As well, it is generally good practice to obtain new trademarks for the refreshed brand.

Finally, New Zealand trademark law, in using the prior "central message" approach, was out of step with other jurisdictions including the UK and Australia. This decision gets it back in line with UK and EU law.

5 TIPS FOR NAVIGATING NATIVE ADVERTISING

By **Ann Ford, James Stewart** and **Naomi Abraham** (Washington D.C.)

Native advertising, which is an advertisement that follows the natural function and form of the user experience in which it is placed, has captured the attention of the US Federal Trade Commission (FTC) and marketers alike for its ability to blur the lines between editorial and commercial content.

Native advertising is paid media fashioned to mimic the look and feel of the news reports, feature stories, product and entertainment reviews, and other material on the online platform where it is placed. As consumers become increasingly adept at avoiding advertisements online, native advertising offers marketers an engaging, effective and flexible way to reach them.

The FTC considers advertising content that could mislead consumers about its commercial nature or its source to be deceptive. Native advertising's flexibility and its insertion alongside editorial content makes it more difficult for consumers to recognize the advertising message within the content. As a result of the popularity of native advertising among marketers, it has become an increasingly popular enforcement target for the FTC.

Here are five tips for in-house counsel to consider when reviewing native advertising for FTC compliance:

- **Is the format misleading?** Consider the overall appearance of the advertisement and the similarity of its written or visual style to the content on the site where it will be published. If unrecognizable as an advertisement, it may be misleading.
- **Would a reasonable consumer recognize the content as an advertisement?** Even if the advertisement could mislead a significant minority of consumers, further revisions to clarify the nature of the content may be required.
- **Who is the target audience?** An ad may be recognizable as such by one group of consumers, but may be indistinguishable from editorial content to another – consider the impact of the format on the particular target group.
- **Simple, conspicuous disclosures.** Use simple terms to disclose that the content is an advertisement to ensure that consumers will understand. Whether the disclosure is conspicuous will vary depending on the type of content and will be judged on a reasonableness standard.
- **Ask for a second opinion.** Seek a second review from colleagues or outside counsel.

Advertisements must be identifiable as such by consumers to avoid being classified as misleading. An advertisement should not sell to consumers without their awareness that the message contained in the content is commercial in nature. If there is a reasonable possibility that consumers may interact with the native advertising content without understanding the commercial nature of its message, the advertisement should be revised to clarify that it is an advertisement and not impartial or independent.

DEMONSTRATING REPUTATION

A LONG AND WINDING ROAD FOR TRADEMARK OWNERS

By **Karine Disdier-Mikus** and **Nancy Larrieu** (Paris)

It is globally recognized that well known and famous trademarks enjoy a broader scope of protection which goes beyond the specialty principles governing trademarks. The European trademark reform adopted in late 2015 strengthened the protection of trademarks with reputation, notably by providing that such trademarks may validly serve as a basis for opposition or cancellation (through an action for invalidity) directed against an identical or similar mark applied for or registered at a later date, "irrespective of whether the goods or services for which it is applied are identical, similar to or not similar to those for which the earlier mark is registered".

Well known and famous trademarks are usually defined as trademarks known by a large portion of the public and that can be immediately recognized as relating to the products and services for which they are used.

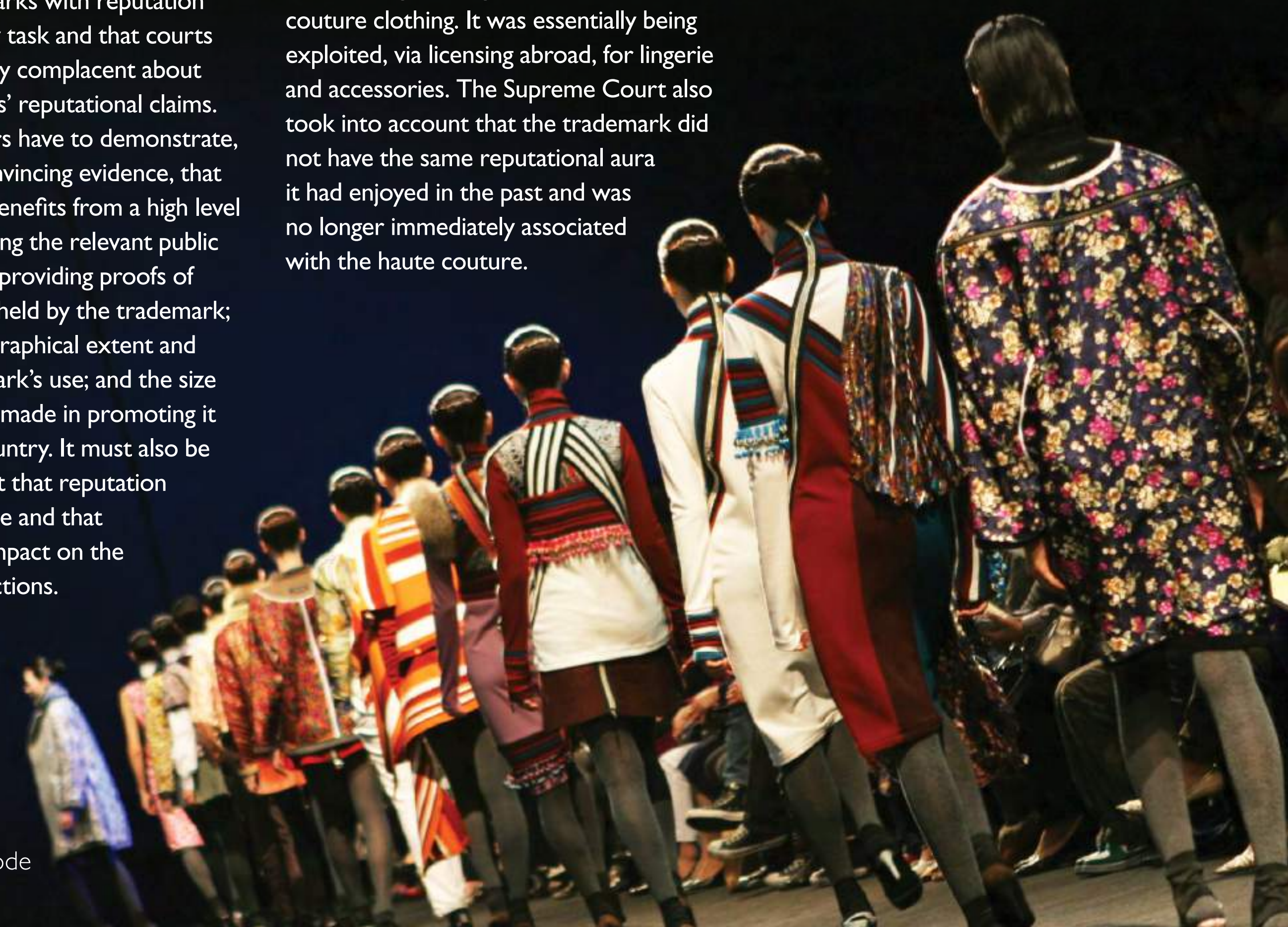
Recent French case law reminds us that defending trademarks with reputation is far from an easy task and that courts are not particularly complacent about trademark owners' reputational claims. Trademark owners have to demonstrate, with clear and convincing evidence, that their trademark benefits from a high level of awareness among the relevant public – in particular, by providing proofs of the market share held by the trademark; the intensity, geographical extent and duration of the mark's use; and the size of the investment made in promoting it in the relevant country. It must also be taken into account that reputation may vary over time and that this can have an impact on the outcome of the actions.

In a perfect example of the difficulties trademark owners may face in demonstrating reputation, on February 8, 2017, the French Supreme Court rendered an important decision in a case involving the CHRISTIAN LACROIX trademark. In this decision, the Supreme Court held that trademark owners cannot rely only on past reputation – indeed, reputation must be constantly nurtured.

In this trademark infringement case, the Christian Lacroix company was claiming reputation of its CHRISTIAN LACROIX trademark in the fashion and haute couture areas against a company selling furniture bearing the mark "designed by Mr. Christian Lacroix". To dismiss the CHRISTIAN LACROIX trademark reputation claim, the Supreme Court noted that, at the time the mark "designed by Mr. Christian Lacroix" was used (*i.e.*, in early 2011), the CHRISTIAN LACROIX trademark was no longer being used for haute couture clothing. It was essentially being exploited, via licensing abroad, for lingerie and accessories. The Supreme Court also took into account that the trademark did not have the same reputational aura it had enjoyed in the past and was no longer immediately associated with the haute couture.

The reputation the trademark CHRISTIAN LACROIX formerly had when used for haute couture was therefore held to be insufficient by the Supreme Court, because the Christian Lacroix company failed to demonstrate that the reputation of its trademark had remained strong at the time when the contested mark was put into use.

This decision is a reminder that everything comes with a price. With greater protection comes a greater burden of proof. Trademark owners who intend to claim reputation must be ready to afford it, not only by providing actual evidence but by doing the long-term brand-building work to maintain and promote an appropriate level of awareness in the public mind. Without being tended, a powerful reputation can fade away, and so can the protections it confers.



SURVIVING THE BIG FREEZE

HONG KONG RETAILERS, 6 APPROACHES TO LOWERING THE COST OF RENT

By **Janice Yau Garton** (Hong Kong)

Hong Kong's notoriously landlord-friendly leases make it hard to renegotiate terms during an economic downturn, tying many tenants into leases well above market values. The territory's high rents, added to 24 months of declining retail sales, have left retailers in Hong Kong feeling the chill.

Many tenants may wish to look beyond their contractual rights and obligations to find a commercial solution. In such difficult circumstances, there are six options retailers could consider.

1. RENT RESTRUCTURE

Landlords are well aware of the tough retail market conditions facing their tenants and may be open to discussions of the terms of a lease, as they are likely to prefer keeping a reputable tenant for a lesser rent over being left with an empty store. Before approaching the landlord, though, tenants must have a strong understanding of their lease terms and their restructuring proposals, using corroborating data about current rents and market conditions to strengthen their position.

A tenant who believes the long-term outlook of the retail market is positive may negotiate for lower rent with increases when the market has recovered. An alternative is to trade a lower rent for a longer lease term.

2. ASSIGNMENT OR SUBLETTING

A tenant may also propose assigning or subletting the lease, either in whole or in part. Retail leases generally do not allow this, and landlords will be reluctant to accept lower income or a lesser tenant. This option, therefore, depends on careful negotiation and the good performance of any proposed alternative tenant.

3. RELOCATION

Relocating also depends upon the willingness of the landlord to cooperate, as well as the availability of alternative premises. The landlord may be keen to keep the tenant, even if this involves relocation that gives the tenant the chance to "right size" in a proper (and cheaper) location.

4. BUYOUT/SURRENDER

Tenants may also offer the landlord a buyout to terminate the lease early. Factors such as additional leases with the same landlord can be used as leverage, as well as the likelihood of any future deals with the landlord.

5. GOING DARK

Most leases require tenants to keep their premises open during specified business hours throughout the year, but tenants may propose "going dark" – closing the store but continuing to pay rent. This would result in substantial savings for the tenant through reduced running costs while maintaining income for the landlord. Another strategy involves partial surrenders, and therefore reduced rent, including using less space by boarding up part of the shop.

6. DEFAULT AND BANKRUPTCY

In extreme cases, a tenant may choose to default and let the landlord claim damages. Under common law, the general position is that damages are calculated to reinstate injured parties to the position they would have enjoyed had the contract been properly performed and to compensate for any losses. Any losses claimed must have been mitigated as far as possible, and the court will take mitigation into account when assessing damages.

Some retailers establish multiple entities so each particular store is separated from all other assets and liabilities. This gives them the option to let any one particular tenant go bankrupt if need be, giving the landlord no viable means of securing rent. But unless this type of structuring was set up prior to entering into the lease, the landlord may be able to sue the tenant's parent company to claw back losses under certain circumstances. This option is also not viable if the lease is guaranteed by either a parent company or any other affiliate of substance. There are, of course, also potential reputational ramifications in choosing this route.

RIDING OUT THE STORM

Several big-brand retailers have recently been successful in renegotiating their rents. A large jewellery retailer closed part of one of its stores on the understanding it would open an extra store at another of that landlord's properties. Coach and Tag Heuer closed flagship stores in 2015, and Abercrombie & Fitch shut its store in the Central district earlier this year. Burberry, Chow Tai Fook, Gucci, Kering and Prada have also looked to renegotiate their rents, according to media reports.

While examples of successful negotiations are encouraging, tenants should be aware that landlords may not accept an economic downturn as justification if adverse conditions were already apparent when the lease was signed – for instance, within the past two years.

THE BIG THAW

The continued depreciation of the Chinese yuan means the years of frenzied shopping by Mainland tourists look unlikely to return. Hong Kong, however, has retained its appeal to cross-border retailers, with 73 international brands entering the market in 2015.

There are signs of recovery, too. Monthly retail sales ended their two-year slide in March, rising for the first time since February 2015. After a few stormy years, the silver lining is a more balanced retail landscape and a more diverse retail offering, as lower rents make prime shopping areas accessible once again to local retailers, fast-fashion brands and lifestyle stores.

BRAND INTANGIBLES

GETTING IT RIGHT FOR TAX PURPOSES

By **Rachit Agarwal** and **Reka Orban** (London)

With a number of multinationals facing increased public scrutiny of their tax positions, the landscape for transfer pricing has never been more challenging. This is particularly true for transactions involving brand intangibles such as trademarks and trade names. These affect the very heart of the profit potential of any business and are more likely to be challenged by tax authorities globally.

Therefore, in order to protect shareholder value and reputation, getting it right for tax purposes should be the first order of business for multinationals. An alignment between legal agreements and underlying economics is critical, because a pure legalistic approach is not sufficient to justify tax positions.

GUIDING PRINCIPLES FOR BRAND INTANGIBLES

Broadly speaking, brand intangibles include trademarks, trade names and domain names, as well as related logos, designs and graphics. These intangibles have an important promotional value for a product or a service and can generate higher margins. When managed carefully and exploited successfully, these intangibles can increase a multinational's profit potential by developing brand awareness, brand association, perceived quality, brand loyalty and competitive advantage in the market.

Tasked by the G20 to issue guidance to avert base erosion and profit shifting, the Organisation for Economic Co-operation and Development (OECD) developed a framework for analysing transactions involving intangibles. The framework includes consideration of a number of elements, such as types of intangibles; contractual arrangements; legal and economic ownership; value of intangibles; and arm's length compensation for the contributions of each member in a multinational group.

The existence and exploitation of brand intangibles require multinationals to determine the inherent value of such assets and to subsequently remunerate the legal and economic owners of the intangibles. The remuneration for the use and exploitation of brand intangibles can be structured in the form of licensing arrangements, factored into the value of the product or service (*i.e.,* in the transfer price for the product or service) or bundled as part of a franchise fee. Regardless of how the payment is structured, any remuneration must account for functions, assets and risks within the framework established by contractual arrangements (the legal view) and, most importantly, by the conduct of the parties (the economic view). Absence of such considerations can lead to tax leakages and other uncertainties.

PRINCIPLES IN ACTION

An analysis of the underlying contractual arrangements in conjunction with the conduct of the parties provides a holistic view of brand intangibles and facilitates the distinction between legal and economic ownership. This distinction is important primarily because *legal ownership by itself does not confer any right to ultimately retain returns from exploiting the brand intangibles*. Rather, such returns should be attributable to the economic owners.

Specifically, economic ownership rests with the members who perform and exercise control over the development, enhancement, maintenance, protection and exploitation of the brand intangibles (the DEMPE functions). Some tax authorities (such as China) have taken a step further and expanded the scope of DEMPE functions to include promotional and marketing activities undertaken locally. Additionally, economic ownership can further entail providing funding and other assets, as well as assuming various risks associated with the brand intangibles. Identifying the economic owners should be done through a thorough functional analysis. Given the various layers that need to be analysed, determining economic ownership should not be taken lightly.

Determining the value of brand intangibles is largely governed by concepts derived from finance, economics, tax and transfer pricing. However, experience shows that assessing the value can be challenging. Difficulties arise particularly in the case of integrated brands, significantly different distribution channels and consumption patterns in various markets. From a transfer pricing perspective, it is essential to clearly identify the profit streams attributable to the brand intangibles and overlay this with considerations regarding economic and legal ownership.

It should be noted that valuation for transfer pricing purposes may differ from valuation approaches in other areas (e.g., customs valuations, accounting, fair market value), thus adding an additional level of complexity to the analysis (particularly when there is a need to reconcile the various outcomes).

KEY TAKEAWAYS

In the case of brand intangibles, a clear understanding of the contractual arrangements in conjunction with a review of the conduct of group members is important to identify inconsistencies between legal and economic ownership. Undertaking a thorough analysis of DEMPE functions will correctly identify the economic owners and, subsequently, the appropriate allocation of the compensation based on contributions made.

To navigate efficiently through the complexities of brand intangibles, key stakeholders (tax, legal, operations and management) must be aligned. Because significant financial and reputational risks are involved, tax needs to be at the table when business decisions are being made. Finally, given the new transparency requirements and the fact that brand intangibles no longer qualify for tax benefits under an intellectual property regime (albeit a few exceptions may exist), multinationals have to be prepared to justify positions taken globally through robust transfer pricing documentation, which should be seen as a strategic exercise rather than a compliance one.

BREXIT UPDATE
UNREGISTERED DESIGNS AND THE FASHION INDUSTRY

By **Ruth Hoy** and **Alice Berkeley** (London)

The potential impact of Brexit on unregistered designs could be significant to the retail and design industry, because the industry relies heavily on unregistered design rights. This is because of the fast turnaround of clothing ranges, which can sometimes make the cost and process of obtaining registered protection for fast moving fashion designs seem unfeasible.

Currently, a business or individual in the UK can benefit from two types of unregistered design rights: a UK unregistered design right and an EU unregistered design right. Both of these rights arise automatically, without the need for registration:

- The UK right can give up to 15 years of protection for designs; however, its scope is more limited than the EU right, in particular because it does not apply to surface decoration. By way of example, this meant that Lambretta Clothing Company were unable to claim an unregistered design right in the positioning of white stripes on a "retro-vintage" tracksuit top; and
- The European right automatically protects qualifying designs for a shorter three-year period. It is available to anyone, regardless of nationality, provided the design in question is "first made available to the public" within the EU. Critically, the protection is broader than the UK right, and provides additional protection for the appearance of a product resulting from its hue, lines, texture, surface decoration, materials and/or ornamentation.

The worry is that, in a post-Brexit world, British designers will only qualify for the more limited UK unregistered design protection, *unless* they (i) make a positive decision to ensure that their designs are always first made available in the European Union (which will obviously, post-Brexit, exclude the UK) or (ii) seek (and pay for) registered protection.

The British Fashion Council has raised this as a particular concern in its recent written evidence provided to the British House of Lords European Union Committee in March 2017. The Committee was considering what would amount to a "good" free trade deal between the UK and the EU, for sectors other than the financial services sector.

In its evidence, the British Fashion Council argued:

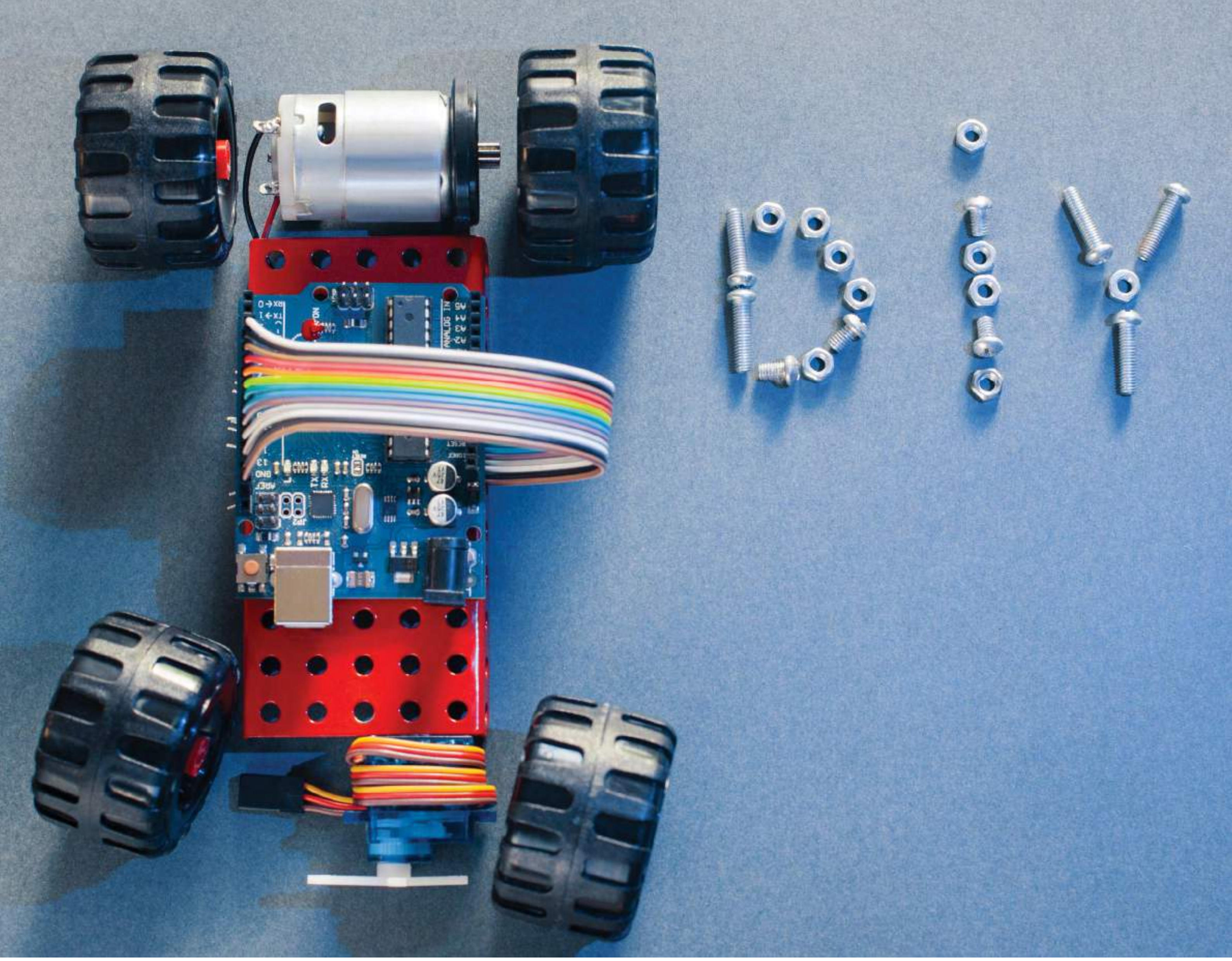
"London Fashion Week is one of the world's leading international trade showcases for the country, which happens biannually for both womenswear and menswear.
It contributes to London being one of the 'big four' fashion capitals alongside New York, Paris and Milan. LFW has a reputation for both established brands, entrepreneurs, future brands and as a launchpad for new emerging talent."

It goes on to conclude:

"Whilst UK-based designers will still be able to rely on [unregistered design protection] in the EU, this will only be on the basis that the relevant designs are first disclosed in the EU. Businesses will therefore be forced to show/disclose their designs first in the EU in order to rely on [unregistered design protection] in the EU, effectively closing down London Fashion Week as a platform to promote British businesses."

Resolving this problem is not straightforward. The UK could expand the scope of its unregistered design right, but designers might still prefer to exhibit first in the EU (as the EU right is likely to be more valuable to them than the UK right due to the EU market being larger). A deal whereby the EU treats the UK, for design right qualification purposes, as part of the EU might be desirable for the UK industry, but would likely be politically very difficult to achieve.

You may also be interested in our article from Issue 22 of Law à la Mode *on the impact of Brexit on trademarks and registered designs.*



OPEN INNOVATION IN THE FASHION SECTOR

FACING THE LEGAL CHALLENGES

By **Bartolome Martin** (Madrid)

New technologies are modifying and boosting the relationships between fashion brands and their customers. Indisputably, customers are shifting from their usual passive consumer role to one that is much more interactive. They are now "prosumers," and they are redefining the rules of the fashion sector. Retailers are embracing this trend and offering their customers the possibility of designing or co-designing their products. Customers have become a link in the production chain, which generates intellectual property and other legal challenges that need to be properly addressed.

Universal access to new technologies and social media is transforming the ways companies interact with their customers. Fashion brands are no exception and are progressively devoting more and more resources to the establishment and consolidation of these new relationships with their customers.

One of these new means of interaction consists of involving the customer in the design process of the products. We are seeing a visible shift to new models in which customers have the possibility of participating and even playing a fundamental role in the final product of the creative process. Indeed, this is becoming common practice in the sector. Some brands already encourage their customer to participate in weekly contests in which they upload their own designs, one of which is chosen for actual production. Others go even further and send the designs proposed by their customers directly to manufacturing.

Currently, several Internet platforms allow creators to refine and ultimately commercialize their creations through a community advisory process. Quirky is one example. This platform matches inventors with its community of professionals and knowledgeable amateurs who are willing to participate in the creative process and advise, improve and market inventions, in exchange for a cut of product revenue. Quirky also sells products that have been created through its community.

On a different commercial level, LEGO is implementing a co-creation model for the design and manufacturing of some of its products. The company has put in place the LEGO Ideas platform: participants design their own Lego sets and then the company selects ideas for new products from these sets. Lego places the creator's name on the products' packing and marketing materials and offers the designer/customer a share of the resulting sales revenue.

Finally, the boom of 3D printers in itself is proving to be another disruptor. The number of platforms offering amateur designers the possibility of manufacturing their products for a small price is growing exponentially. More importantly, 3D printers are also bringing the industry an opportunity to turn back to personalized manufacturing processes, in which the customer is able to decide about the final design of a product by amending specific features – an option that customers, in particular in the luxury sector, are increasingly demanding.

It goes without saying that these types of interactive models bring with them significant new legal challenges that should not be underestimated.

For instance, from a strictly intellectual property point of view, companies must first obtain any and all of the exploitation rights on the designs from the customers. But, in addition, they must also find ways to address the many potential liabilities arising from any infringements of third parties' rights by those customers.

In such cases, although contractual safeguards can be sought to protect the companies' business interests and reputation, they will rarely fully cover the financial consequences of any infringements. This could prove to be an opportunity for lawyers outside the fashion domain to advise on additional protection instruments, such as insurance products and similar facilities.

Another concern arises regarding the extent to which contracts with customers are usually articulated through adherence agreements (this being especially true in certain jurisdictions). Additional risks may be created for fashion companies arising from the applicability to these contracts under a jurisdiction's consumer protection regulatory framework.

Similarly, other legal issues may come into play – for instance, product liability concerns and tax concerns.

In sum, these disruptive approaches are bringing new opportunities to the fashion world, as well as a host of new legal challenges which advisors are only starting to ponder.

CALENDAR

June 2017

Antwerp academy year-end fashion show
June 2 – 3, Antwerp

Graduate Fashion Week
June 4 – 7, London

London Men's Fashion Week
June 9 – 12, London

Milan Men's Fashion Week
June 17 – 20, Milan

Paris Men's Fashion Week
June 21 – 25, Paris

July 2017

Paris Haute Couture AW17
July 2 – 6, Paris

Intertextile Pavilion Shenzhen
July 6 – 8, Shenzhen

Interfilière – Mode City
July 8 – 10, Paris

New York Men's Fashion Week SS18
July 10 – 13, New York

Helsinki Fashion Week
July 22 – 26, Helsinki

August 2017

Copenhagen Fashion Week
August 10 – 12, Copenhagen

Festival Mode and Design
August 21 – 26, Montreal

Stockholm Fashion Week
August 30 – September 1, Stockholm

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