

# LAW À LA MODE

Issue 13 – April 2014

Privacy by design? Fashion flair transforms wearable technologies

Effectively delivering IT services in the retail sector

Advertising in France: “*parlez-vous français?*”

Whistleblowing: a global issue

Jumpstarting online conversation: false claims & endorsements in the fashion space

New draft UAE anti-counterfeit law – what it means for retailers

Insolvency in the fashion retail sector: the risks and the opportunities

#FASHIONLINE @ Borsa Italiana

Retailing in Romania – a practical “*to do list*” for brand owners

Industry Insider with Davide Viganò, CEO of wearables developer Heapsylon LLC



Fashion, Retail and Design Group

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# Editorial

Welcome onto the catwalk 2014's hottest fashion trend: TECHNOLOGY. Wherever you look now, retailers are incorporating technology into their business: be it in the garments themselves (such as 3D printed apparel or wearable technology), by making stores "smart" with virtual fitting rooms and tablets, or by incorporating sophisticated IT services into supply chains. This edition of *Law à la Mode* has a particular focus on these exciting trends, as well as bringing you the usual mix of legal news and views.

Analysts predict that the wearable technology market is set to grow exponentially, from an estimated \$3-5 billion in 2013 to \$42 billion between 2016 and 2018. At **page 3** we consider developments in this progressive market and some of the legal issues they raise. We are also delighted to present an exclusive interview with Davide Viganò, CEO of wearables developer Heapsylon LLC (**page 16**). In particular, Davide tells us about Heapsylon's innovative Sensoria garments, which incorporate 100% textile sensorial technology. He shares his thoughts on the importance of aesthetics for wearables and ways of protecting the intrinsic intellectual property, as well giving us a glimpse into the pioneering potential for use of the Sensoria technology in the healthcare market.

Staying on the tech theme, at **page 6** our technology and sourcing lawyers outline ways to create IT supply contracts that flex with retail business requirements. Technology and e-commerce were also the theme at our recent #FASHIONLINE event held in Milan's famous Borsa Italiana, where DLA Piper lawyers as well as business experts such as Michele Zamboni (Roberto Cavalli) and Gianluca Pastore (Benetton Group) came together to discuss e-fashion issues – see our report at **page 14**.

Moving onto other legal issues, our brand protection team comments on the implications of the new draft anti-counterfeiting law in the United Arab Emirates, which will introduce tougher penalties for infringers (**page 11**) and highlights the risks of publishing ghost-written endorsements about a brand's products and services (**page 10**).

From an international perspective, we examine the Loi Toubon 1994, which prescribes language requirements when advertising in France (**page 8**) and explain some of the practical issues that retailers need to consider before entering the Romanian market (**page 15**).

At **page 9** the spotlight is on whistleblowing, as our employment team highlight the benefits of adopting a whistleblowing policy which caters for differing local laws. Finally, at **page 13** we take an optimistic approach to the spectre of retail insolvency, looking at some of the ways in which "failure" can become an "opportunity".

We hope you enjoy this edition of *Law à la Mode*. If you have any comments, please get in touch with the Fashion, Retail and Design Group via our email address: [fashion@dlapiper.com](mailto:fashion@dlapiper.com) ●

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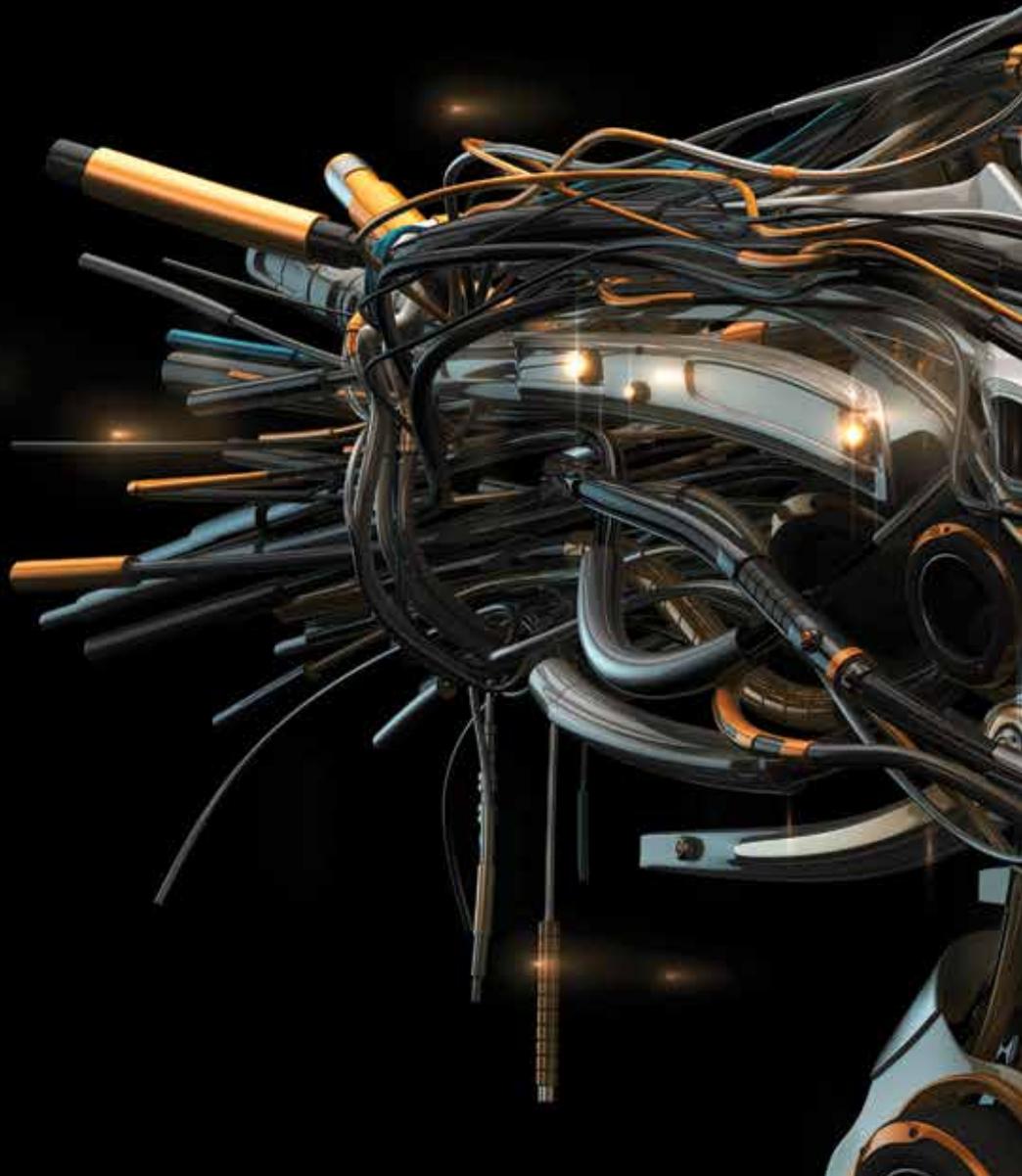
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# PRIVACY BY DESIGN? **FASHION FLAIR TRANSFORMS** WEARABLE TECHNOLOGIES

by Carol A.F. Umhoefer and Caroline Chance (Paris)

The year 2014 is being hailed as the year of wearable technologies. Wearables captured significant attention at January's International Consumer Electronics Show in Las Vegas, and hundreds of new products are expected to be released over the next 12 months. Analysts predict that the wearables market is set to grow exponentially, from an estimated US\$3-5 billion in 2013 to US\$42 billion between 2016 and 2018. Wearable technologies could be the next must-have.



One reason for the current momentum in the wearables market may well be improvements in their style. Few people want to sport ugly devices or accessories, but until recently, wearable technologies' functionalities still outsized (and overwhelmed) their fashion flair. This was the case for calculator watches in the 70s and was also the case for the first smart watches, which looked sober and clumsy. A mere two years ago, fitness tracking wristbands were for the most part still a solely utilitarian purchase – inorganic in appearance and not particularly sleek.

But a new season is opening for wearables. Front and centre is Google Glass, an ersatz smartphone worn on the face which is currently being tested in beta and scheduled for release later in 2014. Google Glass has been hailed as the future of wearable technology. Yet the futuristic eyeglasses at first received mixed critiques. Despite having made an appearance at the Diane von Furstenberg show during the New York Fashion Week in 2012, and showing up in the iconic fashion magazine *Vogue* last year, Google Glass lacked aesthetic appeal for all but the geekiest consumer.

However, the days when Glass wearers were referred to as “cyborg nerds” are now gone. Google Glass



lead designer Isabelle Olsson has redesigned the frame to make it more fashionable (think Lindsay Lohan meets Johnny Depp). It seems that the Californian firm is winning the challenge, succeeding in melding good design and new technology.

Google is certainly not the only tech company that understands the importance of bringing more fashion flair to wearable technologies. Pebble recently introduced a sleeker, more handsome version of its smart watch. Others have started to outsource the design process of their devices to people who know a stitch or two about fashion. For instance, Intel has announced a partnership with design label Opening Ceremony for a future bracelet. Chip-maker CSR has teamed up with jeweller Cellini to create a Bluetooth pendant. The tech trend-setting fitness tracker Fitbit has partnered with luxury icon Tory Burch on a necklace and bracelet.

Other tech companies have chosen to hire top talent away from fashion houses. In the past six months, Apple has brought on board Yves Saint Laurent CEO Paul Deneve as VP of special projects, and Burberry CEO Angela Ahrendts has joined the Cupertino firm to oversee expansion of Apple's retail stores – all this feeding persistent buzz about the impending introduction of an iWatch.

What's more, fashion designers are themselves creating stylish clothing collections integrating new technologies. Dresses that change color with atmospheric conditions, tops that become transparent as the wearer's heartbeat accelerates, jackets with GPS to guide wearers with a gentle prod from sewn-in shoulder pads and Durex's vibrating lingerie controlled by smartphone are all now or soon to be available.

Nonetheless, the joint handiwork of fashion and tech raises issues, notably with respect to privacy and data protection. Once again, Google Glass appears to be the most colorful example. Glass has already been banned in a number of venues. US legislators, like European and other data protection authorities, have shown keen interest in the development of Glass, which by easing wearers' ability to record their surroundings could be used as a constant surveillance tool. Concerns stretch far beyond Google, however, as functionalities found in devices worn 24/7, like smart watches and fitness accessories, will lead to the collection of more and more personal data. As the market for these devices explodes, so will the quantum and quality of personal data collected, most of it passively.

While tech companies like Google have long been at the leading edge of privacy and data protection issues, fashion and design companies typically have not. In a not-so-distant future, technologies could become commodities, and fashion may steer wearable tech, creating a whole new meaning to the concept of privacy by design ●

# EFFECTIVELY DELIVERING IT SERVICES IN THE RETAIL SECTOR

by **Chloe Hersee** (London)

With media sources reporting that online retail is continuing to increase and more people engaging with retail and fashion in a multi-channel way (e.g., via mobiles and tablets), we are seeing even greater business scrutiny of the availability and performance of core information technology services. Retailers are looking at their IT, trying to identify ways to work more efficiently and effectively with their internal and external delivery teams, in order to support changing business needs.

How can retailers work with their suppliers during their contract discussions to drive improvements in availability and service robustness, while at the same time, creating contracts that flex with retail business requirements?

## Making Service Levels Work

When preparing any service level regime it's generally helpful to bear the old adage "quality over quantity" in mind.

The service level metrics need to be easy to work with, so we would typically recommend focusing on a small number of key service levels. They should seek to identify issues which will create a pinch for retail businesses, but, similarly, ensure that any service level regime is inherently flexible (so as to allow for the promotion and/or demotion of services levels, service credit points or percentage pool allocations to reflect changing business need). From a supplier perspective, however, this may need to be subject to a cap on the aggregate number of service levels, or the extent of changes which can be imposed rather than mutually agreed.

It is important to identify what the service requirement actually is. For example, maintenance windows for a core application in the early hours of a Monday morning may be acceptable to a retail business during most of the year, but the sales cost of downtime for the same period in December may well lead to adverse scrutiny of the IT department and its suppliers alike.

In the same vein, it may be that most of the year, on a 24/7 measurement basis, 99.9 percent availability (which equates to roughly 10 minutes of down time a week) for a given IT service/application is sufficient. In peak periods, however, when customers may go elsewhere if they can't make their purchases, the lost sales cost of the same 10 minutes may be significantly more. While a business may not require "gold plated" availability (with a corresponding price tag) for most of the year, one should accordingly consider whether, like other parts of retail businesses, IT service delivery arrangements can be structured around peak trading periods.

## Building Flexibility into Motivational Models

At its simplest, this can mean having a higher service level at different times of the year (e.g., so fewer – or no – Priority 1 incidents are not resolved within the given fixed time), or changing the requirement altogether (e.g., so the fix time for the same Priority 1 incident becomes shorter). Equally, one can look at reducing down time by placing a freeze on all non-essential maintenance unless signed off by both parties' IT change board.

Another means of achieving this, may involve looking at the *consequences* of failing to meet the service level, rather than the service level itself. Often, we see customers seeking to apply a multiplier to any service credit points, percentage allocations or flat rates, with the effect of increasing the service credit accruing as a result of any service level failure, if that the failure occurs during a defined peak period.

Also consider the “response and updating requirements that sit alongside, for example, Priority 1 and Priority 2 incidents – if issues are escalated to senior levels, more quickly, during peak times, then the spectre of executive involvement can drive both supplier and customer to work together to quickly implement workarounds and ultimately, full fixes.

It doesn't have to be all stick as opposed to carrot though. In some cases, it can work to agree on a positive motivational scheme which applies during peak periods, provided that the scheme is clearly structured and easy to administer. Taking the example of the 24/7 availability service level described above, it may be that 10 minutes of weekly downtime is tolerable for most of the year, but during seasonal sales periods there is a tangible (and possibly even quantifiable)

business benefit of a service being delivered to 99.99 percent availability (so only just over 1 minute of downtime over the week), with a resulting increase in online trade.

Rather than pegging the service level at the higher level and paying for a quadruple-nine service all year round, one may accordingly want to consider whether the service level could be pegged at the lower level, with the ability for a supplier to earn a bonus payment, if it can deliver to the higher level during the customer's busiest period. Alternatively, if the platform or application is simply not able to function at these levels, retail businesses could consider rewarding suppliers via gainshare, if a supplier is able to identify and successfully implement initiatives that improve the level of operation,

## Concluding Thoughts

Creating a model which flexes and adapts can be a useful means of ensuring that IT systems meet commercial expectations and trade requirements. Service motivation, at its best, encourages both retail businesses and their suppliers to work together, and the means of achieving this described above, are just examples of the levers and dials to consider ●





# ADVERTISING IN FRANCE

## PARLEZ-VOUS FRANÇAIS?

by Farid Bouguettaya (Paris)

The 20th anniversary of the French Language Act (Loi Toubon) of 4 August 1994 is a good occasion to examine the applicable rules when advertising in France. Such requirements are of particular interest for the fashion, retail and design sectors, which are in essence international and predominantly use English as the language of communication.

**Scope of the law:** The Loi Toubon pursues two purposes: protection of the consumer and defense of the French language. Its scope is very broad and covers all business activities targeting consumers and end users, as well as public entities and documents concerning employees. In this brief article, we focus on advertising.

**First principles:** Pursuant to the Loi Toubon, the French language is mandatory for the “designation, offer, presentation, instructions, and description of the scope and conditions of a warranty of goods, products and services [...]” (Art. 2), as well as for advertisements.

The use of a *foreign* language is only permitted when accompanied by a French translation, and the translation should be as legible, audible and intelligible as the foreign version.

**Means of communication:** All kinds of advertisements must comply with the Loi Toubon, *i.e.* “any written, spoken, radio and television broadcasted

advertisement”. Notwithstanding that the law dates back to 1994, commentators and case law consider that it applies to the Internet and therefore to online advertising.

### Exceptions provided by the law:

Significant exceptions are provided, such as, products and specialties of foreign origin, (e.g. “jeans”, “tweed”, “t-shirt”, “kilt”, “smoking”, “stilettos”) or foreign names protected in France pursuant to international agreements. Business names and trademarks are not affected so if slogans have been registered as a trademark, they need not be translated, which is often advised to companies wishing to advertise internationally with a unique slogan.

**Control and sanctions:** Associations for the Protection of the French Language play an important role in the application of the Loi Toubon and some have the right of action in front of courts. Moreover, the Consumer Authority (DGCCRF) controls its application, as well as the Broadcasting Authority (CSA) and the French

Authority for Advertising Regulation (ARPP). Non-compliance with the Loi Toubon is punished by criminal sanctions, *i.e.* a fine of €750 (for a natural person) and €3,750 for a legal person (corporate body).

### Examples in the fashion and retail

**sector:** In 2009 and 2013, the ARPP issued a report on advertising and the French language.

This report highlighted good and bad practices including the lack of translation in the fashion industry (e.g. “the new vintage”, “eyewear”, “the art of”) and the inventive use of French in the cosmetic field to confer a sense of chic and elegance (“*ne soyez pas en froid avec l’hiver*”, “*attractionisme – fascination – sublimitude*”).

Other examples of the use of French language to provide an advantage in international advertising campaigns: “*j’adore*”, “*parce que je le vaux bien*” ●

# WHISTLEBLOWING A GLOBAL ISSUE

by Lisa Hodgson (Birmingham)

Every business, no matter what industry, faces the risk of inadequate systems, health and safety practices or corruption leading to dangerous or criminal behaviour. The tragedy at the factory in Bangladesh last year put a spotlight on the supply chains used by retailers, leading a number of Western retailers to sign an accord designed to improve safety in factories.

When risks arise, usually the first people to suspect will be those who work with, or within, a company. For this reason, whistleblowers have been instrumental in revealing serious corruption and fraud and preventing mistakes from leading to disasters.

Over 30 countries have now adopted some form of specific whistleblowing protection, although the scope of such protection varies dramatically between jurisdictions. The absence of European legislation also means that even within Europe, the scope of protection varies considerably.

Japan, China, the UK and the US have comprehensive protection, whereas, for now, in Australia, the existence of express federal laws protecting whistleblowers is limited. In the UAE, an employee dismissed for blowing the whistle to the competent authorities is only entitled to a maximum of

three months compensation. Contrast that to the UK, where liability for the same act is potentially unlimited. In the UK, the number of whistleblowing claims in the tribunal system has been increasing steadily year on year, from 157 claims in 1999 to 2500 in 2011/2012.

A report highlighting the variations in whistleblowing protection between jurisdictions and the challenges this presents to global employers seeking to reduce risks to their business can be accessed here – <http://www.dlapiperuknow.com/export/sites/uknow/products/files/uknow/DLA-Piper-Whistleblowing-Report.pdf>

A well-drafted whistleblowing policy provides an opportunity for employers to set out clear rules about how employees may express their concerns about malpractices in the workplace. Global employers need to take a global approach to manage whistleblowing effectively. Due to the wide-ranging differences among jurisdictions, we recommend that employers who have multi-national operations fit their approach to whistleblowing in each jurisdiction. Investing in a tailored approach is likely to be the most effective strategy to ensure that both employers, and employees, are adequately protected ●



# JUMPSTARTING ONLINE CONVERSATION

## NAVIGATING FALSE CLAIMS AND ENDORSEMENTS IN THE FASHION SPACE

by Ann K. Ford and James “Bink” Stewart (Washington D.C.)

The rise in popularity of social networking websites and blogs has extended the reach of a single consumer’s opinion about a brand or its products or services. In fact, prior to purchasing goods or services, consumers frequently review what other consumers have said about the brand or its products or services online. Given the power of consumer testimonials, savvy brands have explored various means of incentivizing positive consumer conversation about their brand online or explored ways to produce content which mimics positive consumer conversation.

In the United States, endorsements are broadly construed to encompass any advertising message that consumers are likely to believe reflects the opinions, beliefs, findings or experiences of a party other than the sponsoring brand, even if the views expressed are identical to those of the sponsoring brand. Persons endorsing the brand must have been *bona fide* users of the product or service at the time the endorsement was made. Moreover, the law requires transparency and disclosure – namely, that endorsements reflect the honest opinion and experience of the endorser and that endorsers (or bloggers) disclose any material connection with the brand they are writing about (e.g. free product in exchange for a review). For example, it would not be permissible to hire a ghostwriter to author false positive reviews or endorsements to create a favorable impression of the brand.

Both brands and their online reviewers are responsible for ensuring that the reviews produced do not contain false, misleading, or unsubstantiated claims. The key for brands who seek to incentivize consumer conversation or blog coverage through payment or privileges is to educate reviewers about the disclosure requirements. Furthermore, brands must clearly inform reviewers of the key qualities of products or services without dictating the tone or content of the reviews.

Brands should monitor coverage secured through these initiatives to confirm that they do not contain false, misleading or unsubstantiated claims and endorsements. Through this process, a brand’s legal department should closely collaborate with the marketing team to provide education on these types of claims.

Transparency and disclosures are essential in a brand’s efforts to induce online consumer conversation. A brand could be subject to liability and considerable consumer backlash online resulting in significant brand damage for engaging in any behavior which appears to mislead consumers about a brand’s products or services (e.g. paying for false positive reviews). Accordingly, while online commerce is popular and booming, brands should be careful not to dampen consumer confidence through misleading or deceptive promotion. The golden rule is always truth and honesty ●

# NEW DRAFT UAE ANTI-COUNTERFEIT LAW WHAT IT MEANS FOR RETAILERS

by Katie Withers (Dubai)

A new law aimed at combating counterfeit goods has just passed through the UAE's Federal National Council and is expected to become law shortly. This measure is part of the UAE's drive to adopt international standards when it comes to IP crime, which is a particular concern in the run-up to EXPO 2020.

The new law, intended to enhance and strengthen (rather than replace) the existing enforcement system, has received a mixed reaction from brand owners. Although the new law is a positive step, there are also areas of concern.

Welcome measures include the establishment of a single cross-emirate body which is responsible for monitoring anti-counterfeiting. Currently, each emirate operates its own enforcement authority, leading to duplication of costs and effort.

Under the new law, it will also be an offence to possess counterfeits, even without proof of intent to sell.

The new law will introduce a tougher penalty regime, of up to two years imprisonment and/or a fine of up to AED 1 million (about US\$275,000). The maximum penalties are reserved for counterfeiters of pharmaceutical and food products. Retailers should be aware that the authorities may ultimately close stores selling counterfeit goods, and repeat offenders may have their trade licences cancelled.

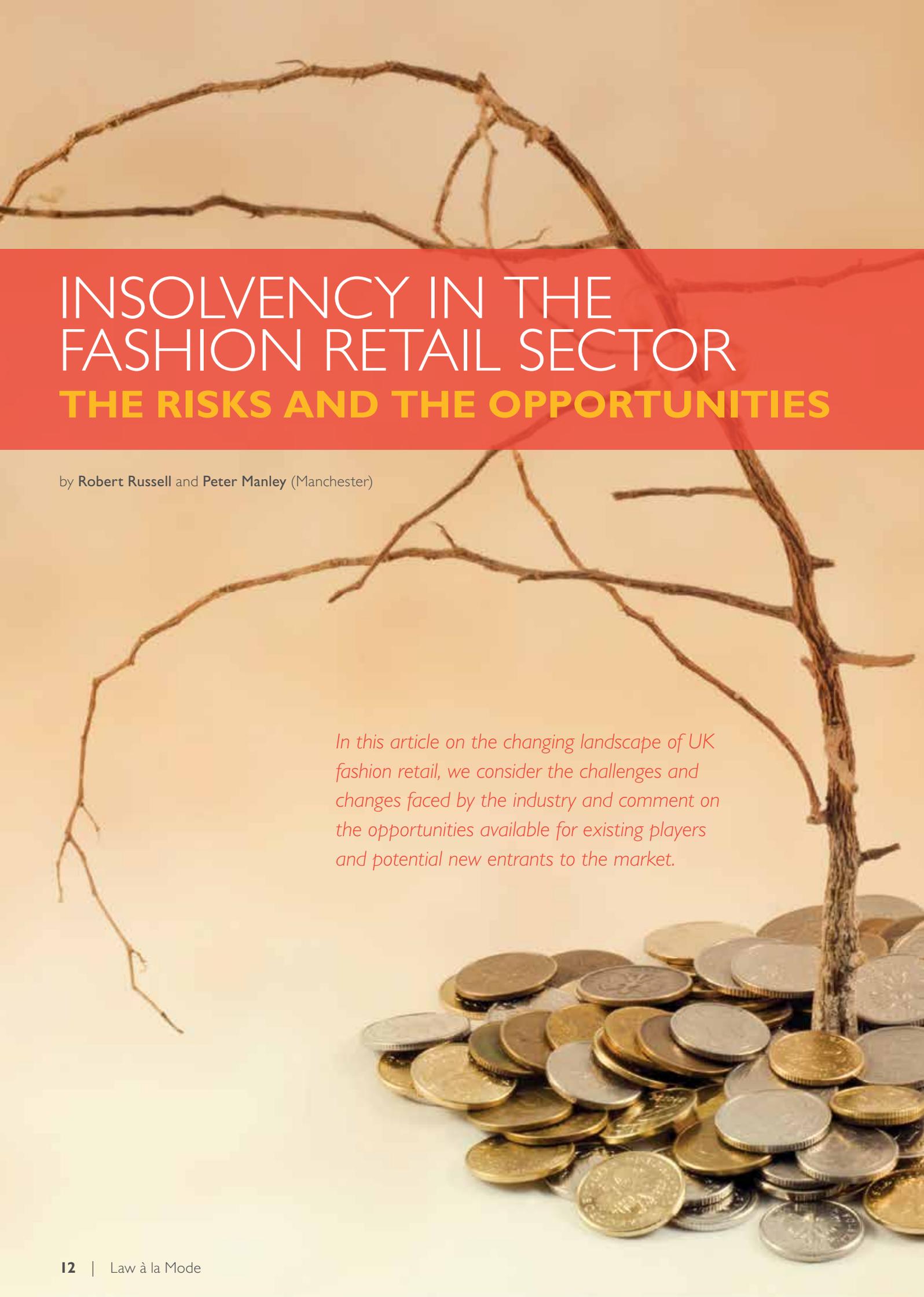
Certain aspects of the new law give cause for concern. First, the law does not allow action to be taken against look-alike products. To be deemed counterfeit, the products must bear an "identical" trademark, and the new law does not extend to any other type of IPR. This appears to be a significant limitation.

The new law also permits the authorities to return counterfeits to their country of origin, meaning that they could well be re-exported and sold. This appears to conflict with the UAE's obligations under the TRIP's agreement

(which only permits re-export in exceptional circumstances). Returning counterfeits will simply displace the problem to another jurisdiction and does little to help brand owners remove counterfeit products from the supply chain.

On balance, the new law is a positive step towards the UAE's adoption of global standards in the detection and enforcement of IP infringement. Brand owners have long complained that the penalties imposed for counterfeiting in the UAE do not act as a serious deterrent. It is also to be hoped that certain aspects of the law (most notably the provisions that allow counterfeits to be re-exported) will be re-examined, to ensure that the new draft law has sufficient teeth to reassure IPR-owning businesses that it will be used to clamp down on counterfeiting and not simply to displace the problem outside the UAE ●





# INSOLVENCY IN THE FASHION RETAIL SECTOR

## THE RISKS AND THE OPPORTUNITIES

by Robert Russell and Peter Manley (Manchester)

*In this article on the changing landscape of UK fashion retail, we consider the challenges and changes faced by the industry and comment on the opportunities available for existing players and potential new entrants to the market.*

The UK fashion industry is estimated to contribute over £21 billion annually to the UK economy. Of this figure, an estimated £2.5 billion comprises retail spending. With over 800,000 people employed in the industry, fashion retail is a significant and vibrant part of UK Plc.



However, in recent years UK fashion retail has been peppered with tales of financial "failure" and in many cases "rescue": retail has struggled to adapt first to the global recession and then to the new realities as the UK emerged from recession in 2009. It may be surprising to note that even in the current post-recession period, the UK market continues to see significant levels of financial distress and business failure. Established businesses across the fashion retail spectrum are being affected, with businesses operating in both the value segment (e.g. Peacocks and Internacionale) and high-end segment (e.g. Nicole Farhi and Aquascutum) finding themselves vulnerable to financial distress.

The retail sector continues to face a number of significant challenges. Many retailers (whether in fashion, entertainment or hospitality) are having to manage the costs of rents across their premises portfolio while addressing profitability challenges on marginal stores. Pressure from online competition, employee costs, continuing development of quality ranges and the impact of seasonal weather on consumer demand have all contributed to the insolvency of a range of prominent fashion retail names.

In broad terms, "insolvent" means that the business is unable to pay its debts and liabilities as they fall due. Very often, the insolvency of a business in the UK will involve the appointment of an accountant by the company or its creditors to act as the administrator of

the company which owns the business. Once an administrator is appointed, the company is in administration and this (in general) prevents any creditors from taking action against the company.

Insolvency is perceived by many to be the end of a business. But while the initial impact on customers, suppliers and employees of a business undergoing a corporate insolvency process can be difficult, there are significant opportunities for competitors and/or new entrants to the market to acquire strategic assets and business when a fashion retailer undergoes an administration or other insolvency/restructuring process. The insolvency of a business in this sector and the appointment of administrators does not necessarily mean loss of brand value. The insolvency regime in the UK aims to facilitate business recovery and provide an opportunity for financially distressed businesses to trade profitably in the future. A large proportion of those brands/businesses have emerged from administration under new ownership as leaner, more dynamic and more competitive businesses with a prospect of trading profitably for years into the future, typically with a smaller store portfolio, reduced employee costs and a strengthened management team to drive the business forward.

A successful acquisition in these circumstances requires a purchaser to move quickly, so early notice of an opportunity is key. The absence of any warranty or representations from the administrator on issues of title

to the business/assets being sold will mean the purchaser will have to price risk into any offer.

When making an acquisition, consideration must also be given to the future structure of the business and to the ownership of the assets. Appropriately structuring a business can be crucially important in managing risk of insolvency within a corporate group operating under different brand names in different sectors and jurisdictions. The use of distinct legal entities to hold particular assets or businesses can isolate unprofitable elements of a group or business in the event of trading difficulties in a particular market or sector. This is a very valuable tool and can allow a purchaser to avoid the "bear traps" which affected the insolvent company. For example, holding trading operations, property assets and intellectual assets in separate legal entities may mitigate the risk to assets of the group in the event of trading difficulties in a particular area.

In the fashion retail sector where brand value is difficult and costly to establish, increasingly the insolvency of an established business in the market is seen as a strategic opportunity to acquire valuable intellectual property assets and skills without having to pay the premium that would apply to a solvent asset or share purchase. The "failure" of a business in this sector is increasingly viewed as an "opportunity" ●



# #FASHIONLINE @ BORSA ITALIANA

by **Giangiaco** Olivi and **Stefania** Baldazzi (Milan)

DLA Piper's Fashion, Retail and Design group held another successful event in Milan's famous Borsa Italiana, discussing legal issues and new trends regarding fashion blogging, e-commerce and wearable technologies.

The event was opened by the University of Milan with a presentation on the e-fashion market in Italy. Although the Italian digital sector is lagging behind (if compared with the overall market), fashion e-commerce is increasing, with a 350 percent growth for mobile e-commerce. The opportunities for further expansion of e-commerce in the fashion sector are quite extraordinary. While fashion e-commerce currently ranks below tourism in terms of sales, there is no reason why it should not be at the top of the list.

The first panel featuring our lawyers from Europe (Ruth Hoy and Carol A. F. Umhoefer), the US (Ann Ford) and Asia (Betty Louie) gave attendees an insight into the legal issues of fashion e-commerce, blogs (and flogs!), wearable technologies and social media, focusing on the main challenges for the fashion industry.

Blogs remain an issue. There is a general awareness that certain bloggers or fashion influencers may be paid to positively review certain products or brands (possibly through their agents), particularly if such influencers have acquired celebrity status. In certain jurisdictions, there are specific sanctions for failing to disclose sponsorship of a blog. In a number of jurisdictions, the general rules for advertising apply (and to a certain extent, "gifts" may be permitted). Regardless of the actual sanctions, transparency is advised so the brand and the blogger will not lose credibility.

There are no "free rider" jurisdictions on e-commerce or wearable technologies. For instance, with the implementation of the data protection and consumers legislations in China, there will likely be a further increase of online shopping confidence (and scrutiny). Various strategies can be devised when entering an emerging market digitally.

Despite some common regulations in Europe, e-commerce rules do differ. Looking at the relevant case law, in certain jurisdictions, after-sales assistance should be specifically addressed: the more often there is a customized after-sale, the lesser the risks.

And then, from theory to practice. A panel of professionals from major fashion brands as well as famous Italian bloggers, including Michele Zamboni (Roberto Cavalli), Gianluca Pastore (Benetton Group), Caterina di Iorgi (Style & Fashion 2.0), Francesco Giartosio (GlassUp), Eleonora Carisi (JouJou Villeroy) and Paola Vee (Les Cahiers Fashion Marketing) discussed their practical experiences.

Connective commerce is a reality. A lot of prominent brands are quickly recouping ground they may have lost. Benetton, for instance, is fully integrating their online and off-line experiences, and their digital investment is above 50 percent of advertising spend. We look forward to seeing the next launch of integrated shops in Milan and new connective applications.

Given the extreme diversity of the players and jurisdictions, any digital strategy cannot be taken lightly. Online brand and technology protection, communication and reputation management remain of paramount importance when devising a digital strategy ●

# RETAILING IN ROMANIA

## A PRACTICAL “TO DO LIST” FOR BRAND OWNERS



by **Cosmina Simion** and **Laura Leanca** (Bucharest)

The Romanian market has a lot of potential. Others have already made a fashion statement in Romania. What are you waiting for?

If you are an international brand owner with Romania on your radar, you should be mindful of:

### LOCATION, LOCATION, LOCATION

Shopping centres are one of the most popular entertainment attractions for the nearly 21 million inhabitants of Romania, located in more than 18 metropolitan areas, each city having at least one shopping centre. Bucharest alone, as the country's capital and fashion hub, now has 15 shopping malls and 4 more are coming.

### TO FRANCHISE OR NOT TO FRANCHISE

#### Pros...

#### ■ It's cost-effective

In general, brand owners decide to begin franchising to avoid potentially risky financial investments, allocation of resources and time. While it is true that the franchisor provides the guidance, training and know-how, the franchisee does the legwork, finances the investment and pays the franchise fee to the franchisor.

#### ■ Limited liability for the brand owner

Since it's the franchisee and not the franchisor who enters into lease agreements, commits to various services and pays the local taxes, franchising allows a brand owner to expand into a new market with virtually minimum liability.

#### ...and cons

Franchise commitments may not be suitable if you want total control over your brand in Romania. Unlike the franchise business model, where it is more difficult for the brand owner to influence all business decisions, a direct local presence allows an extensive, accurate implementation and constant monitoring of the methods, processes and operation systems adequate to the specificities of the brand.

#### What does the market say?

While 10 years ago the franchised model seemed to be the preferred business option, in the past few years more and more international retailers have opted to set up local affiliates, or purchase their franchise businesses. The franchised model continues to be the choice for luxury brands as it allows the possibility of testing the market without losing the flexibility to opt out if something goes wrong.

### FRANCHISES ARE SPECIFICALLY REGULATED

- The franchising agreement must contain several mandatory clauses on (i) financial terms; (ii) duration; and (iii) conditions for contractual amendment, extension, termination or assignment.

- The franchisor is required to grant the franchisee a sufficiently large notice period in case it does not want the agreement renewed (also a disincentive for brand owners to adopt the franchising model).
- Where international brand owners enter into foreign law governed franchises, it is advisable that such agreements are reviewed from the perspective of Romanian overriding legal provisions. Care must be taken to comply with Romanian competition law, which prohibits anticompetitive behaviour and abuse of dominant position.
- Brand owners should also consider registration of their trade mark licences embedded in the franchise agreements, with the Romanian State Office for Inventions and Trade Marks, for opposition purposes.

### WATCH OUT FOR ADVERTISING AND CONSUMER PROTECTION RESTRICTIONS

- Packaging and advertising information must be in the Romanian language, although it may be displayed in other languages as well.
- Discount and promotional sales are permitted under specifically provided for limitations ●

# INDUSTRY INSIDER

## HEAPSYLON LLC

by Ruth Hoy (London), Giulio Coraggio (Milan) and Rebecca Kay (London)



As this edition of *Law à la Mode* shows, the role of technology in the fashion sector is becoming increasingly entrenched and exciting. With this in mind, we decided to chat with Davide Viganò, CEO of wearables developer HEAPSYLON LLC, to get his view on developments.

### Tell us a bit about Heapsylon's Sensoria product line.

The Sensoria collection comprises a range of garments including socks, sports bras and t-shirts, all of which incorporate 100% textile sensorial technology. Taking the Sensoria Fitness Socks as an example, the integrated pressure and force sensors in the socks detect activity, cadence and impact forces. The Sensoria Fitness Socks come with a small anklet electronic device, which communicates the data collected in real-time to the Sensoria mobile app, enabling the user to track his activity and detect foot landing technique in real-time via audio cues.

### Where did the inspiration for the products come from?

The co-founders of Heapsylon, including myself, are all Italian and have a technology background, having previously worked at Microsoft. In late 2010 we started to feel there was an opportunity for the sports apparel and fashion industry to reinvent itself through technology, so we set out to create garments that behave like a computer and still feel natural and look cool and elegant. One of the turning points in our product development story came as a result of a visit by Mario Esposito, our Chief Technology Officer, to his local Starbucks. Mario's wife spilt coffee on his foot and he felt the heat burn through. The experience got Mario thinking that, rather than having technology *attached* to clothing, the textile itself need to be the sensorial computer. We started researching and testing, and the Sensoria Fitness Socks were born.

We knew there were textile material on the market which tried to address this, but they tended to lose effectiveness once washed – which is obviously not ideal for a garment you exercise in! So we had to create our own textile sensor technology which is washable, but also very thin and comfortable.

### We note that many wearables businesses are now involving fashion experts in the design process (e.g. the recent tie-up between Google Glass and another Italian company, Luxottica). How important are aesthetics for Heapsylon, or is it all about functionality?

We want to create something that people *want* to wear. Our vision is to create technology which is transparent to the user and eventually disappears to the human eye. At the moment the electronic anklet is a core element of the Sensoria Fitness Socks, but even there we have reduced its size and weight by 3X in the last six months. The Luxottica/Google Glass collaboration is indicative of how important appearance is regarded by wearables developers.

### Do you see Heapsylon as a technology business, a fashion company, or something else?

We view ourselves as the Gore-Tex® of wearables; as an enabling company. Our technology can be added as an “ingredient” to a product, in order to make it a smart garment. For example, the apparel that we sell is produced by an Italian fashion company that knows much more about manufacturing than we do. Our core competence is injecting intelligence into products. There will come a time where consumers have to decide whether to wear a “dumb” garment or a “smart” garment.

### It seems that brand and design are key to the success of a new wearable tech products. How important is protecting these elements to Heapsylon?

Very important. The intellectual property in our products exists both in the e-textile sensors themselves and in the systematic approach that we use to analyse the data collected by the sensors, through our software solutions.

We sell OEM or licence our technology to third parties through our Sensoria Development Kit, enabling businesses to create new products and applications without needing to



reinvent what we have already developed. The purchase of a Sensoria Developer Kit requires signature of a non-disclosure agreement and a developer agreement with Heapsylon.

We have also just received confirmation of our first design registration in Europe, for the electronic anklet device which connects magnetically to smart garments.

**Your products obviously collect a lot of data from their users. What data protection questions have you had to address as a consequence?**

The data that our wearable devices collect is processed by us and stored on a privacy-protected cloud system. The user has immediate access to this data, which is an important aspect of using our product; for example a runner who is looking to address his heel-striking wants to know in real time whether he needs to change his running style. Waiting till the end of the run and looking at a pretty dashboard when his knee or back hurts at night doesn't help him much!

We also use the data collected in order to improve our products, but not in a way which identifies individual users. Otherwise, we do not share or sell the data. If the user decides to share his personal results (e.g. with his fitness coach, doctor or via social media), that is his own choice.

As we start to move into the healthcare sector though, the data protection questions are getting more complex. We have access to cloud based HIPAA compliant solutions that we are currently evaluating.

**Talking of the healthcare sector, we know that this is an exciting growth area for Heapsylon. What opportunities does the market open for you?**

Our initial business focus has been on the fitness apparel industry. However, we see the most meaningful future of Sensoria as being in the healthcare sector; for example by assisting with patient care issues such as fall prevention, centre of balance and weight monitoring.



Diabetes is one scenario where the Sensoria Fitness Socks can play a really interesting role. According to the CDC at present there are over 350 million patients that suffer from diabetes in the world, with this number set to rise to around half a billion by 2030, making it a condition of epidemic proportions. Diabetics often have deficiencies of the nerves in their feet, resulting in an inability to feel pain in this region. As a result, damage to their feet which would otherwise be easily treatable degenerates into serious complications, with the result that around 15-20% of diabetic sufferers develop major foot related ulcerations, even to the extent of requiring amputation. The opportunities here for our technology are clear: if we develop a version of the Sensoria Fitness Socks for diabetics, we can replace the pain sensation so as to alert users (e.g. that their shoes are too tight) and thereby pre-empt medical complications.

**Thank you Davide for this fascinating insight! ●**



# BUSINESS ROUND-UP

## LUSH TAKES A STAND

**Siân Croxon** (London)

For some years Lush, the UK manufacturer of fresh handmade soaps and other cosmetics, has refused to allow its products to be sold on Amazon. With an ethical approach to business which it feels is not aligned with Amazon's, it was therefore unhappy about Amazon's recent use of its brand to attract consumers to purchase third-party products.

It sued Amazon for trade mark infringement with a good measure of success, the judge finding that Amazon was, in effect, using the LUSH trade mark as a generic indicator of a class of goods, giving consumers the impression that Lush goods could be purchased through Amazon when in fact they could not. This, the judge held, was a direct attack on the ability of the mark to act as a guarantee of origin.

For brand owners unhappy about the activities of on-line retailers, this decision gives some useful guidance on enforcement options and adds to the growing body of European decisions on the subject ●

## DENIM DILEMMAS

**Jaimie Wolbers** (Sydney)

In late 2013, Justice Heath of the New Zealand High Court highlighted the importance of fashion companies ensuring that their internal polices and the training provided to design staff accord with the requirements of the jurisdictions where their products will be sold.

In *G-Star Raw C.V. v Jeanswest Corporation (New Zealand) Ltd* [2013] NZHC 2679, G-Star Raw sought relief from the courts on the basis that Jeanswest had infringed its copyright in the original design drawings for its distinctive "5620 Elwood" denim jeans by selling the "Dean Biker Slim Straight" denim jeans in New Zealand. The Dean Biker Slim Jeans were designed in Australia by Jeanswest Australia.



Justice Heath found that copyright in the original design drawings had been infringed as there were a number of elements of similarity between the two jean designs. In his judgment, His Honour commented that throughout the trial he had been confused as to why Jeanswest would have assumed the risk of infringement proceedings, particularly in relation to a fashion house that takes an “aggressive approach” to protection of its intellectual property. He stated:

*It was only when I was told, during final submissions, that copying of this type would not infringe Australian copyright laws that I formed a view about how this had happened. The problem, in my view stemmed from Jeanswest Australia's treatment of Jeanswest NZ as no more than a branch office.*

It is clear that fashion houses with a global presence must not assume that copyright and design laws operate in a uniform manner across jurisdictions. Such an assumption could potentially lead to costly litigation. While the damages in this case were not significant (only 63 pairs of the infringing jeans had been sold), Jeanswest was liable for G-Star Raw's costs ●



## LIGHTS! GLAMOUR! FASHION! AUSTRALIAN FASHION HITS THE RUNWAY

**Melinda Upton** (Sydney)

DLA Piper had the pleasure of being part of the Melbourne Fashion Festival Gala Opening this month. It was a night of glamour and excitement at the Melbourne Fashion Festival's premiere runway show presented by leading Australian retailer David Jones and supported by *Vogue Australia*.

During the gala, featuring contemporary fashion from Australia's most talented designers, DLA Piper partners and their guests had the opportunity to mingle with leading designers, models and the celebrity A-list at the VIP party. They were also treated to an exclusive behind-the-scenes tour and enjoyed the show from reserve seating in a private box at the festival's premiere runway show. Guests of DLA Piper included contacts from Accenture, Country Road, Deloitte, Geofabrics, Medibank Private and Toyota ●

# CALENDAR

## MARCH 2014

Melbourne Fashion Festival

When: 17 – 23 March 2014

Where: Central Pier, Melbourne, Australia

Hyères 2014 – 29th International Festival of Fashion and Photography

When: 25 – 28 April

Where: Villa Noailles, Hyères, France

## APRIL 2014

Mercedes-Benz Fashion Week Australia

When: 6 – 10 April 2014

Where: Carriageworks, Sydney, Australia

The Fashion World of Jean Paul Gaultier From the Sidewalk to the Catwalk

When: 9 April 2014 – 25 August 2014

Where: The Barbican, London

## MAY 2014

INTA Annual Meeting

When: 10 – 14 May 2014

Where: Hong Kong

## INTA 2014

Members of our global Trademark team will be attending the annual INTA conference in Hong Kong from 10-14 May, 2014.

We will be hosting a lunchtime event dedicated to discussing fashion and retail-related brand issues on Tuesday, 13 May.

If you, or a colleague, are interested in joining us for this event, please email [natalie.chapman@dlapiper.com](mailto:natalie.chapman@dlapiper.com).



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