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FASHION LAW

"People will stare. Make it worth their while."
– Harry Winston

DECEMBER 2018

WELCOME

Welcome to our latest edition of Fashion Law.

The world of fashion continues to raise intriguing legal issues across a variety of subjects including issues relating to modern slavery and combating parallel imports. Our current issue of Fashion Law tackles a range of interesting topics ranging from intellectual property matters to superannuation.

In this edition we look at the steps the New South Wales and Australian Governments are taking to tackle modern slavery. Australian businesses need to understand what is required under the new laws, and get prepared to report on their supply chains.

We also take a look at a decision in a New Zealand trade mark opposition by Mimco, which highlights the importance of brands getting on the front foot and setting up trade mark watching services to protect their trade marks.

Also included in this edition is an article on superannuation requirements, which covers when payments need to begin and the impact that employment status (full-time/part-time or casual) has on payments. We also delve into international markets and look at the importance of managing and protecting your brand and designs beyond Australian borders. Finally, we look at the changes in Australian parallel importation laws, which relate to the importation of genuine products by parties that are not authorised by brand owners.

We hope you enjoy this edition, and welcome your feedback.

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Subscribe to our global Intellectual Property (IP) blog '*IP Law Watch*' at **iplawwatch.com** to learn about all IP related matters.

IN THIS ISSUE

A MODERN SLAVERY ACT FOR AUSTRALIA

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Ethical sourcing and supply chain management in the fashion industry has come under intense public scrutiny in recent years. As brands compete to produce high volumes of affordable clothing, with clothing ranges changing every season, it can be increasingly difficult for businesses to monitor their suppliers and prevent exploitation in complex multi-national supply chains.

READ THIS ARTICLE

MIMCO SUCCESSFULLY OPPOSES APPLICATION TO REGISTER MIMO & CO MARK IN NEW ZEALAND

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WHAT IS MODERN SLAVERY?

Modern slavery exists in many forms and includes forced labour, wage exploitation, involuntary servitude, debt bondage, human trafficking and child labour, both in Australia and globally.

FEDERAL GOVERNMENT INQUIRY

In Australia, supply chain management and transparency has largely been monitored by not-for-profit organisations. Baptist World Aid Australia publishes an annual Ethical Fashion Report which sets out what the industry and individual companies are doing to address modern slavery. The 2018 report showed that the industry is proactively seeking to improve its supply chains and that 78% of companies are already making efforts to ensure that suppliers, buyers and factory managers understand human trafficking, child labour and forced labour risks. Nonetheless, estimates in the 2017 report suggest that over 45 million people across the globe are currently subject to some form of modern slavery.

In 2017, the Federal Government established a committee to conduct an enquiry into the establishment of a Modern Slavery Act in Australia. Key players within the fashion industry, including the Adidas group, made submissions to the enquiry broadly supporting the establishment of a Modern Slavery Act in Australia and provided examples of how each of their businesses worked to mitigate risks of modern slavery within their supply chains and ensure their business practices were compatible with upholding human rights.

The final report of the Committee was published in late 2017 and recommended the Federal Government enact a Modern Slavery Act in Australia, including a supply chain reporting regime requiring certain businesses to publish a Modern Slavery Statement annually. As a consequence, the Federal Government introduced the *Modern Slavery Bill 2018* into Parliament in June 2018. In the same month, the New South Wales Government also enacted its own modern slavery legislation, being the *Modern Slavery Act 2018*.

It is important for fashion businesses to learn about Modern Slavery and have detailed systems, processes and resources in place to identify modern slavery in supply chains and take steps to reduce that risk.

MODERN SLAVERY STATEMENT

In New South Wales, companies with an annual turnover of at least AU50 million are required to publish a Modern Slavery Statement at the end of each financial year. Under the proposed federal law, companies conducting business in Australia with consolidated annual revenue of AUD100 million or more will be required to do the same.

Although the minimum reporting requirements at the federal level are not yet settled, it seems likely that businesses will be able to prepare a single document to comply with both sets of laws that reports on matters including the following:

1. the organisation's structure, its business and its supply chains;
2. the organisation's policies in relation to slavery and human trafficking;
3. due diligence processes in relation to slavery and human trafficking in the organisation's business and supply chains;
4. the parts of the organisation's business and supply chains where there is a risk of slavery and human trafficking taking place and the steps it has taken to assess and manage that risk and its consultation process;
5. the organisation's effectiveness in ensuring that slavery and human trafficking is not taking place in its business or supply chains, measured against such performance indicators as it considers appropriate; and
6. training about slavery and human trafficking available to the organisation's staff.

Businesses that do not comply with reporting requirements will face penalties for non-compliance, at least under the New South Wales laws (the Federal position is still being finalised).

In theory, the Modern Slavery Statement only requires businesses to report against the criteria set out above, as opposed to actually requiring that proactive steps be taken to combat modern slavery. However, it is expected that the reputational risks presented by public reporting will encourage most businesses caught by the thresholds to improve the cleanliness of their supply chains.

WHAT NEXT?

The Federal *Modern Slavery Bill* passed the House of Representatives on 17 September 2018, and was introduced in the Senate on 18 September 2018. We expect the bill to become legislation in the near future. Meanwhile, the New South Wales laws are already in place and more details regarding reporting requirements should be available soon.

It is important for fashion businesses to seek legal advice regarding whether they are caught by the new laws and, if so, what they can do now to ensure they are ready for public reporting, when it commences. To this end, fashion businesses should start to review their supply chains, and look out for further developments.

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Registration of a trade mark is the first step in protecting a brand. However, it is also important for brands to keep a watch on competitors and oppose applications to register marks which are similar to their brands. This was highlighted in a recent New Zealand case involving Australian handbag and accessories business Mimco.

Mimco **successfully opposed a New Zealand trade mark application** filed by Vestiditos for “Mimo & Co” device mark (Mimo Mark):

The goods and services claimed in the application for the Mimo Mark included clothing, footwear, headgear, organising fashion shows and related services.

Mimco is the owner of various registered trade marks in New Zealand, including MIMCO, MIMCO TIMEPEACE and MIMCO PRECIOUS.

GROUNDS OF OPPOSITION

Mimco relied on several grounds of opposition, including that:

1. the Mimo Mark is similar to Mimco’s registered marks and claims the same or similar goods and services;
2. the use of the Mimo Mark would likely deceive or confuse consumers; and
3. the Mimo Mark is identical or similar to Mimco’s trade marks which are well known in New Zealand.

The Assistant Commissioner of Trade Marks (**Commissioner**) found that Mimco had proven the first two grounds of opposition. To be successful, Mimco only needed to establish one ground.

DECISION

In respect of ground (1), the Commissioner focused only on Mimco’s registrations for the MIMCO mark as these marks were the closest to the Mimo Mark. The Commissioner found that there was an obvious overlap between the goods and services claimed by the Mimo Mark and the MIMCO marks. The Commissioner accepted Mimco’s arguments that the Mimo Mark is similar to the MIMCO marks, namely that:

- the words MIMCO and MIMO & CO are visually and phonetically similar;
- the elements MIM and CO are a visual focus for consumers when reading both marks, and are therefore a source of confusion between the marks; and
- the dog device in the Mimo Mark does not render the mark different enough to co-exist with the MIMCO mark without confusion.

For ground (2), the Commissioner found that there was an awareness of the MIMCO mark in New Zealand. The onus then shifted to Vestiditos to demonstrate that its mark was not likely to deceive or cause confusion in the market. Vestiditos did not participate in the proceeding and the Commissioner found that Mimco established that the use of the Mimo Mark would likely deceive or confuse consumers.

Regarding ground (3), the Commissioner found that whilst MIMCO has a degree of reputation in New Zealand, it was not a “well-known” mark.

TRADE MARK WATCHING

This decision underscores the importance of trade mark owners keeping a keen eye on their competitors and their pending trade mark applications in key markets.

Once a trade mark is accepted for registration, the opposition period starts running. Trade mark oppositions must be filed within this period otherwise a trade mark will proceed to registration. While it may still be possible to attack a trade mark after registration, this process involves court action which can be expensive and time consuming.

In most countries, trade mark owners are not automatically notified when applications for similar marks are accepted for registration by the local trade marks office. In Australia, trade mark owners can monitor pending similar applications by reviewing the Australian Trade Marks Register online.

However, the best way for trade mark owners to ensure they are aware of all relevant applications in time is by utilising a trade mark watching service. This can be an inexpensive and effective way to protect a brand. Typically this service involves periodic reviews of the relevant trade marks registers. Marks which are identified as being similar to the registered trade marks recorded with the watching service are then reported back to brand owners, in time for them to consider filing oppositions.

Brand owners should speak to their intellectual property lawyers regarding the benefits of trade mark watch services. These services can provide peace of mind and ensure that competitors' similar marks do not slip through the cracks and proceed to registration.

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OTB Group relied on the two different types of design protection available in the EU: a registered community design (RCD) for the Skinzee-sp jeans and an unregistered community design (UCD) for the Fussbett sandals.

WHAT ARE RCDS AND UCDS?

Both RCDs and UCDs protect 2D and 3D aspects of a design, however there are differences in acquiring and enforcing each right.

An RCD must be registered with the EU Intellectual Property Office (EUIPO). A designer can apply for an RCD 12 months after first disclosing the design. Disclosure means the design must have become known in the normal course of business in the relevant industry. In the fashion industry, disclosure would occur when the design is shown on the runway, on social media or in-store. A UCD comes into existence automatically (not on registration) when a design is first disclosed within the EU.

While an RCD can last up to 25 years, a UCD will expire three years from the date of first disclosure. A UCD is nevertheless a significant right in the fashion industry as three years of protection without registration provides valuable temporary protection from copying.

To enforce a UCD, the holder needs to prove that a third party intentionally copied the UCD and had knowledge of the design. Therefore, it's easier to enforce an RCD as the holder does not need to prove that the infringing design was intentionally copied.

Both RCDs and UCDs must be novel – they must be different from prior designs available to the public at the time of release. They must also have individual character ie produce a different overall impression from prior designs.

DESIGN RIGHTS IN AUSTRALIA?

Australia does not have an unregistered design right, the equivalent of the UCD. To achieve design protection in Australia, a designer must register the design with IP Australia prior to disclosing the design. There is no grace period the designer can rely on. The best way to protect your designs in Australia is to apply for design registration as soon as you can and before you publicly disclose the product which is going to be the subject of the design application.

ZARA: DESIGN INFRINGEMENT

In our case example, OTB Group sought injunctive relief and damages against Zara for design infringement and argued that the relief awarded should apply to Zara's conduct across the EU and not just in Italy where the proceedings were heard. Zara argued that the Court lacked jurisdiction over it as a Spanish company.

The best way to protect your designs in Australia is to apply for design registration as soon as you can and before you publicly disclose the product which is going to be the subject of the design application.

The Court found that Zara had copied both designs. It dismissed Zara's arguments on jurisdiction and held that a court in one EU country can issue an order which covers the conduct of the defendant in another EU country.

The Court awarded an injunction against Zara preventing it from producing, marketing or selling the infringing jeans within the entire EU. As the UCD for the Fussbett sandals had expired, the Court could not make a similar order for the infringing sandals. The Court also made orders for further proceedings to determine damages.

This decision stands as precedent for designers to bring an action for design infringement that occurs within the EU but outside the national jurisdiction of the court in which they commence proceedings. It means designers won't have to initiate proceedings in multiple jurisdictions within the EU to stop infringements occurring. This decision shows that, even in a world of fast fashion, rapid production cycles, and the ease in which copyists can access original designs across national borders, rights holders can efficiently enforce and protect their design rights.

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The question of superannuation payments is an important issue which often arises where a former disgruntled employee seeks additional payments, where an employer has to back-pay an employee, or even where an employer is seeking to terminate an employee.

Generally, if you pay an employee AUD450 or more in a calendar month, then you are required to pay super on top of their wages. This is regardless of whether the employee is full-time, part-time or casual. The minimum superannuation amount you must pay is currently 9.5%. This is referred to as an employee's "ordinary time earnings" (OTE).

OTE is essentially what your employees earn for their "ordinary hours of work". This is usually determined by the relevant award or contract of employment setting out the employee's conditions of employment. If ordinary hours are not specified, then OTE will be the normal or regular hours worked by the employee. OTE goes beyond wages and can also include amounts such as commissions, shift loading and bonuses. It also includes paid annual leave and sick leave.

OTE does not include overtime, fringe benefits or other non-cash payments, redundancy payments and payments for unfair dismissal. It also does not include annual leave, long service leave or sick leave paid as a lump sum on the employee's termination.

To understand how superannuation applies, let's say your employee is employed under an award which states that ordinary hours of work are not to exceed 38 hours per week, and that any time worked in excess of the ordinary hours is overtime, to be paid at a rate of time-and-a-half. In a given week you require the employee to work an additional 4 hours on a Saturday, bringing their total hours worked for the week to 42 hours. In this case the 38 hours would be considered ordinary hours of work in respect of which superannuation is payable, but the 4 hours of overtime are not OTE and there is no requirement to pay super for these additional hours worked.

You are required to remit employees' superannuation contributions to the Australian Taxation Office (ATO) at least four times a year. Superannuation must also be paid to a complying superannuation fund. Where applicable, an award may set out the super fund(s) from which an employer can choose to nominate as its default fund. In the retail industry for example, the default fund may be an industry-specific fund such as REST. Superannuation contributions are ordinarily tax deductible against your business income (subject to some limits).

If you do not pay your employees' superannuation contributions on time (or neglect to pay them altogether), you may have to pay the "super guarantee charge" or SGC. The ATO is increasingly focused on employers who fail to comply with their

Superannuation contributions are ordinarily tax deductible against your business income (subject to some limits).

super obligations, and has estimated that in recent years employers have failed to pay their employees approximately AUD2.85 billion in super they are entitled to.

SUPER GUARANTEE CHARGE

The SGC is made up of a shortfall amount (essentially the amount of super that should have been paid to your employee) plus interest (currently at a rate of 10%) and an administration fee.

Where the SGC applies, you are required to lodge a superannuation guarantee statement with the ATO for the relevant quarter(s). Late payments should not be made to the relevant fund but should be paid to the ATO as part of the SGC. The SGC is not tax deductible.

CONCLUSION

The amount of superannuation payable to your employees requires close consideration, especially where overtime, loadings and bonuses are also paid. It is extremely common for employers to incur significant SGC liabilities as a result of systemic errors in their payroll system that only come to light when a terminated employee raises the issue or the company is subject to an ATO audit.

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Many international fashion brands have long experienced issues with the importation of genuine goods into Australia through unauthorised channels. Upcoming changes to the Trade Marks Act will make it easier for third parties to import genuine products. This article explores the issue of parallel importation and what you can do to ensure your business is prepared.

WHAT IS PARALLEL IMPORTATION?

"Parallel importation" occurs where genuine goods, marked with a registered trade mark with the authorisation of the trade mark owner outside Australia, are purchased by a third party – the "parallel importer" – who imports and sells them in Australia. Many clothing items and fashion accessories offered for sale on social media are parallel imports.

WHAT IS THE PROBLEM?

The price and quality of goods across jurisdictions can vary depending on the marketing strategy of an international brand. Brands often make changes to products to meet local standards and consumer expectations in different countries as well as to meet different regulatory requirements. In fashion, garments are usually released in the Northern Hemisphere one season before the Southern Hemisphere so parallel importers are well placed to purchase stock at the end of the season in the Norther Hemisphere at discounted prices and compete with distributors in the Southern Hemisphere that are selling the same stock.

A common problem faced by Australian fashion distributors is that they invest heavily in marketing and promotional activity for the relevant brand. Once marketing, regulatory, wages and other costs are incurred the price of the goods is not as competitive as those goods that are purchased overseas and then sold in Australia by third parties. Parallel importers are able to leverage the brand's reputation in Australia without incurring the associated marketing costs. As a result, the parallel importer is well placed to compete with the local distributor on price.

Further, local distributors are often forced to field enquires and complaints from disgruntled customers who have purchased parallel imported goods, which they often do simply to avoid any reputational damage.

The proposed amendments to the Trade Marks Act will prevent trade mark owners from being able to use trade mark law to stop parallel importation.

WHAT HAS BEEN THE POSITION?

Until recently, in Australia, trade mark owners have been able to strategically use trade mark law to prevent parallel imports, by assigning registered Australian trade marks to local licensees, distributors or subsidiaries. This has allowed the Australian distributors to effectively control the price, marketing and sales channels of the products in Australia.

WHAT IS CHANGING?

Recent amendments to the Trade Marks Actprevent trade mark owners from being able to use trade mark law to stop parallel importation.

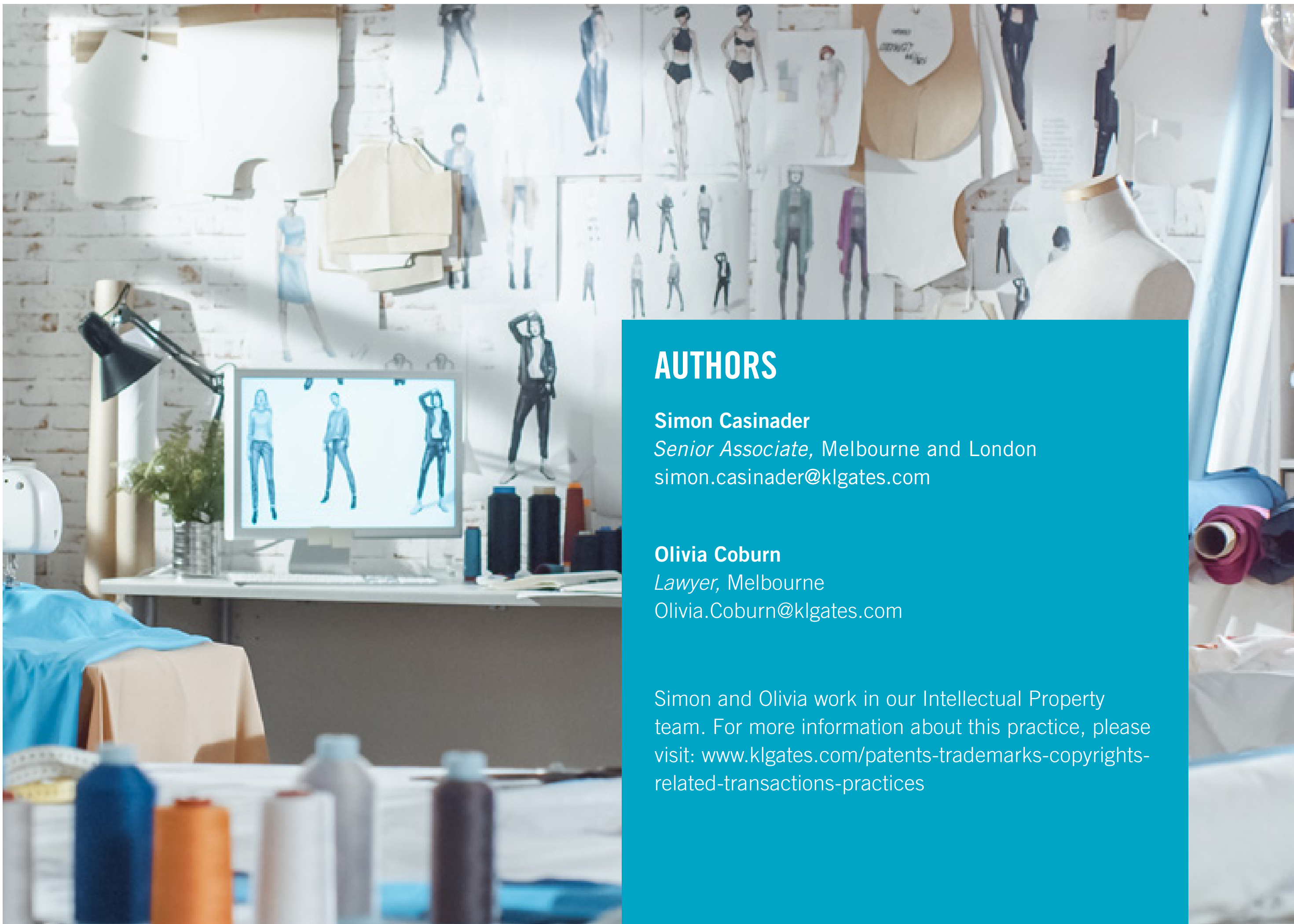
The flow on effect is that fashion goods can be purchased overseas and sold within the Australian market by third parties outside authorised distribution channels agreed between the international brand and Australian distributor. The result is that local distributors will need to compete with the importation of genuine products by third parties.

WHAT SHOULD AUSTRALIAN BUSINESSES DO?

Local distributors of international brands are encouraged to be proactive and revisit supply and distribution contracts now to ensure the interests of both the international brand and local distributor are sufficiently protected.

Brands may also look to their distribution contracts to restrain the resale of their products thereby assisting to stop products being available for parallel importation.

In addition to considerations of price and quality, local distributors should also ask questions about who will be responsible for compliance with warranties and Australian Consumer Law where complaints are brought by consumers who purchased parallel imported products. Exclusive distributors, in particular, should consider whether it is possible to renegotiate terms to ensure they are able to compete with parallel imports in the international market.



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The European Commission has found that fashion companies in Europe are increasingly using selective distribution systems, pursuant to which suppliers select resellers on the basis of specified criteria and resellers undertake not to sell the contract goods to unauthorised resellers. The EU Court's recent judgment therefore brings welcome clarity in an area of growing importance for fashion brands trading in Europe.

The Coty case concerned a dispute between luxury cosmetics supplier Coty Germany and an authorised retailer. In the framework of Coty's selective distribution system, its authorised retailers were permitted to sell online but not via third-party consumer facing platforms.

In its landmark judgment, the Court confirmed that companies may put in place selective distribution systems to preserve the luxury image of goods. The Court clarified that its 2011 statement that the "aim of maintaining a prestigious image is not a legitimate aim for restricting competition" had been misinterpreted.

The Court found that luxury brands can prohibit authorised resellers from using in a discernible manner third-party platforms for the online sale of their products, provided that such prohibition:

- has the objective of preserving the luxury image of those goods;
- is laid down uniformly and not applied in a discriminatory fashion; and
- is proportionate in the light of the objective pursued.

With regard to the marketplace ban in this case, the Court found that the restriction did not prohibit the use of the internet to market the goods. It also referred to the findings of the European Commission's e-commerce sector inquiry that distributors' own online shops were by far the main distribution channel for sales over the internet.

Another useful indication in the judgment is that a marketplace ban does not constitute a "hardcore" restriction of competition. Such restrictions are usually very difficult to justify. Therefore, even if one or more of the above conditions are not met, a marketplace ban may also be acceptable under the EU vertical agreements block exemption regulation if the parties' market shares fall within certain thresholds.

This judgment brings clarity for the fashion industry at the EU level in an area which had been uncertain and yet in which there had been aggressive enforcement at the national level, notably in Germany. This result should provide predictability for brands in Europe and is expected to have a positive spillover effect at the national level.

The judgment also contains a number of helpful implications for fashion companies whose products might not be considered "luxury" but still possess a high quality brand image. Despite the Court's focus on luxury products in Coty, its reasoning and ruling are not limited only to such products and appear to have wider application.

Nevertheless, the ruling does not necessarily give rise to a carte blanche for all marketplace bans. Firstly, the Court noted several facts in the case, which - if absent - might render a ban more risky. These included that in Coty resellers were not prevented from advertising via the internet on third-party platforms or from using online search engines. Secondly, the ruling is likely to be of limited value where a supplier has authorised a party as a reseller but seeks to ban it from selling via a third-party platform, or where the supplier itself sells directly via its own store on the platform. Finally, there remains some doubt about the extent to which national authorities (notably in Germany) might seek to limit the ruling's scope, for example by arguing that it is limited to luxury products or less applicable where marketplaces are regarded as essential sales channels.

These observations notwithstanding, the ruling certainly clears the way for more aggressive online fashion distribution strategies in Europe. Australian brands should seek legal advice regarding how to strengthen their strategies in light of these developments.

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A GLOBAL PERSPECTIVE

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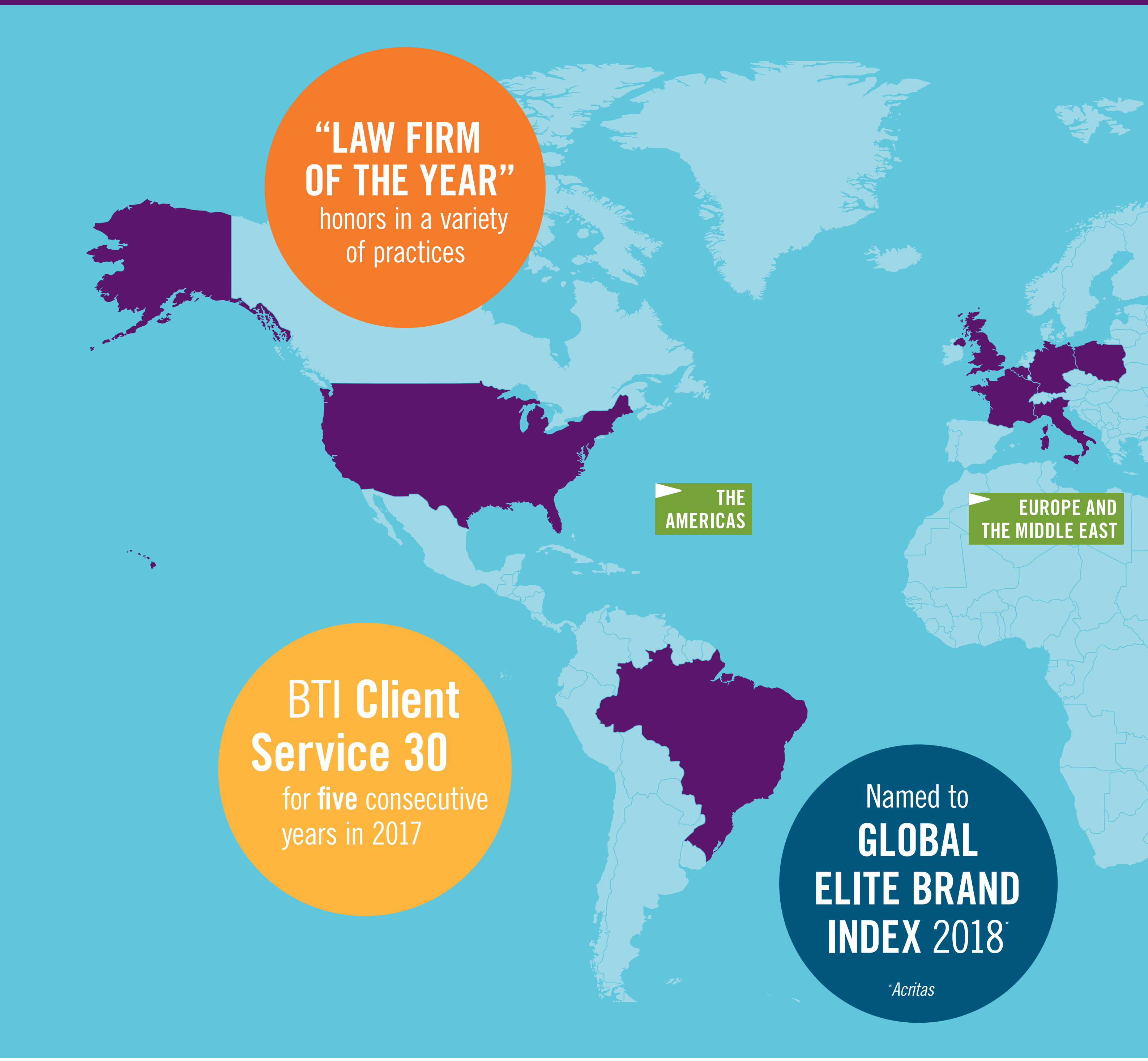

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