LAW À LA MODE

Issue 21 – November 2016

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DLA PIPER

Fashion, Retail and Design Group

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The Australian editorial team is delighted to bring you the 21st edition of *Law à la Mode*, the quarterly legal magazine produced by DLA Piper's Fashion, Retail and Design group for clients and contacts of the firm worldwide.

Our Australian team takes a look at the evolving relationship between online and in-store shopping in the Australian market (page 4), and continuing with the topic of e-commerce and data protection, we explore the outcomes of the European Union's preliminary report on the e-commerce sector (page 8) and examine how data protection laws are affecting retailers that collect personal data in-store (page 16).

Brexit is proving to be this year's hot topic. We look at how this will impact employment in the fashion industry (page 6), and we note that Kanye West is in hot water over a recent casting call (page 12). With an employment focus in mind we review the recent amendment to importation laws in relation to forced labour in the US (page 8).

Cases continue to influence the industry. Delve into *Star Athletica, llc v. Varsity Brands,* inc. and the challenge of copyright protection for garment design (page 14).

In this issue we provide you with two interviews; we hear from Natasha Hall, Senior Legal Counsel of Australia Wool Innovation; and Ramez Toubassy, Chief Executive of Gordon Brothers Brands. Natasha talks about the relationship between fashion and the Australian wool industry and Ramez gives his insights on the world of branding.

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.

AUSTRALIAN
EDITORIAL TEAM

Melinda Upton,
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CLICKS AND MORTAR

THE EVOLVING RELATIONSHIP BETWEEN ONLINE AND IN-STORE SHOPPING IN THE AUSTRALIAN MARKET

By **Melinda Upton** and **Josephine Gardiner** (Sydney)

When e-commerce initially established itself in the Australian marketplace, industry experts predicted the imminent death of brick and mortar – physical retail stores. Online shopping offered appealing prices, a bigger range of products and further convenience for the customer. The two were deemed arch enemies, competing for the same marketspace. However, today we know this prophecy was never realized: brick and mortar stores remain at the heart of Australian shopping.

Due to the geographical location of Australia its absorption of the digital environment into the retail sector was slow and disjointed. Isolation from the rest of the world meant that delivery costs and wait periods were not as convenient as they were to other global markets. This protected Australia from global retail giants that slowly trickled into the retail sector. Unsurprisingly, most of these brands, including Zara, Sephora and Forever 21 acknowledge the importance of brick and mortar in Australia and have invested in flagship stores in Sydney's central shopping area on Pitt Street, as well as additional stores throughout the country.

Today, online retail has embedded itself into the Australian marketplace, but its presence still remains smaller than brick and mortar. In-store sales still account for 90 percent of all retail transactions. Evidently physical stores remain at the core of the Australian shopping experience and the value of "touch and feel" remains a strong necessity for customers. Having said that, there is also no doubt that online sales are growing at a greater rate than in-store sales.

Recent reports have demonstrated that customers do not prefer one retail environment over the other, but rather prefer to use an amalgamation of both, making the path to purchase a much more complicated one for retailers. For example, many customers research a product online, examine the product in the store, research competitor prices, buy online and collect in-store. This process has been driven by the attitudes of today's modern consumers. Gen Y customers are used to accessing information quickly and efficiently through their smartphones. They seek product information before purchasing not only in-store and online, but also by accessing third-party data, such as blog reviews and social media. Customers do not view online shopping as a rival to physical stores but rather as an extension of the same brand, and expect it to provide the same seamless level of service and quality.

Retailers are now finding themselves in a situation where they must operate in a marketing universe that constantly traverses physical, online, mobile and social channels all day, every day. This behaviour is commonly referred to as the omnichannel experience, a term that has become a buzzword within the retail sector, indicating a process of unison between both online and physical environments to provide customers with an individualised experience of optimal convenience.

This omnichannel experience can be convenient for retailers, as often the two environments support each other. For example, 40 percent of in-store visits were influenced by digital sources in Australia in 2015. Further, many once purely online retailers are establishing a brick and mortar presence, such as Shoes of Prey and Warby Parker. The benefit of using omnichannel services is also reflected in the disappointing figures for pure online-based brands. Surfstitch, for instance, reported a loss of AU$154.7 million and Temple & Webster reported a AU$44 million loss. However, this may not always be the case, as The Iconic, an Australian fashion online retailer, has demonstrated by refusing to succumb to brick and mortar pressure in Australia. They argue that their profit margin this year is a result of selling quality brands, offering free returns and competitive prices. This suggests that retailers should shift their focus from the selling channels available to them to the key priorities of the customer.

For the moment, retailers are adapting their business models in accordance with the changing retail landscape to ensure that they are neither exclusively online nor offline, but rather optimizing both channels. The customer-centric model offers several innovative services, including click and collect (buy online, pick up in person), buy now pay later (allows you to pay later for purchases), online returns across all channels, and offering a single inventory view. Some stores have gone further; for example, TopShop offers virtual dressing rooms and Sephora offers makeup tutorials so that you can apply virtual cosmetics to an image of your own face.

However, for the majority of retailers, trying to offer a seamless service over multiple channels has proved a difficult task. It can often produce dissonant multichannel services, with various mediums offering unnecessary services, which consequently clashes with the brand image of the physical store.

On the other hand, services which are successful, support and supplement the in-store experience, whereby customers save time and quickly access the information they are looking for.

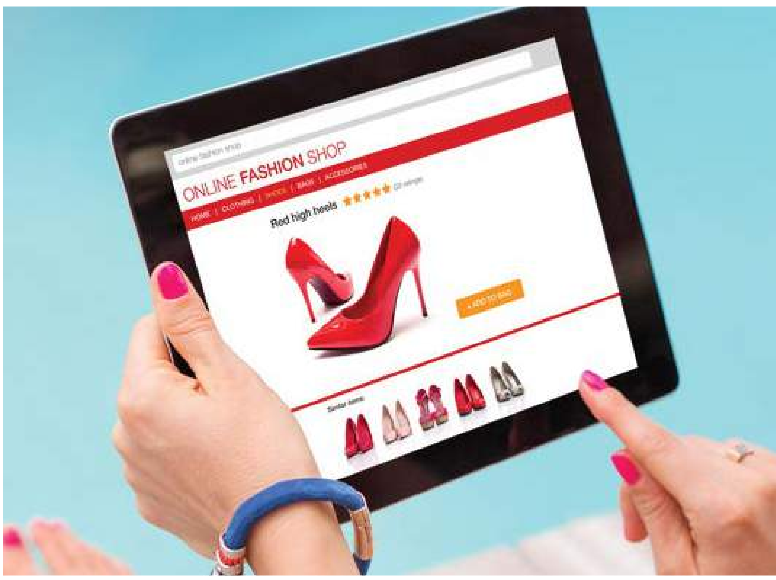
What next for Australian retail?

The relationship between online and in-store retailers is still a controversial and unsettled area in Australia. Just last month, the Australian Competition and Consumer Commission (ACCC) announced severe measures regarding any merges or acquisitions between large retailers and online rivals. The reaction has been twofold. E-commerce entrepreneurs are displeased, given they will be unable to pursue partnerships or selling opportunities and the ACCC's action removes exit options. On the other hand, the ACCC has said it will boost competition in the marketplace and prevent giant retailers from buying and eliminating startups. The ACCC confirmed that the online retailer would have to be of a "certain size" to trigger such a "crackdown", which in effect punishes promising startups that reach a level of success.

What about the law?

Additionally, there are legal risks retailers must consider when navigating this complex "phygital" environment. This is an undeveloped area of the law. Currently, there is no legal concept of omnichannel nor multichannel; each purchase is to be treated as an individual contract. Retailers are therefore free to deal with each channel distinctly – e.g., offering different prices or different promotions in the store versus online. However, customers are channel agnostic, valuing brands first, and relegating sales channels, whether social media, website, or in-store, to a far second place. Customers do not expect a purchase online to be treated differently than one made in-store. Retailers should thus ensure their policies are synonymous over the various channels, which is a challenge in itself, given that the transactions occur over different mediums. For example, a refund policy for an in-store sale might include a return time period which cannot be matched online due to delivery timings.

While the law is struggling to keep up in a rapidly evolving technological world, retailers should ensure that all channels are complying with normal consumer protection regulations, such as the Australian Consumer Law and the *Privacy Act 1988* (Cth). Retailers must therefore be proactive in their risk management of digital risks, such as cybersecurity, data protection, fraud, trademark infringement and copyright violations, or else ultimately face the unquantifiable risk of brand damage. As the digital shopping experience elbows its way into the heart of Australian shopping, retailers should always have a strong risk management framework to deal with the risks that will emerge along the way.



BREXIT
EMPLOYMENT IN THE FASHION INDUSTRY

By **Gurpreet Duhra**, **Lisa Hodgson** and **Matthew Jeavons** (Sheffield and Birmingham)

The recent Brexit outcome has led to a degree of uncertainty in UK consumer markets. How will the Brexit decision impact future UK employment prospects?

In the fashion industry, retailers could be affected by such issues as the free movement of workers, potential changes to EU derived employment laws and potential changes to business decisions. Clearly, Brexit will significantly impact the UK fashion landscape for years to come.

Free movement of workers

The multinational and multicultural nature of the UK fashion industry is unique – one of its main advantages and business assets compared to other global industries. The diversity of the workforce allows for a greater exposure of ideas and experiences which promotes creativity and innovation. Consequently, many employers are asking what can be done to ensure that, in a post-Brexit age, businesses are still able to continue resourcing talent from across Europe.

Importantly, until the UK formally triggers the Brexit process by invoking Article 50 of the Lisbon Treaty (which Prime Minister Theresa May has said will be triggered by the end of March 2017), there will be no change to the status quo. However, it is important for employers to take practical steps now, so they are not caught out when negotiations have been finalised and the terms of Brexit are certain. Such steps include:

- **evaluating the current workforce:** be clear about the current immigration status of your workforce so you can identify any areas where you may rely heavily on migrant workers and are prepared for all possible contingencies.
- **auditing compliance with existing immigration rules:** ensure that you are fully compliant with all existing immigration rules in the UK.
- **keeping up to date with developments:** the issue of free movement is likely to be a main discussion point throughout negotiations.
- **understanding the parameters and time limits for business visitors to the UK:** this is particularly relevant for the fashion industry, where regular worldwide travel is commonplace.

As for sending British employees to Europe, British talent has moved freely in and out of European fashion houses for years and, for the immediate future, this is unlikely to change.

Changes to EU – derived employment laws

Another question pertinent to the fashion industry is Brexit's impact on employment law deriving from the European Union and how any subsequent changes will impact both employers and employees.

The reality of the matter is that much of the EU-derived employment laws are deeply embedded into UK domestic legislation and it would be difficult for the government to scale back the body of law that is currently in place to any significant extent.

However, we can speculate on some possibilities.

Taking one example, TUPE legislation is unlikely to see considerable change, as it has been part and parcel of normal business practice for an extended period of time. However, it would not be surprising if aspects of TUPE were reconsidered, including a relaxation of the rules regarding harmonisation of employee terms and conditions, and less stringent information and consultation requirements.

We could also see discussion around holiday pay. Over recent years, as a result of decisions by the Court of Justice of the European Union, the obligations on UK employers have increased as the meaning of what constitutes holiday pay has widened. Provisions that could be subject to change include obligations on UK employers to include elements other than basic pay, such as overtime and commission, when calculating holiday pay and paying holiday pay during periods of sickness and absence.

Short-term impact

For now, employers should be cautious in relation to issues arising from employees making remarks about the outcome of the Brexit vote to fellow colleagues, particularly derogatory comments around immigration status and employees' right to remain in the UK. This gives rise to the risk of potential discrimination and harassment claims.

As it stands, the post-Brexit picture for the fashion industry is unclear. The industry's ability to adapt and be creative in its approach to economic change will be fundamental in keeping large European fashion houses and the best of the European designers in the UK for years to come.

US PROHIBITS IMPORTS MADE WITH FORCED LABOR:

NEW LAW IS A FORCE TO BE RECKONED WITH

By **Sandra Bell** (Washington, DC)

Your latest shipment of imports is detained at the border. You are told that your goods are not being allowed admission to the US because they were produced, in whole or in part, with forced labor. But these are the same products you've been importing, in pretty much the same way, for years. What is happening? Is this even possible?

The answer is yes. It is very possible. Companies are starting to feel the effects of a significant 2016 amendment to the Smoot-Hawley Tariff Act of 1930, and, in its wake, stepped up enforcement activity by Customs and Border Protection. This amendment eliminated a long-standing exception to a general prohibition of the import of goods manufactured using convict or forced labor into the United States. Under the exception, the prohibition against the use of forced labor did not apply to goods not produced in the United States for which domestic production did not satisfy U.S. consumptive needs. As a result of the 2016 amendment, the prohibition on imported goods made using forced labor is now broadly applicable to all goods.

In response to the amendment, Customs and Border Protection (CBP) has stepped up its enforcement efforts with respect to goods being imported into the United States that are suspected to have been produced using forced labor. According to CBP, merchandise mined, produced or manufactured, wholly or in part, in any foreign country by forced labor – including forced child labor – is subject to exclusion and/or seizure, and may lead to criminal investigation of the importer(s).

In light of these developments, importers must begin to take notice and act. What can you do as an importer in the wake of the reinvigorated Forced Labor statute?

First, *you can take steps to avoid products that already have been identified by CBP* as being subject to a Withhold Release Order (WRO). CBP has announced on its website that it does not target entire product lines or industries in problematic countries or regions, but rather acts on specific information relating to specific manufacturers/exporters and specific merchandise. CBP also publishes on its website a list of all WROs and findings that have been issued. This is sufficient information on which to base precautionary measures for an importer to avoid the products produced by forced labor that may be subject to seizure or withholding.

Second, even if you fail to identify goods that are covered by an outstanding WRO and they are detained by CBP at the ports of entry, there is still a chance that your goods may be allowed entry. CBP Regulations ***allow importers of goods detained under a WRO to provide 'proof of admissibility.'*** Furthermore, if your proffered proof of admissibility (as outlined in the CBP Regulations) is not convincing to CBP, and the goods are finally denied admission, i.e., "excluded" from entry into the US, you still may ***appeal that decision by filing a protest.***

Third, you may ***seek even further redress in the Court of International Trade*** if CBP denies the protest under US Law and CBP Regulations.

RECOMMENDATIONS

In the wake of the revised Forced Labor statute (and possible fallout), we offer two suggestions for importers to consider:

1. ***Avoid*** the importation of goods allegedly produced with forced labor entirely by using the information that CBP publishes on its website in connection with products already identified as having been produced or manufactured with the use of forced labor; or

2. If avoidance is not possible, ***defend*** the importation using the legal tools provided in the CBP Regulations to support your position that your shipment was not produced with the use of forced labor.

If you are concerned about the implications for your business contact Sandra Bell.

PRELIMINARY REPORT ON THE E-COMMERCE SECTOR INQUIRY

FOCUS ON E-COMMERCE OF CONSUMER GOODS

By **Alexandra Kamerling** and **Marianna Kinsella** (London)

Background

The European Commission's Digital Single Market Strategy was designed to put Europe at the forefront of the digital economy. To achieve this, the European Commission has recognised the need to reduce barriers to cross-border e-commerce within the EU.

On September 15, 2016, the Commission published its Preliminary Report on the e-commerce Sector Inquiry. The Report identifies specific business practices that may limit online competition and cross-border sales, and which should motivate companies to reassess the legality of their distribution strategies. The final Report will be published in the first quarter of 2017.

Once finalised, the Report is likely to lead to change in a variety of areas beyond antitrust that will impact e-commerce across the single market including:

- new EU legislative proposals on contracts for the supply of digital content and online sale of goods
- cooperation between national authorities in the enforcement of consumer protection laws
- improved cross-border parcel delivery

The Commission's inquiry was launched into both e-commerce of consumer goods and digital content. However, this article focusses on the Report's preliminary conclusions on the impact of antitrust laws on e-commerce for consumer goods.

E-commerce of consumer goods

Price transparency

The Commission has found that price transparency is a double-edged sword. On the one hand, it intensifies price competition – more than half of retailers track competitor pricing and almost 70 percent use automatic tracking programmes. On the other hand, this increased price transparency could damage competition if it facilitates collusion between retailers.

Online free-riding

Switching between online and offline sales channels is increasingly common and customers will often tailor their shopping experience to get the best of both worlds. For example, customers may use pre-sales services offered at a brick and mortar shop and then purchase the product online. This means that the online retailers benefit from the presence of bricks and mortar operators, but incur none of the costs associated with a physical presence and so are able to undercut them. The Report confirms that this form of free riding by online retailers is a major concern for many manufacturers and retailers. Interestingly, almost half of the manufacturers using selective distribution reported that they do not allow online operators who have no physical presence to join their selective distribution network.

Expansion of selective distribution

The Report indicates that certain clauses in existing agreements may "go beyond what is necessary to achieve the goals of selective distribution," although interestingly it has indicated that it does not consider a ban on reselling on marketplaces to represent hardcore restrictions of competition law. Nonetheless, manufacturers need to be able to justify such restrictions under Article 101(3) of the Treaty on the Functioning of the European Union, in relation to their particular products and distribution system, including whether they themselves sell on these or similar marketplaces.

Contractual sales restrictions

The Report analyses contractual sales restrictions which the Commission states have increasingly been imposed by manufacturers as a

> *A trigger for companies to review their current distribution contracts and bring them in line with EU competition rules if they are not*
>
> Commissioner Margrethe Vestager

response to online competition. These include pricing restrictions, restrictions on online sales and/or restrictions on cross-border sales. Not all of these are unlawful. However, price recommendations, which are lawful provided they truly are recommendations and are not enforced, are provided by 80 percent of manufacturers to their distributors. Restrictions, such as bans on cross-border sales (or geoblocking), and on the use of the Internet are unlawful. The Commission also encountered restrictions on retailers' ability to use price comparison tools, which also need to be assessed on a case by case basis.

Next steps

The publication of the Report triggers the opening of a two month public consultation. During this period, stakeholders may comment on the Report and the Commission is expected to publish a final Report in the first quarter of 2017.

However, this may not be the Commission's final word in the area of e-commerce. Some of the Commission's comments, notably those concerning the growing strength of certain large retailers and the increased pressure they are exercising on manufacturers to guarantee profit margins or otherwise ensure a minimum retail price and the numerous restrictions on online sales, seem to signpost the possibility of further antitrust enforcement investigations, and so possible fines, ahead.

With this in mind, companies should carefully consider whether vertical restraints affecting online selling and distribution through digital platforms (intending to encourage retailers to invest in high quality services, to prevent free riding and/or to protect the image of the products being supplied) are necessary to achieve those objectives and whether they can be achieved by other, less restrictive, alternatives.

A DISASTROUS CASTING CALL

CASTING UNFAIR ASPERSIONS ON KANYE WEST, OR DISCRIMINATION?

By **Jane Hannon** and **Helen McCabe** (Leeds) and
Donna Trembath (Sydney)

Kanye West caused major controversy ahead of his "Yeezy Season 4" show when he issued a casting call for "Multiracial women only". A furor broke out on social media and raised some interesting questions, both in relation to fashion and legal issues. Was this a misjudged attempt by Kanye to take a significant step towards promoting diversity in the notoriously "white-washed" fashion industry; or a simple fashion faux pas that backfired, ironically and inadvertently resulting in discrimination against models of colour he sought to champion?

The law

Whatever his intention, the casting call may have violated both local and federal employment discrimination laws in New York, namely New York's Human Rights Law and Title VII of the Civil Rights Act of 1964. Under these laws, it is illegal to discriminate against someone because of that person's race and colour (among other attributes and beliefs). One of the issues with this casting call lies in the term "multiracial." While the term can be defined in a number of ways, the most understood definition is of "people of several or many races," thus excluding people of just one race. As such, this would be discrimination against those single-race individuals, violating the aforementioned laws. The second issue is whether models have any employment rights. Fashion modelling remains a career in which discrimination regarding appearance is both commonplace and generally accepted. In most cases, models are not engaged as employees, but rather as independent contractors, who are generally not afforded the same protections. Further, there is an argument that as models struggle for jobs within a notoriously fickle and precarious trade, they wouldn't want to risk their reputation and career by bringing a discrimination claim and subsequently being blacklisted.

Additionally, designers and casting directors engage in artistic expression when selecting models for their shows, and it's widely accepted that many models may not embody a designer's artistic and aesthetic vision. The First Amendment's right to free speech is used to protect filmmakers' artistic expression; it is possible many designers use similar reasoning regarding the ways they select models. Indeed, a 2012 district court case in the US, ***Claybrooks v American Broadcasting Companies,*** held that the First Amendment trumps anti-discrimination statutes in certain cases. This highlights the void that still exists in preventing discrimination against independent contractors, and models in particular.

The UK position

Within the UK, the ***Equality Act 2010*** provides models with legal protection against discrimination regardless of employment status, and in 2009 models were allowed to become members of the union Equity. The Equality Act does allow a model of a particular race to be cast where this can be justified for reasons of "authenticity"; however, that justification can be difficult to achieve.

The Australian position

In Australia, applicants have a choice between taking a race discrimination complaint under state/territory or federal anti-discrimination laws. However, the path to a successful claim for a model is not clear cut, and would be likely to be considered a novel claim.

At a national level, the *Racial Discrimination Act 1975* (Cth) makes it unlawful to do an act that involves an exclusion based on race, colour or descent if the purpose or effect of that act is to impair the exercise of a person's human right or fundamental freedom.

On the one hand, this is framed so broadly that it could be used by models regardless of whether they are employees or independent contractors, on the basis that they have a "right to work". On the other hand, the ***Racial Discrimination*** Act recognises that there can be grounds for discrimination when it comes to artists. In particular, the provisions of the Act dealing with "racial hatred" (which make it unlawful to do an act that offends a person because of race) do not apply to an act in the performance or exhibition of an artistic work.

Similar exceptions for artists, as well as in entertainment and modeling, exist in some of the State anti-discrimination laws. For example, in Western Australia racial discrimination in employment is permitted if it is based on a genuine occupational qualification where a person of a particular race is required for reasons of authenticity, in entertainment, or work as an artist's or photographic model. Victoria goes even further by allowing an employer to limit offers of employment to people of a particular race for reasons of "authenticity or credibility" if the job relates to artistic performance, entertainment, photographic or modelling work.

While the better view is that the casting call should be unlawful under Australian law, these exceptions create the impression that the law may be applied differently to models.

FEDERAL GOVERNMENT AMICUS BRIEF ARGUES THAT DESIGNS ON **CHEERLEADING UNIFORMS MERIT COPYRIGHT PROTECTION**

By **Tamar Duvdevani** (New York)

In the United States, federal courts have long addressed when and if aspects of functional items (i.e., items that are not created for purely aesthetic reasons) can be subject to copyright protection. In the United States, "useful articles," such as lighting fixtures, furniture, appliances, and apparel, are generally not afforded copyright protection, and a plaintiff seeking recourse for misappropriation would need to look to trade mark and patent law.

However, certain aesthetic aspects of functional items ***can*** be protected under copyright law, if the plaintiff can show that those aspects can be "separated" from the article's utilitarian function.

The recent Sixth Circuit decision ***Star Athletica v. Varsity Brands,*** which is now pending before the United States Supreme Court, involved allegations of copyright infringement between two companies that designed and sold cheerleading uniforms (useful articles). The Supreme Court took the case in light of the split among United States Circuit Courts as to how courts determined whether an article's aesthetic components are separable from its utilitarian function, and therefore amenable to copyright protection. The question before the Supreme Court: What is the appropriate test to determine when a feature of a useful article is protectable under Section 101 of ***the Copyright Act?***

On September 21 2016, attorneys for various government agencies, including the Department of Justice and the Register of Copyrights, weighed in on the case in an amicus brief filed in support of the respondents. In the brief, the United States made several key arguments:

- Respondents have created two-dimensional artwork, which they would have the exclusive right to reproduce on any display medium, including any garment. In particular, the Copyright Act, 17 U.S.C. 113(a), grants the owner of a copyright in a pictorial, graphic, or sculptural work the exclusive right to reproduce the work in or on any kind of article, whether useful or otherwise.

- Respondents' works are copyright-eligible under 17 U.S.C. 101 because they are conceptually separable from any actual garments that they are used to decorate. This conceptual separability test is key in determining when a useful article has artistic aspects that can be independently protected by copyright law. Given the designs on the uniforms could exist on other mediums, the designs are eligible for copyright protection.
- The argument that the designs on cheerleading uniforms were not 'separable' because to remove the designs would no longer allow the cheerleading uniform to function as such (*i.e.*, a blank outfit, without geometric shapes, lines, etc., is not a cheerleading uniform anymore) is flawed, because such "marketability" of a useful article absent its designs should not factor into the copyrightability analysis.

Overall, the government took a broad approach of the copyrightability of aesthetic components of useful articles, stating that the Copyright Act's history in the United States does not confirm, 'but instead discountenances, a presumption against copyrightability'.

The Supreme Court's decision will have significant ramifications for the apparel industry, where taking inspiration from existing apparel is not only expected, but necessary in an industry where "trend" is what makes the world go round. The decision could provide much needed guidance on aspects of apparel design, including placement of border prints, decorative elements such as rhinestones and beadings, and, of course, separability of allegedly artistic aspects of uniforms.

IN-STORE ANALYTICS

TRACKING CUSTOMERS IN PHYSICAL RETAIL SPACE

By **James Clark** (Leeds)

Most of us are familiar with the many ways in which customer activity can be tracked in the online space. Customer accounts, cookies, web beacons and tracking pixels are familiar tools in the e-commerce arsenal, and all come with familiar challenges from a privacy and data protection perspective. Increasingly, retailers are expanding tracking technologies into the physical space through the use of Wi-Fi location analytics. As the benefits of tracking translate into the real world, so too do the compliance obligations.

Wi-Fi analytics most commonly work by monitoring the media access control (MAC) address which a Wi-Fi enabled device transmits when it is searching for Wi-Fi networks.

By monitoring signal strength (commonly abbreviated to RSSI), retail stores can estimate the distance of a device from a particular access point, distinguish passers-by from customers and, in effect, monitor the location of a device and track the behaviour of a particular device over time.

This kind of monitoring works even where a customer has not signed in to a store's Wi-Fi, providing the customer's device is "probing" for available networks.

The benefits of this kind of tracking are enormous. Stores can build data on customer engagement, measuring visit length, visit duration, frequency of visits and total number of customers. Stores can also track movement around the retail space. Where customers log in to a store's Wi-Fi or have an existing account with the store which can be associated with their device, the store can even send them just-in-time special offers and coupons to drive real-time purchasing.

For the purposes of data protection law, if an individual can be identified from a MAC address, or other device specific information, then the data will be personal data – even where the name of the individual remains unknown. Where an organisation uses a MAC address or other unique identifier to track a device with the purpose of singling them out or treating them differently, or storing or using that information in any way, it will be processing personal data.

What can retailers do?

To ensure retailers remain legally compliant while exploiting this technology, they should:

- understand what personal data they collect over the Wi-Fi network, including MAC addresses and location data
- provide clear and prominent notices for example in privacy policies, on the log-in pages for Wi-Fi networks and in physical locations such as shop floors
- provide users with easy to follow instructions about how to switch off Wi-Fi location tracking features
- ensure their contract with their Wi-Fi analytics provider contains data processing terms and flows down privacy obligations
- consider anonymising MAC addresses if their analytics can be carried out in this way
- try other data minimisation techniques, such as sampling, to reduce the volume of personal data collected.

It is encouraging to see that some regulators, such as the UK's Information Commissioner, have published specific guidance in response to this growing trend.

THE HONG KONG RETAIL REAL ESTATE MARKET
CURRENT STATE AND FUTURE OPPORTUNITIES

Ming Lok Lam* and **Susheela Rivers*** (Hong Kong)

In Hong Kong, reports have shown that the retail market is beginning to revive in the second half of 2016. This is unsurprising given the undeniable fact that Hong Kong is unique in real estate given that space is scarce and demand rarely decreases.

The Hong Kong retail real estate market is currently encountering what the locals refer to as a "severe winter." The biggest victims have been luxury brands. Since the beginning of 2016, a number of powerhouse fashion retailers in sectors ranging from jewellery to watchmaking have been forced to close their stores in prominent shopping areas in Hong Kong. This event is the result of various factors, including:

- the steady rise of the US dollar (to which the HK dollar is pegged) as compared to the relatively weaker RMB and Euro, making shopping in Hong Kong more expensive for mainland Chinese and Europeans than a few years back
- the falling number of mainland Chinese tourists and
- the plunge of retail sales in Hong Kong by 10.5 percent in the first half of 2016 when compared to the same period in 2015 (the worst statistics that shopping has experienced since 1999).

Retailers have reacted to the slump in a number of various ways. Some brands have successfully negotiated a rent reduction, given that landlords would prefer to keep luxury brands in their property to maintain the property value rather than see them "go dark". Other brands have also adopted creative approaches to negotiation, including partial surrender of stores, adding variety to the merchandise (e.g. adding a sub-line) and committing to a longer lease term with reduced rent.

A silver lining in the wider real estate market lies with real estate investment. Since the beginning of 2016, acquisition has been active particularly in the office sector, with mainland investors taking the driver's seat. It was reported by international property consultant Knight Frank that mainland companies paid a total of US$2.9 billion for grade-A office space in the first half of 2016, representing 64 percent of the total office sales transactions. By way of comparison, over the past decade, mainland companies have acquired offices worth around US$6.4 billion in the city. The upward trend in 2016 is substantial.

The phenomenon is fuelled by the long term investment prospect of offices in Hong Kong. Statistics indicate that as at summer 2016, there was only a 1.6 percent office vacancy rate in Central (CBD in Hong Kong). Office rents have soared in the past years despite an increase in supply of office areas outside the CBD. Major players including investment banks, international law firms and Chinese state-owned enterprises are inclined to stay in the prestigious area.

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BUSINESS ROUND-UP

PROPOSED EU REGULATION ON GEOBLOCKING

HELPING CONSUMERS AND COMPANIES REAP THE BENEFIT OF THE DIGITAL SINGLE MARKET

Matt Duncombe and **Helen McCabe** (Leeds)

Geoblocking is anti-EU, yet it makes commercial sense. Geoblocking is a form of Internet censorship in which access to content is restricted based upon the user's geographical location. It can be used to enforce exclusive ownership of territorial rights or to force buyers to either buy from another jurisdiction for online shopping, or indeed, to prevent them from purchasing goods online.

Because geoblocking is seen as a key obstacle to the growth of e-commerce in Europe, the European Commission has proposed the Geoblocking Regulation.

The proposed regulation is broad and will supplement and reinforce existing legislation to ensure that consumers seeking to buy products and services in another EU country are not discriminated against in terms of access to prices, sales or payment conditions (unless objectively justified for reasons such as VAT). The principle of non-discrimination weaves throughout EU law, and this proposed regulation would serve to prompt retailers to work towards uniform sales practices, both online and offline.

Currently, retailers who trade online throughout the EU can essentially use geo-blocking to dictate who can view and purchase goods from their websites according to where those consumers live. Additionally, postal operators can set often exorbitant delivery charges without a clear correlation to actual costs. This is a double-edged sword: retailers often don't want to allow access to EU customers outside of their trading country because of these increased delivery costs, and customers would likely be put off their products should these delivery costs be passed on. The argument is, competition practice aside, if a non-resident makes a purchase in a particular country in person, they aren't prevented from doing so, nor are they asked for their ID.

The proposed regulation, then, is a crucial step towards improving competition and increasing consumer trust in e-commerce. In a UK context, it would seem that time may be of the essence in terms of implementation; once Brexit (in whatever shape that may take) occurs, this regulation may not apply to UK businesses.
As with everything Brexit related, whether that will be a problem or not remains to be seen.

Businesses need to be aware of the potential implications this proposed regulation will have and may want to have plans in place to change their operational practices, including working with IT to change their websites.

IMPORTANT CHANGES TO TERMINATION PAYMENTS

Lynda Finan and **Nick Hinton** (Leeds)

The UK government has recently confirmed changes to how termination payments will be taxed (expected to be effective from April 2018). All retail employers should be aware of the changes and ensure that the correct income tax and national insurance contributions (NICs) are deducted from termination payments (since the primary liability for any shortfall is that of the employer).

The key reforms include the following:

- **Employer NICs will be due** on any termination payment **exceeding £30,000,** making termination payments more costly for employers. The existing £30,000 income tax exemption for termination payments and unlimited exemption for **employee** NICs (provided the payment is not "earnings") will continue to apply.
- **All payments in lieu of notice will be taxed** (irrespective of whether they are contractual or non-contractual) and any payment or benefit which the employee would have received during his notice period (had he worked it) will be subject to tax and NICs.
- **Redundancy payments** (whether statutory or enhanced) will continue to benefit from the £30,000 exemption, but both income tax and employer NICs will be due on the excess under the new regime.
- **Exemption for payments due to injury and disability will not extend to injury to feelings** unless the injury amounts to a "psychiatric injury or other recognised medical condition".
- **Foreign service relief will be withdrawn.**
- **Other existing exemptions will remain,** including payments made to tax exempt or registered pension schemes, and in respect of legal costs.

It is not clear whether there will be transitory provisions for payments pursuant to settlement agreements entered into before April 2018, but that may well be the case. As ever, retail employers should ensure they stay up to date with the changes to the legislation and seek advice in cases of doubt.

REFORMS TO TEMPORARY EMPLOYMENT LAWS IN GERMANY

By **Dr. Kai Bodenstedt, Dr. Christina Heinz** (Hamburg)

In Germany, major developments will be introduced to the ***Labour Leasing Act*** (Arbeitnehmerüberlassungsgesetz, AÜG) as of January 2017.

Labour leasing involves three parties: the agency or lender which is the employer of the temporary worker who "leases" the temporary worker to the hirer; the temporary worker; and the hirer which makes use of the temporary workers.

Two contracts are entered into between the parties. Firstly, a service contract between the agency and the hirer and secondly, an employment contract between the agency and the temporary worker. Labour leasing has always been restricted by the law, but will now be tightened by the reform in order to strengthen the protection of temporary workers.

The new law aims to prevent any circumvention of the strict regime for labour leasing by filling the gaps of the former legislation. This concerns mainly the abuse of "work contracts" which have been used by the "hirer" and the "agency" for the completion of specific work done by "temporary workers" which in fact has been labour leasing.

After several disputes about the contentious legislation within the German government and with interested groups such as employers' associations and trade unions, the German Federal Minister of Labour has proposed some major reforms, expected to be passed by Parliament, the German Bundestag, in upcoming months.

The draft bill includes the following key elements:

- **Maximum hiring term**: Labour leasing will be limited to a maximum duration of 18 consecutive months with the same hirer. The maximum term for hiring a temporary worker refers to the individual employee, not to the job. As a consequence, companies may still continuously fill the specific job with temporary workers by hiring a new candidate for the same job. The new statutory maximum term can only be extended by collective agreements
- **Penalties:** The proposed reforms also includes penalties for non-compliance with the above reform. For example, if the maximum employment term of 18 months is exceeded, the contract between the lender and the temporary worker as well as the contract between the lender and the hirer will become void. Instead, the temporary worker will be considered the hirer's employee.
- **Equal conditions**: From day one of employment, temporary workers will receive the same salary as comparable employees of the hirer, amongst other essential conditions. As above, only a collective agreement allows for any departure from this reform.

As temporary work becomes more complicated and less flexible, employers who make regular use of temporary employees may have to redesign their temporary work concepts. Retailers may particularly be affected by the new legislation as they regularly hire temporary workers which means they should review their existing agreements and business relationships.

TEXTILE LABELLING OBLIGATION IN ADVERTISING BROCHURES

By **Gabriele Engels** and **Saskia Laïs-Jansen** (Cologne)

The German Federal Supreme Court (Bundesgerichtshof or BGH) has recently decided that there is no obligation to include information about the composition of textiles within an advertisement if the brochure does not offer the possibility to order/purchase the particular item. In the relevant case ***(BGH, docket no. I ZR 7/15)***, a fashion company released a printed advertising brochure displaying men's clothing, including a scarf, several coats and trousers which did not disclose the clothing's fibre composition. The brochure did not offer readers the direct possibility to order the advertised clothing.

The Centre for Protection against Unfair Competition (Wettbewerbszentrale) attacked this advertisement on the grounds that the missing textile labelling infringed the EU Textile Labelling Regulation (Regulation (EC) No. 1007/2011) as well as the prohibition of misleading statements under the German unfair competition law. The BGH held that the obligation to mark the fibre composition was only necessary if the textiles were presented to the consumer in a way that allowed them to make a direct purchase. This is in accordance with Art. 3 (2), 16 (1) of the EU Textile Labelling Regulation which requires that the product is "made available on the market."

In Germany, it is quite common that retailers are accused by the Wettbewerbszentrale or its competitors of unfair advertising, potential breaches of textile labelling or price indication obligations. The verdict has not put more pressure on retailers to review their advertisements, especially as this pressure is ongoing. However, the verdict is important because it provides a clear standpoint in regard to this issue; that is, that it is no longer necessary to provide textile labelling in print advertisements if there is no possibility of a direct purchase. Interestingly, the verdict left open a situation in which a brochure makes reference to an existing online shop. However, given that most of the relevant information can usually be obtained on the company's webpage, we believe that the labelling obligation would not be triggered in this case.

WORD FROM THE INDUSTRY MOUTH

Natasha Hall, Senior Legal Counsel, Australia Wool Innovation

Natasha, can you tell us a little about your role at Australian Wool Innovation?

I am the Group Manager in Legal Services for the Australian Wool Innovation (AWI) group of companies. I manage a team of 2 lawyers and together we are responsible for all legal and intellectual property matters globally. Our team also looks after all company secretarial matters for all subsidiaries and affiliates under AWI.

We have offices across the globe including New York, Japan, Shanghai, London, Italy, Hong Kong, Mumbai, Paris, South Korea and Taiwan so this makes the role very interesting.

AWI is the owner of The Woolmark Company which in turns owns the Woolmark device and brand. The Woolmark device is a Certification Trademark and so another part of my role is to manage the administration of the Woolmark portfolio. We work closely with DLA Piper who work with us globally in relation to our intellectual property needs.

How has AWI transformed merino wool into a luxury brand and 'fibre of choice'?

Through our subsidiary company, The Woolmark Company, we have put renewed vigour into global marketing activities, building consumer awareness of the Woolmark brand and logo through the launch of major marketing platforms throughout the world. These platforms are offered to our brand partners to promote their use of wool and build demand for the fibre.

Placing Merino wool firmly on the world stage, projects such as the International Woolmark Prize shine a spotlight on the boundless potential and extraordinary versatility of fashion's finest fibre. Strengthening our reputation for fostering emerging design talent, the prestigious award connects the decision-makers of the future with today's leaders in retail and trade to ensure the inspiring and ongoing use of wool.

The Woolmark logo itself is one of the world's most recognisable logos, providing assurance of the highest quality. Since 1964, the symbol has represented pioneering excellence and innovation at every level of the supply chain to increase consumer demand and enhance the profitability, competitiveness and sustainability of the Australian wool industry.

Why do you think prominent designers like Jason Wu who has chosen merino wool for his summer 2017 collection for NY Fashion week, are passionate about this fibre?

Absolutely. In fact, Jason Wu has said that wool is a staple in his work and that "it's important to use wool in innovative ways". That's one of the reasons why he was so keen to further explore the trans-seasonal properties with wool and produce a collection for the warmer months.

We've worked with a significant number of high-profile designers and brands who each share a passion for the fibre. Take Zegna for instance, who in the pursuit of excellence, work with local woolgrowers to refine and innovate the product through the Ermenegildo Zegna Wool Awards, first introduced in 1963. Or Missoni, who is the brand responsible for creating the best knits in Italian fashion and has provided the world with colourful wools and zig-zag motifs since 1953.

With luxury brands always comes the danger of counterfeiting. How has this affected the wool industry and what do you think is the most important strategy to stop this phenomenon?

It is very difficult to mimic the inherent qualities of wool – man-made fibres have tried to copy wool's benefits, and may succeed in achieving one or two benefits, but never all of them in their entirety. Inferior wool and low quality blends are very easy to pick from first sight due to the product's drape and performance.

The Woolmark brand provides consumers with guaranteed fibre content, an assurance of quality and is backed up by technical specifications and stringent independent testing. A Woolmark licence permits the use of the logo as an independent quality endorsement of wool products. All accredited Woolmark licensees receive a unique licence number and certificate which entitles access to Woolmark branded tickets, labels and merchandising support material. The Woolmark Company and its brands have a reputation and legal requirement to provide consumers with a quality assurance endorsement and as such carry out spot checks on products labelled with our trademarks and take action to remove sub-standard or counterfeit products from the market.

Luxury brands are becoming more aggressive with counterfeiters, with a growing number of premium brands suing sellers of fake goods. An example of this is Alexander Wang who sued the owners of more than 450 websites believed to be selling counterfeit handbags, footwear and clothing last year.

Awareness of sustainable fashion is a growing concern amongst customers. Do you think that the eco-credentials of wool as a fibre is a selling point or are even on a consumers' radar?

I think people are starting to realise the green benefits of wool, and in a world currently dominated by fast fashion this only makes wool's eco-credential shine even brighter.

AWI invests in research into the eco-credentials of wool along the whole wool supply chain from wool growing to manufacturing and final consumption.

The LOHAS market is also growing, which is important for Merino wool as it is a source of new demand for our fibre. LOHAS stands for Lifestyles of Health and Sustainability and describes a type of consumer that actively seeks a healthier and more sustainable lifestyle. LOHAS consumers' demand is changing the apparel and textile industry, pushing the industry towards a greener supply chain and greener garments. Recognising this, we have continued to place wool's eco-credentials in the spotlight, namely that it is a natural, biodegradable and renewable fibre.

You have such strong support from the community and internationally, we saw that even Prince Charles is one of your major supporters. Why do you think people care so much about this fibre in the fashion industry and why do you think it is important to support the wool industry?

HRH The Prince of Wales is so passionate about wool that he started his own campaign – the Campaign for Wool – of which The Woolmark Company is heavily involved in. After seeing what woolgrowers were selling their wool for, he couldn't understand why the price was so low. He knows all too well the benefits and eco-credentials of the fibre and he wants to make sure the rest of the world knows this too.

Historically and still to this day, the wool industry remains one of Australia's most important industries. Our wool helps shape the global fashion industry – what we see on the runways of Paris and Milan and what ultimately ends up in stores.

A key theme of AWI is fashion innovation, and we are aware that you are currently focusing on sportswear (including wetsuits!). What type of apparel do you think will be the next focus for AWI?

New innovations pave the way forward for the Merino wool industry, allowing it to be a dynamic one that is forever changing. New processing technologies and the efforts of Australian woolgrowers, who continue to produce finer Merino wools, have also allowed the introduction of lighter-weight Merino wool fabrics and yarns. But perhaps our most recent exciting innovation is a 100 percent Merino wool outerwear fabric which is wind and water resistant. Wool has long been a favourite for base-layer and mid-layer apparel, yet now by using the most modern processing technologies, this special fabric sees wool enter the outer-wear market which is very exciting for us.

The International Woolmark Prize recognises emerging designers who create pieces with merino wool, we saw Teatum Jones was this year's winner at London Fashion Week. Can you tell us what aspects of their fashion collection was the most striking?

Teatum Jones' winning collection has what fashion author and International Woolmark Prize judge André Leon Talley calls "hanger appeal". A large part of the International Woolmark Prize is the commercial viability of the winning collection, and Teatum Jones certainly has that. It's now stocked in some of the world's most important retailers, such as Harvey Nichols in the UK and will be stocked in David Jones' Sydney store and online from October. The other major part of the prize is innovation, and again, this collection is highly innovative. In fact, Teatum Jones convinced a guipure lace mill in France to consider working with wool in unique ways and created a type of wool lace which was heavily featured in their winning collection.

Ramez Toubassy is the President of the Brands Division at Gordon Brothers Brands LLC. He provides advice on how brands can serve as important business assets in various ways such as equity investing, asset based lending, valuation or consulting efforts.

WORD FROM THE INDUSTRY MOUTH

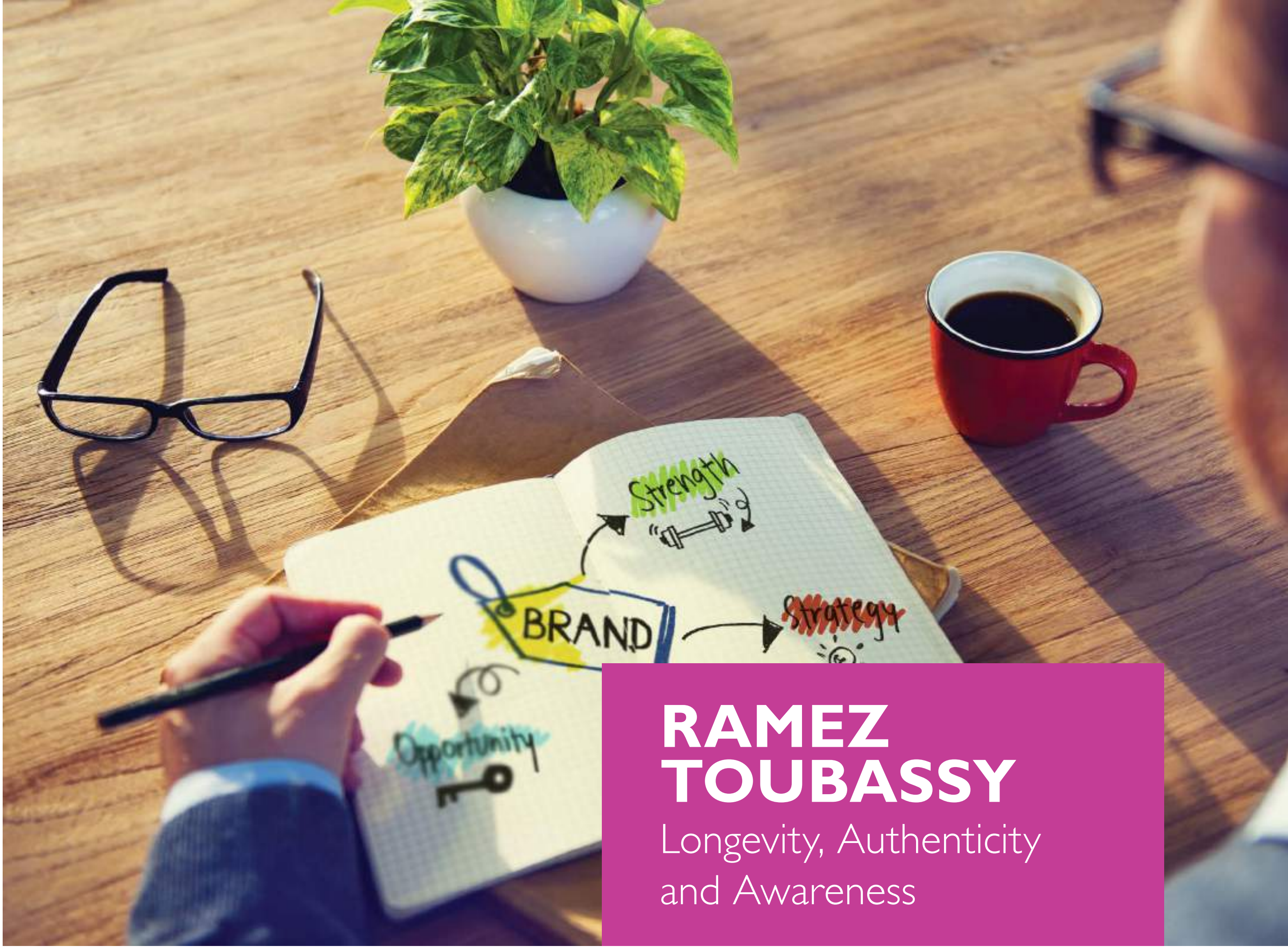
Ramez Toubassy, Chief Executive, Gordon Brothers Brands

1. CAN YOU EXPLAIN TO US THE ROLE OF BRANDING IN THE MARKET AT THE MOMENT?

The value locked up in consumer brands is taking a front seat in how businesses evaluate their growth prospects. Brands are more powerful endorsers of products than ever before. In fact, scientific studies have shown that children consistently identified carrots labelled with a McDonalds wrapper as tastier than identical carrots with no branding. Given this reality businesses are spending more time thinking now they can grow their brand equity and what opportunities exist to better commercialize their brand value. For example, brand licensing, franchising and brand-collateralized loans which were traditionally considered as peripheral issues for businesses and are now being prioritised.

2. IN SUCH A SATURATED MARKET, WHAT TIPS WOULD YOU RECOMMEND FOR SOMEONE TRYING TO DEVELOP A BRAND PRESENCE?

There is a unique blend of art and science that goes into building and growing a brand. The most important ingredients in exploiting brand value are **longevity, authenticity and awareness**. It is much easier to revitalize a brand with significant consumer recognition and affinity than it is to start something from scratch. Given the distracted nature of the current consumer and the incredible fragmentation of the mediums with which to communicate with them, starting a new brand from the ground up either requires an immense amount of money or an even larger amount of luck. I firmly believe that there are a plethora of undervalued brands in the market today that, with a little bit of love and attention, could thrive in the new retail environment.



RAMEZ TOUBASSY

Longevity, Authenticity and Awareness

3. IN RECENT YEARS A LOT OF BIG BRANDS HAVE UNDERGONE REBRANDING TO HAVE A MORE FRESH IMAGE (GOOGLE, STARBUCKS, NIKE). WHAT IS YOUR OPINION ON REBRANDING, DANGEROUS OR REVITALISING?

Constant reinvention is no longer "a nice to have" but rather a critical prerequisite for survival. How people learn about brands, how they engage with brands and how they buy a product is changing drastically with very little notice. We have seen this with some international brands and their business models at New York Fashion Week, allowing viewers to buy products straight off the catwalk. So, the whims of the fashion industry grow more and more fickle as they are radically cutting the time between product conception and delivery in order to meet the constantly shifting needs of the fashion consumer (as opposed to the old model where there were almost six months between fashion show and delivery). The same holds true for branding. Brands must hold on to what is dear but be brave with regards to how they present themselves to be relevant and appealing to consumers.

4. WHAT WOULD YOU SAY ARE THE CURRENT TRENDS IN TERMS OF BRAND EXPLOITATION AND THE MOST SUCCESSFUL TECHNIQUES TO USE?

Brand licensing. Brand licensing affords the ability to determine which categories of the business the brand has permission to play in, and to assess which of those categories the brand can win in, all without the need to consider both the capital and experience constraints of the brand owner. By utilizing third party licensees to attack such market opportunities the brand owner can create an incredibly profitable mechanism for commercializing the value currently locked within their brand.

5. WHAT DO YOU THINK WE ARE LIKELY TO SEE IN THE NEXT FEW YEARS IN TERMS OF TRENDY BRANDING?

If I knew that I probably wouldn't tell you. Without a crystal ball it is difficult to predict who the winners will be in the future but what is clear is that in a world where choice is increasing exponentially I'd much rather own a great brand with longevity, authenticity and awareness than I would want to own the factory in which the products are made.

CALENDAR

November 2016	January 2017	February 2017
Modaprima, Firenze: 18 – 20 November	London Collections: Men 6 – 9 January	New York Fashion Week: Men's 30 January – 2 February
	Pitti Uomo 10 – 13 January	New York Fashion Week: Women's 9 – 16 February
	Milan Fashion Week: Men's 18 – 22 January	London Fashion Week F/W 2017 17 – 21 February
	Paris Fashion Week: Men's 18 – 22 January	Milan Fashion Week F/W 2017 22 – 28 February
	Haute Couture (Paris) 22 – 27 January	Paris Fashion Week F/W 2017 28 February – 8 March 2017

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