

Letter From the Editor



Welcome to the Winter 2018 issue of *Kattwalk*.

In this issue, we are excited to provide a look into the work of Marc G. Schuback, independent consultant and former senior vice president, general counsel and secretary of Aéropostale, Inc., as he takes us through his career thus far and provides insight into online shopping, artificial intelligence and the evolving future of shopping.

We are also thrilled to bring you updates on the foundation of the fashion world—brand licensing, recent ADA compliance issues, infringement news and more!

Don't miss the exciting industry topics in this issue, including additional information on satisfying GDPR compliance. Read on to learn more.

Karen Artz Ash

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Trademark Infringement Test for TV Show Titles

by Karen Artz Ash and Bret J. Danow

In *Twentieth Century Fox Television vs. Empire Distribution* the US Court of Appeals for the Ninth Circuit recently addressed the issue of the appropriate test to apply when an allegedly infringing use is in the title or within the body of an expressive work.

Empire Distribution, a record label that releases albums in the urban music genre, had sent a demand letter to Twentieth Century Fox Television (Fox) regarding a television show titled *Empire*, which portrays a fictional music label named "Empire Enterprises." In response to such demand letter, Fox commenced a lawsuit seeking a declaratory judgment that the Empire television show did not violate Empire Distribution's trademark rights. Empire Distribution, in turn, counterclaimed for trademark infringement under the Lanham Act, among other causes of action.

The district court granted summary judgment in favor of Fox, holding that Fox's use of the name *Empire* was protected by the First Amendment and, as such, outside the reach of the Lanham Act. Empire Distribution appealed such decision to the Ninth Circuit.

In reviewing the district court's decision, the Ninth Circuit noted that, generally, Lanham Act claims of trademark infringement are governed by a likelihood of confusion test. However, when the allegedly infringing use is in the title of an expressive work (such as, in the case at hand, a television program), the court first applies the *Rodgers* two-prong test to determine whether the Lanham Act is applicable. The court explained that expressive works are treated differently because: "(1) they implicate the First Amendment right of free speech, which must



be balanced against the public interest of avoiding consumer confusion; and (2) consumers are less likely to mistake the use of someone else's mark in an expressive work for a sign of association, authorship or endorsement."

Under the *Rodgers* test, a television show title does not violate the Lanham Act "unless the title has no artistic relevance to the underlying work whatsoever, or, if it has some artistic relevance, unless the title explicitly misleads as to the source or the content of the work." In applying the *Rodgers* test, the court found that Fox's use of the name *Empire* satisfied both prongs.

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First, the court determined that Fox used the word *Empire* for artistically relevant reasons— noting that the level of relevance does not need to be high— since the television show is set in New York (known as The Empire State), and its subject matter is a music and entertainment conglomerate (a figurative empire).

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Second, the court found that Fox's use of the title did not explicitly mislead consumers, indicating that it contains no overt claims or explicit references to Empire Distribution and no explicit misstatement that caused consumer confusion. In analyzing the second prong, the court held that "use of a mark alone is not enough" and that they must ask not only about the likelihood of consumer confusion, but whether the creator explicitly misleads consumers.

The court also dismissed Empire Distribution's arguments that Fox's use of the *Empire* mark "as an umbrella brand to promote and sell music and other commercial properties" falls outside the title of an expressive work and, therefore, outside the *Rogers* test. The court noted that "it requires only a minor logical extension of the reasoning of *Rogers* to hold that works protected under its test may be advertised and marketed by name."

This decision is instructive for media companies when developing content.

Christian Louboutin's Red-Sole Legacy

by Alan Meneghetti and Sarah Simpson

Christian Louboutin has been creating and selling his legendary scarlet soles for more than 25 years. Way back in the nineties, while Louboutin designed a black shoe for a client, he looked over at his assistant painting her nails with Chinese Red nail varnish. Louboutin immediately reached for the polish and painted the soles of his Pensée stilettos the now renowned red! Since exclaiming his new discovery made the shoes “pop,” the Paris shoe salon has sought to fiercely protect its signature style.

Fifth Avenue by Halle Berry

Fast forward from Louboutin's nineties heyday to 2012, and the French fashion designer's headache begins when the Dutch shoe retailer Van Haren launched its Fifth Avenue by Halle Berry collection. This particular line included red-soled stilettos. To stand up for his figurative Benelux trademark, Louboutin put his foot down and claimed the Van Haren line infringed his mark consisting of “...the red color (Pantone 18-1663TP) applied on the sole of a shoe...,” which has afforded protection in Belgium, the Netherlands and Luxembourg for almost a decade. The District Court in the Hague concurred.

After being forced to stop producing its red soles, Van Haren struck back, arguing that Louboutin's Benelux trademark is invalid, since EU law prohibits trademarks that only consist of a “shape that gives substantial value to the goods,” and the case was referred to the European Court of Justice (ECJ), for “clarity.”

Spring 2018 Update

Almost six years later, Louboutin and Van Haren are still thrashing it out in the courts. On Tuesday February 6, 2018, the most recent development came when the ECJ's Advocate General (AG), Maciej Szpunar, declared that a shape trademark can include color and, therefore, since a trademark consisting only of a shape that gives substantial value to the goods for which it is registered is not allowed, Louboutin's Benelux trademark could be ruled invalid.

To add insult to injury over Louboutin's 25-year red-sole stint, AG Szpunar also added that any decision on the trademark's validity should not consider the “attractiveness of the goods flowing from the reputation of the mark or its proprietor.”

However, this is not the end of the road for Louboutin. The court still needs to deliver its decision on the referral, which may or may not necessarily follow the opinion of AG Szpunar. The opinion of the AG is only guidance for the ECJ, although in the vast majority of cases, the opinions are followed.

Louboutin Hits Back

Interestingly, since publication of the AG's opinion, Louboutin has (in a very rare move) spoken out in defense of headlines such as the *New York Times*' “[Can Christian Louboutin Trademark Red Soles? An EU Court Says No.](#)”

Louboutin claims that some reports of the opinion are “fake news,” commenting “While ordinarily Christian Louboutin does not comment directly on pending matters, we are making an exception in this instance to correct what appears to be misleading reports of the opinion of M. Szpunar, advocate general, which is seen to impact our trademark adversely. We disagree.” In fact, Louboutin is of the view that the AG's opinion “supports trademark protection for our famous red sole, rather than threatening it.”

Louboutin seems to take this stance since “Advocate General Szpunar states that the concept of a shape which ‘gives substantial value’ to the goods . . . relates only to the intrinsic value of the shape, and does not permit the reputation of the mark or its proprietor to be taken into account.”

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In other words, “Applying Mr. Szpunar's opinion to our case supports the validity of our trademark since the shape of the outsole to which the red color is applied is not intrinsically valuable . . .

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As for Christian Louboutin's red color, the only reason it has value is because of our marketing efforts as well as the public's association of such color applied to a women's heeled shoe outsole with Christian Louboutin.”

In fact, the super-brand claims that the “opinion is not a blow or a setback in Christian Louboutin protection of its famous red sole mark but is ultimately reinforcing our rights.”

It Is All About The Interpretation—Will The Tables Turn in Favor of Louboutin?

Is Louboutin right to interpret the AG's opinion in this way? Arguably, yes. The red-soled stiletto may live to fight another day, but we will have to await the outcome of the ECJ to know whether this turns out to be the case.

Stay tuned to the *Katten Kattwalk* for future updates on this case, which is sure to be of huge interest to fashion brands looking to protect their signature styles as trademarks in Europe.





Through
the Lens



Marc G. Schuback

Independent Consultant; Former Senior Vice President, General Counsel and Secretary of Aéropostale, Inc.

-----[insight]-----

Tell us about your background.

My entire in-house career has been in the retail industry. After practicing corporate and real estate law at the law firm of Graham & James LLP, I started my in-house career at Melville Corporation, which at the time was one of the largest retailers in the US whose businesses included, CVS, Marshall's, Linens 'N Things, Meldisco, Kay-Bee Toys, Footaction and Thom McAn, among others. Thereafter, I transitioned to the role of Vice President, Assistant General Counsel and Assistant Corporate Secretary at Footstar, Inc., which was the footwear spin-off from Melville Corporation, and where I was for a little over 11 years. This led me to my next role as Senior Vice President, General Counsel and Secretary at dELiA*s, Inc. which was a specialty apparel brick and mortar, e-commerce and catalog retailer. Following dELiA*s, I was Senior Vice President, General Counsel and Secretary of Aéropostale, Inc. and helped take them through their Chapter 11 bankruptcy process and the subsequent sale of their assets to a consortium consisting of Simon Property Group, General Growth Properties and Authentic Brands Group. I am currently an independent consultant to the successor to Aéropostale's store and e-commerce businesses.

-----[focus]-----

What's the most rewarding aspect of your work?

Generally, the most rewarding aspect of my work is that I get to work collaboratively with all areas of the organization on transactions and projects that help to achieve the organization's goals. In addition, I enjoy that each day is different, and I never know what is going to come through the door. Specifically, one of the most rewarding aspects of the work I did at Aéropostale was completing the successful sale of its assets, saving approximately 10,000 jobs and keeping approximately 500 stores open.



-----[highlight]-----

What are the industry's strongest areas at the moment?

Brand recognition is a strong area, especially with brands utilizing technology and social media to engage with customers and promote brand awareness.

-----[challenge]-----

What do you think are the greatest challenges facing the industry today?

The ever-changing face of retail and the ability of retailers to adapt is the biggest challenge. For example, although reports say that approximately 85 percent of retail transactions are conducted in brick and mortar stores, the increasing percentage of transactions being conducted online and Amazon's presence have required retailers to adapt in order to survive and succeed. Another significant challenge for retailers is brand protection.

-----[integration]-----

How do you see your field changing in the future? And how are you preparing to meet the evolving needs of the field?

To meet the evolving needs of the industry, retailers need to focus on understanding customer engagement and the methods customers use to engage with a retailer/brand, and then implementing an omni-channel experience—making it easy to shop

online through whatever device the customer utilizes; being able to ship out-of-stock items at a brick and mortar store from a retailer's online store for free; purchasing online and picking up in store; reserving online and trying on in store; and accepting returns/exchanges from online purchases in stores. It is also important to use data and analytics to know the customer's preferences, so retailers can provide their customers what they want, how they want it and when they want it.

-----[innovation]-----

Given these multi-channel sales, have you seen the shopping experience become more customized to the individual?

As retailers have more data and analytics at their disposal, the shopping experience is becoming more customized to the individual. Retailers are continuing to make this happen by utilizing technology and learning more about the individual customer at each touchpoint. One developing technology that will have the ability to add to customization is artificial intelligence.



Karen Artz Ash Named to Leading Women Lawyers List by *Crain's New York Business*



Karen Artz Ash was named to the "Leading Women Lawyers in NYC" list by *Crain's New York Business* for her contribution to the legal industry. As national co-chair of Katten's Intellectual Property department and co-head of the Trademarks and Trademark Litigation practice, Karen is credited for her extensive work for the fashion industry, particularly involving intellectual property and trademark licensing. She is also recognized for her contributions as an academic, noting her writing for *The Licensing Journal* and *Managing Intellectual Property*, in addition to several books.

Fashion Licensing: Lessons From the Courtroom

by **Karen Artz Ash**, **Alexandra Caleca** and **David Sherman**

The fashion world is built substantially on a foundation of brand licensing. While some companies and design houses have very sophisticated licensing partners, there is no question that virtually any license can be improved. In fact, many licenses contain language that may create unforeseen issues. Often these issues are identifiable only in litigation.

Lawyers and business executives who negotiate brand licenses rarely have a glimpse into the courtroom. However, lessons from the courtroom put meaning behind the words. There is no better contract than one negotiated by someone who understands the effective lessons taught by litigation. >>[read more](#)

Website Accessibility and The Americans With Disabilities Act

by **Jonathan Faust**

Many commercial websites cannot easily be accessed by people with visual, auditory, motor and/or cognitive impairments. Businesses that fail to proactively ensure that their websites meet current standards for accessibility should brace for lawsuits in the United States.

A growing number of lawsuits claim that websites that are not reasonably accessible to the disabled violate the US Americans With Disabilities Act (ADA). (See e.g., "[McDonald's, Kmart, Others Settle Suits Over Website Access for the Blind](#)," *Chicago Tribune*, November 6, 2017, which describes four lawsuits brought by the same law firm on behalf of the same group of plaintiffs). Accessibility concerns have most commonly been raised regarding public facing websites by which users engage in transactions or receive goods and services. However, accessibility concerns have also been cited respecting employee intranets and web pages advertising job offerings to the public.

The ease and ubiquity of internet searches means that the disabled often encounter frustrating websites. In addition to those persons genuinely aggrieved by a difficult website experience, there are many recurring plaintiffs who look to manufacture litigation in order to effectuate change and/or extract settlement payments. Such plaintiffs can be represented by a growing industry of attorneys who can quickly file cookie-cutter complaints, often targeting entire industry sectors.

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While the current litigation has tended to target large, well-known retailers, business should expect these lawsuits to proliferate and reach small and mid-market companies.

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Significantly, under current law, businesses can be sued for website accessibility violations without prior notice. In other words, a business might first find out about an ostensible website accessibility concern by reviewing a demand letter or even a formal legal complaint filed against it. Reacting to such a claim means that, in addition to the expense and distraction of litigation, accessibility issues get resolved with plaintiff's counsel's oversight, on the plaintiff's timeline. The public profile of such litigation can expose a business to potential government enforcement actions as well.

There are compelling non-litigation reasons for a company to promptly take steps to make its websites more accessible to the disabled. Making it easier for more customers to find, engage and buy from the business is often its own reward. Likewise, it is easier for a business to retain customers as they age, if the company website is accommodating to those with diminished eyesight, hearing and motor skills. Adhering to enhanced website accessibility standards might also improve search engine optimization, making the company's website higher profile during routine internet searches. In addition, pre-emptively ensuring website accessibility can reinforce a business' reputation as a good corporate citizen.

Business can take pre-emptive action by modifying their websites to add:

- (1) Captions and transcriptions of multimedia content on the site;
- (2) Spoken descriptions of photos;
- (3) Options to navigate online pages without using a mouse; and
- (4) Features that enable the website to work with mass-market screen readers.

Addressing web accessibility proactively lets a business (not a plaintiff's counsel) take charge. Website reconfiguration (and ultimately, replacement with a site that is "accessible by design") and attendant issues such as testing, training and maintenance, can be appropriately budgeted, staffed and planned within the business and financial structures of the company.

There is no single, formal web accessibility standard that can be referenced. However, the World Wide Web Consortium (W3C) sponsors the [Web Accessibility Initiative \(WAI\)](#), which provides a widely respected set of website accessibility guidelines, technical reports, educational materials and other documents that relate to different components of web accessibility. Many private litigation settlement agreements provide that the offending website should be reconfigured to meet the WAI guidelines. Accordingly, website owners should consider proactively redesigning their sites to conform to WAI guidelines.

Skilled counsel can assist you in evaluating the case, controlling the cost of any resolution, and making tactical decisions on how to comply with web accessibility concerns. The up-front investment in time, effort and money will result in reduced litigation and compliance risk, lower long-term costs, and increased business from disabled customers.



Staying In Vogue

by Alan Meneghetti, Sarah Simpson and Emma Phillipot

Vogue magazine is regarded by many as an international fashion bible synonymous with glamour, luxury and celebrity. Recently, however, *Vogue* made UK headlines because of its ongoing trademark battle with the owners of Vogue, a nightclub in Burnley. Burnley is a UK Lancashire mill-town, located 250 miles north of London. Advance Publications, *Vogue*'s parent company, is pursuing the club for infringing its registered trademark.

This ongoing dispute is a salient reminder of the importance of protecting your trademark from infringement, however minor the threat may seem to be, to protect your brand's credibility and limit the risk of dilution from those trying to infringe it.

Know Your Value

Vogue's financial success is largely measured by its advertising revenue. In 2017, it cost £28,020 to place a single page advertisement in the print edition of *British Vogue*, which is almost £10,000 more than it cost to advertise in its rival, *Harper's Bazaar*. *Vogue*'s advertising space is valuable because of the reputation of the magazine and the power of the brand. This value is largely tied up in the name *VOGUE*. It is therefore understandable that Advance Publications moved to protect the strength and value of their registered trademark when it came to light that a somewhat noisier namesake existed in Burnley.

Vogue, Burnley's current predicament, isn't the first law that the owners of the club, the McQuoids, have run afoul of in recent years. In 2016, they reportedly settled with music licencing company PPL in relation to outstanding licencing fees, eventually paying a sum of £20,000. A number of violent incidents have also reportedly taken place in or outside the club. These varying issues are clearly something that a bastion of cultural commentary, such as *Vogue* would not want to be associated with, even if, as club co-owner Jason McQuoid said, "no one's going to think Kate Moss is in *Vogue* in Burnley!"

The Fashion Police Strike

Advance Publications has accused the McQuoids of infringing its registered EU trademark for *Vogue* in the context of "nightclub services." The McQuoids have been forced to change the club's name on Twitter and the club's Facebook page has been shut down. These steps prove that Advance Publications is serious about enforcing its rights as proprietor of the registered trademark.

Under English law, if Advance Publications issued infringement proceedings, it would have to prove that the sign used by the McQuoids is identical or similar to Advance Publications' registered trademark (*check*) and that the *Vogue* trademark

has a reputation in the UK (*HUGE check*). Advance Publications would also have to show that use of the mark by the nightclub takes unfair advantage of, or is detrimental to, the distinctive character or reputation of the *Vogue* mark (if established, then *CHECK-MATE*).

The remedies potentially available to Advance Publications include injunctions, damages and/or an account of profits, orders for removal of the offending signs from infringing articles, and orders for destruction of infringing articles. With a reported turnover of \$2.4 billion, it is highly unlikely that Advance Publications would pursue the McQuoids for monetary compensation; rather, the company would be more concerned with obtaining a remedy to protect its brand, such as an injunction to stop the nightclub from using the trademark.

While the dispute remains ongoing, Advance Publications is in a strong position because the trademark in question has been properly registered. *Vogue* and Advance Publications have received some negative press as a result of this dispute—some think that the global juggernaut is bullying the "little guy." This minor criticism is, however, somewhat inevitable given the difference in size of the parties and is, arguably, not one which should—or indeed will—put Advanced Publications off enforcing what it regards as its rights.

Discovering Infringement: First Steps

Should you discover that your trademark has been infringed, contact a lawyer and take the following initial steps to ensure that the grounds for any infringement case are clear:

- 1) Record the date and circumstance of the discovery of potential infringement;
- 2) Identify the person who discovered the potential infringement;
- 3) Identify the business details of the infringer; and
- 4) Obtain a sample of any infringing product and retain the invoice.

It is important to take swift action once infringement has come to light and the facts have been established, as delay can mean that certain remedies could be lost. It is also important to ensure that your trademark is correctly registered, that any period of use prior to registration is documented, and that you keep records that can be used to show that the trademark in question was in use prior to registration.

Easy Guide to GDPR Compliance

With privacy and data breaches on the increase in our data-driven world, it is important to take the necessary steps to protect your business. But many times complying with the General Data Protection Regulation (GDPR) can be confusing, and it may be difficult to determine just where to start on your path towards compliance. That is why we have created a simple step-by-step guide help ensure that you are headed in the right direction.

10 Steps to GDPR Compliance:

- 1 > List the types of personal data being processed.
- 2 > Record the sources of that personal data. 
- 3 > We help you to establish the legal basis for lawful processing.
- 4 > Draw up a list of vendors and what personal data you send out and where, and prepare data flow map.
- 5 > We check your agreements with third parties to assess your GDPR obligations. 
- 6 > We work with you on your policies regarding handling, retention and protection of personal data from employees and third parties, and responding to data breaches.
- 7 > We draft GDPR and data protection wording for agreements with third parties.
- 8 > We train you on conducting regular audits on the data retained and dealing with subject access requests, and we help train your staff on your data protection obligations and data incident responses.
- 9 > You retain records to demonstrate compliance with your data protection obligations. 
- 10 > We work together to evaluate ongoing compliance, address new types of personal data processing that you undertake, and address new regulatory and legal developments.

Key

Your steps

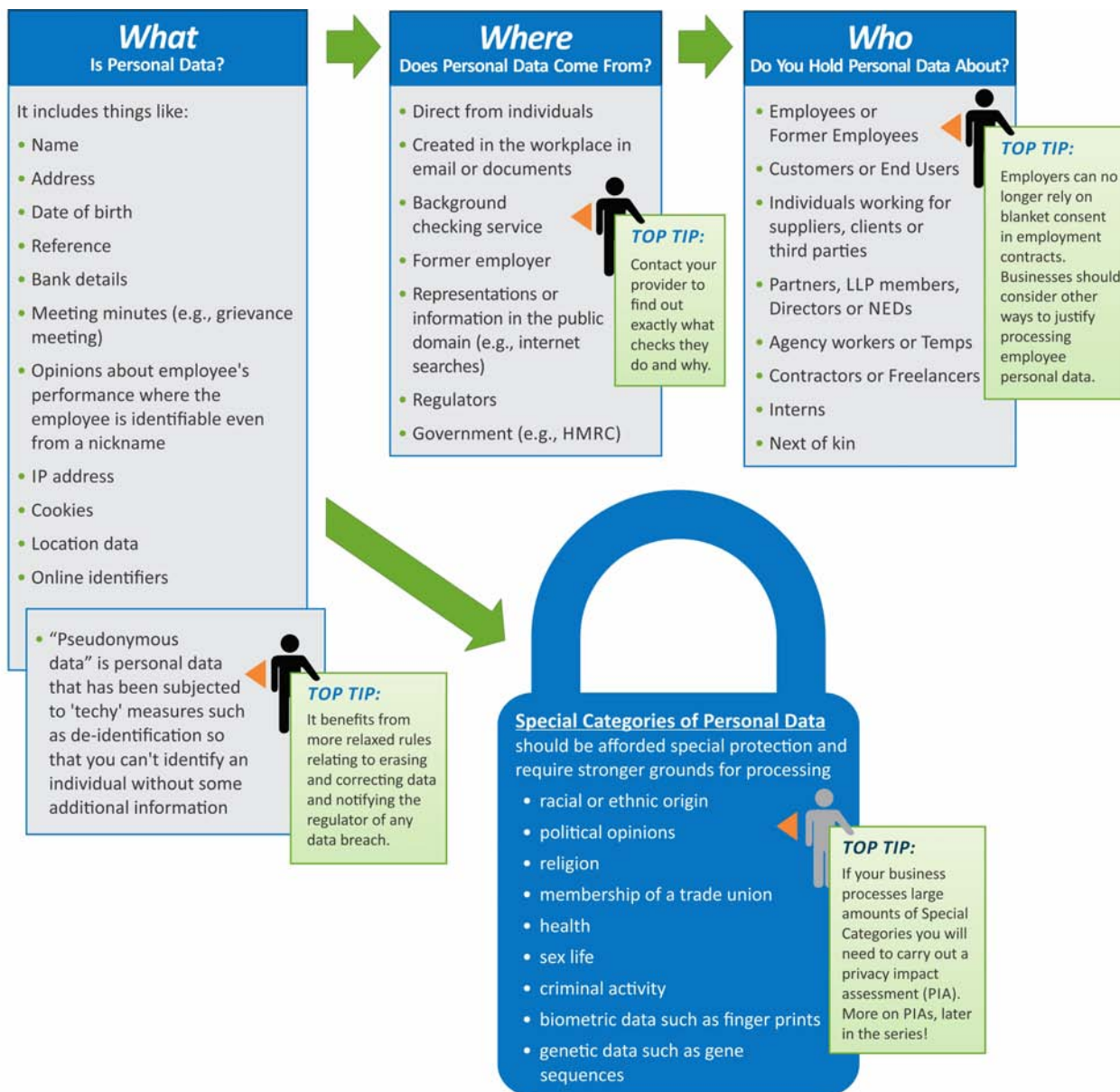
Our steps

Joint steps



Personal Data Checklist: The What, the Where and the Who:

To help you map your data flows, here is a checklist to help you decide what personal data you might hold, where you get it from and who it relates to.



Processing Personal Data Legally:

Before requesting personal data from your customers, your suppliers and your employees, always consider why you need it. “Just because” is unlikely to cut it!



Checklist – Processing Personal Data Legally



Don't Fall at the First Hurdle

Ensure you're covered with a legal basis to process personal data:

- Do you have specific, affirmative and informed consent from the individual?

Top Tip: *Because individuals can withdraw consent, it is often more predictable for businesses to rely on a legal basis other than consent when collecting and processing personal data.*

- Is the personal data necessary to comply with a contract to which the individual is a party?
- Is it necessary to process personal data to comply with the law?
- Is it necessary to process personal data to protect the health and well-being or vital interests of the individual?
- Is it necessary to obtain personal data from individuals in order for a business to run (e.g., processing the names of your employees to employ them)?

Top Tip: *Collecting and processing sensitive personal data (e.g., political opinions, health data, racial or ethnic origin) or personal data from children (ranging from 13 to 16, depending on the member state) requires additional consideration. Know your demographics, the types of data elements and seek advice for any unique requirements or applicable local laws.*



Collected Legitimately

- Inform the individual why you need their personal information.
- If these reasons change, you must inform the individual.

Top Tip: *Keep individuals informed by regularly reviewing and updating your privacy policies and/or customer notices. Conduct reviews when there is a significant change to your collection or processing activities. Bi-annual reviews work well.*



Less is More

- Only collect what you need and keep the processing of personal data to a minimum.
- It is illegal to process more data than is necessary. Data minimization is not only important for compliance but can also reduce unnecessary liability.

Top Tip: *If you need only names and email addresses for a mailing list, consider why you would need to collect an individual's date of birth or other information.*



Keep Only for as Long as Necessary

- Keep personal data you store about an individual:
 - secure;
 - up to date; and
 - relevant and accurate.
- Out-of-date personal data, or data that does not serve the purpose for which it was originally collected, should not be kept.
- Erase stale or irrelevant data.
- **Caveat:** You can keep it as long as it is for:
 - archiving purposes in the public interest; or
 - scientific, historical or statistical purposes.

Top Tip: *Review your data retention policies and technical systems regularly to ensure that you are complying with data minimization practices and requirements.*



Attention to Detail – Record of Processing

- Implement and maintain a Record of Processing. The record should include, at a minimum, identification of the controller(s) and processor(s), the purpose for processing the personal data and a description of the categories of data.
- Third-party vendor contracts that assist you with personal data processing must use compliant language. Review your vendor agreements and update them as necessary.

Top Tip: *As the data controller (i.e., the entity or person that determines the purposes and means of the data processing), you are responsible for the third-party vendors that assist you with data processing activities. Familiarize yourself with your vendors' processing activities and security practices to ensure they are compliant and meet your standards.*



Security

Keep the personal information secure and protect it against:

- unauthorised or unlawful processing;
- accidental loss;
- destruction; or
- damage.

Top Tip: *Have security systems in place like password protection and security policies designed to ensure that the data can only be accessed by people who actually NEED to access it. If possible, pseudonymise the information to add an extra layer of security. Regularly review and update your security systems to ensure that they are current and comply with the requirements of the GDPR.*



If you have questions about the GDPR or about the topics covered in the preceding pages, please contact any of the following Katten attorneys:



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