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Hogan Lovells Retail & Fashion Sector Annual Holiday Guide 2022

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Introduction

The holiday shopping season is upon us once again and this year, much like last year, continues to present unique challenges and opportunities for consumer companies and retailers. In this nearly "post-COVID" environment, retailers are focused on a return to brickand-mortar. As detailed in our Annual Hogan Lovells Retail & Fashion Holiday Guide, customers are expecting a unique shopping experience whether in-person or online. Increasingly, retailers are willing to offer curated experiences to in-store shoppers; but the rise of inperson shopping also requires crisis preparedness to ensure safety and security inside retail stores.

Though some customers flock to physical stores, others continue to demand the conveniences of e-commerce and an immersive online experience that new technologies and the metaverse offer. Retailers may turn to third party vendors to ensure they have the technological capabilities to update their online experiences, protect customer data, and offer a seamless omnichannel shopping experience. No matter how customers engage with brands, whether in-person or online, many are looking for goods that are sustainable. Our guide discusses this focus on sustainability and how retailers are meeting this consumer demand.

Our global Retail and Fashion Team has deep industry knowledge and can assist on legal issues around the world. We advise brands that have become household names from Los Angeles to Hong Kong to London, as well as niche retailers and startups focused on transforming their respective categories in powerful ways. We build strategic relationships to help you throughout all stages of the business lifecycle – from advising on complex transactions to guiding you through e-commerce establishments and the digital world. Our team delivers innovative and practical solutions to help you with every day challenges. Some of our areas of focus include, but are not limited to: supply chain, marketing and advertising, and e-commerce.

We hope that you enjoy our annual Holiday Guide, and encourage you to get in touch.

Happy Holidays!



Retailers are getting the gift of vendors this holiday season!

Meryl Bernstein Partner, New York

The end of restrictions relating to COVID-19 are heralding good cheer in the form of a boisterous return to brick and mortar stores. But shoppers are demanding not only an engaging inperson shopping experience, but also an immersive e-commerce landscape that allows for personalized interactions with brands. This holiday season, can shoppers have their Christmas cookies and eat them too?

Retailers are rejoicing as shoppers flock through their doors this season, but the demands consumers are making of online shopping continue to increase and evolve. Customers want ease of pickup, fast delivery of their items, and personalized online experiences through immersive technology platforms. These demands amount to a significant allocation of resources and time by retail brands, and some are increasingly turning to niche third party vendors to accommodate consumer preferences. In fact, retailers have or are launching dedicated Innovation Centers to bring new products to market and to launch new business lines in keeping up with consumer demand. These Innovation Centers are tasked with working on a faster timeline while trying more novel concepts than have been the norm for traditional retail. In the last twelve months, we've seen a trend amongst these Innovation Centers themselves turning to third party vendors to shoulder the burden of innovation.

Retaining outside vendors offers several benefits to retailers. First, these vendors can operate outside of the internal rules and policies that bind the retailers themselves; whereas it might take weeks for an in-house team at a large retailer to obtain the internal approvals necessary to launch a new product or offering, a third party can be retained and operate outside of these requirements. Second, these vendors often have key relationships

SALF

in the market, including with small subcontractors that may otherwise not be on the radar for large retailers. And third, these vendors specialize in key services (small-scale product launches; certain types of digitization; e-commerce implementations for specific product categories) and therefore have built-in expertise that is ready to be implemented quickly. The retail sector has seen customer preferences shift with increasing speed, and in order to keep up, retailers are innovating at a record pace. This means more business for the vendors tasked with helping retailers' holiday wishes come true.

Happy holidays!



Digital shopping mall: NFTs and the metaverse – trademark protection for virtual goods

Yvonne Draheim Partner, Hamburg

The metaverse is a virtual reality with billions of potential revenue. Platforms such as Ethereum-based metaverse "The Sandbox" will evolve in the years to come, and people will be able to engage in various ways through virtual reality technologies. The revolutionary opportunities this presents to engage directly with their consumers has taken the global market by storm and attracted the likes of adidas, Gucci and Nike, just to name a few, to participate on various metaverse platforms. Closely linked to the business opportunities of the metaverse and equally revolutionary are NFTs (non-fungible tokens).

NFTs are digital assets based on blockchain technology, but as their name suggests, they are non-fungible, i.e. non-replaceable. NFTs have become increasingly popular and exist in a wide variety of forms, e.g. as fashion pieces for metaverse avatars, as metaverse real estate, artwork or the like. Instead of only spending money on real – tangible - items, some customers now choose to buy virtual goods that only exist on the Internet – there might even be an increasing number of virtual gifts "under the Christmas tree" this year.

However, as is always the case with revolutionary ideas, they give rise to various legal issues, including the possibility of obtaining trademark protection for NFTs and virtual goods or, vice versa, bringing a trademark infringement actions in relation to the use of NFTs.

Under European trademark law, NFTs classify as "virtual goods" (class 9 of the Nice classification). The EUIPO has already stated NFTs should be seen as digital certificates that are registered in the blockchain and authenticate digital articles which are distinct from the virtual goods they authenticate. Therefore, according to the EUIPO, "non-fungible tokens" on their own do not qualify for any trademark protection. Instead, information on the type of digital article for which authentication by an NFT is intended has to be provided as part of the trademark application. Trademark owners should take this important nuance into account deciding what trademarks to file, and what they should cover, as it is not possible to amend the list of goods and services after the application.

Protecting a company's trademarks from infringements by third party NFTs is an equally important issue that raises several questions itself, including whether NFTs are digital works of art. If so, in making and publicizing the NFT is the artist exercising their freedom of expression or infringing someone else's trademark? Do your agreements on rights of use of your trademarks address the use of trademarks on digital platforms? These are only examples of issues that are likely to be raised; more are likely in future.

Notwithstanding the fact that the concepts and execution of metaverses are still evolving, it is important for companies to keep an eye on this development and, if necessary, start adapting their trademark portfolios to fit the new reality. We gladly advise you on the strategic questions surrounding a trademark portfolio that is fit for the digital future - both in the real and virtual world.

Most importantly for now, however, we wish you a wonderful Holiday Season!

Schöne Ferien!

NON FUNGIBLE TOKEN

Holiday retail 2022 – a flight to quality?

David Horan Senior Associate, London

For the first time since the start of the COVID-19 pandemic, many shoppers are looking forward to a more normal holiday shopping period, but how different will 2022 look compared to 2019? In London, the picture is mixed. The West End (think Oxford Street and Regent Street) will always retain its appeal but, despite vacancy rates having improved recently, the number of empty stores stands markedly higher than pre-pandemic levels. Many flagship retailers (think John Lewis and M&S) are looking to reduce their retail space over the long term.

Driven by long term structural changes in the retail market, brick-and-mortar needs to find its place in an increasingly omnichannel retail experience Environmental and sustainability issues are also key drivers. What can retailers and developers do to tempt shoppers back? To compete with other channels (and, in the medium-to-longer term, the metaverse) a curated and physical experience will be crucial. October 2022 saw the opening of a new retail scheme at the restored Battersea Power Station, fronting the River Thames. Its developers promote the wider economic, social and environmental benefits of this regeneration project, repurposing a building that had been unused for nearly 40 years. The retail scheme occupies the 1930s and 1950s former turbine halls of the iconic London building, and we have advised a number of clients on their new destination retail stores at the opening of this offering.

Whatever the challenges in the economy, and changes in consumer habits, there will always be a place for unique retail experiences.

Happy shopping!



The long-awaited Christmas present for Indonesian consumers

Karina Antonio Senior Associate, Jakarta

This Christmas, Santa will be bringing the long-awaited present for e-commerce consumers in Indonesia. With Personal Data Protection Law Number 27 of 2022 ("PDP Law") officially passed on the 17 October 2022, it has brought legal certainty for e-commerce consumers in protecting their personal data. The passing of the PDP Law is a crucial milestone in the development of data protection, which will now become the umbrella legal framework for the protection of personal data in Indonesia. The PDP Law brings a lot of benefits, including for the end consumers in e-commerce, including, among others, rights of consumers to:

- obtain information regarding identity clarity, basis of legal interest, the purpose of requesting and using personal data, and accountability of parties that request personal data;
- complete, update and/or correct errors and/or inaccuracies in their personal data (Rectification Requests);

- request to erase and/or destroy their personal data;
- withdraw consent to their personal data processing, which will result in termination of data processing and erasure of personal data (Consent Withdrawal Requests);
- delay or limit the processing activity of their personal data (Limit and Delay Requests)
- be informed by the e-commerce company as the data controller in case of a data breach;
- the right to sue and receive compensation if the data controller violated the processing of their personal data.

The rights of Rectification Requests, Consent Withdrawal Requests, as well as Limit and Delay Requests, must be fulfilled by the data controller no longer than 72 hours after of the receipt of the request. In summary, PDP Law gives certainty that the government protects and gives basic rights to consumers against any unauthorized data processing and failure in data protection by data controllers. Data controllers, e.g., e-commerce businesses (including foreign entities that operate in Indonesia or enter into any transaction with Indonesian nationals) are given the right to fully comply with the requirements under the PDP Law no later than October 2024. Secure Payment

pay now

Selamat Hari Raya!

Back to brick-and-mortar shopping: Crisis preparedness

Lillian Hardy Partner, Washington, D.C.

Jennifer Brechbill Senior Associate, Washington, D.C.

Consumers may be breathing a sigh of relief this holiday season as they return to in-person shopping and gift-giving. Yet, on the heels of a destabilizing pandemic, inflation and economic strife, and a national mental health crisis, the brick-and-mortar shopping experience heightens the risk for crisis events. Assaults in retail settings have been increasing at a faster pace than the national average. In May 2022, a gunman killed ten people and injured three at a Tops supermarket in a racially motivated attack. Two months later, a gunman opened fire inside an Indiana mall. There's also been more individual attacks against retail employees as well as claims of increased retail thefts.

The legal implications are multifold. Unions are making increased demands, including negotiating for the right of workers to defend themselves in an attack. Some workers want companies to act more quickly when they identify a potentially dangerous customer. Failure to do so could create litigation risk in the event that red flags are ignored. Yet, there is a serious countervailing risk of consumer racial profiling if companies act too rashly in response to complaints. In 2021, a study found that of 1,020 consumers in the U.S. that identify as Black or African American, 90.2% had experienced racial profiling while shopping. While many of these harms go unaddressed, consumers have been awarded significant legal judgments as a result of consumer racial profiling.

So what can companies do in the face of these physical, ethical, reputational, and legal risks? First, retailers can assess their current security plans and ensure they have relationships with local law enforcement. Second, they should ensure that they have robust policies in place, such as a violence prevention policy and an anti-discrimination policy, which clearly defines and prohibits consumer racial profiling. Third, there must be appropriate training and communications related to these policies. More broadly, retailers must be cognizant of their company culture and take proactive steps to audit their

loss prevention procedures. Companies should monitor their whistleblower hotlines and conduct periodic internal reviews to assess whether the practices designed to protect employees, consumers, and store assets are being applied in nondiscriminatory ways.

The very real fear of a physical crisis can lead to crises of other sorts. With policy and procedure reviews, trainings and communications, and culture audits, retailers will be better positioned to mitigate these risks.

Happy holidays!

The desperate research for sustainable gifts

Maria Luigia Franceschelli Senior Associate, Milan

Gifts, gifts, gifts. Is this all consumers want for this holiday season?

Apparently not.

A recent study showed that more and more consumers take sustainability into account when deciding what to buy. Although particularly prevalent among Gen Z consumers, the importance of sustainability initiatives and efforts are seen as increasingly significant across all demographics.

If consumers want to buy sustainable gifts in increasing numbers this holiday season, brands, of course, want to sell to them. The result is that every year brands are getting greener, whether by adopting sustainable business models and policies, or by investing time and resources in developing sustainable products.

Increasingly, brands want to emphasize their green policies and choices in their key marketing campaigns, seeing that as the real key to successfully differentiating their offering, especially during the holiday season when advertising campaigns proliferate. Indeed, for some, a smart, festive marketing campaign centering the sustainable features of a product is vital when creating that messaging. Ensuring that innovations are presented and promoted to the public correctly is important, not only to ensure the commercial success of a product but also to prevent legal claims and avoid the dreaded "greenwashing" criticisms.

Some consumers – sometimes together with consumer associations - have appeared eager to take action against brands who they believe are greenwashing. Not only does could this have disastrous reputational downsides, especially when consumers use social media to give voice to their claims, but the effect may not be transient. Some consumers do not easily forgive false "green" claims so the hopes of regaining their trust could be challenging.

With this in mind, a word of caution for brands is necessary: 'green marketing' concerns not only the trademarks adopted to distinguish the sustainable product or process, but also the content of the advertisements and graphics used in advertising campaigns, and any other prominent element used in connection with the product or process, including logos, designs, and packaging.

The tagline or claim used to promote a sustainable product or process should be chosen very carefully to avoid misleading advertising or 'greenwashing.' As a general rule, any claim should be fair, truthful and correct. If a brand is not able to provide scientific evidence that a product or service is sustainable, it is better off not saying that it is. Similarly, brands should avoid using overly generic claims or trademarks that could be deceptive as to the features of the product. Authorities worldwide have not hesitated to take action and have repeatedly stated that the battle against 'greenwashing' remains a priority. More importantly, they actively monitor the market. With this in mind, brands should carefully consider any 'green' marketing claims they make when promoting sustainable products this holiday season.

Buone Feste!

Green claims: Make sure your green marketing communications are compliant this holiday season

Richard Welfare Partner, London

Micaela Bostrom Associate, London

U.K. regulators are continuing to target misleading green claims. As the holiday season approaches, retailers should take notice to minimize the risk of enforcement action and damage to reputation and brand loyalty. Misleading environmental and sustainability claims, or 'green claims', by businesses (usually in the form of marketing or promotional language that claims that a product, service or business practice minimises harm to, or even has a positive effect on, the environment) have been catching the attention of U.K. regulators who are ramping up action against such claims, commonly referred to as 'greenwashing'.

U.K. consumer protection law already prohibits unfair commercial practices by retailers. This includes a ban on false or misleading statements or omissions, which might induce a consumer to make a purchase they would not have otherwise made. Such practices are illegal and could potentially amount to a criminal offence. Given the increasing weight and influence of green claims, last year the Competition and Markets Authority (CMA) published a Green Claims Code to help ensure retailers and other businesses understand and comply with their existing obligations under consumer protection law in the context of making green claims.

The CMA's view is that the effect of the existing law is that businesses must ensure that their green claims:

- are truthful and accurate;
- are clear and unambiguous;

- do not omit or hide important information;
- compare goods or services in a fair and meaningful way;
- consider the full life cycle of the product or service; and
- are substantiated.

To consider the full life cycle means to consider the total impact a product or service has on the environment. If a claim does not reflect the overall impact or focuses only on one aspect but not another, it may be misleading. However, businesses are permitted to make environmental and sustainability claims provided they adhere to the Green Claims Code and do not mislead consumers.

Since publishing its Green Claims Code, the CMA has commenced a review of green claims in the fashion retail sector and it subsequently launched an investigation into specific retailers following concerns about how these brands market their products to consumers. The CMA is also proceeding with its wider investigation into misleading green claims and will review other sectors in due course.

Meanwhile, the Advertising Standards Authority (ASA) resolved 435 cases relating to environmental claims last year under the CAP and BCAP Codes, which contain similar principles to the Green Claims Code. The ASA has since continued to publish rulings on a wide range of environmental and sustainability claims in 2022. Whilst the ASA has already focused on the travel, energy and heating sectors, and claims relating to waste (such as recycling) and food sustainability, this year's investigations have been broad in scope with the ASA also ruling on ads for more niche products, such as coffins and artificial grass.

This indicates that some sectors are more at risk of enforcement action but also that no product category or sector is safe from having their green claims scrutinised. All retailers should therefore take care to ensure that their green claims are truthful and can be properly substantiated before seeking to capitalise on the current sustainability agenda. At the same time, retailers whose products are genuinely "green" should see this as an opportunity. The recent guidance and rulings on green claims not only helps businesses stay on the right side of the law but it also protects them from unfair competition and helps create a level playing field. In the end, this should benefit environmentally conscious consumers, as well as responsible retailers.

Happy holidays!

Protecting shop concepts: A recognizable shopping experience - not only during Christmas season

Yvonne Draheim Partner, Hamburg

Hendrik Schulze Business Lawyer, Hamburg

Using a tablet, smartphone or laptop, either on the train, from the sofa or elsewhere: the majority of internet users shop online, especially during the already stressful holiday season. Yet, going to shops, restaurants, bars and the like offers an analogue (shopping) experience that cannot be entirely replaced by online shopping, and not only during the holiday season when city centers are beautifully decorated.

Creative in-person shopping concepts are of particular importance in offering customers a special shopping experience and at the same time creating a brand recognition value that builds customer loyalty. Eating burgers in the middle of a birch forest, trying on clothes in perfumed dim light or holding the latest technology in your hands in light-flooded, simply designed sales areas: it is not only at Hans im Glück, Abercrombie & Fitch and Apple where the shop design plays a decisive role for the corporate identity. However, a successful shop design/concept not only attracts customers, but also imitators. This, in turn, raises the question as to how such shop designs can be protected. In principle, in Germany shop concepts can be protected not only by IP rights, but also by rights of related fields of law, such as copyrights. Furthermore, under certain conditions, the German Act against Unfair Competition also prohibits the imitation of a competitor's goods or services, but given the restriction on competition, the requirements for such protection are high. Individual elements of shop concepts can also be protected as trademarks - for instance, shop signs as three-dimensional trademarks, logos as figurative marks, a certain lighting design as a potential light mark, shop concepts as position trademarks, or even certain fragrances as scent trademarks and haptical impressions (such as touch and motion-based technology) as touch trademarks.

However, of particular interest is the trademark protection for the shop concept as a whole and although such protection is, in principle, possible based on the CJEU's case law regarding Apple's flagship store, there are onerous requirements. Trademark protection is therefore not the most suitable way of protection for shop concepts. The situation is similar regarding protection as design. Although design law offers protection for individual items that are part of the shop concept, it is not possible to achieve uniform protection for the overall concept of the shop. Shop concepts usually depend on a characteristic, recognizable arrangement of certain items, which cannot be protected as a design.

In contrast to the aforementioned possibilities, German copyright law does offer the possibility of protecting the shop concept as such – provided it is an original, intellectual creation. Another advantage is that copyright protection arises automatically by operation of law when the work is created. However, the exclusive rights resulting from that creation are, in principle, reserved for the author of the work. The author of a shop concept is usually not the shop owner, but the interior designer who created the concept. As German law does not permit assignment of copyright (except by way of inheritance to a beneficiary), to be protected against imitations and to assert its own claims, companies commissioning such designs must therefore rely on exclusive rights of use, which can be granted by the author. In addition, once a shop concept is well established, the law against unfair competition should further support the shop owner's legal position.

Overall, particularly through the interplay of various IP rights, companies can draw on a portfolio of exclusive rights that offers sufficient protection against imitations.



Forhe Feiertage!

New trends in cross-border e-commerce in China: Crossborder payments, DCEP, and new data exportation rules

Sherry Gong Partner, Beijing

Tong Zhu Associate, Beijing

Flora Feng Junior Associate, Beijing

In the past, cross-border payments were mainly completed by licensed banks in China. With the continuous introduction of national incentives, licensed thirdparty payment institutions like Alipay/ WePay have provided important support for cross-border shopping, remittances, and overseas mobile payments. According to the latest data from the China Payment Clearing Association, a total of 43 licensed payment institutions conducted cross-border payment business throughout 2021, processing a total of 7.191 billion cross-border payment transactions. Despite the wide application of the above two payment methods, cross-border payments still suffer from complex processes, high service fees and nonnegligible transaction settlement risks at this stage. With this context, Digital Currency

Electronic Payment (DCEP or DE/CP) introduced by the People's Bank of China (PBOC) signifies a new breakthrough for cross-border payments. The PBOC has determined that DC/EP will be accepted as a form of RMB, convertible with paper currency and coins at a rate of one-to-one. This PBOC-backed sovereign digital currency aims to boost China's role in international trade and payment settlements across the "One Belt, One Road" countries and regions. Since early 2020 and particularly in 2022, multiple closed testing runs and expansion of DC/EP trials were rolled out in several pilot cities/scenes involving the use of DC/EP for payments to civil servants, public transportation services, and energy and supply chain trading. There has not been a clear timeline for the official launch of DC/EP

nationwide in Mainland China. In the meantime, with the stricter scrutiny of cross-border data transfer introduced under China's Personal Information Protection Law, the market players involved in crossborder e-commerce are expected to coordinate their business arrangements with such data exportation restrictions. As a snapshot, the export of personal data that is collected and generated within China has to satisfy either one of the following formalities: (i) passing a security assessment conducted by the Cyberspace Administration of China (CAC); (ii) concluding standard contractual clauses for cross-border data transfer to be issued by the CAC; or (iii) obtaining a third-party certification.

Even a cross-border e-commerce platform operated outside of China which collects personal data of China customers directly via the platform may be subject to the third-party certification requirement. Detailed guidance and implementation rules in this regard are evolving quickly, so ecommerce businesses should make sure they take advice on the current regime as close as possible to implementation and keep it updated to ensure that they remain in compliance with the changing legal and regulatory regimes.

節日快樂



Let's celebrate in the metaverse this holiday season!

Maria Luigia Franceschelli Senior Associate, Milan

The holiday season is the perfect occasion for brands to experiment with the metaverse, by organizing special online events dedicated to these festivities. While metaverse platforms can't wait to host virtual activities dedicated to holidays, brands are well aware that this is an incredible space to create extraordinary gatherings, where their creativity can bloom. They could test new marketing strategies while entertaining their customers and attracting new clients with innovative and fun tech-based experiences.

Since the first launch of the various metaverse platforms, many brands have organized parties, special holiday venues, or virtual shops in the metaverse, where consumers could meet and connect with the brand. Initially, these experiences attracted a few curious customers, but this season they are ready to explode. In the creative buzz, brands should not forget that even the engagement in the metaverse sometimes has rules, and that these rules vary from platform to platform. Not all platforms are fully accessible to minors. Rather, many platforms request that minors are accompanied by a parent or a legal guardian during the experience. Targeting the younger generations could be tricky, will in many countries be the subject of specific regulatory scrutiny, so brands should pay attention to ensure that their offerings comply with the special rules set by each platform for these – vulnerable users.

If a brand is planning to gift, or allow the purchase of, NFTs within their virtual space on a metaverse platform, it must bear in mind that offers to purchase should only be directed to adults, and that all platforms have their specific rules for payments. For example, on Roblox (a metaverse platform heavily used by children) all purchases must be made with the local official currency: the Robux, Although the Robux can be traded between users, purchasers made with it are non-refundable. Usually, platforms retain a commission on such sales. It is also common for platforms to retain the right to remove any content, including experiences or user-generated content, with no advance notice or consultation. This could mean, for example, that a world that has been created specifically for the holidays could be removed once the festivities are over. Platforms are becoming increasingly careful about IP infringement and have instituted notice-andtakedown procedures to facilitate infringement reporting. In case of repeated infringements, accounts could be suspended or even blocked. We recommend conducting thorough clearance searches when designing and implementing a metaverse experience to avoid unexpected third party infringement claims which could jeopardize the success of the event.

Buone Feste!

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